

# CLASS 6

# SEPTEMBER 25, 2018

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Equal Protection and First Amendment

# Equal Protection

- 14<sup>th</sup> Amendment's equal protection clause is "to secure every person...against intentional and arbitrary discrimination."
- The guarantee that "all persons similarly situated should be treated alike" is often implicated in land use law since the essence of many controls, particularly Euclidean zoning, is to classify land and people.
- Standard of review:
  - Strict scrutiny – applicable if a zoning ordinance categorizes uses on the basis of a suspect class (race, national origin, alienage) or a fundamental interest (religion, speech, privacy, right to travel, or right to vote)
    - Requires a compelling governmental interest to justify the law.
  - Intermediate scrutiny – looks for a purpose substantially related to an important governmental interest (gender and legitimacy-based classifications)

# Deferential Review

## *Village of Belle Terre v. Boraas*

- The challenged ordinance differentiated between related and unrelated persons. It allowed only “families” to live in single-family homes and defined “family” to include any number of related persons but not more than two unrelated adults.
- The effect, and likely purpose, of the ordinance was to prevent groups of students from a nearby university from living together in single-family houses in the small village.
- The Court saw the ordinance as merely regulating social and economic affairs, and not implicating any fundamental rights or affecting any suspect class.
- 2017 Iowa Legislature

# Meaningful Rational Basis Review

## *City of Cleburne v. Cleburne Living Center, Inc.*

Group presentation:

- Alaina Mattimiro
- Cameron Rasmussen
- Emily Vanek

- “Meaningful rational basis” or “rationality with a bite”: Courts demand evidence of rationality when unpopular, vulnerable, or sensitive groups are affected.
- “Meaningful rational basis” is difficult to obtain.

# Claims involving Socio-Economic Rights

## *Village of Willowbrook v. Olech*

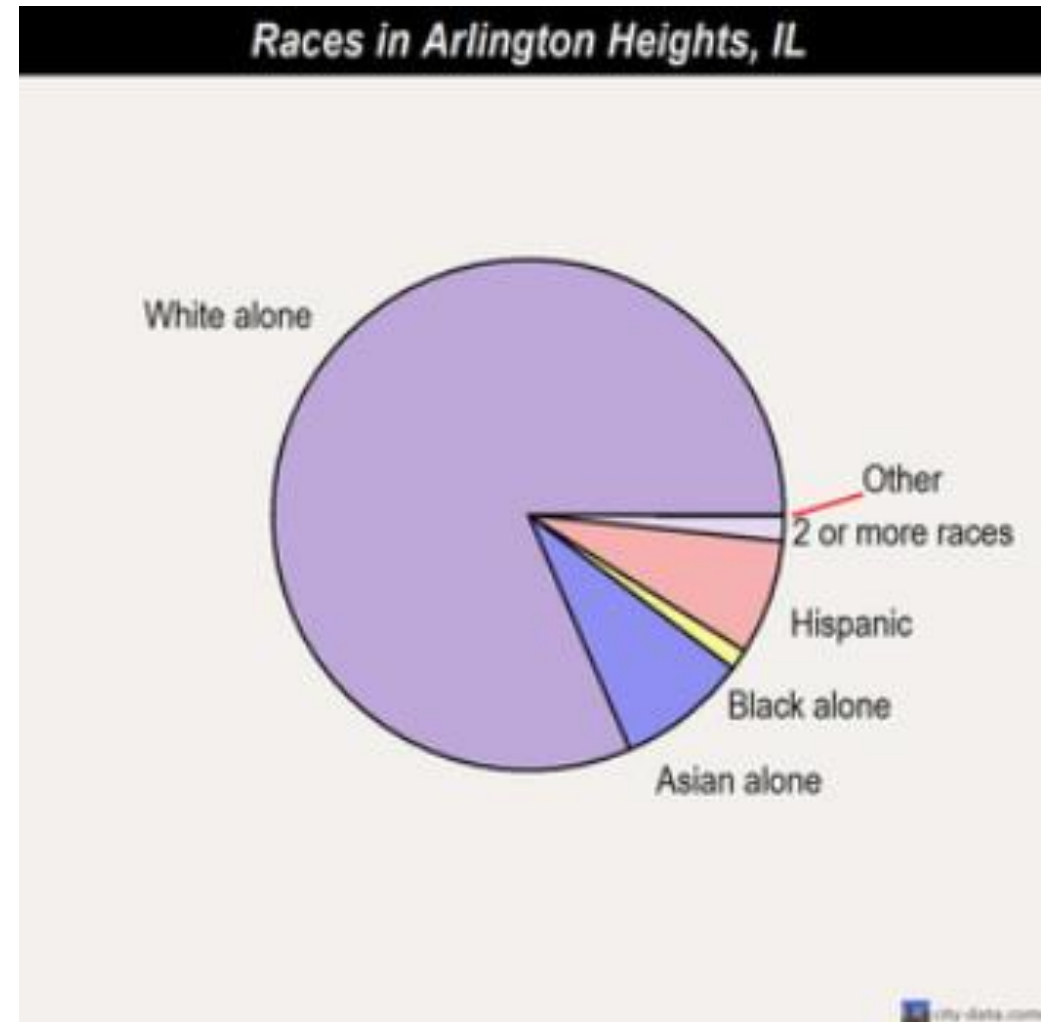
- When Olech asked the village to hook her house to the public water line, the village demanded that she convey a 33-foot easement.
- Others similarly situated had only been asked to grant a 15-foot easement.
- “Class of one”
- It is sufficient that Olech “alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.”

# Discrimination Based on Race

## *Village of Arlington Heights v. Metropolitan Housing Development Corporation*

Group presentation:

- Yutong Wang
- Eliza Schumer
- Kara Harmet
- Anna Busch



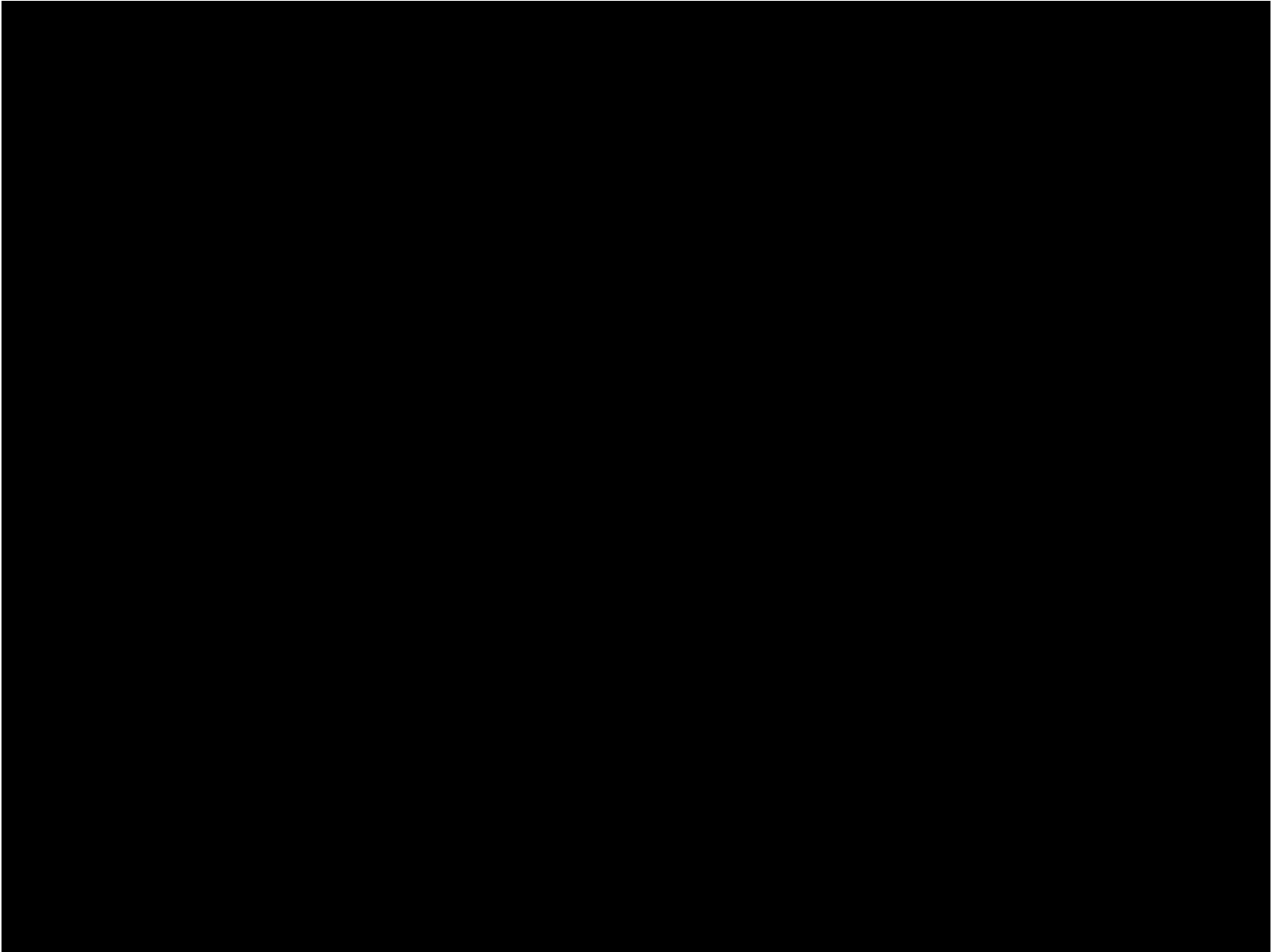
# *Arlington Heights* continued

- Factors to determine whether official action was motivated by discriminatory intent:
  - The racial impact of the decision;
  - The historical background of the decision, particularly where it reveals a series of official actions taken for invidious persons;
  - The specific sequence of events leading up to the challenged decision – including departures from the normal procedural sequence; and
  - The legislative or administrative history – especially where there are contemporary statements by members of the decisionmaking body, or minutes of its meetings.

# Federal Exclusionary Zoning Issues

- The federal government has played both a proactive and reactive role in exclusionary housing practices.
- The combination of the interstate highway system, the income tax deduction, and guarantees on mortgage loans contributes to urban sprawl by making it easier for the wealthier to leave the urban center.
- Also, in the 1930s, when the federal government began loan guarantees to save the housing industry, it required that racially restrictive covenants be put in deeds, and “discouraged the movement of ‘inharmonious racial or nationality groups’ into all-white communities.”





# The First Amendment

"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 of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

# First Amendment and land use

- ABCs of the First Amendment:
  - Adult entertainment
  - Billboards (and other signs)
  - Churches (religious uses)
- Right to petition the government when the government retaliates against property owners and developers who seek development permission.
- When a zoning code allows only “single family” uses, the First and Fourteenth Amendment privacy concerns arise.

# First Amendment standard of review

- The standard of review is dictated by the nature of the right affected rather than by the power being exercised, and “when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest.”

# Regulating the Sex Business

- Sexually oriented businesses such as adult video stores, strip clubs, and massage parlors are regulated separately and more stringently than other entertainment venues.
- While the First Amendment does not protect obscene speech, it does protect non-obscene, sexually oriented speech.
- Adult use zoning is usually done through:
  - “keep your distance”
  - “concentration” method
  - “scatter” or “dispersal” method

# “Scattering or Dispersal” Method

## *Young v. American MiniTheaters*

- Detroit ordinance prohibited the location of an adult movie theater within 1,000 feet of another such theater or 10 other establishments thought to produce similar effects.
- The Court upheld the ordinance, finding it was a valid exercise of the city’s zoning power and not an impermissible prior restraint.

# “Keep your distance” Method

## *City of Renton v. Playtime Theatres, Inc.*

- Renton, a Seattle suburb, banned adult theaters from locating within 1,000 feet of any residential zone, single or multi-family dwelling, park, school, or church.
  - The effect of the distance limitation was to limit adult theaters to an area of 520 acres, 5% of the city.
- The Court treated the ordinance as content-neutral because it had found that the predominant intent was directed at the secondary effects of the message, not the message itself.
  - As a content-neutral ordinance, it would pass constitutional muster if it served a substantial government interest and did not unreasonably foreclose other avenues of communication. Renton’s ordinance met the test.

# Adult Entertainment regulations

- *Renton* makes clear that the regulation of non-obscene sexually explicit material aimed at secondary effects will not be subjected to strict scrutiny.
- **Intermediate scrutiny** applies:
  - Regulation must further an important government interest; and
  - the means must be substantially related to that interest.
- The test of reasonableness of the area where the businesses are allowed ignores economic reality.
  - It does not matter that the land is expensive or not in the market.
  - It only must be physically and legally capable of being used for the adult business.



# City Council to discuss lap dance ordinance

By Molly Willson, [molly.willson@iowastatedaily.com](mailto:molly.willson@iowastatedaily.com) Dec 9, 2014  0

City of Ames



Rela



# Sign Code regulations and the First Amendment

- Four Categorical Distinctions:
  - Whether the prohibited signs are posted on **public or private** property;
  - Whether the prohibited signs display **commercial or noncommercial** messages;
  - Whether the prohibited signs convey information related to premises where the sign is located (**On-premise sign**) or not (**off-premise sign**);
  - Whether the prohibition restricts particular content (**content-based** restriction) or not (**content-neutral** restriction)

# Sign Code regulations and the First Amendment

- A local government may constitutionally prohibit all signs from being posted on public property.
- **Commercial speech:** speech done on behalf of a company or individual for the intent of making a profit.
  - Requires a lower level of scrutiny
- Courts, including the U.S. Supreme Court, have found that sign ordinances may constitutionally prohibit or restrict **off-site commercial signs** while allowing **on-site commercial signs**.
  - As long as they advance the city's stated objectives of *traffic safety and aesthetics*

# Content-based v. Content-neutral

- Content-based: A regulation of speech or expression that is based on the **substance of the message** being communicated, rather than just the manner or method in which the message being expressed.
  - Almost always violated the First Amendment
- Content-Neutral: A restriction on the **manner in which an expression can be communicated or conveyed**.
  - limitations on size, number, construction, placement, setback from rights of way, and illumination
  - regulations are usually upheld as long as they are reasonable, rational, and do not eviscerate the effectiveness of signs as a medium of communication.

# *Metromedia Inc. v. San Diego*

- The San Diego ordinance at issue banned all billboards with two categories of exceptions:
  - It had 12 exemptions for such matters as informational and governmental messages, commemorative historical plaques, religious symbols, time and temperature signs, and temporary political campaign signs.
  - It exempted on-site commercial signs
- The Court upheld the restrictions on commercial speech but invalidated the restrictions on noncommercial speech.
- All the Justices agreed that aesthetics is a legitimate and substantial governmental interest in the evaluation of restraints on First Amendment speech rights.

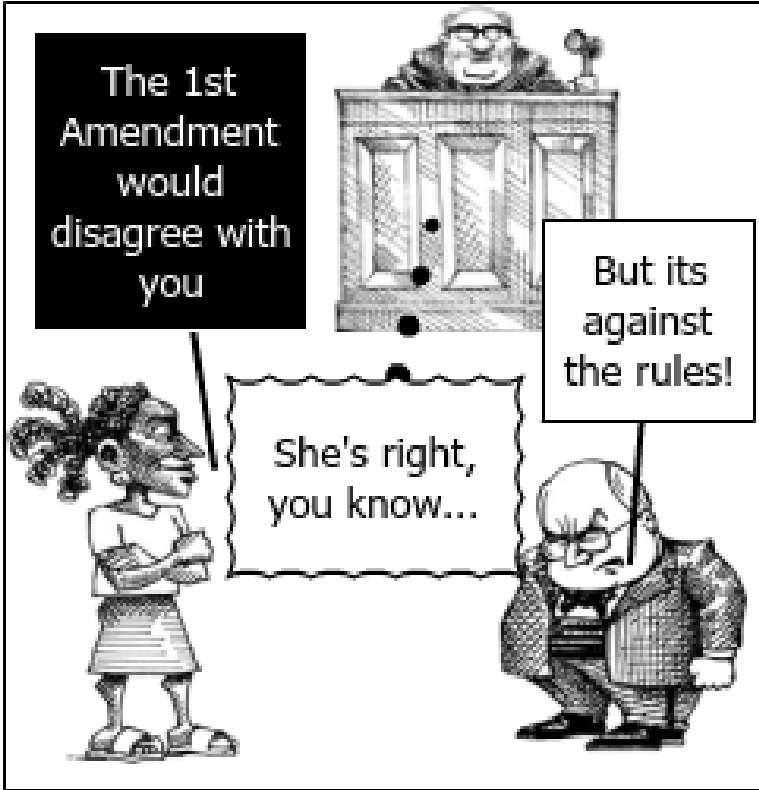
# *City of Ladue v. Gilleo*

- Gilleo had put up an anti-war signs on the front lawn of her suburban home. When the sign disappeared and a second one was knocked to the ground, she reported the incidents to the police.
- Such signs were prohibited in Ladue and the city council denied Gilleo's petition for a variance.
- Gilleo filed suit alleging the sign ordinance violated her First Amendment right of free speech. (under §1983)
- When a new ordinance containing a general prohibition of signs and defining that term broadly was passed, Gilleo amended her complaint and successfully challenged it on constitutional grounds as well.
  - The Ct of Appeals held the ordinance invalid as a content-based regulation because the City treated commercial speech more favorably than noncommercial speech.

# *City of Ladue* continued

- Is government regulation of noncommercial speech in the form of residential signs unconstitutional as a violation of the First Amendment? Yes
  - In this case, adequate substitutes do not exist for the important medium of speech that the City has closed off.
  - Gilleo and other residents of Ladue are forbidden to display virtually any sign on their property.
  - The City has almost completely foreclosed a venerable means of communication that is both unique and important.
  - It has totally foreclosed that medium to political, religious, or personal messages.
  - A special respect for the individual liberty in the home has long been part of our culture and our law.
- The City's ban on almost all residential signs was unconstitutional.

**CITY OF LADUE V. GILLO** by Jessica Holstege

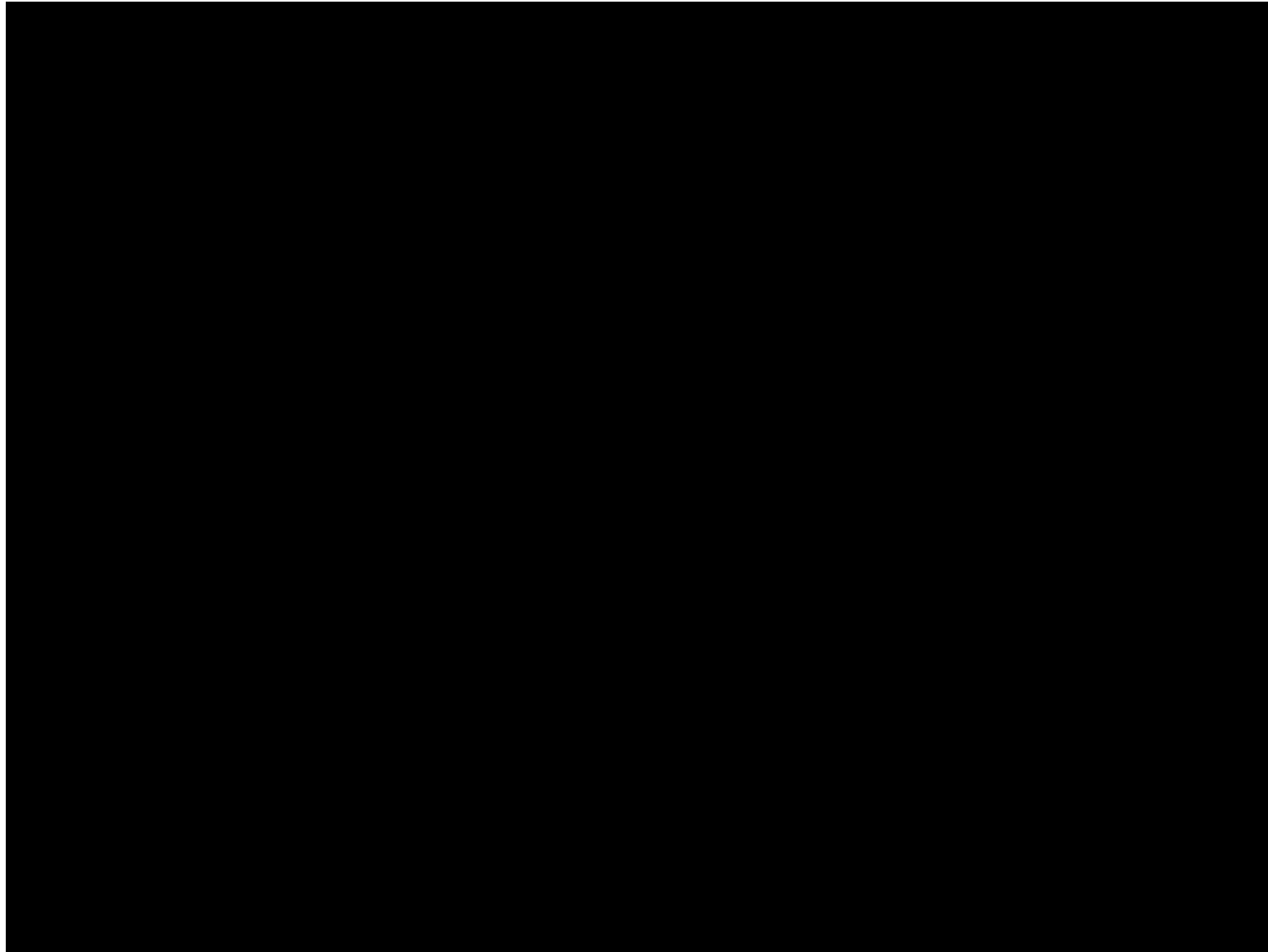




# Standard of Review

1. Is restriction within the constitutional power of government?
2. Does restriction further important or substantial governmental interest?
3. Is the governmental interest unrelated to the suppression of free expression?
4. Is the restriction narrowly tailored – no greater than necessary?
5. added in *Ladue v. Gilleo*, whether the restriction leaves open ample opportunities of communication?

# *Reed v. Town of Gilbert, AZ*



# First Amendment: Government Retaliation

- Generally, to prevail on a constitutional retaliation claim plaintiff must prove:
  - That she engaged in constitutionally protected activity
  - That the government responded with retaliation; and
  - That protected activity caused the retaliation.
- Proof of motive is necessary.

# Religious Land Use

- In zoning's early years, the negative externalities of religious uses were negligible.
  - Buildings devoted to religious use tended to be small and congregations served the neighborhoods in which they were located.
  - Some courts viewed religious uses as presumptively or inherently beneficial to residential areas and lessened any burdens of proof or shifted the burden on government to justify regulating them.
- Times have changed...the United States is, increasingly, religiously active and diverse.
  - They serve regions, not neighborhoods.
  - They are multi-complex, multi-use religious organizations with thousands of members and daily activities – “mega-church”

# Free Exercise Clause

- Land use controls must accommodate religious practices under the command of the free exercise clause, at least to some degree.
- *Sherbert v. Verner*: government regulation of conduct that substantially burdens the free exercise of religion cannot be sustained unless it promotes a compelling interest and uses the least restrictive means to advance that interest.
- *Employment Division v. Smith*: strict scrutiny test of *Sherbert* does not apply to claims challenging neutral laws of general applicability.
- *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*: an ordinance that is neutral on its face will be subjected to strict scrutiny if its application is shown to have been motivated by religious animus.