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## Article

### On Sacred Land

Khaled A. Beydoun<sup>†</sup>

|   |      |
|---|------|
| Introduction .....  | 1804 |
| I. Religion, Law, and Land Use .....                        | 1812 |
| A. Religious Land Use & Institutionalized Persons Act ..... | 1813 |
| 1. Protection .....   | 1814 |
| 2. Causes of Action .....                                   | 1818 |
| B. Land Use Discrimination Against Muslims .....            | 1820 |
| 1. The Terrain .....  | 1820 |
| 2. The Present .....  | 1822 |
| II. Between Law and Rage .....                              | 1827 |
| A. The Anti-Sharia Movement .....                           | 1828 |
| 1. The Campaign .....                                       | 1829 |
| 2. Base Audience .....                                      | 1834 |
| B. Discursive Effect .....                                  | 1837 |
| 1. Coercing Action .....                                    | 1838 |
| 2. Public Covenants .....                                   | 1842 |
| III. Covenants of Religious Rage .....                      | 1844 |
| A. Against Mosques .....                                    | 1844 |
| 1. <i>United States v. Culpeper County</i> .....            | 1844 |
| 2. <i>United States v. Rutherford County</i> .....          | 1848 |
| B. Against Muslim Cemeteries .....                          | 1851 |
| 1. <i>United States v. Farmersville</i> .....               | 1852 |

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|  |      |
|--|------|
| 2. <i>Al Maghfirah v. Castle Rock Township</i> ..... | 1857 |
| C. Against Muslim Schools .....                      | 1861 |
| IV. Restoring Rights and Retrenching Rage .....      | 1865 |
| A. Restoring Religious Freedom .....                 | 1865 |
| 1. Activating Collective Rights .....                | 1866 |
| 2. Transforming Muslim Life .....                    | 1870 |
| B. Retrenching Rage .....                            | 1874 |
| 1. Disestablishing Municipal Animus .....            | 1875 |
| 2. Building Forward .....                            | 1879 |
| 3. Finding Common Ground .....                       | 1881 |
| Conclusion .....                                     | 1884 |

### INTRODUCTION

[T]he land is sacred . . . . The land is our mother . . . . Take our land away and we die.

—Mary Brave Bird, Lakota (1993)<sup>1</sup>

[T]hat the Civil Magistrate is a competent Judge of Religious truth . . . . is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages . . . .

—James Madison (1785)<sup>2</sup>

The Islamic Center of Culpeper stands at 16040 Brandy Road, nearly a two-mile drive from the heart of the small Virginia town’s downtown drag.<sup>3</sup> A number of longstanding churches sit along that colonial stretch, and several more can be spotted along the route between the new mosque<sup>4</sup> and Main Street. The Islamic house of worship formally opened its doors in early 2020 and instantly claimed its historic status as Culpeper County’s first-ever mosque.<sup>5</sup> The growing Muslim population, which formerly met inside of an unheated

1. MARY BRAVE BIRD WITH RICHARD ERDOES, OHITIKA WOMAN 220 (1993).

2. 2 JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, in THE WRITINGS OF JAMES MADISON 183, 187 (Gaillard Hunt ed., 1901).

3. ISLAMIC CTR. CULPEPER, <https://islamiccenterofculpeper.org> [<https://perma.cc/69E9-9XVT>].

4. A mosque is an Islamic house of worship; it is also commonly referred to as a “masjid” (Arabic). *Mosque*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003).

5. Allison Brophy Champion, *Islamic Center of Culpeper Looks to 2020 for Completion of County’s First Ever Mosque*, CULPEPER STAR-EXPONENT (Jan. 4, 2019), [https://www.starexponent.com/news/islamic-center-of-culpeper-looks-to-for-completion-of-county/article\\_2bbb19ba-3d15-5700-8ef5-9ee7b2f129e9.html](https://www.starexponent.com/news/islamic-center-of-culpeper-looks-to-for-completion-of-county/article_2bbb19ba-3d15-5700-8ef5-9ee7b2f129e9.html) [<https://perma.cc/U9HV-EHL9>].

building next to a used car dealership for their daily prayers,<sup>6</sup> finally had a *real* mosque in their adopted hometown.

Farmersville is a predominantly white and Christian town in the heart of northeastern Texas.<sup>7</sup> The swelling Muslim population in nearby Dallas has recently spilled into the rural town, home to a Muslim cemetery that will accommodate the burial of 11,000 departed fathers and mothers, daughters and sons.<sup>8</sup> This new cemetery will afford Muslims living in Farmersville, and towns in its orbit, the opportunity to bury loved ones in line with their religious rites. A Muslim cemetery had never been established in Collin County,<sup>9</sup> making the Farmersville burial site a pioneer.

On a cool autumn Michigan morning, Muslim elementary school students race out of their yellow school bus and toward their future school. Their teachers, many of them adorned in hijab,<sup>10</sup> stand at the entry of the impressive new building in Pittsfield Township, a middle-class town bordering Ann Arbor, the site of the Michigan Islamic Academy's old facility. The state-of-the-art facility inspires wide eyes on their faces and even wider smiles from their teachers,<sup>11</sup> foreshadowing infinite learning possibilities for the children rushing through the doors and future generations of students who will follow in their footsteps.

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6. Victoria St. Martin & Rachel Weiner, *Muslim Group Reaches Agreement To Build Culpeper Mosque*, WASH. POST (Apr. 21, 2017), [https://www.washingtonpost.com/local/muslim-group-reaches-agreement-to-build-culpeper-mosque/2017/04/21/d4ccd262-2543-11e7-a1b3-faff0034e2de\\_story.html](https://www.washingtonpost.com/local/muslim-group-reaches-agreement-to-build-culpeper-mosque/2017/04/21/d4ccd262-2543-11e7-a1b3-faff0034e2de_story.html) [https://perma.cc/P5EG-4YFF].

7. The population of Farmersville is nearly 3,500 and is approximately seventy-three percent white. See *ACS Demographic and Housing Estimates*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci> [https://perma.cc/A8AD-FRHZ] (search in search bar for "Farmersville, Texas"; then select "ACS Demographic and Housing Estimates").

8. Nanette Light, *About-Face in Farmersville Paves Way for Muslim Cemetery that Had Worried Some*, DALL. MORNING NEWS (Sept. 21, 2018, 4:56 PM), <https://www.dallasnews.com/news/2018/09/21/about-face-in-farmersville-paves-way-for-muslim-cemetery-that-had-worried-some> [https://perma.cc/88CJ-UWHU].

9. Wendy Hundley, *Plans for Muslim Cemetery Stir Apprehension Among Farmersville Residents*, DALL. MORNING NEWS (July 16, 2015, 10:53 PM), <https://www.dallasnews.com/news/2015/07/17/plans-for-muslim-cemetery-stir-apprehension-among-farmersville-residents> [https://perma.cc/T34W-NFY4].

10. The headscarf or head-wrap worn by Muslim women is called the "hijab" in Arabic. *Hijab*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 4.

11. Construction of the new facility continued after the Michigan Islamic Academy settled its land use dispute with Pittsfield Township, Michigan, in September 2016. See *infra* Part III.C.

These three Muslim institutions, located in distant and distinct parts of the country, share one vital bond: they would likely *not* be standing and serving the surrounding Muslim populations without the Religious Land Use and Institutionalized Persons Act (RLUIPA).<sup>12</sup>

In September 2000, Congress enacted RLUIPA to counter *Employment Division v. Smith*'s retrenchment of religious protection in two areas—the spiritual lives of prisoners and the focus of this Article, land use.<sup>13</sup> The federal statute empowers the Department of Justice (DOJ) to challenge “local governments”<sup>14</sup> that voted to bury these Muslim institutions during the land use review process. But through investigations and federal litigation, settlements and court orders, RLUIPA helped lift them into existence.

Since September 2010, a decade after Congress enacted RLUIPA, religious discrimination against Muslim land use petitions has skyrocketed.<sup>15</sup> The discrimination experienced by Muslims within the land use context surpasses that faced by other minority faith groups<sup>16</sup> and severely diminishes their scope of religious exercise during a moment of enhanced vulnerability.<sup>17</sup> This uptick in land use discrimination against Muslims is fueled by a protracted War on Terror and

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12. 42 U.S.C. §§ 2000cc to 2000cc-5 (2018).

13. 494 U.S. 872 (1990). In *Smith*, which involved a Native American petitioner seeking a religious exemption from an Oregon state law that restricted ingestion of peyote, the Supreme Court applied a rational basis review to the facially neutral Oregon state policy. *Id.* at 872. Thus, the *Smith* decision established the rule that neutral laws of general applicability that burden religious exercise are to be reviewed using rational basis. *Id.* at 879. The Supreme Court, three years later, held that government regulations cannot “impose special disabilities on the basis of religious views or religious status.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534–36 (1993). Justice Kennedy wrote that the law, which was facially neutral, was “gerrymandered with care” to apply exclusively to the Santeria Church’s ritual killing of animals. *Id.* at 542.

14. This Article will periodically refer to municipal boards and planning commissions, the two civic bodies independently or jointly tasked with making land use determinations, as “local governments.”

15. See U.S. DEP’T OF JUST., UPDATE ON THE JUSTICE DEPARTMENT’S ENFORCEMENT OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT: 2010–2016, at 4–6 (2016) [hereinafter 2016 DOJ RLUIPA REPORT], <https://www.justice.gov/crt/file/877931/download> [<https://perma.cc/WNM4-GGFM>].

16. *Id.* at 3–6.

17. The First Amendment religious clauses state that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I.

polarizing culture wars, the latter of which orients Islam as inimical to constitutional values and ominous to America's core identity.<sup>18</sup>

The Anti-Sharia Movement (ASM), a political campaign that emerged in 2010 and continues today, presents the most virulent anti-Muslim strand of these culture wars.<sup>19</sup> It rages ahead while Islam ranks as the fastest growing faith group in the United States,<sup>20</sup> and it spreads into new parts of the country where upstart communities are seeking to establish mosques, Muslim cemeteries, and Islamic schools to accommodate growing Muslim-American populations. During its protracted and ongoing tenure, the ASM casts a heavy shadow over these land use aspirations—in the form of mobilizing local governments to enforce its anti-Muslim mandate by denying the permits necessary to build these religious institutions.<sup>21</sup>

Land use discrimination is an under-examined front of this culture war. While law scholars have investigated land use discrimination against Muslims and the ASM as isolated phenomena,<sup>22</sup> close

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18. See WAJAHAT ALI, ELI CLIFTON, MATTHEW DUSS, LEE FANG, SCOTT KEYES & FAIZ SHAKIR, CTR. FOR AM. PROGRESS, FEAR, INC.: THE ROOTS OF THE ISLAMOPHOBIA NETWORK IN AMERICA (2011), for a comprehensive examination of the private and public actors that propagate anti-Muslim sentiment in the United States, which labels Islam as pointedly un-American and Muslims unworthy of religious liberty. For a broader discussion of religious liberty and the culture wars that currently grip the United States, whereby conservative religious leadership relies on religious liberty to discriminate against same-sex couples, members of the LGBTQ community, and proponents of abortion, see Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839.

19. "Muslim American," for purposes of this Article, is not limited to American citizens that adhere to Islam. Rather, it is defined capaciously, inclusive of all Muslims residing within the country regardless of legal status. Echoing Abdullahi Ahmed An-Na'im, "There is simply no coherent way of regarding all American Muslims as a single monolithic community, or of speaking about them as such," ABDULLAHI AHMED AN-NA'IM, WHAT IS AN AMERICAN MUSLIM?: EMBRACING FAITH AND CITIZENSHIP 3 (2014), and this Article does not limit inclusion along lines of race, sect, or citizenship but rests predominantly on self-identification.

20. The Pew Research Center projects that the Muslim population in the United States will be the country's second largest faith group in 2040, growing from 3.45 million to 8.1 million by 2050. Besheer Mohamed, *New Estimates Show U.S. Muslim Population Continues To Grow*, PEW RSCH. CTR.: FACT TANK (Jan. 3, 2018), <https://www.pewresearch.org/fact-tank/2018/01/03/new-estimates-show-u-s-muslim-population-continues-to-grow> [https://perma.cc/VBZ7-T484].

21. See *infra* Part II.

22. See Eric Treene, *RLUIPA and Mosques: Enforcing a Fundamental Right in Challenging Times*, 10 FIRST AMEND. L. REV. 330 (2012), for an analysis of RLUIPA's overriding of discriminatory land use denials of mosques during its first decade, written by DOJ Special Counsel for Religious Discrimination. See Yaser Ali, *Shariah and Citizenship: How Islamophobia Is Creating a Second-Class Citizenry in America*, 100 CALIF. L. REV. 1027 (2012), for an early analysis of the Anti-Sharia Movement and its erosion of Muslims' religious freedom in states where it was enacted.

analysis of case law highlights their intimate interplay and compounded impact on the religious freedom of Muslim communities in rural towns, metropolitan areas, and places beyond and in between. This Article investigates this interplay, which explains the explosive rise in land use discrimination against Muslim applicants from 2010 until the present.

Since 2010, the year marking the birth of the ASM and the uptick in anti-Muslim land use discrimination it spawned, RLUIPA has served as both a buffer and a bridge for Muslim land use applicants. First, it empowers the DOJ to investigate local governments suspected of anti-Muslim discrimination.<sup>23</sup> This investigatory power has a deterrent effect on the incidence of religious discrimination within city boards and planning commissions, which protects Muslim communities and safeguards their religious rights and rites.<sup>24</sup>

Second, RLUIPA authorizes the DOJ to independently file causes of action against local governments that deny “Muslim land use requests” on discriminatory grounds.<sup>25</sup> This power, particularly during a span when local governments refuse to independently settle Muslim land disputes at an eighty percent clip,<sup>26</sup> makes RLUIPA’s *productive* impact just as vital as its protective effect.<sup>27</sup> DOJ intervention delivered land use permits to Muslim parties that local governments were keen on denying and thus provided a federal bridge toward building Muslim institutions that would have otherwise been preempted by municipal boards and planning commissions. This Article, and the case law it examines, is chiefly concerned with RLUIPA’s *bridge-building* power.

Land is sacred. Its intimate connection to religious expression is exhibited by the rich indigenous traditions that first occupied this soil.<sup>28</sup> And today, that connection is exhibited by the milieu of faith

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23. See 42 U.S.C. § 2000cc-2(f).

24. See 2016 DOJ RLUIPA REPORT, *supra* note 15, at 3, for a description of this investigatory power.

25. 42 U.S.C. § 2000cc-2(f). This Article will refer to petitions or applications brought by Muslim parties to establish religious institutions as “Muslim land use requests.” “Religious institutions” are institutions that have a pointedly spiritual objective or mandate or are invested in the advancement of a spiritual tradition through worship, education, or practice.

26. 2016 DOJ RLUIPA REPORT, *supra* note 15, at 6.

27. By “productive,” the Article refers to RLUIPA’s effect of bringing religious institutions into existence.

28. “Native American faith is inextricably bound to the use of land. The site-specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being.” *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 460–61 (1988) (Brennan, J., dissenting).

groups that make up the diverse American religious tapestry. Land is notably sacred for a religious population that is interlocked between federal terror suspicion and local hostility while seeking to construct religious spaces that simultaneously serve as safe havens from suspicion and centers of spiritual life. The ASM, the political movement that castigates Islam and casts its religious institutions as ominous symbols of Sharia takeover, is the very entity that emboldens local governments to form “covenants” that drive denials of Muslim land use requests.<sup>29</sup>

Through close investigation of case law, this Article analyzes the forceful impact anti-Sharia bills have on the determinations of local governments presiding over Muslim land use requests. It advances the following three entwined arguments:

First, that the discriminatory posture of municipal governments toward Muslim land use requests is shaped by the local impact of the ASM;

Second, that RLUIPA enforcement has not only served as an effective tool to override discriminatory denials of Muslim land use requests but restores collective and collateral rights to Muslim communities by facilitating the creation of institutions vital for religious expression; and

Third, that RLUIPA relief curtails the municipal entanglement of the ASM by imposing penalties on local governments, deterring prospective discrimination against Muslims within the land use realm and beyond.

In addition to its focus on land use discrimination faced by Muslims, this Article seeks to inspire closer scrutiny of the rising incidence of land use discrimination faced by members of minority faith groups, such as Black churches and Jewish synagogues.<sup>30</sup> These communities are similarly situated to Muslims and vulnerable to rising fronts of racism and anti-Semitism that drive the land use determinations of local governments across the country.

In addition to probing the “dialectic” between bigotry and land use discrimination,<sup>31</sup> this Article seeks to offer prescriptive

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29. This Article adopts the lay definition of “covenant,” meaning “agreement.” Part II.B.2 examines the distinct forms of public covenants that drive land use discrimination against Muslims.

30. 2016 DOJ RLUIPA REPORT, *supra* note 15, at 3–4.

31. The Author has referred to this interplay between law and actors within society, both public and private, as “dialectical Islamophobia,” a process whereby discriminatory law endorses and emboldens enforcement of discriminatory action. Khaled A.



recommendations—namely, interventions that explore RLUIPA’s capacity to curb religious discrimination and restore religious rights within and beyond the land use realm.

Currently, the bulk of legal scholarship examining religious freedom statutes is largely divided along distinct anti-discrimination interests. Advocates of this legislation cite their capacity to protect religious freedom during an era of diminished judicial protection,<sup>32</sup> while critics cite how religious freedom statutes have been wielded to justify discrimination against sexual minorities.<sup>33</sup> Both sides of this debate are correct, and this Article explores the under-examined space in between and seeks to fuse the discourses by offering prescriptions that benefit the lesbian, gay, bisexual, transgender, and queer (LGBTQ) population and religious minorities. In addition to highlighting how members of religious minority groups, including Muslims, also identify as LGBTQ,<sup>34</sup> this Article fixates on the entrenchment of “politico-

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Beydoun, *Islamophobia: Toward a Legal Definition and Framework*, 116 COLUM. L. REV. ONLINE 108, 119–20 (2016).

32. See, e.g., Qasim Rashid, *The Right To Enforce: Why RLUIPA’s Land Use Provision Is a Constitutional Federal Enforcement Power*, 16 RICH. J.L. & PUB. INT. 267 (2013). But see Ronald Brownstein, *The Supreme Court Is Colliding with a Less-Religious America*, ATLANTIC (Dec. 3, 2020), <https://www.theatlantic.com/politics/archive/2020/12/how-supreme-court-champions-religious-liberty/617284> [<https://perma.cc/NVT8-QNBU>] (“Ira Lupu, a George Washington University Law School professor who studies religion and the law, notes that the Supreme Court has . . . ‘taken in the last five, six, seven years many, many religious-liberty cases. . . I’ve been teaching about this stuff and writing it about for the past 35 years. I have never seen such a spurt of religious-liberty cases in such a short time, especially where over and over again there is a victory for religious-liberty claims.’”).

33. See, e.g., HUM. RTS. WATCH, “ALL WE WANT IS EQUALITY”: RELIGIOUS EXEMPTIONS AND DISCRIMINATION AGAINST LGBT PEOPLE IN THE UNITED STATES 13 (2018) (“The religious exemptions that have been considered or enacted by state legislatures take different forms. Some are comprehensive, providing blanket protection for entities that do not wish to provide various services to LGBT people because of their religious or moral beliefs. Others are more narrowly circumscribed, focusing particularly on adoption and foster care services and physical and mental healthcare services.”).

34. As coined by Kimberlé Crenshaw, Muslim and LGBTQ identities “intersect,” in turn, exposing LGBTQ Muslims to a myriad of stigmas that arise from broader society and those internal to the religious and social communities to which they belong. See generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991). “Perhaps no struggle is more imposing tha[n] that faced by LGBTQ Muslim-Americans. LGBTQ Muslim Americans are stigmatized from without and, more acutely, from within their spiritual communities.” Khaled A. Beydoun, *What If Jason Collins Was a Muslim?*, HUFFPOST (May 10, 2013, 4:56 PM), [https://www.huffpost.com/entry/jason-collins-muslim\\_b\\_3255205](https://www.huffpost.com/entry/jason-collins-muslim_b_3255205) [<https://perma.cc/F8LQ-ZYMX>].

religious” animus within local government as the primary driver of discrimination unleashed against religious and sexual minorities.<sup>35</sup>

This Article will proceed in four parts. Part I analyzes the statutory protections and proactive measures enabled by RLUIPA.<sup>36</sup> This analysis is followed by an overview of the land use discrimination experienced by Muslims from 2010 until the present, the very stretch that witnessed the emergence of the ASM.<sup>37</sup>

Part II examines the rise of the ASM as a political movement in 2010 and its impact on state legislatures and local governments across the country.<sup>38</sup> It then proceeds to examine the ASM’s pronounced impact in conservative states and rural areas and how its varying legal and discursive resonance impacts city boards and planning commissions presiding over Muslim land use requests.<sup>39</sup>

Part III investigates the ASM’s projective impact on municipal governments through court cases involving Muslim land use disputes.<sup>40</sup> These RLUIPA cases illustrate how the ASM takes local form through the discriminatory behaviors of city boards and planning commissions in distinct parts of the country—presiding over land use applications for mosques in Virginia and Tennessee,<sup>41</sup> Muslim cemeteries in Texas and Minnesota,<sup>42</sup> and an Islamic school in Michigan.<sup>43</sup>

Part IV identifies RLUIPA’s effects of restoring religious rights and curtailing the influence of the ASM within municipal state bodies.<sup>44</sup> It leads with analyzing how the creation of RLUIPA-enabled Muslim institutions activates and expands collective free exercise and collateral rights for Muslim populations.<sup>45</sup> It then examines how RLUIPA relief erodes the municipal entanglement of the ASM by exposing local

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35. This Article refers to organizations, and broader political fronts, that infuse conservative religious values into state policy as “politico-religious” groups or movements. The ASM qualifies as a politico-religious movement, while the Family Research Center—a leading anti-LGBTQ group that champions “family values” to further homophobic policy goals—is a politico-religious group. For more on the Family Research Council’s anti-LGBTQ stance, see *Family Research Council*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/family-research-council> [<https://perma.cc/N9UQ-QBKF>].

36. See *infra* Part I.A.

37. See *infra* Part I.B.

38. See *infra* Part II.A.

39. See *infra* Part II.B.

40. See *infra* Part III.

41. See *infra* Part III.A.

42. See *infra* Part III.B.

43. See *infra* Part III.C.

44. See *infra* Part IV.

45. See *infra* Part IV.A.

governments to prospective establishment clause challenges from religious and sexual minority groups.<sup>46</sup>

### I. RELIGION, LAW, AND LAND USE

*Employment Division v. Smith* marked a decline in the arc of free exercise of religion protection by the courts.<sup>47</sup> The Supreme Court's ruling extended even greater deference to state and local governments, and it overturned jurisprudence that enabled the courts to apply exacting scrutiny to state and municipal policies that substantially burden religious exercise.<sup>48</sup> For proponents of robust judicial protection of religious freedom, *Smith* narrowed the Warren Court's capacious framing of religious discrimination<sup>49</sup> and enabled municipal governments to discriminate against religious groups behind the veil of administrative deference.<sup>50</sup> In the immediate wake of the Supreme Court decision, constitutional law scholar Michael McConnell indicted *Smith* as "contrary to the deep logic of the First Amendment."<sup>51</sup>

In the years that followed, Congress enacted legislation that sought to balance the effect of *Smith* in favor of restoring religious protection. First, it ratified the Religious Freedom Restoration Act (RFRA) in 1993, which for four years reestablished strict scrutiny review of neutral and generally applicable state policies that substantially

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46. See *infra* Part IV.B.

47. See 494 U.S. 872 (1990).

48. *Smith* overturned *Sherbert v. Verner*, which set forth the rule that strict scrutiny review be applied to neutral state regulations that substantially burden free exercise. *Sherbert v. Verner*, 374 U.S. 398 (1963); see also *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding the religious freedom of Amish parents trumped the state's interest in mandating education beyond the eighth grade, in turn creating a religious exemption from Wisconsin's generally applicable compulsory education law).

49. See *Sherbert*, 374 U.S. at 404 ("For '[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.'" (alteration in original) (quoting *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961))).

50. See *infra* Part III.

51. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990).

burden religion.<sup>52</sup> Seven years later, Congress enacted RLUIPA,<sup>53</sup> legislation that revived *Sherbert v. Verner's* strict scrutiny test to examine state and municipal regulations that substantially burden the religious exercise of incarcerated persons and land use applicants.<sup>54</sup>

RLUIPA came into being one year before 9/11 and its turbulent aftermath, a period when federal national security and counterterrorism policy exposed Muslims to an unprecedented degree of state scrutiny and popular backlash.<sup>55</sup> This backlash marked their mosques and cemeteries, schools, and secular institutions as bastions of suspected terror activity.<sup>56</sup>

#### A. RELIGIOUS LAND USE & INSTITUTIONALIZED PERSONS ACT

This Section examines the statutory protection and proactive measures RLUIPA extends against religious discrimination within the land use realm. First, it analyzes protections against land use regulations that substantially burden religious exercise or intentionally discriminate against or exclude individual religions from access to land.<sup>57</sup>

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52. See Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507 (1997). The Supreme Court, in *City of Boerne v. Flores*, found that Congress exceeded its Fourteenth Amendment enforcement authority with regard to its application of RFRA to state and local governments. 521 U.S. 507, 536 (1997). RFRA still applies to federal government action, but not the states. 42 U.S.C. § 2000bb; see also *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014) (holding that the religious rights of closely held corporations are to be exempted from a federal contraception mandate).

53. Note, *Religious Land Use in the Federal Courts Under RLUIPA*, 120 HARV. L. REV. 2178, 2181 (2007) ("Congress was determined to revive the compelling interest test in any arena in which the Court would permit it to do so. Seizing on the *Smith* dictum suggesting a loophole for 'individualized governmental assessment[s],' Congress in 2000 enacted RLUIPA to require the application of *Sherbert* in two areas in which such assessments were common: land use decisions and regulations governing the conduct of institutionalized persons." (alteration in original) (citing *Emp. Div. v. Smith*, 494 U.S. 872, 884 (1990))).

54. *Sherbert*, 374 U.S. at 406.

55. See generally Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002), for a comprehensive analysis of the disproportionately discriminatory effect the executive and legislative policies enacted after 9/11 had on Muslim populations within the United States.

56. *Id.*

57. RLUIPA defines "land use regulation" capaciously:

[A] zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

Second, it presents the causes of action that can be initiated by a private actor or by the DOJ independently. The latter enforcement mechanism makes RLUIPA an especially potent tool for countering anti-Muslim discrimination within the land use context.

### 1. Protection

Local governments, through boards and planning commissions, are extended considerable deference with regard to land use administration.<sup>58</sup> Determinations are made squarely at the municipal level,<sup>59</sup> beyond the reach of state and federal government. These decisions, and those commissioned to make them, are naturally influenced by the political and cultural stimuli that surround them. This influence includes religious and political movements that deeply impact municipal administration and have sway over members of the polity that sit on city boards and planning commissions. Together, the broad administrative latitude granted to local governments,<sup>60</sup> combined with their susceptibility to local forms of bigotry, has resulted in the rising incidence of land use discrimination against faith groups seeking to establish religious institutions such as parochial schools and synagogues, Hindu temples, and mosques.<sup>61</sup> In short, the broad municipal deference extended by *Smith* enabled local governments to enmesh themselves more intimately with religion and religious discrimination—or for purposes of this Article, anti-Muslim animus.<sup>62</sup>

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42 U.S.C. § 2000cc-5(5). This Article focuses on the discriminatory enforcement of zoning laws by local governments against Muslim claimants who own or hold acquired interest in the property.

58. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389 (1926) (holding that a municipal government, like Euclid, Ohio, holds “authority to govern itself as it sees fit within the limits of the organic law of its creation and the State and Federal Constitutions”).

59. Land use determinations, however, must abide by zoning guidelines crafted at the state level. *Id.*

60. “In accepting the municipality’s appeal in *Village of Euclid v. Ambler Realty Co.*, the Court did much more than sanction the pecuniary loss suffered by Ambler Realty; it endorsed a new form of urban planning that would revolutionize the American landscape. Modern residential zoning was constitutionally born.” Nadav Shoked, *The Reinvention of Ownership: The Embrace of Residential Zoning and the Modern Populist Reading of Property*, 28 *YALE J. ON REGUL.* 91, 95 (2011).

61. 2016 DOJ RLUIPA REPORT, *supra* note 15, at 3–7.

62. This Article will use “anti-Muslim animus” interchangeably with “Islamophobia.”

Congress identified land use discrimination faced by religious groups as a primary motive for RLUIPA enforcement.<sup>63</sup> This recognition of the comparative vulnerability of religious groups brought forth the restoration of a more exacting review of land use regulations.<sup>64</sup> This vulnerability, DOJ statistics reveal, is even greater for minority faith groups filing land use requests to build houses of worship, schools, and cemeteries throughout the United States.<sup>65</sup>

RLUIPA's statutory foundation is the restoration of a strict scrutiny review of land use regulations that substantially burden religious exercise.<sup>66</sup> This general rule negates *Smith* within the area of land use<sup>67</sup>:

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 the imposition of the burden on that person, assembly, or institution—

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

(B) is the least restrictive means of furthering that compelling government interest.<sup>68</sup>

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63. "The [legislative] hearing record compiled massive evidence that [the right to religious land use] is frequently violated." 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sen. Orrin G. Hatch and Sen. Edward M. Kennedy). For an analysis of the legislative history behind RLUIPA, see Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 342–52 (2003).

64. The increased scrutiny, though, has not been universally celebrated.

RLUIPA remains the subject of much debate within the academy—both on its merits and because of the belief that it is an unwarranted interference with an area set aside for local decisionmaking. RLUIPA has become even more controversial with the public at large in the wake of increased demands for religious accommodations.

Michael C. Pollack, *Land Use Federalism's False Choice*, 68 ALA. L. REV. 707, 710 (2017). Pollack cites Marci A. Hamilton, among other law scholars, who deems RLUIPA a violation of municipal sovereignty and, more emphatically, "the most reckless federal intervention in local land use law and community decision-making in history." *Id.* (quoting Marci A. Hamilton, *The Constitutional Limitations on Congress's Power over Local Land Use: Why the Religious Land Use and Institutionalized Persons Act Is Unconstitutional*, 2 ALB. GOV'T L. REV. 366, 369 (2009)).

65. 2016 DOJ RLUIPA REPORT, *supra* note 15, at 3–7.

66. See 42 U.S.C. § 2000cc(a)(1).

67. RLUIPA addresses the *Smith* ruling, stating that a "substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability." *Id.* § 2000cc(a)(2)(A).

68. *Id.* § 2000cc(a)(1).

Thus, in order to survive a RLUIPA suit against action that substantially burdens religious exercise,<sup>69</sup> a local government must satisfy the two-part strict scrutiny test. Conversely, the *Smith* standard would only apply a rational basis review to facially neutral and generally applicable regulatory action,<sup>70</sup> and it shifts the heavy burden onto petitioners to prove intentional discrimination.<sup>71</sup>

Per its title, “substantial burden” keys in on the impact of a stated regulation instead of its facial appearance—and specifically, the discriminatory effect land use regulations have on diminishing religious exercise.<sup>72</sup> Consequently, RLUIPA limits the broad deference *Smith* extends to local governments within the land use context by flagging policy that disproportionately impacts members of a specific faith group, and it extends power to the DOJ and aggrieved parties to challenge these local determinations in federal court.<sup>73</sup> This federalizes local

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69. *See id.* § 2000cc-2. The statute does not provide further clarity as to the specific meaning of “substantial burden.” A number of federal court decisions involving RLUIPA claims have attempted to define “substantial burden” more narrowly. For example, the Eleventh Circuit Court of Appeals in *Midrash Sephardi v. Town of Surfside*, a case involving a Sephardic Jewish community seeking to establish a synagogue in Surfside, Florida, stated that state action that “directly coerces the religious adherent to conform his or her behavior accordingly” rises to the level of a substantial burden. 366 F.3d 1214, 1227 (11th Cir. 2004). Two years later, the Ninth Circuit offered, “[F]or a land use regulation to impose a ‘substantial burden,’ it must be ‘oppressive’ to a ‘significantly great’ extent. That is, a ‘substantial burden’ on ‘religious exercise’ must impose a significantly great restriction or onus upon such exercise.” *Guru Nanak Sikh Soc’y v. Cnty. of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006) (citing *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004)) (discussing a RLUIPA claim involving the land use denial of a Sikh community’s land use petition to build a Sikh temple in Yuba City, California).

70. The *Smith* Court explained:

We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [*Sherbert* strict scrutiny] test inapplicable to such challenges. The government’s ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, “cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.”

*Emp. Div. v. Smith*, 494 U.S. 872, 885 (1990) (citing *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 451 (1988)).

71. *See id.*

72. “[T]he substantial burden is imposed in the implementation of a land use regulation or system of . . . regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses of the property involved.” 42 U.S.C. § 2000cc(a)(2)(C).

73. The Seventh Circuit Court of Appeals observed that RLUIPA’s substantial burden protection “backstops the explicit prohibition of religious discrimination in the

disputes,<sup>74</sup> removing them from state venues that may share the same religious animus manifested by the municipal bodies that denied their land use request.

In 2015, the Supreme Court, in an opinion written by Justice Alito, affirmed RLUIPA's broad application in *Holt v. Hobbs*, holding that governments have no responsibility to issue free exercise exemptions.<sup>75</sup> This form of proactive accommodation is beyond the scope of RLUIPA, *Holt* affirmed.<sup>76</sup> However, a state body responding to a RLUIPA challenge must "at a minimum, offer persuasive reasons why it believes that it" should deny a party's free exercise rights.<sup>77</sup> Critics may argue that Justice Alito's assessment of RLUIPA is exclusive to the prison context, where security and state concerns differ from the land use context.<sup>78</sup> However, Justice Alito did not explicitly limit this reading of RLUIPA to prisons,<sup>79</sup> and therefore, the Court places an equal burden on state actors within the prison and land use contexts to offer compelling justifications for denying free exercise requests.<sup>80</sup>

In addition to restricting land use regulations that substantially burden religious exercise, RLUIPA also bars explicit discrimination and exclusion.<sup>81</sup> As examined closely in actual RLUIPA cases and disputes, explicit municipal discrimination against Muslim land use

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later section of the Act, much as the disparate-impact theory of employment discrimination backstops the prohibition of intentional discrimination [in the workplace]." *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005).

74. Law scholar Marci Hamilton, who criticizes RLUIPA from a Framers' intent perspective, argues, "[W]e are in the era when the federal government is exercising its power to unilaterally rearrange the cities' land use plans." Marci A. Hamilton, *The Re-Making of America's Cities by Religious Organizations and the Department of Justice*, JUSTIA: VERDICT (Sept. 1, 2016), <https://verdict.justia.com/2016/09/01/re-making-americas-cities-religious-organizations-department-justice> [<https://perma.cc/BWY5-K7FX>].

75. 574 U.S. 352, 369 (2015). The case involved a Muslim prisoner denied the ability to grow a half-inch beard in line with his religious customs within an Arkansas federal prison, which the court overruled on RLUIPA substantial burden grounds. For an analysis of where *Hobbs* fits within the broader legal history of free exercise of religion accommodations spearheaded by Muslim claimants within prison, see Khaled A. Beydoun, *Islam Incarcerated: Religious Accommodation of Muslim Prisoners Before Holt v. Hobbs*, 84 U. CIN. L. REV. 99 (2016).

76. *Holt*, 574 U.S. at 369.

77. *Id.*

78. For a discussion of the distinct set of state interests that are cited in response to RLUIPA religious accommodation claims within the prison context, see James D. Nelson, *Incarceration, Accommodation, and Strict Scrutiny*, 95 VA. L. REV. 2053 (2009).

79. *Holt*, 574 U.S. at 369.

80. *See id.*

81. 42 U.S.C. § 2000cc(b)(1)–(3).



petitions is most apparent in states where the ASM is especially resonant.<sup>82</sup> But it is less conspicuous in regions of the country where the ASM's impact spurs latent or subtle animus, which makes the "substantial burden" RLUIPA claim vital for Muslim claimants in these locales.<sup>83</sup> Part III of this Article, through examination of case law, analyzes the varying "projective effect" of anti-Sharia bills across geographic and political lines.<sup>84</sup>

In sum, RLUIPA extends two distinct claims for prospective relief against religious discrimination within the land use realm. If a claimant cannot satisfy the more demanding burden of proving explicit discrimination or exclusion,<sup>85</sup> municipal action that substantially burdens religious exercise is an alternate and less demanding pathway toward relief.<sup>86</sup> This latter substantive intervention is RLUIPA's most forceful rebuttal to *Smith*, and it is the statutory springboard for causes of action that lay the legal groundwork for establishing the Muslim institutions staunchly opposed by municipal boards and planning commissions.

## 2. Causes of Action

RLUIPA's protective measures enable causes of action against land use regulations that explicitly discriminate on religious grounds and regulations that substantially burden religious exercise. By negating *Smith* within the land use realm, RLUIPA expands religious protection in the area of land use on the substantive front through its facilitation of more robust enforcement on the proactive front.<sup>87</sup>

RLUIPA enables the DOJ or an aggrieved party to bring forward a claim of land use discrimination against a local government in federal

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82. See *infra* Part III.

83. 42 U.S.C. § 2000cc(a)(1). RLUIPA defines a claimant as "a person raising a claim or defense under this chapter." *Id.* § 2000cc-5(1).

84. See *infra* Part III. The Author adopts Lauren Sudeall Lucas's "protective-projective framework" delineating judicial framing of religious identity expression. Lauren Sudeall Lucas, *The Free Exercise of Religious Identity*, 64 UCLA L. REV. 54, 95 (2017). This Article broadens Sudeall Lucas's definition of "projective religious identity" to include the ASM's politicization of religion that imposes castigatory views of Islam onto local governments vis-à-vis state legislation. This politicization pressures city boards and state planning commissions to deny Muslim land use petitions. See *id.* at 96-106. Contrary to projective claims, "[p]rotective claims are those that aim to preserve individuals' or groups' ability to define and pursue their religious identity within the confines of their own sphere." *Id.* at 89.

85. 42 U.S.C. § 2000cc(b)(1)-(3).

86. See *id.* § 2000cc(a)(2)(A)-(C).

87. See *id.* § 2000cc-2 (spelling out judicial relief under RLUIPA).

court.<sup>88</sup> DOJ enforcement protects aggrieved parties engaged in land use disputes from exposure to the popular backlash that a personal lawsuit may invite, in addition to removal from a (potentially) oppositional state court.<sup>89</sup> For members of minority faith groups living in locales where anti-Semitism is pronounced or xenophobia targeting Hindu or Sikh land use applicants is acute,<sup>90</sup> this provides protective shelter from popular backlash and reassignment to a favorable judicial venue. Thus, causes of action advanced by the DOJ have the added protective effect of insulating religious minority groups—including aggrieved Muslim land use applicants confronting the backlash spurred by the ASM—while also producing more favorable results.<sup>91</sup>

Unilateral action against a local government by the DOJ also puts the great force of the federal government behind an aggrieved party. As closely examined in Part III, the DOJ typically commences a fact-finding investigation into land use disputes before it files suit against a municipal board or planning commission.<sup>92</sup> This preliminary intervention enables the DOJ to work closely with the aggrieved party, oftentimes in conjunction with a civil rights or advocacy organization.<sup>93</sup> Led by the DOJ, these entities work in unison to negotiate a settlement that concludes the dispute without litigation and results in delivery of

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88. *Id.* In addition to lawsuits, RLUIPA empowers the DOJ to initiate investigations against local governments suspected of religious discrimination and the submission of amicus briefs supporting RLUIPA suits brought forward by aggrieved parties. 2016 DOJ RLUIPA REPORT, *supra* note 15, at 4.

89. *See* 42 U.S.C. § 2000cc-2(a). “A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.” *Id.*

90. *See* cases cited *supra* note 69.

91. 2016 DOJ RLUIPA REPORT, *supra* note 15 (depicting an increase in Muslim DOJ RLUIPA investigations following 2010).

92. 42 U.S.C. § 2000cc-2(f).

The United States may bring an action for injunctive or declaratory relief to enforce compliance with this chapter. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

*Id.*

93. *See, e.g., CAIR Civil Rights*, CAIR, [https://www.cair.com/civil\\_rights/cair-civil-rights](https://www.cair.com/civil_rights/cair-civil-rights) [<https://perma.cc/6HS3-J89P>] (describing the work of the Council on American-Islamic Relations, a prominent civil rights organization that serves clients who have been victims of discrimination).

the desired land use permit from the local governing body.<sup>94</sup> If a settlement cannot be reached, the DOJ will seek a federal court order to deliver the needed permit to enable the construction or use of the religious institution.<sup>95</sup>

As examined in the forthcoming Section, DOJ intervention in land use disputes involving Muslim parties has been vital to collective religious exercise, particularly from 2010 until the present.<sup>96</sup> This timespan converges with a moment when the Muslim population is growing in number and spreading into new regions of the country.<sup>97</sup> As examined in Part III, DOJ intervention is especially instrumental in areas of the country with small and new Muslim communities, which are confronting the civic opposition incited by the ASM that brands mosques, Muslim cemeteries, and Muslim schools as ominous symbols of “Sharia takeover.”<sup>98</sup>

## B. LAND USE DISCRIMINATION AGAINST MUSLIMS

This Section analyzes land use discrimination targeting Muslims since RLUIPA’s enactment in 2000. It begins with an overview of the turbulent terrain Muslims navigated within and beyond the land use context after the 9/11 terror attacks, which took place one year after RLUIPA came into effect.<sup>99</sup> This is followed by analysis of the land use discrimination Muslims confronted in RLUIPA’s second decade—from 2010 through the present—which escalated in line with the emergence of the ASM.<sup>100</sup>

### 1. The Terrain

Land use discrimination is a less examined front of mounting state suspicion against Muslim communities. While law scholars have thoroughly examined discrimination against Muslim expression

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94. See, e.g., Rose French, *Feds Investigate Islamic Center’s Rejection*, STAR TRIB. (Oct. 30, 2012, 7:41 AM), <https://www.startribune.com/feds-investigate-islamic-center-s-rejection/176348731> [<https://perma.cc/T94H-DD28>].

95. See 42 U.S.C. § 2000cc–2(f).

96. See discussion *infra* Part I.B.

97. Mohamed, *supra* note 20.

98. See *infra* Part III. For a popular article that captured the ASM’s projection of “creeping Sharia” threats during its political emergence, see Brian Montopoli, *Fears of Sharia Law in America Grow Among Conservatives*, CBS NEWS (Oct. 13, 2010, 3:30 PM), <https://www.cbsnews.com/news/fears-of-sharia-law-in-america-grow-among-conservatives> [<https://perma.cc/JTR9-7EYF>].

99. See *infra* Part I.B.1. RLUIPA became effective policy on September 22, 2000. See 42 U.S.C. § 2000cc.

100. See *infra* Part I.B.2.

within employment,<sup>101</sup> law enforcement,<sup>102</sup> and counterterrorism,<sup>103</sup> differential treatment of Muslims within the land use context has garnered only minimal attention—particularly during the recent spike in discrimination incited by the ASM. This scholarly void facilitates the popular view that land use discrimination against Muslims is declining or not as intense as the previous decade.

Close assessment of land use discrimination statistics and case law reveals that the very opposite is true.<sup>104</sup> A year before the 9/11 terror attacks and the horrific uptick in anti-Muslim discrimination that followed,<sup>105</sup> RLUIPA restored expanded protection to religious groups within the land use context.<sup>106</sup> This enhanced protection was especially timely for Muslims confronting mounting counterterror suspicion from federal agents, their local law enforcement proxies, and most violently, private hatemongers.<sup>107</sup> This “shared rage” unleashed on Muslim communities by state policy and vigilante violence

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101. See generally Sahar F. Aziz, *Coercive Assimilationism: The Perils of Muslim Women's Identity Performance in the Workplace*, 20 MICH. J. RACE & L. 1 (2014), for a leading examination of employment discrimination experienced by Muslim women—and, in response to that discrimination, strategies adopted by Muslim women to convey their racial and religious expression in ways that diminish the prospect of animus.

102. See Emmanuel Mauleón, *Black Twice: Policing Black Muslim Identities*, 65 UCLA L. REV. 1326 (2018) (investigating how Black Muslim populations face multiple forms of counterterror policing on account of their combined racial and religious identity).

103. See Samuel J. Rascoff, *Establishing Official Islam? The Law and Strategy of Counter-Radicalization*, 64 STAN. L. REV. 125 (2012), for an analysis of how federal counter-radicalization surveillance programs erode the religious liberty of targeted Muslim populations and clash with establishment clause protections. See also Amna Akbar, *Policing “Radicalization,”* 3 U.C. IRVINE L. REV. 809 (2013), for a critical assessment of how counter-radicalization policing ties the religious behaviors of Muslims to terror suspicion.

104. See U.S. DEP'T OF JUST., REPORT ON THE TENTH ANNIVERSARY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT (2010) [hereinafter TENTH ANNIVERSARY RLUIPA REPORT], [https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/rluipa\\_report\\_092210.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/rluipa_report_092210.pdf) [<https://perma.cc/3BGC-CSV9>]. More than thirteen percent of DOJ land use discrimination investigations involved a Muslim claimant. *Id.* at 6.

105. See Akram & Johnson, *supra* note 55. See also Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259 (2004), for a trenchant analysis of the impact counterterror policy enacted in the wake of the 9/11 terror attacks had on inciting vigilante violence unleashed by private actors against Muslim and perceived-Muslim individuals. Anti-Muslim hate crimes proliferated by more than 1600% in 2001, with 481 separate anti-Islamic incidents. UNIF. CRIME REPORTING PROGRAM, FBI, HATE CRIME STATISTICS (2001), <https://ucr.fbi.gov/hate-crime/2001> [<https://perma.cc/T5TV-KP69>].

106. See generally 42 U.S.C. § 2000cc.

107. See Akram & Johnson, *supra* note 55, at 331–45 (discussing the “dragnet” by law enforcement and the federal government of Muslim minorities post-9/11).

trickled into the land use realm,<sup>108</sup> with RLUIPA responding during its embryonic stages to protect Muslim land use requests from religious animus swelling within local governments.<sup>109</sup> Indeed, municipal boards and planning commissions were prone to the very same anti-Muslim suspicion that gripped governmental actors on the state and federal levels after 9/11.<sup>110</sup>

The protection of RLUIPA proved transformative for Muslim land use applicants during 9/11's turbulent aftermath. RLUIPA constricted the legal shelter *Smith* furnished local governments to deny Muslim land use requests behind the entangled veil of subtlety and national security.<sup>111</sup> It empowered the DOJ to unilaterally commence RLUIPA investigations and causes of action on behalf of shell-shocked Muslim communities.<sup>112</sup> RLUIPA emerged at a time when Muslims seeking to establish mosques, cemeteries, schools, and secular institutions found themselves interlocked between local governments and constituents beholden to sharp anti-Muslim attitudes.<sup>113</sup> In turn, it extended protective measures and proactive mechanisms against a hateful front that an unchecked *Smith* regime would have emboldened within the land use realm and adjacent terrains of Muslim American life.<sup>114</sup>

## 2. The Present

Discrimination against Muslim land use requests has risen markedly since the post-9/11 period.<sup>115</sup> In a study published in 2016, the DOJ found that the percentage of RLUIPA investigations involving mosques or Islamic schools rose "from 15% in the 2000 to August 2010 period to 38% during the period from September 2010 to the present."<sup>116</sup> Again, the ASM's emergence in 2010 and its mandate of banning Sharia law mainstreamed a form of threat intimately

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108. See generally Ahmad, *supra* note 105.

109. TENTH ANNIVERSARY RLUIPA REPORT, *supra* note 104, at 5–6.

110. See *id.*

111. See *supra* notes 67–74 and accompanying text.

112. 42 U.S.C. § 2000cc–2(f).

113. See *supra* notes 53–55 and accompanying text.

114. See *supra* notes 53–55 and accompanying text. One commentator observed, "RLUIPA did not attempt simply to reverse *Smith*, as RFRA did; rather, it defined 'religious exercise' to include the use of a plot of land for religious purposes, and it added 'equal terms' and anti-exclusion causes of action." Note, *supra* note 53, at 2196.

115. "[T]he sharp increase in total RLUIPA cases involving mosques and Islamic schools is a matter for concern and attention, even when those cases do not involve explicit anti-Muslim animus." 2016 DOJ RLUIPA REPORT, *supra* note 15, at 6.

116. *Id.* at 4 (citing TENTH ANNIVERSARY RLUIPA REPORT, *supra* note 104).

connected to land,<sup>117</sup> reflected by an over 150% increase in DOJ RLUIPA investigations from the previous decade.<sup>118</sup>

As a result, Muslim parties seeking to establish mosques, cemeteries, and schools in locales where state legislatures introduced or enacted anti-Sharia bills were confronted with zealous opposition from local governments and their constituents.<sup>119</sup> Thus, the emergence and immediate appeal of the ASM, combined with the pointedly anti-Muslim posture of the Trump administration,<sup>120</sup> elucidate why land use discrimination against Muslims more than doubled from 2010 through the present, compared to the previous decade.

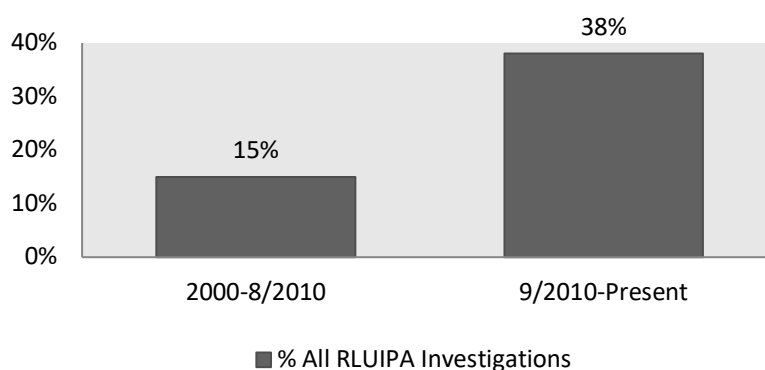


Figure 1 | DOJ RLUIPA Investigations Involving Muslim Claimants<sup>121</sup>

117. See *infra* Part III.

118. See 2016 DOJ RLUIPA REPORT, *supra* note 15, at 4 (noting that investigations increased from 15% between 2000 and 2010 to 38% between 2010 and 2016). Although its legal mandate focused on banning the citation of Sharia law by state courts, it capitalized on state legislative channels as a vehicle for a far broader objective. This is closely examined in Part II of this Article.

119. See *supra* notes 104–11 and accompanying text.

120. For a chronological log of President Trump's anti-Muslim pronouncements, see Jenna Johnson & Abigail Hauslohner, *I Think Islam Hates Us: A Timeline of Trump's Comments About Islam and Muslims*, WASH. POST (May 20, 2017, 2:16 PM), <https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims> [<https://perma.cc/5NVG-GRP9>]. While critics of the travel ban executive order cite these statements as indicative of his intent to discriminate against Muslims, the Supreme Court in *Trump v. Hawaii* ruled otherwise. 138 S. Ct. 2392, 2408 (2018) (“The President lawfully exercised that discretion based on his finding . . . that entry of the covered aliens would be detrimental to the national interest.”).

121. 2016 DOJ RLUIPA REPORT, *supra* note 15, at 4.

Muslim land use disputes (38%) account for nearly the same percentage of DOJ RLUIPA investigations as Christian claimants (45%) between September 2010 and July 2016.<sup>122</sup> This figure is especially staggering given that the Muslim population in the United States only encompassed 3.45 million people, which was roughly one percent of the entire population.<sup>123</sup> On the other hand, over seventy percent of the American population identify as Christian,<sup>124</sup> which accounts for roughly 233.7 million people.<sup>125</sup> In comparison, the Mormon population is nearly double the size of the Muslim population in the United States.<sup>126</sup> These demographic comparisons illustrate the severity of land use discrimination against Muslim claimants.

Comparative analysis of land use discrimination faced by other minority faith groups sheds even greater light on the disproportionate land use discrimination faced by Muslims in the current decade. Between September 2010 and July 2016, the DOJ found that Muslims were nineteen times more likely than Hindus,<sup>127</sup> almost ten times more likely than Buddhists,<sup>128</sup> and approximately four times more likely than Jewish applicants to have their land use petitions denied on account of their religious identity.<sup>129</sup> Figure 2, below, offers a graphic illustration of the comparative discrimination across faith group lines.

Although land use discrimination stands as a primary concern across minority religious lines, the DOJ observed that “[t]he increase in Muslim cases is the most significant development.”<sup>130</sup> This in turn renders the DOJ’s capacity to independently enforce RLUIPA

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122. *Id.* at 5.

123. Mohamed, *supra* note 20 (discussing a 2017 estimate of the Muslim population in the United States).

124. *Religious Landscape Study*, PEW RSCH. CTR., <https://www.pewforum.org/religious-landscape-study> [<https://perma.cc/FB2A-KPUM>] (including a breakdown of religious identification by state).

125. *See id.*; Dudley L. Poston, Jr., *3 Ways That the U.S. Population Will Change over the Next Decade*, PBS: NEWS HOUR (Jan. 2, 2020, 12:22 PM), <https://www.pbs.org/newshour/nation/3-ways-that-the-u-s-population-will-change-over-the-next-decade> [<https://perma.cc/DJF7-HCWV>] (estimating U.S. population to be approximately 331 million people).

126. *Religious Landscape Study*, *supra* note 124 (showing that the Mormon population makes up approximately 1.6% of the U.S. population).

127. Two percent of the land use investigations involved a Hindu petitioner. 2016 DOJ RLUIPA REPORT, *supra* note 15, at 5.

128. Four percent of the land use investigations involved a Buddhist petitioner. *Id.*

129. Eleven percent of the land use investigations involved a Jewish petitioner. *Id.*

130. *Id.* at 6.

compliance, and deter land use discrimination, disproportionately vital for Muslims.

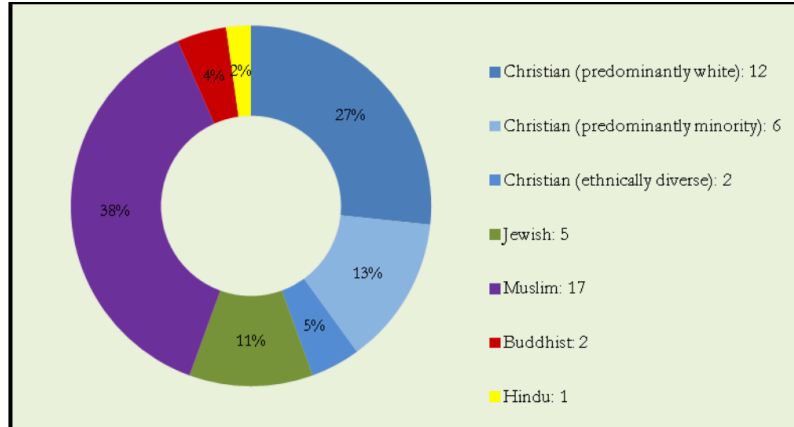


Figure 2 | DOJ RLUIPA Investigations by Religion (Sept. 2010–July 2016)<sup>131</sup>

In the face of higher incidence of anti-Muslim land use discrimination, RLUIPA's impact on resolving land disputes involving Muslim parties is also greater. The DOJ found that eighty-four percent of DOJ investigations involving non-Muslim parties were positively resolved without the United States or the aggrieved party filing a lawsuit against the local municipal body.<sup>132</sup> However, that figure drops to twenty percent in Islamic school and mosque cases.<sup>133</sup> This wide discrepancy illustrates a greater willingness on the part of local governments to settle land disputes with aggrieved Hindu, Christian, or Jewish parties and staunch refusal to do the same when the land use applicant is Muslim.<sup>134</sup> This heightened resistance to the creation of Muslim institutions speaks to the politically potent tropes that conflate them (and Islam at large) with terrorism and the influence of the ASM to project these castigatory views onto local governments presiding over land use applications.

131. *Id.* at 5 (showing data sourced from DOJ statistics).

132. *Id.* at 6. See Figure 3, at page 1826 of this Article, for a graphical depiction of this statistic.

133. 2016 DOJ RLUIPA REPORT, *supra* note 15, at 6.

134. "While it is encouraging that so many RLUIPA cases are resolved once a local government is informed of its obligations under RLUIPA, the sharp disparity between Muslim and non-Muslim cases in this regard is cause for concern." *Id.*



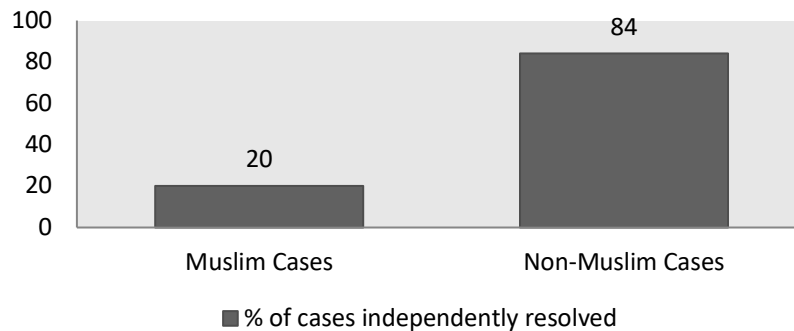


Figure 3 | DOJ Investigations Resolved Without RLUIPA Suit<sup>135</sup>

In light of the intense discrimination against Muslims on the land use application and resolution fronts, the DOJ's ability to unilaterally commence a RLUIPA cause of action against local governments is especially salient for Muslim *life*—not merely Muslim land use.<sup>136</sup> By compelling hostile local governments to extend land use permits by way of litigation, or the threat of litigation, the DOJ is driving mosques and community spaces, Muslim cemeteries and schools, into existence within the very towns where local governments are invested in preventing them.

As closely examined in Part IV, this federal enforcement power has a transformative impact on Muslim life within locales such as Culpeper, Virginia, or Farmersville, Texas,<sup>137</sup> rural and remote towns where no mosque or Muslim cemetery has ever been established.<sup>138</sup> As illustrated most vividly through these examples, RLUIPA blazes

135. *Id.*

136. 42 U.S.C. § 2000cc-2(f).

137. Land dispute cases involving these two towns will be closely examined in Part III of this Article. *See infra* Parts III.A.1, B.1.

138. *See infra* Part IV. The reverse can also be true. The creation of Muslim institutions in areas where they never existed may, gradually, transform the attitudes and views of opponents to be more accepting of Muslims in their community and their faith. Great familiarity, or “contact,” with Muslims can engender tolerance and even affinity where opposition and Islamophobia once existed. This phenomenon of building bridges across groups has been dubbed “contact theory” by scholars examining intergroup animus against LGBTQ communities. *See* Brian F. Harrison & Melissa R. Michelson, *Contact Theory and the Distinct Case of LGBT People and Rights*, in OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS (Dec. 23, 2019), <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1174> [<https://perma.cc/65N6-EGXR>].

pathways for the realization of collective Muslim expression in areas where public opposition has emaciated it.<sup>139</sup>

For fledgling Muslim communities in Virginia and Texas, or the more mature Muslim populations that have withstood the state and popular backlash of the previous decade,<sup>140</sup> plans to establish religious institutions have become increasingly daunting.<sup>141</sup> This is particularly the case when Muslim land use requests are being filed during a moment of intersecting hostility on the part of state legislators peddling anti-Sharia bills and the hatred they project onto municipal boards and planning commissions.<sup>142</sup> However, as illustrated by the statistics examined above and the case law analyzed below, RLUIPA has extended a bridge over the discriminatory divide widened by the ASM between mosques, Muslim cemeteries, and schools and the land use petitioners seeking to build them.<sup>143</sup>

## II. BETWEEN LAW AND RAGE

An inquiry into the anatomy of the movement driving land use discrimination against Muslims is an essential prerequisite to understanding rising municipal opposition to mosques, Muslim cemeteries, and Muslim schools. The ASM emerged in 2010—ten years after Congress enacted RLUIPA—and gained political and popular momentum in the decade that followed.<sup>144</sup> Manifesting the ASM's impact on local governments across the country, that very year also marked the prolific increase in land use discrimination investigations involving Muslim parties, which comprised thirty-eight percent of all RLUIPA DOJ investigations from September 2010 to July 2016.<sup>145</sup>

The emergence of the ASM as a national movement and the rise in land use discrimination cases involving Muslims are deeply correlated. While federal counterterrorism policy assigned the presumption of terror suspicion on Muslim individuals,<sup>146</sup> anti-Sharia bills have the effect of marking Muslim religious institutions as the material coming

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139. As a result, this enables and expands the “protective expression” of religious identity within Muslim institutions. Sudeall Lucas, *supra* note 84, at 89.

140. See 2016 DOJ RLUIPA REPORT, *supra* note 15.

141. *Id.*

142. See *infra* Part II.

143. See Figure 4, at page 1835 of this Article, for a graphic of the number of anti-Sharia bills introduced in every state across the country.

144. See Ali, *supra* note 22 at 1064–66 (describing a proliferation of ASM legislative measures).

145. 2016 DOJ RLUIPA REPORT, *supra* note 15, at 4.

146. See Beydoun, *supra* note 31, at 111 (noting that structural policy legitimizes more than just dislike and fear of Muslims).

of Sharia law—a civilizational threat broader, and more ominous, than a mere terror threat.<sup>147</sup>

#### A. THE ANTI-SHARIA MOVEMENT

The ASM's discursive impact on local governments and the public dramatically outsized its legislative achievements.<sup>148</sup> The rift between the two, and the absence of legal scholarship addressing the latter's impact on Muslim life at large, has bred misguided views that the ASM fell short of its goals of enacting Sharia bans and is sputtering out today. Both are wrong.

Per the words of its architect, the fundamental aim of the ASM was heuristic.<sup>149</sup> The legislative bills introduced across the country were intended to prompt the question, "What is Sharia?" within households and the heart of rural and urban communities, and inside city councils and planning commissions.<sup>150</sup> The ASM was more of a mass (mis)education campaign fixated on winning hearts and minds within states where legislation was introduced than it was a political movement seeking to enact legislation.<sup>151</sup> Conservative politicians peddling copycat bills served as the optimal conduits to project the message that Islam, using state courts as its Trojan horse, was bent on taking over the country one community at a time.<sup>152</sup> This Section surveys the political anatomy and objectives of the ASM and its national impact across geographic and political boundaries.

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147. For example, residents of Wilson, Wisconsin, stated, "I don't want [that mosque] in my backyard . . . [a Muslim's] goal is to wipe out Christianity around the world." Barbara Abel & Julia Lieblich, *Rural Controversy: A Mosque in Sheboygan*, TIME (Aug. 19, 2010), <http://content.time.com/time/nation/article/0,8599,2011842,00.html> [<https://perma.cc/9N3S-B7SQ>].

148. "Discursive" relates to the messages deployed and disseminated by the ASM and the influence it has over private and state actors.

149. David Yerushalmi, a lawyer that has drafted legislation portraying Sharia as a great threat to the United States, revealed, "If this [anti-Sharia legislation] passed in every state without any friction, it would have not served its purpose . . . . The purpose was heuristic—to get people asking this question, 'What is Shariah?'" Andrea Elliott, *The Man Behind the Anti-Shariah Movement*, N.Y. TIMES (July 30, 2011), <https://www.nytimes.com/2011/07/31/us/31shariah.html> [<https://perma.cc/AN4G-EADC>].

150. *Id.*

151. "If you can't move policy at the federal level, well, where do you go? . . . You go to the states," stated Yerushalmi, showing the ASM's focus on the states as the forums to mobilize popular and political opposition to Sharia law. *Id.*

152. See *Why American Laws for American Courts?*, AM. L. FOR AM. CTS. [hereinafter *ALAC Model Statute*], <http://americanlawsforamericancourts.com> [<https://perma.cc/3B5H-L9WY>] (presenting "model" anti-Sharia ALAC legislation).

## 1. The Campaign

2010 marked a second highpoint in the course of “American Islamophobia.”<sup>153</sup> Converging political currents ripened the soil for the rise of the ASM and the deep political and popular impact it would have in the decade. Two years into his first term, President Obama faced a barrage of rumors, propagated by elements on the Right, that he was “secretly a Muslim.”<sup>154</sup> The upstart Tea Party captured scores of congressional seats in the 2010 mid-term election from Democrats and emerged as an influential player on the national political scene.<sup>155</sup> And, nearly a decade after the 9/11 terror attacks, an embellished controversy around the “Ground Zero mosque” further fueled anti-Muslim fervor across the country.<sup>156</sup>

Together, these events and the War on Terror (continuing into its second decade) created a landscape for the ASM to register unprecedented support among reactionary legislators across the nation.<sup>157</sup> The symbiotic relationship between the ASM and its legislative interlocutors proved beneficial to both: the introduction of anti-Sharia bills would shore up voting bases for far right legislators and carry the anti-Sharia message and mission deep inside the halls of state legislatures and ancillary government bodies.

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153. The Author dubs “American Islamophobia” as the nearly two decades’ long climate and culture of anti-Muslim hostility that followed the 9/11 terror attacks. For a more comprehensive analysis, see generally KHALED A. BEYDOUN, *AMERICAN ISLAMOPHOBIA: UNDERSTANDING THE ROOTS AND RISE OF FEAR* (2018).

154. See *Republicans Believe Obama Is Muslim*, PEW RSCH. CTR.: FACT TANK (Sept. 13, 2010), <https://www.pewresearch.org/fact-tank/2010/09/13/republicans-believe-obama-is-a-muslim> [<https://perma.cc/EU87-2K2S>]. Donald Trump has been one of the most resounding propagators of this rumor, which became part of his “birther” conspiracy in 2011. See, e.g., Chris Moody & Kristen Holmes, *Donald Trump’s History of Suggesting Obama Is a Muslim*, CNN POL. (Sept. 18, 2015, 9:04 PM), <https://www.cnn.com/2015/09/18/politics/trump-obama-muslim-birther/index.html> [<https://perma.cc/WW28-CUGT>].

155. See John H. Aldrich, Bradford H. Bishop, Rebecca S. Hatch, D. Sunshine Hillygus & David W. Rohde, *Blame, Responsibility, and the Tea Party in the 2010 Midterm Elections*, 36 POL. BEHAV. 471 (2014), for a political analysis that argues how rising popular opposition to President Obama and a recovering economy contributed to the success of the Tea Party in the 2010 midterm elections.

156. Chris McGreal, *Ground Zero Mosque Plans ‘Fueling Anti-Muslim Protests Across the US,’* GUARDIAN (Aug. 12, 2010, 3:01 PM), <https://www.theguardian.com/world/2010/aug/12/ground-zero-mosque-islamophobia> [<https://perma.cc/WX4L-EB9B>] (discussing a battle for plans to construct a mosque near the 9/11 World Trade Center site).

157. “The ‘teavangelicals,’ as they have been dubbed, are an emotional and vocal crew and have been on the frontlines of the Sharia scare that continues to grip the nation . . . .” NATHAN LEAN, *THE ISLAMOPHOBIA INDUSTRY: HOW THE RIGHT MANUFACTURES FEAR OF MUSLIMS* 11 (2012).

The anti-Sharia model statute provided the legislative template for the Movement. Titled “American Laws for American Courts” (ALAC), the model statute provided the boilerplate language for state legislators seeking to introduce copycat, or analogous, bills:

The [general assembly/legislature] finds that it shall be the public policy of this state to protect its citizens from the application of [Sharia law] when the application of a foreign law will result in the violation of a right guaranteed by the constitution of this state or of the United States, including but not limited to due process, freedom of religion, speech, or press, and any right of privacy or marriage as specifically defined by the constitution of this state.<sup>158</sup>

The per se objective of the model statute—to prohibit state courts from citing Sharia law—was narrow.<sup>159</sup> However, its prefatory language not only superseded its intended technical effect<sup>160</sup> but also revealed the genuine intent of its framer. Sharia and Islamic law were characterized as antithetical to core constitutional liberties<sup>161</sup> and oriented as a civilizational threat to American life.<sup>162</sup> More than a mere terror threat, the ASM positioned Islam as the existential nemesis of the United States, and it projected these fears onto Muslim institutions—particularly mosques and other religious institutions.

Moreover, the model statute offered no definition of “Sharia” or Islamic law.<sup>163</sup> This enabled proponents of legislative proposals to

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158. *ALAC Model Statute*, *supra* note 152.

159. *Id.*

160. The model statute sought to prohibit state courts from citing Islamic law. However, bills inspired by the model statute had broader scopes. The most notable example of this is the Tennessee bill enacted in 2011, which included criminal action against parties that are part of any “Sharia organizations” which it defined as “two (2) or more persons conspiring to support, or acting in concert in support of, sharia or in furtherance of the imposition of sharia within any state or territory of the United States.” S. 1028, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011). The bill’s ambiguous definition of “sharia” seemed intentional, which extended great latitude to the courts and law enforcement.

161. “America has unique values of liberty which do not exist in foreign legal systems, particularly Shariah Law. Included among . . . those values and rights are: Freedom of Religion, Freedom of Speech, Freedom of the Press, Due Process, Right to Privacy, [and] Right to Keep and Bear Arms.” *ALAC Model Statute*, *supra* note 152.

162. “Unfortunately, increasingly, foreign law and legal doctrines, including Shariah law principles, are finding their way into US court cases. Reviews of state laws provide extensive evidence that foreign laws and legal doctrines are introduced into US state court cases, including, notably, Islamic law known as Shariah . . .” *Id.*

163. This was likely by design. The ASM sought to fill this vacuum with existing misconceptions of Sharia law, which were shaped by “the redeployment of old Orientalist tropes” after 9/11 that cast Islam as foreign, violent, and un-American. See Leti Volpp, *The Citizen and the Terrorist*, 49 *UCLA L. REV.* 1575, 1586 (2002), which references the longstanding misrepresentations branded upon Islam and Muslims by the epistemological dialectic Edward Said coined as “Orientalism.” Said theorized this dialectic as a process whereby the West, or the “Occident,” defined itself as the mirror

frame Sharia in line with their political views and interests. In light of the times in which the model statute was introduced, this statutory ambiguity invited merciless and maligned definitions of Islam as a system inherently wed to violence and “conquest”<sup>164</sup> and provided a strategic void that reactionary politicians were keen on filling with vile caricatures of Islam.<sup>165</sup>

Legislation adopting or inspired by the model statute quickly followed. Fourteen bills were introduced in 2010, and fifty-two bills were presented within state legislatures the following year.<sup>166</sup> The growing political presence of Tea Party politicians within state legislatures across the country drove the ASM’s political campaign forward, spurring the introduction of twenty-seven, thirty-five, and thirty bills in 2012, 2013, and 2014, respectively.<sup>167</sup> Buoyed by its immediate political success, the ASM’s popular resonance erupted, evidenced by the wave of anti-Sharia protests staged across the

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opposite image of the Muslim world, which comprised a segment of the “Orient.” See generally EDWARD W. SAID, *ORIENTALISM* (1978).

164. See Asifa Quraishi-Landes, *Five Myths About Sharia*, WASH. POST (June 24, 2016), [https://www.washingtonpost.com/opinions/five-myths-about-sharia/2016/06/24/7e3efb7a-31ef-11e6-8758-d58e76e11b12\\_story.html](https://www.washingtonpost.com/opinions/five-myths-about-sharia/2016/06/24/7e3efb7a-31ef-11e6-8758-d58e76e11b12_story.html). Quraishi-Landes demystifies the tropes that “Sharia Law” is Islamic law, the widespread belief that “sharia is the law of the land” in Muslim-majority countries, that “Sharia is anti-woman,” that “Islam demands brutal punishments” and corporal punishment, and most germane to the political narrative pushed by Sharia bill proponents, that “Sharia is about conquest.” *Id.*

165. Bill Ketron, who introduced several anti-Sharia bills in Tennessee beginning in 2010, said the following of Islam (in relation to the Murfreesboro mosque dispute, closely examined in Part IV.A of this Article):

What if they put in something that’s dangerous to the citizens or the children of the neighborhood? . . . There should be notice of what’s changing. Does the KKK have a church? Do snake handlers have a church? Those are things that should be brought out to the general public. The more transparent we are to the general public, the better off we are.

Jeff Woods, *Ketron Compares Muslims to Snake Handlers*, NASHVILLE SCENE (July 1, 2010, 9:00 AM), <https://www.nashvillescene.com/news/pith-in-the-wind/article/13034608/ketron-compares-muslims-to-snake-handlers> [<https://perma.cc/PF8Q-437C>].

166. Swathi Shanmugasundaram, *Anti-Sharia Law Bills in the United States*, S. POVERTY L. CTR. (Feb. 5, 2018), <https://www.splcenter.org/hatewatch/2018/02/05/anti-sharia-law-bills-united-states> [<https://perma.cc/UN47-B9SY>].

167. *Id.*

country<sup>168</sup> and the marked uptick in land use discrimination against Muslims beginning in 2011.<sup>169</sup>

At the height of its momentum, the ASM faced legal challenges that forced it to change course. In the 2012 case *Awad v. Ziriax*, the Tenth Circuit Court of Appeals struck down the Oklahoma “Save Our State” anti-Sharia legislation on establishment clause grounds.<sup>170</sup> Despite the positive ruling, the litigation fed into the ASM’s grand design of keeping the discourse around Sharia law embedded in the headlines and on the lips of politicians, pundits, and private citizens. The effect of *Awad* on the ASM’s political campaign was minimal, as the campaign’s architect David Yerushalmi replaced “Shariah law” with “foreign law” in the model statute<sup>171</sup> and instructed state legislators pushing copycat bills to do the same. However, unlike the intellectual discourse among jurists and scholars debating the place of foreign law in American courts,<sup>172</sup> the ASM wholly conflated foreign law with Islamic law: the intended and only target.<sup>173</sup>

The rise of Donald Trump onto the national political scene in 2015 provided the ASM with a presidential candidate who trumpeted

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168. A number of these protests were held in front of mosques. See, e.g., Tom Dart, *Protesters Decry Islam Outside Phoenix Mosque: ‘They Want To Take Over,’* GUARDIAN (Oct. 10, 2015, 6:34 PM), <https://www.theguardian.com/us-news/2015/oct/10/anti-islam-protest-phoenix-islamic-community-center> [<https://perma.cc/GA2G-ZRLZ>]. The Phoenix protest was one of many anti-Islam protests held in front of mosques on the weekend of October 10, 2015. *Id.*

169. 2016 DOJ RLUIPA REPORT, *supra* note 15, at 4.

170. *Awad v. Ziriax*, 966 F. Supp. 2d 1198, 1206 (W.D. Okla. 2013), *aff’d*, 670 F.3d 1111 (10th Cir. 2012).

Having reviewed the numerous statements by the legislators who authored the amendment, it is abundantly clear that the primary purpose of the amendment was to specifically target and outlaw Sharia law and to act as a preemptive strike against Sharia law to protect Oklahoma from a perceived “threat” of Sharia law being utilized in Oklahoma Courts.

*Id.*

171. *ALAC Model Statute*, *supra* note 152.

172. Law scholars, including Steven G. Calabresi, view the United States and its courts as part of a global legal community. In line with this internationalist perspective, comity and engagement with the opinions and rulings of foreign courts can be instructive or persuasive authority for American judges. See Steven G. Calabresi & Bradley G. Silverman, *Hayek and the Citation of Foreign Law: A Response to Professor Jeremy Waldron*, 2015 MICH. ST. L. REV. 1, 18. Meanwhile, thinkers including Eugene Volokh and Justice Antonin Scalia are fearful of foreign law’s capacity to influence and even redefine constitutional principles. See Eugene Volokh, *Foreign Law in American Courts*, 66 OKLA. L. REV. 219 (2014).

173. This is further revealed in the ALAC model statute, which only makes specific mention of “Shariah Law” and no other “foreign” legal systems in its prefatory passages. *ALAC Model Statute*, *supra* note 149.

the very anti-Muslim rhetoric it peddled.<sup>174</sup> Trump's presidential victory fueled the ASM with increased momentum to churn out thirty-three, twelve, fourteen,<sup>175</sup> and twenty-one more bills from 2015 through 2018, respectively.<sup>176</sup> The Trump presidency availed the ASM and conservative politicians peddling bills with a de facto spokesman that promoted the same messages of "Sharia takeover" and "civilizational threat" from the highest office in the land.<sup>177</sup> In fact, while on the campaign trail, Trump turned his ire toward American mosques, claiming, "We're going to have no choice [but to close some mosques]."<sup>178</sup> Such statements by Trump intensified the very fears projected by the ASM that mosques and Muslim religious institutions at large symbolized national security and civilizational threats.

From 2010 to 2016, the ASM inspired the introduction of 194 anti-Sharia bills.<sup>179</sup> Eighteen bills were enacted, with several state legislatures debating copycat bills.<sup>180</sup> Thus far, all but seven of the fifty states have had at least one anti-Sharia bill introduced within their

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174. See Khaled A. Beydoun, "Muslim Bans" and the (Re)Making of Political Islamophobia, 2017 U. ILL. L. REV. 1733, 1756-60 (detailing President Trump's "Muslim ban" and other anti-Muslim rhetoric).

175. Shanmugasundaram, *supra* note 166.

176. The Author counted this number of anti-Sharia bills introduced in 2018.

177. Trump's rhetoric embraces the view that the United States, and the West at large, is engaged in a civilizational war with Islam. This belief was revealed by his infamous "I think Islam hates us" statement made in response to a question by CNN's Anderson Cooper six months before winning the 2016 presidential election. Theodore Schleifer, *Donald Trump: 'I Think Islam Hates Us'*, CNN POL. (Mar. 10, 2016, 5:56 PM), <https://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/index.html> [<https://perma.cc/MWU5-QEH3>]. Samuel P. Huntington popularized this worldview, which orients Islam as the West's civilizational nemesis. See generally SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996). Huntington's theory, dubbed the "clash of civilizations," did not narrowly pit the United States against "Islamic fundamentalism," but the whole of Islam. See Samuel P. Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFFS. 22 (1993).

178. Nick Gass, *Trump: 'Absolutely No Choice' But To Close Mosques*, POLITICO (Nov. 18, 2015, 6:45 AM), <https://www.politico.com/story/2015/11/trump-close-mosques-216008> [<https://perma.cc/PU69-YCRQ>].

179. See ELSADIG ELSHEIKH, BASIMA SISEMORE, & NATALIA RAMIREZ LEE, HAAS INST. FOR A FAIR & INCLUSIVE SOC'Y, *LEGALIZING OTHERING: THE UNITED STATES OF ISLAMOPHOBIA 8* (2017), [https://belonging.berkeley.edu/sites/default/files/haas\\_institute\\_legalizing\\_othering\\_the\\_united\\_states\\_of\\_islamophobia.pdf](https://belonging.berkeley.edu/sites/default/files/haas_institute_legalizing_othering_the_united_states_of_islamophobia.pdf) [<https://perma.cc/ATM7-PKBU>].

180. *Id.*; see also Dustin Gardiner & Mark Olaide, *These Copycat Bills on Sharia Law and Terrorism Have No Effect. Why Do States Keep Passing Them?*, USA TODAY (Nov. 19, 2019), <https://www.usatoday.com/in-depth/news/investigations/2019/07/17/islam-sharia-law-how-far-right-group-gets-model-bills-passed/1636199001> [<https://perma.cc/3WAP-FPG4>] (discussing states with anti-Sharia bills currently being debated within their legislatures and, more broadly, the considerable influence the ASM still holds as it transitions into its second decade).



state legislatures.<sup>181</sup> This national reach illustrates that ASM's political and discursive impact is hardly confined to any one region.

## 2. Base Audience

The ASM's legal campaign found the most resonance within "red states,"<sup>182</sup> where the highest numbers of anti-Sharia bills were introduced.<sup>183</sup> Since 2018, the majority of the total 216 anti-Sharia bills were introduced in red states. The ASM found its most receptive audiences within "deep red states,"<sup>184</sup> such as Texas, Mississippi, and Indiana, where the highest number of anti-Sharia bills were introduced—with twenty-one, twenty, and thirteen bills, respectively.<sup>185</sup>

Figure 4, below, illustrates the intimate correlation between the political composition of state legislatures and the number of anti-Sharia bills introduced. The number of introduced bills indicates the political commitment on the part of a legislator (or group of legislators) to enact a bill and, more saliently, to keep the fears centering on Sharia a prominent subject of discussion within the state senate, house of representatives, and, ideally for the ASM, both.

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181. *Islamophobia: Overview of Bills*, OTHERING & BELONGING INST. UC BERKELEY (2018), <https://belonging.berkeley.edu/global-justice/islamophobia> [<https://perma.cc/76QJ-K69L>].

182. This Article defines "red states" as states with majority Republican state legislatures. See *State Partisan Composition*, NAT'L CONF. ST. LEGISLATURES (Sept. 8, 2020), <https://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx> [<https://perma.cc/WEY3-XDFQ>].

183. Compare *Islamophobia: Overview of Bills*, *supra* note 181, with *State Partisan Composition*, *supra* note 182.

184. This Article defines "deep red states" as Republican "trifectas," wherein the state legislature and the gubernatorial seat are held by Republicans. See *State Government Trifectas*, BALLOTPEdia, [https://ballotpedia.org/State\\_government\\_trifectas](https://ballotpedia.org/State_government_trifectas) [<https://perma.cc/WLM8-N2T9>].

185. *Islamophobia: Overview of Bills*, *supra* note 181.



Figure 4 | Number of Anti-Sharia Bills Introduced by State (2018)<sup>186</sup>

Twelve of the thirteen states that enacted anti-Sharia measures are red states.<sup>187</sup> Washington, which enacted anti-Sharia legislation in 2015,<sup>188</sup> is the only blue state among the thirteen.<sup>189</sup> Eleven states that enacted anti-Sharia legislation are definitively red states,<sup>190</sup> while Arizona's increasingly bipartisan legislature inches it closer to purple, swing-state status.<sup>191</sup> Louisiana and Tennessee were the first to enact anti-Sharia measures in 2010, followed by Arizona and Texas in 2011.<sup>192</sup> Tennessee, home to the Murfreesboro mosque opposed by town residents, is closely examined in Section IV.A. The most recent states to enact anti-Sharia bills are Arkansas and Texas, which passed copycat laws in 2017.<sup>193</sup>

186. The asterisk represents a blue state—or a state with a majority Democratic state legislature. Not depicted on the map: Connecticut (1), Delaware (2), Hawaii (1), New Hampshire (2), and Vermont (1). *Id.*

187. Compare *id.*, with *State Partisan Composition*, *supra* note 182.

188. See S. 5498, 64th Leg., 2015 Reg. Sess. (Wash. 2015).

189. See *State Partisan Composition*, *supra* note 182.

190. Compare *Islamophobia: Overview of Bills*, *supra* note 181, with *State Partisan Composition*, *supra* note 182.

191. See generally Reid Wilson, *Dems See Arizona Desert Blooming Blue*, HILL (Mar. 27, 2019, 6:00 AM), <https://thehill.com/homenews/state-watch/435948-dems-see-arizona-desert-blooming-blue> [<https://perma.cc/EM2T-6Y74>].

192. See *Islamophobia: Overview of Bills*, *supra* note 181.

193. *Id.*

| State          | Enacted | Scope                                     |
|----------------|---------|---|
| Arkansas       | 2017    | Courts restricted from citing foreign law |
| Alabama        | 2013    | Courts restricted from citing foreign law |
| Arizona        | 2011    | Courts restricted from citing foreign law |
| Florida        | 2014    | Courts restricted from citing foreign law |
| Kansas         | 2012    | Courts restricted from citing foreign law |
| Louisiana      | 2010    | Courts restricted from citing foreign law |
| Mississippi    | 2015    | Courts restricted from citing foreign law |
| North Carolina | 2013    | Restricted from citing foreign family law |
| Oklahoma       | 2013    | Courts restricted from citing Sharia law  |
| South Dakota   | 2012    | Courts restricted from citing Islamic law |
| Tennessee      | 2010    | Criminal restrictions against Sharia law  |
| Texas          | 2011    | Courts restricted from citing foreign law |
| Washington     | 2015    | Courts restricted from citing foreign law |

Figure 5 | States That Enacted Anti-Sharia Legislation<sup>194</sup>

Again, according to its architect, the ASM's heuristic and discursive impact is the true barometer of its success, rather than the passage of bills.<sup>195</sup> Enacted legislation is best understood as a windfall, with the real prize being the potency and penetration of the bills' messages into public life.

The ASM is still alive and pushing forward. A number of states, including Wyoming and Idaho, have introduced bills to prohibit state courts from citing Sharia law.<sup>196</sup> In addition to expanding vertically, the ASM has inspired collateral anti-Muslim legislation. In Tennessee, which enacted the most draconian anti-Sharia bill in 2011,<sup>197</sup> its proponent sought to pass a bill that would classify neighborhoods with mosques, Muslim schools, and other centers of Muslim life as "no-go zones"<sup>198</sup>—the idea being that these areas are places the public should

194. *Id.*

195. Elliott, *supra* note 149.

196. See *State Legislation Restricting Use of Foreign or Religious Law*, PEW RSCH. CTR. (Apr. 8, 2013), <https://www.pewforum.org/2013/04/08/state-legislation-restricting-use-of-foreign-or-religious-law> [https://perma.cc/99WG-YEY8].

197. The Tennessee legislation would make "adherence to Shariah a felony, punishable by up to fifteen years in prison." See Ali, *supra* note 22, at 1065.

198. See Julia Craven, *Tennessee's Latest Bill Bans Nonexistent Muslim 'No-Go Zones'*, HUFFPOST: POL. (Mar. 3, 2015, 6:19 PM), [https://www.huffpost.com/entry/tennessee-no-go-zones\\_n\\_6795028](https://www.huffpost.com/entry/tennessee-no-go-zones_n_6795028) [https://perma.cc/Z4PR-KUXP].

avoid because they have been fully taken over by Sharia law.<sup>199</sup> In Arkansas, the same representative who introduced the state's anti-Sharia legislation proposed a measure that would prohibit law enforcement from working with the Council on American-Islamic Relations (CAIR), the largest Muslim advocacy organization in the United States.<sup>200</sup>

The ASM's political reach and resonance is not limited to state legislatures. Its discursive imprint manifested as the actions of local governments and private citizens who signed petitions in favor of prospective anti-Sharia legislation, cast votes for politicians campaigning to "ban Sharia," and consumed the ubiquitous media that forewarned the oncoming menace of "Sharia law into their communities."<sup>201</sup>

#### B. DISCURSIVE EFFECT

The ASM's political campaign served as the strategic springboard for its mass mis-education campaign. The 216 bills introduced across forty-three states over the span of nearly a decade proved to be potent catalysts for stirring popular hysteria against the oncoming threat of Sharia law.<sup>202</sup> This hysteria was most pronounced in red states, where the majority of the anti-Sharia bills were introduced and twelve of the thirteen laws were enacted.<sup>203</sup>

Beyond just spreading hysteria, the ASM provoked action on the part of the masses to stand against the construction of mosques, Muslim cemeteries, and Muslim schools within their cities and towns—entities that they interpreted as the coming of Sharia law into their towns. Therefore, as envisioned by its architect and the legislators introducing and advancing bills within their state legislatures, the ASM sought to provoke public vigilance and action against the creation of Muslim institutions. This Section analyzes the discursive impact of

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199. See, e.g., David Emery, *Did Somali Muslims Take Over a Small Tennessee Town?*, SNOPEs (July 31, 2017), <https://www.snopes.com/fact-check/somali-muslims-tennessee-town> [<https://perma.cc/U6QP-J9WR>] (illustrating the popular view—and fear—that Muslims took over the small central Tennessee town of Shelbyville).

200. H.R. 1006, 92d Gen. Assemb., Reg. Sess. (Ark. 2019).

201. See David Mikkelson, *Was Sharia Law Established in Texas?*, SNOPEs (Aug. 14, 2016), <https://www.snopes.com/fact-check/sharia-law-texas>, for an example of media stoking the very fears behind the twenty-two anti-Sharia bills introduced in Texas. For an example of this brand of media fearmongering from a prominent anti-Muslim figure, see Pamela Geller, *Islamic Law Comes to Dearborn*, BREITBART (Apr. 22, 2011), <https://www.breitbart.com/national-security/2011/04/22/islamic-law-comes-to-dearborn> [<https://perma.cc/3TBT-X2NU>].

202. See *supra* Part II.A.2.

203. *Id.*

anti-Sharia legislation on the public, followed by how its mandate of prohibited Sharia law was projected onto municipal boards and planning commissions presiding over Muslim land use petitions.

### 1. Coercing Action

Scholars within and beyond legal academe have theorized the law's capacity to shape norms and drive culture.<sup>204</sup> Specifically, scholars have examined the law's potency to form views and behaviors among the polity during moments of crisis, most notably during times of traditional war or the lifespans of entrapping "forever wars."<sup>205</sup> War, whether conventional or existential, pronounces law's capacity to shape the ideas and drive the actions of an impassioned polity. The ASM, seizing upon the fears and passions stirred against Islam by the War on Terror, paints a more ominous threat of civilizational war against the Islamic faith and its conspicuous symbols.<sup>206</sup>

In *Law as Culture*,<sup>207</sup> law scholar Naomi Mezey builds on Michel Foucault's central thesis that law's discursive effect materially shapes popular ideas and behavior.<sup>208</sup> Mezey theorizes:

[L]aw's power is discursive and productive as well as coercive. Law participates in the production of meanings within the shared semiotic system of a culture, but is also a product of that culture and the practices that reproduce it . . . . As Alan Hunt explains, "[L]aw is implicated in social practices, as an always potentially present dimension of social relations, while at the same time . . . is itself the product of the play and struggle of social relations."<sup>209</sup>

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204. Here, the Author is referring to the "law" in the broadest sense. Specifically, law as an institution, which exercises its normative-making power typically through the acts of the executive, the courts, and per the focus of this Part of the Article, legislation.

205. The Author borrows the term "forever wars" from author Mark Danner to refer to the amorphous cultural or ideological campaigns the state formally refers to as wars, such as the War on Drugs or the War on Terror: campaigns that are far more than merely military standoffs between nations. See generally MARK DANNER, *SPIRAL: TRAPPED IN THE FOREVER WAR* (2016).

206. The ASM adopts the "clash of civilizations" worldview theorized by Huntington. See generally HUNTINGTON, *supra* note 177; Hatem Bazian, *Islamophobia, "Clash of Civilizations", and Forging a Post-Cold War Order!*, 9 RELIGIONS 228 (2018) (discussing Islamophobia in relation to Huntington's "clash of civilizations" theory); ELSHEIKH ET AL., *supra* note 179, at 26.

207. See generally Naomi Mezey, *Law as Culture*, 13 YALE J. L. & HUMANS. 35 (2001).

208. See generally MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977), for a seminal text by the French philosopher who theorizes the power of law in shaping cultural norms, examined within the scope of the French penal system.

209. Mezey, *supra* note 207, at 47 (citing ALAN HUNT, *EXPLORATIONS IN LAW AND SOCIETY: TOWARD A CONSTITUTIVE THEORY OF LAW* (1993)).

Mezey's framing of law as a fluid dialectic between law and members of the polity, or what sociologist Alan Hunt dubs a "constitutive theory of law,"<sup>210</sup> reveals the pointedly discursive mission of the ASM. More specifically, it elucidates the process by which the threats forewarned by anti-Sharia bills shape how local governments and members of the polity interpret Islam and ascribe meaning to its adherents and institutions. This discursive impact of law is more forceful during crisis, real or perceived.<sup>211</sup>

Stated simply, one may think about this theorized dialectic in terms of an interconnected network: first, a message; second, messengers; third, conduits; and fourth, a target audience. The threats posed by Sharia packaged in the ASM model statute, in this instance, comprise the bundle of messages. These core messages are carried forward by ASM brass nationally and state legislators within their home states, who function as the principal anti-Sharia messengers. Next, these messengers capitalize on the media, political campaigns, and state legislatures to disseminate their bundle of anti-Sharia messages to their respective audiences. The ASM's audience is a broad and national one, while the strategic audience for state legislators includes local governments, which include city boards and planning commissions presiding over land use applications made by Muslim parties. Figure 6, below, graphically illustrates the process and parts of this dialectic, highlighting how the ASM's expanding audience and appeal fuel its political momentum moving forward.

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210. ALAN HUNT, *EXPLORATIONS IN LAW AND SOCIETY: TOWARD A CONSTITUTIVE THEORY OF LAW* 3 (1993).

211. The ASM claims that the United States is interlocked in a civilizational war with Islam and a broader cultural war where its values are in jeopardy. *See supra* note 206 and accompanying text.

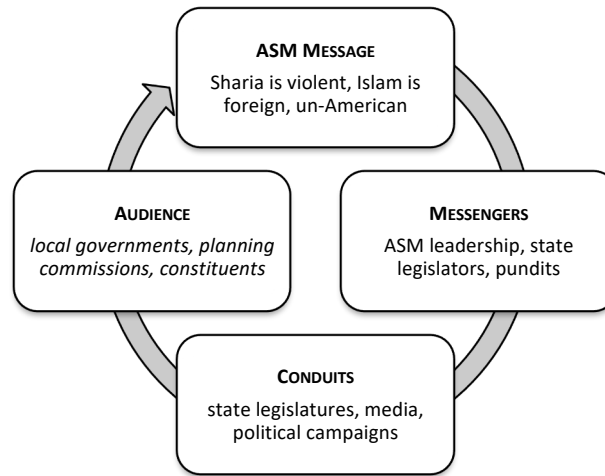


Figure 6 | The ASM as a Popular Dialectic

The “semiotic” bundle of meanings—such as foreign, violent, and un-American—the ASM ascribes to Islam<sup>212</sup> and Muslim institutions such as mosques, cemeteries, and schools is exceptionally menacing within contexts where the ASM is especially resonant. Within these contexts, Muslim institutions become standing symbols for the very threats flagged by the ASM and, in turn, zealously opposed. In his landmark work *Stigma*, noted social psychologist Erving Goffman dubbed these negative symbolic meanings assigned to collective groups, including faith groups and their religious institutions (such as synagogues or mosques targeted by anti-Semitic or anti-Muslim animus), “tribal stigmas.”<sup>213</sup>

More than merely disseminating negative messages and images about the threat of Sharia law, the ASM capitalizes on state legislation to provoke action against perceived symbols of that threat among the audience (citizenry). Mezey dubs this dynamic the “productive” power of law,<sup>214</sup> while legal philosopher Ekow N. Yankah observes the

212. Mezey, *supra* note 207, at 47 (using “semiotic” to explain the assignment of negative stereotypes and stigma to Muslim entities).

213. ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 11–12 (1963). Goffman’s analysis of tribal stigma is rooted in his foundational framing of “stigma” as “the situation of the individual who is disqualified from full social acceptance.” *Id.* at xi.

214. Mezey, *supra* note 207, at 47.

more forceful effect law has on human action as its “coercive power.”<sup>215</sup> Although both Mezey and Yankah focus on the law’s capacity to prompt action, the distinction between its productive and coercive power is a salient one for purposes of this Article. The coercive power of law—or a law’s increased capacity to spur action—entails greater impact.

The ASM’s coercive effect illustrates how it prompts both private and public actors to curtail the religious freedom of Muslims. Constitutional law scholar Lauren Sudeall Lucas’s framing of “projective claims of religious identity,” articulated in her article *The Free Exercise of Religious Identity*,<sup>216</sup> theorizes how Yankah’s articulation of coercive power unfolds to deny the free exercise rights of vulnerable groups, including Muslims within the land use context. By “imposing” a castigatory view of Islam as a means to prevent expression of Muslim identity and establishment of Muslim institutions,<sup>217</sup> the ASM’s projective impact is manifested by local governments that deny the land use requests of Muslim parties. Stated simply, the ASM’s anti-Muslim messages influence local governments to deny Muslims petitions to build mosques, cemeteries, and schools by branding them as subversive, sacrilegious, or uncivilized. In turn, this infringes upon the religious freedom of Muslims in order to accommodate the castigatory religious (and political) ideas imposed by the ASM.

As theorized above and analyzed closely in the five RLUIPA cases and controversies in Part III, the ASM’s coercive impact was not uniform across the country. A range of variables collectively impacts the reach and resonance of the ASM as well as the impact it has on local governments. Those variables include the frequency and number of anti-Sharia bills introduced within a state, the enactment of a law, the nature and gravity of the rhetoric surrounding the bill(s), the degree of media coverage, litigation, and the visible presence or lack of a Muslim population.

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215. Ekow N. Yankah, *The Force of Law: The Role of Coercion in Legal Norms*, 42 U. RICH. L. REV. 1195 (2008).

216. Sudeall Lucas, *supra* note 84, at 96.

217. *Id.*



## 2. Public Covenants

Since September 2010, the ASM's influence on Muslim land use determinations has been considerable.<sup>218</sup> The projective impact is illustrated by the civic opposition that brands Muslim land use requests for mosques, cemeteries, and schools as oncoming embodiments of Sharia law.<sup>219</sup> This high clip (36%) of DOJ investigations involving a Muslim land use request<sup>220</sup> and staunch refusal (80%) to settle Muslim land disputes without federal action manifests the coercive impact of the ASM on local governments.<sup>221</sup>

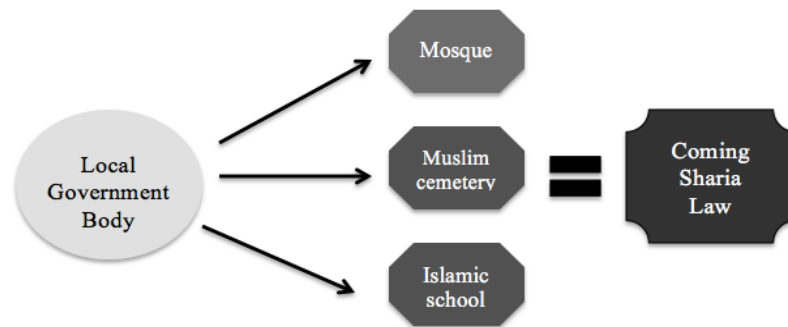


Figure 7 | Municipal Assignment of Sharia Threat to Muslim Institutions

Beyond statistics, this opposition manifests itself in three ways. First, local government bodies tasked with determining the legality of land use applications may have internal discriminatory motives<sup>222</sup> and may seek to build support among their constituents to support a negative ruling. This internal discriminatory motive may be explicit, or, as illustrated in *United States v. Pittsfield Charter Township*,<sup>223</sup>

218. See 2016 DOJ RLUIPA REPORT, *supra* note 15, at 3.

219. Sudeall Lucas, *supra* note 84, at 96 (using “projective identity” as a forceful imposition of one identity as a way to prevent or preempt another’s religious expression).

220. 2016 DOJ RLUIPA REPORT, *supra* note 15, at 4.

221. *Id.* at 6.

222. Government bodies like city planning commissions or boards are typically extended administrative authority to make land use determinations. *Legislative v. Quasi-Judicial Land Use Decisions*, IOWA ST. U.: EXTENSION & OUTREACH, <https://www.extension.iastate.edu/communities/legislative-v-quasi-judicial-land-use-decisions> [<https://perma.cc/PJX5-6CLP>].

223. No. 2:15-cv-13779 (E.D. Mich. Oct. 14, 2016).

examined in Section III.C, guised. This Article will refer to this brand of municipal opposition as a “public covenant.”

Second, popular opposition against a Muslim land use request may put pressure on local governments to deny it. In this instance, the discursive effect of the ASM pushes private citizens to coalesce against a proposed Muslim land use request and lobby the municipal board or planning commission to vote against a Muslim land use petition. Faced with this pressure and the political disincentives associated with disobeying popular will,<sup>224</sup> local governments may endorse the popular opposition against a Muslim land use request by rejecting an otherwise compliant petition. This de facto anti-Muslim covenant is illustrated in *United States v. County of Culpeper*<sup>225</sup> and more zealously in *United States v. Rutherford County*,<sup>226</sup> both of which are closely examined in Section IV.A. This Article will refer to this as a “popular covenant.”

Third, local government and the polity may mount a united front against the Muslim land use request whereby the anti-Muslim animus of the state is wholly shared and reinforced by constituents on the ground. This concerted opposition against Muslim land use requests is most prevalent in red states,<sup>227</sup> and it manifests the pronounced coercive impact of the ASM on the behavior of local government and the people, which are collectively invested in preventing the construction of a mosque, Muslim cemetery, or school. This entwined public opposition to Muslim land use requests is vividly illustrated in *United States v. City of Farmersville*,<sup>228</sup> analyzed in Subsection III.B.1. This Article will refer to this mode of land use opposition as an “aligned covenant.”

These three covenants frame the distinct forms of opposition feeding the uptick in land use discrimination faced by Muslims from 2010 through the present. The force of these covenants of religious rage, assessed through statistics and then theory, will next be closely examined through case law.

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224. Specifically, fear of losing political popularity and, for local government employees in elected positions, being voted out of office.

225. *United States v. Cnty. of Culpeper*, 245 F. Supp. 3d 758, 763 (2017).

226. *United States v. Rutherford Cnty.*, No. 12-0737, 2012 WL 2930076 (M.D. Tenn. July 18, 2012).

227. See *Anti-Muslim Activities in the United States 2012-2018*, NEW AM., <https://www.newamerica.org/in-depth/anti-muslim-activity> [<https://perma.cc/94MS-7SKJ>] (indicating much opposition to mosques, Muslim cemeteries, and schools from 2012 to 2018 occurred in red states).

228. *United States v. City of Farmersville*, No. 4:19-cv-00285 (E.D. Tex. Apr. 16, 2019).

### III. COVENANTS OF RELIGIOUS RAGE

The ASM's impact on local governments varies across geographic and political lines. The degree of coercion it places on local governments presiding over Muslim land use petitions, and their constituents, hinges on the resonance of the anti-Sharia bills within the state in which they were introduced. This resonance manifests itself in three distinct fronts—or covenants—of opposition: public covenants, popular covenants, and aligned covenants.

These distinct fronts of opposition share the common aim of preempting the creation of a Muslim institution. The five cases examined below illustrate how these fronts of opposition unfold during the course of land use disputes involving Muslim petitioners seeking to establish mosques, Muslim cemeteries, and Muslim schools.<sup>229</sup>

#### A. AGAINST MOSQUES

The majority of land use disputes involving Muslims from 2010 through the present involve the creation or expansion of a mosque. Mosques are, along with the headscarf,<sup>230</sup> Islam's most visible symbols. Beyond serving as a place for prayer and collective worship, mosques also function as lifelines for Muslim social, cultural, and civic engagement.

This Section examines the ASM's impact in coercing public opposition to mosques in Culpeper, Virginia, where a mosque has never stood before, and Murfreesboro, Tennessee, the site of a newly constructed mosque that became the epicenter of the state's anti-Muslim movement from 2011 through 2015.

##### 1. *United States v. Culpeper County*

William C. Chase approached the microphone to announce the Board of Supervisors's decision. Five years had passed since the Islamic Center of Culpeper (ICC) commenced its search for a mosque,<sup>231</sup>

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229. These five cases were chosen to highlight how the projective impact of the ASM unfolds distinctly across geographic, political, and socioeconomic lines. The cases arise from rural towns and suburbs, red and blue states, metropolitan areas with established Muslim communities and remote locales with sparse and new Muslim communities.

230. The headscarf, or "hijab," is commonly referred to as the "flag of Islam." It is perceived by many to be a quintessential symbol of the religion. See Julie Anne Taylor, Sanaa Ayoub & Fatima Moussa, *The Hijab in Public Schools*, 41 RELIGION & EDUC. 16, 26 (2014).

231. Complaint at 5, *United States v. Cnty. of Culpeper*, 245 F. Supp. 3d 758 (W.D. Va. Dec. 12, 2016) (No. 3:16-cv-0083) [hereinafter U.S. Culpeper Complaint].

which would be the first one ever in Culpeper County, Virginia.<sup>232</sup> Mohammad Nawabe, the ICC's director, purchased a structure that he planned to convert into a mosque for the county's small but growing Muslim community.<sup>233</sup> Per the instructions of the county's health department, Nawabe filed an application for a "pump and haul" permit,<sup>234</sup> which the Board had never denied before.<sup>235</sup> In fact, since 1992, the Board extended each and every one of the twenty-six applications for septic tank permits, including the nine applications filed by the town's churches.<sup>236</sup>

April 5, 2016, marked a land use precedent for the county. Before an audience of concerned townspeople, Chase announced the Board's 4-3 vote denying the ICC's application for a septic tank that would enable the creation of the county's first mosque.<sup>237</sup> The Board's denial was met with raucous cheers and applause from the audience.<sup>238</sup> This was a response that, given the popular resistance against the prospective mosque during the years preceding the Board hearing, manifested concern for more than just an administrative land use matter. On that day, the ICC and Islam, the target of four anti-Sharia bills introduced in the Virginia state legislature,<sup>239</sup> were on trial. The septic tank denial was pretext for religious discrimination, and the Board's final vote manifested assent to the popular opposition against a mosque being established in Culpeper County.

Public opponents of the planned mosque actively lobbied the Culpeper Board of Supervisors before they issued their final decision on the ICC's request.<sup>240</sup> Kurt Christensen, a "well-known civic leader," emailed Board members, the county administrator, and local media two days before the originally scheduled March hearing, writing, "[The ICC] wishes to rehabilitate the existing home [on the Property] and use it on a weekly basis as a place of prayer.... HMMMMMMMMM . . ." <sup>241</sup> He then ordered the Board to "pull th[e]

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232. *Id.* at 4.

233. *Id.* at 5.

234. A "pump and haul" is a septic tank system used when soil absorption on a property is insufficient for its stated use. *Id.*

235. *Id.* at 9.

236. *Id.* at 3.

237. *Id.* at 9.

238. *Id.*

239. *Islamophobia: Overview of Bills, supra* note 181.

240. U.S. Culpeper Complaint, *supra* note 231, at 7 ("Between the March 1 and April 5, 2016 Board meetings, the County received numerous emails and phone calls from constituents opposing ICC's pump and haul application.").

241. *Id.* at 6.

item from the March meeting agenda and give citizens a detailed briefing pronto.”<sup>242</sup>

Christensen urged the Board to convert an internal administrative matter into one of public concern.<sup>243</sup> His note was followed by scores of phone calls and emails sent to the Board from concerned Culpeper residents.<sup>244</sup> The content of their messages tied the ICC to terrorism and the 9/11 terror attacks,<sup>245</sup> echoing the very stereotypes peddled by anti-Sharia proponents within and beyond the state of Virginia.<sup>246</sup>

The Board assented to the popular call for a public hearing.<sup>247</sup> Concerned with the “barrage of emails and phone calls” from Culpeper residents, Board chairwoman Alexa Fritz emailed the county administrator three days before the hearing.<sup>248</sup> “It just keeps coming back to the same question—why is this request subject to more scrutiny and tighter interpretation of the policy than all the past requests?”<sup>249</sup> the administrator responded, indicating that the popular covenant opposing the ICC’s application had considerable influence on Fritz’s fellow Board supervisors. The surge of emails, phone calls, and private meetings with Board members emerged from the shadows and formed a raucous crowd inside the county building on the day of the hearing.<sup>250</sup> Taken by the size and zeal of the crowd, the Board capitulated to this private covenant by denying the ICC’s request to build a mosque.<sup>251</sup>

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242. *Id.*

243. Yerushalmi argued that “there is a link between ‘Shariah-adherent behavior’ in American mosques and support for violent jihad.” Elliott, *supra* note 149. This thinking entwines religious worship within mosques with terror activity, which spurs the suspicion displayed by Christensen’s email.

244. *United States v. Cnty. of Culpeper*, 245 F. Supp. 3d 758, 763 (W.D. Va. 2017).

245. *Id.*

246. In 2011, the DOJ filed a suit on behalf of the Muslim community in Henrico County, Virginia (approximately 100 miles south of Culpeper), whereby county officials “discriminated against the [planned] Mosque on the basis of religion or religious denomination, including making derogatory and discriminatory statements, and/or treating the Mosque’s application less favorably than similar applications by non-Muslim houses of worship.” Complaint at 4–5, *United States v. Cnty. of Henrico*, No. 3:11-cv-583 (E.D. Va. Sept. 6, 2011).

247. U.S. Culpeper Complaint, *supra* note 231, at 8 (“[The County Administrator] informed Chairwoman Fritz that he would be prepared to cover the questions raised by the community at the April 5 Board hearing.”).

248. *Id.* at 7.

249. *Id.* at 7–8.

250. *Id.* at 8 (noting that an audience was present at the hearing).

251. *Id.* at 9.

The Board's decision delivered what the townspeople wanted: prevention of the creation of the ICC mosque. As a result, the county's Muslims would have to continue praying "at a small house on the site of a used car dealership on Brandy Road"<sup>252</sup> or make the forty-five-minute drive to Charlottesville, Virginia, the site of the nearest mosque.<sup>253</sup> A septic tank permit, which the Board "granted as a matter of course, with little fanfare or scrutiny,"<sup>254</sup> emerged into a public referendum on Islam. It climaxed when the county endorsed the popular covenant that the religion, and their planned mosque, had no place in Culpeper.<sup>255</sup>

Seven months later, on December 12, 2016, the DOJ filed a RLUIPA complaint against the County of Culpeper.<sup>256</sup> The suit claimed that the Board's denial of the ICC's septic tank application discriminated against them on grounds of their Muslim identity.<sup>257</sup> The county ultimately settled a related case brought by the ICC directly, delivering the land use permit as part of the settlement, and the DOJ case was dismissed as moot.<sup>258</sup> The DOJ lawsuit overrode the public covenant that temporarily preempted the construction of the ICC mosque. This in turn opened the door for the creation of the first ever mosque in Culpeper County's 270-year history.<sup>259</sup>

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252. *Id.* at 4.

253. *Id.* ("There is no mosque in the County. The closest mosque is approximately forty-five minutes away by car, which is too far for most ICC members to drive for daily prayers.")

254. *United States v. Cnty. of Culpeper*, 245 F. Supp. 3d 758, 760 (W.D. Va. 2017).

255. *U.S. Culpeper Complaint*, *supra* note 231, at 10 ("In denying the ICC's application, the County has used its pump and haul application review process as a means for allowing land uses that it desires and excluding a use that it does not want in the County.")

256. *See id.*

257. The United States' complaint claimed that the County of Culpeper's denial of a pump and haul permit "imposed a substantial burden on the ICC's religious exercise in violation" of RLUIPA § 2000cc(a)(1). *Id.* Secondly, it discriminated on the basis of religion, in violation of § 2000cc(b)(2). *Id.*

258. *United States v. Cnty. of Culpeper*, No. 3:16-cv-00083, 2017 WL 3835601, at \*1 (W.D. Va. Sept. 1, 2017).

259. *See Allison Brophy Champion, After Resolution of Federal Lawsuit, Culpeper's First Mosque Is on Course for 2020*, RICH. TIMES-DISPATCH (Jan. 4, 2019), [https://www.richmond.com/news/virginia/after-resolution-of-federal-lawsuit-culpeper-s-first-mosque-is/article\\_06bf935f-4b03-59e6-9bf8ae63edb02e11.html](https://www.richmond.com/news/virginia/after-resolution-of-federal-lawsuit-culpeper-s-first-mosque-is/article_06bf935f-4b03-59e6-9bf8ae63edb02e11.html) [<https://perma.cc/8LSC-4CM3>].

## 2. *United States v. Rutherford County*

On July 1, 2011, the Tennessee legislature enacted the nation's most draconian anti-Sharia law.<sup>260</sup> The year before, the Islamic Center of Murfreesboro (ICM) had purchased property in the town roughly thirty miles southeast of Nashville as the site of its new mosque.<sup>261</sup>

The mosque would include a cemetery, a school, and a park<sup>262</sup> and would serve as a community center for Murfreesboro's rapidly growing Muslim population.<sup>263</sup> The ICM needed municipal approval of their site plan to move forward with building. For proponents of Tennessee's recently ratified anti-Sharia law and the legions opposing the ICM's land use request, the proposed mosque represented a "Sharia organization" that would serve as the local engine of "impos[ing] sharia" within Murfreesboro and beyond.<sup>264</sup>

The threat projected onto mosques by the ASM, explicitly bolstered by the state's enacted anti-Sharia bill, made Murfreesboro and the ICM the center of the state's ASM storm. After procuring approval for their site plan from the Rutherford County Regional Planning Commission (RCRPC) on May 24, 2010,<sup>265</sup> the ICM faced the far more daunting public trial standing between it and the realization of its new mosque. Six months after the Board's approval, a group of county residents opposing the construction of the mosque sued the RCRPC, in state court, for issuing a land use decision without adequately notifying the public about the hearing.<sup>266</sup> These residents sought to enforce their popular covenant through a court order.

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260. S. 1028, 170th Gen. Assemb., Reg. Sess. (Tenn. 2011).

261. *Fisher v. Rutherford Cnty. Reg'l Plan. Comm'n*, No. M2012-01397-COA-R3-CV, 2013 WL 2382300, at \*1 (Tenn. Ct. App. May 29, 2013).

262. *Id.*

263. There are no official figures of the actual count of the Muslim population in Murfreesboro. But the prominence of the Muslim population in the Tennessee town was highlighted by the scrutiny it faced during the ICM mosque dispute and the national media attention it garnered. For a recent profile on the Murfreesboro Muslim community and the ICM, see Becca Andrews, *Here's What It's Like To Be Muslim in the Bible Belt in 2017*, MOTHER JONES (Feb. 27, 2017), <https://www.motherjones.com/politics/2017/02/mosque-tennessee-syrian-refugees> [<https://perma.cc/MVL7-LYUW>].

264. Tenn. S. 1028.

265. *Fisher*, 2013 WL 2382300, at \*1.

266. The group of county residents cited the Tennessee Open Meetings Act, TENN. CODE ANN. § 8-44-101 (2019), as the basis of their challenge. *Fisher*, 2013 WL 2382300, at \*1.

After two years of litigation, ICM's opponents secured a favorable state court ruling.<sup>267</sup> The Tennessee court placed a temporary restraining order on the opening of the mosque, holding that "the significance of the matters decided and the overall general interest of the community as a whole"<sup>268</sup> encouraged the RCRPC to extend "the greatest notice available."<sup>269</sup> Like *Culpeper*, the only factor that made the ICM's land use request a matter of public concern was its Muslim character.<sup>270</sup> Otherwise, it would have remained a mundane matter of administrative concern.

In other words, the ASM's projective influence and branding of mosques as oncoming symbols of "[Sharia] threat" pushed the Murfreesboro residents to pursue years of litigation.<sup>271</sup> This not only mobilized litigation on the part of private citizens, but it ultimately persuaded the state court judge that the ICM's Muslim identity made their land use request a matter of public concern.<sup>272</sup> Beyond seeking to prevent the opening of the mosque, the Murfreesboro residents spearheaded a "movement" within the town that sought to popularly enforce the anti-Sharia aims of the enacted legislation.<sup>273</sup> This movement unfolded in court and in the community, and it descended into

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267. *Fisher*, 2013 WL 2382300, at \*2 ("[T]he trial court entered an order finding that . . . the notice given for the May 24, 2010 regional planning commission meeting did not comply with the Open Meetings Act and that, therefore, the decision of the regional planning commission regarding the ICM site plan at that meeting was void ab initio.").

268. *Id.*

269. The trial court further stated in support of its ruling in favor of the county residents, "[W]hen a major issue of importance to all citizens is being discussed at a specially called meeting, the greatest notice available may be required." *Id.* at \*4.

270. *See supra* Part III.A.1.

271. *See Zaid Jilani, Opponents of Tennessee Mosque Argue that Islam Isn't a Religion but Rather a Seditious Political Movement*, THINK PROGRESS (Oct. 4, 2010, 3:46 PM), <https://thinkprogress.org/opponents-of-tennessee-mosque-argue-that-islam-isnt-a-religion-but-rather-a-seditious-political-6da7bd1c9b97> [<https://perma.cc/6JDD-3822>].

272. The RCRPC, which routinely granted hundreds of vetted site plans for religious and secular institution before the ICM's, approved it on grounds of fitting within the town's zoning laws. *Fisher*, 2013 WL 2382300, at \*1. A state court judge ultimately invalidated that decision. *Id.* at \*4 ("The trial court determined that the notice provided by the county did not comply with the [Open Meetings Act].").

273. By "movement," the Author means broader popular resistance by means of litigation, public protest, and even violence. This movement in Murfreesboro illustrates the enhanced coercive impact the facially discriminatory Tennessee anti-Sharia law had on ICM's opponents.



violence when arsonists targeted the mosque five months after RCRPC's site plan approval.<sup>274</sup>

The popular covenant against the ICM mosque echoed the cornerstone ASM polemic that Islam was not a bona fide religion worthy of First Amendment protection but rather a "legal-political-military doctrine and system adhered to, or minimally advocated by, tens of millions if not hundreds of millions of its followers around the world."<sup>275</sup> The imprint of the ASM was evident in the assertions made by the county residents' lawyer who, in court, stated the following to an RCRPC commissioner: "Are you aware that's all the plaintiffs have wanted from day one is to know whether this [proposed ICM mosque] is a religious institution?" The lawyer then rhetorically asked: "Where does tolerance meet Sharia law?"<sup>276</sup>

This view was advanced in court and in the community. At protests staged in front of the mosque, people shouted, "They are not a religion. They are a political, militaristic group," while others carried signs reading, "No Sharia law for USA!"<sup>277</sup> The ASM's heuristic mission violently unfolded at the doorstep of the Murfreesboro mosque.

The anti-ICM movement continued for two years after the RCRPC approved the ICM's land use request.<sup>278</sup> Therefore, although the Commission voted in favor of the land use permit, the townspeople stifled delivery of it through a restraining order procured by a state court,<sup>279</sup> bolstered by continuous physical presence near the construction site

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274. *Fire at Tenn. Mosque Building Site Ruled Arson*, CBS NEWS, <https://www.cbsnews.com/news/fire-at-tenn-mosque-building-site-ruled-arson> [<https://perma.cc/CWN2-59M3>] (Aug. 28, 2010, 9:25 PM).

275. S. 1028, 170th Gen. Assemb., Reg. Sess. (Tenn. 2011). For a critical analysis of the view that Islam is not a legitimate religion, see Asma T. Uddin, *The Latest Attack on Islam: It's Not a Religion*, N.Y. TIMES (Sept. 26, 2018), <https://www.nytimes.com/2018/09/26/opinion/islamophobia-muslim-religion-politics.html> [<https://perma.cc/TF5Z-NU4Z>].

276. Rachel Slajda, *At TN Mosque Hearing, Plaintiffs Claim Islam Isn't a Religion*, TALKING POINTS MEMO (Sept. 30, 2010, 9:30 AM), <https://talkingpointsmemo.com/muckraker/at-tn-mosque-hearing-plaintiffs-claim-islam-isn-t-a-religion> [<https://perma.cc/5PS4-B4NH>].

277. *Far from Ground Zero, Opponents Fight New Mosques*, CNY CENT. (Aug. 9, 2010), <https://cnycentral.com/news/local/far-from-ground-zero-opponents-fight-new-mosques> [<https://perma.cc/2WAN-LT66>].

278. *Fisher v. Rutherford Cnty. Reg'l Plan. Comm'n*, No. M2012-01397-COA-R3-CV, 2013 WL 2382300, at \*1-2 (Tenn. Ct. App. May 29, 2013) ("On September 16, 2010, a group of county residents filed suit against the Rutherford County Regional Planning Commission and numerous other county entities and officials . . . The matter was tried over two days in April 2012.").

279. *Id.*

and the looming threat of violence.<sup>280</sup> The DOJ finally stepped in and filed suit against Rutherford County, claiming that the state court's restraining order violated RLUIPA.<sup>281</sup> On July 18, 2012, a federal court overrode the state court and mandated the county to "process the ICM construction in a typical fashion,"<sup>282</sup> finding that ICM's religious exercise was substantially burdened and overtly discriminated against.<sup>283</sup>

Three weeks later, the ICM finally opened its new mosque doors to the community during the holy month of Ramadan.<sup>284</sup> The DOJ RLUIPA suit ended a nearly twenty-seven-month-long popular covenant that prohibited the opening of the ICM mosque and denied Murfreesboro's Muslim residents the right to worship within the mosque they had pooled their resources to build.<sup>285</sup>

#### B. AGAINST MUSLIM CEMETERIES

Islamic law has a distinct set of traditions with regard to interment.<sup>286</sup> Burial rites include a thorough cleansing of the body and shrouding it within a white linen cloth, followed by a burial and funeral.<sup>287</sup> This all must be done within twenty-four hours of the decedent's passing.<sup>288</sup> The rapid growth of the Muslim American

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280. *Far from Ground Zero*, *supra* note 277.

281. *Fisher*, 2013 WL 2382300, at \*2.

282. *Id.*

283. *United States v. Rutherford Cnty.*, No. 3:12-0737, 2012 WL 2930076, at \*2 (M.D. Tenn. July 18, 2012).

284. The ICM was officially open to the public on August 10, 2012. Nancy De Genaro, *Murfreesboro Mosque Defaced with Graffiti, Bacon*, USA TODAY (July 10, 2017, 5:58 PM), <https://www.usatoday.com/story/news/nation-now/2017/07/10/murfreesboro-mosque-defaced-graffiti-bacon/466122001> [<https://perma.cc/T7TJ-URCS>].

285. Violent opposition against the ICM continued long after it opened its doors. In July 2017, the mosque was spray-painted with expletives and anti-Muslim messages "spelled out with slices of bacon," which Muslims consider sacrilege. *See id.*

286. *See Islamic Funeral Etiquette, Traditions, Rites and More*, BURIAL PLAN., <https://www.burialplanning.com/resources/religious-funerals-guide/islamic-funeral-guide> [<https://perma.cc/84UD-E8UA>].

287. This provides a general description of Islamic burial rites, although there is some variance according to the difference in sectarian traditions and according to how the decedent's life was taken. For a more thorough analysis, see generally LEOR HALEVI, MUHAMMAD'S GRAVE: DEATH RITES AND THE MAKING OF ISLAMIC SOCIETY (2007).

288. *See id.* For a more accessible analysis of the twenty-four-hour burial mandate, see Rema Rahman, *Who, What, Why: What Are the Burial Customs in Islam?*, BBC NEWS (Oct. 25, 2011), <https://www.bbc.com/news/magazine-15444275> [<https://perma.cc/4XVL-ZVLE>].

population, in metropolitan hubs and rural spaces beyond and in between,<sup>289</sup> has increased demand for land where Muslims can be buried in line with their religious rites.

This Section examines the ASM's impact on land use disputes involving Muslim cemeteries within two distinct contexts.<sup>290</sup> The first case involves a dispute resolved in 2019 out of Farmersville, Texas, a rural town that is home to a sparse but growing Muslim community.<sup>291</sup> The second case is out of Castle Rock Township, Minnesota, a satellite town of the Twin Cities home to one of the most sizable Black Muslim populations in the United States.<sup>292</sup>

### 1. *United States v. Farmersville*

The Muslim population of Collin County, Texas, has grown by nearly 400% in 19 years.<sup>293</sup> In 2019, 23,000 residents in Collin County identified as Muslim, up from only 6,000 in 2000.<sup>294</sup> The exponential growth of the Muslim population in northeastern Texas is tied to metropolitan Dallas's status as an emerging hub of Muslim American life.<sup>295</sup> A destination for those seeking a vibrant spiritual and civic

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289. In his landmark *American Mosque* study, Ihsan Bagby finds that the rural Muslim populations are not negligible in size. While “[t]he majority of mosques (53%) are located in urban areas,” which are home to dense and sizable Muslim populations, rural areas, villages, and towns are home to one-fifth of all of the mosques in the United States. These figures indicate that rural Muslims are not a transient population but communities seeking to put down permanent roots, establish their lives and start families, and fuse observance of their faith with the rural American towns they have made home. See IHSAN BAGBY, *THE AMERICAN MOSQUE 2011: BASIC CHARACTERISTICS OF THE AMERICAN MOSQUE ATTITUDES OF MOSQUE LEADERS* 10 (2012).

290. For analysis of municipal opposition to a Muslim cemetery in Dudley, Massachusetts, see Christopher Cataldo, *Discriminating Against the Dead: How To Protect Muslim Cemeteries from Exclusionary Land Use Mechanisms*, 58 B.C. L. REV. 1391, 1392–96 (2017).

291. *United States v. City of Farmersville*, No. 4:19-cv-00285 (E.D. Tex. Apr. 16, 2019).

292. *Al Maghfirah Cemetery Ass'n v. Castle Rock Twp.*, No. 19HA-CV-15-1839 (D. Minn. Jan. 29, 2016).

293. Complaint at 5, *City of Farmersville*, No. 4:19-cv-00285 [hereinafter U.S. Complaint Against Farmersville].

294. *Id.*

295. The Dallas-Fort Worth area is home to fifty-five mosques, which evidences the Muslim population's size and institution-building achievements. See Amina Khan, *In an Irving Building, a Destination for Millennial Muslims*, D MAG. (Oct. 30, 2018, 1:41 PM), <https://www.dmagazine.com/frontburner/2018/10/roots-community-space-irving-dallas-millennial-young-muslims> [https://perma.cc/8DRM-XH28].

community,<sup>296</sup> Dallas has lured Muslims from across the country to settle in the metropolitan area and neighboring Collin County.<sup>297</sup>

The rapid growth of the Muslim population in Collin County has tasked community leaders to accommodate the spiritual needs of living Muslims and, more urgently, the recently departed.<sup>298</sup> In 2013, the two Muslim cemeteries in neighboring Denton County were near or approaching capacity and “landlocked” by surrounding properties that confined their expansion.<sup>299</sup> In response to growing demand for Islamic-compliant interment, the Islamic Association of Collin County (IACC) began its search for a plot of land to develop the first Muslim cemetery in Collin County in 2013.<sup>300</sup> In the face of urgent burial requests from the community and strict state zoning laws,<sup>301</sup> the IACC finally identified and purchased a thirty-four-acre plot in the City of Farmersville in early 2015.<sup>302</sup> This predominantly white and Christian town was located near the easternmost border of Collin County and, at the time, had few Muslim residents and no mosques.<sup>303</sup>

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296. *Id.*

297. Dallas is also home to a sizable, and rapidly growing, Latinx Muslim population. See Jobin Panicker, *A Growing Number of DFW Hispanics Are Converting to Islam. Here's Why*, WFAA (Apr. 23, 2019, 6:04 AM), <https://www.wfaa.com/article/news/local/a-growing-number-of-dfw-hispanics-are-converting-to-islam-heres-why/287-8ae80c5c-6441-4fca-b00a-2a3ad83b3fa6> [<https://perma.cc/7FQ7-XRKA>].

298. U.S. Complaint Against Farmersville, *supra* note 293 (“In 2013, the Islamic Association held a summit with leaders from Collin County[] . . . [concluding that] the development of a local cemetery that provided affordable burials for Muslims in Collin County was the top priority for the Muslim community.”).

299. *Id.*

The Muslim community in Collin County currently buries decedents in two cemeteries—the Restland Cemetery in Dallas and a cemetery for Muslims in Denton. Both of those cemeteries are nearly out of space. The Restland cemetery has only a few hundred gravesites left and is “landlocked” and therefore has no room to expand. The Denton cemetery has gravesites for only a few more years and cannot expand.

*Id.*

300. “The Islamic Association of Collin County is a non-profit organization formed in 1997 to promote the religious interests of Muslims in Collin County and foster relations and understanding between Muslims and non-Muslims.” *Id.* at 4.

301. Texas state laws restrict the development of cemeteries within one mile of the limits of a city with a population greater than 5,000 people, and within five miles of cities with a population of 200,000 or more. TEX. HEALTH & SAFETY CODE ANN. § 711.008 (West 2019).

302. U.S. Complaint Against Farmersville, *supra* note 293, at 6–7.

303. Farmersville is “a predominantly white community of approximately 3,500 residents about 35 miles north-east of Dallas.” *Proposed Muslim Cemetery Raises Concerns About ‘Radical Islam’ in Texas*, GUARDIAN (July 19, 2015, 12:12 PM), <https://>

The challenge of identifying land that could be purposed into a cemetery paled in comparison to the opposition the IACC faced from Farmersville's civic leaders and residents. Mayor Joe Helmberger made the Muslim cemetery the subject of his "State of the City" speech in June 2015, which elevated the IACC's planned cemetery into a matter of public concern.<sup>304</sup> The town galvanized against the planned cemetery in rapid order, and opponents of the Muslim cemetery stormed the Collin County Planning Commission (CCPC) and Farmersville City Council (FCC) meetings before the land use matter was made a matter of formal concern.<sup>305</sup> At these meetings, public attendees stated that the IACC was aiming to "change our laws to conform to Sharia law" and that Islam is a "religion of hate and destruction."<sup>306</sup> The pronouncements echo, almost verbatim, the very fears propagated by the ASM and manifest the discursive force of the twenty-one anti-Sharia bills introduced in Texas since 2010,<sup>307</sup> the highest number in the country. In fact, the majority of these bills were brought before the Texas state legislature between 2010 and 2015,<sup>308</sup> the span in which the IACC emerged as the target of public opposition in Farmersville.

Standing-room-only town hall meetings followed.<sup>309</sup> At a CCPC meeting on August 4, 2015, prominent Farmersville pastor David

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[www.theguardian.com/us-news/2015/jul/19/muslim-cemetery-texas-farmersville](http://www.theguardian.com/us-news/2015/jul/19/muslim-cemetery-texas-farmersville) [<https://perma.cc/8DW8-YU5D>].

304. U.S. Complaint Against Farmersville, *supra* note 293, at 7. Helmberger stated, "There's just a basic concern or distrust about the cemetery coming into town," voicing the popular opposition that quickly mounted after his speech. *Texas Residents Condemn Plan for Muslim Cemetery*, CHI. TRIB. (July 19, 2015, 12:23 PM), <https://www.chicagotribune.com/nation-world/ct-texas-muslim-cemetery-20150719-story.html>.

305. U.S. Complaint Against Farmersville, *supra* note 293, at 7.

306. *Id.*

307. *Islamophobia: Overview of Bills*, *supra* note 181.

308. Texas enacted its anti-Sharia statute in 2017, during the midst of the land use dispute and DOJ litigation against Collin County. See H.R. 45, 85th Leg., Reg. Sess. (Tex. 2017).

309. *In Farmersville, Residents Sound Off About Plans for Muslim Cemetery*, KERA NEWS (Aug. 5, 2015, 1:01 PM) [hereinafter *Farmersville Residents Sound Off*], <https://www.keranews.org/post/farmersville-residents-sound-about-plans-muslim-cemetery> [<https://perma.cc/277A-GEB8>]. Some of these meetings, including a session on August 4, 2015, attracted audiences as large as 300 to 400 people—or roughly 10 to 13% of Farmersville's entire population, which reflected the scale of popular opposition to the IACC's planned cemetery. Randy R. Potts, *Why Is Farmersville, Texas, So Dead-Set Against a Muslim Cemetery?*, DAILY BEAST (Aug. 5, 2015, 2:20 PM), <https://www.thedailybeast.com/why-is-farmersville-texas-so-dead-set-against-a-muslim-cemetery> [<https://perma.cc/5NQR-S5W2>].

Meeks of Bethlehem Baptist Church spoke on behalf of the burgeoning popular covenant against the Muslim cemetery, stating:

We have a real anxiousness about Islamic people, Muslim people coming to Farmersville. We feel very uncomfortable with that. You just can't trust them. I don't think they'll tell the truth about this issue. I think eventually, there will be a mosque. Eventually there will be a training center there.<sup>310</sup>

Echoing the ASM's projected fears of "creeping Sharia,"<sup>311</sup> Pastor Meeks's anxiety centered on the fear that the Muslim cemetery only marked the beginning of an "Islamic takeover";<sup>312</sup> in short, it was the tip of the Sharia iceberg that includes a "[terrorism] training center."<sup>313</sup> The zeal of this popular covenant reflected the resonance of the ASM within the Texas state legislature and deeply impacted the IACC hearing.

The standoff between the IACC and the people of Farmersville continued for another four years. Members of the FCC and Diane Piwko—who succeeded Helmberger as Farmersville's mayor—openly echoed the very anti-Muslim views of their constituents.<sup>314</sup> Mayor Piwko also called the Halff engineering firm, which had concluded that the plot of land was suitable for a cemetery, "disloyal,"<sup>315</sup> appealing to the ASM binary that oriented Islam—and thus the IACC—as un-American.<sup>316</sup> Immediately upon claiming office, Piwko fanned the anti-Muslim sentiment in Farmersville,<sup>317</sup> which turned its rage squarely upon the IACC as the local embodiment of Sharia law.

The FCC unanimously voted against the IACC's land use application on July 11, 2017,<sup>318</sup> enforcing an aligned covenant against the cemetery. The FCC formally cited "draining issues" and "flooding" concerns as the reasons for denial.<sup>319</sup> However, the aligned covenant

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310. *Farmersville Residents Sound Off*, *supra* note 309.

311. *See* Montopoli, *supra* note 98.

312. *Id.*

313. *Farmersville Residents Sound Off*, *supra* note 309.

314. Piwko's mayoral campaign centered on her opposition to the IACC's planned mosque, dovetailing with (then-candidate) Donald Trump's strategic deployment of his proposal to "ban Muslims" as a cornerstone of his 2016 presidential bid. *See* U.S. Complaint Against Farmersville, *supra* 293, at 9.

315. *Id.* at 10.

316. *See* ALAC Model Statute, *supra* note 152.

317. U.S. Complaint Against Farmersville, *supra* note 293, at 10. Mayor Piwko has also stated publicly that her opposition to IACC's cemetery is not about religion. Lauren Silverman, *Proposed Muslim Cemetery Rattles North Texas Town*, NPR (July 25, 2015, 7:47 AM), <https://www.npr.org/2015/07/25/426145892/proposed-muslim-cemetery-rattles-north-texas-town> [<https://perma.cc/E2BC-A37T>].

318. U.S. Complaint Against Farmersville, *supra* note 293, at 14.

319. *Id.*

against the proposed cemetery (and its Muslim handlers), manifested by explicit anti-Muslim pronouncements by residents and local government officials,<sup>320</sup> revealed the FCC's genuine motive. At a meeting with the mayor, FCC members, and other city officials on August 3, 2017,<sup>321</sup> officials "expressed concerns having nothing to do with purported drainage concerns, including the cemetery's aesthetics, management, and long-term funding," which bolstered the IACC's belief that anti-Muslim animus drove their land use denial.<sup>322</sup> In what appeared to be an admission of religious discrimination, Mayor Piwko stated, "[T]he [FCC] serves to implement the will of the citizens, and so we have to be aware of what a majority of our citizens want."<sup>323</sup> Other city officials, including a voting councilmember who shared this perspective, revealed that "political pressure" and "[fear of] losing their jobs" motivated their opposition to the IACC's land use request.<sup>324</sup>

Backed by mayoral and high-level city support, the FCC assented to and endorsed the popular resistance to the construction of a Muslim cemetery. Two years after the land use denial by the FCC, the DOJ filed a RLUIPA suit against the City of Farmersville.<sup>325</sup> The suit claimed that the land use denial discriminated against the IACC on religious grounds and substantially burdened their exercise of religion.<sup>326</sup> On April 16, 2019, the City of Farmersville reached a settlement with the DOJ, which mandated delivery of the land use permit to construct the cemetery,<sup>327</sup> in addition to requirements that the Council undergo mandatory RLUIPA compliance training and education.<sup>328</sup> While RLUIPA enforcement will bring the Muslim cemetery into existence, it did not bury the ASM's stout influence in the Texas town.

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320. *Id.* at 7.

321. The city manager, city engineer, and city attorney were also present at the meeting. *Id.* at 15.

322. *Id.*

323. *Id.* at 16.

324. *Id.* As observed by one commentator writing about land use discrimination against a Muslim cemetery in Dudley, Massachusetts, "local officials in charge of overseeing the community's land use mechanisms are politicians; they are not isolated from the public through long-term appointments, but instead face frequent elections." Cataldo, *supra* note 290, at 1406.

325. U.S. Complaint Against Farmersville, *supra* note 293, at 1.

326. *Id.* at 18-19 (citing 42 U.S.C. § 2000cc(a)-(b)(2)).

327. Settlement Agreement at 6, United States v. City of Farmersville, No. 4:19-CV-00285 (E.D. Tex. Apr. 16, 2019) [hereinafter Farmersville Settlement].

328. *Id.* at 7.

## 2. *Al Maghfirah v. Castle Rock Township*

Castle Rock Township, a small town forty miles south of Minneapolis, seemed like a natural location for a Muslim cemetery. After all, Minnesota is home to the largest Somali population in the United States, a Black immigrant community that has elevated the Twin Cities into a symbolic and demographic capital of Muslim American life.<sup>329</sup> At approximately 58,000 Somali residents and rising,<sup>330</sup> the demand for Muslim cemeteries has grown alongside the Somali and broader Muslim population in Minnesota.

The call for more Islamic burial sites pushed community leadership to search for suitable property to establish a new Muslim cemetery.<sup>331</sup> In February 2014, the Al Maghfirah Cemetery Association (Al Maghfirah) identified an approximately seventy-three-acre property in Castle Rock Township and, immediately upon purchase, submitted an application to the Castle Rock Township Planning Commission (CRTPC) to use the plot of land as a site for a cemetery.<sup>332</sup> The township's ordinances "explicitly stated that land included in the district [where the purchased property is located] could be conditionally used as a cemetery."<sup>333</sup> The planned cemetery would meet the local needs of Muslims in the township and Dakota County, and it would also absorb overflow burials from the near-capacity cemeteries in the Minneapolis-St. Paul area.<sup>334</sup>

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329. See Maya Rao, *How Did the Twin Cities Become a Hub for Somali Immigrants?*, STAR TRIB. (June 21, 2019, 10:45 AM), <http://www.startribune.com/how-did-the-twin-cities-become-a-hub-for-somali-immigrants/510139341> [<https://perma.cc/89CY-KLY6>] ("[Minnesota] has . . . the largest concentration of Somalis in America." (citing U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY (2017))); see also *Immigration and Language*, MINN. ST. DEMOGRAPHIC CTR., <https://mn.gov/admin/demography/data-by-topic/immigration-language> [<https://perma.cc/4V2T-VQKZ>] ("In 2018, the largest groups of foreign-born Minnesotans were born in . . . Somalia (33,500) . . . . These estimates do not include U.S.-born children of these immigrants." (citing U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY (2018))).

330. There were 58,800 Minnesotans that reported Somali ancestry in 2018. *Immigration and Language*, *supra* note 329 (citing U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY (2018)).

331. See generally *Al Maghfirah Cemetery Ass'n v. Castle Rock Twp.*, No. 19HA-CV-15-1839 (D. Minn. Jan. 29, 2016) (summarizing Al Maghfirah Cemetery Association's efforts to establish a Muslim cemetery in Castle Rock Township).

332. *Id.* The planned cemetery would also have a funeral home on its premises. *Id.* at 4.

333. *Id.* at 3.

334. See generally *Castle Rock Township Planning Commission Public Hearing, Conditional Use Permit For 1120 220th St. W.*, CASTLE ROCK TWP. (May 27, 2014) [hereinafter *Castle Rock May 27th Meeting*], [https://www.castlerocktownship.com/pdf/5-27-14\\_Public\\_Hearing\\_Minutes-Cemetery\\_CUP.pdf](https://www.castlerocktownship.com/pdf/5-27-14_Public_Hearing_Minutes-Cemetery_CUP.pdf) [<https://perma.cc/GJE8-8JDN>].



Three months after the purchase, the CRTPC met to review Al Maghfirah's application for a conditional use permit to establish its cemetery.<sup>335</sup> In light of the township's explicit inclusion of cemeteries as part of its zoning plan,<sup>336</sup> the Muslim nonprofit believed this would be an administrative formality and a conditional use permit would be issued expeditiously.<sup>337</sup> However, the Castle Rock Township Board (Board) voiced instant opposition to Al Maghfirah's permit request, with one supervisor asking, "Why are they looking for an additional cemetery? The Burnsville Cemetery is still open for expansion, so I don't understand why they want to establish another one here."<sup>338</sup>

Another supervisor stated, "I am opposed to having a cemetery in this location,"<sup>339</sup> despite the township's zoning ordinance's explicit inclusion of cemeteries<sup>340</sup> and Al Maghfirah representative Hyder Aziz testifying that the Roseville and Burnsville cemeteries are "filling up,"<sup>341</sup> creating need for an additional burial site. The CRTPC hearing ended without a final ruling.<sup>342</sup> This hearing signaled the creation of a guesed public covenant against Al Maghfirah's plans to build a cemetery.

In June 2014, the CRTPC unanimously recommended that the Board approve Al Maghfirah's petition.<sup>343</sup> However, four of the five Board members voted in favor of denial.<sup>344</sup> Their stated reasons for ruling against Al Maghfirah's petition included a diminished tax

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335. *Id.*

336. *Al Maghfirah*, slip op. at 3.

337. See Jessie Van Berkel, *Activists Call for Federal Investigation of Castle Rock Township's Denial of Islamic Cemetery*, STAR TRIB. (Nov. 3, 2015, 8:31 AM), <http://www.startribune.com/activists-call-for-federal-investigation-of-castle-rock-township-s-denial-of-islamic-cemetery/339674762> [https://perma.cc/55W4-3WW3] (quoting "Hyder Aziz, a member of Al Maghfirah Cemetery Association . . . 'They said this application is perfectly fine,' Aziz said, then the board rejected it. 'I don't know what's going on, but something is not right.'").

338. *Castle Rock May 27th Meeting*, supra note 334, at 3 (statement of Commissioner Tammy Salmon).

339. *Id.* (statement of Commissioner Erv Zimmer).

340. *Al Maghfirah*, slip op. at 3.

341. *Castle Rock May 27th Meeting*, supra note 334, at 3.

342. *Id.* at 5.

343. Emma Nelson, *Dakota County Judge Rules in Favor of Islamic Cemetery*, STAR TRIB. (Feb. 1, 2016, 9:11 PM), <http://www.startribune.com/dakota-county-judge-rules-in-favor-of-islamic-cemetery/367222941> [https://perma.cc/C5Z7-LACS].

344. "A favorable Board vote is needed to enforce the Commission ruling; the only Board vote not registered against Al Maghfirah's petition belonged to David Nicolai, who did not attend the hearing." *Castle Rock Township Board of Supervisors Regular Meeting*, CASTLE ROCK TWP. (Aug. 11, 2014), <https://www.castlerocktownship.com/pdf/8-11-14%20BOS%20meeting%20minutes.pdf> [https://perma.cc/3KDF-QW9Y].

base,<sup>345</sup> it being “discriminatory” for not being “open to the public for burials,”<sup>346</sup> and an unsubstantiated decree that “[t]here is no need for more land to be made into cemeteries in the state of Minnesota,”<sup>347</sup> despite Aziz’s testimony about other Muslim cemeteries in the greater area nearing capacity.<sup>348</sup>

No evidence about the suitability of the soil or impact on the tax base was presented at the hearing.<sup>349</sup> Six weeks after denying their land use petition, the Board rejected Al Maghfirah’s appeal request.<sup>350</sup> In response to the land dispute, the Board “approved several amendments to the township [zoning] ordinances, including removing cemeteries as a conditional use” on January 12, 2015.<sup>351</sup> This regulatory amendment sought to kill Al Maghfirah’s attempt to establish a Muslim cemetery in Castle Rock Township, once and for all.

Prior to the RLUIPA investigation commenced by the DOJ in November 2015,<sup>352</sup> Al Maghfirah filed a claim against Castle Rock Township in Dakota County court.<sup>353</sup> Judge Knutson ruled in favor of the plaintiffs, writing, “[The Board’s] decision to deny the [conditional use permit] was arbitrary and capricious,”<sup>354</sup> and he ordered the defendant to provide Al Maghfirah with the permit to establish the cemetery.<sup>355</sup> The court cited the Board’s non-transparency with the plaintiff, lack of evidence about the detrimental tax implication with the

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345. “Russ Zellmer stated that the parcel is over 70 acres, which is extraordinarily large for a cemetery. He feels this is a lot of tax base which will be lost to the Township.” *Id.*

346. *Id.* (statement of Board member Russ Zellmer).

347. *Id.* (statement of Board member Sandy Weber, relaying a message delivered to her by the executive director of the Minnesota Association of Cemeteries).

348. *Castle Rock May 27th Meeting*, *supra* note 334, at 3.

349. *Al Maghfirah Cemetery Ass’n v. Castle Rock Twp.*, No. 19HA-CV-15-1839, slip op. at 5 (D. Minn. Jan. 29, 2016).

350. *Id.*

351. *Id.*

352. The Minnesota chapter of the Council on American-Islamic Relations (CAIR) prompted the DOJ to investigate this matter in November 2015, which was ongoing by the time Al Maghfirah sued in state court. Nelson, *supra* note 343; *see also* Van Berkel, *supra* note 337 (examining the role of activists in pushing for the DOJ investigation).

353. *Al Maghfirah*, slip op. at 6 (“Plaintiff filed a civil Complaint in this case on May 8, 2015 requesting a declaratory judgment by the Court finding that Defendant’s decision to deny the CUP application was arbitrary and capricious and further requesting a writ of mandamus requiring that Defendants issue the requested CUP for the subject property.”).

354. *Id.* at 10.

355. *Id.* at 13.

cemetery, and the speculative financial consequences cited by several Board members to rule against Al Maghfirah.<sup>356</sup>

The ongoing RLUIPA investigation, and the possibility of a federal suit against Castle Rock Township,<sup>357</sup> activated Al Maghfirah toward legal action. In fact, RLUIPA galvanized the support of activists and local media attention that encouraged Al Maghfirah to file suit—highlighting RLUIPA’s “soft” enforcement power.<sup>358</sup> The DOJ continued its investigation during and after the state court ruling, monitoring whether the state court would order the Board to deliver the conditional use permit.<sup>359</sup> In the instance of a negative outcome, it is highly likely that the DOJ would have exercised its right to bring a RLUIPA action against Castle Rock Township. Or, in line with its proactive decision to file suit in state court, Al Maghfirah may have filed a RLUIPA claim in federal court before the DOJ. However, the state court ruling and its delivery of the permit secured the eventual opening of the Al Maghfirah cemetery by the spring of 2017,<sup>360</sup> while the DOJ continues to monitor the Castle Rock Township Board for discriminatory behavior.

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*Al Maghfirah* is a telling case study for how the geographic location of a Muslim land use request impacts the municipal response and the course of litigation. Unlike *Farmersville*, where the IACC was seeking to build a cemetery less than half the size of the cemetery in Castle Rock Township,<sup>361</sup> Al Maghfirah did not face the explicit municipal discrimination or the popular covenant Muslims in Collin County confronted. Rather, as illustrated by the concerns the Castle Rock

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356. *Id.* at 10–12.

357. Nelson, *supra* note 343.

358. Here, the Author uses “soft” power to explain the de facto effects spurred by RLUIPA, distinguished from its delineated “hard” enforcement powers. 42 U.S.C. § 2000cc–2(f).

359. Nelson, *supra* note 343 (“In November, CAIR-MN and other Islamic community leaders asked the U.S. Department of Justice to investigate whether the board’s denial of the application represented discrimination against Muslims. That investigation is continuing.”).

360. *Accord New Islamic Cemetery in Rural Dakota County Is Vandalized*, TWIN CITIES PIONEER PRESS (Aug. 1, 2017, 7:39 PM), <https://www.twincities.com/2017/08/01/islamic-cemetery-in-suburban-minneapolis-is-vandalized> [<https://perma.cc/QN2T-2K4E>]. Opposition to the cemetery continued after it opened. The very element that latently influenced the Board’s petition rose to the surface in late July 2017, when the cemetery walls were spray-painted with swastikas and profanities. *Id.*

361. The Farmersville cemetery sat atop thirty-four acres. U.S. Complaint Against Farmersville, *supra* note 293, at 12. By contrast, the Al Maghfirah cemetery would be built on seventy-three acres of land. Nelson, *supra* note 343.

Township Board used as pretexts for religious discrimination,<sup>362</sup> Al Maghfirah and the Minnesota Muslim community they represented were burdened with navigating the latent discriminatory terrain of a blue state.

While hardly free of anti-Muslim animus, as manifested by the three anti-Sharia bills introduced by Minnesota state legislators,<sup>363</sup> the less pronounced impact of the ASM in Minnesota, and the Castle Rock Township Board, the proposed cemetery did not incite the popular opposition that unfolded in Farmersville, Texas. Rather, the Board's opposition to the Muslim cemetery was subtle and veiled by neutral pretexts.<sup>364</sup> These two Muslim cemetery cases, which rise from two radically different political and geographic contexts, illustrate why Al Maghfirah was able to sue in state court without the threat of popular retribution. This proactive step was not advisable to their Muslim counterparts in Farmersville, whose land use request summoned the explicit angst of the townspeople, its politicians, and planning commissions. If they had sued in state court, the specter of violence attached to the popular covenant may have endangered them and the small Muslim community living in Collin County.

### C. AGAINST MUSLIM SCHOOLS

Pittsfield Township is forty-five miles west of Detroit, a metropolitan area home to a constellation of the country's most concentrated Muslim communities.<sup>365</sup> The town is also home to the new site of the Michigan Islamic Academy (MIA), a "full-time Islamic School, pre-kindergarten through Grade 12,"<sup>366</sup> previously located in

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362. *Al Maghfirah*, slip op. at 10.

363. *Islamophobia: Overview of Bills*, *supra* note 181.

364. The use of discriminatory pretexts, most notably noise, traffic, and tax concerns, are commonly cited to oppose the construction of mosques. For a recent case involving the planned construction of an Islamic center in a Kansas City suburb, opposed by popular covenant citing these discriminatory pretexts, see Katy Bergen, *Huge Islamic Center Planned for South Overland Park. Neighbors Aren't Happy*, KAN. CITY STAR (Mar. 11, 2019, 8:34 PM), <https://www.kansascity.com/news/politics-government/article227329904.html>.

365. See Sarah Parvini, *Trump's Travel Ban Motivated Muslims To Participate in Politics. Now, They're Eyeing Local Office*, L.A. TIMES (Sept. 8, 2020, 5:00 AM), <https://www.latimes.com/politics/story/2020-09-08/la-na-muslim-voters-presidential-election> [<https://perma.cc/GA8P-3YAB>] (discussing the large Muslim population in Detroit and surrounding areas).

366. *United States v. Pittsfield Charter Twp.*, No. 2:15-cv-13779, slip op. at 2 (E.D. Mich. Oct. 14, 2016). The DOJ noted how land use requests for Muslim schools, like the MIA, "are particularly vulnerable to discriminatory zoning actions taken by local officials, often under community pressure." 2016 DOJ RLUIPA REPORT, *supra* note 15, at 4.

neighboring Ann Arbor. In order to accommodate its growing student body,<sup>367</sup> an MIA affiliate purchased a plot of land on September 8, 2010, with plans to make it the site of a new state-of-the-art facility.<sup>368</sup>

A rezoning request needed to accommodate the MIA was filed with the Township at the time of purchase.<sup>369</sup> In fact, the MIA affiliate who secured the land met with the Pittsfield Township supervisor before purchase, who “invited the idea” of purposing the land for a Muslim school.<sup>370</sup> However, on August 4, 2011, the Pittsfield Township Planning Commission (PTPC) voted to deny the MIA’s rezoning petition.<sup>371</sup> Two months later, the Township’s Board of Trustees (Board) confirmed the decision.<sup>372</sup>

The MIA’s land use request, however, fit within the parameters of the Township’s zoning plan.<sup>373</sup> The general development plan for the area permitted “small-scale churches” and “small-scale schools,”<sup>374</sup> and the MIA contended that its intended building fit within the latter category.<sup>375</sup> After relying on the Township supervisor’s representation that a school could be built on the property before purchase, and uncovering that the city’s master development plan permitted the construction of small schools in the area in question,<sup>376</sup> MIA began to sense that religious discrimination was at play. Its representatives believed that “hostility toward Islam” swayed the Board’s determination,<sup>377</sup> fueled by animus toward Michigan’s sizable Muslim population and the four anti-Sharia bills introduced in its state legislature.<sup>378</sup>

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367. “We have very limited resources here, we’re next to the mosque, and we’ve been searching for a place to expand to be in a school that would fit the 21st century,” stated MIA board member Tarek Nahlawi. Tom Perkins, *Michigan Islamic Academy Officials Make Case for New Pittsfield Township School*, ANN ARBOR NEWS (Mar. 31, 2011, 4:40 PM), <http://www.annarbor.com/news/michigan-islamic-academy-officials-make-case-for-new-pittsfield-township-school> [<https://perma.cc/M6FE-4948>].

368. *Pittsfield*, slip op. at 2. In June 2015, the purchaser of the property (Said Issa) conveyed five of the approximately twenty-seven acres to MIA to build a school. *Id.* at 2–3.

369. *Muslim Cmty. Ass’n of Ann Arbor v. Pittsfield Charter Twp.*, No. 12-CV-10803, 2015 WL 1286813, at \*2 (E.D. Mich. Mar. 20, 2015).

370. *Id.*

371. *Id.* at \*5.

372. *Id.*

373. *Id.* at \*2.

374. *Id.*

375. *Id.* at \*3.

376. *Id.*

377. *Id.* at \*1.

378. *Islamophobia: Overview of Bills*, *supra* note 181.

Events that took place at the PTPC hearings on June 16, 2011, and August 4, 2011, bolstered the MIA's claim of religious discrimination.<sup>379</sup> At the initial meeting, a resident of Pittsfield Township sitting in the audience stood up and shouted, "[I] would just wish that everyone in this room could have pledged allegiance to the flag of the United States of America,"<sup>380</sup> calling into question the patriotism of MIA's representatives on grounds of their Muslim identity.<sup>381</sup> The statement was followed by applause from the large group of residents attending the hearing, with members of the audience staring in the direction of the MIA's representatives while clapping.<sup>382</sup> In response, the PTPC chairperson declared, "[Neither] Islam nor the character of the Michigan Islamic Academy is on trial here."<sup>383</sup> However, several members of the audience and commissioners seated alongside the chairperson—it was later revealed—were poised to oppose MIA's land use request on grounds of its religious character. At the following hearing in August, the PTPC denied the MIA land use request by a 3-2 vote,<sup>384</sup> with the June session setting the anti-Muslim tone that marred the administrative process.

Popular opposition to the Muslim land use request displayed at the June hearing was not limited to the residents of Pittsfield Township. In fact, the popular resistance was orchestrated from within. Deborah Williams, a PTPC commissioner who voted against the MIA's land use request,<sup>385</sup> assumed the role of internal ringleader. Williams made her home in the neighborhood where the MIA planned to build its new school, and she actively lobbied her neighbors to attend the

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379. *Muslim Cmty. Ass'n of Ann Arbor*, 2015 WL 1286813, at \*4.

380. *Id.*

381. See Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59 (2004) (analyzing how War on Terror narratives cast Muslim identity as presumptively alien and subversive and place the added burden on Muslims to demonstrate allegiance to the nation by way of performances of patriotism (placing a flag in front of their home or standing for the Pledge of Allegiance)).

382. *Muslim Cmty. Ass'n of Ann Arbor*, 2015 WL 1286813, at \*4. The crowd at the subsequent PTPC hearing was larger and more raucous, with "[a]bout 125 residents attend[ing] and about 50" who spoke during the public comment portion of the proceeding. Tom Perkins, *Islamic School Rezoning Rejected by Pittsfield Township Planning Commission*, ANN ARBOR NEWS (Aug. 5, 2011, 5:59 AM), <http://www.annarbor.com/news/pittsfield-township-planning-commission-recommends-rejection-of-rezoning-for-islamic-academy> [<https://perma.cc/N7BH-GEVC>].

383. *Muslim Cmty. Ass'n of Ann Arbor*, 2015 WL 1286813, at \*4.

384. *Id.* at \*5 (noting that the PTPC's official justification for denying the rezoning request was that the MIA was not a small-scale school, and therefore, outside of the parameters of the city's general development plan).

385. *Id.*

PTPC hearings and voice their opposition.<sup>386</sup> In fact, preventing the construction of the MIA in Pittsfield Township became Williams's personal crusade:

[Williams] was vehemently opposed to MIA's petition, so much so that she took it upon herself to both inform community members about MIA's petition and actively encourage them to oppose it. Williams admitted in her deposition that she went from house to house in February 2011 [four months before the first PTPC hearing addressing MIA's petition], "knock[ing] on doors," distributing to residents living near the site of MIA's proposed school a letter opposing MIA's petition.<sup>387</sup>

Beyond this initial phase of organizing Pittsfield Township's public to oppose MIA's planned school, Williams emailed residents and even "coached community members on how to effectively oppose the petition by sharing specific talking points and arguments."<sup>388</sup> Her objective, well before the PTPC could assess MIA's petition, was to orchestrate popular opposition among the Township's intimate community and mobilize the very hostility that unfolded at the June 16, 2011, hearing.

In short, Williams capitalized on her Board seat with the PTPC to cultivate a popular covenant against the school. At the hearing, Williams cloaked her discriminatory intent by citing pretexts such as a diminished tax base and the spike in traffic the MIA would cause in the Silverleaf neighborhood where she made her home and where the new school would be built.<sup>389</sup>

Facing this religious hostility stoked from within local government, MIA filed a RLUIPA claim on February 22, 2012.<sup>390</sup> The DOJ followed suit, filing a separate cause of action on October 26, 2015.<sup>391</sup> In

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386. *Id.*

387. *Id.*

388. *Id.*

389. The DOJ alleged that Williams "'actively organized residents to oppose MIA's petition, including by instructing them regarding what objections to raise.' By which we take to mean: Talk about the traffic, the landscaping, the height, the noise, anything but the fact that this is a Muslim school." Michael Jackman, *An Expensive Education: Pittsfield Twp. Must Allow Islamic School, Pay \$1.7 Million*, METRO TIMES (Oct. 3, 2016, 1:35 PM), <https://www.metrotimes.com/news-hits/archives/2016/10/03/an-expensive-education-pittsfield-twp-must-allow-islamic-school-pay-17-million>.

390. *Muslim Cmty. Ass'n of Ann Arbor*, 2015 WL 1286813, at \*6. The MIA settled with Pittsfield Township on September 29, 2016, for \$1.7 million, concluding its RLUIPA claim. See Talal Ansari, *This Town Has To Pay an Islamic School 1.7 Million After Denying Its Zoning Rights*, BUZZFEED NEWS (Sept. 29, 2019, 5:35 PM), <https://www.buzzfeednews.com/article/talalansari/town-to-pay-an-islamic-school-17-million> [<https://perma.cc/FJB7-EDDB>].

391. *United States v. Pittsfield Charter Twp.*, No. 2:15-cv-13779, slip op. at 1 (E.D. Mich. Oct. 14, 2016).

addition to the federal court ordering the rezoning that would allow the MIA to finally build its school, the Township was compelled to undergo federal RLUIPA training and to actively maintain, monitor, and keep records of subsequent land use applications.<sup>392</sup> This relief not only resolves the MIA's land use dispute but also deters future Muslim land use applicants in the Michigan town from the prospect of facing the same religious discrimination.

#### IV. RESTORING RIGHTS AND RETRENCHING RAGE

In a letter to a friend, Mark Twain wrote, "If we only had some God in the country's laws, instead of being in such a sweat to get him into the Constitution, it would be better all around."<sup>393</sup> Twain's words speak to the enduring compulsion of municipal actors, many of whom fashion themselves guardians of culture, to inject religion into the affairs of the state. This is duly evidenced by the ASM's projection of anti-Muslim views onto city boards and planning commissions, which drive the land use denials and staunch refusals to settle disputes with Muslim parties seeking to establish mosques, Muslim cemeteries, and Islamic schools. In response, RLUIPA has extended a buffer to Muslim populations in the form of deterring religious discrimination on the part of local governments. And, as the cases examined above demonstrate, RLUIPA has delivered settlements and court orders that extend bridges toward building the Muslim institutions preempted by discriminatory land use denials.

RLUIPA's protection of Muslim religious freedom extends beyond its statutory land use scope. First, the creation of mosques and schools has collateral free exercise implications, particularly in towns where they never existed before, providing vital forums where Muslims collectively engage in free exercise, assembly, and speech activity. Second, the measures imposed on local governments as part of a RLUIPA settlement or court order, including mandated monitoring and storage of all records and RLUIPA training and education, limits the anti-Muslim animus rooted by the ASM within municipal boards and planning commissions.

##### A. RESTORING RELIGIOUS FREEDOM

RLUIPA has met the increased discrimination against Muslim land use petitions since 2010 with a robust response and proven

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392. *Id.* at 6–10.

393. Letter from Mark Twain to William Dean Howells (Sept. 18, 1875), in 1 MARK TWAIN'S LETTERS 261, 262 (Albert Bigelow Paine ed., 1917).



results. This federal vindication of Muslim land use claims has pushed mosques, Muslim cemeteries, and Islamic schools into existence, and it consequently has empowered the collective enjoyment of First Amendment activity within these religious spaces and outside of their walls.

This Section analyzes the collective and collateral religious rights enabled by RLUIPA and the transformative impact the statute's enforcement has in radically transforming Muslim life in locales where Muslim institutions have never existed.

### 1. Activating Collective Rights

Muslim identity is *active*. It obliges responsibilities rooted in distinct spiritual belief<sup>394</sup> and mandates participation in activity that is central to being a member of the faith community.<sup>395</sup> As Sudeall Lucas observes,

One aspect of religious identity is participating in holidays and rituals associated with a given religion. Thus, religious identity is different from other types of identity in that it may require engagement in certain actions or practices. This is why it is critical to religious identity that a member of a given religion be able to engage in such actions under the protections provided by the Free Exercise Clause.<sup>396</sup>

While engagement in spiritual or communal activities is mandated by religion,<sup>397</sup> the *opportunity* to engage in (and the scope of)

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394. For a sociological study examining the formation of Muslim identity within the United States, see generally Lori Peek, *Becoming Muslim: The Development of a Religious Identity*, 66 SOCIO. RELIGION 215 (2005).

395. In addition to the distinctly spiritual obligations tied to Muslim identity, political stigma assigned to outward expression of Muslim identity can compel additional modes of political performances. These stigmas, emitted by the ASM and other stimuli, cause Muslims to negotiate their religious expression and performances in ways that stave off suspicion or violence. For example, a devout Muslim woman who may choose to remove her headscarf to minimize the prospect of animus or attack “covers” her Muslim identity by uncovering. For a theoretical framing followed by a practical analysis of this phenomenon, see generally Khaled A. Beydoun, *Acting Muslim*, 53 HARV. C.R.-C.L. L. REV. 1 (2018).

396. Sudeall Lucas, *supra* note 84, at 69.

397. In *Smith*, Justice Scalia wrote that being part of a religion is not only limited to belief, “but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine.” *Emp. Div. v. Smith*, 494 U.S. 872, 877 (1990); see *Reynolds v. United States*, 98 U.S. 145, 166 (1878) (outlining the jurisprudential distinction between religious belief and religious action and holding that the state can regulate the latter but not the former, here, criminalizing the practice of polygamy); see also *United States v. Ballard*, 322 U.S. 78, 86–88 (1944) (holding that courts are restricted from assessing the veracity of religious beliefs but, in line with *Reynolds*, maintaining that actions tied to those beliefs may be regulated).

free exercise activity is contingent upon the availability of religious spaces.

Members of most faith communities, including Islam, require the land and space to worship together, commune, and engage in the various traditions that activate religion into more than just private belief. The lack of religious spaces not only circumscribes a Muslim's religious expression but limits the opportunity to engage in additional forms of expression, assembly, speech, and "performative" religious activity.<sup>398</sup> The importance of private religious spaces where Muslims can express their "genuine [religious] selves" is especially vital during a moment of intensifying anti-Muslim animus,<sup>399</sup> when public expressions of conspicuous Muslim identity are often met with suspicion from the state and private actors.<sup>400</sup>

RLUIPA enforcement creates vital inroads toward enabling these performative expressions of Muslim identity. By overriding local government denials of land use permits, RLUIPA has facilitated the establishment of the very spaces and centers where Muslim religious expression is activated and expanded.<sup>401</sup> Mosques—not unlike other houses of worship—are where belief transforms from a private and introspective affair into a dynamic and collective enterprise. The most quintessential example of this is Islamic prayer, which is typically a family act when performed at home.<sup>402</sup> But within the confines of a mosque, it evolves into a dynamic and synchronized ritual that brings together Muslims of various races and ethnicities, age groups and wealth classes.<sup>403</sup> As a result, prayer takes on a more multi-

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398. Here, the Author uses "performative" in line with Goffman's framing of being able to outwardly express religious identity in line with one's "genuine self" (and against societal stigma). ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 229 (1959).

399. Law scholar Daniel O. Conkle writes that religion and religious community "form a central part of a person's belief structure, his inner self. They define a person's very being—his sense of who he is, why he exists, and how he should relate to the world around him." Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1164 (1988); see also Christopher C. Lund, *Religion Is Special Enough*, 103 VA. L. REV. 481, 523 (2017) (arguing that religious liberty is deserving of constitutional protection).

400. Beydoun, *supra* note 395, at 1.

401. Sudeall Lucas, *supra* note 84, at 69.

402. *Practices in Islam*, BBC, <https://www.bbc.co.uk/bitesize/guides/zhnhsrd/revision/4> [<https://perma.cc/XZW4-TLLA>].

403. Islam generally encourages its adherents to pray as a collective, particularly on "Jummah," or Friday prayer, the faith's holy day. See Muhammad Jawad Mughniyya, *Prayer (Salat), According to the Five Islamic Schools of Law*, AL-ISLAM.ORG, <https://www.al-islam.org/prayer-salat-according-five-islamic-schools-law-sheikh-muhammad-jawad-mughniyya/salat-al-jamaah> [<https://perma.cc/57AK-NPA4>].

dimensional meaning within the mosque context, spawning social and civic possibilities that would not come into being if confined to the household.<sup>404</sup>

However, mosques are more than just houses of worship. They are also engines of intellectual, social, and civic life for Muslim communities.<sup>405</sup> They provide gathering spaces where Muslims listen to spiritual sermons and learn from guest lecturers,<sup>406</sup> hold language classes, house youth groups, host book talks, and convene public gatherings to address timely political concerns.<sup>407</sup> The mosque is, often-times, the lifeline of the Muslim community and a space that secular Muslims also rely upon for social and civic engagement.<sup>408</sup>

Furthermore, scholars have also argued that mosques in non-Muslim majority states are central to the educational and social engagement of Muslim women in particular,<sup>409</sup> while studies have detailed the mosque's function in stimulating volunteerism and philanthropic engagement.<sup>410</sup> Therefore, beyond prayer and spiritual

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404. This is especially true for mosques that welcome Sunni and Shia Muslims, and individuals of every race, ethnicity, and socioeconomic status, to congregate under one mosque roof. *See, e.g.*, ISLAMIC INST. MINN., <https://www.islamicinstituteofmn.com> [<https://perma.cc/JR6M-CL5H>] (“The Islamic Institute of Minnesot [sic]- IIM is a non-profit religious corporation serving Muslims in the State of Minnesota and surrounding areas regardless of color or place of origin. IIM emphasizes the value of diversity.”).

405. “From the earliest days of Islam, the mosque was the centre of the Muslim community, a place for prayer, meditation, religious instruction, political discussion, and a school.” SALAH ZAIMECHE, FOUND. FOR SCI. TECH. & CIVILISATION, EDUCATION IN ISLAM: THE ROLE OF THE MOSQUE 3 (Salim Al-Hassani & Talip Alp eds., 2002).

406. To cite examples of non-religious educational events routinely held within mosques, the author spoke at thirteen mosques across the country while promoting his book, *BEYDOUN*, *supra* note 153, in addition to other houses of worships, including churches and synagogues.

407. This activity is flattened by the ASM, particularly strident anti-Sharia bills like the version enacted in Tennessee, which spurs popular or civic classification of mosques as “Sharia organizations” tied to terrorism. S. 1028, 170th Gen. Assemb., Reg. Sess. (Tenn. 2011).

408. Therefore, in addition to its inherent spiritual function, American mosques also have deeply secular functions that benefit non-practicing Muslims and non-Muslims. This highlights the (often neglected) non-spiritual dimensions of mosques in the United States. *See Inside the Mosque: What Do You Need To Know?*, BBC, <https://www.bbc.co.uk/teach/inside-the-mosque-what-do-you-need-to-know/zr3f2sg> [<https://perma.cc/D4S5-E4YH>] (“The mosque is a place to gather for prayers, to study and to celebrate festivals such as Ramadan. It can also be used to house schools and community centres.”).

409. *See* Marivi Pérez Mateo, *The Mosque as an Educational Space: Muslim Women and Religious Authority in 21st-Century Spain*, 10 RELIGIONS 222 (2019) (examining the mosque's centrality to the spiritual and social engagement of Muslim women in Spain).

410. *See generally* INST. FOR SOC. POL'Y & UNDERSTANDING, AMERICAN MUSLIM PHILANTHROPY: A DATA DRIVEN COMPARATIVE PROFILE (2019) (assessing the causes spurring the

activity, mosques provide the essential spaces that enable and expand the First Amendment speech and assembly rights rooted in religious engagement,<sup>411</sup> particularly in locales where Muslims are sparsely populated.

For example, the absence of a bona fide mosque in Culpeper forced the town's Muslims to pray in a small house without an adequate washroom on the lot of a car dealership.<sup>412</sup> The DOJ challenge of the County Commission's land use denial, which resulted in settlement ordering delivery of the land use permit,<sup>413</sup> will enable the small Virginia town's Muslim community to hold regular daily and Friday prayer services, hire a full-time *imam*,<sup>414</sup> and convene programming that enhances the spiritual and social life of the community. The DOJ RLUIPA claim, therefore, not only helped bring the brick-and-mortar mosque into existence but also activates meaningful assembly and exchanges, educational engagement, and the robust Muslim life that will unfold within the mosque and the small Virginia town at large.

The creation of Muslim schools also spurs collateral rights for Muslim communities. The MIA's expanded and modern facility in Pittsfield Township, Michigan, provides secular and religious academics. Religious instruction entwines religious liberty with the substantive due process rights of parents, as observed by the Supreme Court.<sup>415</sup> More narrowly, the right of parents to enlist their children in Muslims schools is a natural emanation of religious freedom, which enables them to rear their children in line with their religious beliefs and worldview.<sup>416</sup>

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recent increase in Muslim philanthropy and the mosque's central role in stimulating it).

411. "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble." U.S. CONST. amend. I.

412. U.S. Culpeper Complaint, *supra* note 231, at 4–5.

413. United States v. Cnty. of Culpeper, No. 3:16-cv-00083, 2017 WL 3835601, at \*1 (W.D. Va. Sept. 1, 2017).

414. The spiritual leader of a mosque, who is in charge of leading prayer and guiding the institution and community (Arabic). See *Beliefs and Practices*, BBC, <https://www.bbc.co.uk/bitesize/guides/zvm96v4/revision/8> [<https://perma.cc/DW4N-FEPJ>] ("The term 'imam' means 'in the front' and this person simply leads the prayers—they are no better than anyone else as everyone is equal in the eyes of Allah. Often, an imam will teach Arabic and they act as the khatib—the person to preach the Friday sermon.").

415. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (establishing that the substantive due process rights of parents to guide the education of their children is a fundamental right).

416. *Id.* at 518–19.

Furthermore, the MIA's expanded facility broadens the scope of that collective right by allowing more parents to enroll their children at the school, in turn making education steeped in Islamic values more readily available to southeastern Michigan's sizable Muslim population. As the MIA school case illustrates along with the cases analyzed in Part III of this Article, Muslim land use matters involve not just the right to build religious institutions—but also the broad scope of religious and non-religious activity that unfolds within them.

## 2. Transforming Muslim Life

"Our [new] mosque gives us *everything*," shared Hassan, "a place to teach our children, enjoy Ramadan together, and learn [how] to respect ourselves."<sup>417</sup> Hassan and his family of four have called Culpeper home since 2013.<sup>418</sup> His testimony—sharing the trials of not having a real community mosque and having to pray inside an unheated building during unbearably cold winter days and nights—conjures imagery of secret observances of a faith criminalized by an authoritarian regime.<sup>419</sup> However, Hassan does not live in Xinjiang, China;<sup>420</sup> he lives in Virginia, the tenth state to join the Union<sup>421</sup> and home to Thomas Jefferson, who owned his own copy of the Qur'an.<sup>422</sup>

The nearly completed new mosque<sup>423</sup> will create unprecedented opportunities for Hassan and Muslims in Culpeper. Among them are plans of a youth academy, a permanent imam and mosque board, interfaith sessions, and educational programs for the town's Muslim

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417. Interview with Hassan, Member of the Culpeper, Va., Muslim Cmty. (Sept. 3, 2019) (name changed to protect subject's identity).

418. *Id.*

419. See Sigal Samuel, *China Is Treating Islam Like a Mental Illness*, ATLANTIC (Aug. 28, 2018), <https://www.theatlantic.com/international/archive/2018/08/china-pathologizing-uighur-muslims-mental-illness/568525> [<https://perma.cc/Q5U2-5YFV>], for a leading exposé of China's mass internment of Uighur Muslims and its violent crackdown on Muslim life in the disputed Xinjiang province.

420. *Id.*

421. See MARGO J. ANDERSON, *THE AMERICAN CENSUS: A SOCIAL HISTORY* 280–81 (2d ed. 2015).

422. DENISE A. SPELLBERG, *THOMAS JEFFERSON'S QUR'AN, ISLAM AND THE FOUNDERS* 3 (2013) ("[Jefferson's] engagement with the [Muslim] faith began with the purchase of a Qur'an eleven years before he wrote the Declaration of Independence.").

423. See Emily Jennings, *Culpeper Mosque Construction Nearly Complete*, CULPEPER STAR-EXPONENT (Apr. 22, 2020), [https://starexponent.com/news/culpeper-mosque-construction-nearly-complete/article\\_9e03d194-cb6a-5a47-869d-4779aeaa3b3d.html](https://starexponent.com/news/culpeper-mosque-construction-nearly-complete/article_9e03d194-cb6a-5a47-869d-4779aeaa3b3d.html) [<https://perma.cc/AJZ8-NDH5>] (explaining the Islamic Center of Culpeper president Mohammad Nawabe hopes to open the mosque to the community soon); see also *About Us*, ISLAMIC CTR. CULPEPER, <https://islamiccenterofculpeper.org/about-us> [<https://perma.cc/Q57M-MRLF>] (explaining the mosque "is nearly done").

families.<sup>424</sup> None of these opportunities existed while the community prayed in a makeshift prayer room.<sup>425</sup> The new mosque will radically change Muslim life in the small town by offering a central community space that enables regular spiritual and civic assembly, a private space to engage in unencumbered speech, and educational programs for youth and adults.

This transformative effect on Muslim life in Culpeper would likely not have been possible without RLUIPA enforcement. First, the facts of the *Culpeper* case would have presented challenges for the Muslim petitioners' argument that the county engaged in facial discrimination. Therefore, petitioners' First Amendment free exercise claim may have been dismissed or subjected to only rational basis review. Second, by federalizing their claim of religious discrimination, RLUIPA took petitioners' claim from the state court and into federal court, imposing upon the ICC the lower burden of proving a substantial burden on religious grounds.<sup>426</sup>

While the *Smith* regime could have been fatal,<sup>427</sup> RLUIPA enforcement proved fruitful. Consequently, the DOJ's RLUIPA enforcement effort overrode a discriminatory local government and extended the needed septic permit to the ICC,<sup>428</sup> allowing the ICC to establish Culpeper County's first mosque, which—unlike the vacant building the town's Muslims once prayed in—is far more than just a prayer room but an institution where religious expression and a myriad of other First Amendment liberties vibrantly take form. RLUIPA enforcement did more than just enable Culpeper's Muslims to establish their first mosque; it provided the very lifeline for a burgeoning Muslim community.

In addition to revitalizing Muslim life in towns where land use discrimination rendered religious expression dormant, RLUIPA enforcement has enabled decedent Muslims to be buried in line with their Muslim rites, now and into the future.<sup>429</sup> Prior to RLUIPA

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424. Interview with Hassan, *supra* note 417.

425. See U.S. Culpeper Complaint, *supra* note 231, at 4–6.

426. See *United States v. Cnty. of Culpeper*, No. 3:16-cv-00083, 2017 WL 3835601, at \*2 (W.D. Va. Sept. 1, 2017).

427. See *supra* note 13 and accompanying text.

428. See Press Release, Muslim Advoc., The Islamic Center of Culpeper Settles Religious Land Use Lawsuit (Apr. 21, 2017), <https://muslimadvocates.org/2017/04/the-islamic-center-of-culpeper-settles-religious-land-use-lawsuit> [<https://perma.cc/QZ25-T3DL>].

429. The threshold meaning of “decency” for observing Muslims includes a burial that aligns with religious custom. See generally Mir Ubaid, *What Is a Muslim Funeral Like in New York?*, AL JAZEERA (Mar. 7, 2016), <https://www.aljazeera.com/features/>

enforcement, land use discrimination against Muslim cemeteries denied and deprived Muslims of their dignity within an enterprise where the law has traditionally extended care and concern: death and interment.<sup>430</sup>

Denying Muslims the right to be buried in line with their rites strips them and their loved ones of religious dignity. In her formative work *Dignity Takings and Dignity Restoration*, property law scholar Bernadette Atuahene defines a “dignity taking” as seizure of property that “occurs when a state directly or indirectly destroys or confiscates property rights from owners or occupiers and the intentional or unintentional outcome is dehumanization or infantilization.”<sup>431</sup> Recently, the Supreme Court emphasized the salience of dignity (and dignity denials) to core constitutional rights, most famously illustrated in Justice Anthony Kennedy’s majority opinion in *Obergefell v. Hodges*, which positioned marriage equality as a fundamental due process right.<sup>432</sup>

Like same-sex couples wishing their marriages would be acknowledged by the state and society at large, Muslims seeking to establish cemeteries for their loved ones also “ask for equal dignity in the eyes of the law,”<sup>433</sup> seeking to recover dignity denied to them, and preemptively taken,<sup>434</sup> by discriminatory land use decisions in Farmersville, Texas, and Castle Rock Township, Minnesota. In *Farmersville*, the Islamic Association of Collin County (IACC) purchased a plot of land and filed for a land use permit in early 2015.<sup>435</sup> For four years, the city’s discriminatory ruling denied the IACC, and the broader

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2016/3/7/what-is-a-muslim-funeral-like-in-new-york [https://perma.cc/P7YL-PPKF].

430. See 4 CHARLES E. TORCIA, WHARTON’S CRIMINAL LAW § 524 (15th ed. 2020) (“At common law, it is a nuisance to fail to provide a decent burial for a person to whom the defendant owes such a duty.”).

431. Bernadette Atuahene, *Dignity Takings and Dignity Restoration: Creating a New Theoretical Framework for Understanding Involuntary Property Loss and the Remedies Required*, 41 LAW & SOC. INQUIRY 796, 817 (2016). Atuahene defines dehumanization as “the failure to recognize an individual’s or group’s humanity.” *Id.* at 801.

432. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (“There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.”).

433. *Id.* at 2608.

434. The Author broadens Atuahene’s socio-legal concept “dignity taking” by including a preemptive discriminatory denial of a complainant’s land use petition. See Atuahene, *supra* note 431, at 817–18 (outlining Atuahene’s definition of “dignity taking”).

435. See U.S. Complaint Against Farmersville, *supra* note 293, at 6.

Muslim community in Collin County, access to a cemetery that aligned with local zoning parameters.<sup>436</sup>

A similar scenario took place in Minnesota. In *Al Maghfirah*, a Muslim nonprofit purchased a plot of land in Castle Rock Township in 2014, which the Township's Planning Commission initially ruled was in compliance with local zoning law.<sup>437</sup> However, the Township Board's later permit denial prolonged the opening of the cemetery until the spring of 2017.<sup>438</sup> Consequently, many Muslims in Minnesota were denied the right to bury their loved ones in line with their religious customs for more than three years. Many compromised their religious beliefs and buried loved ones in mixed cemeteries.<sup>439</sup> These delays and compromises stripped Muslims in Castle Rock Township of the dignity one should expect during the mourning process and denied the departed the dignity of being buried in line with their religious rites.

Again, as examined above, land use denials are not only injurious to the applicant, but they are also harmful to the broader community that seeks to engage with or benefit from the institution. Therefore, the *Farmersville* and *Al Maghfirah* cemetery cases involve "community dignity takings,"<sup>440</sup> which prevented Muslims in northeastern Texas<sup>441</sup> and Minnesota from being able to bury their loved ones for four and three years, respectively.<sup>442</sup> The right to bury loved ones within zoning-compliant cemeteries was delivered by RLUIPA as the chief vehicle for change in *Farmersville* and *Castle Rock Township*.

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436. A settlement was finally reached between the DOJ and the City of Farmersville on April 16, 2019, which included delivery of the permit to the IACC to build the cemetery. See *Farmersville Settlement*, *supra* note 327, at 4–6.

437. Nelson, *supra* note 343.

438. See *Farmersville Settlement*, *supra* note 327, at 2.

439. See *Death Related Issues*, AL-ISLAM.ORG, <https://www.al-islam.org/a-code-of-practice-for-muslims-in-the-west-ayatullah-sistani/death-related-issues> [<https://perma.cc/F7C3-7HZH>] ("It is not permissible to bury a deceased Muslim in the graveyard of non-Muslims.").

440. Cf. Jamila Jefferson-Jones, "Community Dignity Takings": *Dehumanization and Infantilization of Communities Resulting from the War on Drugs*, 66 U. KAN. L. REV. 993 (2018) (applying the community dignity taking framing to collective forms of punishment resulting from the War on Drugs).

441. This discrimination likely includes Muslims in bordering Oklahoma, Arkansas, and Louisiana, who have few or no Muslim cemeteries within their bounds.

442. Likewise, given the metropolitan Twin Cities' proximity to Wisconsin and Iowa, which have few Muslim cemeteries, harm extends to Muslim residents in Wisconsin and Iowa who may have sought to bury their loved ones at the *Al Maghfirah Cemetery* in *Castle Rock Township*.



This change occurred by way of a DOJ settlement in the former<sup>443</sup> and a DOJ investigation inspired by an independent lawsuit in the latter.<sup>444</sup> RLUIPA “affirmed” the religious dignity of the Muslim communities in Farmersville and Castle Rock Township<sup>445</sup> and restored the dignity of the family members and friends who would be put to rest in those pioneer cemeteries in different parts of the country.

#### B. RETRENCHING RAGE

Free exercise of religion incursions are typically rooted in institutionalized animus or aversion.<sup>446</sup> This phenomenon, which is the very focus of this Article, highlights the intimate connection between the free exercise and establishment clauses and, specifically, how RLUIPA’s de facto mission to disentangle anti-Muslim animus seeded by the ASM operates alongside the Act’s statutory mission to protect Muslim land use claimants against the ASM’s projective effect on local governments.

Through settlement and court order relief, RLUIPA mandates municipal governments to maintain records, volunteer for federal monitoring, and engage in anti-discrimination trainings. This Section analyzes: first, the retrenchment effect these modes of relief have on the institutionalization of anti-Muslim attitudes; second, how proposals to expand the scope of RLUIPA trainings combat municipal animus against multiple faith groups; and third, the efficacy of an appeal for coordinated establishment clause strategies by Muslim and LGBTQ populations—who are both primary targets of culture wars, which mobilize municipal actors to leverage religious freedom as a sword of discrimination.<sup>447</sup>

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443. Farmersville Settlement, *supra* note 327.

444. Al Maghfirah Cemetery Ass’n v. Castle Rock Twp., No. 19HA-CV-15-1839, slip op. at 10 (D. Minn. Jan. 28, 2016).

445. Cf. Jamila Jefferson-Jones, *Extending “Dignity Takings”: Re-Conceptualizing the Damage Caused by Criminal History and Ex-Offender Status*, 62 ST. LOUIS L.J. 863, 868–70 (2018) (articulating “dignity restoration” as the product of state or private action that restores one’s ability to engage in activity that sustains or enhances individual or collective dignity).

446. See *supra* Part II.

447. Religious freedom laws, like RLUIPA and RFRA, are intended to serve as *shields* against religious discrimination. Yet, the more expansive interpretation of the latter statute, and the copycat state legislation it inspired, has been wielded as an offensive tool to discriminate. See, e.g., *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020).

### 1. Disestablishing Municipal Animus

The ASM's projective effect on local governments, from a sequence perspective, is first an establishment clause concern.<sup>448</sup> Before its messages are deployed by way of land use denials to discriminate against Muslim claimants and the broader communities they represent, anti-Sharia ideas and images must first be absorbed and "entangled" with the administration of land use determinations.<sup>449</sup> The degree of municipal entanglement with the ASM's condemnation of Islam varies in shape and appearance, as illustrated in the cases examined above.<sup>450</sup> However, the entrenchment of anti-Sharia narratives, or what Sudeall Lucas dubs "projective religious identity claims,"<sup>451</sup> in each of the five cases suggest encroachment on the establishment clause.

There is, perhaps, no area of modern doctrine that is as fractured as establishment clause jurisprudence. Many First Amendment scholars contend that none of the standing judicial tests offer a compelling articulation of establishment clause infringement,<sup>452</sup> and constitutional law scholar Eric Segall aptly observes the "great deal of confusion" among "the lower courts, and the Justices of the Supreme Court over appropriate establishment clause principles."<sup>453</sup> While a unifying theory does not exist, two standing tests—the "Lemon test" and the "endorsement test"—offer useful doctrinal frameworks to examine

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448. See U.S. CONST. amend. I (declaring the government "shall make no law respecting an establishment of religion").

449. The Author is applying the "Lemon test," which holds that a governmental action (1) must have a secular purpose, (2) "its principal or primary effect must be one that neither advances nor inhibits religion," and (3) must avoid causing "excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

450. The ASM does not necessarily impose one religious worldview onto local governments but projects the castigation of Islam and casts rigid suspicion onto its core religious practices.

451. Sudeall Lucas examines the establishment clause ramifications of projective religious identity, arguing that "a prohibition on projective religious identity claims would be in alignment with the Establishment Clause, as the Clause is opposed to the promotion or projection of one religious identity such that it infringes on the religious identities of others or obstructs others from exercising their legal rights." Sudeall Lucas, *supra* note 84, at 105–06.

452. See KENT GREENAWALT, RELIGION AND THE CONSTITUTION 433–51 (2008) (summarizing scholarship critical of the Court's establishment clause jurisprudence).

453. Eric J. Segall, *Mired in the Marsh: Legislative Prayers, Moments of Silence, and the Establishment Clause*, 63 U. MIA. L. REV. 713, 724 (2009).

how RLUIPA relief counters the ASM's entrenchment within municipal land use administration.<sup>454</sup>

The facts in *Farmersville* illustrate both municipal entanglement and "endorsement" of anti-Muslim views.<sup>455</sup> Again, the city council's unanimous vote against the IACC's (zoning law compliant) permit to build a Muslim cemetery in Farmersville was assenting to the popular opposition of residents, who explicitly derided the Islamic faith and openly voiced their collective "anxiousness about Islamic people [or] Muslim people coming to Farmersville."<sup>456</sup> Councilmembers admitted that mounting "political pressure" from the townspeople and fear of "losing their jobs" pushed them to capitulate to the popular anti-Muslim rage and vote to deny the IACC's request.<sup>457</sup> This admission is a quintessential example of religious endorsement and unequal treatment enforced through a regulatory decision driven by "disapproval" of the IACC's Muslim faith.<sup>458</sup>

With regard to the Lemon test, the Farmersville Council's denial was hardly secular and was driven pointedly by the ASM's objective of "inhibit[ing]" the creation of a Muslim cemetery in the city.<sup>459</sup> Furthermore, beyond the ultimate decision being sealed by religious animus, the Farmersville Council's entire administrative process was "entangle[d]" with the anti-Muslim lobbying by the townspeople<sup>460</sup> and was influenced by the anti-Sharia messages found in legislation introduced in Texas that year.<sup>461</sup> In *Farmersville*, the Council's sole reason for denying the land use permit was a religious one, and specifically an

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454. These two tests, while widely critiqued, are the tests most commonly used by the courts to examine an establishment clause question. This Article does not engage with the "coercion test," adopted by the Supreme Court in *Lee v. Weisman*, given that test's focus on youth and, specifically, "protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." 505 U.S. 577, 592 (1992). Justice Sandra Day O'Connor introduced the "endorsement test" in a concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). A majority of the Court adopted the test five years later in *County of Allegheny v. ACLU*, 492 U.S. 573, 595-97 (1989).

455. The endorsement test invalidates governmental action if "a reasonable observer would view such longstanding practices as a disapproval of his or her religious choices." *Cnty. of Allegheny*, 492 U.S. at 631 (O'Connor, J., concurring).

456. *Farmersville Residents Sound Off*, *supra* note 309 (quoting a popular pastor who shared these words at the city council hearing).

457. U.S. Complaint Against Farmersville, *supra* note 293, at 16.

458. See *Cnty. of Allegheny*, 492 U.S. at 631 (O'Connor, J., concurring) (citing the endorsement test).

459. See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

460. See *id.* at 613.

461. See *Shanmugasundaram*, *supra* note 166.

anti-religious one. This consequently rendered the Council's administration of the IACC's land use request in conflict with the establishment clause according to Lemon test analysis.

The settlement agreement reached between the United States and Farmersville illustrates the DOJ's commitment to limit the institutionalization of anti-Muslim animus within the Council. First, the DOJ recognized that the land use dispute encompassed far more than a plot of land and one aggrieved party. The IACC's religious exercise concerns were resolved by the DOJ's settlement agreement, which mandated delivery of the permit to build the cemetery.<sup>462</sup> Second, looking past resolving the specific harm tied to the land use denial, the DOJ settlement mandated that

within ninety (90) days of the Effective Date of this Agreement, it will provide training on the requirements of RLUIPA to persons that have responsibilities relating to the enactment, implementation and enforcement of the City's zoning or land use regulations.<sup>463</sup>

This RLUIPA training, in effect, is punitive and rehabilitative.<sup>464</sup> First, swift assignment of RLUIPA training is a functional judgment by the DOJ that the municipal body has endorsed anti-Muslim views or its land use determinations are firmly entangled with them.<sup>465</sup> Second, the training provides the DOJ with the ability to coordinate programming that (seeks to) disentangle anti-Muslim views from municipal land use administration and disestablish projective anti-Sharia stimuli within the city council.<sup>466</sup> The training has a sustained effect beyond a mandated course, or courses, of instruction; it also placed the Farmersville Council on the DOJ's ongoing RLUIPA radar, thus deterring the prospect of future violations.

In addition to mandated trainings, RLUIPA relief also includes inspection and monitoring of municipal records as possible remedies.<sup>467</sup> These remedies enable the DOJ to assess the *degree* of municipal

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462. Farmersville Settlement, *supra* note 327.

463. *Id.* at 7.

464. The training is also injunctive because it seeks to cease anti-Muslim state action on the part of the city, within and beyond the land use context.

465. The order in *Pittsfield* also mandated that the planning commission and Board undergo RLUIPA training. See *United States v. Pittsfield Charter Twp.*, No. 2:15-cv-13779, slip op. at 6-7 (E.D. Mich. Oct. 14, 2016).

466. In comparison, the RLUIPA training ordered in *United States v. Township of Bernards*, a case involving a land use denial of a mosque, was more stringent than the remedy in *Pittsfield*. See Settlement Agreement at 9-11, *United States v. Twp. of Bernards*, No. 16-CV-08700 (D.N.J. May 30, 2017). It required the mayor, consultants and contractors of the Township, planning board, and zoning board of adjustments to first sign a contract of RLUIPA compliance, and then attend a RLUIPA training. *Id.*

467. See, e.g., *id.* at 11-13.

entanglement with anti-Muslim sentiment through close scrutiny of land use records, which is particularly salient in cases where the discrimination was subtle or disguised by pretext. This was the case in *Pittsfield*, where private actors manifested an explicit animus toward the MIA and its plans to build a school, while Board members enforced that animus by way of campaigning against the school in their private lives.<sup>468</sup> Inspection and monitoring of records enables the DOJ to uncover the sources, motives, and context surrounding a land use denial advanced under covert discriminatory motives.<sup>469</sup> It then allows the DOJ to subsequently gauge if additional RLUIPA trainings or other DOJ interventions are needed to counter the municipal entrenchment of anti-Muslim animus.

These modes of RLUIPA relief speak directly to establishment clause infringement, both in relation to the land disputes in question and prospective causes of action. In addition to the injunctive, punitive, and rehabilitative effect that RLUIPA trainings, record inspection, monitoring, and public notice have on a municipal body in remedying the direct injury,<sup>470</sup> these interventions also provide a presumption of anti-Muslim animus in future matters where the local government is alleged to have engaged in a RLUIPA, free exercise of religion, or establishment clause violation. Therefore, RLUIPA's mission of disestablishing anti-Muslim animus is achieved in the short-term by remedy and carried forward in the long-term by establishing a record of municipal compliance (or non-compliance) that provides an evidentiary basis for future free exercise, establishment clause, or RLUIPA challenges.

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468. Specifically, Board member Williams organized residents and coached them on how to voice their opposition to the school. *See supra* Part III.C. Williams transformed her post on the Board into a vehicle to campaign against the MIA and, more broadly, the Muslim faith it represents. This transformation of a municipal post illustrates intimate entanglement with anti-Muslim views for the purpose of inhibiting a Muslim school. *See Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). In line with endorsement test analysis, “a reasonable observer would view” Williams’s actions as rooted in anti-Sharia sentiment. *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 631 (1989) (O’Connor, J., concurring).

469. *See Pittsfield*, slip op. at 9–13.

470. Public notice remedies include the placement of signage on the buildings of governments that violated RLUIPA (“[T]he Township shall post and maintain printed signs regarding their obligations under RLUIPA”); placement of an Internet posting of municipal obligations to adhere to RLUIPA moving forward “on the first page of its Internet home page”; and a commitment to non-discriminatory treatment of future land use applicants on religious grounds. *Id.* at 4–5.

## 2. Building Forward

The municipal entanglement of anti-Muslim sentiment and action examined above, although directly sourced by the ASM, is also tied to other forms of religious discrimination. As articulated at the outset of this Article, the ASM is a strand of a broader culture war that singles out Muslims, Jews, Buddhists, and Hindus as members of “un-American” faith traditions. This religious discrimination is violently manifested by attacks on Sikh gurdwaras and Jewish synagogues<sup>471</sup> and the rising land use discrimination against these and other minority faith groups seeking to build religious institutions.<sup>472</sup>

In response to the disproportionate threat faced by minority faith groups, RLUIPA relief has centered on constraining hostility along religious lines. The broader culture war that inspires the ASM also drives anti-Semitism, which has accounted for eleven of the DOJ’s RLUIPA land dispute investigations since 2010. RLUIPA relief, particularly trainings mandated by settlement or court order, extends opportunities for the DOJ to counter the source that gives rise to multiple forms of religious animus and to seriously limit the myriad forms of religious animus rooted in municipal bodies.

As a member of the U.S. Civil Rights Commission, the Author has proposed the creation of cross-community RLUIPA trainings. Namely, these convening trainings would speak to the experiences of minority religious groups across spiritual lines. Currently, RLUIPA trainings focus on instructing local government employees about the statute’s provisions and enforcement mechanisms, offering a one-size-fits-all presentation that responds to an individual land use dispute. While this manner of RLUIPA training may be effective in deterring municipal discrimination against the faith group that prompted training, it may have limited effect on deterring overall animus or discrimination. With an eye toward maximizing the retrenchment effect of RLUIPA trainings and expanding those who would benefit from it, the Author proposes the following additions.<sup>473</sup>

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471. This was most tragically illustrated by the mass shooting in Squirrel Hill on October 27, 2018, when a shooter entered the Tree of Life Synagogue in the Pittsburgh suburb and killed eleven people. *11 Dead, Several Others Shot at Pittsburgh Synagogue*, CBS PITT. (Oct. 27, 2018, 11:41 PM), <https://pittsburgh.cbslocal.com/2018/10/27/heavy-police-presence-near-synagogue-in-squirrel-hill>.

472. 2016 DOJ RLUIPA REPORT, *supra* note 15, at 3–6.

473. The Author has formally proposed this plan as a sitting member of the Michigan State Committee of the U.S. Civil Rights Commission.

First, the DOJ could propose RLUIPA trainings to municipal boards or planning commissions during the investigatory stage.<sup>474</sup> This proactive use of the training mechanism could be used to incentivize the local government to settle with the Muslim claimant before litigation. Avoiding litigation would protect Muslim communities—particularly those subjected to zealous popular covenants—from the possibility of violence that litigation invites.<sup>475</sup> In addition, avoiding litigation would also prevent the media coverage that comes along with it and feeds into ASM’s heuristic and discursive plans.<sup>476</sup> Finally, if the city is receptive to a pre-litigation RLUIPA training, it could expedite reaching a settlement and, thus, expedite the creation of the intended mosque, Muslim cemetery, or school.

Second, the author proposes a “close to home presentation” be integrated into RLUIPA trainings to ensure training content focuses closely on local fronts of religious bigotry. Specifically, this presentation would identify political actors or movements that have pointedly anti-Semitic, anti-Muslim, racist, or bigoted mandates. In turn, this would *localize* the character of RLUIPA training and single out its effect on actors sitting on city boards and planning commissions. This forward-looking addition would put municipal actors on notice and isolate those on city boards and planning commissions sympathetic to discriminatory views. In addition, it could prompt cooperation among Muslim, Jewish, and other religious minority groups in the area, which is especially critical in remote and rural locales where their respective populations are small and sparse.<sup>477</sup>

Third, instead of abstractly discussing the importance of religious pluralism and tolerance, the DOJ should consult with academics or scholars of religion to help design RLUIPA trainings.<sup>478</sup> The DOJ can coordinate panels where scholars of faith groups disproportionately targeted in that town or city counter prevailing tropes or damaging

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474. Instead of deploying the training as a post-litigation remedy, the DOJ can extend it as a tool toward settlement without litigation.

475. See *Anti-Muslim Activities in the United States 2012–2015*, NEW AM., <https://www.newamerica.org/in-depth/anti-muslim-activity> [<https://perma.cc/9SL2-2JLR>].

476. See, e.g., *Islamic Cemetery Vandalized in Rural Dakota Co.*, MPR NEWS (Aug. 1, 2017), <https://www.mprnews.org/story/2017/08/01/islamic-cemetery-in-suburban-minneapolis-vandalized> [<https://perma.cc/M59D-NMCN>].

477. The Author, in his capacity as an Equality Fellow, has convened several inter-faith sessions with local governments centered on RLUIPA training and education, including in states where the ASM and anti-Semitism are particularly threatening.

478. Although theoretically appealing, consulting with local faith leaders to be part of RLUIPA trainings would run the DOJ afoul of the establishment clause. See *supra* Part IV.B.1.

political messaging. To forge lasting bridges and minimize costs, the DOJ should seek academics or scholars from nearby universities or colleges. A cross-religious panel would identify the various fronts of religious bigotry that threaten minority faith communities and, in line with the spirit of the establishment clause, erode distinct strands of religious bigotry enmeshed with local government.<sup>479</sup>

These three revisions would enhance the positive impact of RLUIPA trainings on the front- and back-end of land use disputes. In addition, these revisions push the DOJ to frame religious bigotry as a broader, interconnected phenomenon that may manifest itself in the form of civic opposition to a mosque in a town today but could mobilize into a protest against the creation of a Sikh temple or synagogue tomorrow. This change would turn RLUIPA trainings into proactive instruments for sustained change and diminish the institutionalization of religious animus vertically and horizontally.

### 3. Finding Common Ground

This Article interrogates rising land use discrimination faced by Muslims. However, the legal territory this Article investigates is the space between the promise of expressive freedom and civic denial. Muslims, certainly, do not find themselves alone on these trying grounds. As examined above, other minority faith groups are denied access to land as a consequence of their spiritual beliefs. However, the scope of victims harmed by religious animus is not limited to minority faith groups; religious animus also drives discrimination against racial and sexual minority groups. Although crafted by Congress to shield against religious discrimination, private and civic actors have wielded religious freedom statutes as swords to inflict harm on groups they deem as sacrilegious and uncivilized.<sup>480</sup>

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479. See generally Jeffrey H. Goldfien, *Thou Shalt Love Thy Neighbor: RLUIPA and the Mediation of Religious Land Use Disputes*, 2006 J. DISP. RESOL. 435 (arguing for a mediation-based approach to RLUIPA claims where parties establish common ground and common language to ensure the parties gain a deeper understanding of the other's religious beliefs and arguments, and then work to obtain an agreeable outcome).

480. See Tom Gjelten, *How the Fight for Religious Freedom Has Fallen Victim to the Culture Wars*, NPR (May 23, 2019, 5:00 AM), <https://www.npr.org/2019/05/23/724135760/how-the-fight-for-religious-freedom-has-fallen-victim-to-the-culture-wars> [<https://perma.cc/7PY4-ET5T>]; Emily London & Maggie Siddiqui, *Religious Liberty Should Do No Harm*, CTR. FOR AM. PROGRESS (Apr. 11, 2019, 9:03 AM), <https://www.americanprogress.org/issues/religion/reports/2019/04/11/468041/religious-liberty-no-harm> [<https://perma.cc/39FZ-PQKL>]; Ian Thompson, *In an Era of Religious Refusals, the Do No Harm Act Is an Essential Safeguard*, ACLU (Feb. 28, 2019, 11:15 AM), <https://www.aclu.org/blog/religious-liberty/using-religion-discriminate/era-religious-refusals-do-no-harm-act-essential> [<https://perma.cc/5FCU-V785>].



Framing the projective impact of the ASM as an establishment clause concern enables strategic coordination with LGBTQ scholars and advocates. While much of the legal scholarship examining how federal religious protection statutes—especially RFRA and state (or “mini”) RFRAs<sup>481</sup>—fixate on the use of religious freedom as a tool to deny services and rights to LGBTQ communities, the very politico-religious fronts that castigate Islam are simultaneously invested in condemning sexual minorities. By shifting the analytical prism from the free exercise to the establishment clause and exposing how movements such as the ASM and the “Religious Right” enmesh their views within local government,<sup>482</sup> members of the Muslim and LGBTQ communities can align and coordinate strategic actions to safeguard, and promote, their respective interests.

Local government is more susceptible to the projective influence of politico-religious movements. While sexuality law scholars have examined how religious entanglement has resulted in the denial of civic services to LGBTQ communities, this Article illustrates the ASM’s influence over city boards and planning commissions.<sup>483</sup> Law scholar Kyle Velte dubs this phenomenon the emergence of “quasi-theocratic zones,”<sup>484</sup> whereby municipal actors’ determinations are driven by projective views that deny public and private services to sexual minorities on account of their religious beliefs and reject land use permits to Muslims on the basis of the same beliefs. Therefore, the bureaucratic entrenchment of this religious animus erodes the rights of both Muslim and LGBTQ communities.

This kindred victimization should prompt coordinated action.<sup>485</sup> This action, if forged through an establishment clause theory, enables

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481. For an analysis of “mini” RFRAs, see Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466 (2010).

482. This Article adopts this (broadly used) term to encompass the numerous Christian political groups that seek to inject conservative religious values into government policy.

483. The majority of this scholarship interrogates RFRA and the copycat RFRA statutes states adopted after the Supreme Court’s ruling in *City of Boerne*. See generally Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015), for a leading analysis of how religious exemption bars third-parties, including members of LGBTQ communities, from accessing equal services from public and private actors.

484. See Kyle C. Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right’s Challenges to Antidiscrimination Statutes*, 49 CONN. L. REV. 1 (2016).

485. As an Equality Fellow, the Author has held workshops within more than twenty mosques across the United States, pushing Muslim communities to work closely with LGBTQ leadership on a range of civil rights fronts, including the land and property contexts.

the protection of religious exercise for Muslims while confronting the institutional homophobia that denies sexual minorities access to services. Echoing law scholar Berta Esperanza Hernandez Truyol, "I am as concerned with Muslims having the right to build mosques as I am with sexual minorities to not experience discrimination for who they are."<sup>486</sup> Using the establishment clause to attack this common source of homophobic and anti-Muslim animus could erode the religious (and anti-religious) stronghold within local governments that actively discriminates against Muslims and sexual minorities.

Disestablishing the religious roots of homophobia and anti-Muslim animus within local government should be a common objective, and indeed, one that should push Muslim leadership to overcome their own biases against sexual minorities, who are likewise condemned by cultural movements that assail their humanity and deny their dignity.<sup>487</sup> Muslim civic and religious organizations have been slow to forge strategic relationships with LGBTQ groups, but as the Author has observed, acknowledging the existence of LGBTQ Muslims on both sides of the divide is a prerequisite for finding common ground and fostering solidarity:

Queer people of Islamic heritage have often been erased, by both allies and enemies, homophobes and homophiles: those who rightly fight against Islamophobia [within the land use context] have not always been aware or inclusive of the many LGBT individuals in their midst, and the LGBT mainstream and its allies have not always condemned xenophobic Islamophobia, and have in certain cases contributed to it.<sup>488</sup>

Indeed, disentangling homophobia within mosques and Muslim organizations and retrenching anti-Muslim sentiment from LGBTQ institutions are prerequisites for building a common front against movements that cast both groups as unworthy of equality. To challenge institutionalized homophobia within Muslim spaces, the Author has convened private community discussions within mosques addressing the concerns of LGBTQ Muslims and, on two occasions, mediated discussions between them and mosque leadership.<sup>489</sup> Although a small step, interventions like these are essential for progress within the broader Muslim community and will dictate the possibility for

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486. Khaled A. Beydoun, Panelist, LatCrit Biennial Conference at Georgia State University Law School: Religious Rights and Restraints (Oct. 19, 2019).

487. See BEYDOUN, *supra* note 153, at 183–87.

488. Khaled A. Beydoun & Mehammed A. Mack, *The Hate Behind the Orlando Massacre*, AL JAZEERA (June 13, 2016), <https://www.aljazeera.com/opinions/2016/6/13/the-hate-behind-the-orlando-massacre> [<https://perma.cc/CC2G-KRLU>].

489. In his capacity as an Equality Fellow, the Author mediated two private sessions between LGBTQ Muslims and Islamic clergy in Detroit, Michigan, and Miami, Florida.

coordination with LGBTQ communities against cultural fronts that demonize the two.

While establishment clause attacks against these collectives offer the possibility of rights redemption beyond the land use realm, collective resistance and sustained solidarity—among minority faith groups and Muslims and LGBTQ communities—extends the greatest hope for repressing their projective influence within local governments across the country.

### CONCLUSION

Beware the ridiculous. It will one day rule you.

—Steven Dietz, *God's Country*<sup>490</sup>

[O]ur civil rights have no dependence on our religious opinions . . . .

—Thomas Jefferson (1779)<sup>491</sup>

Land is sacred. It was tended to faithfully by the indigenous nations who first lived atop American soil.<sup>492</sup> It remains sacred today, especially for minority faith groups interlocked between emboldened popular hostility and the projective effect such hostility has on municipal bodies presiding over the fate of their cemeteries and synagogues, schools and temples.

Keying in on the Muslim experience since 2010, this Article investigates the challenging terrain Muslim land use claimants occupy—between municipal enforcement of law that seeks to deny their religious freedom and federal legislation that aims to restore it. This terrain has become even more precarious since the rise of the ASM in 2010 and its imprint on the land use determinations conducted by city boards and planning commissions across the country. Enacted in 2000, RLUIPA's value to Muslim land use requests climaxed when it confronted the ASM in 2010. The Act also challenged the ASM's projective impact on local governments in rural towns, where no Muslim institution had ever been established, and on urban fronts, where Islam is an established part of the religious landscape.

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490. STEVEN DIETZ, *GOD'S COUNTRY* 95 (2010).

491. See 82. *A Bill for Establishing Religious Freedom*, 18 June 1779, NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/jefferson/01-02-02-0132-0004-0082> [<https://perma.cc/F5S4-NDRA>].

492. See *Johnson v. M'Intosh*, 21 U.S. 543, 589 (1823) (establishing the principle that indigenous peoples' dominion over North American territory could be extinguished by force and legally supplanted by European colonial claim).

For Muslims enduring one of the most *ungodly* fronts of today's culture wars, RLUIPA has given life to the very Muslim institutions local governments were invested in preempting. Through examination of case law, this Article highlights the impact of religious bigotry within local governments, which govern the fate of minority faith communities, and RLUIPA's role in protecting them. In the coming decade, when the public covenants of rage will be inflamed by mounting culture wars that intensify divisions along lines of race and religion, sect and sexual orientation, RLUIPA's capacity to combat hate within local government may be more vital than ever.