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 West Columbia

BRIEF FOR PETITIONER

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March 6, 2020

QUESTIONS PRESENTED

1. Does an ordinance prohibiting a solicitor from approaching within eight feet of another person to communicate a verbal request for an immediate donation, within an entire geographic area, violate the solicitor's right to free speech?

2. Does an individual have a reasonable expectation of privacy in personal belongings kept in his home, which is located in a secluded area accessible to the public?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

CITATIONS TO THE OPINIONS BELOW

The District Court of Jackson County, West Columbia order is unpublished. R. 55. The West Columbia Court of Appeals Opinion and Order affirming conviction is unpublished. R. at 57. The Supreme Court of West Columbia Opinion and Order affirming the lower court is unpublished.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 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 findings of fact for clear error and its legal conclusions *de novo*.

PROVISIONS INVOLVED

"Congress shall make no law… abridging the freedom of speech." U.S. Const. amend. I.

"The right of the people to be secure… against unreasonable searches and seizures." U.S. Const. amend. IV.

Starwood, W. Colum., City Code § 22-13 (2016).

STATEMENT OF THE CASE

Petitioner Mack Strong, a resident of the city of Starwood and a veteran of the United States military, suffers from mental illness, including post-traumatic stress disorder. R. at 10. While serving our country, Mr. Strong was struck by a roadside bomb, injuring his head, right elbow, and shoulder. *Id.* Due to these physical and mental injuries, Mr. Strong lost his most recent job in December 2016 and, since then, has been unable to find traditional work. *Id.* Not able to pay rent, Mr. Strong was evicted from his apartment in March 2017, and has had to make do with a tarp tent as his home, which he pitched in a secluded area of Confluence Park. *Id.* Having no employment opportunities, but still needing money for basic necessities, Mr. Strong relies on the kindness of strangers for donations as his main source of income. R. at 4.

The Starwood City Code includes section 22-13, referred to as the "Aggressive Panhandling Ordinance" ("Starwood ordinance"). Starwood, W. Colum., City Code § 22-13 (2016). The Starwood ordinance prohibits aggressive panhandling "at any time of day or night" in the Downtown Square vicinity. *Id.* § 22-13(c). "Downtown Square vicinity" is defined as the downtown square, or "within 100 feet of any spot on" the four streets surrounding the square. *Id.* § 22-13(a)(2). The Starwood Ordinance defines "aggressive panhandling" as "to knowingly approach another person within eight feet" without consent, "to request or solicit an immediate donation of money… from another person, regardless of the solicitor's purpose or intended use of the money." *Id.* § 22-13(a)(1). Solicitation may be "1) Vocal appeal or, 2) Exchange of an item… for a donation under circumstances in which a reasonable person would understand that the transaction is in substance a donation." *Id.* § 22-13(b)(1)-(2).

On September 1, 2017, Officer Jones began watching Mr. Strong because he appeared to be a homeless man approaching and speaking to pedestrians on the Downtown Square. R. at 32.

Presuming Mr. Strong was violating the Starwood ordinance, Officer Jones moved close enough to overhear the content of the conversation in order to validate his suspicions. R. at 32-33, 36-38. Officer Jones observed Mr. Strong walk toward a pedestrian and request financial assistance because he was hungry. R. at 33. Officer Jones detained Mr. Strong and ultimately issued Mr. Strong a citation. R. at 35.

Meanwhile, Officer Brown questioned a witness who pointed Officer Brown in the direction of the public woods where Mr. Strong's home was located. R. at 34-35, 39. Because Officer Brown assumed the witness had a history of drug use, she thought she needed to investigate Mr. Strong's home. R. at 42-43. Although Officer Brown regularly patrolled area, she had to search to find Mr. Strong's home because it was located deep in Confluence Park, away from the area used by park visitors. R. at 39, 43. There, she found Mr. Strong's tarp, which was secured to a tree forming a tent, and underneath, a storage bin secured with its lid and a bedroll tied closed. R. at 39-40. She believed this was Mr. Strong's home, and a clothesline with laundry drying nearby led her to believe Mr. Strong intended to return and had not abandoned his belongings. R. at 40, 43. Officer Brown moved the bedroll to get to the bin. R. at 40. She opened the bin and found two Purple Heart medals Mr. Strong earned from his service, personal items, and his expired driver's license. *Id.* While moving the bedroll, Officer Brown reportedly observed part of a plastic bag peeking out of the bedroll. *Id.* Not knowing what was in the bag, she opened the bedroll, and a gallon sized bag containing marijuana fell out. R. at 40-41. At this point, Officer Brown radioed her discovery to Officer Jones, who transported Mr. Strong back to the location of Strong's tent. R. at 35. When he saw that his home had been ransacked, he became upset and said "Hey that's my property! You can't just go through it without my

permission!" *Id.* Officer Brown did not have a warrant to search Mr. Strong's home, nor did she try to obtain one. R. at 43-44.

After being indicted for possession with intent to distribute related to the marijuana and for aggressive panhandling, Mr. Strong filed a Motion to Suppress the marijuana evidence and a Motion to Dismiss the panhandling charge. R. at 3-14, 50-52. Both motions were denied. R. at 29-30. A jury convicted Mr. Strong of both counts. R. at 53-54. The maximum sentence on the possession charge is nine years imprisonment. W. Colum. Code § 39-17-417(b)(1) (2012). The maximum sentence for the panhandling violation is 11 months, 29 days. City Code § 22-13(d). Mr. Strong received the maximum for both charges. R. at 55.

Mr. Strong appealed to the West Columbia Court of Appeals, which affirmed the lower court. R. at 56, 65. On appeal to the Supreme Court of West Columbia, that court erroneously held the panhandling ordinance content neutral because it does not distinguish the content of the speech, and found it would be narrowly tailored to a compelling interest if it were content based. R. at 68-69. As to the possession charge, the court incorrectly found Mr. Strong abandoned his belongings in a public area. R. at 69-70.

Mr. Strong filed a Writ of Certiorari, which was granted on August 17, 2019. R. at 74. He now appeals to the Supreme Court of the United States to protect his right to free speech and against warrantless searches. R. at 74.

SUMMARY OF THE ARGUMENTS

I.

The Starwood ordinance violates Mr. Strong's First Amendment right to freedom of speech because it prohibits him from making verbal requests for immediate donations of financial assistance, limiting his ability to provide for himself. Such content-based restrictions of

the topic and purpose of speech are prohibited by the Constitution, unless they can survive strict scrutiny. Strict scrutiny requires Starwood to narrowly tailor its restriction to a compelling government interest and to select the least restrictive means possible.

First, the Starwood ordinance is not narrowly tailored because there are ways Starwood could have placed fewer restrictions on speech to achieve its stated interests. The most obvious choice would be to limit the restriction to the times people have reported feeling most vulnerable instead of restricting speech at all times of day and night.

Next, Starwood's restriction is not narrowly tailored because Starwood offers no evidence the interest of protecting against crime is satisfied by the ordinance. The only protection provided is against an immediate verbal request for money or donation. All strangers who approach another person within eight feet are permitted to do so, as long as they are not making such a request. Starwood does not provide evidence that such requests result in crime. Additionally, Starwood could identify the specific "aggressive" behaviors they are attempting to address, and enforce currently existing laws if there are any in place.

Because Starwood's limitation on speech is not narrowly tailored in the least restrictive means possible, the Starwood Ordinance cannot pass strict scrutiny. Therefore, it is an impermissible violation of Mr. Strong's Constitutional right to freedom of speech.

II.

The reasonableness of Mr. Strong's expectation of privacy in his belongings is proved by application of the two-prong test created for this purpose. The first prong is satisfied by Mr. Strong's exhibition of a subjective expectation of privacy, and the second prong is satisfied because society accepts his expectation of privacy as reasonable.

First, a subjective expectation of privacy was clear by the manner in which Mr. Strong closed his important belongings within his bin and tied his bedroll, placed those items underneath the structure he called home, which he chose to establish in the untraveled depths of a wooded area of Confluence Park. Evidencing this expectation further is Mr. Strong's statement to the officers that he did not believe they could go through the items without permission.

Second, society accepts this expectation of privacy as reasonable because Mr. Strong secured his belongings in his home, where the Court has granted the greatest Fourth Amendment protection. As a homeless person, Mr. Strong has no castle with four walls and a foundation. He is relegated to staking his tent where possible, and society's expectation of privacy attaches to the person, not the location.

Finally, Mr. Strong did not knowingly leave his belongings exposed to the public, nor did he abandon them. He did all that he could do within his meager means, to protect his belongings from the prying eyes of others, with clear intent to return to them.

Having satisfied the two-prong test for reasonableness, Mr. Strong's expectation of privacy in the belongings left at his home should have been afforded Fourth Amendment protection against an unreasonable search.

ARGUMENTS

I. The Starwood ordinance violates the right to free speech because it is a content-based regulation and it fails strict scrutiny.

The First Amendment of the Constitution of the United States provides "Congress shall make no law… abridging the freedom of speech." U.S. Const. amend. I. The First Amendment applies to speech related to charitable donations, such as solicitation and panhandling. *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980). The government cannot

restrict speech based on its content, subject matter, or message. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

In analyzing whether a law violates the First Amendment's protection of free speech, the first step is to determine what level of scrutiny must be applied when evaluating its terms. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015). To determine the level of scrutiny, the law must be classified as either content based or content neutral. *Id.* If a law is found to be content based, it is subject to strict scrutiny. *Id.*

A. The Starwood ordinance is a content-based regulation because it restricts based on the topic and purpose of the speech conveyed.

Laws that restrict speech based on content are presumed unconstitutional. *Reed*, 135 S. Ct. at 2226. A content-based law restricts speech based on the topic, idea, or message conveyed by the speech. *Id.* at 2227. Facially content-based restrictions distinguish between subject matter, purpose, or function of the message conveyed. *Id.* If a law appears content neutral on its face, but the content of the speech must be referenced to justify the restriction, the law will be considered content based. *Id.*

For example, in an important recent Supreme Court decision, *Reed v. Town of Gilbert*, the Court evaluated one town's regulation and deemed it facially content based. *Reed*, 135 S. Ct. at 2227. There, the town created a Sign Code which prohibited display of all signs but created categories of certain types of signs and applied different restrictions to each category. *Id.* at 2224. For instance, temporary directional signs with information about certain events like church services were required to be much smaller and displayed for much shorter periods of time than political signs. *Id.* at 2225. The Court found the Sign Code content based because the sign categories were based on the message the sign projected. *Id.* at 2227.

1) The Starwood ordinance is facially content based because it treats verbal requests for immediate donations differently than all other speech.

Here, the Starwood ordinance restricts speech by singling out verbal requests for immediate donations in and near the Downtown Square vicinity. City Code § 22-13(a)-(b). Any other topic, idea, or message is permitted. *See id.* A person would not violate the ordinance by approaching a stranger within eight feet and asking for the time or for directions. *See id.* However, on the topic and subject of donations, Starwood has established that two forms of requests are acceptable: nonverbal requests for immediate donations, and verbal requests for future donations. City Code § 22-13(a)-(b). The requesting party is forced to choose what is most important to fit their needs, and speakers who would like to, or need to, request a donation receivable in the moment are silenced by this ordinance. *Id.* § 22-13(a)-(c). To illustrate, a person approaching someone while holding a sign that reads "hungry, please give me your spare change" or shaking a cup would not violate the ordinance, nor would a person who verbally asks for a donation payable the following day. *See id.* If the same person walked up to someone with an open hand and asked for spare change, that person could be charged with violating the ordinance. *See id.*

Few cases have been considered by the United States Court of Appeals circuits after the decision in *Reed*, but the Starwood ordinance is directly synonymous with an ordinance that was evaluated by the Seventh Circuit after *Reed*. *Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. 2015). In *Norton*, the city of Springfield passed an ordinance banning panhandling that included verbal requests for immediate financial donations in the downtown historic district. *Id.* Signs requesting immediate donations were allowed and verbal requests for future financial donations were permitted. *Id.* The court held the ordinance was content based because the ordinance restricted speech based on the topic discussed, i.e., asking for money. *Id.* at 412-13.

Like the Springfield ordinance, Starwood's ordinance bans verbal requests while allowing signs and future requests. City Code § 22-13(b). The effect is a prohibition of free speech on the topic of verbal requests for immediate donations within a geographic area. *See id.* § 22-13(a)-(c).

The Starwood ordinance does not prohibit people approaching within eight feet of another person in the Downtown Square if the purpose of their speech is something other than asking for immediate donations, e.g., lobbying for a political candidate, begging for signatures on a petition, or asking for directions. *See* City Code § 22-13(a)(1). Street vendors, who may make a living by selling merchandise in heavily trafficked areas, are treated differently by the ordinance than another person trying to make a living, like Mr. Strong, who may make a verbal request for an immediate donation. *Id.* § 22-13(a)-(c). That is true, though they may be standing side by side on the Downtown Square. *Id.* In that situation, the ordinance criminalizes Mr. Strong's words, but not the words of the vendor. *Id.*

Another court to recently evaluate the status of a regulation is the United States District Court for the Eastern District of Louisiana, and they held the regulation content-based. *Blitch v. City of Slidell*, 260 F. Supp. 3d 656, 665-69 (E.D. La. 2017). There, the city of Slidell passed an ordinance requiring panhandlers to apply for, obtain, and use a permit before panhandling. *Id.* at 660-61. Peddlers and solicitors were subject to different rules and restrictions. *Id.* at 668-69. The court held the permitting requirement was facially content based because the ordinance only restricted speakers who wanted to panhandle, and not those who sold products; therefore, it was a restriction based on the purpose of the speech. *Id.* at 666-69. Starwood's similar restriction of speech related to solicitation discriminates one subject matter and purpose of speech: requests for immediate donations. City Code § 22-13(a)(1).

The Starwood ordinance is facially content based because it restricts a person's ability to verbally express a request with regard to the entire subject matter and topic of immediate donations, while leaving other speech unregulated. *See Reed*, 135 S. Ct. at 2227 (holding a regulation facially content based because it identified and treated differently subjects of speech).

2) The Starwood ordinance is content based even if it appears neutral.

A law may appear content neutral on its face, but if the content of the speech must be referenced to justify the restriction, it is content based. *Reed*, 135 S. Ct. at 2227. Further, if authorities must hear the content of the speech to evaluate if the speech violates the regulation, it is content based. *Reed*, 135 S. Ct. at 2231; *McCullen v. Coakley*, 573 U.S. 464, 479 (2014).

Here, the justification for burdening speech is protecting against crime and annoyance. City Code § 22-13. The ordinance is not justified as a means to protect against crime and annoyance without referring to the content of the speech regulated, because it differentiates the speech directly, and does not forbid other messages, subject matter, or topics. City Code § 22-13 (a)(1). An authority must hear the words spoken to determine if the ordinance had been violated. *Id.* That is precisely what occurred in this case: Officer Jones surreptitiously moved behind Mr. Strong for the purpose of eavesdropping on his conversation to determine if he was requesting an immediate donation. R. at 33, 36-38.

In contrast, in *McCullen*, the Court examined a facially content-neutral law. *McCullen*, 573 U.S. at 479. There, the law created a buffer zone around entrances of reproductive healthcare facilities in which people were not permitted to remain on the sidewalk. *Id.* at 471. This limited the ability of others wanting to counsel patients of the facilities. *Id.* at 472-474. The Court determined it was not a content-based law, in part, because the authorities need not know what a person said. *Id.* at 479. Instead, one could violate the law simply by entering the buffer zone

without speaking. *Id.* at 479-480. In Starwood, a violation may not be confirmed unless the authorities know the content of the words spoken. City Code § 22-13 (a)(1).

Therefore, even if the Starwood ordinance appears content neutral on its face, because it cannot be justified without referring to the speech's content, and the content must be heard to assess a violation, the ordinance remains content based. *Reed*, 135 S. Ct. at 2227, 2231.

B. The Starwood ordinance fails strict scrutiny because it is not narrowly tailored to a compelling government interest in the least restrictive means possible.

If a law is content based, strict scrutiny is applied. *Reed*, 135 S. Ct. at 2227. To withstand strict scrutiny, a law must be narrowly tailored toward a compelling governmental interest. *Id.* at 2231. To be narrowly tailored, the regulation of speech must be the least restrictive means possible. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

1) Starwood must rely on public safety as its compelling interest.

First, strict scrutiny requires the identification of the government's compelling interest to support the need for its content-based restriction. *Reed*, 135 S. Ct. at 2226. The interest identified by Starwood to support its ordinance is to protect unwilling listeners' right to privacy from crime and annoyance. City Code § 22-13. However, the interests of protecting unwilling listeners, privacy, and against unwelcome solicitation, have been found uncompelling in a public forum. *Norton v. City of Springfield*, 324 F. Supp 3d 994, 1002-03 (C.D. Ill. 2018); *see McCullen*, 573 U.S. at 481 (explaining protecting listeners from uncomfortable messages is not a content-neutral justification). Starwood also mentions protection of its local economy and public safety. R. at 27. Promotion of a local economy has not been held a compelling interest. *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 189-90 (D. Mass. 2015). Therefore, Starwood must rely on the interest of protecting against crime and promoting public safety. City Code § 22-13.

2) The Starwood ordinance is not narrowly tailored in the least restrictive means because it is too broad and does not further public safety.

Next, to satisfy strict scrutiny, a law must be narrowly tailored to the compelling government interest. *Reed*, 135 S. Ct. at 2231. The regulation of speech must be made by the least restrictive means possible in order to be considered narrowly tailored under strict scrutiny. *Sable Commc'ns of Cal., Inc.*, 492 U.S. at 126.

The Starwood ordinance fails the second requirement of strict scrutiny. Starwood has chosen to impose a ban on soliciting at all times of the day and night. City Code § 22-13(c). The record only contains information that some people felt they may be unsafe mostly in the evening hours. R. at 28. Having received no other potential evidence of the safety concerns during daytime hours, at least one alternative that would be less restrictive of speech would be limiting the ban to nighttime only. *See* R. at 27-28.

The United States District Court for the District of Massachusetts considered and rejected a temporal ban on solicitation. *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 230, 237-38 (2015). There, the city adopted an ordinance prohibiting solicitation of an immediate donation at night. *Id.* at 228-29. The court found the night time restriction impermissible because no evidence was admitted proving such a blanket ban was necessary to further the interest of public safety. *Id.* at 235. An outright ban in Starwood at all times of day and night would have the same sweeping effect, because the evidence shows only a possible need at night. R. at 28. This alone demonstrates the Starwood ordinance is not the least restrictive means to further the government's stated interest.

The Starwood ordinance attempts to narrowly tailor its restriction on speech to public safety by imposing a buffer zone of eight feet, in which approaching for the purpose of a verbal immediate solicitation is prohibited. City Code § 22-13(a)(1), (b)(1), (c). And while the

ordinance includes the behavior of approaching, the speech is what it actually forbids. *Id.* However, Starwood has not shown how citizens will be safer when they are protected from being approached by someone requesting immediate donations compared to being approached for any other reason. *See* R. at 27-28. Although the record mentions Starwood received numerous complaints about panhandlers downtown, the record reflects no information as to the actual number of complaints, or the behavior or speech that made the complainants feel unsafe. R. at 28. The record indicates Starwood was concerned about rising crime in the Downtown Square vicinity, specifically drug crimes, but it does not connect that concern about crime, or the crime itself, to the burdened speech. R. at 28. An increase in drug crimes does not in itself make unrelated speech a threat to public safety. R. at 28.

A similar disconnect was evaluated by the Court in *Reed*. There, the town's content-based Sign Code imposed different restrictions on signs based on the message conveyed. *Reed,* 135 S. Ct. at 2224-25. In *Reed*, the Court held the Sign Code was not narrowly tailored with regard to the government's alleged interest of traffic safety because the categories of signs do not affect traffic safety differently. *Id.* at 2232. Starwood's eight-foot buffer zone is not narrowly tailored toward Starwood's interest because it has not established a connection between verbal requests for immediate donations and public safety. *See* R. at 28.

The Starwood ordinance does not identify the behavior, other than verbal requests, which makes approaching another person to request an immediate donation a threat to public safety. *See* City Code § 22-13. Certainly, Starwood has in place existing laws intended to deal with disfavored behaviors, such as harassment, intimidation, or battery, and related problems could be handled through enforcement of those laws, rather than restricting speech. The *Norton* court in the United States District Court for the Central District of Illinois, Springfield Division took this

approach. *Norton*, 324 F. Supp. 3d at 1003-04. After holding that the restriction was not narrowly tailored to a compelling interest, the court stated less restrictive alternatives to resolving the interests include enforcement of already-existing laws. *Id.* Unless Starwood can show there are no duplicative laws in effect to be enforced, they have likely overlooked another way in which the Starwood ordinance is not narrowly tailored in the least restrictive means.

The Starwood ordinance also attempts to narrowly tailor its restriction on speech by limiting the restriction to within 100 feet of the streets which form the Downtown Square vicinity. City Code § 22-13(a)(2), (c). The vicinity is broad in terms of the geographic area where certain speech is prohibited, and includes many shopping and entertainment venues for the city. R. at 27. Such areas are quintessential public forums where freedom of speech is afforded great protection and is customarily practiced. *McCullen*, 573 U.S. at 476-77. While the complaints suggest people feel unsafe in the downtown square, the record does not indicate the specific locations people encountered the behavior that made them feel unsafe. R. at 28.

Post-*Reed*, the United States District Court for the District of Massachusetts evaluated geographic restrictions to determine if they were sufficiently narrowly tailored. *McLaughlin*, 140 F. Supp. 3d at 195-96. In *McLaughlin*, a regulation imposed twenty-foot location restriction prohibiting panhandling around bus stops, outdoor seating, banks and ATMs, but did not permit passive solicitation such as holding a sign. *Id.* at 195. There, the court held the regulation not narrowly tailored at all to public safety as to bus stops and outdoor seating because panhandling is not more dangerous in those locations. *Id.* at 195. The court surmised there may be a possible connection to crime such as robbery near ATM and bank locations, but held the regulation was not narrowly tailored because it was not the least restrictive means possible. *Id.* The court suggested the law could be made narrowly tailored with the allowance of passive solicitation in

those locations. *Id.* at 195-96. The Starwood ordinance already permits nonverbal speech but prohibits verbal requests for donations in a large geographic area, which includes locations not made more dangerous by requests for immediate donations. City Code § 22-13(a)-(c). This suggests the Starwood ordinance covers too broad an area to be narrowly tailored in the least restrictive way.

C. Even if it is content neutral, the Starwood ordinance still violates the right to free speech because it is not narrowly tailored to survive intermediate scrutiny.

The government may establish non-discriminatory restrictions on speech in public areas, for example on the time or location. *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989). These content-neutral laws are subject to lesser, intermediate scrutiny. *Reed*, 135 S. Ct. at 2232. Intermediate scrutiny requires a significant government interest, that the law be narrowly tailored for the purpose of serving the interest, and other avenues of communication must be left available. *Ward*, 491 U.S. at 791. To be narrowly tailored for the purposes of intermediate scrutiny, it needs to be shown the interest would be served less effectively without the restriction, though it may not burden considerably more speech than needed. *Id.* at 799. The regulation is not required to be the least restrictive means. *Id.* at 798. But it must be shown less burdensome options would not achieve the government's stated interests. *McCullen*, 573 U.S. at 495.

The Starwood ordinance is not narrowly tailored to fit the requirements of intermediate scrutiny. The record identifies Starwood's interests in creating its ordinance, but it does not describe any steps taken to further those interests prior to the decision to restrict speech. *See* R. at 26-28. Starwood cannot assert other less burdensome remedial options would not achieve its interests because the record does not disclose that it investigated any alternatives. *See* R. at 27-28. Instead, Starwood chose to criminalize any person who requests an immediate donation downtown, which might include local baseball teams raising money, requests for charity, and

other innocent fundraising. City Code § 22-13(a)-(d). The speech of these individuals is silenced by the ordinance in a broad public area. *Id.* § 22-13(a)-(c). That is not the speech the ordinance was intended to address. R. at 28. The Starwood ordinance burdens more speech than is necessary to satisfy its interests. R. at 26-28.

The Court considered whether a law was narrowly tailored to a significant government interest in *McCullen v. Coakley*. *McCullen*, 573 U.S. at 486. In *McCullen*, a law prohibited standing in buffer zones on a sidewalk near reproductive healthcare facilities. *Id.* at 471. There, the Court agreed public safety was a content-neutral interest. *Id.* at 486. The Court held the buffer zones burdened speech substantially more than necessary for its goals. *Id.* at 490. The Court held the law was not narrowly tailored because it prohibited speech in a large public area traditionally open to the public without taking advantage of available options that would restrict speech substantially less. *Id.* at 494-95, 97. There, the Court pointed to the option of creating new laws addressing the specific problem without burdening speech, and to existing laws that could simply be enforced. *Id.* at 491-92. Here, Starwood burdened more speech than necessary. R. at 26-28. It did not show it attempted available means that burden speech less to restrict speech in an area traditionally protected, and those were not adequate to address the concerns they claim. *See* R. at 28.

Therefore, even if the Court finds the Starwood ordinance content neutral, it would not survive intermediate scrutiny because it is not narrowly tailored to Starwood's interests.

II. An individual has a reasonable expectation of privacy in personal belongings kept in his home, located in a secluded area accessible to the public.

The Fourth Amendment of the United States Constitution promises freedom "against unreasonable searches and seizures." U.S. Const. amend. IV. A warrant issued by a judge based

on probable cause, or an exception to the warrant requirement, is necessary. *Katz v. United States*, 389 U.S. 347, 357 (1967). Warrantless searches are presumptively unreasonable. *Id.*

The protection promised by the Fourth Amendment is not limited to areas or locations, but instead is afforded to individuals. *Katz*, 389 U.S. at 351. Therefore, an expectation of privacy may be valid even where a person does not have a property interest in the land where a search is made. *Id.* at 353. An item one knowingly leaves visible to the public is not protected regardless of its location. *Id.* at 351. However, privacy in that object may be recognized if a person makes efforts to conceal it, even if it is located in an area the public may access. *Id.*

To determine if a person's expectation of privacy is protected by the Fourth Amendment, a two-prong test has been established that requires a person to display a subjective expectation of privacy, and further, that the expectation be one that society believes is reasonable. *Oliver v. United States*, 466 U.S. 170, 177 (1984) (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). For example, using these principles in *Katz*, the Court found the search of audio in a public phone booth unconstitutional. *Katz*, 389 U.S. at 353. There, the FBI placed a listening device outside a phone booth used by the defendant to listen to conversations in which the defendant made illegal bets. *Id.* at 348. The Court held the warrantless search violated the Fourth Amendment because the defendant sought to keep his conversation private and did so in a way society would agree was reasonable by entering the booth and closing the door. *Id.* at 352-53.

A. Mr. Strong exhibited a subjective expectation of privacy in his personal belongings concealed in his home located in a public park.

The first inquiry is whether a person has displayed a subjective expectation of privacy. *California v. Greenwood*, 486 U.S. 35, 39 (1988).

A home is one area in which courts have presumed the resident to have a subjective expectation of privacy. *United States v. Ruckman*, 806 F.2d 1471, 1472 (10th Cir. 1986); *State v. Dias*, 609 P.2d 637, 639 (Haw. 1980). That presumption has been applied to temporary homes. *State v. Pruss*, 181 P.3d 1231, 1234 (Idaho 2008). The presumption does not apply to items the resident knowingly leaves visible to the public. *Katz*, 389 U.S. at 351. However, efforts to make an item not readily visible may create an expectation of privacy. *Id.*

The tent in Confluence Park served as Mr. Strong's home. R. at 4. Mr. Strong lived in the tent in all meaningful ways that make a house a home: it is where he slept, hung his laundry to dry, sheltered from the weather, and kept all of his personal belongings. R. at 4, 6, 45-46, 49. Even if it is not presumed in this case, Mr. Strong exhibited a subjective expectation of privacy in his tent and belongings by making them not readily visible. R. at 5-6, 43. He enclosed his personal items and stored them under the tarp. R. at 40. Mr. Strong tethered his forest green tarp to a tree deep in the secluded section of Confluence Park, away from the footpaths of the area used by park visitors. R. at 5, 39, 45.

The Supreme Court of Idaho reviewed a set of similar circumstances to determine if a subjective expectation of privacy existed in a tarp home. *Pruss*, 181 P.3d at 1234. There, Mr. Pruss laid a blue tarp over a tree branch frame located in a wooded area and covered the tarp with tree boughs to provide camouflage. *Id.* at 1233. The court held Mr. Pruss exhibited a subjective expectation of privacy because he made efforts to conceal his tarped structure in the woods to make it not readily visible. *Id.* at 1234. Likewise, Mr. Strong isolated his forest green residence in the woods. R. at 39, 45.

After his detention, Mr. Strong verbally exhibited a subjective expectation of privacy in his belongings by exclaiming that the officers had no right to go through his property without

permission. R. at 5, 35. His statements and upset reaction further indicate his subjective expectation of privacy. R. at 35, 41.

Mr. Strong exhibited a subjective expectation of privacy in his personal belongings kept in his home, the tent, situated on public property, which he did not expose knowingly and instead made effort to conceal.

B. Mr. Strong's expectation of privacy in his personal belongings concealed in his home is one that society would think is reasonable.

If a person has shown a subjective expectation of privacy, courts next determine if that expectation is one society would agree is reasonable. *Greenwood*, 486 U.S. at 39-40.

Factors used to determine whether a search violates a person's right to privacy include society's expectation that some areas should be especially protected from intrusion by the government and what use the defendant makes of the location. *Oliver*, 466 U.S. at 178.

1) Mr. Strong's tent is shielded from warrantless searches because it is his home, where Fourth Amendment protection is great.

Homes are provided the utmost protection against warrantless government intrusion under the Fourth Amendment. *Kyllo v. United States*, 533 U.S. 27, 31 (2001). This is so because all details of items and activities in a person's home are considered intimate. *Id.* at 37-39. Movable structures like tents have been held deserving of Fourth Amendment protection equivalent to that afforded homes in many circumstances in different jurisdictions. *United States v. Gooch*, 6 F.3d 673, 677 (9th Cir. 1993) (holding tents on private property and tents on public campgrounds while permitted camping are more like homes and are entitled to reasonable expectation of privacy); *Pruss*, 181 P.3d at 1234 (holding reasonable expectation of privacy in temporary shelter on public land); *People v. Schafer*, 946 P.2d 938, 944 (Colo. 1997) (holding tents on private land are entitled to protection against unreasonable searches like homes). Society

also recognizes a reasonable expectation of privacy in belongings in temporary overnight shelters in which there is no property ownership. *Minnesota v. Olsen*, 495 U.S. 91, 99 (1991).

There is no dispute that Mr. Strong utilized his tent as living quarters. R. at 6, 15. The tent was set up to provide shelter from the elements and prying eyes. R. at 39-40, 45. Protected underneath was Mr. Strong's bedroll for the most vulnerable act of sleeping, and a bin containing his possessions. R. at 40, 46. Hanging to dry nearby was his clothing. R. at 40, 49. Officer Brown conceded she thought it likely Mr. Strong lived there due to the way the belongings were arranged. R. at 40. It is of no matter that a home consists of fabric walls and no traditional foundation, because a reasonable expectation of privacy exists in a home, no matter the structure. *United States v. Ross*, 456 U.S. 798, 822 (1982); *Pruss*, 181 P.3d at 1234-35. And although an individual may not own public land, he may still expect Fourth Amendment protection there. *Katz*, 389 U.S. at 353; *Oliver*, 466 U.S. at 183-84.

Although there have been no Supreme Court cases declaring Fourth Amendment protection in a tent on public land used as a home, the Supreme Court of Idaho addressed this issue. *Pruss*, 181 P.3d at 1234-36. There, the defendant established a makeshift home in the woods. *Id.* at 1233. After the court found a subjective expectation of privacy existed, it specifically held that temporary living quarters established on public property are subject to Fourth Amendment protection. *Id.* at 1234-35. The court reasoned society agrees a reasonable expectation of privacy exists in a home, regardless of how the home is constructed. *Id.* Here, Mr. Strong utilized the tent located on public land for his home. R. at 39-40. Homes are recognized by the courts as areas that should be especially protected from intrusion by the government. *Kyllo*, 533 U.S. at 31. It follows that, as his home, Mr. Strong had an expectation of privacy in his tent that society would recognize as reasonable.

2) Mr. Strong did not expose his belongings to the public.

Yet, even inside a home, the expectation of privacy does not extend to items the resident knowingly leaves visible to the public. *Katz*, 389 U.S. at 351. For example, in *State v. Dias*, a police officer viewed the defendants engaging in an illegal gambling game through a two-or-three-inch gap between the doors to a shack located on state property where squatters were known to reside. *Dias*, 609 P.2d at 639. The Supreme Court of Hawaii found that the defendants were not entitled to a reasonable expectation of privacy in actions that could be observed from outside the shack because they knowingly exposed their activities to the public. *Id.* at 640.

Here, Mr. Strong's tent was located on public property, so it was possible for a person to search out his tent and view it from the outside, as happened, just as could occur with a traditional home. R. at 39. But a tent owner would no more expect a stranger to enter his residence and open the closed bins inside than a traditional homeowner, even if he accidentally left the door open. Unlike the facts in *Dias*, Mr. Strong sought to keep his belongings private by settling deep in secluded woods, choosing a tent the color of the outdoors, sealing his belongings in a container, wrapping the plastic bag inside the bedroll, and placing those items inside the tent. R. at 40, 43, 45. A person walking by the tent could not see Mr. Strong's two Purple Hearts, the plastic bag peeking out from the bedroll, and certainly could not have seen what the plastic bag contained. R. at 40. Mr. Strong did not knowingly expose his belongings to the public, and in fact, nothing was exposed. *Id.* It was only due to Officer Brown's warrantless search that any of his items were uncovered. R. at 39-44.

The closing of the bin and rolling of the bedroll are similar to the facts in a case wherein the Supreme Court of Colorado considered the issue of reasonable expectation of privacy in items left on land accessible to the public. *Schafer*, 946 P.2d at 940. There, while Mr. Schafer

was away, police entered his tent situated on publicly accessible land, opened his closed knapsack and located his identity, tying him to a crime. *Id.* at 940-41. The court held Mr. Schafer had a reasonable expectation of privacy in his belongings because he closed the knapsack which was inside his tent. *Id.* at 941, 944-46. Likewise, Mr. Strong did all that he could with the resources available to him to keep his items private and concealed, by closing them and keeping them in his home secluded in the woods. R. at 40, 43, 45. Because he did not purposefully expose his belongings to the public, instead overtly trying to conceal them, his items were entitled to protection against unreasonable searches. *See Katz*, 389 U.S. at 351 (affirming items knowingly exposed are not protected by the Fourth Amendment, but items attempted to be kept private are protected).

3) Mr. Strong did not discard his belongings.

One may forego Fourth Amendment protection in his belongings if he sufficiently exposes them to the public so as to abandon any expectation of privacy. *Greenwood*, 486 U.S. at 40. Society does not attach Fourth Amendment protection to garbage discarded in public for collection. *Id.* at 44.

Far from leaving any indicators that his belongings were discarded or unowned items of property, Mr. Strong showed great care for his belongings by packing them and storing them in his tent. R. at 28. He indicated an intent to return, and not abandon or discard his items. R. at 43. The belongings were not items packaged or left for a garbageman or another third party. R. at 43. After securing them, Mr. Strong secreted them in his home deep within the woods. *Id.* Further, Mr. Strong verbally asserted his right to his belongings to the police officers. R. at 35.

The Court considered the idea of discarded property in relation to whether society would agree a defendant's expectation of privacy was reasonable in *Greenwood*. *Greenwood*, 486 U.S.

at 39-40. There, the defendants discarded incriminating evidence in opaque garbage bags and placed the bags at the street for collection, which the police retrieved from the garbageman. *Id.* at 37-38. The Court held the warrantless search of the garbage left outside in a pubic area did not violate the Fourth Amendment because society would not accept a reasonable expectation of privacy in garbage left at the curb for pickup. *Id.* at 43-44. The Court reasoned the defendants gave up a claim to privacy in the bags because they were left where any member of the public could go through them, the defendants knew someone would take it, and society would not find there to be a reasonable expectation of privacy in garbage left at the curb on a public street. *Id.* at 40-41.

Here, in sharp contrast, Mr. Strong purposefully attempted to conceal his belongings so the public could not go through them. R. at 40, 43. He did not leave them for a third party to take. R. at 43. He did not put them in a trash bag and set them by the street for a garbageman. R. at 40. Mr. Strong, having not exposed his belongings to the public by discarding them, he did not abandon his societally-accepted reasonable expectation of privacy.

4) The open fields doctrine does not apply because Mr. Strong's tent is his home, and his belongings were not exposed in an open field.

The open fields doctrine permits searches without a warrant in open fields. *Oliver*, 466 U.S. at 177. Society does not demand special protection in fields because fields are not areas where intimate activities that need shielding from government intrusion usually occur, and fields are visible from the air. *Id.* at 179. A right to privacy in an open field may only be expected in the immediate area around a home. *Id.* at 178.

The doctrine does not apply in this case. Mr. Strong's tent is his home. R. at 4, 40. Even if Confluence Park was an open field, the inside of Mr. Strong's tent was not. *See Pruss*, 181 P.3d 1236 (holding the interior of a makeshift home was not an open field). Therefore, Mr.

Strong was entitled to a reasonable expectation of privacy in the area around the tent. *See Oliver*, 466 U.S. at 178 (affirming Fourth Amendment protection in curtilage). Because the tent was his home, the traditional intimate activities, such as sleeping and laundering clothes, took place in and near his home. R. at 4, 40. Because the items Mr. Strong sought to keep private were secured and wrapped under his tent, they were not visible from the air, nor from the ground. R. at 39-40.

In contrast, the Court applied the open fields doctrine in *Oliver* under very different facts. *Oliver*, 466 U.S. at 176-184. There, the police received a tip that Mr. Oliver was growing marijuana on a farm. *Id.* at 173. Officers drove by a house on the farm and arrived at a locked gate that warned against trespassing. *Id.* at 173. The officers exited the vehicle and continued on foot several hundred yards and eventually located a marijuana field, surrounded by a fence and out of sight from public access points. *Id.* at 173-74. The Court held the warrantless search was proper because Mr. Oliver's property was an open field and not entitled to protection by the Fourth Amendment. *Id.* at 173-74. Unlike Mr. Oliver, what Mr. Strong sought to keep private was not in an open field, but concealed within the tent. R. at 40.

C. Even if it is not found to be a home, Mr. Strong's tent is afforded Fourth Amendment protection.

A person is entitled to expect privacy in locations other than the home. *Minnesota v. Olsen*, 495 U.S. at 96; *Gooch*, 6 F.3d at 678. Because the Fourth Amendment attaches to the person and not the place, lack of property ownership does not strip a person of its protection. *Katz*, 389 U.S. at 351, 353. For example, in *Katz*, the defendant was found to have a reasonable expectation of privacy in conversations had in a public phone booth. *Katz*, 389 U.S. at 353.

Mr. Strong's tent, if not a home, still housed his belongings in a manner that exhibited a subjective expectation of privacy. R. at 39-40. All of the facts herein proving society would agree a reasonable expectation of privacy exists in a tent that is a home still exist if the tent is not

a home. R. at 39-40, 43, 45-46, 49. Mr. Strong relies on his tent for shelter for himself and security of his belongings. R. at 4, 40.

The Court confronted the issue of privacy expectations as to personal items outside of a home in *Minnesota v. Olsen*. *Olsen*, 495 U.S. at 93. In that case, Mr. Olson, a criminal hiding from police after commission of a crime was staying at a house belonging to a third party. *Id.* at 93-94. The day after the crime, police entered the house without permission or a search warrant and apprehended Mr. Olson. *Id.* at 95. The Court held that Mr. Olson had a reasonable expectation of privacy in the third party's house because overnight visitors seek shelter for themselves and their belongings during the vulnerable time of sleep when security cannot be monitored, and society expects this privacy. *Id.* at 99. By misfortune, Mr. Strong is an overnight visitor in Confluence Park. R. at 4, 10.

Mr. Strong's expectation of privacy in his personal belongings and his tent, situated on public property, is one that society would consider reasonable even if not a home, because the Fourth Amendment does not protect places, but people.

CONCLUSION

For the foregoing reasons, Mack Strong prays this Court hold the Starwood ordinance violated his First Amendment right to free speech, hold the search of his home violated the Fourth Amendment, and accordingly, reverse the Supreme Court of West Columbia's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel for Petitioner certifies 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 this the 6th day of March, 2020 to:

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