Case 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 WEST COLUMBIA

BRIEF FOR RESPONDENT

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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 solicitations 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The District Court of Jackson County, West Columbia's Opinion is unpublished, but may be found at R. at 29. The West Columbia Court of Appeals' Opinion affirming the lower court's decision is unpublished, but may be found at R. at 61.

STATEMENT OF JURISDICTION

The Supreme Court of West Columbia entered judgment on December 19, 2018. R. at 67. Petitioner timely filed 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

The First and Fourth Amendments of the Constitution, the relevant statutes, city ordinances, and the statement of legislative need are in the Appendix, located at the end of the brief.

STATEMENT OF THE CASE

In the past couple of years, Starwood, West Columbia has experienced periods of economic fluctuations R. at 27. These fluctuations have led to an increase in the number of unemployed and homeless individuals looming in the area. R. at 28. Specifically, it has become commonplace for the homeless population to congregate in the downtown area of the city. *Id.* Consequently, the city was faced with numerous complaints from businesses in the area and tourists. *Id.* To respond to this issue, business owners and residents petitioned for the enactment of an ordinance to properly address and eradicate the increasing problem caused by the homeless population. R. at 27.

Concurrently, Starwood experienced an escalation in drug-related crimes. R. at 28. The Starwood Police Department associated the inflation in drug-related crimes to the rise in the homeless community. *Id.* The influx of the homeless population in Downtown Square coupled with the secluded areas of the nearby Confluence Park made it a prime site for crimes. *Id.*

Petitioner was arrested by Officer Jones and charged with violating section 22-13 of the Starwood City Code for aggressive panhandling in Downtown Square. R. at 19. Following his arrest for violating the city's aggressive panhandling ordinance, Officer Brown discovered Petitioner's place of habitation, a tarp erected near Confluence Park. R. at 15. While lawfully searching the tarp, Officer Brown found items belonging to Petitioner, including a gallon-sized baggie containing marijuana, an amount which was later determined to exceed personal use. *Id*. Strong was subsequently charged with violating West Columbia Code § 39-17-417, possession of a controlled substance with intent to distribute. R. at 20.

The district court found Strong guilty on both counts. R. at 55. Strong appealed his conviction to the West Columbia Court of Appeals, which affirmed the judgment of the District

Court. R. at 65. Strong then petitioned the Supreme Court of West Columbia to review judgment, which affirmed the judgment of the West Columbia Court of Appeals. R. at 73. Following, Strong petitioned this Court to review judgement of the Supreme Court of West Columbia. R. at 66. This Court granted the petition for writ of certiorari. R. at 74.

SUMMARY OF THE ARGUMENTS

I.

This Court has established that a government may regulate speech when the regulation is content-neutral and is narrowly tailored to further a substantial government interest, pursuant to the First Amendment. Starwood's aggressive panhandling ordinance is centered on an individual's conduct, not on the content of an individual's speech. If, and only if, an individual acts in a manner which potentially indicates a violation, then the content of the speech must be evaluated. Furthermore, the ordinance restricts aggressive panhandling in the downtown area alone and not Starwood as a whole. Petitioner fails to demonstrate the ordinance violates the First Amendment because the ordinance was not enacted with the purpose of restricting the content of the message and does not unconstitutionally infringe on his rights to solicit for money altogether. Therefore, the city's aggressive panhandling ordinance is a content-neutral regulation because the ordinance is a proper regulation of time, place, and manner, and leaves open alternative modes of communication.

II.

This Court has recognized that an individual has a reasonable expectation of privacy in personal belongings if the individual satisfies the two-pronged test. Petitioner fails to satisfy both prongs of the two-pronged test for three reasons. First, petitioner's tarp is located in an open field. Society is not ready to recognize an individual's makeshift structure, illegally placed on

public property, as subject to a reasonable expectation of privacy. Second, Petitioner left the flap of his tarp open, thereby exposing his belongings in plain view. Items in plain view are not subject to an expectation of privacy. Third, Petitioner has no authority to erect a tarp at Confluence Park and is trespassing on public, government-owned property. The Fourth Amendment protections do not extend to individuals who are trespassing on public or private property. For these reasons, Petitioner fails to manifest both a subjective and objective reasonable expectation of privacy in his personal belongings kept in a public area.

ARGUMENTS

I. THE STARWOOD ORDINANCE DOES NOT VIOLATE THE FIRST AMENDMENT RIGHT TO FREE SPEECH.

The First Amendment of the Constitution does not provide an individual with an unlimited right to free speech. U.S. CONST. AMEND. I. For example, the First Amendment authorizes a government to place certain restrictions on speech in a public forum as long as the constitutional right to free speech is not diminished entirely. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct 2218, 2226 (2015). Constitutionally protected speech, such as soliciting for money, can be regulated and subject to certain restrictions in public spaces if the government can justify the regulation based on an important interest such as public safety. *Id.* The threshold inquiry to determine what level of scrutiny applies depends on whether the regulation is characterized as content-neutral or content-based. *Id.* at 2227.

A content-neutral regulation does not regulate the substance or message of the speech. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983). Rather, it only regulates the circumstances surrounding the speech and is subject to intermediate scrutiny. *Id.* On the other

hand, a content-based regulation targets the speech due to the message it conveys and is subject to strict scrutiny. *Reed,* 135 S. Ct. at 2227.

A. THE STARWOOD ORDINANCE IS A CONTENT-NEUTRAL REGULATION.

This Court has held that a content-neutral regulation can impose reasonable time, place, and manner restrictions. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). A content-neutral regulation must be narrowly tailored to serve a substantial government interest and leave open ample alternative channels of communication. *Id.* Lastly, the regulation does not have to be the least restrictive means of achieving the substantial interest. *Id.* Content-neutral regulations only regulate the circumstances and conduct that surround the speech, not the substance of the speech. *Id.* Generally, content-neutral laws are often found to be constitutional. *Perry,* 460 U.S. at 47.

1. The Ordinance Focuses on Physical Actions of Aggressive Solicitation, Not the Speech in Solicitation.

A content-neutral regulation focuses on the conduct, not the message of the speech. R. at 21. A regulation that serve purposes unrelated to the speech is neutral even if it has any incidental effect on the speaker or messages. Ward, 491 U.S. at 791.

To illustrate, in *Ward v. Rock Against Racism*, the city of New York sought to limit the volume of music at the bandshell in Central Park. *Id.* at 792. The regulation required all bandshell performers to use a sound technician and equipment provided by the city. *Id.* This Court upheld the ordinance, ruling it was a content-neutral regulation because there was no disagreement with the message conveyed. *Id.* at 796.

Moreover, this Court reasoned the regulation was narrowly tailored to serve the government's substantial interest in protecting the surrounding residents from the disturbance of excessive noise and was not broader than necessary. *Id.* By imposing the regulation, the

government did not express disagreement with the content of the music, but rather sought to restrict the manner in which music was being played. *Id.* The regulation still allowed for any genre of music to be played at the bandshell and only regulated the volume at which it could be played. *Id.* For these reasons, this Court ruled that the ordinance had reasonable time, place, and manner restrictions. *Id.*

The Starwood ordinance prevents a person from knowingly approaching another person within eight feet, without the person's consent, in order to vocally solicit or to receive a donation from another. R. at 14. The ordinance restricts soliciting for money in this manner at all times in the Downtown Square and its vicinity. *Id.*

The city's aggressive panhandling ordinance regulates the place and manner of solicitation for money. R. at 14. Like the ordinance discussed in *Ward*, Starwood's regulation does not ban solicitation for money altogether, but rather, the manner in which solicitation takes place. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Even though the speech must be examined, the speech is only subject to examination when an individual acts, thereby looking at an individual's conduct first. R. at 22.

Thus, as long as an individual does not approach another within eight feet, or approach without a potential donor's consent, an individual is authorized to verbally solicit for money in the Downtown Square vicinity. Therefore, the ordinance only focuses on the physical actions involving aggressive solicitation and not the speech involved in solicitation.

2. The Ordinance Only Restricts a Broad Category of Speech.

In a content-neutral regulation, the regulation does not restrict a specific topic of speech, but rather only a broad, overall category. *Hill v. Colorado*, 530 U.S. 703, 718 (2000).

For instance, in *Hill v. Colorado*, this Court upheld a state statute that restricted conversations with individuals outside of all medical facilities. *Id.* at 718. The ordinance did not violate the First Amendment because the ordinance imposed a time, place and manner restriction that was narrowly tailored to protect the state's substantial interests of protecting unwilling listeners. *Id.* Additionally, this Court ruled the state ordinance only imposed a minor place restriction on where speech could occur, and did not restrict the content of the speech entirely. *Id.* at 719.

More importantly, this Court reasoned the Colorado statute was a content-neutral regulation even though the contents of the speech had to be examined. *Id.* This Court explained it is common to examine the content of speech to determine the speaker's purpose, but that itself does not deem the regulation content-based. *Id.* at 721. The Colorado statute did not prohibit a specific viewpoint, but rather a broad category of speech and applied equally to all speakers. *Id.* Furthermore, the state's substantial interest in protecting unwilling listeners from harassment was not overly restrictive. *Id.* Lastly, the distance requirement of eight feet was far enough to make it difficult for a speaker to be heard, but not so far that if a person intended on conveying a message that the person could not do so adequately. *Id.*

Similar to the *Hill* ordinance, the Starwood ordinance regulates the place and manner in which speech may take place. *See Hill v. Colorado*, 530 U.S. 703, 718 (2000). The Starwood ordinance was enacted to further the government's substantial interest of promoting public safety and furthering the local economy. R. at 20-21. The ordinance, while prohibiting vocal solicitation, does not place a burden on speech more than necessary because the eight feet buffer still allows for solicitors to verbally communicate with individuals from a minor distance. R. at 14. Moreover, the ordinance allows for alternative, non-verbal forms of solicitation for money

such as busking or holding a sign at all times. R. at 28. The ordinance does not limit the solicitation of money entirely, but only seeks to limit the manner in which it takes place. R. at 14.

The Starwood ordinance is a content-neutral regulation on speech because it does not seek to limit the content of the speech, just the manner in which it takes place. Specifically, the regulation seeks to prevent the solicitation of money in an aggressive manner. Because the regulation does not focus on the speech, but rather the act of soliciting and only restricts a broad category of speech, it is a content-neutral regulation.

B. THE STARWOOD ORDINANCE IS A CONSTITUTIONAL REGULATION OF TIME, PLACE, AND MANNER AND PASSES INTERMEDIATE SCRUTINY.

In order for an ordinance to be constitutional, it must be a proper regulation of time, place or manner. *Ward*, 491 U.S. at 798. A government may enact reasonable regulations on speech, such as solicitation, so long as the regulations reflect proper concern for the constitutional interests at stake. *Village of Schaumburg v. Citizens for a Better Env't*, 222 U.S. 620, 632 (1980).

For example, in *Madsen v. Women's Health Center, Inc.*, this Court upheld the section of an ordinance that prevented anti-abortion protestors from entering a thirty-six foot buffer zone around abortion clinics and making noise around the area. *Madsen v. Women's Health Ctr., Inc.,* 512 U.S. 753, 770 (1994). The majority approved of the buffer zone around the front of the clinic because it was reasonable enough to allow patients and staff to enter and exit the building without fear of being approached. *Id.* at 771. Furthermore, the noise ordinance was upheld because it was determined that the limitations on noise were necessary for the well-being of the patients. *Id.* at 772.

The Starwood ordinance places restrictions on the time, place, and manner of soliciting for money. The ordinance prohibits "aggressive panhandling" at all times in the downtown area. R.

at 14. However, these regulations are reasonable as they take precaution to still allow for individuals to enjoy their First Amendment freedom to solicit. R. at 21. Furthermore, like the *Madsen* ordinance, the limitations placed on soliciting for money in the Starwood ordinance are necessary to protect public safety and the local economy. R. at 21.

Because the ordinance has reasonable time, place, and manner restrictions on aggressive panhandling in downtown, it is narrowly tailored to serve the state's substantial government interests and survives intermediate scrutiny.

1. The Ordinance is Narrowly Tailored to Serve a Substantial Government Purpose.

In order to pass intermediate scrutiny, an ordinance must be narrowly tailored to serve a substantial government interest. *Ward*, 491 U.S. at 791. Under an intermediate scrutiny analysis, the regulation does not have to be the least restrictive means. *Id.* at 792. The government must merely show that the purpose is achieved more effectively with the restriction than without. *Id.* Furthermore, the government must show that the ordinance actively addresses the stated interests. *Id.*

For example, the court in *Watkins v. City of Arlington*, ruled the city's ordinance regarding interactions between pedestrians and drivers of vehicles at a traffic stop was a content-neutral regulation of speech because it placed a proper regulation on time, place, and manner. *Watkins v. City of Arlington*, 123 F. Supp. 3d 856, 868 (N.D. Tex. 2015). Furthermore, the Court determined the ordinance was narrowly tailored to serve the city's substantial interest in traffic and pedestrian safety because the city presented evidence relating to the number of deaths and injuries to pedestrians at intersections. *Id.* This evidence justified the city's substantial need to enact a regulation to control the frequency of accidents from occurring. *Id.*

Similarly, the city of Starwood enacted the aggressive panhandling ordinance to protect the safety of the public and to promote the local economy. R. at 21. Similar to *Watkins*, the need to protect the public and promote the local economy are substantial because failure to address the issue of aggressive solicitation will continue to negatively affect the city overall. *Id.* Legislative intent is important as it shows the need for the regulation and justifies the reasoning behind the enactment of the law. *United States v. Kokinda*, 497 U.S. 720, 731 (1990).

The Starwood ordinance places proper restrictions on time, place, and manner of aggressive solicitation. The city exemplifies the need for an ordinance based on their legislative intent. Without an ordinance in place to diminish the incidents of aggressive verbal solicitation, pedestrians and tourists would continue to feel uncomfortable and fear for their safety. Subsequently, with a decrease in tourism, Starwood's economy would suffer. Therefore, the Starwood ordinance is narrowly tailored to serve the city's substantial government interests of protecting citizen's safety and promoting the local economy.

2. The Ordinance Leaves Open Ample Alternative Channels of Communication.

Lastly, in order for the regulation to be justified and constitutional, there must also be ample alternative channels of communication left open for the speaker. *Ward*, 491 U.S. at 791. The alternative channels do not have to be the speaker's first or best choice, or even one that provides the same audience or impact for the speech. *Gresham v. Peterson*, 225 F.3d 899, 907 (7th Cir. 2000).

In particular, this Court in *Frisby v. Schultz*, upheld an ordinance that banned picketing outside of residences. *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). This Court reasoned that the government can place restrictions to protect individuals from listening to unwanted speech in

their homes. *Id.* at 482. The ordinance prevented picketing in front of a residence but still provided other means to allow the speakers to convey their message. *Id.*

For example, the ordinance did not prevent picketers from conveying their message anywhere else outside of residential homes. *Id.* And if these individuals sought to convey their message to people in their homes, they could do so through other methods, such as leaving pamphlets and brochures outside of homes. *Id.* These alternatives provided individuals ample opportunities to convey their message and only enacted a minor place restriction. *Id.*

In our case, the Starwood ordinance leaves open an ample number of alternative means to solicit for money. R. at 22. For example, the ordinance does not ban holding a sign, busking, standing still, asking for a future donation, letting someone else approach the solicitor, soliciting in areas outside of Downtown Square or asking for the individual's consent before approaching. R. at 22. There are a substantial number of reasonable alternatives in place that allow for a solicitor to reach the same intended audience as with vocal solicitation. *Id.* The city's aggressive panhandling ordinance leaves open ample alternative channels of communication that allow for an individual to still enjoy the freedom of soliciting. *Id.* The restrictions are not overburdensome because they do not prevent verbal soliciting entirely. *Id.*

The Starwood ordinance is a content-neutral regulation on the verbal solicitation for money because it is a constitutional regulation of time, place, and manner. Furthermore, it is narrowly tailored to serve substantial government interests of protecting the safety of citizens and promoting the local economy. Lastly, the ordinance leaves open alternative channels of communication thereby allowing the solicitation of money to still take place and passes intermediate scrutiny.

C. EVEN IF THE ORDINANCE IS FOUND TO BE CONTENT-BASED, IT STILL PASSES STRICT SCRUTINY.

This Court may find the ordinance to be content-based for one of two reasons: (1) the ordinance targets the speech based on the message conveyed, or (2) because it is content-neutral on its face but cannot be justified without referring to the content of the speech. *Reed,* 135 S. Ct. at 2227. A content-based regulation is presumptively unconstitutional and triggers strict scrutiny. *Id.* In order for a content-based regulation to be upheld, it must pass a strict scrutiny analysis. *Id.*

To pass strict scrutiny, a government has to show a compelling interest is furthered through enacting the regulation. *Id.* Additionally, the regulation must be narrowly tailored to meet that interest. *Id.* The restriction must also be the least restrictive means of furthering the compelling interest. *Id.* If a government cannot provide justification for a compelling state interest, then the content-based regulation can be ruled unconstitutional. *Id*.

To illustrate, in *Reed v. Town of Gilbert*, this Court ruled an Arizona city's ordinance unconstitutional because it treated directional signs differently than political or ideological signs. *Reed,* 135 S. Ct. at 2224. Because the law drew distinctions based on the message the speaker conveyed, the regulation was ruled as content-based and subject to a strict scrutiny analysis. *Id*.

The town stated the purpose of the regulation was to protect the city's aesthetic appeal and manage the traffic in the area. *Id.* at 2231. Under a strict scrutiny analysis, the town failed to prove that the regulation was narrowly tailored to serve a compelling state interest because it allowed for other types of signs to be displayed city wide that interfered with the exact interest they sought to prevent. *Id.* Further, this Court ruled preserving the aesthetic and beautification of a city could not be considered a compelling government interest. *Id.* at 2232.

In our case, unlike *Reed*, the content of speech regarding the Starwood ordinance only matters if certain behavior occurs beforehand. R. at 22. For example, if an individual is to approach within eight feet of another, this conduct may be considered "aggressive" and requires police to consider the speech taking place to determine whether the ordinance was violated. R. at 14. Moreover, the city seeks to further what this Court has previously held is a compelling interest, public safety. *See McCullen v. Coakley*, 573 U.S. 464, 497 (2014).

The Starwood ordinance, as enacted, furthers a compelling government interest of public safety because it seeks to prevent residents and tourists in downtown from feeling captive and uncomfortable by solicitors. Further, the city provides the least restrictive means of regulating aggressive panhandling because it still allows for solicitation to take place in different areas of the town or in different manners.

1. The Ordinance Furthers a Compelling Government Interest.

A compelling government interest adequately serves the government's stated purpose in the least restrictive means. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986). By demonstrating a reasonable compelling government interest for a regulation, a content-based law may be upheld. *Id.*

For instance, in *City of Renton v. Playtime Theatres, Inc.*, an ordinance was enacted prohibiting adult movie theatres from being located within 100 feet of any residential area, church, park, or school. *Id.* at 52. This Court held the ordinance served as a valid governmental response to the serious problem the adult theatres would cause. *Id.* at 53. Because the ordinance was enacted with concern to the secondary effects of the theatres, the facially content-based regulation was interpreted under a content-neutral analysis. *Id.* The ordinance was ruled constitutional because it did not ban the presence of adult theatres altogether but rather restricted

the areas in which they were allowed. *Id.* This Court ruled the ordinance had proper time, place, and manner regulations due to these reasons. *Id.*

Additionally, this Court determined the city had a substantial interest in preserving the quality of life of their residents and left open reasonable alternative channels for communication. *Id.* Because there were other sites where the theatres could be located, there were ample alternative channels present. *Id.* This Court determined that if the city desired to restrict the message of adult theatres, the city would have tried to shut them down completely or restrict them in number, rather than attempt to relocate them. *Id.*

Similarly, the Starwood ordinance should be analyzed in the same framework as the regulation in *Renton* because Starwood seeks to minimize the secondary effects of soliciting for money. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986). By restricting the manner in which solicitation takes place, the city seeks to minimize the harmful effects of the conduct, and not the speech as a whole. R. at 21. The Starwood ordinance leaves open ample alternative channels for individuals to solicit and only prevents the most impactful method of disturbing citizens' safety. Therefore, the Starwood ordinance seeks to minimize the secondary effects of verbal solicitation and not solicitation altogether. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986).

Ultimately, the ordinance seeks to further the compelling government interest of public safety. Starwood enacted this ordinance as a response to the spike in drug-related crimes and increase in the homeless population connected to these crimes. The public's safety is a compelling government interest that cannot be adequately addressed or minimized without enforcement of the city's ordinance.

2. The Ordinance is Narrowly Tailored.

In order for an ordinance to be narrowly tailored under a strict scrutiny analysis, the regulation must be the least restrictive means of achieving the compelling government interest. *Reed*, 135 S. Ct. at 2231. If the ordinance is narrowly tailored and the least restrictive means, then a court may determine that it passes strict scrutiny. *Id.*

States and municipalities are justified in preserving a compelling interest by controlling activities around public areas. *McCullen*, 573 U.S. at 509. The ordinance, while seeking to further a compelling government interest of protecting the safety of citizens, is also narrowly tailored to achieve these means. R. at 22. The ordinance only restricts verbal solicitations in a manner which may make citizens and tourists feel unsafe. *Id.* Simultaneously, the ordinance allows for alternative means to solicit for money and does not restrict the act altogether. *Id.* Therefore, even if the ordinance is found to be content-based, it passes strict scrutiny because it is narrowly tailored to further the compelling interest of public safety. *Id.*

Starwood's ordinance is a content-neutral regulation that passes intermediate scrutiny because it is a constitutional regulation of time, place and manner and is narrowly tailored to further their two substantial government interests of public safety and promoting the local economy. On the other hand, if this Court determines the ordinance is content-based, it also passes strict scrutiny because it is narrowly tailored to serve a compelling government interest of public safety. Therefore, the aggressive panhandling ordinance does not violate the First Amendment.

II. AN INDIVIDUAL DOES NOT HAVE A REASONABLE EXPECTATION OF PRIVACY IN PERSONAL BELONGINGS KEPT IN PUBLIC SPACE WHERE HE LIVES.

The Fourth Amendment of the United States Constitution protects "persons, houses, papers and effects" from unreasonable searches and seizures without a warrant or probable cause. U.S. CONST. AMEND. IV. However, this protection does not apply to belongings readily accessible to the public. *California v. Greenwood*, 486 U.S. 35, 41 (1988). This Court characterized the Fourth Amendment to incorporate reasonableness factors, which could be determined through a two-pronged test. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

The two-pronged test entails: (1) that a person has presented an actual, subjective expectation of privacy, and (2) that the expectation itself is one which society objectively recognizes as reasonable. *Id.* at 361. If a person does not expect something to be private, or his expectation of privacy is unreasonable based on societal standards, then there is no reasonable expectation of privacy. *Id.* A search violates the Fourth Amendment if the government compromises an individual's actual and reasonable expectation of privacy through the search. *Oliver v. United States*, 466 U.S. 170, 177 (1984). Petitioner cannot satisfy the two-part test because he fails to subjectively manifest his expectation of privacy and society will not accept his expectation of privacy as reasonable.

A. THE FOURTH AMENDMENT PROTECTIONS ARE STRONGEST IN THE HOME.

Under the Fourth Amendment, the strongest protections for privacy are awarded to one's home. *Oliver*, 466 U.S. at 178. Courts have often held that a home is not temporary structure such as a box or makeshift structure. *California v. Thomas*, 38 Cal. App. 4th. 1331, 1334 (Cal.

Ct. App. 1995). *See Amezquita v. Colon*, 518 F.2d 8, 11-12 (1st. Cir. 1975 (holding that a makeshift structure is not considered a home subject to Fourth Amendment protections).

For example, in *California v. Thomas*, the defendant, a homeless man, resided in a cardboard box on a public sidewalk in Los Angeles. *Thomas*, 38 Cal. App. 4th. at 1333. Defendant constructed the box for privacy, and he would often call the box his "home" which evidenced a manifested subjective expectation of privacy. *Id.* at 1334. However, the court ruled the defendant did not have an objectively reasonable expectation of privacy, and his box was not considered a home because it was a temporary shelter located illegally on a public sidewalk. *Id.*

In our case it is undisputed that Petitioner has set up a makeshift shelter in a public park without the city's permission. R. at 5. Specifically, Petitioner's tarp was set up alongside a running trail in Confluence Park which, despite its location, cannot be considered private. *Id*. Parallel to the reasoning in *Thomas*, Petitioner's tarp is not considered a home and is not allowed to be erected there by law. R. at 17. It is irrelevant whether Petitioner referred to the tarp as his home because Petitioner did not have the authority to erect the tarp on the land. *Id.* Based on these facts, the tarp is not subject to Fourth Amendment protections because the tarp cannot be reasonably considered to be a home. *Id.*

An individual has the strongest Fourth Amendment protections in his home. In this case, it is evident that despite Petitioner's attempt to manifest the tarp as his home, it cannot be considered a home because it is illegally located on public property. R. at 17.

B. IN ORDER TO HAVE FOURTH AMENDMENT PROTECTIONS, THERE MUST BE A SUBJECTIVE EXPECTATION OF PRIVACY MANIFESTED.

The first prong of the two-pronged test of reasonable expectation of privacy is determined through an individual's subjective intent. *Katz*, 389 U.S. at 361. In order to determine whether

Petitioner's tarp was subject to Fourth Amendment protections, we must first analyze whether a subjective expectation of privacy was manifested. *Id* To illustrate, an individual's home is usually a place where he expects privacy, but an individual does not expect privacy regarding objects placed outside of his home. *Greenwood*, 481 U.S. at 40-41. This Court determined that objects and property which a person purposely avails to the public are not subject to Fourth Amendment protections. *Id*.

Furthermore, this Court, in *Katz v. United States*, held that the Fourth Amendment protects people, not places. *Katz*, 389 U.S. at 351. This Court ruled that a telephone booth, since enclosed like a home, is subject to a reasonable expectation of privacy. *Id*. at 360. The defendant subjectively expected the conversation in the phone booth to be private, and his expectation of privacy was also objectively reasonable because it was one which society was willing to recognize as reasonable. *Id*. at 351. Therefore, it is evident where one has a meets both prongs of the test, the individual has a reasonable expectation of privacy and is protected from unreasonable search and seizure under the Fourth Amendment. *Id*.

Unlike the defendant in *Katz*, Petitioner in this case did not manifest a subjective expectation of privacy. R. at 5. Petitioner voluntarily left his belongings to engage in soliciting for money. Also, Petitioner left his tarp open and drew the flap back, allowing others, such as Officer Brown the opportunity to peek inside. *Id.* Through this action, it is evident that Petitioner did not manifest a subjectively reasonable expectation of privacy for his tarp or his belongings located within it. *Id.* Even though Petitioner attempted to manifest a subjective expectation of privacy when brought to his tarp, a reasonable person would not have believed his subjective intent was manifested because the tarp was left open. *Id.* The open flap markedly demonstrates that Petitioner did not subjectively intend for privacy. *Id.*

In order to have Fourth Amendment protections, a subjective intent must be manifested. In this case, Petitioner's voluntary abandonment of his belongings and his disregard to close the tarp displayed his failure to manifest a subjective expectation of privacy.

C. IN ORDER TO HAVE FOURTH AMENDMENT PROTECTIONS, THERE MUST BE AN OBJECTIVE EXPECTATION OF PRIVACY MANIFESTED.

The second prong of the two-pronged test is the objective intent to privacy. *Katz*, 389 U.S. at 361. If an individual intentionally exposes their property to the public, whether inside the home or outside the home, the individual's privacy is not protected under the Fourth Amendment. *Greenwood*, 486 U.S. at 40. A person has no objective expectation of privacy in objects that are readily accessible to members of the public. *Id.* While there is no dominant factor to prove an individual has an objectively reasonable expectation of privacy, this Court has previously held that general societal understanding the leading and important factor. *Oliver*, 466 U.S. at 170.

For example, in *California v. Greenwood*, this Court held respondents, by voluntarily leaving garbage for collection outside of their home, failed to have an objectively reasonable expectation of privacy. *Greenwood*, 846 U.S. at 40. This Court reasoned that the trash bags were left on the curb for a third party to pick up, and therefore, Respondents did not intend the trash or its contents to be shielded from public eyes. *Id.* at 41. Additionally, the understanding of society as a whole is that one does not expect objects left outside, in public, to be subject to a reasonable expectation of privacy. *Id.*

In this case, Petitioner erected a tarp and a clothesline in the corner of Confluence Park, next to a running trail. R. at 25. By assembling his tarp in a public sphere, Petitioner forfeited his right to privacy. *See California v. Greenwood*, 846 U.S. 35, 40-41. Furthermore, Petitioner left his belongings unattended on public land, where other members of the public have access. R. at 61.

Petitioner could have reasonably believed that his belongings would not be disrupted based on the location. *Id.*

Society will not recognize Petitioner's tarp as a home subject to a reasonable expectation of privacy because it is located on public land, accessible to anyone. Therefore, Petitioner fails to meet the second prong of the two-pronged test because he does not have an objectively reasonable expectation of privacy with his belongings on public grounds.

1. The Plain View Doctrine is an Exception to Fourth Amendment Protections.

An exception to the Fourth Amendment's warrant requirement is the plain view doctrine. *Horton v. California*, 496 U.S. 128, 134 (1990). An officer's observation of objects left in plain view does not generally constitute a search under the Fourth Amendment. *Id*. An individual's privacy interests are not implicated when an officer obtains property in plain view. *Id.* Instead, an individual is deprived of ownership of his or her property. *Id.* at 135. Because petitioner's property is located in plain view, he does not have an objective expectation of privacy.

The ruling in *Horton* distinguished the "inadvertent" requirement the ruling in *Coolidge* laid out. *Id.* at 134. The opinion in *Coolidge* stated that in order to uphold a seizure under the plain view doctrine, three conditions must be met: (1) the intrusion must have been justified, (2) the discovery had to be "inadvertent", and (3) the nature of the object must have been "immediately apparent." *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971). This Court's decision in *Horton* stated that the discovery of an item in plain view does not have to be "discovered inadvertently" because it is not a necessary condition. *Horton*, 496 U.S. at 130.

In the past, this Court has also held that a person surrenders an expectation of privacy in his belongings when he knowingly exposes his belongings to public scrutiny. *Abel v. United States*, 362 U.S. 217, 240-41 (1960). Further, a reasonable expectation of privacy cannot exist

when an individual abandons his property and leaves them in public. *Id.* For example, when a person has property in his hand or on his person, it is clear to everyone that it is his property. *Id.* But when he leaves his property behind in a place where others can find it, he leaves it open for others to access. *Id.*

By leaving his belongings unattended to solicit for money and conduct other activities, Petitioner did not manifest a reasonable expectation of privacy. R. at 16. Petitioner could not have reasonably believed that his tarp and his belongings would not have been interfered with considering his proximity to the trail near Confluence Park. R. at 17. Furthermore, the tarp's flap was drawn back, allowing any passerby to see inside the tarp. R. at 5. The baggie which contained the marijuana was sticking out, in plain view, from the bedroll. *Id.* Officer Brown had a legitimate reason to suspect that the baggie sticking out of the bedroll was evidence of illegal activity because Starwood was experiencing an influx of drug trafficking among the homeless population. R. at 42. The baggie, in plain view, did not have to be discovered inadvertently to be a lawful seizure. *See Horton v. California*, 496 U.S. 128, 130.

Petitioner failed to manifest an objective expectation of any of his belongings because everything he possessed was in plain view. Specifically, by leaving the flap of his tarp open, he forfeited any privacy he may have intended and provided the opportunity for his belongings to be exposed to the public. Because Petitioner's items were in plain view, he cannot be protected under the Fourth Amendment.

2. The Open Fields Doctrine is an Exception to Fourth Amendment Protections.

The open fields doctrine allows for police officers to enter and search an area, such as a field, without a warrant. *Oliver*, 466 U.S. at 170. An open field entails any area which is not considered to be one's home or curtilage. *Id.* Fourth Amendment protections extend only to the

land which immediately surrounds the home. *Id.* at 171. Therefore, activities which take place within an open field are not generally subject to a reasonable expectation of privacy, regardless of the subjective view of a person. *Oliver*, 466 U.S. 176-77.

For example, in *Oliver v. United States*, the police entered the defendant's hidden field on suspicion that he was growing marijuana. *Id.* at 173. The officers passed "no trespassing" signs and stumbled across a field over a mile away from the defendant's home. *Id.* The defendant was arrested and the district court affirmed a motion to suppress the evidence of the marijuana fields. *Id.* The defendant argued his Fourth Amendment rights were violated through the warrantless search. *Id.* The district court ruled for Oliver and stated he had a reasonable expectation of privacy however, the Court of Appeals reversed. *Id*. at 714. The Court of Appeals and this Court held the field was not subject to a reasonable expectation of privacy because the marijuana field was considered an open field on private property. *Id.*

Comparable to our facts, Petitioner's tarp is located within a public space in Confluence Park. R. at 6. While the tarp is located within a secluded corner of the park, the area is still considered public. *Id.* Despite the fact that Petitioner established a clothesline around the curtilage of his tarp, all of Petitioner's belongings were located in an open area. *Id.* Due to these circumstances, there is no reasonable expectation of privacy in Petitioner's tarp regardless of his intended subjective view. *See Oliver*, 466 U.S. at 170.

If the defendant in *Oliver* could not expect a reasonable expectation of privacy on his private property which was located a mile away from his home, then Petitioner cannot reasonably expect privacy in his tarp which is located in a public area near Confluence Park. *Id.* Petitioner fails to establish an objectively reasonable expectation of privacy because his tarp is located in an open field available to public scrutiny. R. at 17.

D. AN INDIVIDUAL WHO IS TRESPASSING ON PROPERTY DOES NOT HAVE FOURTH AMENDMENT PROTECTIONS.

The Fourth Amendment protections do not extend to individuals who are trespassing on public or private property. *Thomas,* 38 Cal. App. 4th at 1331. While the Fourth Amendment may protect an individual's expectation of privacy in a temporary structure, that temporary structure must be in a lawfully occupied area. *United States v. Ruckman,* 806 F.2d 1471, 1474 (10th Cir. 1986).

To illustrate, in *California v. Thomas,* the California Court of Appeals determined the defendant did not have an objectively reasonable expectation of privacy because his box was located on a public sidewalk without the city's permission. *Thomas,* 38 Cal. App. 4th. at 1331. When Defendant would be inside his box, he could not see outside and people outside could not see inside. *Id.* Further, Defendant kept all of his personal belongings hidden in the confines his box. *Id.* Responding to a burglary, the police questioned a witness and decided to go to where Thomas resided. *Id.* Absent a warrant, the officer looked inside Thomas' box while he was sleeping and found evidence connecting him to the burglary. *Id.* at 1334. Subsequently, the officers seized the evidence and arrested him. *Id.*

The California Court of Appeals upheld the search of the defendant's box and affirmed his conviction. *Id.* The court held that there is no objectively reasonable expectation of privacy where someone occupies a temporary shelter on public property. *Id.* Further, the Court argued that it was impractical for the police to wait and obtain a warrant beforehand because a temporary shelter like a box could be easily removed. *Id.* at 1335.

In a similar case, a defendant made his home inside of a cave on public land for approximately eight months. *Ruckman,* 806 F.2d at 1472. Defendant furnished the cave and built

a door to secure the premises. *Id.* Regardless of these factors, the Tenth Circuit held the defendant was not entitled to Fourth Amendment protections because he was trespassing on public property and did not have any legal rights to occupy it. *Id.*

Further, the Tenth Circuit held that the defendant could not have a reasonable expectation of privacy in an area which is easily accessible by the public. *Id.* The court also noted that although the first prong of the reasonable expectation test might have been met, through furnishing the cave and creating a door, the second prong was not fulfilled because a trespasser on public land does not have an objective expectation of privacy. *Id.* at 1474. Further, society would not find it objectively reasonable that a cave on public land is someone's home. *Id.*

The same reasoning can be applied in our case. Petitioner was unlawfully living on public property. R. at 17. Petitioner does not own Confluence Park, nor does he have the authority to prevent others from using Confluence Park and the area which surrounds it. *Id.* The area in which Petitioner's tarp is located is not fenced or entirely away from the public eye. *Id.* By erecting a tarp, Petitioner attempted to claim the land for himself and expecting privacy in an area that is utilized and available for public use by all residents and visitors of the city. *Id.*

The State urges this Court to follow the ruling in *California v. Thomas* and *United States v. Ruckman*. If this Court rules to allow individuals to set up tarps and construct makeshift homes in areas not designated for that purpose, it would be detrimental to cities and states nationwide. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 289 (1984). For example, by allowing Petitioner and other homeless individuals to reside on public land, the State sends a message to its residents that any individual can erect a tarp anywhere and claim it as a home. *See Id.*at 296. Authorizing this action would mean the Court is disregarding the laws in place and is incentivizing criminal activity. *Id.* at 297.

It is undisputed that Petitioner's tarp is located near Confluence Park and open to the public within an open field. Furthermore, Petitioner intentionally left his belongings on public land in plain view, as the flap to his tarp was intentionally left open. Moreover, Petitioner was unlawfully occupied on government land intended for public use as shelter, not for the purpose of camping, thereby trespassing. Due to these facts, it is evident that Petitioner fails to establish both a subjective and objective expectation of privacy, and therefore Petitioner was not subject to any Fourth Amendment protections. Consequently, Petitioner did not have a reasonable expectation of privacy regarding his personal belongings left in the public park even though he lived there.

CONCLUSION

For the foregoing reasons, the State of West Columbia prays this Court affirms the Supreme Court of West Columbia's judgment, which upheld Starwood's aggressive panhandling ordinance as a constitutional regulation of speech and upheld the search supporting Strong's conviction for possession of marijuana.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel for Respondent 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 the 6th day of March 2020 to:

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APPENDIX

U.S. CONSTITUTION: AMENDMENT I

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. CONSTITUTION AMENDMENT IV

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.

Starwood City Code § 22-13 (2016) Aggressive Panhandling Ordinance

The City of Starwood recognizes that panhandling is speech protected under the First Amendment but seeks to balance the constitutionally protected rights of law- abiding speakers against the privacy rights of unwilling listeners to be protected against crime and undue annoyance.

(a) Definitions.

a. "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.
b. "Downtown Square vicinity" means a region of the City of Starwood, West Columbia, on the Downtown Square, or the streets surrounding it (Columbia Street, Earl Street, Valley Avenue, and Park Street), or within 100 feet of any spot on those streets.

(b) A request or solicitation may take the form of, without limitation:

a. Vocal appeal or,
b. Exchange of an item of little or no monetary value for a donation under circumstances in which a reasonable person would understand that the transaction is in substance a donation.

(c) Aggressive panhandling shall be unlawful in the Downtown Square vicinity at any time of day or night.

(d) Any person violating the provisions of this section shall be guilty of a Class C misdemeanor, subject to a fine of up to but not more than $2500.00 dollars and a sentence of up to but no more than 11 months 29 days incarceration.

West Columbia Code § 39-17-417 (2012) Possession of marijuana with intent to distribute.

(a) It is an offense for a person to, knowingly or intentionally, possess marijuana with intent to sell or distribute.

(b) Penalties:

(1) A violation of this subsection (a) containing not less than one ounce nor more than two pounds is punishable by no less than one but no more than nine years imprisonment.

(2) A violation of this subsection (a) containing not less than two pounds nor more than four pounds is punishable by no more than twelve years imprisonment.

(3) A violation of this subsection (a) containing not less than four pounds nor more than twenty pounds is punishable by no less than eight but no more than fifteen years imprisonment.

(4) A violation of this subsection (a) containing twenty pounds or more is punishable by no less than fifteen but no more than twenty years imprisonment.

(c) Any person found in violation of this subsection (a), who has previously received a conviction involving any controlled substance, shall receive:

(1) the appropriate penalty under subsection (b), and

(2) a minimum of eight additional years imprisonment.

Statement of Legislative Need for Starwood City Code § 22-13

Madam Mayor:

I call for a vote to amend the Starwood City Code to add the section 22-13 to address a public-safety and local-economy problem. Members of the City Council find the proposed legislation will protect public safety and the local economy. The need for the legislation flows from the following history:

The City of Starwood (Starwood) is a small, rural city in the state of West Columbia. It is also the county seat of Jackson County. Historically, Jackson County has had a population of around 30,000 residents, the majority of whom lived in or around Starwood. Starwood has historically been a small western city with a population of approximately 16,500 residents. Starwood lies in a valley between two large mountain ranges. Pioneers searching for gold first established Starwood as a settlers' camp in the surrounding mountains. The Downtown Square preserves the original layout of historic Starwood.

The Downtown Square consists of four main streets surrounding a plaza with a granite monument of the City's founder, E.B. Confluence. On the northern side of the square is Park Street. Most of the City and County government buildings, including the County Courthouse, are located on Park Street. Valley Avenue lies East of the square. Valley Avenue—known locally as the "Arts District"—hosts several art galleries, theaters, coffee shops, and music venues. Earl Street lies South of the square. Several restaurants, a drug store, and Gold Rush Tavern are located o Earl Street. Columbia Street lies West of the square and hosts Starwood's hippest shopping district and several upscale boutiques. Confluence Park lies approximately one block west of Downtown Square. Confluence Park consists of 250 acres, a baseball field, picnic areas, an amphitheater, a playground, a small lake, and several wooded areas with running trails.

The people of Starwood have consistently sought to protect its small-town appeal, but at times, this goal has proved difficult to achieve. An economic downturn hit Starwood hard in 2012 and caused many businesses to close. The Downtown Square became all but deserted.

Starwood's fortune rapidly changed for the better in August 2014, when oil conglomerate Sinclair Industries discovered Starwood was a perfect area for fracking to extract oil and natural gas. Sinclair Industries set up fracking operations in the area surrounding Starwood. Within a year, Starwood went from a rural town to a thriving metropolitan area. Thousands of young men and women flocked to Starwood to work in the fracking industry. Businesses began to recover with the boost in employment and investment. The Downtown Square enjoyed a full-scale revitalization with many businesses experiencing unprecedented success. The Downtown Square attracted residents and visitors. Confluence Park became a popular weekend destination. Starwood held regular festivals, art exhibitions, and other events to attract people to the center of the city. The State Highway Department even built a four-lane highway around Starwood to accommodate the increase in traffic and the shipping needs of Sinclair Industries.

Our fair city's spike in good fortune did not last. The job market leveled out. The number of people looking for work out-numbered open positions. The decrease in demand for labor,

coupled with the influx of people, led to a sharp increase in the city's homeless and unemployed population. Many members of the homeless community began congregating in and around the Downtown Square. Business owners and residents observed an increase in the number of homeless people aggressively panhandling in the Downtown Square. Local government officials received numerous complaints from people visiting the Downtown Square indicating they felt unsafe, especially in the evening hours due to panhandlers approaching them and harassing them for money. The restaurants and shops in the area experienced a decrease in business, something many attributed to the harassment patrons experienced from aggressive panhandlers. A coalition of local business owners and residents petitioned the City Council to enact an ordinance to address the growing homeless problem in downtown Starwood.

At the same time, drug-related crime reached an all-time high. Drug arrests increased. Starwood experienced an increase in other crime as well, mostly in the Downtown Square area. Many officials, and the Police Department, attributed the increase surge in crime to the increase in the homeless population in that area. Officers made several arrests involving homeless individuals who trafficked drugs in Confluence Park. The high traffic in the Downtown Square and the many secluded areas of the nearby park made the area a prime location for illegal activity, specifically drug trafficking. Police became increasingly suspicious of the homeless community in Starwood because of those incidents.

Section 22-13 responds to the aggressive panhandling problem by prohibiting panhandlers from approaching too close to make unwanted verbal solicitations for immediate donations of money within the Downtown Square area. The ordinance would ban aggressive panhandling within 100 feet in any direction of Columbia Street, Earl Street, Valley Avenue, and Park Street. The ordinance would apply at all times. Because the City has experienced no complaints or problems in other areas of Starwood, the proposed ordinance would limit aggressive panhandling to the area where the problem is most pervasive. The proposed ordinance does not apply to non-verbal solicitations, such as signs requesting money, because experience indicates non-verbal solicitations are less threatening than verbal solicitations.

Introduced: July 13, 2016
Passed first reading: July 13, 2016
Referred to: Public Safety Committee: July 13, 2016 Passed second reading: August 15, 2016
Passed by majority vote: August 15, 2016
Signed by the Mayor: August 31, 2016