

COMMANDEERING THE CHURCHYARD:
THE FIRST AMENDMENT IMPLICATIONS OF THE GOVERNMENT'S
JUNE 2020 ASSAULT ON ST. JOHN'S - LAFAYETTE SQUARE

*Sarah Duggin and Donald Crane**

INTRODUCTION

On Monday, June 1, 2020, in the course of the ongoing response to the murder of George Floyd,¹ Black Lives Matter protestors assembled in Washington, D.C. and throughout the United States to call for justice for all people and an end to systemic racism.² Early that evening, then-President Donald Trump made his way across Washington's

* The Rev. Sarah Duggin is an Episcopal priest who teaches constitutional and corporate law at The Catholic University of America's Columbus School of Law and serves part-time as Associate Rector of St. John's Episcopal Church - Georgetown Parish. Prior to joining the law faculty, she was a corporate General Counsel and a partner in the law firm of Williams & Connolly LLP. Donald Crane practices in the international arena and has served as General Counsel for public and non-profit entities and as an Adjunct Faculty member at the University of Michigan School of Law. From 2018 to 2020, Mr. Crane was Senior Counsel to the Rt. Rev. Mariann Edgar Budde, Bishop of Washington, and the Chief Operating Officer of the Episcopal Diocese of Washington. Mr. Crane and Professor Duggin were members of the legal team that represented the Episcopal Diocese of Washington in connection with the events of June 1, 2020, but the views expressed in this article are solely their own. The authors are grateful to the other members of the legal team: Joshua Geltzer, former founding Executive Director of the Georgetown University Law Center Institute for Constitutional Advocacy and Protection, now Deputy Assistant to the President and Deputy Homeland Security Advisor; Professor Mary McCord, Executive Director of the Institute for Constitutional Advocacy and Protection; and Raphael Prober, Thomas Moyer, Joseph Di Piero, and Karen Christian of Akin Gump Strauss Hauer & Field LLP – for their assistance in a challenging time. The authors deeply appreciate the dedicated work of the editors and staff of the George Mason University Civil Rights Law Journal and the comments of Arthur Spitzer, Senior Counsel and former Legal Director, ACLU of DC; Amy Marshak, Managing Director of the Institute for Constitutional Advocacy and Protection; and members of the CUA Law faculty on earlier drafts of this article, as well as the input of the Rt. Rev. Mariann Edgar Budde, the Rev. Robert Fisher, the Rev. Gini Gerbasi, the Rev. Glenna Huber, the Rev. Gayle Fisher-Stewart, the Rev. Melanie Mullen, and the Rev. William Morris.

¹ See, e.g., Dan Mangin, *Ex-Minneapolis cop Derek Chauvin sentenced to 22.5 years in prison for George Floyd murder*, CNBC (June 25, 2021, 11:33 AM), <https://www.cnbc.com/2021/06/25/derek-chauvin-sentencing-for-murder-of-george-floyd.html>.

² See, e.g., Scott Mlyn, et al., *A Look Back at a Week of Protests Across the U.S. Demanding Justice and Change for the Killing of George Floyd*, CNBC (June 6, 2020), <https://www.cnbc.com/2020/06/06/george-floyd-pictures-of-protests-against-police-brutality-across-the-us.html>; Dalton

famed Lafayette Square to St. John's Episcopal Church to pose for cameras (the photo op).³ In advance of Mr. Trump's arrival at the church, law enforcement personnel descended on St. John's with tear gas, rubber bullets, and flash-bang grenades.⁴ They drove away clergy and others gathered peacefully at the church for prayer, ministry, and witness.⁵ When the government invaded the churchyard,⁶ "sacred space became a battleground" as police in riot gear commandeered St. John's churchyard and silenced the church's voice.⁷ The former president then incorporated St. John's empty churchyard and welcome sign into a government message antithetical to the church's teaching.

In looking back on the events that took place in Washington, D.C., on June 1, 2020, the nation and the world have appropriately focused on the aggressive tactics employed against peaceful protestors

Bennet, et al., *The Crackdown Before Trump's Photo Op*, WASH. POST (June 8, 2020), <https://www.washingtonpost.com/investigations/2020/06/08/timeline-trump-church-photo-op/>.

³ See, e.g., Tom Berron, *Trump WALKS to Vandalized St. John's Church as Riot Police Face off with Protesters in US Capital* (photos and video), REUTERS (June 1, 2020), <https://www.rt.com/usa/490454-trump-church-bible-riots/>; Karl Gelles, Veronica Bravo, & George Petras, *How Police Pushed Aside Protesters Ahead of Trump's Controversial Church Photo*, USA TODAY (June 5, 2020), <https://www.usatoday.com/in-depth/graphics/2020/06/05/george-floyd-protests-trump-church-photo-curfew-park/3127684001/>; Steve Benen, *With Heavy-handed Tactics, Trump's Church Photo-op Backfires*, MSNBC (June 2, 2020), <https://www.msnbc.com/rachel-maddow-show/heavy-handed-tactics-trump-s-church-photo-op-backfires-n1221921>.

⁴ Jonathan Allen, et al., *Police, National Guard Clash with Protesters to Clear Streets Before Trump Photo Op*, NBC NEWS (June 1, 2020, 12:36 PM), <https://www.nbcnews.com/politics/politics-news/after-night-significant-damage-d-c-mayor-bowser-imposes-earlier-n1221126>.

⁵ See Carol Kuruvilla, *Religious Leaders Say They Were Tear-gassed for Trump's Church Photo Op*, HUFFINGTON POST (June 2, 2020), https://www.huffpost.com/entry/clergy-st-johns-church-trump_n_Sed6403ac5b6f9c2444b5851; Jack Jenkins, *Clergy Expelled from Church Prior to Trump Photo Op*, RELIGION NEWS SERV. (June 2, 2020) <https://www.baptiststandard.com/news/nation/clergy-expelled-from-church-prior-to-trump-photo-op/> ("The Reverend Glenna Huber . . . was at St. John's but left as the National Guard arrived, said she watched as police rushed into the area she had just fled. Concerned, the priest sent a frantic e-mail to clergy at the church urging them to be careful.").

⁶ We use the term "churchyard" to refer to the grounds of St. John's Lafayette Square, including the patio in front of the main church entrance, as well as other church property facing 16th Street, N.W. and H Street, N.W.

⁷ Gini Gerbasi, *as told to Sophia Nguyen, "I'm a Priest. The Police Forced Me Off Church Grounds for Trump's Photo Op,"* WASH. POST (June 3, 2020), <https://www.washingtonpost.com/outlook/2020/06/03/priest-stjohns-church-trump/>. See also Eric Orts, *The Lafayette Square Assault: A Turning Point for Democracy in America*, THE RULE OF LAW BLOG, CTR. FOR ETHICS AND THE RULE OF LAW (JUNE 23, 2020), <https://www.law.upenn.edu/live/news/10188-the-lafayette-square-assault-a-turning-point-for/news/CERL-NEWS>. See also Joanna Walters, *They Turned Holy Ground Into a Battleground": Clergy Teargassed by Washington*, GUARDIAN (JUNE 2, 2020) (quoting the Rev. Gini Gerbasi), <https://www.theguardian.com/us-news/2020/jun/02/clergy-priests-attacked-police-washington-dc-st-john-church-trump-photo-op>.

gathered in and around Washington's Lafayette Square.⁸ Lawsuits filed in the United States District Court for the District of Columbia allege that the government's actions unconstitutionally deprived peaceful protestors of their civil rights and, in many instances, illegally inflicted physical injuries.⁹ The injuries suffered by those who gathered in our nation's capitol on June 1, 2020, demand ongoing attention.¹⁰ Whether we do so through the courts, Congress, or the ballot box, this nation needs to ensure that peaceful protestors never again suffer this kind of official violence. If we fail, the light of American democracy will be forever dimmed.

Our nation must also address the shocking violation of religious freedom that took place that day. St. John's and the Episcopal Church have chosen to focus on healing and support for racial justice initiatives rather than to pursue legal action,¹¹ but it is essential to

⁸ A recently published account of the former president's final year in office offers a detailed narrative of the events of June 1, 2020. See CAROL LEONNIG AND PHILIP, I ALONE CAN FIX IT: DONALD J. TRUMP'S CATASTROPHIC FINAL YEAR (2021). Europeans and European media, too, reacted with shock to news of law enforcement actions against Black Lives Matter demonstrators; protests in support of the Black Lives Matter movement spread across Europe. Sofia Lotto Persio, *'Trump Declares War On America': Europe Reacts as Black Lives Matter Protests Spread Across Continent*, FORBES (June 2, 2020), <https://www.forbes.com/sites/sofiaplotto/persio/2020/06/02/trump-declares-war-on-america-europe-reacts-as-black-lives-matter-protests-spread-across-continent/?sh=44204ad08c64>; Javier C. Hernández and Benjamin Mueller, *Global Anger Grows Over George Floyd Death, and Becomes an Anti-Trump Cudgel*, N.Y. TIMES (June 1, 2020), <https://www.nytimes.com/2020/06/01/world/asia/george-floyd-protest-global.html>.

⁹ Black Lives Matter DC v. Trump, 2021 WL 2530722 at 18-19 (D.D.C. 2021). See also 3d Amend. Complaint, <https://www.courthousenews.com/wp-content/uploads/2021/06/BLMcomplaint.pdf>. Black Lives Matter DC and several individual plaintiffs sued President Donald J. Trump, members of the Trump Administration, federal officers, Arlington County, and other non-federal law enforcement officers who allegedly "authorized, planned, or participated in the attack on peaceful protestors in and near Lafayette Square on June 1, 2020," Complaint ¶¶ 21-22, *id.* (filed June 4, 2020). The case is currently stayed until November 15, 2021, pending settlement negotiations. Order of Sept. 13, 2021 (granting parties' joint motion for a stay of proceedings), *id.*

In a June 2021 ruling, the court denied the government's motions to dismiss claims for injunctive relief from ongoing speech restrictions in Lafayette Square, as well as claims against District of Columbia and Arlington County, Virginia, law enforcement personnel. The court granted motions to dismiss the remaining claims principally on non-justiciability and qualified immunity grounds. 2021 WL 2530722 at 23-24.

¹⁰ Nicholas Wu & Christal Hayes, *'I was horrified': Witnesses Injured by Police Testify about Trump's Photo Op at Lafayette Square*, USA TODAY (June 29, 2020), <https://www.usatoday.com/story/news/politics/2020/06/29/trumps-photo-op-lafayette-square-focuses-hearing-congress/3270064001/>.

¹¹ In response to the events of June 1, 2020, the Reverend Robert Fisher, Rector of St. John's, expressed his prayer, "I want to start shifting so that hearts start moving toward the cure

recognize the First Amendment implications of what happened at St. John's. Understanding the nature and gravity of those events is critical to safeguarding religious freedom and the ability of faith traditions to speak out against injustice. Clergy and people of faith should not be evicted violently from the grounds of a church, and even presidents should not be free to commandeer a churchyard.

The purpose of this Article is to consider substantive First Amendment issues raised by the government's June 1, 2020, assault on St. John's.¹² Although the issues are complex, application of existing First Amendment precedents¹³ demonstrates that: (1) by clearing and commandeering St. John's churchyard for the former president's photo op, the government violated the Free Exercise Clause; and (2)

which is healing . . . (a)s a spiritual person, that's what we have to find and what we have to work for." Don Lemon interview with Rev. Robert Fisher, *St. John's Church Rector Rev. Robert Fisher Says Seeing President Trump Visiting the Church*, CNN (June 2, 2020), available at <https://www.youtube.com/watch?v=KChBhmtz4c>.

¹² The events of June 1, 2020, at St. John's involve other legal issues, including questions relevant to free speech common to both the protestors who were driven away from Lafayette Square and the individuals evicted from St. John's churchyard, as well as issues pursuant to the Takings Clause of the Fifth Amendment. The free speech questions are at issue in the lawsuits filed on behalf of several protestors by the ACLU in *Black Lives Matter DC v Trump*. See *Black Lives Matter D.C.*, 2021 WL 2530722, at *16–20. In its June 2021 decision, *Black Lives Matter DC v. Trump*, the District Court dismissed several of the claims filed by protestors who were injured in and around Lafayette Square. See *supra* note 10. Although the circumstances differ significantly in some respects, similar questions of qualified immunity, as well as issues pertaining to the availability of declaratory and injunctive relief, could well have arisen with respect to any actions filed by St. John's, the diocese, or the Episcopal Church. Although these issues are beyond the scope of this article, we note that both judges and scholars have questioned the application of qualified immunity where blatant infringements of individual rights and liberties are concerned. For example, in *Browder v. City of Albuquerque*, 787 F.3d 1076 (10th Cir. 2015), in upholding a district court's refusal to dismiss a wrongful death suit against a police officer brought under 42 U.S.C. § 1983 on grounds of qualified immunity, then Court of Appeals Judge, now Justice, Neil M. Gorsuch observed: "Sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing. . . Indeed, it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt." *Id.* at 1083. See Noah Watson, "Yes Harm, No Foul": Recalibrating Qualified Immunity, 64 WASH. U. J.L. & POL'Y 231(2021); Joanna C. Schwartz, *How Qualified Immunity Fails*, 172 YALE L. J. 2 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018); William Baude, *Is Qualified Immunity Unlawful*, 106 CAL. L. REV. 45 (2018). With respect to possible presidential immunity, we note Justice Byron White's words in his dissent in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), "I do not agree that if the Office of President is to operate effectively, the holder of that Office must be permitted, without fear of liability and regardless of the function he is performing, deliberately to inflict injury on others by conduct that he knows violates the law." *Id.* at 756.

¹³ See *infra* Parts II and III.

by silencing the church's voice and compelling it to participate in Mr. Trump's message, the government violated the Free Speech Clause.

Part I of this Article provides a brief narrative of events related to the presidential photo op, and Part II considers that narrative through the lens of Free Exercise jurisprudence. Part III explores the application of Free Speech precedents to the assault on St. John's and notes related Establishment Clause issues. Part IV explores why all this matters and how Americans might begin to address the serious constitutional issues raised by the assault on St. John's. By illuminating the events of June 1, 2020, at St. John's, this Article seeks to demonstrate the gravity of the government's actions, and spark discussion and scholarship on holding leaders accountable¹⁴ to help safeguard the freedoms of religion and speech essential to the health of our democracy.

BACKGROUND

I. THE FORMER PRESIDENT'S ACTIONS ON JUNE 1, 2020

The events of June 1, 2020, were chaotic, and accounts differ as to both the precise occurrences and the exact timeline of events.¹⁵ However, a sense of how these events developed with respect to St. John's

¹⁴ A few scholars have questioned whether, and to what extent, the First Amendment applies to the actions of the Executive Branch. See, e.g., Daniel J. Hemel, *Executive Action and the First Amendment's First Word*, 40 PEPP. L. REV. 600 (2013); Mark. P. Denbeaux, *The First Word of the First Amendment*, 80 NW. L. REV. 1156, 1169-70 (1986). Federal courts, however, regularly apply the First Amendment to matters involving the Executive Branch. See, e.g., *N.Y.T. v. United States*, 403 U.S. 713, 713-14 (1971) (invoking the First Amendment's free press guarantee to prohibit a prior restraint on publication of the Pentagon Papers); *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 790 (1985) (analyzing a challenge brought by legal defense funds to an executive order excluding them from participation in a federal-employee and military-personnel charity drive); *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 230 (2d Cir. 2019) (upholding District Court grant of summary judgment to plaintiffs who argued that blocking their access to former President Trump's Twitter feed constituted unconstitutional viewpoint discrimination). In *Black Lives Matter DC v. Trump*, the court appears to assume the applicability of the First Amendment to the government's conduct in connection with the events of June 1, 2020, in Washington, D.C. See, e.g., *Black Lives Matter D.C.*, 2021 WL 2530722. The Article's authors agree that "the First Amendment applies to exercises of executive authority no less than it does to the passage of legislation." *Shrum v. City of Coweta*, 449 F.3d 1132, 1142 (2006).

¹⁵ See JM Rieger, *Trump Team's Effort to Explain Away Lafayette Square Hits Yet Another Snag, One Year Later*, WASH. POST (June 10, 2021), <https://www.washingtonpost.com/politics/2020/06/09/how-trump-administration-has-tried-explain-clearing-protesters-lafayette-square/>; see also Ted Johnson, *Park Police Claim That Protesters Threw Projectiles at Lafayette Square Park*,

is critical to applying First Amendment precedents. This Part offers an overview.

St. John's is a parish of the Episcopal Diocese of Washington (Diocese) located at 16th and H Streets, N.W.¹⁶ The church stands across from Lafayette Square, a traditional assembly point for the exercise of First Amendment rights in the nation's capital.¹⁷ On June 1, 2020, protestors denouncing the May 25th murder of George Floyd by Minneapolis police officer Derek Chauvin filled the square.¹⁸ Episcopal clergy and others gathered in St. John's churchyard, principally in an area known as the parish "patio,"¹⁹ in response to a call by the Right Reverend Mariann Budde, Bishop of the Episcopal Diocese of Washington, to support and minister to protestors and lift the church's voice in solidarity with its call for racial justice.²⁰ One ministry team, for example, posted a sign reading: "Free water and free prayers."²¹ The Diocese also circulated posters in English and Spanish appealing for "justice for George Floyd, Breonna Taylor, and Ahmaud Arbery" and asking people of faith to gather at St. John's on June 1, 2020, for "solidarity, prayer and witness."²²

The Reverend Melanie Mullen, Director of Reconciliation, Justice, and Creation Care for the Episcopal Church was there to support the protest. Reverend Mullen explained, "The [Bishop's] invitation

But Reporters Say They Saw Peaceful Demonstration, DEADLINE (June 2, 2020), <https://deadline.com/2020/06/donald-trump-george-floyd-demonstrators-lafayette-square-park-1202949717/>.

¹⁶ See SAINT JOHN'S CHURCH, <https://stjohns-dc.org/welcome-to-saint-johns-church/history/> (last visited Sept. 24, 2021).

¹⁷ *President's Park: A History of Protest at the White House*, THE WHITE HOUSE HISTORICAL ASS'N, <https://www.whitehousehistory.org/presidents-park-a-history-of-protest-at-the-white-house> (last visited Sept. 24, 2021).

¹⁸ Eric Levinson and Aaron Cooper, *Derek Chauvin Found Guilty of All Three Charge for Killing George Floyd*, CNN (April 21, 2021), <https://www.cnn.com/2021/04/20/us/derek-chauvin-trial-george-floyd-deliberations/index.html>. With respect to the protests, see Alan Siegel, *One Night in D.C.: The Oral History of June 1, 2020*, THE RINGER (July 13, 2020, 8:27 AM), <https://www.theringer.com/2020/7/13/21322010/washington-dc-protests-june-1-trump-lafayette-square>.

¹⁹ See, e.g., Justine Coleman, *Priest Among Those Police Cleared from St. John's Church Patio for Trump Visit*, THE HILL (June 2, 2021), <https://thehill.com/homenews/administration/500628-priest-among-those-police-cleared-from-st-johns-patio-for-trump-visit>.

²⁰ Episcopal Diocese of Washington, FACEBOOK (June 1, 2020), <https://www.facebook.com/Washdio/posts/3190403267672555> ("Join us today (and everyday) as the Episcopal Diocese of Washington stand[s] in prayerful solidarity and witness for racial justice and healing. We will be gathering at St. John's-Lafayette Square to offer prayer, witness and solidarity. . . .").

²¹ Laura Rosbrow Telem, *New England Bishops Denounce Trump Photo Op*, PUBLIC NEWS SERV. (June 3, 2020), <https://www.publicnewsservice.org/2020-06-03/civic-engagement/new-england-episcopal-bishops-denounce-trump-church-photo-op/a70421-1>.

²² Copy on file with the authors.

was so explicit: pray with the protesters.”²³ The Reverend Glenna Huber, a diocesan priest and rector of a nearby parish, stated that she was there because, “It’s important, when you’re visibly representing Christianity, to be present. I just wanted to be there on behalf of myself and [my congregation] to say life is important. And brutality – police brutality – needs to end.”²⁴ At the invitation of the parish, a Black Lives Matter medical team joined those in the churchyard to offer assistance to protestors.²⁵

Bishop Budde’s call and the response of her clergy and people reflected the church’s teaching on racial justice. As the Most Reverend Michael Curry, Presiding Bishop of the Episcopal Church, has explained:

Our long-term commitment to racial justice and reconciliation is embedded in our identity as baptized followers of Jesus. We will still be doing it when the news cameras are long gone . . . That work of racial reconciliation . . . must go on when racist violence and police brutality are no longer front-page news. It must go on when the work is not fashionable, and the way seems hard, and we feel utterly alone. It is the difficult labor of picking up the cross of Jesus like Simon of Cyrene, and carrying it until no one – no matter their color, no matter their class, no matter their caste – until no child of God is degraded and disrespected by anybody. That is God’s dream, this is our work, and we shall not cease until God’s dream is realized.²⁶

²³ Rev. Charles Wynder interviews with Rev. Glenna Huber and Rev. Melanie Mullen (June 17, 2020) (on file with authors and appended to Letter from the Most Rev. Michael Curry, Presiding Bishop of the Episcopal Church).

²⁴ *Id.*

²⁵ Correspondence from the Rev. William Morris, Associate Rector, St. John’s Episcopal Church – Lafayette Square (July 25, 2020) (on file with the authors). Black Lives Matter medical aids told Rev. Morris that when they were forcibly removed on June 1st, their supplies were taken. They later estimated that close to \$15,000 of “supplies, gear and property” were lost because of the clearing of the churchyard. *See also* Nguyen, *supra* note 7 (noting the presence of a medical team from Black Lives Matter in the churchyard).

²⁶ *Presiding Bishop’s Word to the Church: When the Cameras Are Gone, We Will Still Be Here*, Episcopal Church Off. of Pub. Aff., EPISCOPAL NEWS SERV. (May 30, 2020), <https://www.episcopalnewsservice.org/pressreleases/presiding-bishops-word-to-the-church-when-the-cameras-are-gone-we-will-still-be-here/>. The Church has also undertaken several racial reconciliation efforts to understand and acknowledge the Church’s role in centuries of injustice. *See e.g.*, Virginia Theological Seminary, *Conversations on Race and Faith: The Sacred Ground Curriculum*, <https://vts.edu/campus-calendar/conversations-on-race-and-faith-the-sacred-ground-curriculum/>. *See also, e.g.*, GAYLE FISHER-STEWART, PREACHING BLACK LIVES MATTER (2020).

This theology stands in sharp contrast to Mr. Trump's philosophy.²⁷ In a video teleconference on the morning of June 1st, in response to the nationwide protests against police brutality and racial injustice, the former president urged state governors to call out the National Guard and to "dominate" the streets.²⁸ He threatened to "send the American military to states where governors could not bring under control" the protests over police brutality.²⁹ Mr. Trump's statements set the context for the events that would unfold later that day.

The June 1, 2020, protest at Lafayette Square was overwhelmingly peaceful, although random acts of violence—largely unrelated to the protests—occurred during the preceding days.³⁰ St. John's itself suffered modest fire damage to a basement classroom because of vandalism on May 31st, but the parish and the diocese chose not to focus on the damage, but on addressing injustice. St. John's Rector, the Reverend Robert Fisher, told those gathered near St. John's on June 1st: "A church is not just a building. The damage to the building from fire is easily fixed. What's harder is healing."³¹

By 6:00 PM on June 1st, the protest had begun to wind down as participants prepared to leave in advance of a 7:00 PM curfew announced by District of Columbia Mayor Muriel Bowser.³² At 6:04

²⁷ Baker et al., *infra* note 38.

²⁸ Katherine Faulders, et al., *Trump, Barr Tell Governors to 'Dominate' Streets in Response to Unrest; Trump Put Blame for the Unrest Squarely on 'the Radical Left,'* ABC News (June 1, 2020), <https://abcnews.go.com/Politics/trump-barr-governors-dominate-streets-response-unrest/story?id=70994362>.

²⁹ Katie Rogers, et al., *As Trump Calls Protesters 'Terrorists,' Tear Gas Clears a Path for His Walk to a Church*, N.Y. TIMES (June 1, 2020), <https://www.nytimes.com/2020/06/01/us/politics/trump-governors.html>.

³⁰ See, e.g., Jonathan Allen, *Trump and Tear Gas in Lafayette Square: A Memo from the Protest Front Lines*, NBC NIGHTLY NEWS (June 2, 2020), <https://www.nbcnews.com/politics/white-house/memo-front-lines-different-america-n1222066>; Anderson Cooper, *360 Degrees*, CNN Transcripts (June 1, 2020), ("What the president doesn't seem to know or care is that the vast majority of those protesting, they, too, are calling for law and order."), <http://transcripts.cnn.com/TRANSCRIPTS/2006/01/acd.01.html>; Luis Martinez, *Milley Apologizes for Taking Part in Trump Church Walk: 'I should not have been there,'* ABC News (June 11, 2020), <https://abcnews.go.com/Politics/milley-apologizes-taking-part-trump-church-walk/story?id=71195023> (quoting General Mark Milley, "we should all be proud that the vast majority of protests [were] peaceful.").

³¹ Michelle Boorstein & Rachel Weiner, *Historic D.C. Church Where Trump Stood with a Bible Becomes a Symbol for His Religious Foes*, WASH. POST (June 3, 2020), <https://www.washingtonpost.com/religion/2020/06/03/church-trump-bible-protesters/>.

³² D.C. Exec. Order No. 2020-069 (June 1, 2020), https://mayor.dc.gov/sites/default/files/dc/sites/mayor/mb/release_content/attachments/Mayor%27s%20Order%202020-069.pdf.

PM, however, the White House press office announced that Mr. Trump would deliver an unscheduled address from the Rose Garden at 6:15 PM.³³ Although he described himself as an “ally of all peaceful protestors,” Mr. Trump condemned “domestic terror” and proclaimed, “I am your President of law and order”³⁴ He spoke of “dispatching thousands and thousands of heavily armed soldiers, military personnel, and law enforcement officers,” and then concluded, “[N]ow I am going to pay my respects to a very, very special place.”³⁵ That place was St. John’s. A senior White House official later stated, “Trump hoped his personal walk to the church, after federal officials dispersed protestors, would send a message about how dominant force could restore law and order.”³⁶

As Mr. Trump was midway through his remarks, without any audible warning,³⁷ a phalanx of law enforcement officers climbed over barriers and advanced on protestors assembled around the perimeter

³³ Philip Bump, *Timeline: The Clearing of Lafayette Square*, WASH. POST (June 5, 2020), <https://www.washingtonpost.com/politics/2020/06/02/timeline-clearing-lafayette-square/>.

³⁴ *Read: President Trump’s Rose Garden Speech on Protests*, CNN (June 1, 2020), <https://www.cnn.com/2020/06/01/politics/read-trumps-rose-garden-remarks/index.html>.

³⁵ *Id.*

³⁶ Zeke Miller, et al., *Trump Offers “Domination” of D.C. Protests as Model for States*, AP NEWS (June 2, 2020), <https://apnews.com/article/donald-trump-cultures-ap-top-news-religion-politics-7ac8bdf71cade4f4622fae24add04c5>.

³⁷ 3d Am. Compl., *Black Lives Matter, D.C. v. Trump*, 19-84, No. 1:20-cv-01469-DLF (D.D.C. 2020), <https://www.courthousenews.com/wp-content/uploads/2021/06/BLMcomplaint.pdf>; *Unanswered Questions About the U.S. Park Police’s June 1 Attack on Peaceful Protestors at Lafayette Square*: Hearing Before the H. Comm. on Natural Resources, 116th Cong. (July 28, 2020); Written Statement of National Guard Major Adam DeMarco, “The warnings were conveyed using a megaphone near the statue of President Jackson, approximately 50 yards from the demonstrators. From where I was standing, approximately 20 yards from the demonstrators, the announcements were barely audible and I saw no indication that the demonstrators were cognizant of the warnings to disperse,” https://naturalresources.house.gov/imo/media/doc/Mr.%20Adam%20DeMarco%20-%20Written%20Testimony_.pdf.

Although a June 2021 report from the Inspector General of the United States Department of the Interior differed with Major Marco’s in-person observations to some extent, the report conceded that “the USPP does not have a detailed dispersal warning policy applicable to operations like the one that occurred on June 1 and this may have led to the ineffective warnings issued to the crowd that day. . . .” and acknowledged that “several law enforcement officers could not clearly hear the incident commander’s dispersal warnings. . . .” Review of U.S. Park Police Actions at Lafayette Park, Case No.: 20-0563 (June 2021), Results in Brief [hereafter IG Report], <https://www.oversight.gov/sites/default/files/oig-reports/DOI/SpecialReviewUSPPActionsAtLafayetteParkPublic.pdf>. See also, e.g., Allen, *supra* note 30 (“Someone announced over a loudspeaker that the city’s curfew – 7 p.m. – was approaching and that the crowd would be hit with force if it didn’t disperse on its own. But few could hear the warning clearly.”).

of Lafayette Square.³⁸ A short time later, law enforcement forces advanced on St. John's as well.³⁹ The Reverend Gini Gerbasi was in the churchyard ministering to protestors.⁴⁰ Her firsthand account describes a chaotic and frightening scene: "The police in their riot gear were literally walking onto the St. John's patio with metal shields, pushing people off the patio and driving them back . . . We were literally DRIVEN OFF of the . . . patio with tear gas and concussion grenades."⁴¹ Seminarian Julia Dominick, an emergency trauma nurse who ministered to injured persons alongside Reverend Gerbasi, wrote on her Facebook page, "No warning. . . Screaming, flash grenades, and tear gas came at us. People ran as fast as they could around the corner of the church. Within minutes all of the church volunteers were met with a crowd running from the police and the police swarming the church property."⁴²

The events Reverend Gerbasi and Reverend Dominick described took place shortly before the June 1st photo op, but the possibility of a presidential visit to St. John's arose in meetings throughout that day.⁴³ Administration officials indicated that Mr. Trump, agitated about news coverage that he had been sequestered in the White House bunker, was "annoyed that anyone would think he was hiding and eager for action."⁴⁴ It is unclear who initially conceived of the excursion.⁴⁵ Several officials indicated that it was the former president's idea, although a few attributed the notion to others involved in the discussions.⁴⁶ One official recommended the move "to demonstrate that [the former president] was not hunkered down and was out of the White House, as well as standing with evangelical voters by visiting the church."⁴⁷ The administration reportedly decided on the former

³⁸ Peter Baker, et al., *How Trump's Idea for a Photo Op Led to Havoc in a Park*, N.Y. TIMES (June 2, 2020, updated Sept. 17, 2020), <https://www.nytimes.com/2020/06/02/us/politics/trump-walk-lafayette-square.html>.

³⁹ *Id.*

⁴⁰ Nguyen, *supra* note 7.

⁴¹ Rev. Gini Gerbasi, FACEBOOK (June 1, 2020) (copy on file with authors).

⁴² Kuruvilla, *supra* note 5.

⁴³ See Baker et al., *supra* note 38.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Ashley Parker et al., *Inside the Push to Tear-gas Protesters Ahead of a Trump Photo Op*, WASH. POST (June 1, 2020), https://www.washingtonpost.com/politics/inside-the-push-to-tear-gas-protesters-ahead-of-a-trump-photo-op/2020/06/01/4b0f7b50-a46c-11ea-bb20-ebf0921f3bbd_story.html.

president's actions by midafternoon,⁴⁸ but the Secret Service and other law enforcement agencies were not advised until later in the afternoon.⁴⁹ "[O]fficials privately conceded that little thought was given to what Mr. Trump would do once he actually got to the church."⁵⁰ St. John's leadership was not informed about the President's plans and had no idea that he intended to visit the church until he appeared there.⁵¹ Reverend Fisher reported that "he felt blindsided by the visit. Usually, the White House gives the church at least 30 minutes' notice before the president comes by."⁵² Bishop Budde and Reverend Fisher were clear that the President would be welcome at St. John's for prayer and worship.⁵³ In Bishop Budde's words:

[T]he president is always welcome to pray at St. John's. In fact, we would have loved for him to address from the church our nation's collective grief, anger and frustration. We would have stood by him had he called for swift justice for the killing of George Floyd. We would have added our voices had he asked for calm and the need to stop opportunistic looting and senseless destruction.⁵⁴

But Mr. Trump's purpose was different.

Although the White House staff focused on the presidential excursion, other officials were planning to expand the security perimeter around the White House.⁵⁵ According to Attorney General Barr, the United States Park Police developed the security expansion plan on Sunday, May 31st,⁵⁶ and on the morning of Monday, June 1st, he

⁴⁸ See Bump, *supra* note 33.

⁴⁹ See Parker et al., *supra* note 47.

⁵⁰ Baker et al., *supra* note 38.

⁵¹ See interview by Don Lemon, *supra* note 11.

⁵² Michelle Boorstein & Sarah Pulliam Bailey, *Episcopal Bishop on President Trump: 'Everything he has said and done is to inflame violence,'* WASH. POST (June 1, 2020), https://www.washingtonpost.com/religion/bishop-budde-trump-church/2020/06/01/20ca70f8-a466-11ea-b619-3f9133bbb482_story.html.

⁵³ Ruth Graham, *St. John's Would've Been Open to a Trump Visit. All He Had to Do Was Ask*, SLATE (June 6, 2021), <https://slate.com/human-interest/2020/06/st-johns-church-rector-rob-fisher-trump-photo-op.html>.

⁵⁴ The Rt. Rev. Mariann Edgar Budde, Opinion, *Bishop Budde: Trump's Visit to St. John's Church Outraged Me*, N.Y. TIMES (June 4, 2020), <https://www.nytimes.com/2020/06/04/opinion/trump-st-johns-church-protests.html>.

⁵⁵ Margaret Brennan Interview with Attorney William Barr, (June 7, 2020) (*Face the Nation*, CBS NEWS), <https://www.cbsnews.com/news/full-transcript-of-face-the-nation-on-june-7-2020/>.

⁵⁶ *Id.*

approved the plan.⁵⁷ The Park Police had not yet executed the expansion when the former president decided to walk to the church; their plan apparently was neither based on, nor coordinated with, the idea of a presidential visit to St. John's.⁵⁸ The lack of coordination between plans for Mr. Trump's excursion and the expansion of the perimeter is significant to an analysis of the day's events. The Park Police focused on the security of the White House, while the presidential excursion plans focused on securing St. John's as a backdrop for a photo op.

Attorney General William Barr left the White House and arrived in Lafayette Square at 6:08 PM.⁵⁹ A Justice Department official said that Mr. Barr was surprised that the perimeter was not yet expanded.⁶⁰ The official told reporters that, after meeting with law enforcement officials, Mr. Barr said to "get it done."⁶¹ A short time later, after delivering his Rose Garden speech, the former president and an entourage that included Attorney General Barr, Secretary of Defense Mark Esper, and General Mark Milley headed across Lafayette Square to St. John's for the photo op.⁶² General Milley later apologized for participating in the event, saying, "My presence in that

⁵⁷ *Id.* According to the former Attorney General:

The park police on their own on Sunday night determined this was the proper approach. When I came in Monday, it was clear to me that we did have to increase the perimeter on that side of Lafayette Park and push it out one block. That decision was made by me in the morning. It was communicated to all the police agencies, including the Metropolitan Police at 2:00 p.m. that day. The effort was to move the perimeter one block, and it had to be done when we had enough people in place to achieve that. And that decision, as I say, was communicated to the police at 2:00 p.m.

⁵⁸ Kevin Liptak, et al., *60 Minutes of Mayhem: How Aggressive Politics and Policing Turned a Peaceful Protest into a Violent Confrontation*, CNN (June 2, 2020), <https://www.cnn.com/2020/06/02/politics/trump-white-house-protest-police-church-photo-op/index.html>. ("A day after the incident, interviews with White House officials and sources across the government reveal a confusing, harried series of decisions that were not fully coordinated, as well as conflicting accounts of who was in charge and how a peaceful protest ended in a violent confrontation.").

⁵⁹ Bump, *supra* note 33.

⁶⁰ Carol D. Leonnig et al., *Barr Personally Ordered Removal of Protesters Near White House, Leading to Use of Force Against Largely Peaceful Crowd*, WASH. POST (June 2, 2020), https://www.washingtonpost.com/politics/barr-personally-ordered-removal-of-protesters-near-white-house-leading-to-use-of-force-against-largely-peaceful-crowd/2020/06/02/0ca2417c-a4d5-11ea-b473-04905b1af82b_story.html?utm_campaign=WP_main&utm_medium=Social&utm_source=twitter.

⁶¹ *Id.* See also Baker et al, *supra* note 38 ("For the president to make it to St. John's Church, they would have to be cleared out. Mr. Barr gave the order to disperse them.").

⁶² Paul Shinkman, *Pentagon Distances Leaders From Trump Photo Op*, U.S. NEWS & WORLD REP. (June 2, 2020), <https://www.usnews.com/news/national-news/articles/2020-06-02/pentagon-distances-esper-milley-from-trumps-church-photo-op>.

moment and in that environment created a perception of the military involved in domestic politics.”⁶³ According to several sources, the former president’s movement surprised nearly everyone, including state and federal law enforcement officials.⁶⁴ Washington, D.C. Police Chief Peter Newsham said he was notified only moments beforehand.⁶⁵ Park Police commanders on the scene were also unaware of the proposed presidential visit.⁶⁶

When Mr. Trump arrived at St. John’s, he posed with Attorney General Barr and other senior White House staff in front of a church building.⁶⁷ The former president then stood on the sidewalk adjacent to the now-emptied grounds in front of a sign reading “*St. John’s Church Parish House*” that identified parish clergy and proclaimed “*All are welcome.*”⁶⁸ Against this background, Mr. Trump hoisted a Christian Bible for the cameras.⁶⁹ The former president did not read from the Bible, nor did he offer conciliatory remarks or express concern over the deep divisions in the country.⁷⁰ Instead, after the photo op, he commented: “We have a great country. That’s my thoughts. Greatest Country in the world. We will make it greater. We will make it even greater. It won’t take long. It’s not going to take long. You see what’s going on. You see it coming back.”⁷¹ The following day Mr. Trump tweeted: “D.C. had no problems last night. . . . Many

⁶³ See *id.*; Martinez, *supra* note 30 (General Milley went on to say, “What we are seeing is the long shadow of the original sin in Jamestown 401 years ago,” and observed that “the senseless and brutal killing of George Floyd . . . amplified the pain, the frustration, and the fear that so many of our fellow Americans live with day in, day out,” and “[t]he protests that have ensued not only speak to his killing, but also to the centuries of injustice toward African Americans.”).

⁶⁴ Baker et al., *supra* note 38.

⁶⁵ *Id.*

⁶⁶ *Id.*; IG Report, *supra* note 37, at 14 (“The USPP operations commander said the Attorney General asked him, ‘Are these people still going to be here when POTUS [President of the United States] comes out?’ The USPP operations commander told us he had not known until then that the President would be coming out of the White House and into Lafayette Park.”).

⁶⁷ Laura Wainman, *Tear Gas, Flash Bangs Used to Clear Protesters from Lafayette Square Before Surprise President Trump Photo Op*, WUSA9, <https://www.wusa9.com/article/news/local/dc/trump-bible-photo-op-walks-out-of-white-house-peaceful-protesters-tear-gas/65-76b1067d-29e8-4c70-9010-0cda71b4fb28>.

⁶⁸ Bump, *supra* note 33.

⁶⁹ Katie Rogers, *Protestors Dispersed with Tear Gas So Trump Could Pose at Church*, N.Y. TIMES (June 6, 2020), <https://www.nytimes.com/2020/06/01/us/politics/trump-st-johns-church-bible.html>.

⁷⁰ See *id.*

⁷¹ Brian Bennett, *President Trump’s Big Moment in Front of a Church Shows He Has Missed the Point of the Protests*, TIME (June 2, 2020), <https://time.com/5846449/trump-church-protests/>.

arrests. Great job done by all. Overwhelming force. Domination . . . (thank you President Trump!).”⁷² In interviews on Fox News Radio and Newsmax on June 3rd, Mr. Trump reiterated his message: “Right now, I think, the nation needs law and order because you have a bad group of people out there”⁷³ . . . “Maybe it doesn’t sound good to say it, but you have to have a dominant force. We need law and order.”⁷⁴ The former president’s remarks suggested a connection between his display of the Bible outside St. John’s and the government’s use of force.⁷⁵ In Mr. Trump’s view, “[m]ost religious leaders loved it”⁷⁶ From the perspective of Dallas pastor Robert Jeffress, “by holding up the Bible, the former President was showing us that it teaches that, yes, God hates racism, it’s despicable—but God also hates lawlessness”⁷⁷ Another religious leader who supported Mr. Trump explained that the former president’s presence at the church “sent the twin message that our streets and cities do not belong to rioters and domestic terrorists, and that the ultimate answer to what ails our country can be

⁷² See Baker, *supra* note 38.

⁷³ Ayesha Rascoe and Ryan Lucas, *Trump’s Response To Unrest Raises Questions, Criticisms*, NPR Morning Edition (June 5, 2020), <https://www.npr.org/2020/06/05/870242445/trumps-response-to-unrest-raises-questions-criticisms>.

⁷⁴ Bryan Kilmeade, interview with Donald Trump, FOX NEWS (June 3, 2020), <https://www.youtube.com/watch?v=casHRZCz8fg> (responding to the interviewer’s reference to a statement by the Reverend James Martin, a Jesuit priest, said that “the church is not a photo op. Their religion is not a political tool, and God is not a plaything,” Trump answered: “Well my response is simple. I think it was very symbolic. I did hold up a Bible. I think that’s a good thing, not a bad thing, and many religious leaders loved it. I hear Franklin Graham this morning loved it. I heard many other people think it was great.”).

⁷⁵ See Matthew Teague, *He Wears the Armor of God: Evangelicals Hail Trump’s Church Photo Op*, GUARDIAN (June 3, 2020), <https://www.theguardian.com/us-news/2020/jun/03/donald-trump-church-photo-op-evangelicals> (reporting that John Fea, an Evangelical Christian who is a history professor at Messiah College said, “People once concerned with piety now crave ‘an exercise in pure political power,’ and the Bible is no longer a spiritual weapon but an earthly one. “When Trump describes himself as a ‘law and order’ president and holds aloft a Bible, he conflates which law he will enforce, and whose order will follow.”). See also McKay Coppins, *The Christians Who Loved Trump’s Stunt*, ATLANTIC (June 2, 2020), <https://www.theatlantic.com/politics/archive/2020/06/trumps-biblical-spectacle-outside-st-johns-church/612529/> (“To Trump, the Bible and the church are not symbols of faith; they are weapons of culture war. And to many of his Christian supporters watching at home, the pandering wasn’t an act of inauthenticity; it was a sign of allegiance—and shared dominance.”).

⁷⁶ Kilmeade interview with Trump, *supra* note 74.

⁷⁷ Ed Kilgore, *Christian Right Leaders Loved Trump’s Bible Photo Op*, INTELLIGENCER (June 2, 2020), <https://nymag.com/intelligencer/2020/06/christian-right-leaders-loved-trumps-bible-photo-op.html>.

found in the repentance, redemption, and forgiveness of the Christian faith.”⁷⁸

Episcopal Church leaders took a decidedly different view. Shortly after the photo op, Bishop Budde stated:

The president just used a Bible, the most sacred text of the Judeo-Christian tradition, and one of the churches of my Diocese without permission as a backdrop for a message antithetical to the teachings of Jesus and everything that our churches stand for. And to do so . . . he sanctioned the use of tear gas by police officers in riot gear to clear the churchyard. I am outraged.⁷⁹

A joint statement released by the Episcopal bishops of New England declared:

What President Trump did in front of St. John’s Episcopal Church, Lafayette Square on the evening of June 1 was disgraceful and morally repugnant. Displaying a Bible from which he did not quote, using as a mere backdrop an Episcopal church where he did not pray, and – more callously – ordering law enforcement to clear, with force and tear gas, a path through demonstrators who had gathered in peace, President Trump distorted for his own purposes the cherished symbols of our faith to condone and stoke yet more violence.

His tactic was obvious. Simply by holding aloft an unopened Bible he presumed to claim Christian endorsement and imply that of The Episcopal Church. Far more disturbingly, he seemed to be affecting the authority of the God and Savior we worship and serve, in order to support his own authority and to wield enhanced use of military force in a perverted attempt to restore peace to our nation.⁸⁰

Presiding Bishop Michael Curry responded as follows:

⁷⁸ *Id.*

⁷⁹ Jessie Yeung et al., *June 1 George Floyd Protest News*, CNN (June 2, 2020), https://edition.cnn.com/us/live-news/george-floyd-protests-06-01-20/h_002e6784274eaba8439a1860c5d62bdd.

⁸⁰ Laura J. Ahrens et al., *New England Bishops Respond to President Donald Trump’s Photo Op*, EPISCOPAL NEWS SERV. (June 2, 2020), <https://www.episcopalnewservice.org/2020/06/02/new-england-bishops-respond-to-president-donald-trumps-photo-op/>.

This evening, the President of the United States stood in front of St. John's Episcopal Church, lifted up a bible, and had pictures of himself taken. In so doing, he used a church building and the Holy Bible for partisan political purposes. This was done in a time of deep hurt and pain in our country, and his action did nothing to help us or to heal us.⁸¹

Administration officials gave conflicting reasons for moving against protestors and clearing St. John's churchyard prior to Mr. Trump's photo op.⁸² Initially, White House spokesman Judd Deere said law enforcement personnel acted to "help enforce the [city's] 7 p.m. curfew."⁸³ But the curfew had not yet taken effect, and D.C. officials said they did not request any such help.⁸⁴ According to Mayor Bowser, "I imposed a curfew at 7pm. A full 25 minutes before the curfew & w/o provocation, federal police used munitions on peaceful protesters in front of the White House . . . Shameful! DC residents — Go home. Be safe."⁸⁵

Representatives of the administration ultimately claimed that clearing protestors from Lafayette Square and surrounding areas, including St. John's churchyard, was essential to expand the security perimeter around the White House.⁸⁶ Review of the circumstances and statements by administration officials leads convincingly to inferences that: (i) there was a Park Police plan to expand the perimeter around the White House for presidential security, and (ii) the Park Police plan was rushed because of the presidential plan to visit St. John's, resulting in a chaotic and forcible clearance of protestors. While it appears accurate that the Attorney General and the Park

⁸¹ Michael Curry, *Presiding Bishop Michael Curry's Statement on President Donald Trump's Use of St. John's, Holy Bible*, EPISCOPAL CHURCH OFF. OF PUB. AFF. (June 1, 2020), <https://www.episcopalnewsservice.org/pressreleases/presiding-bishop-michael-currys-statement-on-president-donald-trumps-use-of-st-johns-holy-bible/>.

⁸² See Rieger, *supra* note 15.

⁸³ *Id.*

⁸⁴ *Id.* See Aaron C. Davis et al., *Officials Familiar with Lafayette Square Confrontation Challenge Trump Administration Claim of What Drove Aggressive Expulsion of Protesters*, WASH. POST (June 14, 2020), https://www.washingtonpost.com/politics/officials-challenge-trump-administration-claim-of-what-drove-aggressive-expulsion-of-lafayette-square-protesters/2020/06/14/f2177e1e-acd4-11ea-a9d9-a81c1a491c52_story.html.

⁸⁵ Parker et al., *supra* note 47.

⁸⁶ Davis et al., *supra* note 84. See also Rieger, *supra* note 15 (reporting that officials sought to justify the aggressive behavior of law enforcement on fears of violence and domestic terrorism).

Police had a pre-existing plan to install a fence providing an expanded barrier of protection around the White House,⁸⁷ there is little support for the proposition that the *timing* and *manner* of clearing the protestors were unrelated to the presidential excursion.

Attorney General Barr later stated:

[W]e needed more of a buffer . . . I made the decision (on Monday morning) that we would try to move our perimeter northward by a block to provide this additional protection, and later at 2 o'clock on Monday, I met with all the various law enforcement agencies and we set our tactical plan, and that plan involved moving our perimeter a block north, to I Street . . .⁸⁸

A report by the Inspector General of the Department of the Interior (IG Report) similarly disclaimed a relationship between the clearing operation and the presidential visit.⁸⁹ The IG Report concluded that the Park Police acted pursuant to a pre-existing plan and had the “discretion and authorization” to clear the protestors.⁹⁰ According to the report, “[t]he evidence [the Inspector General] obtained did not support a finding that the USPP cleared the park to allow the President to survey the damage and walk to St. John’s Church.”⁹¹ Instead, the IG Report determined that the Park Police cleared the park “to allow the contractor to safely install the anti-scale fencing in response to destruction of property and injury to officers occurring on May 30 and 31.”⁹² As columnist Radley Balko writes, however, “that reason makes little sense, especially given that every other decision the agencies made that day all but guaranteed that the fence could only be installed at night.”⁹³

⁸⁷ IG Report, *supra* note 37.

⁸⁸ Stefan Becket & Clare Hymes, *Barr Defends Decision to Forcefully Clear Protesters Near White House*, CBS NEWS (June 4, 2020), <https://www.cbsnews.com/news/barr-defends-decision-forcefully-clear-protesters-lafayette-park-white-house/>.

⁸⁹ *Id.* (“There was no correlation between our tactical plan of moving the perimeter out by one block and the president’s going over to the church.”); *See also* IG Report, *supra* note 37, at 15.

⁹⁰ IG Report, *supra* note 37.

⁹¹ *Id.*

⁹² *Id.*

⁹³ Radley Balko, *Opinion: The Mystery Around What Happened in Lafayette Square*, WASH. POST (July 14, 2020), <https://www.washingtonpost.com/opinions/2021/07/14/mystery-around-what-happened-lafayette-square/> (“The [IG] report endorses an exonerating explanation

Whatever the pre-existing plans, there are objective indications that the presidential excursion prompted both the timing of the clearing and the use of aggressive tactics. One official told reporters that the protestors were expected to be cleared by 4:00 PM that day for installation of the expanded barrier.⁹⁴ In contrast, numerous other sources indicated that the law enforcement agencies involved did not all receive this information.⁹⁵ Attorney General Barr held a 2:00 PM briefing at an FBI command center, with the heads of the Park Police, the Secret Service, the D.C. National Guard and the Arlington County police in attendance.⁹⁶ He later told CBS News that the decision (as to expanding the perimeter) “was communicated to all the police agencies.”⁹⁷ However, D.C. Police Chief Peter Newsham and National Guard chief Gen. Joseph Lengyel told the *Washington Post* that “no specific time or plan of action was discussed.”⁹⁸ Several individuals at Barr’s briefing understood that officials planned to install the fencing after the 7:00 PM curfew and confirmed that the decision to clear the protestors was “hurried up.”⁹⁹ The officials said “they had no warning that U.S. Park Police, the agency that commanded the operation, planned to move the perimeter—and protesters—before a 7 p.m. citywide curfew, or that force would be used.”¹⁰⁰ Chief Newsham reportedly “learned via police communications that force was going to be used to clear the protesters just moments after he and other officials were told that Trump would be walking to the church . . . He reiterated that there was no firm decision about when such an

over a more damning explanation that’s far more consistent with the actions of the officials and police agencies involved.”).

⁹⁴ Liptak et al., *supra* note 58.

⁹⁵ Carol D. Leonnig & Tom Jackman, *National Guard Commander Says Police at Lafayette Square Used ‘Excessive Force’ to Clear Path Ahead of Trump*, WASH. POST (July 27, 2020), <https://www.washingtonpost.com/nation/2020/07/27/national-guard-commander-says-police-suddenly-moved-lafayette-square-protesters-used-excessive-force-clear-path-trump/>.

⁹⁶ IG Report, *supra* note 37.

⁹⁷ Interview by Margaret Brennan, *supra* note 55.

⁹⁸ *Id.*

⁹⁹ See Davis et al., *supra* note 84. See also Katelyn Caralle, *Generals WIN Battle with Trump as 82nd Airborne Soldiers Are REMOVED from D.C. After Chairman of Joint Chiefs Publicly Slammed President and Told His Troops to ‘Uphold the Constitution,’* THE DAILY MAIL (June 4, 2020), <https://www.dailymail.co.uk/news/article-8389743/Generals-WIN-battle-Donald-Trump-82nd-Airborne-soldiers-REMOVED-D-C.html> (reporting that senior defense officials told reporters the two were not aware that the Park Police and law enforcement had decided to clear the square or that Trump intended to visit the church).

¹⁰⁰ See Davis et al., *supra* note 84.

operation would take place” prior to that time.¹⁰¹ National Guard Major Adam De Marco “back[ed] up law enforcement officials who told the *Washington Post* they believed the clearing operation would happen after the 7 p.m. curfew that night – but it was dramatically accelerated after Attorney General William P. Barr and others appeared in the park around 6 p.m.”¹⁰²

The IG Report offers insights into the Park Police perspective, but many credible sources indicate that officials expedited plans for clearing protestors because of the former president’s decision to visit St. John’s.¹⁰³ In addition, the IG Report did not address the roles of other federal agencies or their interactions with the White House,¹⁰⁴ and the Inspector General expressly declined to comment on the nature of the tactics employed and the injuries inflicted.¹⁰⁵

Although the narratives about exactly what happened on June 1, 2020, may differ, these events unquestionably raise significant and troubling constitutional questions.

ANALYSIS

I. THE GOVERNMENT’S ASSAULT ON THE CHURCH AND THE FREE EXERCISE CLAUSE

The Episcopal Church understands Holy Scripture to require people of faith to seek racial reconciliation and to stand with all who have suffered because of systemic racism.¹⁰⁶ Those gathered at St.

¹⁰¹ *Id.*

¹⁰² Leonning & Jackman, *supra* note 102 (“[National Guard Major] DeMarco backs up law enforcement officials who told The Washington Post they believed the clearing operation would happen after the 7 p.m. curfew that night – but it was dramatically accelerated after Attorney General William Barr and others appeared in the park around 6 p.m. Monahan has said the operation was conducted so that a fence might be erected around the park. DeMarco said the fencing did not arrive until 9 p.m. – hours after Barr told the Park Police to expand the perimeter.”).

¹⁰³ *Id.* See also Liptak, *supra* note 58; Davis et al., *supra* note 84.

¹⁰⁴ See Radley Balko, *Opinion: The Inspector General Delivers an Odd, Contradictory Report on Lafayette Square*, WASH. POST (June 24, 2021), <https://www.washingtonpost.com/opinions/2021/06/24/trump-ig-report-lafayette-square/>. See also Mychael Schnell, *Inspector General Chose Not to Investigate Secret Service in Clearing of Lafayette Square Report*, MSN (April 20, 2021), <https://www.msn.com/en-us/news/politics/inspector-general-chose-not-to-investigate-secret-service-in-clearing-of-lafayette-square-report/ar-BB1fReMh>.

¹⁰⁵ IG Report, *supra* note 37.

¹⁰⁶ See Curry, *supra* note 26. See also, e.g., GAYLE FISHER-STEWART, *supra* note 26.

John's were following their faith, obeying their bishop, and exercising their religion by engaging in prayer, ministry, and witness to the church's teaching. The individuals who sought out prayer and ministry from clergy and lay ministers were also exercising their religious rights. By commandeering St. John's churchyard, silencing the voices of the church and its ministers, and using the church to communicate a government message contrary to the church's teaching, the government violated the Free Exercise Clause.¹⁰⁷

The government's physical interference with the free exercise of religion at St. John's should be subject to the most exacting judicial scrutiny under both constitutional standards and the Religious Freedom Restoration Act.¹⁰⁸ This type of assault on a church is extraordinary.¹⁰⁹ As Justice Anthony Kennedy observed in *Church of the Lukumi Babalu Aye v. Hialeah*, "[t]he principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in [Supreme Court] opinions."¹¹⁰ Government assaults on houses of worship are an even rarer species. It is well settled, however, that the government violates the Free Exercise Clause of the First Amendment¹¹¹ whenever it targets religion or singles out a particular religion or religious entity.¹¹² Mr. Trump's photo op could have taken place anywhere, but he chose St. John's as his stage. The former president viewed St. John's as "a very, very special place,"¹¹³ because the church was an essential part of conveying a particular message to the American people. In different circumstances, an unannounced presidential visit to a church for photographs would not raise constitutional concerns, but context is key. The photo op took place following the former president's law-

¹⁰⁷ U.S. CONST. amend. I.

¹⁰⁸ The Religious Freedom Restoration Act (RFRA), 42 U. S. C. §§2000bb-1(a)-(c) (as amended by the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §2000cc).

¹⁰⁹ See *Civil War, Church, and State*, THE LIVING CHURCH (July 4, 2013), <https://livingchurch.org/2013/07/04/civil-war-church-and-state/>. The clearing and commandeering of St. John's churchyard was remarkable as a peacetime seizure of church property. During the Civil War, Union forces seized churches in battle zones on occasion. These seizures, however, took place in a time of war in states in rebellion.

¹¹⁰ 508 U.S. 520, 523 (1993) (citing *McDaniel v. Paty*, 435 U.S. 618 (1978); *Fowler v. Rhode Island*, 345 U.S. 67 (1953)).

¹¹¹ U.S. CONST. amend. I.

¹¹² *Lukumi*, 508 U.S. at 532.

¹¹³ See *President Trump's Rose Garden Speech on Protests*, CNN (June 1, 2020), <https://www.cnn.com/2020/06/01/politics/read-trumps-rose-garden-remarks/index.html>.

and-order speech, but only after the government had driven away those gathered at St. John's and commandeered its churchyard.¹¹⁴ By his own admission, Mr. Trump intentionally chose St. John's for his photo op. Consequently, free exercise precedents about the targeting of religious entities offer a useful analytical framework.

A. *Free Exercise and the Jurisprudence of Targeting*

As the United States Supreme Court held in *Lukumi*, a law that restricts religious practice violates the First Amendment unless it "advance[s] 'interests of the highest order' and [is] narrowly tailored in pursuit of those interests."¹¹⁵ Constitutional challenges to generally applicable laws that incidentally burden the free exercise of religion are reviewed under less exacting scrutiny.¹¹⁶ Actions targeting religion or religious entities, however, are constitutionally permissible only if the government can show a compelling justification for its actions and demonstrate the absence of less restrictive alternatives.¹¹⁷

In *Lukumi*, the Church of the Lukumi Bablu Aye challenged the constitutionality of a municipal ordinance directed at a particular religious practice—ritual animal sacrifice.¹¹⁸ The ordinance stemmed from a thinly veiled effort to discourage the church from moving into the city of Hialeah, Florida.¹¹⁹ The Lukumi Babalu Aye follow the Santeria faith, a blend of elements of Roman Catholicism and the traditional Yoruba religion, and their sacramental practices include animal sacrifice during worship services.¹²⁰ When members of the Hialeah, Florida City Council learned that the Lukumi Babalu Aye planned to buy property in Hialeah to build a church, school, and culture center, the council passed an ordinance that precluded the killing of animals "for any type of ritual" within the city limits.¹²¹ Although the ordinance was neutral on its face, it was evident that it was

¹¹⁴ Ayesha Rascoe et al., *Trump Defends 'Law and Order' Symbolism of Photo-Op at St. John's Church*, NPR (June 3, 2020), <https://www.npr.org/2020/06/03/868779265/trump-defends-symbolism-of-photo-op-at-st-johns-church>.

¹¹⁵ 508 U.S. at 546 (citing *McDaniel v. Paty*, 435 U.S. at 628 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972))).

¹¹⁶ *Id.* at 531-32; *Employment Div. v. Smith*, 494 U.S. 872 (1990).

¹¹⁷ *Lukumi*, 508 U.S. at 531-32.

¹¹⁸ *Id.* at 527-28.

¹¹⁹ *Id.* at 546.

¹²⁰ *Id.* at 524-25.

¹²¹ *Id.* at 528.

directed at the church because the city continued to allow the killing of animals for use as food and purposes such as pest control.¹²²

Despite the broad language of the Hialeah ordinance, in light of the circumstances of its enactment, the Court reasoned that it was neither neutral nor generally applicable.¹²³ Accordingly, the Court applied strict scrutiny.¹²⁴ Characterizing the ordinance as both overinclusive and underinclusive, the Court concluded that the city had targeted the Lukumi Bablu Aye, not because of a compelling interest in animal welfare or other legitimate civic concerns, but in an effort to prevent the church from locating facilities in Hialeah.¹²⁵ The Court therefore struck down the ordinance on Free Exercise grounds.¹²⁶

Two decades later, the global pandemic set the stage for the Supreme Court's most recent rulings on targeting houses of worship. In its November 2020 decisions on applications for injunctive relief pending appeal in *Roman Catholic Diocese of Brooklyn, N.Y. v. Cuomo*¹²⁷ and *Agudath Israel of America v. Cuomo*,¹²⁸ as well as in its February 2021 decisions in *South Bay United Pentecostal Church v. Newsom*¹²⁹ and *Harvest Rock Church, Inc. v. Newsom*,¹³⁰ the Court emphasized the troubling consequences of targeting religious entities.¹³¹ In the New York cases, a Roman Catholic diocese and an Orthodox Jewish congregation challenged an executive order issued in October 2020 by New York's then-governor Andrew Cuomo as part of the state's COVID-19 prevention measures.¹³² The Diocese of Brooklyn and Agudath Israel argued that the order singled out houses of worship for "especially harsh treatment" by treating churches and temples differently—and less favorably—than businesses deemed essential.¹³³ Observing that the "challenged restrictions were not neu-

¹²² *Id.*

¹²³ *Lukumi*, 508 U.S. at 542-46.

¹²⁴ *Id.* at 546 (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972))).

¹²⁵ *Id.* at 545-46.

¹²⁶ *Id.* at 547.

¹²⁷ 141 S. Ct. 63, 65 (2020) (order granting injunction and relief against enforcement pending resolution of a timely-filed application for a writ of certiorari entered Nov. 25, 2020).

¹²⁸ 208 L. Ed. 2d 447 (order granting injunction and relief against enforcement pending resolution of a timely-filed application for a writ of certiorari entered Nov. 25, 2020).

¹²⁹ 141 S. Ct. 716 (2021) (order entered Feb. 5, 2021).

¹³⁰ 141 S. Ct. 1289 (2021) (order granting injunction in part entered Feb. 5, 2021).

¹³¹ *Id.*; *South Bay*, 141 S.Ct. 716.

¹³² *Roman Catholic Diocese*, 141 S. Ct. at 65-66.

¹³³ *Id.* at 66.

tral laws of general applicability,” the Court applied strict scrutiny.¹³⁴ Although it acknowledged that “stemming the spread of COVID-19 [was] unquestionably a compelling interest,”¹³⁵ the per curiam opinion admonished that the state had many other less restrictive means of accomplishing its public health objectives.¹³⁶ The Court emphasized that “[t]he restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment’s guarantee of religious liberty.”¹³⁷ In a dissenting opinion joined by Justice Kagan, Justice Sotomayor disagreed with the majority’s conclusions about the neutrality and general applicability of the orders.¹³⁸ However, she, too, emphasized that “Free religious exercise is one of our most treasured and jealously guarded constitutional rights. States may not discriminate against religious institutions, even when faced with a crisis as deadly as [the COVID-19 pandemic].”¹³⁹

California’s COVID-19 restrictions on houses of worship came before the Court in *South Bay Pentecostal Church* and *Harvest Rock Church*.¹⁴⁰ In these cases the Court allowed capacity limitations and a prohibition on singing and chanting indoors to stand, but it overturned a general prohibition of indoor services.¹⁴¹ A statement by Justice Gorsuch, joined by Justices Thomas and Alito, noted that he would have overturned the restrictions on singing and chanting as well.¹⁴² Justice Gorsuch cautioned that even pandemic regulations must satisfy the demands of strict scrutiny when they target houses of worship; that is, the State must “show they are the least restrictive means of achieving a compelling government interest.”¹⁴³

¹³⁴ *Id.* at 67.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 68.

¹³⁸ *Roman Catholic Diocese*, 141 S. Ct. at 80.

¹³⁹ *Id.* (Sotomayor, J., dissenting).

¹⁴⁰ *S. Bay United Pentecostal Church*, 141 S. Ct. at 716; *Harvest Rock Church*, 141 S. Ct. at 889.

¹⁴¹ *See, e.g., id.*

¹⁴² *S. Bay United Pentecostal Church*, 141 S. Ct. at 718-19.

¹⁴³ *Id.* at 717-18 (Barrett, J., concurring). Justice Barrett, joined by Justice Kavanaugh, filed a statement agreeing with Justice Gorsuch’s statement except with respect to the prohibition on singing and chanting indoors because, in her view, the church had not met its burden to show entitlement to relief on that issue.

B. *The Constitutional Insufficiency of Government Justifications for Clearing and Commandeering St. John's Churchyard*

In analyzing the First Amendment implications of the government's actions, it is important to consider applicable standards of review. The discussion below addresses why strict scrutiny is appropriate, then considers how this standard would apply to the events at St. John's on June 1, 2020.

1. Strict Scrutiny Is the Appropriate Standard of Review

In the aftermath of the events of June 1, 2020, as noted earlier, Trump administration officials offered different explanations for the assault on St. John's.¹⁴⁴ They eventually settled on the claim that clearing Lafayette Square was necessary to establish an expanded security perimeter around the White House,¹⁴⁵ and that the clearing of St. John's churchyard was part of an overall effort to protect the President and the White House.¹⁴⁶ If forced to offer a *legal* justification for the assault on St. John's, the government conceivably could argue that clearing the protestors from in and around Lafayette Square took place pursuant to a neutral, generally applicable order, not because Mr. Trump targeted the church. As the *Lukumi* Court explained, however, constitutional review of Free Exercise claims, like equal protection analyses, may look beyond proffered explanations to determine governmental objectives "from both direct and circumstantial evidence."¹⁴⁷

Looking beneath the surface of the events of June 1, 2020, reveals a reality very different from the picture painted by Trump administration officials. As discussed in Part I, the evidence suggests that the Executive Branch engaged in at least two different decision-making processes prior to the initiation of the clearing actions that began shortly after 6:00 PM on June 1, 2020.¹⁴⁸ One process centered on enhancing the security of the White House, while another focused on creating the presidential photo op.¹⁴⁹ The former president's decision

¹⁴⁴ Davis et al., *supra* note 84; Riegler, *supra* note 15. See also *supra* Part I.

¹⁴⁵ See IG Report, *supra* note 37, at 23.

¹⁴⁶ See Beckett & Hynes, *supra* note 88.

¹⁴⁷ *Lukumi*, 508 U.S. at 540 (citing *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977)).

¹⁴⁸ See Baker et al., *supra* note 38; Interview by Margaret Brennan, *supra* note 55.

¹⁴⁹ See Liptak et al., *supra* note 58.

to incorporate St. John's in his message was separate from the plan to clear protestors to enhance White House security.¹⁵⁰ The government's security justification for the first process – the clearing action – rings hollow in light of Mr. Trump's decision to leave the White House to walk to a churchyard at the margin of the expanded perimeter. Moreover, there is significant evidence that the timing of the clearing process was "hurried up" once Mr. Trump decided to visit St. John's.¹⁵¹ With respect to the second process – staging the photo op – Mr. Trump has never disputed that he chose St. John's as the location for hoisting a Bible in support of his message precisely because it is a church—in his words, "a very special place."¹⁵²

This narrative compels the conclusion that strict scrutiny is the appropriate constitutional standard of review with respect to both the clearing of St. John's churchyard and its commandeering for the photo op. In addition, strict scrutiny is also the applicable standard pursuant to the Religious Freedom Restoration Act of 1993 (RFRA), as amended by the Religious Land Use and Institutionalized Persons Act (RLUIPA).¹⁵³ RFRA requires courts to utilize strict scrutiny in reviewing challenges to government actions that "substantially burden the free exercise of religion," even those that are generally applicable.¹⁵⁴ RFRA applies to "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."¹⁵⁵

RFRA does not define the term "substantially burden," but the Supreme Court has found substantial burdens on the free exercise of religion in a number of cases.¹⁵⁶ Lower courts have fashioned defini-

¹⁵⁰ See Bump, *supra* note 33.

¹⁵¹ See *supra* Part I.

¹⁵² See Trump Rose Garden Speech, *supra* note 34.

¹⁵³ 42 U.S.C. §§2000bb-1(a)-(c), *amended by* the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc.

¹⁵⁴ 42 U.S.C. § 2000bb-1(a). Although Congress originally directed RFRA to the states, as well as the federal government, the Supreme Court struck down the statute with respect to the states on grounds that it failed to satisfy the constitutional requirements for legislation enacted pursuant to section 5 of the Fourteenth Amendment in *City of Boerne v. Flores*, 521 U.S. 507, 532-36 (1997).

¹⁵⁵ 42 U.S.C. § 2000cc-5(7)(A). See also *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694-96 (2014). RFRA permits the award of "appropriate relief," including money damages against federal officials in their individual capacities where appropriate. *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020).

¹⁵⁶ See, e.g., *Burwell*, 573 U.S. 682 (2014) (striking down HHS contraceptive regulations with respect to closely held corporations on grounds that they did not meet RFRA's "least restrictive alternative" requirement for government actions that substantially burden the free exercise of religion); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418

tions focusing on the magnitude of the burden and the extent to which the government forces a choice between exercising one's religion and receiving a governmental benefit or facing civil or criminal sanctions.¹⁵⁷ Those assembled in St. John's courtyard on June 1, 2020, had no real choice. They either had to terminate their ministry and flee, or, face physical assault from police in riot gear employing teargas, rubber bullets, and flash-bang grenades. RFRA therefore would require a reviewing court to apply strict scrutiny to the clearing of St. John's churchyard.

The government's subsequent commandeering of the churchyard also imposed a substantial burden on the free exercise of religion that would obligate a reviewing court to apply strict scrutiny pursuant to RFRA.¹⁵⁸ By taking control of St. John's grounds to facilitate the photo op, the government imposed yet another substantial burden on the free exercise of religion at St. John's. Those driven away from the churchyard could not return to their ministry or oppose Mr. Trump's use of the church in his message. Any attempt to do so would have been confronted with force, and possibly arrest.

Consequently, strict scrutiny is the appropriate standard of review of the Free Exercise issues arising out of the events of June 1, 2020, at St. John's. Pursuant to *Lukumi*, *Roman Catholic Archdiocese of Brooklyn*, and other pandemic cases,¹⁵⁹ the targeting of St. John's by the former president for his photo op would require application of strict scrutiny as a matter of constitutional law.¹⁶⁰ In addition, RFRA would mandate application of strict scrutiny to both the clearing and

(2006) (seizure of a shipment of the hallucinogen hoasca imported for sacramental use by a religious group imposed a substantial burden on the free exercise of religion and violated RFRA because the government failed to demonstrate a compelling reason for the seizure).

¹⁵⁷ See, e.g., *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069-70 (9th Cir. 2008) ("Under RFRA, a 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions."); *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (2008) (quoting *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981)) ("A substantial burden exists when government action puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'").

¹⁵⁸ 42 U.S.C. § 2000bb-1(a).

¹⁵⁹ See *supra* Part II.A.

¹⁶⁰ *Lukumi*, 508 U.S. at 529 ("A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases."); *S. Bay United Pentecostal Church*, 141 S. Ct. at 718 (2020) ("The whole point of strict scrutiny is to test the government's assertions, and our precedents make plain that it has always been a demanding and rarely satisfied standard.").

commandeering of the churchyard, even if the government could somehow succeed in showing that the clearing operation was carried out pursuant to a neutral, generally applicable order.

2. Applying Strict Scrutiny Demonstrates that the Government Violated the Free Exercise Rights of the Church and Those Gathered in the Churchyard

As the District Court noted in its opinion in *Black Lives Matter v. Trump*, the Supreme Court has recognized the nation's "valid, even . . . overwhelming, interest in protecting the safety of its Chief Executive,"¹⁶¹ but presidential security should not be the issue here. Although the government ultimately asserted that both the clearing of protestors from Lafayette Square and the eviction of clergy and others from St. John's courtyard were designed to protect the White House,¹⁶² the photo op was not about White House security; it was about using the church as a stage for Mr. Trump's message. The notion that the government had a compelling interest in using teargas, flash-bang grenades, and rubber bullets to drive clergy and other people of faith away from church grounds and then commandeer the churchyard for a photo op defies reason and common sense.

Even assuming *arguendo* that a compelling reason existed for both the clearing operation and the commandeering of St. John's churchyard, the government would still need to show narrow tailoring.¹⁶³ The aggressive actions and violent tactics employed against those gathered at St. John's were by no stretch of the imagination the least restrictive means of clearing the churchyard or conducting the presidential photo op. Several less restrictive alternatives were readily available:

(1) The clearing action and the photo op could have been delayed, thus allowing the D.C. curfew to take effect. By the time law enforcement personnel acted against protestors in Lafayette Square, the curfew was less than an hour away, and it was even closer when federal forces stormed St. John's churchyard.¹⁶⁴

¹⁶¹ *Black Lives Matter D.C.*, 2021 WL 2530722, at *6 (D.D.C. June 21, 2021) (citing *Watts v. United States*, 394 U.S. 705, 707 (1969)).

¹⁶² See IG Report, *supra* note 37, at 1.

¹⁶³ See, e.g., *Lukumi*, 508 U.S. at 546 (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972))).

¹⁶⁴ See IG Report, *supra* note 37, at 4, 18.

(2) The administration had plenty of time to notify St. John's rector and other members of the parish leadership of the former president's plan to visit so that the church could have taken appropriate steps to ensure that those gathered in the churchyard would not be subjected to teargas, flash grenades, and rubber bullets. The White House has routinely communicated with the parish when the former president planned to attend services at St. John's, yet there was no communication on June 1st.¹⁶⁵

(3) Law enforcement personnel could have employed far less aggressive tactics. Rather than descending without warning on the churchyard, they could have alerted those gathered at St. John's that they needed to evacuate the area immediately, and provided them an opportunity for an orderly means of egress. This approach would have been consistent with guidelines the Park Police agreed to in a 2002 settlement of lawsuits arising out of arrests of demonstrators in Pershing Park. Although geared toward mass arrests, the practices stipulated in that agreement could have been applied in both Lafayette Square and St. John's churchyard. Among other measures, these steps include audible warnings with officers stationed at points where they can verify that protestors are able to hear the warnings, and clear provisions for an orderly exit.¹⁶⁶

(4) The former president could have staged the photo op on the grounds of the White House or in any of several other locations. Holding the photo op at the White House would have been far more secure and much less restrictive of the free exercise of religion than driving clergy, lay ministers, and other people of faith away from the grounds of a church.

It is questionable at best whether the government had a compelling justification for clearing and commandeering St. John's churchyard, but it is virtually certain that neither the clearing of the churchyard nor its commandeering for the photo op was narrowly tailored. The use of violent force against clergy and others gathered peacefully and lawfully in a churchyard is utterly inconsistent with our nation's constitutional values. Viewing the events of June 1, 2020, in this light illuminates the gravity of the government's assault on the

¹⁶⁵ See Boorstein et al., *supra* note 52.

¹⁶⁶ Mem. Of P. & A. in Supp. of Joint Mot's. for Prelim. Approval of Proposed Class Settlement, Notice to Class, and Notice of Fairness Hr'g, 7-10, *Barham v. Ramsey*, 434 F.3d 565 (D.C. Cir. 2006) (No. 02-2283).

church and underscores the importance of recognizing the dangers these actions posed to the free exercise of religion.

III. FREE SPEECH AND ESTABLISHMENT CLAUSE IMPLICATIONS OF COMPELLING THE CHURCH TO PARTICIPATE IN OR HOST MR. TRUMP'S MESSAGE

By commandeering St. John's grounds on June 1, 2020, law enforcement personnel enabled former President Trump to exploit the iconic image of the parish, its name, and its signboard, without contrasting images of clergy and other people of faith ministering to protesters and proclaiming that Black Lives Matter. Mr. Trump chose the front of a church building adjacent to the sanctuary for photographs with senior staff and then stood by a sign reading "*St. John's Church Parish House – All are welcome*" for a series of video clips and solo photographs.¹⁶⁷ As Bishop Budde, Presiding Bishop Curry, and other Episcopal leaders protested immediately after the photo op, the former president made the church an unwilling party to the militaristic message he had just proclaimed in the Rose Garden¹⁶⁸—a message contrary to the teaching of the Episcopal Church and the witness of the clergy and lay ministers who gathered at St. John's that day to support racial justice.¹⁶⁹ Neither the rector and other leaders of St. John's, nor Bishop Budde and the Episcopal Diocese of Washington, had any opportunity to object before the government commandeered the churchyard for Mr. Trump's photo op.¹⁷⁰

This is not to say that any time government leaders have their photos taken in front of a church they violate the church's free speech rights, but the events at St. John's arose in the context of an assault that enabled the photo op. By clearing St. John's churchyard, the government forcefully suppressed the prayers, ministry, and witness taking place there in violation of the Free Exercise Clause. Its actions also silenced the voices of individuals, a parish, a diocese, and a national church engaged in offering a message of welcome and soli-

¹⁶⁷ See Bump, *supra* note 33.

¹⁶⁸ Trump's Rose Garden Speech, *supra* note 34.

¹⁶⁹ See *supra* Part I. The government's action also raises the specter of involuntary association and imposition of an unwanted message in violation of the Freedom of Association. Abner S. Greene, "Not in My Name" *Claims of Constitutional Right*, 98 B. U. L. REV. 1475, 1486-88 (2019); see also *infra* Part III.A.3.

¹⁷⁰ See Boorstein et al., *supra* note 31.

clarity to protestors,¹⁷¹ and made the Church an unwilling party to a message alien to Episcopal theology in violation of the Free Speech Clause.¹⁷²

The First Amendment's Religion Clauses protect the religious liberty of people of all faiths and no faith,¹⁷³ but the freedoms of speech and association also play an important role in protecting religious freedom in the United States.¹⁷⁴ One of the most vital aspects of constitutional protection of speech and association is freedom from compelled expression. The following discussion explores compelled speech doctrine and its application to the events of June 1, 2020, at St. John's.

A. *Constitutional Limits on Compelled Speech and Expressive Association*

In 1943, Justice Robert Jackson's opinion for the Court in *West Virginia v. Barnette* laid the foundation for contemporary compelled speech doctrine.¹⁷⁵ *Barnette* upheld the right of Jehovah's Witness children to refuse to salute the flag of the United States.¹⁷⁶ The decision overturned an earlier ruling in *Minersville v. Gobitis* permitting states to require public school students to recite the pledge of allegiance and salute the flag.¹⁷⁷ Although both cases concerned religious beliefs, the *Barnette* Court framed its ruling in terms of free speech. In Justice Jackson's ringing words:

¹⁷¹ See Episcopal Diocese of Washington, FACEBOOK (June 1, 2020), <https://www.facebook.com/Washdio>.

¹⁷² See *supra* Part I.

¹⁷³ See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985) ("[T]he individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all."); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (discussing First Amendment mandate of neutrality toward believers and nonbelievers).

¹⁷⁴ See, e.g., *W. Va. State Bd. of Educ. of Ewing Twp. v. Barnette*, 319 U.S. 624, 642 (1943); *Snyder v. Phelps*, 562 U.S. 443, 460 (2011) (striking down state tort verdict against Westboro Baptist Church for emotional distress suffered by the father of a fallen soldier as a result of religiously motivated picketing near the church holding his son's funeral on free speech grounds); *McCullen v. Coakley*, 134 S. Ct. 2518 (2014) (striking down a Massachusetts buffer zone law that prevented speech within 35 feet of the entrance to clinics providing abortions other than by clinic employees in an action brought by religiously motivated individuals). See, Mark W. Cordes, *Religion as Speech: The Growing Role of Free Speech in Protecting Religious Liberty*, 38 Sw. L. REV. 235 (2008).

¹⁷⁵ *Barnette*, 319 U.S. at 633-36.

¹⁷⁶ *Id.* at 629.

¹⁷⁷ *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 600 (1940).

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.¹⁷⁸

As Justice Murphy noted in his concurrence, the First Amendment guarantees “both the right to speak freely and the right to refrain from speaking at all.”¹⁷⁹ Since *Barnette*, courts have consistently upheld the right of individuals and organizations to refrain from speaking when “a reasonable observer might wrongly attribute compelled speech to reflect attitudes that the speaker does not hold.”¹⁸⁰

1. Mandating Proclamation of Unwanted Government Messages Raises Grave Constitutional Questions

Compelled speech is particularly troublesome—and likely to be held unconstitutional—when the government tries to force individuals or entities to communicate messages dictated by the government itself.¹⁸¹ The courts have recognized that requiring speakers to proclaim government messages they find offensive or contrary to deeply held beliefs and values violates core First Amendment principles. “In *Wooley v. Maynard*, the Court ruled that the state of New Hampshire could not constitutionally penalize drivers who blocked the words “Live free or die” on state automobile license plates to avoid “becom[ing] a ‘mobile billboard’ for the State’s ideological message.”¹⁸² The *Wooley* Court explained, “Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.”¹⁸³

¹⁷⁸ *Barnette*, 319 U.S. at 642.

¹⁷⁹ *Id.* (Murphy, J. concurring).

¹⁸⁰ Steven Shiffrin, *What Is Wrong with Compelled Speech*, 29 J. L. & POL. 499, 499-505 (2014). See also Greene, *supra* note 169, at 1486. The government may, however, compel speech pursuant to generally applicable mandates in certain narrow circumstances such as grand jury testimony. *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972) (declining to extend a testimonial privilege to journalists with respect to news sources). See, e.g., ERWIN CHERMERINSKY, CONSTITUTIONAL LAW § 11.2.4.3 (5th ed. 2015).

¹⁸¹ Shiffrin, *supra* note 180, at 505.

¹⁸² *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

¹⁸³ *Id.* at 715.

The Court has reached similar conclusions with respect to entities. In *National Institute of Family and Life Advocates v. Becerra*, the Court ruled in favor of crisis pregnancy centers that challenged the constitutionality of the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency (FACT) Act's patient notice requirements.¹⁸⁴ The precise notices depended on whether the centers were licensed or unlicensed "covered facilities" under state law.¹⁸⁵ The FACT Act obligated licensed covered centers to post and distribute to patients government-authored notices about the availability of free and low-cost family planning, prenatal care, and abortion services, along with contact information for service providers.¹⁸⁶ The Act required unlicensed covered facilities to post prominently, and include in their advertising materials, a government-drafted notice that they were not licensed by the state to offer medical services and had no licensed providers on site or under contract to supervise their services.¹⁸⁷ The centers sought an injunction against enforcement of these notification and disclosure provisions.¹⁸⁸ The District Court denied the injunction,¹⁸⁹ and the United States Court of Appeals for the Ninth Circuit affirmed on grounds that the statute regulated "professional speech" and was therefore subject to a lower standard of review than the strict scrutiny ordinarily applied to content-based regulations of speech.¹⁹⁰

The United States Supreme Court disagreed.¹⁹¹ In his opinion for the Court, Justice Clarence Thomas identified "the licensed notice [as] a content-based regulation of speech" subject to strict scrutiny.¹⁹² He concluded that "[b]y compelling individuals to speak a particular message, [the licensed facility notice plainly] 'alter[ed] the content of [petitioners'] speech.'"¹⁹³ Justice Thomas rejected the state's attempt to justify the regulations on grounds that they applied to a separate

¹⁸⁴ 138 S. Ct. 2361, 2378 (2018).

¹⁸⁵ *Id.* at 2368.

¹⁸⁶ *Id.* at 2368-70.

¹⁸⁷ *Id.* at 2369-70.

¹⁸⁸ *Id.* at 2370.

¹⁸⁹ *Id.*

¹⁹⁰ *Becerra*, 138 S. Ct. at 2370.

¹⁹¹ *Id.* at 2378.

¹⁹² *Id.* at 2371.

¹⁹³ *Id.* (quoting *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 795 (1988)).

category of “professional speech” entitled to less searching review.¹⁹⁴ Noting the Court’s reluctance to expand categories of speech exempt from the full panoply of constitutional protections,¹⁹⁵ Justice Thomas cautioned: “[This] Court’s precedents do not permit governments to impose content-based restrictions on speech without ‘persuasive evidence . . . of a long (if heretofore unrecognized) tradition’ to that effect.”¹⁹⁶

The *Becerra* Court held that the notice requirements for unlicensed covered facilities unconstitutionally imposed an unduly burdensome “government-scripted, speaker-based disclosure requirement.”¹⁹⁷ The Court found it unnecessary to resolve the applicable level of scrutiny because these regulations unconstitutionally compelled speech under both strict and intermediate scrutiny.¹⁹⁸ Justice Thomas reasoned that the state could have accomplished its objective of informing women about free and low-cost abortions and other services “without burdening [either licensed or unlicensed facilities] with unwanted speech.”¹⁹⁹

2. Forcing Individuals or Entities to Host or Accommodate Others’ Messages Is Rarely Permissible

The United States Supreme Court has held that the government may violate free speech rights by requiring an individual or entity to accommodate or host others’ messages. Although these cases have arisen in somewhat different contexts, they are useful in analyzing the government’s actions at St. John’s on June 1, 2020.

In its 1974 decision in *Miami Herald Publishing Co. v. Tornillo*, the Court held that a Florida “right of reply” statute violated the First Amendment’s guarantee of Freedom of the Press.²⁰⁰ The challenged law required newspapers to permit candidates for political office to

¹⁹⁴ *Id.* at 2374. As an example, Justice Thomas noted that in *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, the Court applied intermediate scrutiny in upholding state regulations that required lawyers to disclose “purely factual and uncontroversial information about the terms under which . . . services will be available.” *Zauderer v. Off. Of Disc. Counsel*, 471 U.S. 626, 651 (1985).

¹⁹⁵ *Becerra*, 138 S. Ct. at 2375.

¹⁹⁶ *Id.* at 2372 (quoting *United States v. Alvarez*, 567 U.S. 709, 722 (2012)).

¹⁹⁷ *Id.* at 2378.

¹⁹⁸ *Id.* at 2375.

¹⁹⁹ *Id.* at 2376.

²⁰⁰ 418 U.S. 241, 258 (1974).

reply to media criticism of the candidate—for example, in editorials and op-ed pieces.²⁰¹ The Court struck down the statute on grounds that compelling a newspaper to print the speech of political candidates it criticized infringed on the newspaper's liberty to determine the content of its communications.²⁰² A decade later, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, the Court overturned a state utility commission mandate requiring utilities to transmit messages from private sources with billing statements, even where those messages were contrary to the utility company's views.²⁰³ Applying strict scrutiny, the Court held that the government could not compel a public utility to include third-party literature with which it disagreed in its customer mailings.²⁰⁴

A few years after deciding *Pacific Gas & Electric*, however, in *Pruneyard Shopping Center v. Robins*, the Court upheld a state constitutional provision obliging private shopping center owners to permit the exercise of free speech and petition rights on their properties.²⁰⁵ It was essential to the Court's First Amendment analysis that, unlike in *Wooley*,²⁰⁶ several "distancing factors" made it unlikely that the messages communicated would be attributed to the shopping mall owners.²⁰⁷ As Justice (later Chief Justice) Rehnquist's opinion for the Court explained:

The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition . . . will not likely be identified with those of the owner. Second, no specific message is dictated by the State to be displayed on appellants' property. There consequently is no danger of governmental discrimination for or against a particular message. Finally, as far as appears here appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could

²⁰¹ *Id.* at 243.

²⁰² *Id.* at 258.

²⁰³ 475 U.S. 1, 4-7 (1986).

²⁰⁴ *Id.* at 20.

²⁰⁵ *See id.*; 447 U.S. 74, 88 (1980) (holding additionally that the requirement did not violate the First, Fourth or Fourteenth Amendments to the United States Constitution).

²⁰⁶ *Wooley*, 430 U.S. at 705.

²⁰⁷ *Pruneyard*, 447 U.S. at 87.

explain that the persons are communicating their own messages by virtue of state law.²⁰⁸

Pruneyard provides a helpful framework for reviewing allegations of compelled use of property in violation of the Free Speech Clause. As discussed below, *Pruneyard*'s elements all weigh against the government when applied to the Trump photo op.

3. Compelling Unwanted Expressive Association Infringes on Fundamental Principles of Speech Autonomy

In other decisions, the Supreme Court has focused on the associational aspects of compelled speech. For example, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, the Court unanimously reversed a decision of the Massachusetts Supreme Judicial Court upholding the application of the state's public accommodations law to require the organizers of the Boston St. Patrick's Day Parade to allow the Irish-American Gay, Lesbian, and Bisexual Group of Boston (GLIB) to march in the parade.²⁰⁹ Writing for the Court, Justice Souter emphasized that a parade is an expressive event and that the First Amendment recognizes a fundamental "principle of autonomy to control one's own speech."²¹⁰ Justice Souter explained that:

[t]he very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis.²¹¹

Boy Scouts of America v. Dale, decided a few years later, involved a challenge to the application of New Jersey's antidiscrimination law against the Boy Scouts for expelling an openly gay leader.²¹² The *Dale* Court held that the state could not constitutionally sanction the Scouts for the leader's expulsion.²¹³ The majority viewed the Boy

²⁰⁸ *Id.* at 88.

²⁰⁹ 515 U.S. 557, 566 (1995).

²¹⁰ *Id.* at 574.

²¹¹ *Id.* at 579 (citing *Barnette*, 319 U.S. at 642; *Pacific Gas & Electric*, 475 U.S. at 20).

²¹² 530 U.S. 640 (2000).

²¹³ *Id.* at 661.

Scouts as an expressive association and concluded that the Scouts' opposition to homosexuality at the time was an expression of the Boy Scouts' values.²¹⁴ Consequently, "the forced inclusion of [the gay leader] would [have] significantly affect[ed] its expression."²¹⁵

In its 2006 decision in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*,²¹⁶ the Court addressed both compelled speech and expressive association issues in resolving a challenge by an association of law schools and law faculties to the Solomon Amendment,²¹⁷ a federal law providing that colleges and universities that denied military recruiters equal access to students would lose certain federal educational funds.²¹⁸ FAIR's member schools all had policies against discrimination on the basis of sexual orientation.²¹⁹ They either planned to exclude military recruiters or to treat military recruiters less favorably than recruiters who followed the schools' nondiscrimination policies.²²⁰ FAIR sought a pre-enforcement injunction against application of the Solomon Amendment to the law schools on grounds that the conditions imposed on the receipt of federal funds violated their First Amendment rights of free speech and association.²²¹ The United States District Court for the District of New Jersey denied FAIR's request,²²² but a divided panel of the United States Court of Appeals for the Third Circuit reversed and ordered entry of the injunction.²²³

The Supreme Court overturned the Third Circuit's decision on grounds that "[t]he Solomon Amendment neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds."²²⁴ Chief Justice Roberts, writing for a unanimous Court, observed that, unlike in *Barnette* and *Wooley*, the Solomon Amendment did not impose anything

²¹⁴ *Id.* at 654.

²¹⁵ *Id.* at 656.

²¹⁶ 547 U.S. 47 (2006) (hereinafter FAIR).

²¹⁷ 10 U.S.C.S. § 983 (2005).

²¹⁸ FAIR, 547 U.S. at 51.

²¹⁹ *Id.* at 52.

²²⁰ *Id.*

²²¹ *Id.* at 51.

²²² FAIR v. Rumsfeld, 291 F. Supp. 2d 269, 322 (D.N.J. 2003).

²²³ FAIR v. Rumsfeld, 390 F. 3d 219, 246 (3rd Cir. 2004).

²²⁴ FAIR, 547 U.S. at 60.

“approaching a Government-mandated pledge or motto that the school must endorse.”²²⁵ The Court concluded that the Solomon Amendment regulated conduct rather than speech,²²⁶ and that the conduct required of the law schools in hosting military recruiters on campus was not “inherently expressive.”²²⁷

Noting that its compelled speech cases also applied to the government’s “ability to force one speaker to host or accommodate another speaker’s message,” the Chief Justice stressed that the free speech violations in those cases “resulted from the fact that the complaining speaker’s own message was affected by the speech it was forced to accommodate.”²²⁸ The Court rejected FAIR’s contentions that providing the recruiting access required by the Solomon Amendment to military recruiters would send the message that the schools approved of their position on sexual orientation.²²⁹ He analogized the position of the law schools to that of the shopping center owners in *Pruneyard*, explaining that the likelihood of associating the schools’ views with those of the military recruiters was low.²³⁰ The schools, like the owners in *Pruneyard*, had ample means of dissociating themselves from views they found objectionable.²³¹ The Court also rebuffed FAIR’s expressive association arguments.²³² Noting that “a speaker cannot ‘erect a shield’ against laws requiring access ‘simply by asserting’ that mere association ‘would impair its message,’”²³³ the Court emphasized that the military recruiters’ presence did not violate associational rights.²³⁴

²²⁵ *Id.* at 62.

²²⁶ *Id.* at 66 (citing *Texas v. Johnson*, 491 U.S. 397, 406 (1989)).

²²⁷ *Id.* at 64.

²²⁸ *Id.* at 63.

²²⁹ *Id.* at 64.

²³⁰ *FAIR*, 547 U.S. at 65.

²³¹ *Id.*

²³² *Id.* at 69.

²³³ *Id.*

²³⁴ *Id.* at 70. In recent years, issues of the inherent expressiveness of an activity and the feasibility of dissociating from an unwanted message have arisen in cases involving wedding services vendors. These cases proliferated as states began to allow same-sex marriage, particularly after the Supreme Court’s 2015 decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015), recognized marriage as a fundamental right enjoyed by two people of the same sex as well as for heterosexual couples. The underlying disputes generally involve the application of state or local human rights laws or public accommodations statutes to wedding vendors such as photographers, florists, and bakers. Many anticipated that the United States Supreme Court would weigh in on these issues in its 2018 ruling in *Masterpiece Cakeshop, Ltd. v. Colo. Human Rights Comm’n*, 138 S. Ct. 1719 (2018). The Court, however, resolved the case on grounds that the

B. *Applying Compelled Speech Principles to the Trump Photo Op Demonstrates that Foisting the Former President's Message on St. John's Violated the First Amendment*

The central tenet of compelled speech doctrine is that the government ordinarily may not force individuals or entities to participate in, communicate, host, or accommodate an unwanted message, particularly when the government generates the message, or in circumstances where it is difficult for the individual or entity to dissociate from the unwanted message.²³⁵ What happened at St. John's contrasted sharply with the circumstances in *FAIR* where there was little risk that anyone would associate the law schools' own views with the military recruiters' message, and the schools could readily disassociate themselves from that message.²³⁶

1. St. John's Was an Unwilling Participant in the Former President's Message

The context of the June 1, 2020, photo op is especially revealing because the circumstances shed light on the expressive purpose of Mr.

Colorado Human Rights Commission proceedings that led to a ruling against the Cakeshop owner revealed "elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated [the Cakeshop owner's] objection" to designing and providing wedding cakes for gay couples. *Id.* at 1729. Ruling that this hostility to sincerely held religious beliefs violated the Free Exercise Clause, the Court indicated that "[t]he outcome of cases like this in other circumstances must await further elaboration in the courts." *Id.* at 1732.

The Court has yet to offer guidance with respect to the compelled speech and expressive association issues presented by *Masterpiece Cakeshop* and other wedding services cases. In June 2021, it denied certiorari in *Arlene's Flowers, Inc. v. Washington*, 441 P.3d 1203 (Wash. 2019) (en banc decision on rehearing), certiorari denied, No. 19-333 (July 2, 2021), a matter involving a florist who challenged a post-*Masterpiece* decision by the Washington Supreme Court. The Washington Supreme Court upheld a judgment against the florist under the Washington Law Against Discrimination, concluding in part that the florist's arrangements neither constituted speech nor qualified as "inherently expressive." *Arlene's Flowers, Inc.*, 441 P.3d at 1225, 1227. Other courts have held in favor of wedding services vendors who provide video, photography, and custom design invitation services that involve communication of messages about the events. *See, e.g.*, *Brush & Nib Studio LC v. City of Phoenix* (holding that the City could not constitutionally apply its Human Relations Ordinance, Phx. Ariz. City Code ("PCC") § 18-4(B), to the owners of an invitation studio who refused to design wedding invitations for a gay couple). Courts that have ruled against wedding services vendors often have done so on grounds that the owners chose to enter a business for hire and that they had ample means of dissociating themselves from the views of their customers in several ways. *See, e.g.*, *Arlene Flowers, Inc.*, 441 P.3d at 1224; *Elane Photography v. Willock*, 309 P.3d 53, 66 (N.M. 2013).

²³⁵ *See supra* Part II.A.1.

²³⁶ *See supra* Part III.A.3.- B.1.

Trump's visit to St. John's. Earlier that day, the former president had made a highly publicized call to state governors telling them to call out the National Guard and "dominate" the streets. He had just given a speech in the White House Rose Garden proclaiming, "I am your President of law and order."²³⁷ Although Mr. Trump did not offer a speech or remarks at St. John's, like the parade organizers' choice of marchers in *Hurley*,²³⁸ his conduct was inherently expressive. New England bishops explained that by lifting the Bible with the backdrop of St. John's parish hall, its empty grounds, and the parish signboard, Mr. Trump

presumed to claim Christian endorsement and imply that of the Episcopal Church . . . he seemed to be affecting the authority of the God and Savior we worship and serve, in order to support his own authority and to wield enhanced use of military force in a perverted attempt to restore peace to our nation.²³⁹

The former president accomplished this objective not simply by standing in front of the church, but by commandeering the forcibly cleared churchyard for his own purposes. Mr. Trump later asserted that some religious leaders loved his message and perceived it as an affirmation that the Bible supports law and order and that the former president would help create a "godly order" in the United States.²⁴⁰ Others, however, expressed concern that Mr. Trump had implied that the Episcopal Church supported his message.²⁴¹

Mr. Trump was able to communicate his message as he did only because law enforcement personnel in riot gear terminated the church's own speech by driving away clergy, lay ministers, and other people of faith. Whether or not the former president stood on church property in the photographs, there is no question that other government agents physically entered the churchyard to facilitate the photo op. In reaching its decision on the compelled speech claims of law schools and law faculty members, the *FAIR* Court stressed that the challenged Solomon amendment provision "neither limit[ed] what law

²³⁷ Trump's Rose Garden Speech, *supra* note 34.

²³⁸ *Hurley*, 515 U.S. at 570.

²³⁹ Ahrens et al., *supra* note 80.

²⁴⁰ See Kilgore, *supra* note 77.

²⁴¹ Compare Ahrens et al., *supra* note 80, with Curry, *supra* note 81.

schools may say nor require[d] them to say anything.”²⁴² This was decidedly not the case on June 1, 2020, at St. John’s. As the Court explained in *FAIR*, a critical consideration in compelled speech cases is whether “the complaining speaker’s own message was affected by the speech it was forced to accommodate.”²⁴³ In contrast to the situation in *FAIR*, the government entirely cut off the speech of St. John’s clergy and lay ministers and used the iconic church, its empty churchyard, and its signboard to convey the former president’s own message. The church’s speech was not just affected by the commandeering of its churchyard as a set for Mr. Trump’s message, the message preempted the church’s speech. St. John’s and the Episcopal Church, like the New Hampshire residents who filed suit in *Wooley*,²⁴⁴ thereby became an unwilling “instrument for fostering public adherence to an ideological point of view [the church] finds unacceptable.”²⁴⁵ The *Hurley* Court held in favor of St. Patrick’s Day parade organizers who disputed the city’s right to force them to include an unwanted group in their parade on expressive association grounds, even though the parade was scheduled for one particular time frame.²⁴⁶ The connection between the church and the former president is far more enduring. The association will survive so long as the resulting video clips and photographs are available on the internet.

The government did not force St. John’s to post a sign as in *Becerra*,²⁴⁷ but the use of the church as a setting was, as the New England bishops suggest, even more powerful.²⁴⁸ People often speak through symbols and signs. Demonstrators wave images of American flags and peace signs,²⁴⁹ and Black Lives Matter protestors often carry depictions of raised fists.²⁵⁰ Religious entities, too, speak through symbols.²⁵¹ Houses of worship signal their presence through architectural features and signage. Signboards proclaiming the names of con-

²⁴² *FAIR*, 547 U.S. at 60.

²⁴³ *Id.* at 63.

²⁴⁴ *Wooley*, 430 U.S. at 706-07.

²⁴⁵ *Id.* at 715.

²⁴⁶ *Hurley*, 515 U.S. at 580-81.

²⁴⁷ See *supra* Part III.A.

²⁴⁸ See Ahrens et al., *supra* note 80.

²⁴⁹ See BONNIE SIEGLER, *A VISUAL HISTORY OF PROTESTS IN AMERICA* (2018).

²⁵⁰ See, e.g., Samara Lynn, *Before Black Lives Matter: Black Justice Slogans, Symbols Dating Back to the 1700s*, ABC NEWS (July 21, 2020), <https://abcnews.go.com/US/black-lives-matter-black-justice-slogans-symbols-dating/story?id=71672825>. See SIEGLER, *supra* note 249.

²⁵¹ Cf., *Barnette*, 319 U.S. at 633.

gregations, information about services, and words of welcome—like the St. John’s sign in the background of Mr. Trump’s photos—are another prominent feature of many churches. The St. John’s signboard explicitly speaks a message of welcome.²⁵² It communicates the presence of a holy space with its own distinct beliefs and practices and invites people into that space. This message of welcome is an integral part of the parish and the Episcopal Church. It is an essential, readily identifiable part of the church’s proclamation of the Gospel of Jesus Christ.²⁵³

When the former president incorporated St. John’s signboard, building, and empty churchyard into his message, he fundamentally altered the content of the church’s own speech. Rather than a message of welcome from a church proclaiming a gospel of love, St. John’s was associated with a message utterly inconsistent with the theology of the parish, the Diocese, and the Episcopal Church. The result was a deliberate appropriation of identity designed to make it appear that the church, as well as its Holy Scripture, supported Mr. Trump’s views. The government cut off the ability of the church to communicate its own very different theological message. This was an especially egregious injury to a church engaged in supporting the Black Lives Matter protest through prayer, ministry, and witness.²⁵⁴ The government took over the churchyard, emptied it of all conflicting speakers and speech, and then appropriated its images and signage to support Mr. Trump’s militaristic message. That message quickly circulated throughout the nation and world, overpowering the church’s own message of racial reconciliation and support for Black Lives Matter protestors.²⁵⁵

2. The Government Unconstitutionally Forced the Church to Host Mr. Trump’s Message

As noted earlier,²⁵⁶ government officials who pose for photographs and videos in or near sacred spaces do not necessarily run afoul of the First Amendment. Americans are accustomed to politi-

²⁵² See Bump, *supra* note 33.

²⁵³ Cf., *First Lutheran Church v. City of St. Paul*, 326 F. Supp. 3d 745, 768-69 (2018) (holding that a city mandate to post a “no trespassing” sign could constitute compelled speech because it undermined the church’s mission of welcoming all people).

²⁵⁴ See Episcopal Diocese of Washington, FACEBOOK (June 1, 2020), <https://www.facebook.com/Washdio>.

²⁵⁵ See *supra* Part I.

²⁵⁶ See *supra* Part III.

cians and other officials who select backdrops to convey ideas or associations; they generally understand that these choices express the officials' views rather than those of the entities pictured. Yet, something very different happened at St. John's on June 1, 2020. Application of the factors suggested by *Tornillo*²⁵⁷ and *Pacific Gas & Electric*,²⁵⁸ articulated as three related elements in *Pruneyard*,²⁵⁹ and reiterated in *FAIR*,²⁶⁰ provide helpful insights: (1) the risk of identification of an unwanted message with a property owner; (2) the government's role with respect to the message; and (3) the ability of the property owner to disavow any connection with the speaker's message.²⁶¹

First, given the context, there was a significant risk that the public would connect Mr. Trump's message with St. John's and the Episcopal Church, especially because the government silenced the church's own voice and emptied the churchyard of contrasting messages. Second, the former president, the head of the U.S. government, authored the unwanted message and forcibly imposed it on the church. Third, without either prior notice or the ability to remain in the churchyard, unlike the law schools in *FAIR*,²⁶² the Church's ministers had no ability to dissociate the Church or themselves from Mr. Trump's message.²⁶³ Ordinarily, a church anticipating the arrival of a government leader whose policies offended the church's teaching could post signs and banners proclaiming its own views or even cover up its name to prevent an unwanted association. Even if its ministers simply observed a government official proclaiming an offensive message, the church could take immediate action to demonstrate its opposition. The opportunity to disclaim or at least place some limitations on unwanted expressive activity was critical to the Court's *Pruneyard* decision.²⁶⁴ The *Pruneyard* Court emphasized that shopping center owners could "restrict expressive activity by adopting time, place, and manner regulations [to] . . . minimize any interference with [the venues'] functions" and post notices disclaiming any connection to the

²⁵⁷ 418 U.S. at 258.

²⁵⁸ 475 U.S. at 7-8.

²⁵⁹ 447 U.S. at 80-85.

²⁶⁰ See 547 U.S. 47 (2006).

²⁶¹ See *id.* at 87.

²⁶² See *supra* Part III.A.3.

²⁶³ See *FAIR*, 547 U.S. at 69-70 (noting ability of law schools, faculty, and students to dissociate from unwanted messages of military recruiters).

²⁶⁴ See *Pruneyard*, 447 U.S. at 83, 87.

speakers or their messages.²⁶⁵ In contrast, the government forcibly prevented St. John's from taking these steps when it drove away all of those gathered on its grounds.²⁶⁶ Consequently, the *Pruneyard* analysis²⁶⁷ supports the conclusion that the commandeering of St. John's churchyard and use of the church's signboard and images unconstitutionally forced the church to host the Trump photo op.

Religious leaders sometimes allow the government to use sacred spaces and their images. For example, the day after former President Trump's photo op at St. John's, he and former First Lady Melania Trump visited and posed for photographs at the St. John Paul II Shrine in Northeast Washington, D.C., with the permission of the shrine's operator, the Knights of Columbus.²⁶⁸ Although Cardinal Wilton Gregory, Roman Catholic Archbishop of Washington, later sharply criticized the shrine's operators,²⁶⁹ constitutional concerns do not arise when the stewards of a house of worship or other religious site permit the government to use its premises or images to communicate messages. This is unless the resulting interactions contravene the Establishment Clause or other constitutional protections. The government, however, did not seek permission from St. John's, the Episcopal Diocese of Washington, or the national Episcopal Church for the June 1st photo op.²⁷⁰

3. Strict Scrutiny Is the Appropriate Standard of Review

Supreme Court precedents do not always resolve or even address the applicable standard of review in compelled speech and expressive association cases. *Hurley*, for example, did not discuss standards of review,²⁷¹ while the *Becerra* Court found no need to decide between

²⁶⁵ *Id.* at 83.

²⁶⁶ *See, e.g.,* Kuruvilla, *supra* note 5.

²⁶⁷ *See Pruneyard*, 447 U.S. at 87.

²⁶⁸ *See* Tom Howell, Jr., *Donald Trump, first lady visit John Paul II shrine ahead of religious-freedom order* (June 2, 2020), <https://www.washingtontimes.com/news/2020/jun/2/donald-trump-first-lady-visit-john-paul-ii>.

²⁶⁹ *See* Sarah Pulliam Bailey & Michelle Boorstein, *'I find it baffling and reprehensible': Catholic Archbishop of Washington Slams Trump's Visit to John Paul II Shrine*, WASH. POST (June 2, 2020), <https://www.washingtonpost.com/religion/2020/06/02/trump-catholic-shrine-church-bible-protesters/> (providing statement by Cardinal Gregory that he found "it baffling and reprehensible that any Catholic facility would allow itself to be so egregiously misused and manipulated in a fashion that violates our religious principles").

²⁷⁰ *See* Boorstein & Bailey, *supra* note 52.

²⁷¹ *See Hurley*, 515 U.S. at 557.

strict and intermediate scrutiny with respect to notice requirements for unlicensed clinics because the challenged state regulations failed to satisfy the elements of either standard.²⁷²

Nevertheless, as with respect to the Free Exercise issues relevant to the photo op, strict scrutiny should be the appropriate standard under the Free Speech Clause. The assault on St. John's disrupted speech in the forms of prayer, ministry, and witness, and made the church an unwilling party to Mr. Trump's inherently expressive photo op. In any event, as in *Becerra*, it is unnecessary to resolve this issue given the absence of a compelling, or even important, governmental purpose for holding a photo op at St. John's.²⁷³

Assuming arguendo that the government could identify a compelling, or at least important, reason for commandeering the churchyard and forcing St. John's and the Episcopal Church to appear to endorse the former president's message, its actions were not narrowly tailored under either strict or intermediate scrutiny. As discussed in Part II, the government had several far less restrictive alternatives, including briefly delaying the photo op, holding the photo op on the White House grounds or in another location, using less aggressive tactics in keeping with earlier commitments, and providing prior notice and warnings to facilitate an orderly evacuation of the churchyard.²⁷⁴

C. *Establishment Clause Concerns Raised by the Government's Actions in Connection with the Photo Op*

Since the dawn of civilization, political leaders have argued that God is on their side. The framers of the United States Constitution were well aware of the dangers this tendency posed to the new republic.²⁷⁵ The First Amendment's religion clauses reflect the framers' conviction "that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State."²⁷⁶ As the Supreme

²⁷² *Becerra*, 138 S. Ct. at 2375.

²⁷³ Several sources have suggested that the former President, who was running for reelection at the time, was seeking a way to gain support from a particular segment of Christian voters by using the church and the Bible for his photo op. However, a court might well be reluctant to challenge a president's motives for acts that conceivably could fall within the realm of presidential duties. Presidents are immune from money damages for actions within the outer perimeter of their official duties. See *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982).

²⁷⁴ See *supra* Part II.B.2.

²⁷⁵ See *Engel v. Vitale*, 370 U.S. 421, 429 (1962).

²⁷⁶ *Lee v. Weisman*, 505 U.S. 577, 589 (1992).

Court noted in its 1962 decision in *Engel v. Vitale*, “[b]y the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State.”²⁷⁷ Consequently, the framers designed the Free Exercise Clause to safeguard the freedoms of worship and conscience and to protect against the unwarranted suppression of religious practices.²⁷⁸ They formulated the Establishment Clause to guard against the dangers of a state-created orthodoxy.²⁷⁹ As the Court emphasized in *Abington School Dist. v. Schempp*, the “first and most immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion.”²⁸⁰

The perils foreseen by the framers are greatest when the government not only interferes with the free exercise of religion but attempts to compel others to embrace teachings the government itself promotes. The government may neither coerce individuals to support or participate in religion or its exercise, nor act in any other way that “establishes a [state] religion or religious faith, or tends to do so.”²⁸¹ When the government forces individuals or entities to participate in or endorse a government message contrary to their own religious beliefs or teachings, in addition to infringing on the First Amendment’s guarantee of freedom of speech, the government’s actions violate the Establishment Clause.

In its 1962 decision striking down the New York State Regents’ school prayer, the Supreme Court admonished: “The First Amendment was added to the Constitution to stand as a guarantee that

²⁷⁷ *Vitale*, 370 U.S. at 429.

²⁷⁸ *See id.*

²⁷⁹ *See, e.g., Buckley v. Valeo*, 424 U.S. 1.

²⁸⁰ *Sch. Dist. of Abington Twp., v. Schempp*, 374 U.S. 203, 221 (1963) (alteration in original) (quoting *Vitale*, 370 U.S. at 431). For this reason, the *Vitale* Court cautioned: “It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.” *Vitale*, 370 U.S. at 435.

²⁸¹ *See Lynch v. Donnelly*, 465 U.S. 668, 678 (1984). *See also* *Cnty of Allegheny v. Am. Civ. Liberties Union*, 492 U.S. 573, 591 (1989) (quoting *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15–16 (1947) (“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will, or force him to profess a belief or disbelief in any religion.”)).

neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say.”²⁸² Fifty years later, in *Hosanna Tabor Evangelical Lutheran Church and School v. EEOC*, a unanimous Court ruled in favor of a Lutheran parochial school that challenged an Equal Employment Opportunity Commission order requiring the school to reinstate a “called” teacher terminated after she contracted narcolepsy.²⁸³ Reasoning that “by imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments,”²⁸⁴ the Court embraced a “ministerial exception” to employment laws.²⁸⁵ The Court then admonished that “[a]ccording the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause.”²⁸⁶ Justice Alito, joined by Justice Kagan, concurred in the decision, emphasizing the fundamental right of religious organizations to select who will engage in “the critical process of communicating the faith.”²⁸⁷

In contrast, in *Marsh v. Chambers*, the Supreme Court upheld state employment of a chaplain to offer benedictions before the start of legislative sessions²⁸⁸ and, in *Town of Greece v. Galloway*, the Court rejected an Establishment Clause challenge to the opening of Town Council meetings with prayers from local clergy.²⁸⁹ In both cases the Court reasoned that these practices are consistent with traditions that began with the first Congress.²⁹⁰ Neither *Marsh* nor *Town of Greece* involved either government sponsorship of a particular message or involuntary substitution of a government message for that of a

²⁸² *Vitale*, 370 U.S. at 429.

²⁸³ 565 U.S. 171, 177-81 (2012).

²⁸⁴ *Id.* at 188.

²⁸⁵ *Id.* at 188-90.

²⁸⁶ *Id.* at 188-89. *See also* *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (holding that “the [f]reedom to select the clergy, where no improper methods of choice are proven” is “part of the free exercise of religion” protected by the First Amendment against government interference). *Kedroff* in turn cited *Watson v. Jones*, 13 Wall 679, 20 L.Ed. 666 (1872), a decision the Court read as radiating a “spirit of freedom for religious organizations, an independence from secular control or manipulation – in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *Kedroff*, 344 U.S. at 116.

²⁸⁷ *Hosanna*, 565 U.S. at 199 (Alito, J., concurring).

²⁸⁸ 463 U.S. 783, 786 (1983).

²⁸⁹ 572 U.S. 565, 569-70 (2014).

²⁹⁰ *See id.* at 602-03; *Marsh*, 463 U.S. at 787-91.

religious entity.²⁹¹ Unlike the situations in those cases, our nation has no history and tradition of replacing the prayer, theology, and witness of a church and its ministers with government leaders' own messages about the meaning of sacred scriptures.

Establishment Clause questions, as well as Free Exercise and Free Speech issues, necessarily arise when the government substitutes its own theology for the teaching of a religious entity, particularly when the government expels a church's ministers and compels it to participate in communicating a message antithetical to its teachings. The government forcibly evicted clergy and other ministers engaged in prayer, ministry, and witness in St. John's churchyard on June 1, 2020, to allow Mr. Trump to substitute his own message for that of the Episcopal Church. An in-depth analysis of the application of the Establishment Clause to the events of that day is beyond the scope of this Article, but the gravity of the Establishment Clause concerns warrants diligent attention to the very real threat posed by those events to our religious freedoms.

IV. WHY RECOGNIZING THE CONSTITUTIONAL SIGNIFICANCE OF THE GOVERNMENT'S ASSAULT ON ST. JOHN'S MATTERS

The assault on St. John's, in combination with the violence visited on peaceful protestors in and around Lafayette Square, struck a heavy blow to the freedoms of speech and religion that are the heart of this nation's democracy. The legal actions filed by protestors who suffered injury to their First Amendment rights and physical health on June 1, 2020,²⁹² highlight the dangers to Americans and to democracy itself from government over-reaching and officially sanctioned violence. Although there are no lawsuits pending with respect to the assault on St. John's, our nation cannot afford to forget what happened to the church that day.

²⁹¹ In *Marsh*, the Court held that the framers looked at invocations as "conduct whose . . . effect . . . harmonize[d] with the tenets of some or all religions," and concluded that "[i]n light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society." *Marsh*, 463 U.S. at 792 (citing *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)). Consistently, in *Town of Greece*, the Court held that the "Framers considered legislative prayer a benign acknowledgment of religion's role in society." 572 U.S. at 576.

²⁹² See, e.g., *Black Lives Matter DC v. Trump*, 2021 WL 2530722 at 18-19 (D.D.C. 2021).

As our nation struggled to come to terms with the events of June 1, 2020, former Secretary of Defense and four-star Marine Corps General James Mattis described the protests following George Floyd's death as "defined by tens of thousands of people of conscience who are insisting that we live up to our values—our values as people and our values as a nation."²⁹³ He urged Americans to "reject and hold accountable those in office who would make a mockery of our Constitution."²⁹⁴ The events of June 1, 2020 revealed a critical gap in our collective understanding of the First Amendment and fidelity to the values underlying our national identity.

CONCLUSION

Religious traditions have an important role to play in our democracy. We cannot allow the Executive, or any branch of government, to silence the voices of people of faith or compel churches and other houses of worship to participate in messages contrary to their theology. The freedom to speak out peaceably against injustice should be inviolate in sacred spaces as well as in public squares.

The courts and the press play essential roles in clarifying and safeguarding the freedoms of speech and religion, but judges and journalists should not bear that burden alone. Scholars need to continue to explore the limits of executive authority and the shortcomings of immunity doctrines that too often preclude official accountability for constitutional violations. Members of Congress and other government officials need to work together to enact laws and develop policies that protect us all against official transgressions. Religious traditions must do their part by speaking out against those who seek to silence the voices of people of faith and all who cry out against systematic racism and other injustices. All Americans need to exercise vigilance and demand accountability from public officials at every level of government. These tasks require immediate and ongoing

²⁹³ Jeffrey Goldberg, *James Mattis Denounces President Trump, Describes Him as a Threat to the Constitution*, THE ATLANTIC (June 3, 2020), <https://www.theatlantic.com/politics/archive/2020/06/james-mattis-denounces-trump-protests-militarization/612640/>; See also Balko, *supra* note 104; Robert A. Kagan, *The Battle of Lafayette Square and the Undermining of American Democracy*, WASH. POST (June 3, 2020), https://www.washingtonpost.com/opinions/why-mark-milley-striding-behind-trump-through-lafayette-square-was-so-troubling/2020/06/02/81ef5388-a503-11ea-b473-04905b1af82b_story.html; Orts, *supra* note 7.

²⁹⁴ *Id.*

attention if the freedoms of religion and speech we cherish are to continue to flourish. Recognizing the gravity of the events of June 1, 2020, and the importance of the role of religious institutions in our collective conscience is a critical step, but significant work remains.

