Cause No. 19-320

IN THE

Supreme Court of the United States

Mack STRONG,

Petitioner,

v.

State of WEST COLUMBIA,

Respondent,

On Writ of Certiorari to the Supreme Court of the United States

BRIEF FOR PETITIONER

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March 6, 2020

QUESTIONS PRESENTED

I. Whether an ordinance prohibiting a solicitor from approaching within eight feet of another person without consent to make a verbal solicitation for immediate donations of things of value within a specific geographic area violates the First Amendment right to free speech.

II. Whether an individual has a reasonable expectation of privacy in personal belongings kept in a public area where he lives.

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The District Court of Jackson County, West Columbia's order denying Petitioner's Motion to Suppress and Motion to Dismiss Count 2 is unpublished. R. at 29-30. The District Court of Jackson County, West Columbia's judgment is unpublished. R. at 55. The West Columbia Court of Appeals' Opinion and Order affirming the lower court's decision is unpublished. R. at 57. The Supreme Court of West Columbia's Opinion and Order affirming in part and reversing in part the lower courts decisions is unpublished. R. at 67.

STATEMENT OF JURISDICTION

The Supreme Court of West Columbia entered judgment on December 19, 2018. R. at 67. Petitioner timely file a Petition for Writ of Certiorari, which this Court granted on August 17, 2019. R. at 74. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

STANDARD OF REVIEW

This Court reviews a district court's fact findings for clear error and its legal conclusions *de novo*.

PROVISIONS INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

"'Aggressive panhandling' means to knowingly approach another person within eight feet of such person, unless such other person consents, to request or solicit an immediate donation of money or other thing of value from another person, regardless of the solicitor's purpose or intended use of the money or other thing of value." Starwood City Code § 22-13 (2016).

"It is an offense for a person to, knowingly or intentionally, possess marijuana with intent to sell or distribute." West Columbia Code § 39-17-417 (2012).

STATEMENT OF THE CASE

Mack Strong moved to the city of Starwood, West Columbia in April 2015 after serving his country in the armed forces. At the same time the city of Starwood was experiencing an economic boom with the introduction of Sinclair Industries. Sinclair Industries found Starwood and the surrounding area to be the ideal place to set up fracking operations. Within a few years, thousands of men and women descended on Starwood in search of work. Mack Strong was one of those individuals to be employed at Sinclair Industries.

However, as the market leveled out, the number of people coming into Starwood began to outweigh the number of available jobs. This led to a rise in the number of homeless individuals in and around Starwood, at which time the city of Starwood, in a brazen attempt to preserve its "small-town appeal," enacted the Starwood City Code § 22-13 Aggressive Panhandling Ordinance. R. at 26-28. This Ordinance prohibited individuals—presumably homeless—from approaching to "request or solicit" anything of value while in or around the Downtown Square vicinity. Starwood City Code § 22-13(a)(1) (2016).

Shortly after the enactment of the ordinance, Mack Strong's physical and mental health began to decline, which was a result of his time in Afghanistan and Iraq. At times Mr. Strong was unable to leave his apartment, so much so that eventually Strong was terminated from Sinclair Industries for excessive absence. After losing his job, Strong was without money to pay his rent and was evicted from his apartment in March 2017. For a few months Strong was able to sleep on a friend's couch, but soon felt that he had outstayed his welcome and was forced to sleep on the streets, in a tent in a secluded area of Confluence Park near downtown Starwood.

Nearly six months later Mr. Strong set out for his day, packing up his personal belongings inside his tent as he had done every day, only that day, Mr. Strong became a victim

of this unconstitutional ordinance at hand, and at the same time was subjected to an unlawful search and seizure of his belongings. After his arrest, Strong moved to dismiss Count 2 as a violation of his First Amendment rights to free speech and also motioned to suppress the evidence seized during the unconstitutional search of his home. The trial court erred in failing to dismiss both motions which subsequently led to a guilty verdict on both counts. Strong filed a timely appeal, where the appellate court mistakenly affirmed the verdict when they failed to recognize solicitation as a subject matter of speech that receives First Amendment protections and by relying on *Greenwood* to determine that Strong had exposed his property to the public—when in reality Strong had taken every precaution necessary to prevent scrutiny from the public.

Strong then timely appealed the judgment to the Supreme Court of West Columbia. The state's high court then proceeded to erroneously uphold the judgment from below when it held the ordinance to be a restriction on the manner in which particular message is conveyed—although any other message could be presented in the same manner—and further when it incorrectly held that Strong had abandoned his property by leaving his tent. This proceeding follows.

SUMMARY OF THE ARGUMENT

The Fourth Amendment, applicable to the States through the Fourteenth Amendment, protects the privacy rights of citizens from unreasonable search and seizure in their home. An individual does not lose these protections simply because he does not have a traditional home. When the Fourth Amendment was drafted the Framers could not have envisioned the plight of homelessness in our society today. The Framers however were aware of the settlers and expeditioners traveling West to discover the largely unexplored native land. These settlers traveled by carriage, and before establishing their homestead would set up tents for shelter.

These individuals received the same protections as the businessman in New York in his brick and mortar home.

Similarly, when Mack Strong established his homestead in Confluence Park, equipped with a tent for shelter and a clothesline for laundry, the Fourth Amendment protected Mr. Strong. The police unconstitutionally searched Mr. Strong's home, and unlawfully seized his possessions. Officer Brown's ignorance does not justify that this was Mack Strong's home and was therefore constitutionally protected against unreasonable search and seizures. This justification flies the face of the Fourth Amendment.

At the same time, the First Amendment protects citizens' right to free speech, which includes solicitation speech. Regulations that treat certain speech differently depending on the content of speech are presumed unconstitutional. These content-based regulations cannot be justified through a mere claim of a content-neutral purpose. In order to survive a constitutional challenge, a content-based regulation must survive strict scrutiny. Strict scrutiny burdens the municipality with establishing a showing that the regulation is achieving a *compelling* governmental interest, while being narrowly tailored to promote that interest. West Columbia has not shown any evidence to support a finding that it has a compelling interest and therefore the ordinance cannot survive the presumably unconstitutional requirements of strict scrutiny.

Starwood's Aggressive Panhandling Ordinance treats requests or solicitations for immediate donations differently than all other areas of speech. An individual in Downtown Starwood may approach someone to ask for directions, to declare their political affiliation, or to engage in casual conversation. However, if that same individual approaches and speaks the words "Can you spare any change?" he commits a crime. Therefore, the Starwood ordinance is facially content based and cannot survive the stringent requirements of strict scrutiny.

ARGUMENT

FIRST AMENDMENT ARGUMENT

I. The Starwood Aggressive Panhandling Ordinance violates Mack Strong's First Amendment rights because it is a facially content-based regulation that fails to survive strict scrutiny.

The First Amendment, applicable to the States through the Fourteenth Amendment, protects citizens' free speech from being unduly abridged by the government. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). In particular, this Court has held that the First Amendment protects solicitation for charitable donations, *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), and lower courts recognize panhandling speech should receive the same protection, *see, e.g. Gresham v. Peterson*, 225 F.3d 899, 904 (7th Cir. 2000); *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 184 (D. Mass. 2015). The first step when analyzing if a regulation violates the First Amendment is to determine if the regulation is facially content based. *See Reed*, 135 S. Ct. at 2227. A regulation is content based if it applies to a particular speech because of the message, idea or topic that is being conveyed. *Id.* If found facially content neutral, the next step is to determine if the regulation can be justified without reference to the content of speech or if the regulation was adopted because of disagreement with the expressed message. *Ward v. Rock Against Racism*, 491 U.S. 781, 791-92 (1989). If found content based, either facially or through these two steps, strict scrutiny will apply, *Reed*, 135 S. Ct. at 2227, however, if held content neutral then intermediate scrutiny will apply, *see Hill v. Colorado*, 530 U.S. 703, 719 (2000).

The Starwood ordinance prohibits aggressive panhandling in the Downtown Square vicinity. The Starwood ordinance defines aggressive panhandling as follows:

> "Aggressive panhandling" means to knowingly approach another person within eight feet of such person, unless such other person consents, to *request or solicit* an

> immediate donation of money of other thing of value from another person, regardless of the solicitor's purpose or intended use of the money or other thing of value.

Starwood City Code § 22-13(a)(1) (2016) (emphasis added). This definition, on its face, differently regulates one content of speech—a request or solicit for an immediate donation—from all other speech. Therefore, the ordinance is a facially content-based regulation which cannot survive strict scrutiny. For these reasons, this Court is urged to reverse the lower court's decision and remand this proceeding with orders to vacate the conviction.

A. Mack Strong's solicitation speech deserves the same protections as speech soliciting charitable donations.

This Court has held the First Amendment applies to solicitation speech for charitable donations. *Schaumburg*, 444 U.S. at 633. *Schaumburg* held that charitable organizations implicate a number of speech interests when seeking donations, mainly the conveyance of information, the expression of views or ideas, and advocacy of certain messages. 444 U.S. at 632. In striking down the ordinance that required organizations to prove that seventy-five percent of the proceeds from solicitations were used directly for the charitable purposes of the organization, this Court reiterated that solicitations to pay or contribute money was a form of long protected speech. *Id.* at 633.

Similarly, panhandlers soliciting immediate donations convey messages that involve both informative and persuasive speech. *Id.* at 632. An individual soliciting for immediate donations may inform the public of the economic climate in the area or of political and social issues they face such as homelessness, disability, or unemployment. *See Gresham*, 225 F.3d at 904. These messages are closely intertwined with the act of soliciting, and the two are virtually inseparable. *Cf. Schaumburg*, 444 U.S. at 632.

Therefore, the distinction between an individual soliciting for himself and an organization soliciting to help such individual is unnecessary. Limiting the protection an individual has in soliciting for donations would undermine the First Amendment and result in enforcement officers around the nation trying to determine if an individual is soliciting for himself or for an organization. It is therefore reasonable to extend to individual solicitors, such as Mack Strong, the same First Amendment protections as a charitable organization.

Solicitation speech is also fundamentally distinguishable from commercial speech. Despite the fact that this argument has more than likely already been waived, commercial speech, in the First Amendment context, requires that the speech be "purely" for commercial purposes, *Schaumburg*, 444 U.S. at 632, or in other words, an expression solely for the economic benefit of the speaker and its audience, *see Central Hudson Gas v. Public Service Comm'n of New York*, 447 U.S. 557, 561-62 (1980). However, individuals seeking immediate donations do not do so in a purely commercial sense. *See Schaumburg*, 444 U.S. at 632. As stated above, individual solicitors convey many messages that are unrelated to the commercial expression, if any, that is associated with the transaction. An individual that conveys his veteran status, homelessness, or mental health status is engaging in more than just commercial expression. Every interaction with an individual solicitor has a unique story that helps the solicited decide to donate or not. Therefore, any attempt to justify the Starwood Ordinance as commercial speech that is less demanding of First Amendment protections fails to pass muster.

B. The Starwood ordinance is a facially content-based regulation of speech that demands strict scrutiny be applied.

The Starwood ordinance is a facially content-based regulation. *See, e.g.*, *McLaughlin*, 140 F. Supp. 3d at 185. A regulation is content based if it applies to a particular speech because of the message, idea or topic that is expressed. *See Reed*, 135 S. Ct. at 2227. Facially content-based regulations may be easy to recognize, such as drawing distinctions based on subject matter, while others are more innocuous, defining regulated speech based on its function or purpose. *Id.* Regulations that require enforcement officials to inquire into the content of speech to determine if a violation has occurred typically indicate a regulation is content based on its face. *See McLaughlin*, 140 F. Supp. 3d at 186. A regulation, if held facially content neutral, may still be content based if it (1) cannot be justified without reference to the content of speech, or (2) was adopted because of disagreement with the speaker's message. *Ward*, 491 U.S. at 791-92 ("The principle inquiry . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."). Thus, on its face the Starwood ordinance is a content-based regulation that demands strict scrutiny.

1. The Starwood ordinance is facially content based because it differently regulates speech depending on the subject matter of the speaker.

The Starwood ordinance is a facially content-based regulation because it criminalizes certain speech, soliciting for immediate donations, while all other speech remains unaffected. In *Reed*, this Court identified two types of facially content-based regulations; one that defines the regulated speech based on the subject matter, and the less obvious way of defining the regulated speech through its function or purpose. 135 S. Ct. at 2227. The Starwood ordinance fits into either category of the facially content-based restrictions. On one hand, the ordinance distinguishes on the subject matter of solicitation by allowing any speech to occur within eight

feet of an unwilling listeners unless that speech happens to be asking for a donation. Thus, if Mack Strong approached an individual on the street and asked for an immediate donation, Strong would be in violation of the ordinance. Contrarily, if Strong approached that same individuals to ask for directions, the individual's political affiliation, or to solicit that persons signature there would be no violation under the plain language of the Starwood ordinance.

On the other hand, the ordinance defines the solicitation speech through its function. In order to solicit donations an individual must necessarily be within eight feet of another individual, otherwise the physical exchange of a monetary donation is impossible. The act of approaching with the intention of soliciting a donation defines the regulated speech and in turn differentiates that speech from all other types of speech. Thus, the Starwood ordinance, even if it partly restricts where speech can occur, is a facially content-based regulation that must survive strict scrutiny.

Any contention that the ordinance only regulates the approach with the intent to solicit immediate donations is another way of defining the regulated speech through its purpose. However, this contention would be even more eviscerating to the First Amendment. Under this theory, every speech would be prohibited if a person intended to solicit immediate donations while approaching within eight feet of another individual. Even if the panhandler had a change of heart and decided to ask for directions or simply engage in casual conversation with the bystander, that panhandler would still be in violation because this analysis would only regulate the approach with the *intent* to solicit. Thus, every enforcement official would be left guessing if the person approaching was intending to ask for immediate donations or for some other purpose. In light of this overbreadth theory, the ordinance must be subjected to strict scrutiny.

The Starwood ordinance is also facially content based in that it requires an inquiry into the content of speech to determine when a criminal offense has occurred. A regulation is facially content based if enforcement officials are required interpret the content of the speech to determine if a violation has occurred. *See Reed*, 135 S. Ct. at 2227. In *Reed*, the town's sign ordinance regulated the size and the amount of time that signs could be displayed based on whether the sign was used for a political campaign, ideological views, or temporary directional signs. *Id.* This Court held that differentially regulating the size and length of time the signs could be displayed based on these subject matters was a facially content-based regulation subject to strict scrutiny because the limitations were entirely dependent on the content of the message. *Id.*

Similarly, the Starwood ordinance requires an inquiry into whether an individual is making an appeal for an immediate donation—rather than merely engaging in conversation—to determine if a violation is occurring. *Cf. McCullen v. Coakley*, 573 U.S. 464, 479 (2014). Officer Jones even testified that he only suspected that a violation had occurred, however it wasn't until he moved in closer to hear what Strong was saying that he confirmed the violation. R. at 33. If Strong's message was for anything other than asking for a monetary donation, there would not have been a violation of the ordinance; however, because Strong asked the bystander "You got any change man?" there was a violation of the ordinance. *Id.* Thus, on its face the ordinance is a content-based regulation that distinguishes speech based on the message being conveyed and is subject to strict scrutiny.

That the ordinance criminalizes certain speech when approaching within eight feet of another individual, while leaving other speech unaffected, supports the conclusion that the Starwood ordinance is not merely a regulation of where speech can occur. *See, e.g., Hill*, 530 U.S. at 719. For example, this Court in *Hill* held an ordinance that restricted approaching within

eight feet, while within one hundred feet of a medical facility, for the purpose of engaging in oral protest, education or counseling was content neutral because it was a regulation of where speech could occur, that applied to everyone equally. *Id.* However when applied to the Starwood ordinance, the argument that *Hill* would control is unpersuasive for two reasons: (1) this Court relied on the interpretation of the legislative history to determine that Colorado did not enact the ordinance because of disagreement with the message that was being conveyed, and (2) the statute in question did not discriminate based on viewpoint or make reference to the content of the speech being regulated, but rather was interpreted to include a prohibition on an overly broad category of speech in a certain geographic area. *Id.* Thus, *Hill* did not involve a facially content-based challenge, rather, petitioners contended that the regulation was facially content neutral, but still content based according to the *Ward* analysis. Contrarily, the Starwood ordinance is a facially content-based regulation that differently regulates speech depending on the message of the speaker.

2. The Starwood ordinance is also content based in that it cannot be justified without reference to the content of speech.

Starwood cannot justify the ordinance without referring to the content of the prohibited speech. For a regulation to be content neutral, it must be justified without reference to the content of the speech. *Hill*, 530 U.S. at 719-20. The main justification drawn from the preamble to the Ordinance is that Starwood wants to protect "unwilling listeners . . . against undue crime and annoyance." Starwood City Code § 22-13. This conclusion supports that Starwood has selected to restrict a certain subject matter of speech—vocal appeals for an immediate donation—because they believe this content of speech to be the only annoyance that should require consent prior to approaching. *See Hill*, 530 U.S. at 747-48 (Scalia, J., dissenting).

This argument would suggest that a municipality can prohibit any subject of speech that its citizens or visitors deem annoying. The problem lies in the fact that the First Amendment protects the right to persuade others, and this right may not be infringed because the message may be offensive to some. *Hill*, 530 U.S. at 716. In fact, it is not uncommon that individuals will experience uncomfortable situations or messages when in public, and this has been described as a "virtue" rather than a "vice." *McLaughlin*, 140 F. Supp. 3d at 189 (quoting *McCullen v. Coakley*, 573 U.S. 464 (2014)). This is because prohibiting an activity in favor of one group over another is to give deference to that "superior" group's opinion or message over the others. *See McLaughlin*, 140 F. Supp. 3d at 189. In turn, by restricting panhandler's speech in favor of another's comfort, the ordinance discriminates the allowable speech based on the speaker's message.

This is also not a case where the secondary effects doctrine is applicable. The secondary effects doctrine, which this Court has never extended outside the adult entertainment context, permits more judicial leniency towards regulations targeting the secondary effects following a particular activity or speech. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986). Of course, Starwood's aggressive panhandling ordinance is not a secondary effects ordinance. First, West Columbia has not produced any evidence—either through its own research or that of another municipality—that panhandling leads to harmful secondary effects. *See McLaughlin*, 140 F. Supp. 3d at 187; *see also Renton*, 475 U.S. at 47 (allowing the city to use studies from nearby municipalities as evidence of secondary effects). The second reason is that the secondary effects doctrine requires the "*predominate*" motivating factor for enacting the ordinance to be the concern of the secondary effects, such as crime or property values. *Renton*, 475 U.S. at 47. The preamble of the ordinance identifies protecting the unwilling listeners as the main motivating

factor for enacting the ordinance. Starwood City Code § 22-13. Any post hoc justification would not bring the Starwood Ordinance into the crosshairs of the secondary effects' doctrine. Therefore, the Starwood ordinance is a content-based regulation, and as discussed in greater depth later, would fail to survive strict scrutiny required by a content-based regulation.

3. The Starwood Aggressive Panhandling Ordinance cannot survive strict scrutiny that is awarded to content-based regulations.

The Starwood ordinance does not survive the strict scrutiny analysis that is required of a content-based regulation. When a regulation is content based strict scrutiny applies, which burdens the government with proving that the regulation achieves a compelling governmental interest with narrowly tailored restrictions to further that interest. *Reed*, 135 S. Ct at 2231. To be narrowly tailored, the restrictions must be the least restrictive means necessary, *see id.*, though it is not necessary for the government to show that every restrictive means have been attempted, rather the government must show that alternative methods to burden less speech would be unsuccessful, *McCullen*, 573 U.S. at 495. Thus, West Columbia has the burden of proving that the ordinance is narrowly tailored, through the least restrictive means, to promote a compelling governmental interest. *See Reed*, 135 S. Ct. at 2231. This burden is too heavy for West Columbia, because West Columbia does not have a compelling interest to promote, and therefore the ordinance violates Mack Strong's First Amendment right to free speech.

The Starwood ordinance cannot survive strict scrutiny because it does not achieve a compelling interest. The preamble of the ordinance declares Starwood's interest is in protecting unwilling listeners in a public area, however this interest is not a compelling interest. A city has a substantial interest in protecting its visitors and citizens from unwanted or excessive noise, *see Ward*, 491 U.S. at 796, however, to hold this interest as compelling would make the First Amendment a "dead letter," *Hill*, 530 U.S. at 748-49 (Scalia, J., dissenting). In this case, the City

has proclaimed in the preamble of the Ordinance that protecting "unwilling listeners . . . against crime and undue annoyance" is the primary interest being served. Starwood City Code § 22-13. A city cannot abridge the First Amendment protections of a speaker because the content of the speech makes the recipient uncomfortable. *See McLaughlin*, 140 F. Supp. 3d at 189. Thus, while protecting unwilling listeners from unwelcome speech may be a significant interest, it is not a compelling state interest.

While maintaining a small-town appeal may also be a significant interest of the government, in that it provides tourism which boosts the local economy and can provide for a safe, pleasant environment, it cannot be said to be a *compelling* interest. *See McLaughlin*, 140 F. Supp. 3d at 189. Here Starwood wishes to prohibit individuals from approaching tourist or citizens to solicit immediate donations only. The same individuals are free to approach to ask for words of advice or engage in casual conversation. However, the First Amendment does not allow the suppression of one group's expression in favor of another's simply because the latter group is uncomfortable with the message. *See McCullen*, 573 U.S. at 481. Here, Starwood is hindering panhandlers from effectively delivering their message in favor of accommodating a more likeable class of tourist and better off citizens, because that class is uncomfortable when approached with the message of panhandling. To allow this suppression would be to "eviscerate" the First Amendment protections of content-based regulations. *McLaughlin*, 140 F. Supp. 3d at 189.

Additionally, even though public safety can be a compelling government interest, without evidence to show that panhandling in the Downtown Square vicinity has a direct correlation to crime, Starwood cannot prove they have narrowly tailored the ordinance to achieve this interest. Though public safety is a compelling interest of the government, *see e.g. McLaughlin*, 140 F.

Supp. 3d at 189; *Thayer*, 144 F. Supp. 3d at 235, the Legislative Statement and the preamble to the ordinance lack the evidence to show that panhandling and crime are intertwined. The Legislative Statement provides only that visitors "felt unsafe" and that drug related crime had risen along with the homeless population; however, the Legislative Statement does not indicate any instance in which panhandling directly attributed to unsafe or dangerous environments. Additionally, the ordinance's preamble states that the city is balancing the First Amendment rights of speakers against the rights of the "unwilling listers to be protected against crime and undue annoyance." Starwood City Code § 22-13. With only the mere mention of crime, this overly broad justification of public safety cannot survive the narrowly tailored requirement of strict scrutiny.

The ordinance also fails at being narrowly tailored in that the downtown restriction is disproportionally large compared to the size of the City. A city-wide ban on panhandling cannot be defined as narrowly tailored. *See Gresham*, 225 F.3d at 907. Though on paper the ordinance is only a "downtown" restriction, prohibiting panhandling in downtown would effectively be a city-wide ban. The Legislative Statement describes Starwood as a "small western city" with a population of 16,500, and when taken into context with the fact that Confluence Park—only one block from downtown—is roughly 250 acres, it appears that outside of downtown, Starwood is largely unincorporated. R. at 27. Given that Starwood is also located in a valley between two mountain ranges, it would be difficult to imagine the city expanding more than a few blocks. R. at 27. In light of this overbreadth, complete restriction, holding this ordinance as narrowly tailored under strict scrutiny would be unconstitutional.

Finally, the ordinance could not even survive the less demanding intermediate scrutiny. A regulation held content neutral in time, place and manner is analyzed to determine if it can be

justified without reference to the content of regulated speech, and if it is narrowly tailored to promote a significant governmental interest while at the same time leaving open amble alternative methods of communication. *Ward*, 491 U.S. at 791-92.

Starwood cannot show that the ordinance is narrowly tailored to promote a significant governmental interest. For a regulation to be narrowly tailored the government must show that the government interest that is promoted through the regulation would be served less effectively absent the regulation. *Id.* However, here Starwood has ample opportunity to restrict the behavior that is problematic in the Downtown Square vicinity. A panhandler that is pursuing an individual for immediate donations in a truly aggressive nature would be subject to the criminal law and therefore alternative enforcement methods—that could arguably better serve a government's public safety interest—are available to Starwood. For example, an individual who approaches and unexpectedly touches another person while asking for immediate donation might be liable for assault or an individual acting unruly could be detained for disorderly conduct. *Cf. McLaughlin*, 140 F. Supp. 3d at 192. In fact, Starwood has criminalized even passive forms of panhandling, that fall inconceivably short of "aggressive" in the traditional sense, including politely approaching and requesting an immediate donation. Therefore, the Starwood ordinance would fail to pass constitutional muster even under the less demanding intermediate scrutiny. For the foregoing reasons, this Court is urged to reverse the Supreme Court of West Columbia's decision and remand this proceeding with orders to vacate Mr. Strong's conviction.

FOURTH AMENDMENT ARGUMENT

II. The West Columbia state courts erred in failing to suppress the evidence from the warrantless search of Mack Strong's home.

The Fourth Amendment provides the right of people to be secure in their "persons, homes, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A warrantless search of a person's home is generally presumed unconstitutional, with a few exceptions. *See Katz v. United States*, 389 U.S. 347, 357 (1967). A warrantless search is unconstitutional if the victim can show that he has a subjective expectation of privacy in the place or items searched and if society will recognize that expectation as reasonable. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). This two-prong test weighs a number of factors, including: (1) the Framer's intentions, (2) how the individual uses the location or item, and (3) society's understanding that certain areas demand the most scrupulous protections. *Oliver v. United States*, 466 U.S. 170, 178 (1984). Fourth Amendment protections are thought to be most deserving in a person's home. *See Silverman v. United States*, 365 U.S. 505, 511 (1961).

Mack Strong's home is a place that he has a subjective expectation of privacy which society recognizes as reasonable. Mr. Strong took every precaution to secure his home and prevent society's snooping eyes from intruding. *Cf. California v. Greenwood*, 486 U.S. 35, 41 (1988). Mr. Strong ate, slept, and conducted every private and intimate conduct expected inside of a home while in his tent. *See Oliver*, 466 U.S. at 179. Strong also stored his belongings in the campsite, had a clothesline for laundry, and returned at the end of every day for six months, just as an individual with a traditional home would. For these reasons, the lower court's erred in failing to suppress the evidence obtained from a warrantless search of Strong's home and this Court should reverse and remand with orders to suppress the evidence.

A. Mack Strong's tent was his home and therefore deserves Fourth Amendment protections from unreasonable searches and seizures.

When the Framers drafted the Bill of Rights, they certainly were not aware of the massive homeless epidemic our nation faces today. As indicated in Justice Krzywicki-Cox's dissenting opinion, there are roughly 550,000 homeless Americans as of 2018. R. at 71. These individuals do not camp on the streets or in a park because they want to, rather they camp in these places out of necessity. To be effective, the Fourth Amendment needs to be adapted to the realizations of the modern day. Fourth Amendment protections should not depend on how much money a man has to spend on his home; instead, all Americans should feel comfortable that they are free from government intrusion in the confines of their home.

Mack Strong's campsite exhibited many signs that show the campsite and tent were his home. Strong left all of his personal belongings in the tent, including his driver's license, his two Purple Hearts, and his bedroll. His laundry could be seen on a clothesline out to dry nearby. Officer Brown even went on to testify that she believed Strong lived in the tent, R. at 40, before contradicting herself and saying that she "wasn't sure it was [Strong's] home when [she] looked through his belongings," R. at 43. Finally, Strong even rightfully expressed his disdain for Officer Brown's unwarranted search when he screamed "Hey that's my property! You can't just go through it without my permission!" R. at 35. Thus, Mr. Strong had established a home in his tent at Confluence Park, and absent a warrant, the search and seizure from his home was a violation of Mr. Strong's constitutionally protected rights.

That Mack Strong may not have had formal permission to establish a campsite in the park does not destroy the constitutionally guaranteed protections of his home. This is because the notion that property interests control the government's right to search and seize has been condemned. *Katz*, 389 U.S. at 353 (quoting *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294,

304 (1967)). Many lower courts have interpreted this to include both a subjective and a reasonable expectation of privacy in tents on both public and private lands that the individuals did not legally have permission to camp on. *See e.g. United States v. Sandoval*, 200 F.3d 659, 660-61 (9th Cir. 2000); *State v. Pruss*, 181 P.3d 1231, 1235 (Idaho 2008) (holding that a tent located on public land has a reasonable expectation of privacy); *People v. Schafer*, 946 P.2d 938, 944 (Colo. 1997) (en banc) (holding a tent on private land, that did not have a fence or posted notice, received the same Fourth Amendment protections as a home or hotel room). In *Sandoval*, the defendant was camping on federally owned Bureau of Land Management land. 200 F.3d at 660. In holding a reasonable expectation of privacy, the court noted that the record did not support a finding that Sandoval had ever been asked to vacate the premises or of any applicable rules, regulations or practices prohibiting camping on the land. *Id.* at 661.

Similarly, West Columbia has failed to show that Strong was an unwelcome guest or even that camping in Confluence Park is prohibited. Rather, Strong used the campsite as his home for nearly half a year before Officer Brown unlawfully searched his property. R. at 10. Officer Brown testified that Mack Strong's campsite is in part of her "regular patrol area." R. at 39. This means that for nearly six months Officer Brown walked past Strong's home and never once asked him to leave or inquired about his presence in Confluence Park. However, when Officer Brown finally did make contact with Mr. Strong, she did not ask him to leave, instead she warrantlessly searched his belongings because she thought Mr. Strong was "involved in some illegal activity." R. at 39. Therefore, Mr. Strong's tent should be treated as a home for this Fourth Amendment analysis.

B. The search of Mack Strong's home was unconstitutional because Mr. Strong has shown not only an actual expectation of privacy, but also a reasonable expectation of privacy.

The warrantless search of an individual's home is presumably unconstitutional. *Katz*, 389 U.S. at 357. A warrantless search is unconstitutional if the victim can show that he had a subjective expectation of privacy and that expectation of privacy is one that society will deem as reasonable. *Id.* at 361 (Harlan, J., concurring). In determining if an expectation is one that society finds reasonable, a number of factors are considered, namely the manner in which the property is used and societal understandings that certain places, specifically the home, demand the highest protection. *Oliver*, 466 U.S. at 178. Thus, by establishing that Mack Strong's tent is his home, society will recognize the reasonableness of protecting his tent from unauthorized searches and seizures.

1. Mack Strong exhibited an actual expectation of privacy in his tent and the belongings within.

Mack Strong had a subjective expectation of privacy in his belongings left in confluence park. R. at 60. The first prong of the *Katz* two-prong test requires a defendant to exhibit an actual expectation of privacy. 389 U.S. at 361 (Harlan, J., concurring). This first test is an issue of fact. *Pruss*, 181 P.3d at 1234. Though the defendant may not be formally permitted to camp, there may still be a subjective expectation of privacy. *See Sandoval*, 200 F.3d at 660. Accurately stated in *Sandoval*, to hold otherwise would mean no one involved in illegal activity would have an actual expectation of privacy because anticipation of "arrest is always imminent." *Id.*

Here, several factors affirm Strong's subjective expectation of privacy in his tent. First, Strong rightfully yelled "Hey, that's my property! You can't just go through it without my permission!" R. at 35. Strong also kept items such as his Purple Heart medals, his ID, and other personal belongings inside of the tent. R. at 40. If there was any belief that these items would be

taken or were not secure, Strong would not have left them behind. Additionally, Strong placed the campsite in a secluded area of the park. R. at 43. This portrays Strong's intention of keeping his tent and belongings private and out of the prying eyes of the public. Finally, Strong took the necessary precautions in securing his campsite to ensure his belongings were safe. His personal items were secured in a storage container, his bedroll was rolled up tight, and the interior of the tent was hidden from public view. For these reasons, Strong has shown an actual expectation of privacy in his belongings.

2. Mack Strong's expectation of privacy is one that society will recognize as reasonable.

Mack Strong's expectation of privacy is one that society accepts as deserving of the Fourth Amendment protections for either of two reasons. First, this Court can recognize that the campsite was Strong's home for the purposes of the Fourth Amendment, and therefore a warrantless search is against society's expectation of reasonableness. Or second, this Court can find the privacy interests in the campsite and personal effects therein were violated under society's reasonable expectation of privacy. Either analysis results in the same societal understanding that without a warrant, West Columbia violated Mack Strong's constitutionally guaranteed protections against unlawful search and seizure.

Mack Strong's campsite was his home; thus, society recognizes a right to be free from unreasonable government trespass. The sanctity of the home is important to the Fourth Amendment, not for the possessory interests, but rather for the privacy interest of the events that take place therein. *Segura v. United States*, 468 U.S. 796, 810 (1984). While a tent cannot be fortified with a deadbolt, the walls of a tent shield the occupant from the prying eyes of the public, thereby providing sufficient notice of the occupant's expectation of privacy. *Schafer*, 946 P.2d at 944. Mack Strong's home was where he slept for nearly six months, a place that he could

feel safe knowing that he was free from unreasonable government intrusions. In small, rural areas such as Starwood, West Columbia, homeless individuals like Mack Strong have nowhere else to turn. To hold that these individuals cannot escape the invasion of law enforcement in their homes would be an outright denial of Fourth Amendment protections.

Mack Strong's privacy interest in the campsite also require society to find a reasonable expectation of privacy. The principal objective of the Fourth Amendment lies with protecting privacy rights rather than property rights. *Ruckman*, 806 F.2d at 1477 (McKay, J., dissenting) (quoting *Warden v. Hayden*, 387 U.S. 294, 304 (1967)). Mr. Strong attempted to keep his home private, although in a public park, by carefully selecting a secluded, wooded area. He also took the ordinary, yet necessary precautions to retain his privacy through meticulously organizing his belongings inside the tent. Even the presence of a clothesline outside the tent infers a particular level of privacy that society recognizes as reasonable. It is therefore easy to conclude that society finds a reasonable expectation of privacy, even in a tent.

Additionally, the Supreme Court of West Columbia erred in finding that Mack Strong abandoned his property when he left the campsite. Abandonment of property generally consists of both intent and act. *See Friedman v. United States*, 347 F.2d 697, 704 (8th Cir. 1965). Court's should never assume abandonment, rather the party asserting abandonment must prove through "clear, unequivocal and decisive evidence" that the item or place searched was abandoned. *Id.* (quoting *Linscomb v. Goodyear Tire & Rubber Co.*, 199 F.2d 431, 435 (8th Cir. 1952)). A party's intent can be inferred by their actions, their words or "other objective facts." *United States v. Jones*, 707 F.3d 1169, 1172 (10th Cir. 1983) (quoting *United States v. Kendall*, 655 F.2d 199, 202 (9th Cir. 1981)).

Contrarily, there is no indication in the record that Strong intended or took action to abandon his campsite. The clothes left to dry on the clothesline, the personal effects left inside the tent, and the bedroll all indicate that Strong intended to return. Officer Brown even concedes this in her testimony stating, "[Strong] probably intended to return." R. at 40. Additionally, following the discovery that Officer Brown was rummaging through his belongings, Strong explicitly proclaimed his ownership of the property in question. R. at 35. Lastly, when Strong left clothes hanging on a clothesline, he took actions that are inconsistent with an individual intending to abandon his property, because an individual that intends to abandon his property would conceivably not wash his laundry and hang it out to dry. Thus, without evidence to the contrary, any argument that Strong abandoned his property would be unfounded.

It is also of no consequence that Strong did not own the land underneath his campsite, because even in public if one seeks to protect an item or area as private, it may be subject to Fourth Amendment protections. *See Katz*, 389 U.S. at 351. In *Katz*, the Court upheld an expectation of privacy that society deems reasonable when Katz entered into a public phone booth and shut the door. *Id.* It did not matter that the public could access the phone booth or see inside of it, because Katz was attempting to keep his phone conversations private and therefore the Government's use of electronic surveillance to record his phone calls were deemed an unconstitutional invasion of society's reasonable expectation of privacy. *Id.*

Similarly, when Strong chose to establish his homestead in a secluded, wooded area, society would recognize an expectation of privacy in his belongings. This attempt to keep out the public eye, even if still accessible to the public, was enough to protect Strong from having his property unlawfully searched and seized. Officer Shelley Brown even testified that campsite was secluded and that "you couldn't see it from the area most people go when they visit the park." R.

at 43. This admission furthers the argument that Strong intended to keep the campsite private even though he was in a public park, and in turn had a reasonable expectation of privacy.

Further, the plain view doctrine does not apply as an exception to Strong's Fourth Amendment protections. While it may be true that items exposed to the public, even in one's home, are not generally subjected to Fourth Amendment protections, *Katz*, 389 U.S. at 351, there is no indication that Strong exposed the contents of his home to public scrutiny. Strong did everything he could to prevent his belongings from being seen by the public, including strategically placing his campsite in a secluded area, keeping his belongings inside of his tent, and securing all of his belongings in closed containers. This clearly is not a case where the plain view doctrine applies because Officer Brown was not able to see the corner of the baggie protruding from the bedroll until she moved the bedroll—after she had illegally entered into Strong's residence. R. at 40. After describing the scene, Officer Brown's testimony reads in relevant part as follows:

> State's attorney: What did you see in the plastic bin?
> Brown: I'd like to look at my report to make sure I answer accurately. Uhm, I found several books, two Purple Heart medals, some personal items, and an expired driver's license bearing the name "Mack Strong."
> State's attorney: Anything else?
> Brown: A bedroll. Initially, I set it aside when I took the lid off the plastic bin. *When I moved it*, I observed what looked like a plastic baggie sticking out of the bedroll.

R. at 40 (emphasis added). In this case, permitting the plain view doctrine would grant officers the ability to enter and move objects as they please in order to create an exception to the Constitution. To uphold a search and seizure under these circumstances would eviscerate what the Fourth Amendment seeks to protect at its core. Thus, the plain view doctrine did not diminish Strong's expectation of privacy, as he shielded his belongings from the prying eyes of the public.

Likewise, the open field doctrine will not serve as an exception to Strong's reasonable expectation of privacy. The open field doctrine states that open fields, outside the curtilage of the home, do not receive Fourth Amendment protections. *Oliver*, 466 U.S. at 177. However, while a person does not have a reasonable expectation of freedom in the area around the tent, inside the tent is afforded the same protections as a permanent residence. *Pruss*, 181 P.3d at 1236. Thus, Strong's tent and the contents therein are not an open field, but rather Strong's home. To hold otherwise would tear "at the very core" of the Fourth Amendment. *Silverman*, 365 U.S. at 511.

It then follows that with respect to Mack Strong's tent, while it was located in a public park, it should still be afforded the same Fourth Amendment protections as a permanent structure. For the Fourth Amendment purposes, the tent served as Mack Strong's home and deserves to be free from unreasonable searches and seizures. In order to prevent gross misjustice, the Fourth Amendment must take into consideration the reality of homelessness. These 550,000 individuals have no other place to go in small towns like Starwood, West Columbia, who would rather throw the homeless in jail than to ensure their constitutional rights are protected.

CONCLUSION

Mack Strong is entitled to the same constitutional protections as every citizen in this great nation. West Columbia violated those protections first by enacting a facially content-based regulation of speech that criminalizes Mr. Strong for attempting to convey his message while allowing any other speech under the same circumstances. Additionally, the State went further by unlawfully searching Mack Strong's home and seizing his possessions without a warrant.

For the reasons above, this Court is urged to vacate the convictions of both counts against Mack Strong and remand this proceeding with orders to dismiss the charge of aggressive panhandling and to suppress the evidence in connection with the unlawful search and seizure of Mr. Strong's home.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel for Petitioner certifies that this brief has been prepared and served upon all opposing counsel in compliance with the Rules of the Supreme Court of the United States by certified mail on 6th day of March 2020 to:

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