FIRST AMENDENT CONSIDERATIONS FOR LAND USE PLANNING

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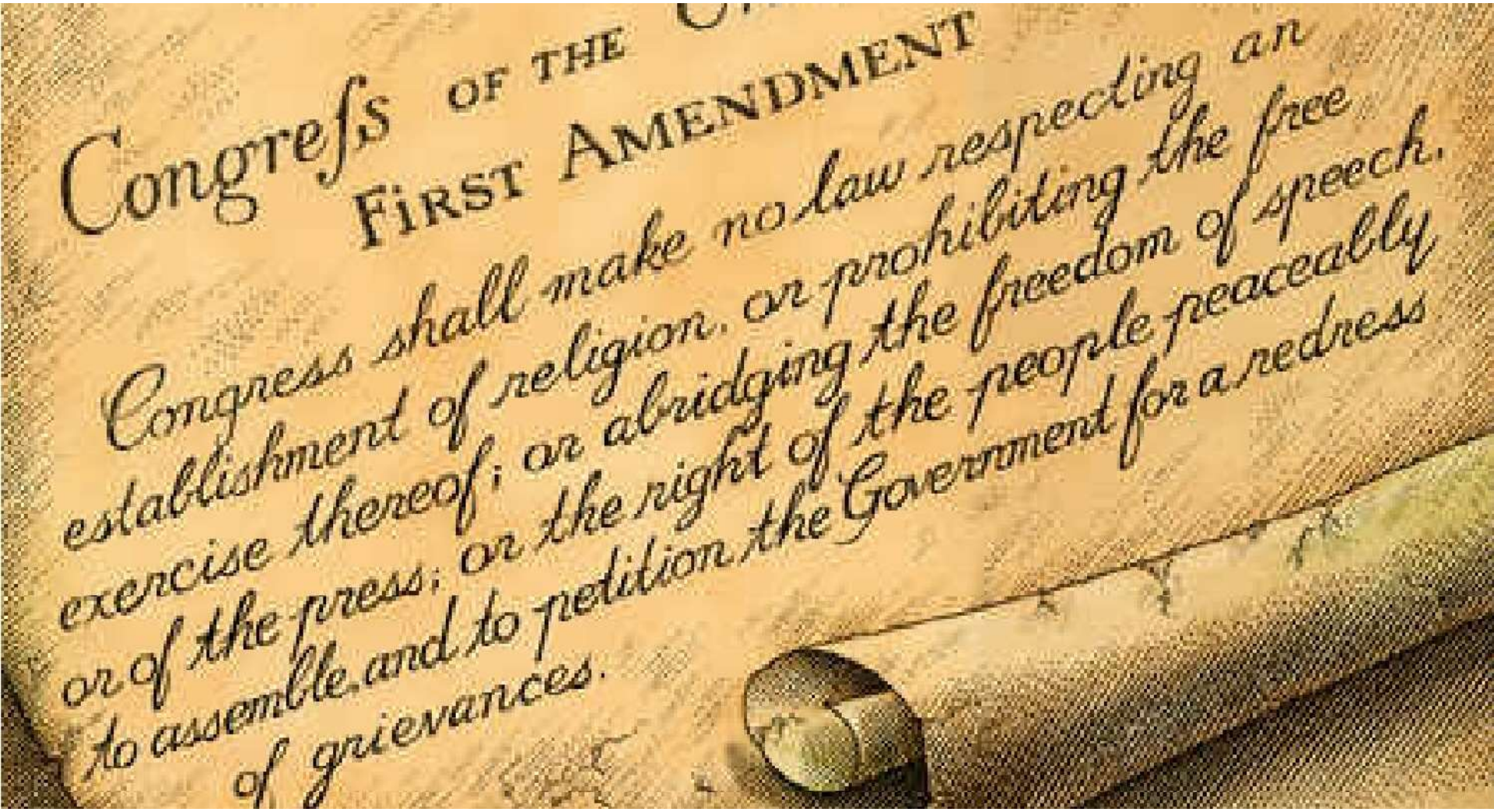

Congress of the
First Amendment
Congress shall make no law respecting an
establishment of religion, or prohibiting the free
exercise thereof; or abridging the freedom of speech,
or of the press; or the right of the people peaceably
to assemble, and to petition the Government for a redress
of grievances.

A Whirlwind Tour of First Amendment Issues in Land Use Law

- Type of Forums ("Fora")
- Types of Speech
- Applicable Legal Standards
- Practical Application in Land Use Context
- Application in Religious Context

What is a "Traditional Public Forum"?

- Streets, sidewalks and parks are traditional "public forums."
- Utility poles are not traditional "public forum."

City of Seattle v. Mighty Movers, Inc., 152 Wn.2d 343, 360, 96 P.3d 979, 984 (2004)

Traditional Public Forum – Strict Scrutiny on Regulation of Speech

- "Traditional public forum" is an area–such as streets and parks. Areas used for public assembly, communicating thoughts between citizens, and discussing public questions.

Traditional Public Forum – Strict Scrutiny on Regulation of Speech

- Content-neutral restrictions are reviewed under the traditional time, place, and manner test.

Traditional Public Forum – Strict Scrutiny on Regulation of Speech

- Time Place & Manner Restrictions are permissible if they are "narrowly drawn to serve a significant government interest, and leave open ample channels of communication."

Traditional Public Forum – Strict Scrutiny on Regulation of Speech

The government's ability to proscribe speech in a public forum is "sharply circumscribed." A content-based exclusion requires a showing "that [the government's] regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."

Traditional Public Forum – Strict Scrutiny on Regulation of Speech

Courts are reluctant to extend the concept of traditional public forums to new contexts, "reject[ing] the view that traditional public forum status extends beyond its historic confines."

United States v. American Library Ass'n, Inc., 539 U.S. 194, 206 (2003) (refusing to declare Internet access in a public library either a traditional or designated public forum).

What is a "Limited" or "Designated" Public Forum?

- The Courts have held that a government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects.

  Perry Ed. Assn., supra, at 46, n. 7, 103 S. Ct. 948.

What is a "Limited" or "Designated" Public Forum?

- Designated or limited public fora are sites created by the government's express dedication of its property to expressive conduct. *Perry*, at 45-46, 103 S. Ct. 948.
- Such fora cannot be created by inaction, but only by an intentional governmental act. *Cornelius*, 473 U.S. at 802, 105 S. Ct. 3439.

Limited or Designated Public Forums

- Public School Rooms (Meetings)
- Municipal Theater (Meetings)
- Query: City Council Chambers?

Limited Public Forum Allows More Restriction

- A government entity may impose restrictions on speech that are reasonable and viewpoint-neutral. *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1132, 172 L. Ed. 2d 853 (2009) (10 Commandment monument).
- The government may limit the forum to certain groups or subjects-although it may not discriminate on the basis of viewpoint-and may close the fora whenever it wants. *See Perry*, 460 U.S. at 46, 103 S. Ct. 948.

Limited Public Forum Allows More Restriction

- As long as the government maintains the open character of the forum, it is subject to the same constitutional strict scrutiny that must be applied to traditional public fora. *See id.*

Currier v. Potter, 379 F.3d 716, 728 (9th Cir. 2004)

Non-Public Forums

- Public School or City Hall internal email system. *Perry*, 460 U.S. 37, 46 (1983).
- In a non-public forum, scrutiny is less exacting: In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."

  Currier v. Potter, 379 F.3d 716, 728-29 (9th Cir. 2004); *City of Seattle v. Mighty Movers, Inc.*, 152 Wn. 2d 343, 361, 96 P.3d 979, 989 (2004)

Government Speech or Private Speech?

- Government-established memorial is *government* speech
- Bulletin board at XYZ Company is *private* speech

Government Speech or Private Speech?

- Four-part test:
  (1) the central "purpose" of the program in which the speech in question occurs;
  (2) the degree of "editorial control" exercised by the government or private entities over the content of the speech;
  (3) the identity of the "literal speaker";
  (4) whether the government or the private entity bears the "ultimate responsibility" for the content of the speech.

  Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm'n of Virginia Dept. of Motor Vehicles, 288 F.3d 610, 618 (4th Cir. 2002) (Government established memorial is Government Speech).

Regulatory Problems: Vague Statutes/ Standards

Vagueness

- For a regulation to be void for vagueness under the due process clause of the Fourteenth Amendment, the regulation must be so unclear that a person of common intelligence must necessarily guess as to its meaning and differ as to its application. *City of Spokane v. Douglass*, 115 Wash.2d 171, 179, 795 P.2d 693 (1990) (quoting *Burien Bark Supply v. King County*, 106 Wash.2d 868, 871, 725 P.2d 994 (1986)).

Regulatory Problems: Vague Statutes/ Standards

Vagueness

- The test does not demand impossible standards of specificity, and if persons of ordinary intelligence can understand what the ordinance proscribes, notwithstanding possible areas of disagreement, the ordinance is sufficiently definite.

Regulatory Problems: Overboard Statutes/Standards

Overbreadth

- "An overly broad statute that sweeps within its proscriptions protected expression is unconstitutional under both the Washington and United States Constitutions." *O'Day*, 109 Wash.2d at 803, 749 P.2d 142.

Regulatory Problems: Overboard Statutes/Standards

Overbreadth

- "[W]here a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *World Wide Video*, 368 F.3d at 1198 (quoting *Osborne v. Ohio*, 495 U.S. 103, 112, 110 S. Ct. 1691, 109 L.Ed.2d 98 (1990)).

Free Speech on Traditional Forums

Comite Jornaleros v. City of Redondo Beach, 657 F.3d 936 (9th Cir. 2011)

- City ordinance allowed police to arrest day laborers who solicited work from motorists while standing on street corner.
- Ordinance prohibiting solicitation of business, employment or contributions was not narrowly tailored to achieve interest in promoting traffic flow and safety.

Free Speech on Traditional Forums

Comite Jornaleros v. City of Redondo Beach, 657 F.3d 936 (9th Cir. 2011)

- Sidewalks and streets are traditional public forums.
- Ordinance did not satisfy strict scrutiny applicable to content-based regulation.

Impact of *Comite Jornaleros*

- Constitutional right to solicit recognized.
- Concurrence: Regulation of solicitation was content based speech regulation on its face, not regulation of conduct – subject to strict scrutiny.

Impact of *Comite Jornaleros*

- Aggressive panhandling ordinances are questionable as content based regulations.
- Exposure to future 42 U.S.C. 1983 claims & limitation of qualified immunity defense.

Recent developments after *Comite Jornaleros*

- City ordinance which prohibited standing, sitting, driving, or parking on median traffic strips violated First Amendment.

  Cutting v. City of Portland, Maine, 802 F.3d 79, 1st Cir.(Me. Sep. 11, 2015)

- Ordinance prohibiting aggressive panhandling throughout city was not least restrictive means of furthering city's compelling public safety interest.

  McLaughlin v. City of Lowell, 2015 WL 6453144, D.Mass.

Recent developments after *Comite Jornaleros*

- Ordinance prohibiting solicitation within roadways was not narrowly tailored to serve county's governmental interests.

  Reynolds v. Middleton, 779 F.3d 222, 227, 4th Cir. (Va.)
- Court held permit requirement of Street Use Ordinance, as SDOT administers it, is facially invalid because it confers overly broad discretion to deny permits, violating the First Amendment.

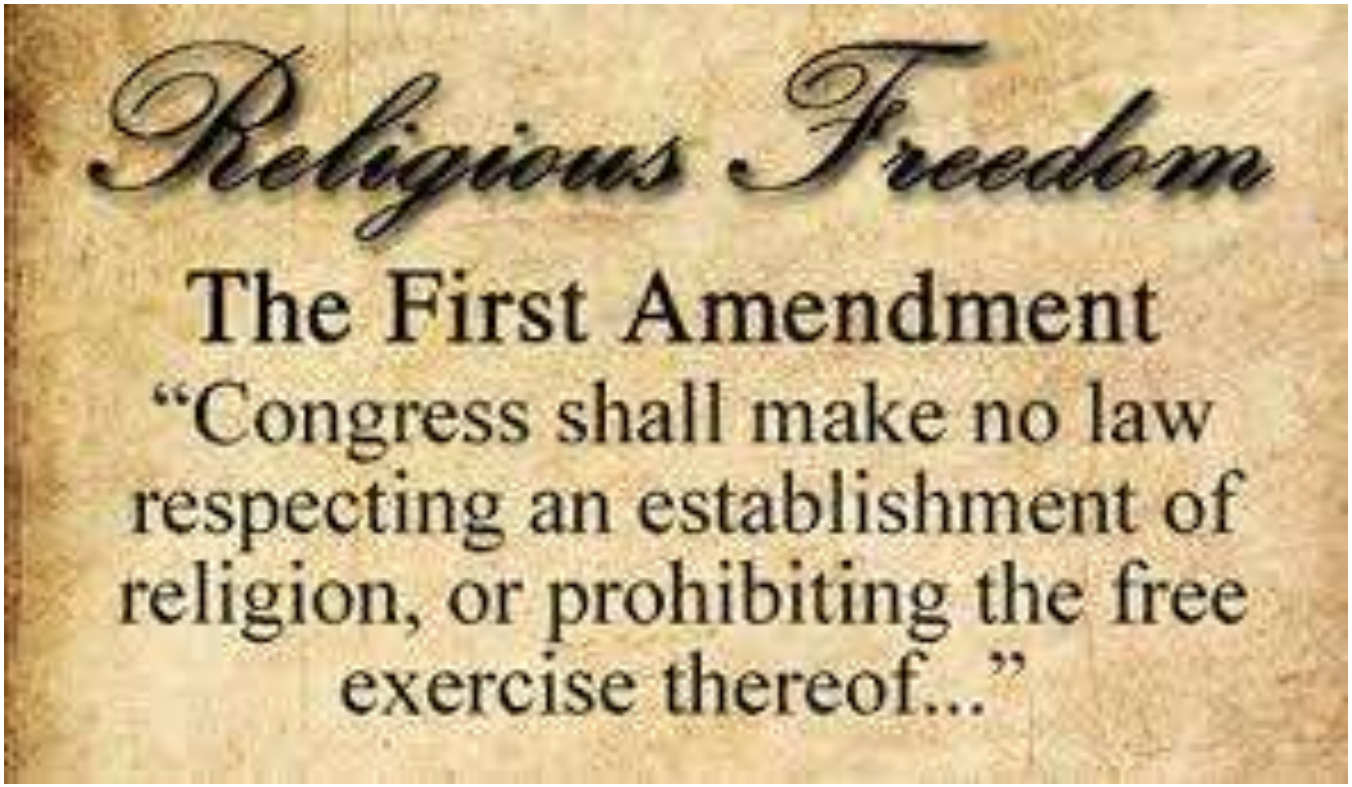
  Battle v. City of Seattle, 89 F. Supp. 3d 1092 (W.D. Wash. 2015)

Permitting Schemes and Excessive Discretion

- Limitless discretion permits licensor to disguise censorship, making it difficult to distinguish, in any individual case, "between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power."
- A licensing scheme that properly limits a licensor's discretion "provide[s] the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech."

  Battle v. City of Seattle, 89 F. Supp. 3d 1092, 1099 (W.D. Wash. 2015)

Religious Uses under First Amendment



Test for Infringement of Free Exercise Clause

- The test for whether a governmental action infringes on the right to freely exercise religious practices has three parts:

  (1) whether the party claiming an infringement has a sincere religious belief;

  (2) whether the governmental action burdens the free exercise of a religious practice; and

Test for Infringement of Free Exercise Clause

(3) if so, whether the burden is offset by a compelling state interest.

Munns v. Martin, 131 Wn.2d 192, 199–200, 930 P.2d 318 (1997)

North Pacific Union Conference Ass'n of Seventh Day Adventists v. Clark Cty., 118 Wn. App. 22, 31–32, 74 P.3d 140, 145 (2003)

Land Use Regulations and Religious Uses

- Requirement to apply for CUP for Church not undue burden on religion.
- Permit did not infringe on beliefs.
- "[A] church has no constitutional right to be free from reasonable zoning regulations."

Open Door Baptist Church v. Clark County,140 Wn.2d 143, 995 P.2d 33 (2000)

Land Use Regulations and Religious Uses

- Building codes and zoning applied to church school.
- Must balance impact on free exercise in seeking injunction against operation.
- Must determine if building was grandfathered as a non-conforming use.

City of Sumner v. First Baptist Church of Sumner, 97 Wn.2d 1 639 P.2d 1358 (1982)

Historic Preservation of Religious Buildings

- Potential delay of 14 months in demolition and renovation of church building unduly burdensome and violated First Amendment. *Munns v. Martin.*

- Applying the City's ordinances to the church violates the free exercise guaranties of the First Amendment. *First Covenant Church of Seattle v. City of Seattle*, 120 Wn.2d 203, 208, 840 P.2d 174 (1992).

Historic Preservation of Religious Buildings

- "Gross financial burdens violate the right to free exercise."
- The financial burden complained of there was the fact that "[l]andmark nomination … has prevented United Methodist from either remodeling its sanctuary or selling the church property."

Historic Preservation of Religious Buildings

- Landmark designation of church building violated church's constitutional right to free exercise of religion

First United Methodist Church of Seattle v. Hearing Exam'r for Seattle Landmarks Pres. Bd., 129 Wn.2d 238, 244–45, 916 P.2d 374 (1996)

Tent Cities As Religious Uses

Remember Test:

- A party challenging government action must show two things: that the belief is sincere and that the government action burdens the exercise of religion. The government must then show it has a narrow means for achieving a compelling goal.[3]

Tent Cities As Religious Uses

- Hosting Tent City is important or central to the Church's exercise of sincerely held beliefs.
- City's moratorium on all land use permit applications placed a substantial burden on church, in violation of church's constitution right to religious freedom.

City of Woodinville v. Northshore United Church of Christ, 166 Wn.2d 633, 211 P.3d 406 (2009)

Test for Violation of Establishment Clause

- Key is degree of entanglement
- Excessive entanglement occurs when the distinction between the state and the church functions becomes blurred and such functions noticeably overlap. *Malyon v. Pierce County*, 131 Wn.2d 779, 811, 935 P.2d 1272 (1997).

Test for Violation of Establishment Clause

- One of the driving forces behind the establishment clause was the concern of "political oppression through a union of civil and ecclesiastical control." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 n. 10, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982); *Malyon*, 131 Wn.2d at 811, 935 P.2d 1272.

  North Pacific Union Conference Ass'n of Seventh Day Adventists v. Clark Cty., 118 Wn. App. 22, 34, 74 P.3d 140, 146 (2003)

Examples of Excessive Entanglement

- Conditioning issuance of government license on church approval. *Larkin v. Grendel's Den, Inc.,* 459 U.S. 116, 127 n. 10, 103 S. Ct. 505, 74 L.Ed.2d 297 (1982).
- Contracts with churches for paid chaplains limited to specific church. *Voswinkel v. City of Charlotte,* 495 F. Supp. 588, 595-97 (W.D.N.C.1980).
- More recently, county clerk approval of 22 marriage licenses.

Religious Land Use & Institutionalized Persons Act (RLUIPA)

- No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly or institution–

Religious Land Use & Institutionalized Persons Act (RLUIPA)

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1) (Supp. 2003)

RLUIPA

- To show a substantial burden on the free exercise of religion, the religious adherent must prove that the government's action burdens the adherent's practice of his or her religion by preventing him or her from engaging in conduct or having a religious experience that the faith mandates. *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir.1995).

RLUIPA

- Moreover, the burden must be more than an inconvenience; it must be substantial and interfere with a tenet or belief that is central to religious doctrine. *Bryant*, 46 F.3d at 949.

  North Pacific Union Conference Ass'n of Seventh Day Adventists v. Clark Cty., 118 Wn. App. 22, 35-36, 74 P.3d 140, 147 (2003)

RLUIPA

- Zoning regulation that prevented rezoning hospital to future use as religious college did not constitute undue burden on religion.
  - Site was only hospital in community.
  - Other sites possibly available for college.
  - College refused to comply with PUD process to apply for rezone.
  - City reasonably determined that college had failed to meet the requirements of its zoning ordinance and CEQA.

  San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1037 (9th Cir. 2004)

Unconstitutional Burdens on Religion

- Potential 14 month delay for permits to convert church building to pastoral center to evaluate historic preservation.
- St. Patrick's School was a state historic site and the Bishop of Spokane intended to change the church building use to a pastoral center. Petitioner sought to enforce an ordinance to delay permitting for up to 14 months. This court held the potential burden of delay created an unconstitutional burden. *Munns v. Martin*, 131 Wash.2d 192, 930 P.2d 318 (1997).

Unconstitutional Burdens on Religion

- Moratorium on Tent City established for outreach to homeless.

  City of Woodinville v. Northshore United Church of Christ, 166 Wn.2d 633, 643, 211 P.3d 406, 411 (2009)

Victory Center v. City of Kelso, 2012 WL 1133643 (W.D. Wash. 2012)

- City zoning restricting uses to commercial retail in downtown core did not violate RLUIPA when applied to religiously affiliated community center that held educational sessions in life skills for youth and adults, cultural events and conferences.

Victory Center v. City of Kelso, 2012 WL 1133643 (W.D. Wash. 2012)

- No "substantial burden" as use allowed a few blocks away.
- Court did not dismiss claim that RLUIPA violated because city regulation of religious entity was not on equal terms with non-religious entities. Regulation excluded non-retail uses, except for "educational, cultural, or governmental" uses.

Questions?