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## A RELIGIOUS DOUBLE STANDARD: POST-9/11 CHALLENGES TO MUSLIMS' RELIGIOUS LAND USE

*Asma T. Uddin*

Muslims in the United States face real limits on their religious freedom. Numerous influential individuals and organizations even posit that Islam is not a religion and that, therefore, Muslims do not have rights to religious freedom. The claim is that Islam is a political ideology that is intent on taking over the country and subverting Americans' constitutional rights. This narrative has gained momentum since the attacks of September 11, 2001 and continues to be amplified and disseminated by a well-funded cadre of anti-Muslim agitators. One area where its effects can be seen clearly is in religious land use, where a concerted effort to deprive Muslims of basic rights frustrates the aims and principles of the Religious Land Use and Institutionalized Persons Act (RLUIPA).<sup>1</sup>

### “ISLAM IS NOT A RELIGION”

Many politicians and other leaders have publicly claimed that Islam is something other than a religion and that Muslims are not protected by religious freedom guarantees under U.S. law. For example, Jody Hice, U.S. Representative from Georgia's 10th District, once argued: “Most people think Islam is a religion, it's not. It's a totalitarian way of life with a religious component.”<sup>2</sup> Based on this assessment, Hice argued that “[Islam] is a complete geo-political structure and, as such, does not deserve First Amendment protection.”<sup>3</sup>

Similarly, John Bennett, a Republican lawmaker in the Oklahoma state legislature, said in 2014, “. . . Islam is not even a religion. It's a social political system that uses a deity to advance its agenda of global conquest.”<sup>4</sup> Former Florida congressman, Allen West, has said “Islam is a totalitarian theocratic political ideology; it is not a religion. It has not been a religion

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1. 42 U.S.C. 2000cc(a) (2006).

2. Jane C. Timm, *GOP Candidate Jody Hice in 2011: “Most People Think Islam Is a Religion, It's Not,”* MSNBC (June 24, 2014), <http://www.msnbc.com/msnbc/gop-jody-hice-islam-doesnt-deserve-first-amendment-protections>.

3. *Id.*

4. Chris Branch, *State Rep. John Bennett Stands by Anti-Islam Comments: “Islam Is Not Even A Religion,”* THE HUFFINGTON POST (Sep. 22, 2014), [https://www.huffingtonpost.com/2014/09/22/oklahoma-john-bennett-islam\\_n\\_5863084.html](https://www.huffingtonpost.com/2014/09/22/oklahoma-john-bennett-islam_n_5863084.html).

since 622 A.D.”<sup>5</sup> In 2015, former assistant U.S. attorney, Andrew C. McCarthy wrote in the *National Review*, “When we discuss ‘Islam,’ it should be assumed that we are talking about both a religion and a political-social ideology . . . ‘Islam’ . . . should be understood as conveying a belief system that is not merely, or even primarily, religious.”<sup>6</sup> Retired Lt. General William “Jerry” Boykin, a former advisor to Ted Cruz’s 2016 presidential campaign, has stated that Islam “should not be protected under the First Amendment.”<sup>7</sup>

In 2016, former national security adviser, Michael Flynn, said that “Islam is a political ideology . . .” that “. . . hides behind being a religion.”<sup>8</sup> In 2017, then-White House aide, Sebastian Gorka could not unequivocally state that Islam is a religion; when asked by Steven Inskeep of NPR, “Does the president believe Islam is a religion?” Gorka failed to give a direct answer, instead opining, “This is not a theological seminary. This is the White House. We aren’t going to get into theological debates.”<sup>9</sup>

In a January 2018 press release, state senator of South Dakota, Neal Tapio, a Republican running for the U.S. House of Representatives, questioned whether the First Amendment applies to Muslims.<sup>10</sup> In July 2019, when the former Colorado Senate President, John Andrews, addressed a crowd of over a thousand at the Western Conservative Summit, he stated unequivocally that “the simplistic approach of simply granting unconditional ‘freedom of religion’ to a religion that doesn’t believe in freedom—and never doubt me, Islam does not—that approach is civilizational suicide, friends.”<sup>11</sup>

5. Asawin Suebsaeng, *Allen West’s Muslim Hate Goes Well Beyond a Genocide Meme*, DAILY BEAST (Dec. 12, 2016), <https://www.thedailybeast.com/allen-wests-muslim-hate-goes-well-beyond-a-genocide-meme>.

6. Andrew C. McCarthy, *Ben Carson and Islam*, NAT’L REV. (Sep. 21, 2015), <http://www.nationalreview.com/corner/424379>.

7. Arnold R. Isaacs, *Meet the Radical Anti-Islam Conspiracy Theorists Advising Ted Cruz*, WASH. POST (Apr. 14, 2016), [https://www.washingtonpost.com/posteverything/wp/2016/04/14/meet-the-radical-anti-islam-conspiracy-theorists-advising-ted-cruz/?noredirect=on&utm\\_term=.fe16a2b655e6](https://www.washingtonpost.com/posteverything/wp/2016/04/14/meet-the-radical-anti-islam-conspiracy-theorists-advising-ted-cruz/?noredirect=on&utm_term=.fe16a2b655e6).

8. Political Animal, *“Islam Is Not a Religion”: The Real Reason Michael Flynn’s Appointment Is Ominous*, WASH. MONTHLY (Nov. 25, 2016), <https://washingtonmonthly.com/2016/11/25/the-real-reason-michael-flynn-s-appointment-is-ominous-islam-is-not-a-religion/>.

9. Sarah Wildman, *A Top White House Aide Was Asked If Trump Thought Islam Was a Religion. He Refused to Answer*, VOX (Mar. 1, 2017), <https://www.vox.com/world/2017/3/1/14778756/white-house-trump-sebastian-gorka-islam-religion-anti-semitism>.

10. Seth Tupper, *Tapio Questions Religious Freedom for Muslims*, RAPID CITY J. (Jan. 21, 2018), [http://rapidcityjournal.com/news/local/tapio-questions-religious-freedom-for-muslims/article\\_a4e4532f-1b69-5b4d-9400-a70fb5028caa.html#tracking-source=home-top-story-1](http://rapidcityjournal.com/news/local/tapio-questions-religious-freedom-for-muslims/article_a4e4532f-1b69-5b4d-9400-a70fb5028caa.html#tracking-source=home-top-story-1).

11. Justin Wingerter & Cory Gardner, *The Women’s Vote and Religion: Western Conservative Summit Takeaways*, THE DENV. POST (July 14, 2019), <https://www.denverpost.com/2019/07/14/western-conservative-summit-trump-gardner/>.

These influential figures use many of the same words and phrases because they likely have the same source. In its report “Fear, Inc.: The Roots of the Islamophobia Network in America,” the Center for American Progress identifies a group of highly active anti-Muslim agitators who have for the past decade influenced the national and international political conversation about Islam, its teachings, and its followers. Referring to these individuals as “misinformation experts,” the report describes their extensive sources of funding and the media enablers who help amplify their message.<sup>12</sup>

The individuals highlighted in the report include, among others, Pamela Geller and Robert Spencer, the co-founders of the Stop Islamization of America (SIOA) organization.<sup>13</sup> The group stokes fears about a supposed Islamic conspiracy to take over America and deprive Americans of the fundamental rights safeguarded by the United States Constitution.<sup>14</sup>

The Center for Security Policy (CSP), run by Frank Gaffney, also insists on the existence of an overpowering Islamic threat to an American democracy.<sup>15</sup> In May 2018, CSP’s senior vice president for policy, Fred Fleitz, was named chief of staff for then-President Trump’s National Security Council.<sup>16</sup> Fleitz has in the past claimed that Muslim communities in America are susceptible to a “radical worldview that wants to destroy modern society, create a global caliphate and impose sharia law on everyone on Earth.”<sup>17</sup>

Both SOIA and CSP structure their initiatives to limit Muslims’ religious rights, including Muslims’ access to legal protections for religious land use. SOIA helped instigate mass protests against the construction of

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12. See generally Wajahat Ali et al, *Fear, Inc.: The Roots of the Islamophobia Network in America*, CTR. FOR AM. PROGRESS (Aug. 26, 2011), <https://www.americanprogress.org/issues/religion/reports/2011/08/26/10165/fear-inc/>.

13. *Id.* at 37, 45.

14. Talal Ansari, *Anti-Muslim Bills Based on Conspiracy Theories Have Been Introduced in Two States*, BUZZFEED NEWS (Jan. 12, 2017, 5:14 PM), <https://www.buzzfeednews.com/article/talalansari/two-new-anti-sharia-bills>.

15. Peter Beinart, *The Denationalization of American Muslims*, THE ATLANTIC (Mar. 19, 2017), <https://www.theatlantic.com/politics/archive/2017/03/frank-gaffney-donald-trump-and-the-denationalization-of-american-muslims/519954>.

16. Abigail Hauslohner, *New NSC Chief of Staff Is from Group That Believes Muslims Are Plotting to Take Over U.S.*, WASH. POST (May 30, 2018), [https://www.washingtonpost.com/news/post-nation/wp/2018/05/30/new-national-security-council-chief-of-staff-comes-from-a-group-that-believes-muslims-are-plotting-to-take-over-america/?noredirect=on&utm\\_term=.5f0b3debbed1](https://www.washingtonpost.com/news/post-nation/wp/2018/05/30/new-national-security-council-chief-of-staff-comes-from-a-group-that-believes-muslims-are-plotting-to-take-over-america/?noredirect=on&utm_term=.5f0b3debbed1).

17. *Id.*

an Islamic cultural center near the site of the 9/11 attacks.<sup>18</sup> Although the center was referred to by its leaders as “Park51,” Geller falsely dubbed it “Ground Zero Mosque.”<sup>19</sup> She concocted a theory that the center represented the threat of Muslim domination and then used that theory to organize an extensive and enduring campaign against it.<sup>20</sup> In the end, SOIA succeeded and plans for the building were abandoned.<sup>21</sup>

CSP, for its part, has published, “Mosques in America: A Guide to Accountable Permit Hearings and Continuing Citizen Oversight.” The guidebook instructs concerned citizens on how to disrupt the zoning process without exposing their true motives: “[c]oncerned citizens must learn to express questions and reservations in a manner appropriate to the relevant civic forum’s purpose.”<sup>22</sup> It also discourages readers from “expressing alarm as hysteria” as that could be “used to characterize the entire oversight effort as racially biased and ignorant.”<sup>23</sup>

CSP’s and others’ efforts to hinder Muslims’ religious land use have been successful. There is widespread resistance to the construction or expansion of mosques.<sup>24</sup> Even plans to build Muslim cemeteries have been met with fierce resistance.<sup>25</sup> In each case, the resistance is based on the idea—stoked by the 9/11 attacks—that Islam is a dangerous political ideology, and that Muslims are aggressors intent on taking over the United States.

#### POST-9/11 CHALLENGES TO MUSLIMS’ RELIGIOUS LAND USE

The opposition to Muslims’ mosque and cemetery projects remains prevalent despite RLUIPA’s explicit protections for religious land use. In 2000, Congress unanimously passed RLUIPA with the support of a

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18. CNN Wire Staff, *Protestors Descend on Ground Zero for Anti-Mosque Demonstration*, CNN (June 7, 2010), <https://www.cnn.com/2010/US/06/06/new.york.ground.zero.mosque/index.html>.

19. *Id.*

20. *Id.*

21. Ronda Kaysen, *Condo Tower to Rise Where Muslim Community Center Was Proposed*, N.Y. TIMES (May 12, 2017), <https://www.nytimes.com/2017/05/12/realestate/muslim-museum-world-trade-center.html>.

22. KAREN LUGO, MOSQUES IN AMERICA: A GUIDE TO ACCOUNTABLE PERMIT HEARINGS AND CONTINUING CITIZEN OVERSIGHT 12 (2016), [http://www.centerforsecuritypolicy.org/wp-content/uploads/2016/12/Mosque\\_in\\_America.pdf](http://www.centerforsecuritypolicy.org/wp-content/uploads/2016/12/Mosque_in_America.pdf).

23. *Id.* at 18.

24. *Nationwide Anti-Mosque Activity*, ACLU (May 2021), <https://www.aclu.org/issues/national-security/discriminatory-profiling/nationwide-anti-mosque-activity>.

25. *Muslim Cemetery Sparks Row in Texas Town of Farmersville*, BBC (July 20, 2015), <https://www.bbc.com/news/world-us-canada-33599843>.

religiously and ideologically diverse coalition.<sup>26</sup> RLUIPA's land use provisions incorporate constitutional principles based on the Free Exercise, Free Speech and Equal Protection Clauses.<sup>27</sup>

There are five sections on land use protections. Section 2(a) applies the strict scrutiny standard to the government's decisions about religious land use.<sup>28</sup> That is, if a government regulation substantially burdens religious exercise, the government must justify the law by showing that it had a "compelling interest" in limiting religious exercise and that there is no less restrictive way for the government to serve that interest without violating rights.<sup>29</sup>

Section 2(b)(1) requires that religious assemblies and institutions be treated at least as well as secular assemblies and institutions.<sup>30</sup> Section 2(b)(2) emphasizes that the government also cannot discriminate between religions or religious denominations—for example, churches cannot be favored over mosques.<sup>31</sup> Section 2(b)(3) addresses scenarios where the government would want to unreasonably limit or completely exclude religious institutions from a particular area.<sup>32</sup> Taken together, these sections provide comprehensive protection for religious land use projects.

In passing the statute, Congress reviewed a wide array of evidence on state and local violations of religious land use laws, including statistical and anecdotal evidence, and detected a strong pattern of discrimination.<sup>33</sup> The discrimination, both overt and subtle, for the most part involved "new, small, or unfamiliar churches."<sup>34</sup> A House Report stated, "the motive is not always easily discernible, but the result is a consistent, widespread pattern of political and governmental resistance to a core feature of religious exercise: the ability to assemble for worship."<sup>35</sup> What made this discrimination possible were the vague and inconsistent standards of zoning processes, leading to highly subjective decision-making. Land use regulators had complete discretion to reject or approve land use permits and otherwise implement zoning laws to their liking.

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26. Eric Treene, *RLUIPA and Mosques: Enforcing a Fundamental Right in Challenging Times*, 10 FIRST AMEND. L. REV. 330, 340 (2012).

27. *Id.* at 341.

28. 42 U.S.C. § 2000cc(a)(1) (2018).

29. *Id.*

30. 42 U.S.C. § 2000cc(b)(1) (2018).

31. 42 U.S.C. § 2000cc(b)(2) (2018).

32. *See* 42 U.S.C. § 2000cc(b)(3) (2018).

33. 146 CONG. REC. 16,698-99 (2000) (Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000); H.R. REP. NO. 106-219, pt. 5, at 18-24 (1999).

34. *See* 146 Cong. Rec. S7,774 (2000).

35. H.R. REP. NO. 106-219, at 24 (1999).

RLUIPA was passed less than a year before the 9/11 attacks. As a result, when Congress was reviewing the evidence, Muslim communities were barely on its radar.<sup>36</sup> But that context changed drastically after 9/11. In RLUIPA's first ten years, 14% of RLUIPA investigations conducted by the Department of Justice (DOJ) involved Muslim institutions.<sup>37</sup>

SOIA's campaign against Park51 heightened this opposition. In the period between 2010 and 2016, 40% of all DOJ RLUIPA investigations involved Muslim groups<sup>38</sup>—an especially startling statistic if one considers that Muslims make up only an estimated 1.1% of the American population.<sup>39</sup>

Park 51 catapulted mosque construction to national and international headlines.<sup>40</sup> To this day, mosque projects face years of delays as residents raise a litany of complaints and concerns. The case of the Islamic Center of Murfreesboro (ICM) in Murfreesboro, Tennessee is particularly illustrative.

In 2010, a Murfreesboro lawyer argued in court that ICM should be denied religious land use protections because Islam is not a religion. Several politicians first gave life to this bizarre claim outside of court. Lou Ann Zelenik, a local Republican Party chair and candidate for the U.S. House of Representatives, founded her campaign on anti-Islamic rhetoric.<sup>41</sup> On June 14, 2010, she denounced the planned mosque as “an Islamic training center,” saying that it is not a *bona fide* religious institution but instead had a political mission “to fracture the moral and political foundation of Middle Tennessee.”<sup>42</sup>

Echoing Zelenik's doubts about Islam's status as a religion, the Lieutenant Governor of Tennessee, Tom Ramsey, publicly questioned whether Islam is “actually a religion, or is it a nationality, way of life, cult,

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36. Treene, *supra* note 26, at 343.

37. *Id.* at 345.

38. Jennifer Chambers, *Feds Target Religious Bias in Zoning Fights*, THE DETROIT NEWS (May 24, 2016, 11:32 PM), <https://www.detroitnews.com/story/news/local/michigan/2016/05/24/feds-target-religious-bias-zoning-fights/84881958/>.

39. Besheer Mohamed, *New Estimates Show U.S. Muslim Population Continues to Grow*, PEW RES. CTR. (Jan. 3, 2018), <https://www.pewresearch.org/fact-tank/2018/01/03/new-estimates-show-u-s-muslim-population-continues-to-grow/>.

40. See Finlo Rohrer, *The Battle Over the 'Ground Zero Mosque'*, BBC NEWS (Aug. 3, 2010), <https://www.bbc.com/news/world-us-canada-10846716>; see also Russell Goldman & Jake Tapper, *Islamic Center 'Ground Zero Mosque' Controversy Heats Up*, ABC NEWS (Aug. 19, 2010), <https://abcnews.go.com/Politics/islamic-center-ground-mosque-controversy-heats/story?id=11435030>.

41. See, Travis Loller, *Tenn. Candidate Denounces Mosque Proposal*, ASSOCIATED PRESS (June 25, 2010), <https://web.archive.org/web/20150329175257/http://www.highbeam.com/doc/1A1-D9GHVDE82.html>.

42. *Id.*

or whatever you want to call it.”<sup>43</sup> Ramsey declared Islam “a violent political philosophy more than [a] peace-loving religion.”<sup>44</sup>

In September 2010, four residents filed a lawsuit in chancery court to halt the building effort and nullify the construction permit. The plaintiffs laid out a litany of grievances. They claimed the planning commission had failed to give adequate notice of the meeting where the mosque plans were approved (though the commission had done nothing differently than usual with approving religious buildings).<sup>45</sup> The construction project elevated risks to county residents, they said (though the risks were unspecified).<sup>46</sup> And finally, the plaintiffs have been and will be irreparably harmed by the risk of terrorism created by the mosque’s “proselytizing” and “Sharia practices.”<sup>47</sup> Because Islam is not a religion and ICM’s practices did not constitute “religious exercise,” the argument went, the mosque construction plans should not benefit from any of the county or federal laws that protected religious organizations.<sup>48</sup>

On September 27, 2010, the judge, Robert Corlew III, held a public hearing.<sup>49</sup> At the hearing, he gave an open platform to the plaintiffs’ attorney, Joe Brandon, Jr. Brandon badgered his witnesses with, “Can you envision in your wildest dreams how something could be called a religion that promotes the abuse, physical abuse of women[?]”<sup>50</sup> and “If they practiced Sharia law would it still be your opinion that this is a religion?”<sup>51</sup> He spent six days trying to persuade the court that Muslims deserved no religious liberty protections because “these are the same people who flew jets into the World Trade Center on 9/11.”<sup>52</sup>

Fortunately, the arguments were unpersuasive—although the local court ruled against the mosque, the Tennessee appellate court overturned

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43. Erik Schelzig, *Tenn. Gov Hopeful Questions If Islam Is A “Cult.”* SEATTLE TIMES (July 27, 2010, 2:47 PM), <https://www.seattletimes.com/seattle-news/politics/tenn-gov-hopeful-questions-if-islam-is-a-cult/>.

44. *Id.*

45. *Golcyncki v. Rutherford Cnty. Reg’l Plan. Comm’n*, No. 3:12-0737, 2012 WL 3917055 (M.D. Tenn. 2012).

46. *Id.*

47. *Id.*

48. *Id.*

49. Transcript of Unwelcome: The Muslims Next Door (CNN television broadcast Sept. 4, 2011), <http://www.cnn.com/TRANSCRIPTS/1109/04/cp.01.html>; *see also* *Fisher v. Rutherford Cty. Reg’l Planning Comm’n*, No. M2012-01397-COA-R3-CV, 2013 WL 2382300, at \*1 (Tenn. Ct. App. May 29, 2013) (indicating that the hearing on the plaintiffs’ motion for temporary injunctive relief began September 27, 2010).

50. *Id.*

51. *Id.*

52. Rachel Slajda, *TN Mosque Trial Continues: ‘Your Honor, This Is a Circus,’* TALKING POINTS MEMO: MUCKRAKER (Oct. 21, 2010, 5:46 AM), <https://talkingpointsmemo.com/muckraker/tn-mosque-trial-continues-your-honor-this-is-a-circus>.

the ruling and the mosque prevailed.<sup>53</sup> But that was after the DOJ stepped in and filed a brief explaining that “under the United States Constitution and other federal laws, it is uncontroverted that Islam is a religion, and a mosque is a place of religious assembly.”<sup>54</sup>

Today, mosques face long approval processes, with public hearings dominated by hours of statements by residents expressing concerns about terrorism and “the role of mosques in terrorist training.”<sup>55</sup> They repeat Brandon’s imagery of mosques as Trojan horses for terrorists. Neighborhood associations echo Pamela Geller when they assert that a mosque will subvert the Constitution of the United States.<sup>56</sup> These conspiracies center the assertion that Islam is not a religion. It is a political ideology or “cult” in opposition to everything Americans stand for.<sup>57</sup> Outside public sessions, where mosque organizers can respond to the opposition, objectors take to the street in loud and fiery protest.<sup>58</sup>

#### A RELIGIOUS DOUBLE STANDARD

In many of the mosque disputes, the opposition is clear about its target. The problem is Islam itself. They argue that even the most acclimated, Americanized Muslim clandestinely seeks to replace the U.S. Constitution with Islamic law. As *The New York Times* stated in 2010,

These local skirmishes make clear that there is now widespread debate about whether the best way to uphold America’s democratic values is to allow Muslims the same religious freedom enjoyed by other Americans, or to pull away the welcome mat from a faith seen as a singular threat.<sup>59</sup>

American Muslims working on building mosques and other facilities for the Muslim community have learned not to expect a welcome mat. The

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53. Bob Smietana, *Murfreesboro Mosque Fight Laid to Rest After Supreme Court Ruling*, RELIGION NEWS SERV. (June 3, 2014), <https://religionnews.com/2014/06/03/murfreesboro-mosque-fight-laid-rest-supreme-court-ruling/>.

54. Brief for the United States of America as Amicus Curiae, *Estes v. Rutherford Cty. Reg’l Planning Comm’n*, No. 10cv-1443 (Tenn. Ch. Ct. 2010).

55. KATHLEEN E. FOLEY, NOT IN OUR NEIGHBORHOOD: MANAGING OPPOSITION TO MOSQUE CONSTRUCTION 8 (2010), [http://www.ispu.org/wp-content/uploads/2016/08/ISPU\\_Not\\_In\\_Our\\_Neighborhood\\_Kathleen\\_Foley-3.pdf](http://www.ispu.org/wp-content/uploads/2016/08/ISPU_Not_In_Our_Neighborhood_Kathleen_Foley-3.pdf).

56. Laurie Goodstein, *Across Nation, Mosque Projects Meet Opposition*, N.Y. TIMES (Aug. 12, 2010), <https://www.nytimes.com/2010/08/08/us/08mosque.html>.

57. Aymann Ismail, *The Mosque Wars*, SLATE (Sept. 11, 2021), <https://slate.com/human-interest/2021/09/september-11-new-mosques-islam-ground-zero.html>.

58. Foley, *supra* note 55, at 8-9.

59. Goodstein, *supra* note 56.

obstacles are apparent. They know that even the broad RLUIPA protections are not enough. So, Muslim communities concede to restrictions and other demands even if those restrictions place significant burdens on the right of congregants to exercise their religion.

While RLUIPA may have attempted to enforce equality across faith groups, the reality on the ground is that some groups are freer than others to practice their faith.

