APPENDIX

APPENDIX A

In the
United States Court of Appeals
For the Second Circuit

August Term 2019

(Argued: October 3, 2019 Decided: October 14, 2021)

Docket No. 18-2626

ZHANG JINGRONG, ZHOU YANHUA, ZHANG PENG, ZHANG CUIPING, WEI MIN, LO KITSUEN, CAO LINJUN, HU YANG, GUO XIAOFANG, GAO JINYING, CUI LINA, XU TING, BIAN HEXIANG,

Plaintiffs-Counter-Defendants-Appellees,

- v. -

CHINESE ANTI-CULT WORLD ALLIANCE INC., MICHAEL CHU, LI HAUHONG, WAN HONGJUAN, ZHU ZIROU,

Defendants-Counter-Plaintiffs-Appellants,

DOES 1-5, INCLUSIVE,

Defendants.[*]

B e f o r e :

WALKER, LEVAL, and CARNEY, *Circuit Judges*.

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[*] The Clerk of Court is directed to amend the official case caption as set forth above.

The Freedom of Access to Clinic Entrances Act of 1994 ("FACEA") prohibits a person from intentionally injuring, intimidating, or interfering with another who is exercising her religion "at a place of religious worship." 18 U.S.C. § 248(a)(2). Plaintiffs–Counter-Defendants–Appellees ("Plaintiffs") are Falun Gong practitioners who passed out flyers and displayed posters, primarily protesting the Chinese Communist Party's treatment of Falun Gong, at sidewalk tables in Flushing, Queens, New York. Plaintiffs claim that Defendants–Counter-Plaintiffs–Appellants (Defendants") harassed them in the vicinity of these tables—the claimed "place of religious worship"—in violation of FACEA. After the parties filed cross-motions for summary judgment, the district court (Weinstein, *J.*) determined that the sidewalk tables were "a place of religious worship" as a matter of law. Rejecting Defendants' constitutional challenge, the district court further held that Congress did not exceed its Commerce Clause authority in enacting § 248(a)(2). On interlocutory appeal, we conclude that "a place of religious worship" means anywhere that religious adherents collectively recognize or religious leadership designates as a space primarily to gather for or hold religious worship activities. The Flushing tables do not qualify because the undisputed record shows that Plaintiffs and their fellow practitioners treated the tables primarily as a base for protesting the Chinese Communist Party's alleged abuses against Falun Gong, rather than for religious worship. Because the § 248(a)(2) claim fails on this statutory ground, we do not reach the constitutional issue. We therefore REVERSE the district court's

partial grant of summary judgment to Plaintiffs and its denial of summary judgment to Defendants, and REMAND for further proceedings consistent with this Opinion.

Judge Walker concurs in the court's opinion, and files a separate concurring opinion.

REVERSED AND REMANDED.

TOM M. FINI, Catafago Fini LLP, New York, NY (Edmond W. Wong, Law Office of Edmond W. Wong, PLLC, Flushing, NY, *on the brief*), *for Defendants–Counter-Plaintiffs–Appellants*.

TERRI E. MARSH, Human Rights Law Foundation, Washington, D.C., JAMES A. SONNE, Stanford Law School Religious Liberty Clinic, Stanford, CA (Joshua S. Moskovitz, Bernstein Clarke & Moskovitz PLLC, New York, NY, *on the brief*), *for Plaintiffs–Counter-Defendants–Appellees*.

Sirine Shebaya, Juvaria Khan, Muslim Advocates, Washington, D.C., *for* Amicus Curiae *Muslim Advocates*.

CARNEY, *Circuit Judge*:

This appeal presents the question of whether five tables on the sidewalk in Flushing, Queens, New York — where Plaintiffs–Counter-Defendants–Appellees ("Plaintiffs") passed out flyers and displayed posters primarily protesting the Chinese

Communist Party's treatment of Falun Gong—constitute "a place of religious worship" under the Freedom of Access to Clinics Entrances Act ("FACEA"), 18 U.S.C. § 248.

Plaintiffs are adherents of Falun Gong, a modern spiritual practice originating in China. They allege that Defendants–Counter-Plaintiffs–Appellants ("Defendants") harassed, intimidated, and interfered with them when they engaged in activities at the tables. Based on these incidents, Plaintiffs brought a claim under FACEA, 18 U.S.C. § 248(a)(2), which makes it unlawful to intentionally injure, intimidate, or interfere with or to attempt to injure, intimidate, or interfere with a person exercising her religion at "a place of religious worship." They allege that the sidewalk tables are a "place of religious worship."

We hold that "a place of religious worship" is anywhere that religious adherents collectively recognize or religious leadership designates as a space primarily to gather for or hold religious worship activities. We hold further that the tables do not qualify under this definition: at summary judgment, the undisputed record showed that Plaintiffs and their fellow practitioners treated the tables primarily as a base for protesting and raising public awareness about the Chinese Communist Party's alleged abuses against Falun Gong, rather than for religious worship. Nor was there evidence that the Falun Gong religious leadership had designated the tables as a place primarily to gather for or hold religious worship activities. Accordingly, the § 248(a)(2) claim fails.

Defendants argue separately that the claim cannot be sustained because Congress lacked the authority under the Commerce Clause to enact § 248(a)(2). Because we resolve the appeal on statutory grounds, we do not reach this constitutional issue.

We therefore reverse the district court's grant of partial summary judgment to Plaintiffs and its corresponding denial of summary judgment to Defendants, and remand for further proceedings consistent with this Opinion.

BACKGROUND

I. Statutory Background

FACEA dually protects individuals' access to "reproductive health services" and the free exercise of religion "at a place of religious worship." 18 U.S.C. § 248(a)(1)-(3). Section 248(a)(2) of that statute, at issue here, imposes civil and criminal penalties on any person who:

> by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship.

Id. § 248(a)(2). A person is authorized to sue under § 248(a)(2) only if she was "lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship or by the entity that owns or operates such place of religious worship." *Id.* § 248(c)(1)(A). FACEA does not define "a place of religious worship."

II. Factual Background

On this interlocutory appeal from orders on cross-motions for summary judgment, we draw the following undisputed facts from the parties' Local Rule 56.1 statements and the documents, deposition testimony, and evidentiary hearing testimony comprising the summary judgment record. The district court held a three-day evidentiary hearing to supplement the summary judgment record, during which several of the parties' experts and witnesses provided additional testimony. To the extent any issues discussed in the factual narrative are in dispute, we note them below.

A. Falun Gong

Plaintiffs are practitioners of Falun Gong, a spiritual practice founded in China in 1992 by Li Hongzhi.[1] App'x at 204 (Pls.' Rule 56.1 Statement), 572 (Defs.' Response to Pls.' Rule 56.1 Statement).[2] The basic principle of Falun Gong is that followers strive to "return" to their "True Sel[ves]" or "Primary

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[1] Two of the thirteen Plaintiffs, Zhang Cuiping and Bian Hexiang, are not Falun Gong practitioners, but were allegedly attacked on the street in Flushing because they were mistaken as practitioners. *See* App'x at 59-60. Because we find that the tables were not a place of religious worship, we need not determine whether these Plaintiffs could maintain an action under 18 U.S.C. § 248(a)(2).

[2] As reflected in Defendants' response to Plaintiffs' Rule 56.1 statement, Defendants maintained at summary judgment that Falun Gong is not a religion under U.S. law. Because they do not pursue that issue on appeal, we assume without deciding that Falun Gong is a religion for purposes of determining whether the Flushing tables qualify as "a place of religious worship" under 18 U.S.C. § 248.

Soul[s]" through regular spiritual practice known as "cultivation." App'x at 247, 577, 582 (quoting Falun Gong teachings). Cultivation entails meditation, physical exercises like qigong, and the study and application of Li's teachings, which are collected in a book of his lectures entitled "Zhuan Falun." Although Falun Gong lacks "temples, churches, or religious rituals," followers gather at conferences, parades, parks, and spiritual centers. App'x at 621 (quoting Li's statements on Falun Gong practice). Adherents also commonly practice Falun Gong in their homes.

Falun Gong is subject to controversy. Defendants are the Chinese Anti-Cult World Alliance Inc. ("CACWA"), its leaders, and affiliated individuals, who oppose Falun Gong. In their view, Falun Gong is "cult-like" and espouses troubling views. *See*, *e.g.*, App'x at 585 (Defs.' Response to Pls.' Rule 56.1 Statement). Defendants object, for instance, to Falun Gong teachings that followers should not take medication for illness, that aliens have visited earth, and that the heavens are divided into racial zones and a person of a mixed racial background will "go to the heaven that belongs to the race of his Main Spirit." App'x at 633. Plaintiffs do not dispute that these are Falun Gong teachings. *See* App'x at 609.

Plaintiffs allege that in China, the government harshly persecutes members of Falun Gong. According to U.S. government reports, the Chinese government deems Falun Gong a "cult[]," and has brutally tortured, detained, and imprisoned followers. App'x at 608 (quoting annual reports of the Congressional-Executive Commission on China); *see also* App'x at 606 (quoting State Department's Human Rights Report on China). One Plaintiff

recounted that, because he practiced Falun Gong in China, he was "abused and beaten in custody" and "was forced to watch as his mother was beaten in the face" by Chinese authorities. App'x at 593. Plaintiffs also allege that the Chinese government exerts influence against Falun Gong practitioners overseas by encouraging its state-owned enterprises to provide financial support to organizations like CACWA. *See* App'x at 1246-48.

In response to this treatment, Li Hongzhi has urged followers to raise awareness—as Falun Gong practitioners describe it, "to tell the truth"—about the Chinese Communist Party's persecution of practitioners and its malignment of the movement.[3] *See*, *e.g.*, App'x at 777 (Plaintiff Cui Lina describing the work of practitioners "to tell the truth of how the Chinese communist party persecute[s] the Falun Gong practitioner"); App'x at 247 ("Supplementary Teachings of Falun Gong" providing that practitioners should do "truth-clarifying work" regarding persecution by the Chinese government).

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[3] In their testimony and written submissions, the witnesses or parties sometimes refer to the government of the People's Republic of China as the Chinese Communist Party. *See* App'x at 1737-38 (Plaintiffs' witness describing Falun Gong practitioners' efforts in protesting the Chinese government, referred to as the "Chinese Communist Party"); *see also* Taisu Zhang & Tom Ginsburg, *China's Turn Toward Law*, 59 VA J. INT'L L. 313, 357 (2019); Yi Zhao & Mark Richards, *The Diffusion of the Concept of Public Figure in China*, 53 LAW & SOC'Y REV. 1202, 1205-07 (2019) (discussing China's one-party system). Consequently, we use this nomenclature as well.

B. The Flushing Sidewalk Tables

Located in the Flushing neighborhood of Queens, New York, are two "centers" where Falun Gong practitioners gather. One is the large Taiwan Cultural Center and the other, the much "small[er]" spiritual center (the "Spiritual Center") based in the suite of a building located on Main Street. App'x at 1743, 1747, 1751. The parties do not dispute that the Taiwan Cultural Center is the site of "regular[]" worship and study among practitioners. App'x at 1747; *see* App'x at 1751 (Plaintiffs' witness, a Falun Gong practitioner, explaining that "[w]e make true wishes and pray at Taiwan Center"). Plaintiffs state that practitioners gather at the Spiritual Center "to meditate, exercise, and study in groups." App'x at 1820; *see also* App'x at 1746 (same witness explaining that "[w]e also practice at Spiritual Center.").

During the relevant period of the lawsuit, from 2011 to 2015, Spiritual Center leadership arranged five tables to be set up daily in the same locations and at the same times along the sidewalk in downtown Flushing. The tables displayed a variety of posters and images and were staffed by volunteers who handed out flyers. The volunteers also walked up and down the street near the tables to distribute flyers. Most, but not all, of the volunteers were Falun Gong practitioners. *See* App'x at 1740 (describing the volunteers as "mainly" Falun Gong practitioners).

Plaintiffs' witness Yu Yuebin, the director of the Spiritual Center, testified at the evidentiary hearing

on the purpose and activities of the tables.[4] In Yu's view, the tables were "part of our spiritual center." App'x at 1738. He explained that the materials displayed at the tables were geared toward raising awareness about the Chinese Communist Party's treatment of Falun Gong:

> Q. What materials are displayed at the tables?
>
> A. We mainly put three kind[s] of materials. First kind, we tell people what is Falun Gong, to reveal the lies about Falun Gong from Chinese Communist Party, the lies that reveal and wrongfully blamed Falun Gong. Second kind, Chinese Communist Party persecute Falun Gong. The third kind is to reveal Chinese Communist Party persecute Falun Gong and to persuade people to withdraw from the party organization.
>
> Q. You said the first category is the materials explain what Falun Gong is, right?
>
> A. Yes. First kind we explain what is Falun Gong—it's a kind of religion for us to practice—to reveal the lies that Chinese [C]ommunist party wrongfully blame Falun Gong.

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[4] The record does not contain copies of the materials allegedly displayed at the tables and has little documentation of how the tables physically appeared during the relevant period. Indeed, the parties dispute whether the display and materials at the tables changed over time in response to this litigation. *See*, *e.g.*, App'x at 1718-19. As a result, we rely on witness testimony to reconstruct the activities and materials at the tables.

> Q. And are the materials at the table simply there for people to pick up, or are they handed out to people?
>
> A. Mainly we distribute them to people; but some of them, people could pick it up by themselves.
>
> Q. So people who are working at the tables at times will distribute the materials on Main Street.
>
> A. Yes.

App'x at 1738-39.

Yu also described the posters and images displayed at the tables. Some depicted "organ harvesting"—the forcible removal of internal organs—from Falun Gong practitioners allegedly committed by the Chinese government. App'x at 1751-52. Yu testified that he hoped displaying these images would "reveal the evilness of the Chinese Communist Party" and motivate passersby to take action against the persecution:

> Q. So, if I told you that we have photographs showing that there are a lot more organ harvesting photos [at the tables before this litigation commenced] compared to now, your testimony is that you'd disagree with that. Is that your testimony?
>
> A. The organ harvesting is a crime, a sin. That has never happened in the history. It's part of our [sic] tell the truth, to reveal the evilness of Chinese Communist Party, to tell people what's happening in China, to help people. More people can pay attention to it

and to stop people being persecuted; and right now, every minute, every second someone organ was being taken. There's no reason for us to decrease that. I think it's normal when it's more or less.

[. . . .]

Q. You understand what organ harvesting is, correct?

A. We have materials about organ harvest.

Q. And that material includes posters that show pictures of bodies being cut open and the organs to be harvested, removed?

A. I want them to display less pictures about this kind. Maybe there are some.

[. . . .]

Q. Okay. And that table that's there does display pictures of organ harvesting, correct?

A. Yes, there is.

Q. Now that poster or those posters displayed, are open for the public to see, correct?

A. Yes.

App'x 1751-55.

Yu further explained that practitioners who staffed the tables engaged in "prayer and promoting the Fa [meaning "law" of Falun Gong]" there. App'x at 1739. As he put it, the tables are "like an extension" of the Spiritual Center "to help to preach and tell the truth, to spread good works to people."

App'x at 1738. Yu admitted, however, that "[m]ainly" Falun Gong "exercises" are done "at the parks and at home" rather than around the tables. App'x at 1746.

Plaintiffs who staffed the tables testified consistently with Yu's statements in their depositions. Plaintiff Cui Lina explained that the purpose of the tables was for volunteers to pass out flyers and raise awareness of the "Chinese communist party['s]" organ harvesting and actions against Falun Gong:

> Q. But when you're practicing, actually practicing Falun Gong, isn't it the movements and the meditation?
>
> A. Yes.
>
> Q. But you are not doing that at the five tables. At the five tables you are handing out materials? You do the movements and the meditation in the spiritual center and the parks. You are not doing that at the table, right?
>
> [. . . .]
>
> A. At a table we pass out fliers. We try to tell the truth of how the Chinese communist party persecute the Falun Gong practitioner. We try to tell the truth about how the communist party harvest organs.
>
> Q. Right. But you don't do the meditation or the exercises at the five tables, correct?
>
> A. No, we don't—we don't do meditation.
>
> Q. And you don't do the exercises at the five tables either, correct?

[. . . .]

A. That's correct.

App'x at 1788.

Plaintiff Lo Kitsuen likewise testified at her deposition that the tables were "not mainly for worship":

> Q. Are the tables a place of worship or are they more to distribute information?
>
> A. There are multiple various printed materials on the table, and we distribute those pamphlets, materials when we tell other people about the truth.
>
> Q. Right. But my question was are the tables actually a place of worship where you actually engage in worship?
>
> [. . . .]
>
> A. No. No. It's not mainly for worship, no. Mostly they are for distribution of our flyers.
>
> Q. Where do you Falun Gong practitioners go to worship?
>
> [. . . .]
>
> A. When we gather at the Taiwan Center on Northern Boulevard and worship by yourself of [sic] at home. You could do that yourself.

App'x at 1784.

Defendants' expert, Professor Xia Ming, a political scientist who wrote about Falun Gong, regularly observed the tables as part of his "data

collection process." App'x at 1695. He testified as follows at the evidentiary hearing:

> Q. And what types of materials do you see being displayed and distributed at those tables?
>
> A. Yes, so based upon my different encounters, I believe some of them about quitting the Chinese Communist party . . . . Some materials about quitting, some about the organ harvest. Sometimes they have materials about the literature about the Falun Gong about what Falun Gong is, and sometimes they have pictures about organ harvest and also about torture in China.
>
> Q. And just to be clear for the court reporter, did you say there are pictures of organ harvesting?
>
> A. Yeah.
>
> Q. Okay. What is organ harvesting? What are they talking about when they display pictures of organ harvesting?
>
> A. Because it has been claimed by the Falun Gong and many Falun Gong practitioners and they were in jail in China, then they were subject to organ harvesting and so they were put to death and their organs were removed when they were still alive. So, this is what pictures they were about.
>
> [. . . .]

> Q. Have you seen the tables at Flushing being used to tell the Falun Gong members [sic] are handing out fliers to Chinese Americans on Main Street and saying "You have to quit the Chinese Communist Party." Have you seen that?
>
> A. I did see them hand them. And I was also approached by different Falun Gong practitioners with the pamphlets regarding quitting the Chinese Communist party, and also the organ harvesting materials.

App'x at 1672-73, 1680-81.

At the hearing, Defendant Li Huahong introduced into evidence photographs of the five tables that she took in 2015 and 2016. Li lived near the tables and passed by them every day for over ten years. She described three of the photographs: two showed a banner hanging over a table that said, "Prosecute Jiang Zemin," the former Chinese president. App'x at 1706-07. A third photograph showed a sign by a table that said, according to Li's translation, "To wrong people in this world. And kindness or evilness will get karma or reward." App'x at 1707.

C. Altercations Between the Parties

Plaintiffs' FACEA claim is based on a series of physical and verbal altercations that took place near the tables from around 2011 until the complaint was filed in 2015.

Plaintiffs allege numerous incidents. In April 2011, Defendant Li Huahong threatened Plaintiff Zhou Yanhua while he passed out flyers by a table. In

September 2011, Defendant Zhu Zirou tore down a table display and struck and cursed at Plaintiff Zhou, who was stationed there. In 2014, Defendant Wan Hongjuan threatened or assaulted Plaintiffs Gao Jinying, Hu Yang, Cui Lina, and Zhang Peng, and Defendant Li attacked Plaintiff Lo Kitsuen, all near the tables. In January 2015, Defendant Wan Hongjuan approached Plaintiff Zhang Jingrong at a table, knocked over the table's materials, and threatened that he would "eradicate" Zhang and her fellow practitioners. App'x at 55-56.

Plaintiffs also allege incidents on Main Street in Flushing. For example, in April 2011, Defendant Li threatened Plaintiff Gao "while traveling by foot on Main Street near the Spiritual Center." App'x at 57. In July 2011, Defendants Li and Zhu and "a mob of twenty to thirty people" surrounded and attacked Plaintiffs Li Xiurong and Cao Lijun while they "walked together on Main Street from the Falun Gong site located at 41-70 Main Street to the Spiritual Center." App'x at 58. While participating in a parade in February 2014, supporters of Defendant CACWA verbally attacked Plaintiff Lo.

Defendants vehemently dispute each of these accounts, claiming instead that they were in fact the victims, and not the aggressors, in these incidents.

III. Procedural History

Based on these and other altercations, Plaintiffs filed this action on March 3, 2015, pleading violations of FACEA in the fifth count of their complaint. The

other counts and Defendants' counterclaims are not at issue in this appeal.[5]

After several years of discovery, the parties filed cross-motions for partial summary judgment. Although neither party initially moved for summary judgment on the FACEA claim, the district court *sua sponte* notified the parties that it was "considering summary judgment on all claims and counterclaims" pursuant to Federal Rule of Civil Procedure 56(f) and ordered the parties to "be prepared to defend or oppose summary judgment on all claims and counterclaims." D. Ct. Dkt. No. 130, 15-cv-1046 (E.D.N.Y.).

Following an evidentiary hearing in connection with the cross-motions, the parties submitted supplemental briefing on the FACEA claim. *See* D. Ct. Dkt. No. 165. Plaintiffs sought partial summary judgment, including, as relevant here, that the Flushing tables are "a place of religious worship" under 18 U.S.C. § 248. D. Ct. Dkt. No. 145 at 16-20.[6]

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[5] The remaining counts include two additional federal law claims (conspiracy to violate civil rights and conspiracy to prevent equal access to public spaces, both under 42 U.S.C. § 1985(3)), and five state law claims (assault and battery, negligence, public nuisance, intentional infliction of emotional distress, and bias-related violence and intimidation under New York Civil Rights Law § 79-n). Defendants assert corresponding counterclaims of assault and battery, negligence, intentional infliction of emotional distress, and violation of New York Civil Rights Law § 79-n. One Defendant, Wan Hongjuan, pled identical counterclaims, except for violation of New York Civil Rights Law § 79-n, in a separate answer.

[6] In their written submissions, Plaintiffs sometimes use broad language to suggest that the claimed "place of religious worship" is not just the Flushing sidewalk tables, but the

Defendants sought summary judgment on the entirety of the claim, arguing that the tables are not "a place of religious worship" because they were not "used primarily for worship" and therefore the claim failed. D. Ct. Dkt. No. 146 at 6-9. Defendants further moved for summary judgment on the ground that Congress exceeded its authority in enacting § 248(a)(2), which regulates only "local, non-economic" activity not affecting interstate commerce. D. Ct. Dkt. No. 172 at 11.

Spiritual Center itself. *See*, *e.g.*, D. Ct. Dkt. No. 145 at 16 (at summary judgment, Plaintiffs arguing that "*the Spiritual Center* and its extensions, including the Spiritual Center's five site tables, are 'places of religious worship.'") (emphasis added). Despite this language, Plaintiffs' FACEA claim in substance is based only on attacks near the tables or on the public street in Flushing. *See* Section II.C, *supra*. Plaintiffs likewise have focused on arguing that the tables themselves, and not the Spiritual Center, are the qualifying "place of religious worship" in this case. *See*, *e.g.*, D. Ct. Dkt. No. 145 at 16, 18 ("The Spiritual Center's five site tables are the functional equivalents of places of worship."). Consequently, the FACEA claim is viable only if the tables are deemed a "place of religious worship." Assuming that the Spiritual Center qualifies as a "place of religious worship"—an issue on which we express no view—Plaintiffs have failed to show that the tables are adjacent or sufficiently near to the Spiritual Center to be deemed an extension of the Spiritual Center for our analytic purposes. *See* Section II.C, *supra*. We also disagree with the district court's statement that Plaintiffs pleaded "incidents of violence and intimidation *at* or around the Falun Gong Temple." *See Zhang Jingrong v. Chinese Anti-Cult World All.*, 311 F. Supp. 3d 514, 562, 564 (E.D.N.Y. 2018) ("*Zhang I*") (emphasis added). As the catalogue of alleged incidents in the district court's opinion shows, the incidents all occurred near the tables or on the street in Flushing, not "at" a "Falun Gong Temple." *Id.* at 533-35.

The district court rendered its decision in two orders, one issued on April 23, 2018, and one on May 30, 2018. In the first, it granted partial summary judgment to Plaintiffs, concluding that the tables are a qualifying "place of religious worship" and denying Defendants' corresponding motion. *Zhang Jingrong v. Chinese Anti-Cult World All.*, 311 F. Supp. 3d 514, 522, 553-55 (E.D.N.Y. 2018) ("*Zhang I*").[7] The district court further ruled that, to avoid effecting a preference for certain religions over others, which would violate of the Establishment Clause, "[*a*]*ny place a religion is practiced* is protected by a constitutional construction of" the phrase "place of religious worship." *Id.* at 553-54 (emphasis added) (citing *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 15 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can . . . . prefer one religion over another.")). Thus, the district court found that "a place of religious worship" under § 248(a)(2) is not limited to "fixed" structures like "temples," but also includes "transitory locations" such as Plaintiffs' tables. *Id.* at 554. The district court further rejected the proposition that a "place of religious worship" means a "structure or place used *primarily* for worship," an interpretation that it characterized as deriving only from the legislative history rather than text of the statute. *Id.* (quoting H.R. REP NO. 103–488, at 9 (Conf. Rep.) (1994), *as reprinted in* 1994 U.S.C.C.A.N. 724, 726 (Section 248 "covers only conduct occurring at or in the immediate

[7] Unless otherwise noted, in quoting case law, this Opinion omits all alterations, citations, footnotes, and internal quotation marks.

vicinity of a place of religious worship, such as a church, synagogue or other structure or place used primarily for worship")). In the district court's view, because Plaintiffs' activities at the tables included religious practice in the form of proselytizing, the tables constituted "a place of religious worship." *See id.*

In the second order, dated May 30, 2018, the district court denied Defendants' motion for summary judgment based on the Commerce Clause challenge to § 248(a)(2). *See Zhang Jingrong v. Chinese Anti-Cult World All.*, 314 F. Supp. 3d 420 (E.D.N.Y. 2018) ("*Zhang II*"). It concluded that, because the provision proscribes misconduct "at a place of religious worship," Congress was permissibly regulating "economic activity" substantially affecting interstate commerce as the Commerce Clause authorizes. *See id.* at 439-40 (quoting *United States v. Morrison*, 529 U.S. 598, 609 (2000) (The Commerce Clause permits Congress to regulate "those activities that substantially affect interstate commerce")). In support, the district court found that "[p]laces of religious worship—even interpreted broadly to avoid an issue under the First Amendment[']s Establishment Clause]—are economic" in light of their substantial collective annual revenue, "account[ing] for 1% of gross national product in the United States and half of all charitable giving." *Id.* at 440. It reasoned that "violence and intimidation at places of religious worship can deter people from participating in religious-based, commercial activity," thereby affecting interstate commerce. *Id.*

In light of the novelty and complexity of the issues, the district court certified both *Zhang I* and *II*

for interlocutory appeal. *See id.* at 424-25. It noted that "[a] two month jury trial looms—demanding substantial time, effort, and money of the parties, a jury, and the court. Prudence dictates that this case not be tried with a substantial, dispositive question of constitutional law" or a question on "the scope of FACEA" left undecided. *Id.* at 424.

We now reverse the order issued in *Zhang I* to the extent it interprets the phrase "a place of religious worship" and concludes that the tables qualify as such under § 248(a)(2). Because the FACEA claim fails on this statutory ground, we do not reach the Commerce Clause issue ruled on in *Zhang II*.

DISCUSSION

"We review a district court's grant of summary judgment *de novo* where the parties filed cross-motions for summary judgment and the district court granted one motion but denied the other." *Atlas Air, Inc. v. Int'l Bhd. of Teamsters*, 943 F.3d 568, 576-77 (2d Cir. 2019). "[W]e evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Byrne v. Rutledge*, 623 F.3d 46, 53 (2d Cir. 2010). We may find for the movant defendant "only if we conclude that on the record presented, considered in the light most favorable to [the non-movant plaintiff], no reasonable jury could find in his favor on his claim[]." *Capobianco v. City of New York*, 422 F.3d 47, 54-55 (2d Cir. 2005). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version

of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007). Summary judgment is proper where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

I. Meaning of "Place of Religious Worship"

Plaintiffs' FACEA claim turns on the meaning of the critical statutory term "place of religious worship." Section 248(a)(2) does not define the term. On review of the statutory text and legislative history, we conclude that the term means a space devoted primarily to religious worship activity—that is, anywhere that religious adherents collectively recognize or religious leadership designates as a place primarily to gather for or to hold religious worship activities.[8]

A. Plain Meaning

When interpreting a statute, we begin with the text. We must give effect to the text's plain meaning. Plain meaning "does not turn solely on dictionary definitions"; rather, it draws on "the specific context in which that language is used, and the broader context of the statute as a whole." *United States v.*

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[8] In interpreting "a place of religious worship" as a space that religious adherents collectively recognize, we do not mean to suggest that a single religious adherent could not designate "a place of religious worship" if his religion authorized this practice. In such a case, although the action might be undertaken by one person, other religious adherents would still collectively recognize the space as "a place of religious worship" because the designation would be rooted in a shared religious tradition and practice.

Rowland, 826 F.3d 100, 108 (2d Cir. 2016). Where the plain meaning of the text is clear, our inquiry "generally end[s] there." *United States v. Balde*, 943 F.3d 73, 81 (2d Cir. 2019).

We conclude that the phrase "a place of religious worship," in context, is susceptible to multiple reasonable interpretations. A "place" is a "location," "a particular part or region of space," "a space that can be occupied." *Place*, Oxford English Dictionary ("OED") (3d ed. 2006), https://www.oed.com /view/Entry/144864; *see also Place*, Merriam-Webster Dictionary ("M-W"), https://www.merriam-webster. com/dictionary/place. When "place" is joined with "of," the phrase "place of" may denote a "place" whose defining feature or purpose is identified in the terms following the preposition "of." *See*, *e.g.*, *Place*, OED (explaining that "place of" is typically accompanied by a "qualification indicating the purpose" of the "place," so that the entire phrase means a "building, establishment, or area *devoted* to a particular purpose" (emphasis added)); *Place*, M-W ("place of" is a construction denoting a "locality used *for a special purpose*" (emphasis added)). In some contexts, however, the words following "place of" merely describe an incidental feature of the location, rather than its primary purpose. For example, the sentence "The town launderette is a place of lively, well-informed conversations," does not denote that the establishment primarily serves as a forum for discourse as opposed to cleaning clothes. The common phrases "place of birth," "place of employment," and "place of wrong" likewise denote one activity or event that occurs at the location, but not necessarily its primary purpose. *See Place of Employment*; *Place of*

Wrong, Black's Law Dictionary (11th ed. 2019); *Birthplace*, M-W (defined as "place of birth or origin").

All of this is to suggest that "place of worship" is susceptible to more than one plausible interpretation. For instance, a "place of worship" is defined as "a place where believers regularly meet for religious worship, esp. a building designed for or dedicated [to] this purpose." *Place*, OED. The latter part of the definition confirms that the phrase is often used to refer to buildings whose primary purpose is to host meetings of religious worship, as Defendants contend. But, as the first clause suggests, a "place of worship" may also refer to any place where adherents "regularly meet for religious worship"—a meaning that may encompass regular sites of worship primarily used for other purposes, such as a public-school classroom where a religious student group meets at lunchtime or a café where believers gather to study and discuss religious texts. *Id.*

Nor can we conclusively ascertain the plain meaning of the text when it is placed in the context of the statute. A person is protected under § 248(a)(2) only if he is both "exercising or seeking to exercise the First Amendment right of religious freedom" and is "at a place of religious worship" at the time. At first glance, the phrase "a place of religious worship" may appear to be surplusage if it means any location where religious worship occurs: under that reading, the statute redundantly protects a person worshipping at any place where a person worships. But the phrase "exercising or seeking to exercise the First Amendment right of religious freedom" could reasonably be read to refer to a broader range of

activities than religious worship itself. Contextual clues from the statute, accordingly, do not provide much clarity.

The district court ruled that, under the plain language of § 248(a)(2), "any place a religion is practiced" must be understood to qualify as a "place of religious worship." *Zhang I*, 311 F. Supp. 3d at 553-54. In so finding, it concluded that interpreting the phrase to mean a place whose primary purpose is religious worship is atextual and imported from the legislative history only. *Id.* at 554. It is true that the words "primary purpose" are not found in the statute, but in light of the common usage of the phrase "place of [an activity]," we are constrained to disagree with the able District Judge that the provision's plain language forecloses this interpretation. As just discussed, "a place of" is a grammatical construction that may denote that the "place" in question is one where the activity described after the word "of" predominates: the fundamental purpose of that "place" is defined by that activity. A "place of religious worship," as used in the statute, could reasonably be interpreted to refer to a place primarily dedicated to religious worship. Although this is not the only possible construction of the statute, it certainly is a permissible one.

B. Legislative History

Having found the statutory language to be ambiguous, "we turn to the provision's legislative history" to determine its meaning. *Panjiva, Inc. v. United States Customs & Border Prot.*, 975 F.3d 171, 180 (2d Cir. 2020). Through this analysis, "we must construct an interpretation that comports with the

statute's primary purpose and does not lead to anomalous or unreasonable results." *Puello v. Bureau of Citizenship & Immigr. Servs.*, 511 F.3d 324, 327 (2d Cir. 2007).

We conclude that the legislative history compels reading the phrase "place of religious worship" to mean a place recognized or dedicated as one primarily used for religious worship. "[N]ext to the statute itself," the Joint Conference Report prepared in conjunction with the legislation's passage, and upon which Plaintiffs here rely, "is the most persuasive evidence of congressional intent." *Disabled in Action of Metro. New York v. Hammons*, 202 F.3d 110, 124 (2d Cir. 2000). The Joint Conference Report strongly supports our interpretation. In describing the House's modifications to the provision, the Report emphasized that the law "covers only conduct occurring at or in the immediate vicinity of a place of religious worship, such as a church, synagogue or other structure or place *used primarily for worship*." H.R. REP. NO. 103–488, at 9 (Conf. Rep.) (1994) (emphasis added). This statement clarifies that Congress did not intend all locations where incidental worship activities occur to qualify as "place[s] of religious worship."

The interpretation supplied by the Joint Conference Report is consistent with the purpose of the statute, which is to protect persons subject to injury, intimidation, or interference at certain physical locations. As discussed above, § 248 protects persons who are practicing their religion at "place[s] of religious worship," not persons practicing their religion anywhere. The statute both protects individuals in the vicinity of such places, as well as

the "property of a place of religious worship" from "intentional[] damage[] or destr[uction]." 18 U.S.C. § 248(a)(3). This place-oriented focus is paralleled in the statute's protection of the property or persons "obtaining or providing reproductive health services" at a "facility" that serves such a purpose. 18 U.S.C. § 248(a)(1), (3). It makes sense that Congress would not have intended the scope of covered places to extend to the wide variety of locations where an individual may engage in religious worship, but which are not primarily used for that purpose, such as one's home.

Nor does the "primary purpose" construction violate the Establishment Clause. Like the district court, we agree that "[r]eligious worship and the places it occurs come in numerous forms," and therefore, "a place of religious worship" "require[s] a flexible interpretation." *Zhang I*, 311 F. Supp. at 553. But Congress may select as its regulatory agenda the protection of certain broad categories of places, as it did here. What Congress may not do is to prefer the "places of religious worship" of certain religions over those of others. *See Everson*, 330 U.S. at 15 (explaining that the Establishment Clause forbids Congress from "prefer[ring] one religion over another"). Accordingly, we cannot interpret "a place of religious worship" as imposing any particular conceptual, physical, or temporal requirements. "Places of religious worship" may be fixed or moveable, enduring or temporary, bounded within a structure or structureless. But the basic feature of "a place of religious worship," as understood by Congress, is that religious adherents collectively recognize or religious leadership designates the place

as one primarily for religious worship. To the extent a religion may disavow the concept of designating any particular locations for worship, we respectfully are of the view that this hypothetical addresses a circumstance distinct from Congress's regulatory focus in § 248(a)—namely, the protection of persons exercising their First Amendment rights to practice religion at physical locations primarily devoted to religious worship.

Defendants urge us to adopt instead a narrow interpretation and construe "a place of religious worship" to mean only fixed structures. We reject that view for the reasons just discussed. The text of § 248 contains no such limitation. A "place" broadly means a point "in space," but that point need not be fixed or have any particular physical feature or structure. *See Place*, OED. Moreover, the Joint Conference Report states that the statute "covers only conduct occurring at or in the immediate vicinity of a place of religious worship, such as a church, synagogue *or other structure or place* used primarily for worship." H.R. Rep No. 103–488, at 9 (Conf. Rep.) (1994) (emphasis added). The phrase "other structure or place" suggests that Congress specifically contemplated a definition of "place" that would extend beyond structures. Although some "places of religious worship" are fixed structures like churches, mosques, or temples, adherents of other religions may worship in spaces that are not so fixed or enclosed. *See*, *e.g.*, Kristen A. Carpenter, *Living the Sacred: Indigenous Peoples and Religious Freedom*, 134 HARV. L. REV. 2103, 2113 (2021) (book review of Michael McNally's DEFEND THE SACRED: NATIVE AMERICAN RELIGIOUS FREEDOM BEYOND THE FIRST

AMENDMENT) (noting that certain "Indigenous religious rituals" are practiced at a designated "sacred site" in nature rather than in fixed structures like a "church, temple, or mosque"). We see no reason why, if such religions designate these spaces as primarily for religious worship during a given period of time, these spaces would not qualify as "place[s] of religious worship" under the statute.

II. The Flushing Tables Are Not a "Place of Religious Worship"

Turning to the record here, we conclude that no reasonable jury could find that the Flushing tables are "a place of religious worship" in the sense that they are a place whose primary purpose is religious worship. The undisputed evidence shows that Plaintiffs and their witnesses characterized the tables primarily as a site for political protest activity against the Chinese Communist Party, even if some incidental religious practice took place at the tables. Consequently, the tables are not a space that Falun Gong adherents collectively recognized or its leadership designated as primarily for religious worship.

Plaintiffs moved for partial summary judgment on the issue that the tables are "a place of religious worship." Defendants correspondingly sought summary judgment on the entirety of the § 248(a)(2) claim, contending that Plaintiffs could not adduce sufficient evidence to prove at trial that the tables are "a place of religious worship." *See Capobianco*, 422 F.3d at 54-55 (summary judgment is proper where the record shows that "no reasonable jury

could find in [the non-movant's] favor"). We agree with Defendants.

Construing the record in the light most favorable to Plaintiffs, as we must on Defendants' motion, we find that the key facts compelling our conclusion are not in dispute. At the direction of the leadership of the Spiritual Center, the tables were set up daily in five locations in downtown Flushing. The tables were used to display certain materials and make them available to passersby. Volunteers who staffed the tables handed out materials either from the tables or when walking up and down the street near the tables.

The director of the Spiritual Center explained at the evidentiary hearing that the materials displayed at the tables fell into three categories, all of which pertain to protesting the Chinese Communist Party's treatment of Falun Gong. The first category "tell[s] people what is Falun Gong, to reveal the lies about Falun Gong from [the] Chinese Communist Party, the lies that reveal and wrongfully blame[] Falun Gong." App'x at 1738. The second category informs the public that the "Chinese Communist Party persecute[s] Falun Gong." App'x at 1738. And the third category of materials "persuade[s] people to withdraw from the party organization." App'x at 1738. When asked to clarify the first category, the director reiterated that the materials explain what Falun Gong is with the aim of exposing the Chinese Communist Party's propaganda and malignment of the group. *See* App'x at 1738 ("Q. You said the first category is the materials explain what Falun Gong is, right? A. Yes. First kind we explain what is Falun Gong – it's a kind of religion for us to practice – *to*

reveal the lies that Chinese [C]ommunist party wrongfully blame Falun Gong." (emphasis added)). The director also described the organ harvesting photos at the tables, intended to spur public action against the Chinese Communist Party: "The organ harvesting is a crime, a sin. That has never happened in the history. It's part of our [sic] tell the truth, to reveal the evilness of Chinese Communist Party, to tell people what's happening in China, to help people. More people can pay attention to it and to stop people being persecuted; and right now, every minute, every second someone['s] organ was being taken." App'x at 1751-52.

In their depositions, Plaintiffs who staffed the tables testified consistently that the primary activity at the tables was not religious worship, but raising awareness of the Chinese Communist Party's abuses. For instance, when asked whether "the tables actually [are] a place of worship where you actually engage in worship," Plaintiff Lo Kitsune responded, "No. No. *It's not mainly for worship*, no. Mostly they are for distribution of our flyers." App'x at 1784 (emphasis added). Plaintiff Cui Lina described the purpose of the tables in a similar vein: "At a table we pass out fliers. We try to tell the truth of how the Chinese communist party persecute[s] the Falun Gong practitioner. We try to tell the truth about how the communist party harvest[s] organs." App'x at 1788. Plaintiff Cao Lijuan agreed that practitioners do "not really practic[e] Falun Gong" at the tables. App'x at 1792. Other evidence in the record corroborates these descriptions of the political orientation of the tables. For instance, pictures taken of the table showed a banner that stated, "Prosecute

Jiang Zemin," the former Chinese president. App'x at 1707.

The record also contains undisputed evidence of certain locations where Falun Gong practitioners habitually worship. They include the Taiwan Center where practitioners pray and study together, parks where they do qigong exercises, and practitioners' own homes where they meditate. The Spiritual Center director testified that "[m]ainly" Falun Gong "exercises" are done "at the parks and at home." App'x at 1746. Plaintiff Cui Lina similarly testified that "practicing Falun Gong" consists of meditation and exercises mainly, which do not occur the tables. App'x at 1788. When asked "where . . . Falun Gong practitioners go to worship," Plaintiff Lo Kitsuen responded, "we gather at the Taiwan Center on Northern Boulevard and worship by [ourselves] . . . at home." App'x at 1784.

Certainly, the record contains some evidence that volunteers who staffed the tables would pray or "promot[e] the Fa" there. *See*, *e.g.*, App'x at 1739. But the issue is not whether there is any evidence that worship activities sometimes occurred at the tables. Rather, we must determine whether there is sufficient evidence for a reasonable jury to conclude that the primary purpose of the tables is religious worship. Consider the distinction between two hypotheticals: members of a sports team form a prayer circle on a field before a game but do not conceive of that field as "a place of religious worship" in their religious tradition. By contrast, adherents of a particular religion rent a secular facility to conduct their daily or weekly church services and conceive of that space as devoted to religious worship during

that time. Although religious worship is taking place in both examples, only the latter circumstance involves "a place of religious worship" because religious adherents have so designated that space for that primary purpose. The record here shows that at most that there were only sporadic instances of worship at the tables. Plaintiffs and their fellow practitioners instead understood the primary purpose of the tables as a site from which to disseminate information about the Chinese Communist Party's treatment of Falun Gong.

The record likewise contains insufficient evidence for a reasonable jury to find that the primary purpose of the tables was proselytizing, a protected religious practice. *See Murdock v. Pennsylvania*, 319 U.S. 105, 110 (1943) ("[S]preading one's religious beliefs . . . is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types."). Rather, the evidence consistently shows that practitioners disseminated information about Falun Gong toward exposing the Chinese Communist Party's alleged defamatory propaganda against the group. The actions encouraged by the tables' materials included quitting the Communist Party, stopping organ harvesting, and mobilizing for punishment of Chinese leaders like Jiang Zemin—not joining Falun Gong per se. Although there is evidence that the Falun Gong leader encouraged this activity, a reasonable jury could not conclude that his call to action to raise awareness of the Chinese Communist Party's abuses transformed this activity into religious worship. *See*, *e.g.*, App'x at 247 (excerpts of "Supplementary Teachings of Falun Gong" providing that, "Of course, many students have been quietly

doing *large amounts of truth-clarifying work—passing out flyers*, making phone calls, using the Internet, going to the consulates, and using all different forms of media *to tell the world's people the truth about Dafa and to expose the evil's persecution*." (emphases added)). At most, the evidence shows that the activity at the tables was motivated by teachings of the Falun Gong leader, akin to how Quaker groups may protest wars or Catholic groups may protest abortion laws in public streets motivated by their respective religious beliefs. But that such political and social action may be rooted in religious belief does not transform the public spaces where the action occurs into "places of religious worship."

Reviewing the full record in the light most favorable to Plaintiffs, we conclude that it contains insufficient evidence for a reasonable jury to find at trial that the primary purpose of the tables was religious worship. Rather, the undisputed evidence shows that activities at the tables were primarily aimed at exposing and motivating action against the Chinese Communist Party for its alleged abuses against Falun Gong, even if some religious activity may have incidentally or occasionally occurred at the tables. The § 248(a)(2) claim therefore fails.[9]

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[9] We note that, with the § 248(a)(2) claim eliminated, no federal claims remain in the suit because the district court dismissed the other federal claims at summary judgment. *See Zhang I*, 311 F. Supp. 3d 514. On remand, the district court may determine in its discretion whether to retain supplemental jurisdiction over the surviving state law claims expected to proceed to trial. *See Wright v. Musanti*, 887 F.3d 577, 582 n.2 (2d Cir. 2018) ("[A court] may, at its discretion, exercise

In light of this resolution, we do not reach the merits of Defendants' constitutional challenge to § 248(a) under the Commerce Clause.

CONCLUSION

The April 23, 2018 order of the district court is **REVERSED** to the extent that it interprets "a place of religious worship" in 18 U.S.C. § 248(a)(2) and concludes that the Flushing tables qualify. This case is **REMANDED** for further proceedings consistent with this Opinion.

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supplemental jurisdiction over state law claims even where it has dismissed all claims over which it had original jurisdiction.").

JOHN M. WALKER, JR., *Circuit Judge*, concurring:

Although I agree with the majority's reasoning that FACEA does not protect the Falun Gong tables as places of religious worship, I am convinced that the conduct is beyond Congress' Commerce Clause authority to regulate and would dismiss plaintiffs' claim on that basis as well.

In prohibiting violence against worshippers at places of religious worship, FACEA regulates local, non-economic conduct that has at best a tenuous connection to interstate commerce. The Supreme Court in *United States v. Lopez* and *United States v. Morrison* expressly rejected the notion that the commerce power reaches "noneconomic, violent criminal conduct" of the sort proscribed here "based solely on that conduct's aggregate effect on interstate commerce."[1] I therefore would reach and sustain the Commerce Clause challenge to the religious exercise provision of FACEA, 18 U.S.C. § 248(a)(2), and would reverse the district court's denial of summary judgment to defendants.

The Supreme Court has identified three categories of conduct that Congress may regulate under the Commerce Clause: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "those activities that substantially affect interstate

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[1] *United States v. Morrison*, 529 U.S. 598, 617 (2000); *see also United States v. Lopez*, 514 U.S. 549, 565–67 (1995).

commerce."[2] The regulated conduct in this case, violence against worshippers at places of religious worship claimed here, can reasonably pertain only to the third category. To determine whether a regulated activity substantially affects interstate commerce, we consider four factors: (i) whether the statute regulates economic activity, (ii) whether the statute contains an "express jurisdictional element" to establish a connection to interstate commerce, (iii) whether the legislative history includes express findings on the activity's effects on interstate commerce, and (iv) whether the link between the activity and a substantial effect on interstate commerce is too attenuated to bring the activity within the Commerce Clause's reach.[3] Each of these factors counsels against upholding § 248(a)(2).

First, and most importantly, nothing about the regulated conduct is economic in nature. The Supreme Court in *United States v. Lopez* emphasized that it has considered only *economic* intrastate activity, as opposed to non-economic intrastate activity, to substantially affect interstate commerce.[4] The Court surveyed congressional Acts that it had upheld which included those that regulated intrastate coal mining,[5] extortionate intrastate credit transactions,[6] restaurants using substantial

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[2] *Lopez*, 514 U.S. at 558-59.

[3] *Morrison*, 529 U.S. at 609-12.

[4] *Lopez*, 514 U.S. at 559-60.

[5] *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981).

[6] *Perez v. United States*, 402 U.S. 146 (1971).

interstate supplies,[7] inns and hotels catering to interstate guests,[8] and production and consumption of homegrown wheat.[9] The Court emphasized in *Lopez* that "the pattern is clear": statutes that regulated *economic* intrastate activity have been sustained as proper exercises of Congress' commerce power.[10]

The Supreme Court reaffirmed the centrality of the economic activity component in *United States v. Morrison*, which concerned a Commerce Clause challenge to the Violence Against Women Act (VAWA). The Court struck down the law because the regulated conduct, gender-motivated violence, was "not, in any sense of the phrase, economic activity."[11] The Court criticized petitioners and the dissent for "downplay[ing] the role that the economic nature of the regulated activity plays in our Commerce Clause analysis," a consideration the Court found "central" to its analysis in past cases.[12]

Although it stopped short of "adopt[ing] a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases,"

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[7] *Katzenbach v. McClung*, 379 U.S. 294 (1964).

[8] *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

[9] *Wickard v. Filburn*, 317 U.S. 111 (1942).

[10] 514 U.S. at 560; *see also Morrison*, 529 U.S. at 610 (observing that "a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision" to strike down the challenged statute in that case.

[11] *Morrison*, 529 U.S. at 613.

[12] *Id.* at 610.

the Court emphasized that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.[13] Absent an economic nexus or a jurisdictional requirement in the statute tying the conduct to interstate commerce, congressional findings standing alone could not sustain VAWA's constitutionality.[14]

Applying the lessons of *Lopez* and *Morrison*, the Court in *Gonzales v. Raich* upheld provisions of the federal Controlled Substances Act (CSA) that made it unlawful to possess, obtain, or manufacture cannabis for personal medical use, which was legal under California law.[15] Respondent Monson cultivated and used her own marijuana, and Respondent Raich relied on two "caregivers" to "provide her with locally grown marijuana at no charge."[16] Distinguishing Monson's and Raich's activities from the conduct in *Lopez* and *Morrison*, the Court explicitly rejected the Ninth Circuit's "heavy reliance" on those cases when that court concluded that Congress had exceeded its commerce power.[17] Whereas the statutes struck down in *Lopez* and *Morrison*, proscribing local criminal activity, lacked any nexus with interstate commerce, the CSA regulated the "quintessentially economic" activities of "production, distribution, and

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[13] *Id.* at 613.

[14] *Id.* at 613-14.

[15] 545 U.S. 1, 7 (2005).

[16] *Id.*

[17] *Id.* at 9; *see id.* at 23-26.

consumption of commodities for which there is an established, and lucrative, interstate market."[18]

Raich follows from the Court's "striking[ly]" similar decision six decades earlier in *Wickard v. Filburn*.[19] In *Wickard*, the Supreme Court upheld a statute directed at "control[ling] the volume [of wheat] moving in interstate and foreign commerce" to stabilize supply and prices even though Wickard intended to grow wheat only for his own consumption.[20] *Wickard*, the *Raich* Court stated, "firmly establishe[d]" that the commerce power includes the "power to regulate purely local activities that are part of an economic class of activities that have a substantial effect on interstate commerce."[21] The *Raich* Court observed that Congress may reach a purely intrastate activity—even one that is not itself commercial because it does not involve a purchase or sale—if it finds that the failure to regulate that class of intrastate activity would "undercut the regulation of the interstate market in that commodity."[22] The Court concluded that the marijuana home growers in that case, like the *Wickard* farmer, were cultivating "a fungible commodity."[23] Congress could have found that the production of marijuana for home consumption in the aggregate would have a "substantial effect" on supply and demand in the

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[18] *Id.* at 25-26.

[19] 317 U.S. 111 (1942); *see also Raich*, 545 U.S. at 18.

[20] 317 U.S. at 115.

[21] *Raich*, 545 U.S. at 17 (internal quotation marks omitted).

[22] *Id.* at 18; *see also Wickard*, 317 U.S. at 127-28.

[23] *Raich*, 545 U.S. at 18.

greater interstate market for marijuana.[24] Thus, the CSA fell within Congress' commerce power.

Applying these principles to the relevant provision of FACEA, the regulated conduct in this case cannot be viewed as economic. Whether the relevant regulated activity under 18 U.S.C. § 248(a)(2) is either religious practice at a "place of religious worship" or violence against those worshippers and proselytizers at places of religious worship, neither activity is economic. Neither worship nor violence against worshippers affects the production, distribution, or consumption of a commodity in an interstate (or any) market. To be sure, the precise activities at issue in *Wickard* and *Raich* were not commercial, in that the subsets of wheat and marijuana were not being purchased or sold. But they were economic enterprises that, in the aggregate, would have a direct economic effect on the interstate market for each commodity. The statutes in *Wickard* and *Raich*, by "restrict[ing] the amount which may be produced for market," limited "the extent . . . to which one may forestall resort to the market by producing to meet his own needs."[25] No such economic effect can be found here. Neither plaintiffs, by practicing their religion, proselytizing, or protesting the Chinese government's opposition to Falun Gong, nor defendants, by engaging in violence against plaintiffs, fulfill a need locally that they would otherwise fulfill by purchasing some commodity on an interstate market.

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[24] *See id.* at 18-19.

[25] *Wickward*, 317 U.S. at 127; *Raich*, 545 U.S. at 18 (quoting same).

In my view, § 248(a)(2) suffers from the same infirmity as the statute struck down in *Lopez*, a provision of the Gun-Free School Zones Act of 1990[26] that prohibited knowing possession of a firearm in a place known or reasonably believed to be a school zone.[27] The Court observed that the provision at issue was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise."[28] Possession of a gun in a local school zone is not an activity that, through repetition, would substantially affect interstate commerce.[29] So too here. Neither worship nor violence against worshippers is economic activity nor would repetition of either generate a substantial effect on interstate commerce.

The second and third *Lopez/Morrison* factors, the presence of a jurisdictional requirement in the statute limiting the statute's reach to conduct with a connection to interstate commerce, and legislative findings on the activity's effect on interstate commerce, each also weigh against upholding § 248(a)(2). Like the statutes in *Lopez* and *Morrison*, FACEA contains no congressional pronouncement that would tie the proscribed conduct to activity affecting interstate commerce.[30] Nor does the legislative history contain any findings that connects acts of worship or violence against worshippers at places of religious worship to interstate commerce.

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[26] 18 U.S.C. § 922(q)(1)(A).

[27] *See* 514 U.S. at 551.

[28] *Id.* at 561.

[29] *Id.* at 567.

[30] *Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. at 613.

Although we have previously sustained the provision of FACEA that prohibits violence at abortion clinics, in part based on legislative findings that women, doctors, and medical supplies may travel interstate for reproductive health services,[31] those findings were limited to regulating violence at abortion clinics. They have no bearing on whether violence against worshippers at places of religious worship substantially affects interstate commerce. To be sure, the presence or absence of congressional findings is not dispositive to whether a statute is within Congress' commerce power. But it is telling here that Congress made specific interstate commerce findings as to abortion clinics but not to places of religious worship.

Section 248(a)(2) is also distinguishable from the Church Arson Prevention Act of 1996, which imposes federal criminal penalties for the destruction of "religious real property."[32] In rejecting a Commerce Clause challenge to the Act,[33] the Tenth Circuit noted that it contained an express jurisdictional nexus[34] and recited legislative findings that "arson or other destruction or vandalism of places of religious worship . . . pose a serious national problem" that

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[31] *United States v. Weslin*, 156 F.3d 292, 296 (2d Cir. 1998) (per curiam).

[32] 18 U.S.C. § 247.

[33] *See United States v. Grassie*, 237 F.3d 1199 (10th Cir. 2001).

[34] *Id.* at 1209 (citing Church Arson Prevention Act of 1996, Pub. L. No. 104–155, § 2, 110 Stat. 1392 (1996) ("Congress has authority, pursuant to the Commerce Clause of the Constitution, to make acts of destruction or damage to religious property a violation of Federal law.").

"warrant[s] Federal intervention."[35] The legislative history of the Church Arson Prevention Act also referenced a "broad range" of commercial activities in which churches engage, "including social services, educational and religious activities, the purchase and distribution of goods and services, civil participation, and the collection and distribution of funds for these and other activities across state lines."[36] Although Congress made specific commerce findings regarding religious real property, it made no such findings relating to § 248(a)(2), which importantly regulates violence against persons, not real property.

Finally, the link between the regulated activity in this case and any effect on interstate commerce is far too attenuated to offset the other factors. The Supreme Court in *Morrison* made clear that "[t]he Constitution requires a distinction between what is truly national and what is truly local," lest the commerce power engulf the general police power reserved to the States.[37] Upholding § 248(a)(2) would all but eliminate that fundamental distinction. Intrastate violence "has always been the province of the States" to regulate.[38]

Even accepting that some religious organizations may offer commercial services, such as childcare, education, and the purchase and distribution of

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[35] *Id.*

[36] *Id.*; *see also* 142 Cong Rec. S7908–04 at *S7909 (1996) (joint statement of floor managers concerning H.R. 3525, the Church Arson Prevention Act of 1996); 142 Cong. Rec. S6517–04 at *S6522 (1996) (statement of Sen. Kennedy).

[37] *Morrison*, 529 U.S. at 617.

[38] *Id.* at 618.

goods, § 248(a)(2) does not target violence interfering with social services provided at houses of worship, or damage or destruction to the property of a place of religious worship. The act of worship—separate from whatever commercial endeavors religious organizations may also engage in—is in no sense a commercial or economic activity. To find otherwise would require us to layer "inference upon inference,"[39] a step that I am unwilling to take in the light of *Lopez*, *Morrison*, and the constitutional bounds on federal power.

For these reasons and the reasons stated by the majority with respect to the absence of places of worship, I would reverse the district court's denial of summary judgment to defendants.

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[39] *Lopez*, 514 U.S. at 567.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ZHANG Jingrong, ZHOU Yanhua, ZHANG Peng, ZHANG Cuiping, WEI Min, LO Kitsuen, CAO, Lijun, HU Yang, GUO Xiaofang, GAO Jinying, CUI Lina, XU Ting, BIAN Hexiang, Plaintiffs, – against – Chinese Anti-Cult World Alliance (CACWA), Michael CHU, LI Huahong, WAN Hongjuan, ZHU Zirou, and DOES 1-5 Inclusive, Defendants.	**MEMORANDUM AND ORDER ON PLAINTIFFS', DEFENDANTS', AND COURT'S MOTIONS FOR SUMMARY JUDGMENT** 15-CV-1046

JACK B. WEINSTEIN, Senior United States District Judge

Parties

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Zhou Yanhua,
Zhang Peng,
Zhang Cuiping,
Wei Min,
Lo Kitsuen,
Cao, Lijun,
Hu Yang,
Guo Xiaofang,

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I. Introduction

A. Background

Plaintiffs are members of a group, Falun Gong, developed in the second half of the twentieth century in China. The People's Republic of China ("Chinese Government"), it is alleged, has acted to suppress this group in both China and abroad, including in the United States; it deems it a threat to the hegemony of the Chinese State and Communist Party. *See, e.g.*, Pitman B. Potter, *Belief in Control: Regulation of Religion in China*, 174 The China Q. 317, 323, 331-32 (2003); Fenggang Yang, *The Red, Black, and Gray Markets of Religion in China*, 47 The Soc. Q. 93, 110-13 (2006).

Adherents of Falun Gong live in the United States. Some are citizens of this country. It is contended by them as plaintiffs that the Chinese Government has conspired with individuals to harm followers and suppress Falun Gong in the United States by organizing and encouraging the Chinese Anti-Cult World Alliance ("CACWA") and individuals to inflict injuries on those who follow Falun Gong.

Defendants oppose Falun Gong in Flushing, Queens, New York, and elsewhere. They deny that Falun Gong is a religion. Following the position of the Chinese Government, their opposition is based upon characterizing Falun Gong as a "cult" indoctrinating its followers with beliefs that are dangerous, unscientific, and offensive.

Plaintiffs' claims require a showing, for the purposes of this litigation, that Falun Gong is a religion and that defendants obstructed the right of its adherents to practice this religion at places of religious worship.

In China, and in the United States, anti-Falun Gongists define Falun Gong as a "cult" that challenges the authority of the ruling Communist Party and Chinese Government. *See* Anne S. Y. Cheung, *In Search of a Theory of Cult and Freedom of Religion in China: The Case of Falun Gong*, 13 Pac. Rim L. & Pol'y J. 1 (2004).

The history and tradition in American constitutional law and the beliefs of most of the population of the United States mandates a finding that Falun Gong is a religion for only purposes of standing and applicable substantive law in the present case. "Heresy trials are foreign to our Constitution." *United States v. Ballard*, 322 U.S. 78, 86 (1944).

The court defines Falun Gong as a religion for purposes of this litigation. *See infra* Sections III(B), IV(A). The court makes no ruling on the religious nature of Falun Gong for general theological purposes. The parties' post-summary judgment hearing submissions seeking a definition of Falun Gong as a religion or non-religion for purposes outside this litigation are not persuasive. *See* Plts.' Post-Hr'g Br. at 1-10, ECF No. 145; Defs.' Post Hr'g Br. at 1-3, 7-10, ECF No. 146.

Plaintiffs proselytize their religion and protest the Chinese Government's opposition to it on Main Street in Flushing, Queens, near what they consider

to be one of their temples. *See* Appendixes A & B (map and pictures of area). The Federal Freedom of Access to Clinic Entrances Act protects plaintiffs "lawfully exercising . . . [their] First Amendment right of religious freedom *at a place of religious worship*." 18 U.S.C. § 248(a)(2) (emphasis added). This statute is inclusive of all lawful religious practices and of all places it is practiced. Any place a religion is practiced—be it in underneath a tree, in a meadow, or at a folding table on the streets of a busy city—is protected by this and other statutes and the First Amendment to the Federal Constitution. A contrary reading would render the Freedom of Access to Clinic Entrances Act unconstitutional since it would discriminate between religions that use formal temples and those that do not.

Plaintiffs set up their tables in a heavily pedestrian-traveled area in Queens. *See* Summary Judgment Hearing Transcript ("Hr'g Tr.") 251:5-253:10 (April 4, 2018 & April 11, 2018). There they proselytize for the Falun Gong, also known as Falun Dafa. *See id.* As noted above, for purposes of this litigation, Falun Gong is properly characterized as a religion under the Federal Constitution and federal and state statutes and cases. *See infra* Sections III(B), IV(A). Its adherents verbally and with hand-outs, signs, and literature attacked the Chinese Government politically for, among other things, harvesting human organs. Hr'g Tr. 265:15-266:6.

Defendants, following the Chinese Government's position, allegedly verbally and physically attacked plaintiffs at their tables, and referred to Falun Gong as a "cult," dangerous to its adherents and others.

See infra Section II(C). Defendants claim plaintiffs attacked them physically.

At times the debates became loud, spirited, and robust, with occasional striking out and hitting, but with no appreciable physical harm to any person. *Id.* Since the instant case was brought, physical confrontations have subsided. *See* Hr'g Tr. 156:24-157:10. The parties appear to have reached a *modus vivendi*. The New York police are well in control of the situation. *See id.*

B. Motions and Claims

A motion to dismiss on the pleadings has been denied. *See Zhang Jingrong v. Chinese Anti-Cult World All.*, No. 15-CV-1046, 2018 WL 1326387 __ F.Supp. __ (E.D.N.Y. Mar. 14, 2018).

Both parties now move for summary judgment. Plaintiffs seek dismissal of defendants' counterclaims. Defendants seek dismissal of several of plaintiffs' causes of action. The court *sua sponte* moved for partial summary judgment after providing notice in accordance with Federal Rule of Civil Procedure 56(f). *See* Mar. 26, 2018 Order, ECF No. 130.

The court does not contemplate granting injunctive relief because the violence has abated and the police are in control. *See supra* Section I(A). An injunction might complicate appropriate police action. The case will proceed to a jury trial on the issues of liability and damages.

A full evidentiary hearing was provided on the motions for summary judgment. *See* Hr'g Tr. The

motions for summary judgment are decided as follows:

(1) Assault and battery: this is a simple New York State common law based claim. It is amply supported by the allegations and evidence. It will be tried by a jury.

(2) Bias related violence and intimidation (New York Civil Rights Law § 79-n): this statute is applicable by its language to plaintiffs' complaint. It will be tried by a jury.

(3) Conspiracy to violate civil rights (42 U.S.C. § 1985(3)): the magistrate judge's report and recommendation approved by the late Judge Sandra Townes denied defendants' motion to dismiss this claim. *Zhang Jingrong v. Chinese Anti-Cult World All.*, No. 15-CV-1046, 2018 WL 1326387 __ F.Supp. __ (E.D.N.Y. Mar. 14, 2018); Order Adopting Report and Recommendation, ECF No. 38.

This court is dubious about the application of this statute. The latest decisions on the subject by the Supreme Court implicitly overrule Second Circuit Court of Appeals' decisions, which might have been read as approving plaintiffs' legal theory supporting the instant claim. *Compare Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 275 (1993) (denying claims under § 1985(3) based on the right to interstate travel), *with Spencer v. Casavilla*, 903 F.2d 171 (2d Cir. 1990) (approving § 1985(3) claim based on the right to intrastate travel); *cf. Spencer v. Casavilla*, 839 F. Supp. 1014, 1017 (S.D.N.Y. 1993), *aff'd in part, appeal dismissed in part*, 44

F.3d 74 (2d Cir. 1994) (expressing doubt about "the Second Circuit Court of Appeals' position that the right to intrastate travel is on a constitutional par with the right to interstate travel"); *Upper Hudson Planned Parenthood, Inc. v. Doe*, 836 F. Supp. 939, 947 (N.D.N.Y. 1993) (expressing "serious reservations" about the extent of the right to intrastate travel after *Bray*).

There is no indication that the conduct alleged here goes beyond a narrow religious and political dispute between two relatively small groups. The history of 42 U.S.C. § 1985(3), the Ku Klux Klan Act, adopted in 1871, does not bear on such minor disputes as those before the court. This local dispute is in no way comparable to those in 1871, when the Ku Klux Klan was a powerful national and local entity, in effect laying siege to state and local government in the South in order to deny African Americans their post-slavery rights. The Ku Klux Klan's operations could be analogized to "color of state action." The instant dispute is not in that class.

This claim is dismissed. Trying the case under 42 U.S.C § 1985(3) would enhance the possibility of a mistrial or reversal. That unfortunate result after a full trial can be avoided by substituting (2) above and (5) below for their equivalent (3). Attorneys' fees may be awarded under (2) and (5), as well as (3).

(4) Conspiracy to prevent authorities from providing full, free, and equal access to public spaces (42 U.S.C. § 1985(3)): this theory has

no support in the record. The police have done, and are doing, their job well in protecting access to public spaces. The evidence shows that police were taking adequate steps to protect defendants and plaintiffs; there is no basis for this claim or reason to bring alleged police failures into the case.

(5) Interference with religious freedom (18 U.S.C. § 248): this claim will be tried by jury. The statute allows claims based on denial of access to places of worship. It has application to plaintiffs' claims; the evidence will largely overlap with that for (2) above.

(6) Negligence: there is no basis in either state or federal law on the facts to find negligence. The activities at issue are intentional. The gravamen of this case is alleged deliberate action by a conspiracy of defendants to harm a religion practiced by plaintiffs in this country, and push back by plaintiffs. Political as well as religious differences divide the parties.

(7) Intentional infliction of emotional distress: this issue will be treated under plaintiffs' claim for assault and battery, which can support both physical and psychic injury. It is not an independent claim.

(8) Public nuisance: there is no need to fall back on a nuisance claim in the present case since it is essentially founded on the common law theory of assault and battery. *See N.A.A.C.P. v. AcuSport, Inc.*, 271 F. Supp. 2d 435, 447

(E.D.N.Y. 2003) (rejecting public nuisance claim).

Defendants raise counterclaims and seek relief on the following grounds:

(9) Assault and battery: this counterclaim will go forward in a jury trial. *See* (1) above.

(10) Intentional infliction of emotional distress: this counterclaim will be treated in the same way as plaintiffs' claim. *See* (7) above. It is not an independent claim.

(11) Negligence: this counterclaim is dismissed for the same reasons as plaintiffs' negligence claim. *See* (6) above.

(12) New York Civil Rights Law § 79-n: this claim will proceed to trial. The statute is written to cover disputes such as the present one.

The present case involves issues of free speech, freedom of religion, religious rights, and political disputes in China and the United States. It will be tried on the theory that defendants committed violent acts against plaintiffs because of religious and political differences, and vice versa.

II. Facts

Sufficient evidence has been adduced to support the pleadings' allegations. What follows is based upon evidence from court hearings, background materials, media reports, academic studies, and submissions of the parties.

A. Falun Gong

1. Background and Tenets

Li Hongzhi founded Falun Gong in 1992. Plts.' Affirmative 56.1 Statement (Plts.' 56.1 Stm't) at ¶ 1, ECF No. 106, Ex. 2. He wrote the main corpus of Falun Gong beliefs, Zhuan Falun. *Id.* at ¶¶ 1-3. Falun Gong literally translates to "the practice of the wheel of the Dharma." Anne S. Y. Cheung, *In Search of a Theory of Cult and Freedom of Religion in China: The Case of Falun Gong*, 13 Pac. Rim L. & Pol'y J. 1, 21 (2004). It combines the practice of *qigong*, breathing exercises, with traditions of Buddhism and Taoism. *Id.* It also goes by the name "Falun Dafa." *Id.*

The founder did not call Falun Gong a religion. Defs.' Counterstatement of Additional Facts ("Defs.' Counterstatement") at ¶ 1, ECF No. 108. Some adherents deny that it is a religion. Cheung, *supra*, at 21. These statements are based on an understanding of religion different from that under American law; for the purposes of the present suit, Falun Gong is a religion.

Falun Gong speaks of a divine creator, known as DAFA/the Buddha FA, who created time and space. Plts.' 56.1 Stm't at ¶ 5. The purpose of life, according to its tenets, is to return to one's original self, achieve enlightenment, and attain salvation. *Id.* at ¶ 7. Practitioners undergo a process known as "cultivation," requiring adherence to a detailed ethical code. *Id.* at ¶ 8. Truth, tolerance, and respect for family and elders, are essential parts of its ethics. *Id.* at ¶¶ 12-18. Following its path leads to virtue. *Id.* at ¶¶ 18-19. Jealousy, deception, bullying, lust, and arguing decrease virtue. *Id.* at ¶ 20.

Falun Gong teaches of separate dimensions where the divine creator lives. *Id.* at ¶¶ 21-23. Those

living in the human dimension cannot experience other dimensions as can great enlightened beings. *Id.* at ¶ 24. One's true self lives in a miniature dimension. *Id.* Reincarnation transcends these dimensions as a person's spirit adopts "skin," the physical form of the dimension in which he or she is reincarnated. *Id.*

Practitioners of Falun Gong exercise physically five times per day and pray at six-hour intervals. *Id.* at ¶ 25. They study daily and proselytize. *Id.* Adherents avoid uncooked meat and alcohol, celebrate holidays, such as Falun Dafa Day, and venerate sacred images and symbols such as a law wheel or Falun, Buddhas, Taos, Bodhisattvas, and Celestial maidens. *Id.* at ¶ 26.

Falun Gong has a number of controversial teachings. Its leader has stated that mixed-race children are inferior, aliens have visited earth, and homosexuality and women's liberation cause societal harm. Defs.' Counterstatement at ¶¶ 7-10. Adherents avoid western medicine. Plts.' 56.1 Stm't at ¶ 50.

2. Expert Testimony

Three experts testified at the summary judgment hearing: Caylan Ford and Dr. Arthur Waldron for the plaintiffs, and Dr. Xia Ming, for the defendants.

a. Caylan Ford

Ford received a Bachelor of Arts degree in Chinese History from the University of Calgary, a Masters in International Affairs from the George Washington University, and a Masters in International Human Rights Law from the University of Oxford. Hr'g Tr. 39:7-14. She has

studied and written learned articles about Falun Gong. *Id.* 39:7-41:11. She practices Falun Gong. *Id.* 44:1-5.

She explained the genesis and basic teachings of Falun Gong:

> Falun Gong was first publicly taught in China in 1992 by a man named Li Hongzhi who is referred in the practice as the master or teacher . . . .
>
> Li described Falun Gong, which is also sometimes called Falun Dafa. It's described as a practice stemming from the Buddhist school and it's stated essential teachings principles, and practice methods have been transmitted orally to him through a long lineage of masters and disciples . . . . as is quite typical of Asiatic or spiritual disciplines and traditions. After being passed on to him, he reorganized some of these practice methods to make them suitable for popularization and he compiled the essential teachings in the book Zhuan Falun . . . .
>
> [I]t was originally classified as a system of Qigong. And Qigong is an umbrella term, it's a system of categorization that's fairly new in China that captures sort of a wide variety of meditation-regulated breathing practices. And they were classified in contemporary China as forms of Chinese medicine meant to effect better health. But Li Hongzhi made clear that Falun Dafa, Falun Gong, the purpose of it was not limited to obtaining

> better health. Instead, it was presented as a path to transcendence, spiritual salvation.
>
> Emphasis was put on spiritual and moral rectitude, and the ultimate goal is to achieve a kind of reconciliation with the divine. And this is actually much more reflective of the traditional function that these kinds of meditation and exercises had in antiquity.
>
> But a lot of these were more philosophical or theological components . . . lost within the political climate of communist China. So, in effect, Li Hongzhi was reviving the kind of religious origins of this type of Qigong discipline.

Id. 45:10-47:3.

Ford further explained the relationship between Falun Gong and the meditation and breathing exercise practice, known as Qigong.

> Well, Qigong is not a discrete single thing. So Falun Gong shouldn't be understood as a branch of Qigong or a sect, for instance. Rather, Qigong is a modern system of a classification that was devised in the political climate of the Peoples Republic of China under Communism.
>
> So, for centuries, Qigong-like techniques of meditation, regulated breathing, specific movements and exercises, these have been employed for centuries, if not millennia, by Daoist practitioners, by some Buddhist groups, as a sort of ancillary means of achieving spiritual transformation. And many

of these types of practices were transmitted orally through lineage systems in private, and they were sort of rediscovered early in the Maoist era. In order to survive in that political climate, they had to cast off their theistic beliefs or their religious beliefs.

So, to survive, Qigong practices were essentially reclassified as systems of Chinese medicine and stripped of their more overtly religious content. And it's that trend, as I said earlier, that Falun Gong in a sense reversed . . . .

Qigong is not necessarily religious, or the practices that are described as Qigong practices, rather, are not necessarily unreligious. Some of them are. I suppose, in a way, it's analogous to . . . Yogic practices. In both China and India, there are these similar traditions of . . . focused movements that are in to assist a person in their quest for transcendence and moksha and enlightenment, and comprised part of spiritual and religious practice. That doesn't mean that everyone practicing [] yoga in New York is engaged in a religious practice, but neither does it mean that there are no religious applications or religious practices that involve yoga . . . .

So some Qigong practices, I think, could rightly be classified as having religious elements, and some having been divorced from their religious roots no longer have that claim.

Id. 49:9-50:24.

Buddhism and Falun Gong are related to one another.

> [T]here is the Buddhist religion founded by Buddha Shakyamuni, the historical Buddha, but then there is the Buddhist school Falun Gong calls Fojiao . . . . And the Falun Gong understand the name of this is that the Buddhism founded by Buddha Shakyamuni, the religious Buddhism is but one branch of a much broader school. And so the relationship between Falun Gong and religious Buddhism is of two different sort of denominations within a very vast system or school of teachings. As opposed to Falun Gong being a sect of religious Buddhism as founded by Buddha Shakyamuni.

Id. 103:23-104:9.

In Ford's expert opinion, Falun Gong is a religion by Western standards. She described the features of Falun Gong that led to this conclusion.

> Falun Gong elaborates a very complete cosmology or sacred order. It places ethical and moral demands on its practitioners and grounds these demands within a metaphysical framework.
>
> The ultimate goal of the practice is the attainment of spiritual salvation, enlightenment, transcendence of this mortal realm in the context of Eastern religions. They talk of reincarnation, a cycle of samsara. And the goal is ultimately to

> extricate one's self from this cycle of reincarnation and achieve reconciliation for the divine. It involves an extensive body of scripture, a moral code. Teachings deal with ultimate questions of the purpose of life, the afterlife, the source of suffering, the means of salvation. It discusses metaphysical, or other worldly realms that are beyond our human perception or beyond this material world, planes inhabited by deities or gods.
>
> In terms of its function in the lives of its practitioners with the caveat that religion can mean different things to different people and can be embraced with varying levels of commitment for the vast majority of Falun Gong practitioners that I know, they engage daily with the study of Falun Gong [teachings], Falun Gong meditation and exercise, and they certainly would see it as, you know, sort of playing a parallel role to what belief in God plays in established in orthodox faiths. And it's an essential component to their self-identity.
>
> So, in all these ways, yes, I believe that Falun Gong would qualify as a religion based on our Western conceptions of religion, and certainly, based under U.S. law.

Id. 51:7-52:11

Falun Gong teaches of a divine creator:

> So its teachings articulate a belief in a divine creator, and the ultimate kind of manifestation is found in the principles of

> Chinese of Zhen, Shan, Ren . . . . But this translates roughly as truth or truthfulness; compassion, benevolence; and something akin to forbearance. Endurance, patience, et cetera.
>
> And this quality is described as the great law of the universe, the Dafa. It represents the fundamental or the ultimate nature of the universe. The ultimate manifestation of the Dao or the Buddhist law. It's seen as the source of order that animates and gives rise to all life and all things. And It's the sole criteria by which Falun Gong measures what's good and bad, right and wrong. So it's unchangeable and immutable, and it's . . . the source or the divine ground of being.

Id. 52:16-53:8.

> Unlike some other religions, Falun Gong generally does not issue strict prohibitions; instead, it offers its followers general principles.
>
> [Li Hongzhi's] approach . . . is typically to explain the principles of why a particular thing is good or bad. Why it may not be compatible with the ends of practice. And then it's up to the individual student, him or herself, to apply these principles in her life.
>
> So, as an example, Buddhist practices have just a hard-and-fast prohibition on eating meat. Falun Gong would explain that the practitioner shouldn't be attached to eating meat, that negative karma may be accrued in

> the process of eating meat. But it doesn't forbid it outright. So this is a little bit of . . . how to understand the sort of Li's approach to these types of ethical teachings.

Id. 53:12-54:22.

> It is a "revealed religion" shown to Li's followers through his speeches and writings. *Id.* 57:23-58:5. Much "is left to the individual practitioner to understand and interpret in their life and their own manner." *Id.*
>
> The daily practice of Falun Gong includes five exercises:
>
> These include four slow-moving meditative standing exercises and one seated meditation. In addition, there's a daily short meditation ritual that's performed . . . multiple times a day where possible, and it's kind of akin to a prayer. These are the main sort of outward manifestations of ritual in that sense.

Id. 54:23-55:6.

> Although Falun Gong's founder has stated that it is not a religion, Ford explained that this teaching is based on a Chinese concept of religion that differs from religion in the Western sense. *Id.* 59:1-60:4. Li has stated the Falun Gong is not a "Zong Jiao," a Chinese concept that is often translated as "religion" in English.
>
> Zong Jiao is actually a neologism that was invented in China in the 19th century. It generally is translated into English as religion, but I would say that a more accurate

> translation is institutional religion or organized religion because what the term Zong Jiao encompasses is much narrower than what the English term is understood to mean i.e., Zong Jiao refers to highly institutionalized religion that [has] churches or temples, clergy or some kind of monastic order; systems of membership, tithing, et cetera. . . .
>
> [A]t various points, Li has said that Falun Gong is not a, he said it's not a Zong Jiao because it doesn't have these kinds of institutionalized features. . . .
>
> The fact that the Li Hongzhi has said in Chinese that Falun Gong is not a Zong Jiao religion, to me, has no bearing on the question of whether it should be understood as a religion under U.S. law. I think it's perfectly irrelevant for the United States who, as I understand it, has their own criteria . . . that are independent of this kind of question.

Id. 59:1-62:8.

Falun Gong does not have many formal physical or organizational structures. In the 1990s, it had no temples or clergy. *Id.* 89:18-23. There is now a Falun Gong Temple located in upstate New York, and several more formal Falun Gong gathering places, including those in Flushing, Queens. *Id.* 89:18-90:13. In Flushing, Falun Gong practitioners gather at a spiritual center on Main Street to meditate, exercise, and study in groups. *Id.* 114:19-24.

But, in most places, Falun Gong remains a decentralized religion.

> [G]roup meditation sites or places where practitioners congregate for the purpose of studying the teachings or exchanging ideas, in most places around the world this occurs in wherever they can get free real estate. So, typically, public parks and schools, universities, community centers and these tend to be ad hoc and informal.

Id. 89:18-90:13.

Falun Gong practitioners set up tables throughout the world on public streets, including those in Flushing, Queens. *Id.* 94:14-95:1, 97:24-98:12. One purpose of their tables is to criticize the Chinese Government. *Id.* In Flushing, Falun Gong practitioners "disseminate literature and speak with passersby about the nature of their religious practice, and [its] persecution in China. And they also sometimes will encourage people to . . . make symbolic renunciations of their ties to the Communist Party." *Id.* 114:4-15.

b. Arthur Waldron

Arthur Waldron is the Lauder professor of International Relations in the History Department at the University of Pennsylvania. Hr'g Tr. 120:17-121:6. He received a B.A. from Harvard College and a Ph.D. from Harvard University in Chinese History. *Id.* He has studied, written in learned journals, and taught about religion in China. *Id.* 121:13-123:1.

Waldron concluded, in his expert opinion, that Falun Gong is a religion by Western standards. *Id.*

123:24-124:6. He had two primary bases for his conclusion:

> Well, the first conclusion, the first basis, would be that Falun Gong describes itself as one of the 84,000 Buddhisms. And Buddhism is recognized, I think, in America as being a religion. If Buddhism is not a religion, then it's very hard to say what is a religion.
>
> The second point is that like most religions, Falun Gong is not about worldly things or even about one's self, it is about advancing through a path of spiritual exercise to higher and higher levels of understanding of the nature, the origins, the moral dimensions and so forth of the universe and I think it shares this characteristic with every religion that I can think of.

Id. at 124:7-21.

He explained the relationship between Falun Gong and Buddhism:

> I would say [Falun Gong] is probably one-third composed of analogies and quotations from the Daoist and Buddhist masters. The story, of course, is that Li Hongzhi [Falun Gong's founder] as a very young boy was recognized as having certain spiritual gifts and, therefore, during the Cultural Revolution, he was taken from monastery to monastery in China where there were great sages. And each of these sages would teach him the essence and the best of what that sage knew and this was his education.

> So you can say that his education was eclectic in the sense that he studied with many masters of many different Chinese religions and then he put together a synthesis that he had arrived at, but which was a synthesis of what was already there in the others. And, therefore, it was kith and kin. It was in no way different. It was in certain respects novel you might say, but it represents in many ways, also, a development of trans-Buddhist thought which you can follow all the way back to the time of Buddha.

Id. 130:13-131:7.

c. Xia Ming

Xia Ming is a professor of political science at the City University of New York Graduate Center and the College of Staten Island. Hr'g Tr. 163:9-20. He has researched and written learned articles about Falun Gong. *Id.* 166:9-167:15.

Dr. Xia did not offer a concrete opinion that Falun Gong is not a religion as defined by United States law. He did express hesitation about calling it a religion. *Id.* 171:3-172:2. Some of the aspects that give Dr. Xia pause include: (1) a lack of a God and savior figure, *id.* 173:11-15; (2) Falun Gong's founder's statements that it is not a religion, *id.* 173:23-174:3; and (3) Falun Gong's lack of interfaith tolerance, *id.* 174:3-175:18. None of these are dispositive factors in the American tradition.

The political aspects of modern Falun Gong practice, associated with anti-Chinese Government statements and propaganda, also add to Dr. Xia's

hesitation in calling it a religion. But, as shown from the following colloquy with the court, when the political dimension is severed from the spiritual, he agrees that there are clear religious aspects to Falun Gong:

> Court: So, for the Court, it is necessary in approaching the problem to put aside the political aspects of the entity. You agree, do you not?
>
> Dr. Xia: In order to understand the Falun Gong, whether it is a religion or not, I think we should do that. But unfortunately, for the context of this case, and in the court, and I think—and the reason—the primary course for the controversy in which led to confrontation and conflicts, and I believe they were more political than religious.
>
> Court: But putting aside the political aspects, is there a residual spiritual aspect in the Buddhist tradition, which I understand may have literally thousands of subreligions, correct?
>
> Dr. Xia: Yes, different sects, yes.
>
> Court: Sects. But they are each a religion, correct?
>
> Dr. Xia: Yes.
>
> Court : If we strain out the political for our analysis, is there left a residual spiritual value which under the United States' very broad religious definition could be characterized as religious?

> Dr. Xia: Excuse me. I believe it has a spiritual aspect. It has religious aspects, sure . . . .
>
> Court: But you do understand that today, even with respect to the so called Abrahamic religions, Catholicism, Protestantism, Judaism, et cetera, there are political aspects which we see in various civil and other wars in other parts of the world, correct?
>
> Dr. Xia: Yes.
>
> Court: But the problem for the Court is whether when we put that aside, is there this—what we have referred to as spiritual, but you understand is very broad under the American law—residual aspect that can be characterized for litigation purposes under the Constitution as religious in its aspects.
>
> Dr. Xia: If we think without reference to the context of this case, and if there was no litigation going on over this issue, and I can say we can identify the religion or spiritual aspect of the Falun Gong.

Id. 176:3-177:22.

The court does not construe this witness's testimony as demonstrating in his view that Falun Gong is not a religion. His testimony tends to support plaintiffs' experts' position that Falun Gong should be characterized as a religion in the United States.

B. Suppression of Falun Gong in China

Shortly after its beginnings in 1992, the People's Republic of China ("Chinese Government") began

attacking Falun Gong and its adherents. Amnesty International, *China: The Crackdown On Falun Gong And Other So-Called "Heretical Organizations"* 4 (Mar. 23, 2000). To protest police harassment, Falun Gong practitioners held a demonstration in Beijing on April 25, 1999. *Id.* Ten thousand practitioners stood in front of the Communist Party's compound from dawn until late in the night. *Id.*

Falun Gong was soon after branded as a threat to social stability by the Chinese Government. *Id.* In the summer of 1999 it was outlawed. Plaintiffs' 56.1 Statement in Opposition to Defendants' Motion for Summary Judgment, Plaintiffs' Supplemental Material Facts ("Plts.' Supp. Facts") at ¶ 1, ECF No. 115, Ex. 1. This measure was followed by a legislative ban on all "heretical organizations," including Falun Gong, in October of 1999. Amnesty International, *supra*, at 1.

Shortly after the ban, tens of thousands of Falun Gong practitioners were detained by the police and pressured to abandon their beliefs. *Id.* at 1-2. Many Falun Gong leaders were charged with crimes. *Id.* at 6. There was a presumption of guilt at trial. *Id.*

The Chinese Government created the "6-10 Office" in June of 1999 to "formulate and execute policies against Falun Gong." Anne S. Y. Cheung, *In Search of a Theory of Cult and Freedom of Religion in China: The Case of Falun Gong*, 13 Pac. Rim L. & Pol'y J. 1, 23 (2004). This governmental unit is above the courts, prosecutors, and general security apparatus. *Id.* at 23-24.

Along with the ban came a sustained propaganda campaign. The Chinese Government portrayed Falun

Gong practitioners as mentally unstable cult members. Plts.' Supp. Facts at ¶ 2-5. The 6-10 Office led a "douzheng" campaign, a violent suppression. *Id.* "Ye Xiaowen, Director of The Bureau of Religious Affairs of the State Council (government), said that 'Falun Gong had brainwashed and bilked [double-crossed] followers, caused more than 1,400 deaths, and threatened both social and political stability.'" Amnesty International, *supra*, at 4. The Chinese Government sought to publicize statements from those it claimed to be former Falun Gong practitioners denouncing Falun Gong's leaders and practices. *Id.*

Violent suppression of Falun Gong continued after the initial crackdown. In 2008, for example, nine Falun Gong practitioners died in police custody. Congressional-Executive Commission on China, *2008 Annual Report*, *available at* https://www.cecc.gov/publications/annual-reports/2008-annual-report (last visited Mar. 23, 2018).

The 6-10 Office coordinates a network in China of Anti-Cult Associations ("CACAs"). *Id.* The local associations are a "prominent information channel for the [Chinese] government's campaign against Falun Gong, as they widely disseminate anti-Falun Gong propaganda by holding study sessions and other community activities to raise 'anti-cult awareness.'" *Id.* Although technically independent of the government, these associations are supported and funded by the 6-10 Office.

Reports of the imprisonment and torture of Falun Gong practitioners and defenders are repetitive and continuing. *See, e.g.*, Didi Kirsten Tatlow, *11*

Detained After Protesting 'Black Jail' in China, N.Y. Times (April 1, 2014) (reporting the jailing of 11 individuals, including four human rights lawyers, who were allegedly supporting Falun Gong); Edward Wong, *2 Chinese Lawyers Are Facing Disbarment for Defending Falun Gong*, N.Y. Times (April 21, 2011); Austin Ramzy, *Family of Dissident Lawyer Fears for His Health After Prison*, N.Y. Times (August 14, 2014) (reporting on a lawyer, who represented Falun Gong clients, being tortured in prison).

C. Conflict in Flushing New York

Many of the plaintiffs had been subject to the Chinese Government's campaign of violent suppression while living in China. Plts.' Supp. Facts at ¶¶ 6, 31. They came to the United States, often as refugees and asylees after being tortured or detained. *Id.* Eleven of the thirteen plaintiffs have expressed a sincere belief in Falun Gong. *Id.* at ¶¶ 27-39.

In the United States, plaintiffs were physically and verbally harassed; they allege, as a result of their practice of Falun Gong at the direction of the Defendant Chinese Anti-Cult World Alliance ("CACWA"), an international offshoot of CACA. *Id.* at ¶ 14. Formed in connection with the Chinese extrajudicial security apparatus, the 6-10 Office, *see supra* Section II(B), CACA operates in China as a network of "anti-cult associations," founded with the purpose of eradicating Falun Gong. *Id.* at ¶ 9.

CACWA activities include: (i) disseminating propaganda calling for the *douzheng* (violent suppression) and *zhuanhua* (forced conversion through torture) of Falun Gong believers; (ii) disseminating pamphlets that degrade and

dehumanize believers; and (iii) perpetuating physical violence and other attacks against known or suspected Falun Gong believers, including plaintiffs. *Id.* at ¶ 16. CACWA's organizational certificate explains that its purpose is to "educate society about the dangers of the Falun Gong cult and its anti-human and anti-society" practices and "warn the society about emerging anti-society cults and so called 'spiritual' practices that distort human psyche." *Id.* at ¶ 22.

Individual defendants have collaborated with CACWA. *Id.* at ¶¶ 24-29. There have been violent incidents on the streets in Queens, New York. *Id.* at ¶ 28 ("[T]he individual Defendants have engaged in verbal and physical confrontations with Plaintiffs in concert with one or more of the other Defendants, or have actively supported, endorsed, and ratified such conduct."); *id.* at ¶ 29 ("Many of these attacks have involved physical violence . . . while many have included death threats."); *id.* at ¶ 37 ("During the attacks themselves, Defendants spoke of the 'elimination' of Falun Gong from Flushing as the purpose of their attacks on Plaintiffs.").

Defendants Chu and Li produce the CACWA Newsletter, which characterizes Falun Gong believers as "malignant tumors," the "scum of humanity," "dogs' legs," "parasites," and subhumans. *Id.* at ¶ 25. The newsletters call for the violent suppression of Falun Gong. *Id.* at ¶¶ 26, 58 ("All of the Plaintiffs were attacked by Defendants in close proximity to the CACWA table and the spot where Defendants Chu and Wan distribute the CACWA Newsletter.").

In July 2011, the individual defendants began verbally and physically confronting plaintiffs in close proximity to Falun Gong places of religious worship, such as the Falun Gong Spiritual Center ("Spiritual Center"), located at 40-46 Main Street in Flushing, Queens. Complaint ("Compl.") ¶ 5, ECF No. 2. Plaintiffs proselytize at five designated Falun Gong table sites, which have been authorized for this use by the police. Compl. at ¶ 6. These sites are viewed as extensions of the Spiritual Center and are within walking distance of each other. Compl. at ¶ 6; Hr'g Tr. 251:21-254:9 (director of Falun Gong Spiritual Center in Queens explaining that the tables are used for proselytizing, protesting the Chinese Communist Party, and praying). They are located at: 136-06 Roosevelt Avenue, 41-17 Main Street, 41-65 Main Street, 41-28 Main Street, and 41-70 Main Street. Compl. at ¶ 7; *see also* Appendixes A & B.

Verbal and physical confrontations between plaintiffs and defendants occurred at these sites. Compl. at ¶¶ 20-31; *see* Plts.' Supp. Facts at ¶ 35 ("Defendants attacked Plaintiffs in public as they traveled (for the most part) to proselytize in the vicinity of their designated Spiritual Center sites . . . A few of these attacks have taken place as Plaintiffs were coming or going from those locations and/or traveling past Defendants' CACWA tables and/or banners.").

1. Plaintiffs' Accounts

    a. Plaintiff Gao Jinying and Plaintiff Cui Lina

In April 2011, walking on Main Street in Flushing near the Spiritual Center, Plaintiff Gao

Jinying ("Plaintiff Gao") was threatened by Defendant Li Huahong ("Defendant Li"). She said to her: "[T]he United States cannot protect you. We can make you disappear in the United States. The Chinese Embassy has a blacklist of all of you." Compl. at ¶ 26.

On July 21, 2014, Plaintiff Gao saw Defendant Wan Hongjuan ("Defendant Wan") attack Plaintiff Hu Yang ("Plaintiff Hu"), a Falun Gong adherent on Main Street in front of the 136-06 Roosevelt Avenue site. Compl. at ¶ 26. When distributing flyers at the same location with Plaintiff Cui Lina ("Plaintiff Cui"), Defendant Wan threatened both of them with extermination and strangulation. Compl. at ¶ 26; Plts.' Supp. Facts at ¶ 37 ("During a . . . verbal attack against Gao Jinying and Cui Lina . . . Defendant Wan made [known] her intent to eliminate Falun Gong believers by strangling or in other ways disappearing them."); Plts.' Supp. Facts at ¶ 40 (noting that Defendant Wan said, "You are worse than a dog and I will take out your heart, your liver, and your lungs. I will choke you to death. We will destroy you. We will destroy everyone. Somebody will be here to kill you.").

b. Plaintiff Zhou Yanhua

While distributing fliers near a Falun Gong table in April 2011, Plaintiff Zhou Yanhua ("Plaintiff Zhou") was threatened by Defendant Li, who informed him that he and other Falun Gong believers were on a "blacklist" maintained by the Chinese Embassy. Compl. at ¶ 21. Plaintiff Zhou was in the same location distributing fliers when Defendant Zhu Zirou ("Defendant Zhu") approached him, cursed at

him, tore down display boards, and struck him several times. Compl. at ¶ 21.

On January 16, 2015, again in the same location on Main Street, Plaintiff Zhou observed Defendant Wan knock Falun Gong materials off a table and shout loudly, "[y]ou can call the police. We have people in the police station. I am going to eradicate all of you within three months." Compl. at ¶ 21; Plts.' Supp. Facts at ¶ 40.

c. Plaintiff Li Xiurong and Plaintiff Cao Lijun

In July 2011, while Plaintiff Li Xiurong ("Plaintiff Li") walked with Plaintiff Cao Lijun ("Plaintiff Cao") near the 41-70 Main Street table, they were physically attacked by Defendant Li, who was accompanied by Defendant Zhu. Compl. at ¶ 29. At Defendant Li's direction, a "backup" mob of twenty to thirty people arrived at the scene and surrounded plaintiffs. *Id.* During the incident, Defendant Zhu grabbed Plaintiff Li's shoulder bag, while the crowd yelled out "[g]rab her and hold her," "[k]ill her," and "[b]eat her to death." *Id.*; Plts.' Supp. Facts at ¶ 39 ("[W]hile Plaintiff Li was held captive by Defendants Li, Zhu and an angry mob, Defendants' associates surrounded her repeatedly threatened to kill or eradicate her."). The violence lasted about thirty minutes until police arrived. Compl. at ¶ 29.

d. Plaintiff Zhang Peng

After being detained for his practice of Falun Gong while living in China, Plaintiff Zhang Peng ("Plaintiff Zhang") was physically assaulted on July 14, 2014, by Defendant Wan as he walked up and

down Main Street in front of 136-06 Roosevelt Avenue. Compl. at ¶ 28.

e. Plaintiff Lo Kitsuen

On February 8, 2014, Plaintiff Lo Kitsuen ("Plaintiff Lo"), while participating in a Chinese New Year's parade, was confronted by a group of CACWA supporters, Chinese Communist Party loyalists, and others who violently intimidated him and shouted "[d]own with the evil cult." Compl. at ¶ 22. On December 17, 2014, while working at the 136-06 Roosevelt Avenue table, Plaintiff Lo was physically attacked and verbally abused by Defendant Li. *Id.*

f. Plaintiff Hu Yang

On July 21, 2014, Plaintiff Hu Yang ("Plaintiff Hu") was aggressively shoved and kicked by Defendant Wan in an alleged attempt to steal his cell phone as he walked near the 136-06 Roosevelt Avenue table. Compl. at ¶ 25. Three days later, Defendant Wan confronted Plaintiff Hu at the same location, saying "[y]ou are even worse than dogs. I'm going to round you all up and exterminate all of you within three months. I'll strangle all of you to death." *Id.*; Plts.' Supp. Facts at ¶ 37 ("During a physical attack of Hu Yang . . . Defendant Wan made her intent to eliminate Falun Gong believers by strangling or in other ways disappearing them."); Plts.' Supp. Facts at ¶ 40 (noting that Defendant Wan said, "You guys are less than dogs. I am going to chose [sic] you guys to death. I am going to eliminate you all."). Plaintiff Gao witnessed both incidents. Compl. at ¶ 26.

g. Plaintiff Zhang Jingrong

On January 16, 2015, Plaintiff Zhang Jingrong ("Plaintiff Zhang Jingrong"), while staffing the 41-70 Main Street table, was approached by Defendant Wan, who knocked religious materials off of the table and held a piece of paper that said, "I will eradicate you all from the United States. I have a list of all of your names on my paper. It is of no use if you call the police." Compl. at ¶ 20; Plts.' Supp. Facts at ¶ 40 (noting that Defendant Wan said, "I will chase you to the end of the world and I will kill all of you" and "I will kill you all. Here is a list of all your names. It's no use for you to call the police.").

h. Plaintiff Zhang Cuiping and Plaintiff Bian Hexiang

Both Plaintiff Zhang Cuiping and Plaintiff Bian Hexiang were targeted because of defendants' mistaken belief that they were Falun Gong practitioners. Compl. at ¶ 32. On January 3, 2015, Defendant Wan attempted to steal Plaintiff Zhang Cuiping's camera. He made death threats, telling her, "[y]ou don't know how you will die. I won't kill you, but someone else will." *Id.* at ¶ 33; Plts.' Supp. Facts at ¶ 40 (noting "[Wan] [t]hreaten[s] me if she doesn't kill me someone kill me; on many occasions, she said that."). On March 9, 2009, Defendants Li and Zhu attacked Plaintiff Bian Hexiang. Compl. at ¶ 33; Plts.' Supp. Facts at ¶ 38 ("As Defendants Chu, Li and an angry mob chased and grabbed at him, they spoke repeatedly of eliminating . . . [him].").

2. Defendants' Accounts

Defendants offer a starkly different account of relevant events. They claim that they were non-violently opposing plaintiffs' political beliefs orally when they were attacked by plaintiffs.

a. Defendant Zhu Zirou

Defendant Zhu was confronted by plaintiffs several times on Main Street in Flushing. Plaintiffs harassed Zhu about his disability—he uses a wheel chair—and threatened him. Defs.' Counterstatement at ¶¶ 20-21 (noting that Zhu testified: "And then [Plaintiff Xu Ting] start to say something about karma, something—something that tried to transform my thinking. She said even something bad, like, you have to go die. And then she try to say something really bad, for example, about I—I should go to die, something like that.").

Plaintiff Bian assaulted Defendant Zhu in March 2009, knocking him out of his wheel chair and pushing him to the ground. *Id.* at ¶ 23. The verbal attacks based on Defendant Zhu's disability were upsetting to him. *Id.* at ¶ 22.

b. Defendant Li Huahong

Defendant Li has been harassed by plaintiffs many times on Main Street in Flushing. *Id.* at ¶ 24. Plaintiffs have provoked and assaulted her, on occasion throwing rocks or sharp objects. *Id.* at ¶¶ 25-26. Many of the confrontations occurred on the dates that plaintiffs alleged in the complaint they were victims. *Id.* at ¶ 27.

c. Defendant Wan Hongjuan

Plaintiff Zhang used to follow Defendant Wan around Flushing. *Id.* at ¶ 31. Zhang would threaten her, by telling her that "Falun Gong is a very strong, very big organization." *Id.* On one occasion, Zhang physically confronted Wan; she hit her and grabbed her hair. *Id.*

D. Procedural History

Thirteen plaintiffs, Zhang Jingrong, Zhou Yanhua, Zhang Peng, Zhang Cuiping, Wei Min, Lo Kitsuen, Li Xiurong, Cao Lijun, Hu Yang, Gao Jinying, Cui Lina, Xu Ting, and Bian Hexiang ("Plaintiffs"), sued defendants: the Chinese Anti-Cult World Alliance (CACWA), Michael Chu, Li Huahong, Wan Hongjuan, Zhu Zirou, and five unnamed individuals on March 2, 2015.

Plaintiffs seek damages, a declaratory judgment, and injunctive relief. *See* Compl. at ¶ 1. The court's view of which claims can be tried are sketched in Part I(B), *supra*. The pleadings can be summarized as follows:

COMPLAINT			
	Cause of Action	**Plaintiffs**	**Defendants**
1	Assault & Battery	Zhang Jingrong; Zhou Yanhua; Zhang Peng; Zhang Cuiping; Wei Min; Lo Kitsuen; Hu Yang; Gao Jinying; Cui Lina; Xu Ting	All Defendants

2	Bias Related Violence & Intimidation (NewYork Civil Rights Law § 79-n)	All Plaintiffs	All Defendants
3	Conspiracy to Violate Civil Rights (42 U.S.C. § 1985(3) (Deprivation Clause)	Zhang Jingrong; Zhou Yanhua; Zhang Cuiping; Lo Kitsuen; Wei Min; Hu Yang; Gao Jinying; Cui Lina; Zhang Peng; Li Xiurong; Cao Lijun; Bian Hexiang	All Defendants
4	Conspiracy to Prevent Authorities from Providing Full, Free, Equal Access to Public Spaces (42 U.S.C. § 1985(3)) (Hindering Clause)	Li Xiurong; Cao Lijun; Zhou Yuanhua*; Min Wei; Lo Kitsuen; Zhang Jingrong; Zhou Yuanhua; Hu Yang; Cui Lina; Gao Jinying; Zhang Peng	All Defendants
5	Interference with Religious Freedom (18 U.S.C. § 248) (Clinic Access Statute)	Zhang Jingrong; Zhou Yanhua; Lo Kitsuen; Wei Min; Hu Yang; Gao Jinying; Cui Lina; Zhang Peng; Li Xiurong; Cao Lijun	All Defendants

6	Negligence	Zheng Jingrong; Zhou Yanhua; Lo Kitsuen; Xu Ting; Min Wei; Hu Yang; Gao Jinying; Cui Lina; Zhang Peng; Zhang Cuiping	CACWA; Chu; Li
7	Intentional Infliction of Emotional Distress	Zheng Jingrong; Zhou Yanhua; Lo Kitsuen; Xu Ting; Min Wei; Hu Yang; Gao Jinying; Cui Lina; Zhang Peng; Zhang Cuiping	All Defendants
8	Public Nuisance	Zheng Jingrong; Zhou Yanhua; Lo Kitsuen; Xu Ting; Min Wei; Hu Yang; Gao Jinying; Cui Lina; Zhang Peng; Zhang Cuiping	All Defendants

Defendants moved to dismiss plaintiffs' complaint. Mem. in Supp. of Defs.' Mot. to Dismiss, ECF No. 18, Ex. 1. The magistrate judge recommended denial. R. & R., ECF No. 35. The late Judge Sandra Townes, then presiding, adopted the recommendation. *See* Order Adopting R. & R., ECF No. 38.

Defendants answered, asserting a counterclaim, and amended their answers to include additional counterclaims. The court's present view of these counterclaims is summarized in Part I(B), *supra*. The counterclaims are:

ANSWER			
	Counterclaim	**Defendants**	**Plaintiffs**
1.	Assault & Battery	Wan Hongjuan	Unspecified
2.	Assault & Battery	Huahong; Zirou	Unspecified
FIRST AMENDED ANSWER			
	Assault & Battery	Wan Hongjuan	Unspecified
	Assault & Battery	CACWA; Chu; Huahong; Zirou	Unspecified
SECOND AMENDED ANSWER			
	Assault & Battery	Wan Hongjuan	Unspecified
3.	Intentional Infliction of Emotional Distress	Wan Hongjuan	Unspecified
4.	Negligence	Wan Hongjuan	Unspecified
	Assault & Battery	Huahong; Zirou	Unspecified
5.	New York Civil Rights Law § 79-n	Zirou	Bian Hexiang; Zhou Yanhua; Li Xiurong; Xu Ting

6.	Intentional Infliction of Emotional Distress	Zirou	Bian Hexiang; Zhou Yanhua; Li Xiurong; Xu Ting
7.	Negligence	CACWA; Chu; Huahong; Zirou	Unspecified

The parties cross-moved for summary judgment. The presiding district judge, Sandra Townes, died while the motions were pending. The case was then reassigned to the judge presently presiding.

Plaintiffs and defendants have aggregated hundreds of individual claims. Thirteen plaintiffs brought eight causes of action against five individual defendants. The counterclaims are also numerous.

The court gave notice to the parties that it was considering summary judgment on all claims and counterclaims because of the dubious nature of some claims and unmanageability of a jury trial that would necessitate hundreds of unanimous decisions. Mar. 26, 2018 Order, ECF No. 130; Hr'g Tr. 18:4-13. As now construed, the jury would have to make some 234 decisions. They are as follows:

Plaintiffs' Claims			
Cause of Action	**Plaintiffs**	**Defendants**	**Number of Issues to be decided**
Assault & Battery	Zhang Jingrong; Zhou Yanhua; Zhang Peng; Zhang Cuiping; Wei Min; Lo Kitsuen; Hu Yang; Gao Jinying; Cui Lina; Xu Ting	All Defendants	50
Bias Related Violence & Intimidation (New York Civil Rights Law § 79-n)	All Plaintiffs	All Defendants	65
Interference with Religious Freedom (18 U.S.C. § 248) (Clinic Access Statute)	Zhang Jingrong; Zhou Yanhua; Lo Kitsuen; Wei Min; Hu Yang; Gao Jinying; Cui Lina; Zhang Peng; Li Xiurong; Cao Lijun	All Defendants	50

Defendants' Counterclaims			
Cause of Action	**Defendants**	**Plaintiffs**	**Number of Issues to be decided**
Assault & Battery	All Defendants	All plaintiffs	65
New York Civil Rights Law § 79-n	Zirou	Bian Hexiang; Zhou Yanhua; Li Xiurong; Xu Ting	4

Pursuant to present claims and parties the total number of factual issues a jury must decide unanimously is 234.

III. Law

A. Summary Judgment Standard of Review

Summary judgement is appropriate when, "after construing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in its favor, there is no genuine issue as to any material fact." *Sledge v. Kooi,* 564 F.3d 105, 108 (2d Cir. 2009). The non-moving party must provide "specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986) (internal quotation omitted).

Under Federal Rule of Civil Procedure 56(f), after giving notice and a time to respond, a district court may "grant summary judgment for a nonmovant" or "grant the motion on grounds not raised by a party."

The Supreme Court has directed district courts to actively engage with cases at early procedural stages using their "judicial experience and common sense." *Ashcroft v. Iqbal,* 556 U.S. 662, 679 (2009)*; cf.* Fed. R. Civ. P. 1 ("[The Federal Rules of Civil Procedure] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."). It is this court's practice—and has been for some years—to provide parties an opportunity to be heard early in a litigation. *See* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure,* 88 N.Y.U. L. Rev. 286, 344 n.214 (2013) (noting this court's approach of meeting with the parties before ruling on a motion to dismiss in order to get "a sense of the litigation").

When a dispositive motion is filed, the court requires the parties and their attorneys to appear for a hearing. These hearings, a mixture of attorney argument and witness testimony, allow the court to assess the case and provide litigants with a chance to articulate their position in the lawsuit in a way relying on the papers and arguments of counsel alone cannot achieve. Outstanding factual questions can be directed to the litigants, allowing the court to efficiently decide motions on a more accurate factual record. These hearings also reassure the parties that it is the court itself—not a clerk—that is deciding the case after listening to them.

B. Religion in American Law

Plaintiffs' claims under 18 U.S.C. § 248 and New York Civil Rights Law § 79-n require a showing of

religious discrimination. The court holds as a matter of law that Falun Gong is a religion for purposes of the present litigation. American constitutional concerns underlie the legal meaning of religion.

1. Historical Account

a. First Amendment Drafting History

Writing several years before the passage of the Bill of Rights, James Madison—the principle author of the First Amendment—described his inclusive, broad view of religion:

> Because we hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." [Virginia Declaration of Rights, art. 16.] The Religion then of every man *must be left to the conviction and conscience of every man*; *and it is the right of every man to exercise it as these may dictate*. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he

> must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true that the majority may trespass on the rights of the minority.

James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785) (emphasis added). In Madison's view, the "conviction and conscience of everyman" was the touchstone of religion. *Id.* No longer was it the Established Church of England.

Prior to the enactment of the Bill of Rights, religion was mostly left out of the United States Constitution. *See* Frank Lambert, *The Founding Fathers and the Place of Religion in America* 14 (2003) ("For the delegates at the Constitutional Convention in 1787, religion was a divisive issue that threatened the union they were trying to forge. Fractured by pluralism and enflamed by sectarianism, Americans were unlikely to agree upon any federal establishment, no matter how broadly

stated. Thus the delegates opted to avoid conflict by making no mention whatever of religion in the proposed Constitution except in the ban against all religious tests. Thereby, they gave legal standing to the free religious market place.").

The idea of equating religion with "conscience" became part of First Amendment history. What is now part of the First Amendment to the United States Constitution, in its initial draft by Madison read: "The civil rights of none shall be abridged on account of [1] religious *belief or worship*, [2] nor shall any national religion be established, [3] nor shall the full and equal rights of *conscience* be in any manner, or on any pretext, infringed." 1 Annals of Cong. 434 (1789) (emphasis added). "Throughout the summer of 1789, the three clauses rotated in and out of the text." Burt Neuborne, *Madison's Music: On Reading the First Amendment* 133 (2015). Many saw the clauses as overlapping. *Id.* The version that was passed by the House of Representatives and sent to the Senate contained the three clauses. *Id.*

On the Senate's initiative, the final version dropped the third clause. As adopted it states: "Congress shall make no law [1] respecting an establishment of religion, or [2] prohibiting the free exercise thereof." U.S. Const. Amend. I. It was combined with the free speech, assembly, and petition clauses outlawing: "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

Senate deliberations were secret. Neuborne, *supra*, at 133. It is not known why the third clause was removed. *Id.*

b. Early Supreme Court Cases

In an early Supreme Court case, *Reynolds v. United States*, 98 U.S. 145, 162 (1878), religion was defined narrowly. The Court noted, "[t]he word 'religion' is not defined in the Constitution." *Id.* at 162. It looked to history to determine whether a Mormon man had a constitutional right under the free exercise clause to take multiple wives, as allowed by his religion. The Court wrote:

> Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void, and from the earliest history of England polygamy has been treated as an offence against society. After the establishment of the ecclesiastical courts, and until the time of James I., it was punished through the instrumentality of those tribunals, not merely because ecclesiastical rights had been violated, but because upon the separation of the ecclesiastical courts from the civil the ecclesiastical were supposed to be the most appropriate for the trial of matrimonial causes and offences against the rights of marriage, just as they were for testamentary causes and the settlement of the estates of deceased persons.

Id. at 164-65 (internal citations omitted).

With this Abrahamic worldview in mind, the Court considered "whether those who make polygamy a part of their religion are excepted from the operation" of a statute outlawing polygamy. *Id.* at 166. The Court concluded that "while [laws] cannot interfere with mere religious belief and opinions, they may with practices," such as polygamy. *Id.*

Even in early Supreme Court cases less protective of religious freedom, the idea of conscience appeared.

> The first amendment to the constitution, in declaring that congress shall make no law respecting the establishment of religion or forbidding the free exercise thereof, was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose *as may be approved by his judgment and conscience*, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect.

Davis v. Beason, 133 U.S. 333, 342 (1890) (emphasis added), *abrogated by Romer v. Evans*, 517 U.S. 620 (1996) (finding unconstitutional under the United States Constitution a state constitutional provision discriminating based on sexual orientation). But, despite the use of broad language, the Court, in upholding an Idaho statute prohibiting Mormon polygamists from voting, expressed a limited view of

religion: "[t]o call [Mormon] advocacy [of polygamy] a tenet of religion is to offend the common sense of mankind." *Id.* at 341-42.

c. Later Supreme Court Cases

During World War II, the Supreme Court began to speak of religion in terms of freedom of thought and speech. In *West Virginia State Board. of Education. v. Barnette*, 319 U.S. 624 (1943), the Court addressed the issue of whether a child could be made to salute the American flag contrary to his religious belief. The Court was protective of this non-mainstream religious practice, holding that "compelling the flag salute and pledge transcends constitutional limitations." *Id.* at 642. Justice Jackson concluded with one of the most well-known statements of principle in constitutional law:

> 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. If there are any circumstances which permit an exception, they do not now occur to us.

Id.

Barnette's idea of free thought buttressed *United States v. Ballard*, 322 U.S. 78, 86-87 (1944) (internal citations omitted):

> Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. It embraces the right to maintain theories of life and of death and of the

> hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.

Ballard, 322 U.S. at 86-87 (internal citations omitted).

The "conscientious objector" cases during the Vietnam War required an expanded meaning of religion. In *United States v. Seeger*, 380 U.S. 163 (1965) the Supreme Court interpreted broadly an act of Congress that exempted those with religious objections from service in the armed forces.

> Congress, in using the expression 'Supreme Being' rather than the designation 'God,' was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views. We believe that under this construction, the test of belief 'in a relation to a Supreme Being' is *whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption*. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that

> one is 'in a relation to a Supreme Being' and the other is not.

Id. at 165-66 (emphasis added).

The Court essentially put back into the First Amendment the third, conscience clause, in Madison's draft. *Id.* To avoid a constitutional issue, the Supreme Court transformed Congress' language—requiring belief in a "Supreme Being"—to include all systems of belief "parallel to that filled by the orthodox belief in God." *Id*; *see also* Kent Greenawalt, *Religion and the Constitution: Free Exercise and Fairness* 155 n.96 (2006) ("[T]hat the deepest held moral convictions of nonbelievers can qualify as religious leads to the conclusion that some moral convictions of believers that are not connected to their religious beliefs might also qualify as religious.").

The *Seeger* Court referred to freedom of conscience:

> [P]utting aside dogmas with their particular conceptions of deity, *freedom of conscience* itself implies respect for an innate conviction of paramount duty. The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field.

Id. at 176 (quoting *United States v. Macintosh*, 283 U.S. 605, 634 (1931) (emphasis added)).

In *Welsh v. United States*, 398 U.S. 333 (1970) the Supreme Court reaffirmed its broad definition of

religion. Welsh sought exemption from service. Initially he denied that his opposition to the war was based on his religion. *Id.* at 341. The government argued that his opposition was purely political. *Id.* The Court rejected the government's view holding that the religious objector statute "exempts from military service all those *whose consciences, spurred by deeply held moral, ethical, or religious beliefs*, would give them no rest or peace if they allowed themselves to become a part of an instrument of war." *Id.* at 344 (emphasis added). The Court again relied on the Madisonian concept of conscience to support its conclusion, while deciding the case on statutory grounds. *Id.* at 340.

Justice Harlan concurred in *Welsh*, and addressed the constitutional question of "whether a statute that defers to the individual's conscience only when his views emanate from adherence to theistic religious beliefs is within the power of Congress." *Id.* at 356. The statute, which required belief in a "supreme being" for a draft exemption was, in Justice Harlan's view, unconstitutional.

> The 'radius' of this legislation is the conscientiousness with which an individual opposes war in general, yet the statute, as I think it must be construed, excludes from its 'scope' individuals motivated by teachings of nontheistic religions, and individuals guided by an inner ethical voice that bespeaks secular and not 'religious' reflection. It not only accords a preference to the 'religious' *but also disadvantages adherents of religions that do not worship a Supreme Being*. The constitutional infirmity cannot be cured,

> moreover, even by an impermissible construction that eliminates the theistic requirement and simply draws the line between religious and nonreligious. This is my view offends the Establishment Clause and is that kind of classification that this Court has condemned.

Id. at 357-58 (emphasis added).

Resurrection by judicial decision of the conscience clause was, in Professor Neuborne's view, what Madison intended through the structure of the Bill of Rights. Neuborne, *supra*, at 134. Professor Neuborne relied in part on the Ninth and Tenth Amendments, recognizing that not all rights are precisely and specifically enumerated in the Bill of Rights. *Id.* at 29. These two amendments—protecting rights "retained by the people" and "reserving rights to the States" not specifically covered in the Constitution—espoused the idea of "equity of the statute." *Id.* at 29-30. The Amendments encourage the courts to "expand laws beyond their literal wording to closely related, analogous settings." *Id.* The *Seeger* and *Welsh* decisions' protection of nontheistic conscience affected the purpose of the religion clauses, as Madison viewed the matter.

d. Interpretive Approaches

History has been used to support multiple interpretations of the First Amendment. Some scholars have advocated for an originalist position "that 'religion,' in 1791, meant at least what we would think of today as a traditional theistic belief in a God with concomitant duties, which imply a future state of rewards and punishments." Lee J. Strang,

The Meaning of "Religion" in the First Amendment, 40 Duq. L. Rev. 181, 182 (2002). Madison's proposed initial third "conscience clause," it can be argued, shows that there is a distinction between "religion" and "conscience." *Id.* at 233-35. By rejecting the conscience clause, arguably the Senate privileged theistic belief over nontheistic systems of thought. *Id.* But, the Supreme Court put "conscience" back in as a nontheistic religious belief.

The Senate's secret deliberations make an accurate historical account impossible. Neuborne, *supra*, at 133. Other scholars have opined, relying on the views of only Madison and Jefferson can lead to "bad history." Mark David Hall, *Jeffersonian Walls and Madisonian Lines: The Supreme Court's Use of History in Religion Clause Cases*, 85 Or. L. Rev. 563, 605 (2006). "The First Amendment did not spring fully clothed from Madison's mind . . . . Madison's proposals were revised significantly in the House of Representatives, changed by the Senate and Conference Committee, agreed to by Congress, and ratified (initially) by nine state legislatures." *Id.*; *cf.* Martha C. Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* 75 (2008) ("If the seventeenth century was the century that forged our Free Exercise Clause, it was the eighteenth century whose politics forged our Establishment Clause.").

Professor Strang focuses on the meaning of "religion" at the time of the First Amendment's ratification. Strang, *supra*. This approach is vulnerable to the general criticism of originalism and the particular difficulty of understanding First Amendment history since records of the debates on

the Amendment are "notoriously scanty." Hall, *supra*, at 605; *see also* Essay, *The Role of Judges in a Government Of, By, and For the People*, 30 Cardozo L.Rev. 1, 34 (2008) ("Justice Breyer's nuanced view of the need for flexibility in interpreting the Constitution makes him a 'member' of the American Metaphysical Club, allowing for a more pragmatic and effective administration of justice than a stiff and abstract approach." (citing Stephen Breyer, *Active Liberty: Interpreting our Democratic Constitution* (2006))); Kent Greenawalt, *Religion and the Constitution: Free Exercise and Fairness* 11 (2006) ("That we can learn from history is a truism. Historical Investigation rarely, if ever, tells us how to respond to modern problems, but it can teach us about our society's values and lines of division, and it can illumine pitfalls and possibilities.").

The Supreme Court has construed religion pliantly, increasing its scope. *See supra* Section III(B)(1)-(2). "Any judicial test of what counts as 'religious' is worrisome; it is intrinsically difficult to apply and creates the danger that judges will favor the familiar over the unorthodox." Greenawalt, *supra*, at 125. As current Supreme Court precedent emphasizes, a belief in God is not the hallmark of religion. Congress cannot "constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can [it] aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

Torcaso passingly mentioned several "religions in this country which do not teach what would generally be considered a belief in the existence of God

[including] Buddhism, Taoism, Ethical Culture, Secular Humanism and others." *Id.* at 495 n.11. The religion at issue in the present suit, Falun Gong, can be characterized as a form of Buddhism. Hr'g Tr. 124:7-21, 130:13-131:7 (plaintiffs' expert, Arthur Waldron, testifying that Falun Gong is a variant of Buddhism).

Flexibility in interpretation—the equity of the Constitution—is particularly important in construing the First Amendment, where changing demographics, mores, and values can affect the concept of religion. "The United States is not only one of the most religious nations in the developed world, but it is also the most diverse, with some 3,000 religious groups." Bruce T. Murray, *Religious Liberty in America: The First Amendment in Historical and Contemporary Perspective* 10 (2008). An example of this religious diversity is reflected in the United States Military. A survey of military personnel made by the Army in 1979 revealed the following religious preferences among enlisted personnel:

Protestant	38.5%
Catholic	22.5%
Mormon	2.5%
Eastern Orthodox	0.5%
Moslem	1.0%
Jewish	0.7%
Buddhist	0.7%
Other religions not listed	19.3%

No religious preference	14.3%

Katcoff v. Marsh, 755 F.2d 223, 226-27 & n.1 (2d Cir. 1985).

As Professor Neuborne reminds us, "the modern Free Exercise Clause, as tweaked by the Supreme Court, requires us to tolerate conscientiously driven private behavior to the outer limits of a free society's capacity for such tolerance." Neuborne, *supra*, at 132. Madison understood that "religion has a dark side capable of inciting true believers to inflict unspeakable cruelties on nonbelievers." *Id.* at 138. His initial draft of the First Amendment—now embraced by the Supreme Court—implicitly rebukes religious violence by protecting secular and religious conscience equally.

2. Current Approaches to Defining Religion

a. Second Circuit Approach

The Second Circuit's approach to defining religion is faithful to the modern Supreme Court cases. Relying on *Seeger*, *see supra* Section III(B)(1)(c), the Court of Appeals for the Second Circuit has explained:

> The test for identifying an individual's belief "in a relation to a Supreme Being," the [Supreme] Court noted, is "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the (statutory conscientious objector) exemption." The *Seeger* Court cited with approval the use of a

> functional, phenomenological investigation of an individual's "religion" advocated by liberal theologian Paul Tillich. In the absence of a requirement of "God," this approach treats an individual's "ultimate concern" whatever that concern be as his "religion." A concern is "ultimate" when it is more than "intellectual."

Int'l Soc. For Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 440 (2d Cir. 1981). A belief in a God is not required. *Id.*

Before the Supreme Court's jurisprudential shift, Judge Hand offered a functional, nontheistic account of religion:

> It is unnecessary to attempt a definition of religion; the content of the term is found in the history of the human race and is incapable of compression into a few words. Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men in the most primitive and in the most highly civilized societies. It accepts the aid of logic but refuses to be limited by it. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets.

United States v. Kauten, 133 F.2d 703, 708 (2d Cir. 1943).

In *Jews for Jesus, Inc. v. Jewish Cmty. Relations Council of New York, Inc.*, 968 F.2d 286 (2d Cir.

1992) the Court of Appeals for the Second Circuit briefly addressed the issue of whether Jews for Jesus was a bona fide religious organization in a § 1985(3) suit. The defendants in the case argued that "[Jews for Jesus ("JFJ")] is not a religion and that, in any event, [defendants'] actions were not based on JFJ's espousal of evangelical Christianity." *Jews for Jesus*, 968 F.2d at 291. The court disagreed. "On the basis of the present record, [it could not] discern whether JFJ qualifie[d] as [a] bona fide religious organization or whether the alleged discrimination was based on religious creed or on practices unrelated to such creed." *Id.*

The opinion in *Jews for Jesus* is too cryptic to provide a useful test for what qualifies as a religion. It provided no indication of what was contained in the record, and why that was insufficient to find that JFJ was a religion. The test stated in *Int'l Soc. For Krishna Consciousness v. Barber* appears to better express the Court of Appeals' view. *Cf. Equal Opportunity Emp. Comm'n v. United Health Programs of Am., Inc.*, 213 F. Supp. 3d 377, 402 (E.D.N.Y. 2016) (citing *Barber* and finding that "Onionhead" is a religion in a Title VII employment discrimination case).

b. Other Circuits

Other Circuit Courts of Appeals approaches are instructive. According to the Court of Appeals for the Third Circuit in reviewing a religion claim under § 1983 "[a] court's task is to decide whether the beliefs avowed are (1) sincerely held, and (2) religious in nature, in the claimant's scheme of things." *DeHart v. Horn*, 227 F.3d 47, 51 (3d Cir. 2000) (en

banc) (quoting *Africa v. Pennsylvania*, 662 F.2d 1025, 1029-30 (3d Cir. 1981)).

The Court of the Appeals for the Tenth Circuit adopted a five-factor test developed by a district court:

> 1. Ultimate Ideas: Religious beliefs often address fundamental questions about life, purpose, and death . . . . These matters may include existential matters, such as man's sense of being; teleological matters, such as man's purpose in life; and cosmological matters, such as man's place in the universe.
>
> 2. Metaphysical Beliefs: Religious beliefs often are "metaphysical," that is, they address a reality which transcends the physical and immediately apparent world. Adherents to many religions believe that there is another dimension, place, mode, or temporality, and they often believe that these places are inhabited by spirits, souls, forces, deities, and other sorts of inchoate or intangible entities.
>
> 3. Moral or Ethical System: Religious beliefs often prescribe a particular manner of acting, or way of life, that is "moral" or "ethical." . . . A moral or ethical belief structure also may create duties—duties often imposed by some higher power, force, or spirit—that require the believer to abnegate elemental self-interest.

> 4. Comprehensiveness of Beliefs: Another hallmark of "religious" ideas is that they are comprehensive. More often than not, such beliefs provide a telos, an overreaching array of beliefs that coalesce to provide the believer with answers to many, if not most, of the problems and concerns that confront humans . . . .
>
> 5. Accoutrements of Religion: By analogy to many of the established or recognized religions, the presence of [certain] external signs may indicate that a particular set of beliefs is "religious."

United States v. Meyers, 95 F.3d 1475, 1483-84 (10th Cir. 1996).

The accoutrements of religion, according to *Meyers*, include Founder, Prophet, or Teacher; Important Writings; Gathering Places; Keepers of Knowledge; Ceremonies and Rituals; Structure or Organization; Holidays; Appearance and Clothing; and Propagation. *Id*; *see also* Leslie C. Griffin, Law and Religion: Cases and Materials 30-35 (2007) (explaining Professor Ninian Smart's approach to analyzing religion in seven dimensions: (1) "the practical and ritual dimension"; (2) "the experiential and emotional dimension"; (3) "the narrative or mythic dimension"; (4) the doctrinal and philosophical dimensions"; (5) "the ethical and legal dimensions"; (6) "the social and institutional dimensions"; (7) the material dimensions").

The Court of Appeals for the Seventh Circuit has stated principles similar to that of the Court of

Appeals for the Second Circuit, finding that atheism can qualify as a religion.

> [W]hether atheism is a "religion" for First Amendment purposes is a somewhat different question than whether its adherents believe in a supreme being, or attend regular devotional services, or have a sacred Scripture. The Supreme Court has said that a religion, for purposes of the First Amendment, is distinct from a "way of life," even if that way of life is inspired by philosophical beliefs or other secular concerns. A religion need not be based on a belief in the existence of a supreme being (or beings, for polytheistic faiths), nor must it be a mainstream faith.

Kaufman v. McCaughtry, 419 F.3d 678, 681 (7th Cir. 2005) (internal citations omitted).

C. 42 U.S.C. § 1985(3)

1. Background on § 1985(3) Deprivation Clause

Section 1985(3) of Title 42 of the United States Code traces its origins to the post-Civil War Civil Rights Act of 1871, known as the Ku Klux Klan Act. *See Griffin v. Breckenridge*, 403 U.S. 88, 98 (1971). The portion known as the deprivation clause reads:

> If two or more persons in any State . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . [and] do or cause to be

> done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damage occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3).

During debate on the bill, President Grant wrote to Congress urging it to extend the power to provide federal assistance in Southern United States protecting the civil rights of the newly freed slaves. Alfred Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light in State Action and the Fourteenth Amendment*, 11 St. Louis U. L.J. 331, 332 (1967). The President acknowledged a virtual breakdown in local governments' ability to protect rights of some portions of the population:

> A condition of affairs now exists in some of the States of the Union rendering life and property insecure, and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of the State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore I urgently recommend such

> legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.

Id. at 332 n.10. Is the interference by an organized small group of individuals with the right of another small group to travel or to exercise their religious beliefs a form of taking over protections by local government? It is too much of a stretch to so find.

Passage of the Ku Klux Klan Act reflected the reality that private actors working with or without the state could deprive large groups of African Americans of their constitutional rights. *Id.* Some at the time viewed the Ku Klux Klan as a quasi-governmental entity—"an auxiliary of the Democratic Party." *Id.* at 334. It was a broad, multi-state conspiracy combined with intrastate and local conspiracies responsible for innumerable acts of racial and political violence. *Id.* at 343-45. By contrast, alleged Chinese Government support of a few individuals trying to prevent travel or the exercise of religious beliefs by a small group of mainly non-citizen residents of the United States is hardly the equivalent of the almost total takeover of local government and the need for protection of African American rights post-Civil War.

Section 1985(3) is not a general hate-crime statute. Congress passed such a criminal statute in 2009. *See* 18 U.S.C. § 249. And New York State has passed its own bias-motivated violence statute. *See infra* Section III(E).

2. State Action under the Deprivation Clause

In *Collins v. Hardyman*, 341 U.S. 651 (1951) the Supreme Court held—seemingly to avoid a constitutional question—that state action was required for all claims under § 1985(3). "Private discrimination is not inequality before the law unless there is some manipulation of the law or its agencies to give sanction or sanctuary for doing so." *Id.* at 661. *Collins* did, however, leave open the possibility that a "conspiracy by private individuals could be of such *magnitude and effect* as to work a deprivation of equal protection of the laws, or of equal privileges and immunities under laws." *Id.* at 662 (emphasis added).

Collins' core holding was relatively short lived. *Griffin v. Breckenridge*, 403 U.S. 88 (1971) overturned *Collins* recognizing that "[t]he approach of [the Supreme Court] to other Reconstruction civil rights statutes in the years since *Collins* has been to 'accord (them) a sweep as broad as (their) language.'" *Griffin*, 403 U.S. at 97. The language of § 1985(3), the Court declared, "speaks simply of 'two or more persons in any State or Territory' who 'conspire or go in disguise on the highway or on the premises of another.'" *Id.* at 96. Nothing in § 1985(3) requires state action.

In the place of state action, *Griffin* "added the 'class-based animus' requirement in order to prevent § 1985(3) from being broadly—and erroneously—interpreted as providing a federal remedy for 'all tortious, conspiratorial interferences with the rights of others.'" *Jews for Jesus, Inc. v. Jewish Cmty.*

Relations Council of New York, Inc., 968 F.2d 286, 291 (2d Cir. 1992) (citing *Griffin*, 403 U.S. at 98). In effect, the Court traded one non-textual requirement for another—"state action" for "class based animus."

The Court identified three possible forms of state action under § 1985(3):

> that there must be [1] action under color of state law, that there must be [2] interference with or influence upon state authorities, *or* that there must be [3] *a private conspiracy so massive and effective that it supplants those authorities and thus satisfies the state action requirement*.

Griffin, 403 U.S. at 98 (emphasis added).

The Court recognized that literal state action is not required:

> The Congress that passed the Civil Rights Act of 1871, . . . which is the parent of § 1985(3), dealt with each of these three situations in explicit terms in other parts of the same Act. An element of the cause of action established by the first section, now 42 U.S.C. § 1983, is that the deprivation complained of must have been inflicted under color of state law. *To read any such requirement into § 1985(3) would thus deprive that section of all independent effect*. As for interference with State officials, § 1985(3) itself contains another clause dealing explicitly with that situation. And § 3 of the 1871 Act provided for military action at the command of the President should massive

> private lawlessness render state authorities powerless to protect the federal rights of classes of citizens, such a situation being defined by the Act as constituting a state denial of equal protection. Given the existence of these three provisions, it is almost impossible to believe that Congress intended, in the dissimilar language of the portion of § 1985(3) now before us, simply to duplicate the coverage of one or more of them.

Id. at 98-99 (internal citations omitted).

The Court relied upon legislative history for its interpretation:

> The final area of inquiry into the meaning of § 1985[3] lies in its legislative history. As originally introduced in the 42d Congress, the section was solely a criminal provision outlawing certain conspiratorial acts done with intent 'to do any act in violation of the rights, privileges, or immunities of another person.' Introducing the bill, the House sponsor, Representative Shellabarger stressed that 'the United States always has assumed to enforce, as against the States, and also persons, every one of the provisions of the Constitution.' The enormous sweep of the original language led to pressures for amendment, in the course of which the present civil remedy was added. The explanations of the added *language centered entirely on the animus or motivation that would be required, and there was no suggestion whatever that liability would not*

be imposed for purely private conspiracies. Representative Willard, draftsman of the limiting amendment, said that his version 'provid(ed) that the essence of the crime should consist in the intent to deprive a person of the equal protection of the laws and of equal privileges and immunities under the laws; in other words, that the Constitution secured, and was only intended to secure, equality of rights and immunities, and that we could only punish by United States laws a denial of that equality.'. Representative Shellabarger's explanation of the amendment was very similar: 'The object of the amendment is to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the animus and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies of this section.'

Other supporters of the bill were even more explicit in their insistence upon coverage of private action. Shortly before the amendment was introduced, Representative Shanks urged, 'I do not want to see (this measure) so amended that there shall be taken out of it the frank assertion of the power of the national Government to protect life, liberty, and property, *irrespective of the act of the State*.' At about the same time,

> Representative Coburn asked: 'Shall we deal with individuals, or with the State as a State? If we can deal with individuals, that is a less radical course, and works less interference with local governments. It would seem more accordant with reason that the easier, more direct, and more certain method of dealing with individual criminals was preferable, and that the more thorough method of superseding State authority should only be resorted to when the deprivation of rights and the condition of outlawry was so general as to prevail in all quarters in defiance of or by permission of the local government.' After the amendment had been proposed in the House, Senator Pool insisted in support of the bill during Senate debate that 'Congress must deal with individuals, not States. It must punish the offender against the rights of the citizen.'

Id. (internal citations omitted) (emphasis added).

Griffin did not address the issue of *which constitutional rights* are protectable against private conspiracies under § 1985(3). Many constitutional rights are designed to protect a citizen against government. As the Court recognized, "[a] century of Fourteenth Amendment adjudication . . . ma[kes] it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons. Yet there is nothing inherent in [§ 1985(3)] that requires the action working the deprivation to come from the State." *Griffin*, 403 U.S. at 97.

A decade after *Griffin*, the Supreme Court revisited the state action requirement. In *United Brotherhood of Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott*, 463 U.S. 825 (1983) ("*Scott*") the Court held that if the claimed constitutional deprivation ordinarily requires state action, then state action is necessary under § 1985(3). "*Griffin* did not hold that even when the alleged conspiracy is aimed at a right that is *by definition a right only against state interference* the plaintiff in a § 1985(3) suit nevertheless need not prove that the conspiracy contemplated state involvement of some sort." *Id.* at 833 (emphasis added). The Court specifically held—an issue relevant in the instant litigation—that "a conspiracy to violate First Amendment rights is not made out without proof of state involvement." *Id.* at 832.

The Court confirmed this view of state involvement in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993): "The statute does not apply . . . to private conspiracies that are 'aimed at a right that is by definition a *right only against state interference*.'" *Id.* at 278 (1993) (quoting *Scott*, 463 U.S. at 833). It only reaches private conspiracies "aimed at interfering with rights . . . protected against private, as well as official, encroachment." *Id.*

Griffin apparently exchanged the strict state action requirement for a class-based animus element. The reintroduction of some aspect of the state action requirement curtails § 1985(3)'s reach. Not all constitutional rights are protectable against private actors; some rights are protected only against government action.

The claim here—discrimination by a small private group, CACWA, against another small group, Falun Gongists, based on religion—is cutoff by the state action requirement of *Scott* and *Bray*. First Amendment claims require state action or its equivalent, as by the Ku Klux Klan effectively taking over and superseding state and local governmental authority. Plaintiffs rely on interference with the right to intrastate travel to support their § 1985(3) claim. That reliance does not support a cause of action in the present case. *See infra* Section IV(C)(3).

3. Elements of a Deprivation Clause Claim

"To state a civil rights conspiracy under § 1985(3), a plaintiff must allege: 1) a conspiracy; 2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and 3) an act in furtherance of the conspiracy; 4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States." *Britt v. Garcia*, 457 F.3d 264, 270 (2d Cir. 2006) (quoting *Gray v. Town of Darien*, 927 F.2d 69, 73 (2d Cir. 1991)).

A private conspiracy claim under the deprivation clause of § 1985(3) requires "[1] interfere[nce] with [a plaintiff's] constitutional rights, [and] [2] some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Jews for Jesus, Inc. v. Jewish Cmty. Relations Council of New York, Inc.*, 968 F.2d 286, 290-91 (2d Cir. 1992) (quoting *Colombrito v. Kelly*, 764 F.2d 122, 130 (2d Cir.1985)). The deprivation of

the constitutional right must "be a conscious objective of the enterprise." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 275 (1993) (quoting *United Bhd. of Carpenters & Joiners, Local 610 v. Scott*, 463 U.S. 825, 833, (1983)). A conspirator must "do more than merely be aware of a deprivation of right that he causes, and more than merely accept it; he must *act at least in part for the very purpose of producing it*." *Bray*, 506 U.S. at 276 (emphasis added).

A conspiracy under the deprivation clause *does not require state action* if, and only if, the constitutional right impinged does not require state action. *Griffin v. Breckenridge*, 403 U.S. 88 (1971). "The statute does not apply . . . to private conspiracies that are 'aimed at a right that is by definition a *right only against state interference*.'" *Bray*, 506 U.S. at 278.

"[D]iscrimination based on religion," according to the Court of Appeals for the Second Circuit, is recognized as class-based animus under § 1985(3). *Jews for Jesus*, 968 F.2d at 290-91. "[T]he right freely to move about, to adopt [one's] own life-style, and to practice the religion [one] chose[s], . . . is the very core of the First and Fourteenth Amendments." *Colombrito*, 764 F.2d at 131. In many instances, the demarcation between racial and religious discrimination is impossible to mark. *Cf. Jews for Jesus*, 968 F.2d at 291 ("[T]he Supreme Court has defined racial discrimination as discrimination based solely on a person's 'ancestry or ethnic characteristics' . . . Jews have been considered a race for purposes of § 1982.").

4. Continuing Validity of Deprivation Clause Claims

The magistrate judge in the present case wrote a well-reasoned opinion on the motion to dismiss the complaint. *See* R & R on Mot. to Dismiss, ECF No. 35. It was adopted by the late District Judge, Sandra Townes. Order Adopting R & R, ECF No. 38. It provides the law of the case. *See Zhang Jingrong v. Chinese Anti-Cult World All.*, No. 15-CV-1046, 2018 WL 1326387 --F.Supp.-- (E.D.N.Y. Mar. 14, 2018).

The district judge and magistrate judge held that the Court of Appeals for the Second Circuit recognizes the right to intrastate travel protected through 42 U.S.C. § 1985(3). *Id.* at *5. The decision was based primarily on *Spencer v. Casavilla*, 903 F.2d 171 (2d Cir. 1990). Shortly after *Spencer*, the Supreme Court decided *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). *See supra* Section IV(C)(2)-(3). *Bray* weakened the § 1985(3) plaintiffs' deprivation clause claims by significantly limiting claims based on the right to *interstate* travel—by analogy, weakening the right to *intrastate* travel.

The two constitutional claims—interstate and intrastate travel—may be analytically distinct, but are related. The Court of Appeals for the Second Circuit has not withdrawn its recognition of the right to intrastate travel after the *Bray* decision when state action is present. *See, e.g.*, *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 100 (2d Cir. 2009) ("Contrary to the District Court's holding in this case, we have recognized the Constitution's protection of a right to intrastate as well as interstate travel."); *Williams v. Town of Greenburgh*, 535 F.3d 71, 75 (2d

Cir. 2008) ("[Second Circuit] precedent[] stand[s] for the proposition that individuals possess a fundamental right to travel *within a state*. While *the parameters of that right have not been sharply defined by our Court*, it is clear that the right protects *movement between places* and has no bearing on access to a particular place.") (emphasis added).

There is a question about the continuing validity of the Second Circuit's view*. Cf. Spencer v. Casavilla*, 839 F. Supp. 1014, 1017 (S.D.N.Y. 1993), *aff'd in part, appeal dismissed in part*, 44 F.3d 74 (2d Cir. 1994) (expressing doubt about "the Second Circuit Court of Appeals' position that the right to intrastate travel is on a constitutional par with the right to interstate travel"); *Upper Hudson Planned Parenthood, Inc. v. Doe*, 836 F. Supp. 939, 947 (N.D.N.Y. 1993) (expressing "serious reservations" about the extent of the protection of the right to intrastate travel after *Bray*). It is reasonable to conclude that the majority in *Bray* might preclude recovery in the instant case under § 1985(3).

As a scholar recently noted about the religious liberty jurisprudence of Justice Scalia in cases such as the instant one:

> It is at the state level where most conflicts between law and religion occur . . . . Justice Scalia . . . generally rejected constitutionally mandated judicial exemptions but simultaneously embraced legislative accommodations.

Ronald J. Colombo, *The Religious Liberty Jurisprudence of Justice Antonin Scalia* 46 Hofstra L.

Rev. 433, 443 (2017). Although the federal deprivation clause claim may not be available in the present case, New York State has passed a statute prohibiting religiously motivated violence. *See infra* Section III(E).

In the wake of *Bray*, rather than amend the historic deprivation clause, Congress passed a separate statute, applicable here. *See infra* Section III(D).

5. Hindrance Clause

The Hindrance Clause of § 1985(3) provides:

> [i]f two or more persons in any State or Territory conspire . . . for the purposes of . . . preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons with in such State or Territory the equal protection of the laws . . . the party so injured or deprived may have an action for the recovery of damages.

42 U.S.C. § 1985(3).

As stated in the magistrate judge's report and recommendation on the motion to dismiss, three elements are necessary for a claim under the hindrance clause: (1) "the purpose [of the conspiracy] must be to interfere with state law enforcement, not just to interfere with the persons seeking to exercise their legal rights;" (2) the conspiracy must be "directed at a protected class;" and (3) the conspiracy must implicate "a constitutional right." *Zhang Jingrong v. Chinese Anti-Cult World All.*, No. 15-CV-1046, 2018 WL 1326387, at *6 --F.Supp.-- (E.D.N.Y. Mar. 14, 2018).

D. 18 U.S.C. § 248: Freedom of Access to Clinic Entrances Act

1. Text and Legislative History

In what appears to have been an attempt to soften *Bray*, *see supra* Section III(C), Congress passed the Freedom of Access to Clinic Entrances Act of 1994 ("FACEA"). Kathleen M. Sullivan and Noah Feldman, *Constitutional Law* 883 (19th Ed. 2016); H.R. Conf. Rep No. 103-488, at 7-8, *reprinted in* 1994 U.S.C.C.A.N. 724, 724-25 (May 2, 1994) ("Prior to the Supreme Court's decision in *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993), the conduct described in [the FACEA] was frequently enjoined by federal courts in actions brought under 42 U.S.C. 1985(3), but in that case the Court denied a remedy under such section to persons injured by the obstruction of access to abortion-related services.").

The FACEA contains a provision about religious freedom:

> Whoever . . . [1] *by force or threat of force* or by physical obstruction, [2] intentionally injures, *intimidates or interferes* with or *attempts to injure*, intimidate or interfere with [3] *any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom* [4] *at a place of religious worship* shall be subject to the penalties provided in . . . the civil remedies provided in subsection (c).

18 U.S.C. § 248(a)(2) (emphasis added).

The FACEA allows plaintiffs to obtain "appropriate *relief, including temporary, preliminary*

or permanent injunctive relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses." 18 U.S.C. § 248(c)(1)(B) (emphasis added). A plaintiff may choose, "in lieu of actual damages, an award of statutory damages in the amount of $5,000 per violation." *Id.*

The magistrate judge's report and recommendation on the motion to dismiss concluded that "the plain language of [§ 248] dictates that it provides protection to those seeking to exercise their First Amendment right of religious freedom at a place of religious worship. *Zhang Jingrong v. Chinese Anti-Cult World All.*, No. 15-CV-1046, 2018 WL 1326387, at *12 --F.Supp.-- (E.D.N.Y. Mar. 14, 2018). Although the statute's history and name suggests a connection to abortion clinic access, legislative history support the conclusion that practicing religion at a religious site is protected by the FACEA:

> This provision, much like the one found at 18 U.S.C. 247, is a reflection of the profound concern of the Congress over *private intrusions on religious worship*, and the judgment of the Congress that the exercise of the right to religious liberty deserves federal protection . . . . [I]t covers only conduct occurring *at or in the immediate vicinity of a place of religious worship*, such as a church, synagogue or other *structure or place used primarily for worship*. Examples of conduct that would be prohibited and would give rise to a civil cause of action under this Act would be physically blocking access to a church or pouring glue in the locks of a synagogue.

H.R. Conf. Rep No. 103-488, at 9, *reprinted in* 1994 U.S.C.C.A.N. 724, 726 (May 2, 1994) (emphasis added).

2. Meaning of "A Place of Religious Worship"

Little has been written explicating the meaning of "a place of religious worship." The cannon of constitutional avoidance and the statute's text require a flexible interpretation of this phrase.

Religious worship and the places it occurs come in numerous forms. The Establishment Clause of the First Amendment requires that religious belief and worship of different form and doctrine be treated on equal footing. *See supra* Section III(B); *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 15 (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*.") (emphasis added); *Welsh v. United States*, 398 U.S. 333, 357-58 (1970) (Harlan, J. Concurring) (noting the constitutional issue with privileging one religion over another).

Insofar as this statute may be read to protect religions differently based on whether the religion has fixed temples or prayer takes place in transitory locations, it would be unconstitutional. Any place a religion is practiced is protected by a constitutional construction of this statute.

"Religious worship," too, must be broadly defined. Traditional prayer in communal houses of worship

does not have a monopoly on worship. *See e.g.*, Susannah Heschel, *Their Feet Were Praying: Remembering the inspiration Heschel and King drew from each other*, The N.Y. Jewish Week (Jan. 10, 2012) (noting Rabbi Abraham Joshua Heschel's words that when he marched in Selma, Alabama during the civil rights movement "[he] felt [his] legs were praying"); Hr'g Tr. 55:16-56:3 (plaintiffs' expert explaining that most Falun Gong practitioners meditate as a form of prayer in public parks); Madhyama-devi dasi, *Why And How To Chant Hare Krsna*, www.krishna.com (last accessed April 6, 2018) (explaining the Hare Krishna practice of chanting in public venues); Spencer Wilking & Lauren Effron, *Snake-Handling Pentecostal Pastor Dies From Snake Bite*, abcnewsgo.com (Feb. 17, 2014) (describing the Christian practice of snake handling). The religion clauses "as tweaked by the Supreme Court, require[] us to tolerate conscientiously driven private behavior to the outer limits of a free society's capacity for such tolerance." Neuborne, *supra*, at 132.

Proselytizing, central to the instant dispute, is a recognized religious practice. "[S]preading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types." *Murdock v. Com. of Pennsylvania*, 319 U.S. 105, 110 (1943).

Defendants argue that "a place of religious worship" should be construed narrowly to avoid opening too wide the gates to litigation. They contend that the congressional report's language—"structure or place used *primarily* for worship"—counsels in

favor of finding that religious worship must be the *primary* use of a site for it to garner protection. H.R. Conf. Rep No. 103-488, at 9, *reprinted in* 1994 U.S.C.C.A.N. 724, 726 (May 2, 1994) (emphasis added). But this concept is not in the text of the FACEA—only specifying that First Amendment activity must take place at "*a* place of religious worship." As Judge Lohier recently pointed out, "[t]ime and time again, the Supreme Court has told us that the cart of legislative history is pulled by the plain text, not the other way around." *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 137 (2d Cir. 2018) (Lohier, J. Concurring). The reading proposed by defendants is unwarranted.

The FACEA's language counsels for an expansive interpretation. Congress used the word "place," meaning a "physical environment" or "space." Webster's Third New International Dictionary 1727 (1993). By contrast, in 18 U.S.C. § 247, referenced in the FACEA's legislative history, Congress used starkly different language in describing religious sites. It outlaws "intentionally defac[ing], damage[ing], or destroy[ing] any *religious real property*." 18 U.S.C. § 247 (emphasis added). And "religious real property" is defined as "any church, synagogue, mosque, religious cemetery, or other religious real property, including fixtures or religious objects contained within a place of religious worship." *Id.* The difference—between "a place of religious worship" and "religious real property"—suggests congressional intent to protect *all* places of religious worship and not just fixed structures in the FACEA.

E. New York Civil Rights Law

The New York Civil Rights law provides a remedy for those affected by bias-related violence. It states:

Any person who intentionally *selects a person or property for harm* or causes damage to the property of another or causes physical injury or death to another in whole or in substantial part *because of a belief or perception regarding* the race, color, national origin, ancestry, gender, *religion, religious practice*, age, disability or sexual orientation of a person, regardless of whether the belief or perception is correct, shall be liable, in a civil action or proceeding maintained by such individual or *group of individuals, for injunctive relief, damages, or any other appropriate relie*f in law or equity. If it shall appear to the satisfaction of the court or justice that the respondent has, in fact, violated this section, an injunction may be issued by such court or justice, enjoining and restraining any further violation, without requiring proof that any person has, in fact, been injured or damaged thereby.

In any such action or proceeding, the court, in its discretion, may allow the party commencing such action or proceeding, if such party prevails, reasonable attorneys' fees as part of the costs.

N.Y. Civ. Rights Law § 79-n. This is a broad and powerful new statute that has not been fully analyzed by the courts.

Legislative history is sparse. The summary accompanying the law stated: "It establishes a *civil remedy for victims of bias-related violence or*

intimidation for deprivation of a civil liberty, property damage, injury or death motivated by race, *religion*, national origin, sex, disability, age or sexual orientation to recover actual damages, injunctive relief or other appropriate remedy; includes attorneys fees." New York Assembly Bill Summary, 2009 A.B. 529 (April 29, 2009) (emphasis added).

The bill was passed with religiously motivated violence in mind. *See* New York Sponsors Memorandum, 2009 A.B. 529 (April 7, 2009) ("In the last few years, the Anti-Defamation League of B'nai B'rith reported 1,685 anti-Semitic incidents, the highest total in 12 years.").

Several elements are discernable from the text. To be liable a defendant must (1) intentionally commit, (2) damage to a person or property, (3) "because of a belief or perception regarding [that person's] . . . religion [or] religious practice . . . disability or sexual orientation." N.Y. Civ. Rights Law § 79-n. Available remedies include monetary damages, injunctive relief, and attorneys' fees and costs.

F. Assault and Battery

Assault and battery are rooted in the common law. "To plead a cause of action to recover damages for assault, a plaintiff must allege intentional physical conduct placing the plaintiff in imminent apprehension of harmful contact." *Thaw v. N. Shore Univ. Hosp.*, 129 A.D.3d 937, 938–39 (N.Y. App. Div. 2015). Battery requires a plaintiff to "prove that there was bodily contact, made with intent, and offensive in nature." *Id.*

A routine oral argument, with minimal contact, is not an assault. *See Okoli v. Paul Hastings LLP*, 117 A.D.3d 539, 540 (N.Y. App. Div. 2014) ("The physical conduct alleged by plaintiff, which amounts to finger pointing and generalized yelling in the context of a heated deposition, is inappropriate behavior, not to be condoned, but, without more, is not the type of menacing conduct that may give rise to a reasonable apprehension of imminent harmful conduct needed to state an actionable claim of assault.").

G. Intentional Infliction of Emotional Distress

A claim for intentional infliction of emotional distress requires: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress" *Chanko v. Am. Broad. Companies Inc.*, 27 N.Y.3d 46 (N.Y. 2016) (quoting *Howell v New York Post Co.*, 81 N.Y.2d 115, 121 (N.Y. 1993)). The conduct at issue must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.*

There appears to be a split in the New York Appellate Divisions about whether medical evidence is necessary for an intentional infliction of emotional distress claim. "The overwhelming weight of authority from the First, Second, and Third Departments favors a requirement of objective medical evidence separate and apart from a plaintiff's self-serving testimony." *Samtani v. Cherukuri*, No. 11-CV-02159, 2015 WL 64671, at *15 (E.D.N.Y. Jan.

5, 2015). Fourth Department cases have reached the opposite conclusion. *See Zane v. Corbett*, 82 A.D.3d 1603 (4th Dep't 2011); *Cavallaro v. Pozzi*, 28 A.D.3d 1075 (4th Dep't 2006).

The New York Court of Appeals has apparently never squarely addressed this issue. Dicta in a negligent infliction of emotional distress claim sheds light on that Court's view of discretion: "where supporting medical evidence is lacking a trial court *might* well preclude a plaintiff from pursuing recovery for that component of psychic distress." *Ornstein v. New York City Health & Hosps. Corp.*, 10 N.Y.3d 1, 6-7 (N.Y. 2008) (emphasis added).

Plaintiffs advocate for the minority position, that special medical evidence is not necessary because, a "contrary rule would prevent people, like some of the Plaintiffs, who would not normally seek medical attention unless it was a matter of life-or-death, from pursuing a legitimate IIED claim." Plts.' Br. Opp'n at 27, ECF No. 115. But a soft push rather than a hard shove is hardly the material for a serious constitutionally based claim.

H. Negligence

Both plaintiffs and defendants allege negligence claims as an alternative to their intentional tort claims. These two theories are incompatible. "Various federal courts within this circuit have held . . . that under New York State law, when a plaintiff brings excessive force and assault claims which are premised upon a defendant's allegedly intentional conduct, a negligence claim with respect to the same conduct will not lie." *Tatum v. City of New York*, No. 06CV4290 (BSJ)(GWG), 2009 WL 124881, at *10

(S.D.N.Y. Jan. 20, 2009) (quoting *Clayton v. City of Poughkeepsie*, No. 06 CIV. 4881 SCR, 2007 WL 2154196, at *6 (S.D.N.Y. June 21, 2007).

I. Public Nuisance

"The term 'public nuisance' means the private interference with the exercise of a public right." *N.A.A.C.P. v. AcuSport, Inc.*, 271 F. Supp. 2d 435, 448 (E.D.N.Y. 2003). There are three elements:

> 1. the existence of a public nuisance—a substantial interference with a right common to the public;
>
> 2. negligent or intentional conduct or omissions by a defendant that create, contribute to, or maintain that public nuisance; and
>
> 3. particular harm suffered by plaintiff different in kind from that suffered by the community at large as a result of that public nuisance.

Id.

A public right is interfered with when "the health, safety, or comfort of a considerable number of persons in New York is endangered or injured, or the use by the public of a public place is hindered." *Id.*; *see also 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96 N.Y.2d 280, 292 (2001) ("A public nuisance exists for conduct that amounts to a substantial interference with the exercise of a common right of the public, thereby offending public morals, interfering with the use by the public of a public place or endangering or injuring the property,

health, safety or comfort of a considerable number of persons.").

This is not a public nuisance case. It is limited to two relatively small groups that oppose each other.

J. Statute of Limitations: Continuing Violations Doctrine

There are two distinct strands of the continuing violations doctrine: the first aggregates multiple acts so that the limitations period begins to run when a defendant's wrongful conduct ceases; the second divides one continuous wrong into severable acts, one of which accrues within the statute of limitations. Kyle Graham, *The Continuing Violations Doctrine*, 43 Gonz. L. Rev. 271, 275 (2008). The claim here is of the first kind; there are many alleged assaults and continuous harassment taking place over a period of years.

The statutes of limitation, accrual rules, and tolling provisions in the present litigation come from both federal and state law. The federal and state continuing violations doctrines function similarly. As the Court of Appeals for the Second Circuit has explained: "[w]hen a plaintiff experiences a 'continuous practice and policy of discrimination,' [ ] 'the commencement of the statute of limitations period may be delayed until the last discriminatory act in furtherance of it.'" *Cornwell v. Robinson*, 23 F.3d 694, 703 (2d Cir. 1994).

The doctrine has been held to reach a number of different civil rights actions in the federal courts. *See, e.g.*, *Shomo v. City of New York*, 579 F.3d 176, 182 (2d Cir. 2009) ("We agree that the continuing

violation doctrine can apply when a prisoner challenges a series of acts that together comprise an Eighth Amendment claim of deliberate indifference to serious medical needs."); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 134-35 (E.D.N.Y. 2000) (applying the continuing violations doctrine in a case where plaintiffs asserted claims under international law related to a conspiracy to steal property from Jewish families, suffering at the hands of the Nazis, during World War II).

The continuing violations doctrine can apply to a claim under 18 U.S.C. § 248(a)(2) when there is a pattern and practice of one group blocking another from accessing its places of worship. That the remedies provided for by Congress specifically contemplate continuous conduct buttresses this conclusion. *See* 18 U.S.C. § 248(c)(1)(B) (providing for "permanent injunctive relief" and "statutory damages in the amount of $5,000 *per violation*") (emphasis added).

New York Courts have applied the continuing violations doctrine when there is a continuous pattern or practice of harassment and assaults. *See Estreicher v. Oner*, 148 A.D.3d 867, 867-68 (N.Y. App. Div. 2017) (applying continuing violations doctrine to a "concerted campaign of harassment"); *Mintz & Gold, LLP v. Zimmerman*, 71 A.D.3d 600, 601 (N.Y. App. Div. 2010) (applying the doctrine to a claim for malicious prosecution under New York Civil Rights Law § 70); *Shannon v. MTA Metro-N. R.R.*, 269 A.D.2d 218, 219 (N.Y. App. Div. 2000) (applying the doctrine where there was a "pattern of harassment, intimidation, humiliation and abuse").

Estreicher controls the instant dispute. In that case, the Appellate Division, Second Department held that events that would be time barred without application of the continuing violations doctrine were timely.

> The counterclaim was supported by factual allegations that the plaintiff engaged in a continuing and concerted campaign of harassment and intimidation of the defendant that progressed from, among other things, calling the defendant, his family, and guests ethnic and racial epithets and throwing items onto his property to eventually making threats of violence, making false criminal accusations, committing assault and battery against the defendant, and continuing to engage in threatening and intimidating conduct nearly two months after the physical confrontation that is the subject of the plaintiff's complaint.

Estreicher, 148 A.D.3d at 867-68.

K. Counterclaim Timeliness

A counterclaim "is not barred if it was not barred at the time the claims asserted in the complaint were interposed." N.Y. CPLR 203(d). If the counterclaim "arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint." *Id.*

N.Y. CPLR 203(d) allows "a defendant to assert an otherwise untimely claim" arising "out of the same transactions alleged in the complaint . . . as a shield

for recoupment purposes[; it] does not permit the defendant to obtain affirmative relief." *DeMille v. DeMille*, 5 A.D.3d 428, 429 (N.Y. App. Div. 2004). Some authority holds that the "claim-saving benefit" of N.Y. CPLR 203(d) does *not* apply to counterclaims asserted for the first time in an amended answer. *AMEX, LLC v. Mopex, Inc.*, 230 F.Supp.2d 333, 335 (S.D.N.Y. 2002).

N.Y. CPLR 203(f) provides a relation back rule for amended answers. A claim asserted in an amended answer relates back to the pleading it amends "unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." N.Y. CPLR 203(f). It "permits the amended pleading to 'relate back,' for Statute of Limitations purposes, to the time when the original pleading was served, provided the initial pleading gave notice of the transaction or occurrence from which the amended claim arose." *Hager v. Hager*, 177 A.D.2d 401, 402 (N.Y. App. Div. 1991).

Factual similarities between counterclaims in the amended pleading and the original pleading puts the other side on notice of the claim. 1-2 Korn & Miller, et. al., CPLR Manual § 2.09 (2017) (noting that the "relate-back" test is functional: "relation back does not depend on similarity of the legal theories underlying the two claims"). General denials will not suffice. *Hager*, 177 A.D.2d at 402.

N.Y. CPLR 203(d) and (f) can work together. *See* Claim in Amended Pleading, Siegel's N.Y. Prac. § 49 (6th ed.) ("With a counterclaim, a triple relation back can sometimes be seen. If an amended answer adds a

counterclaim arising out of an occurrence mentioned in the original answer, it relates back to the original answer; the original answer then relates back to the complaint's claim; and the complaint relates back to the commencement of the action.").

IV. Application of Facts to Law

A. Falun Gong Is a Religion in the United States for Purposes of this Litigation

The Constitution constrains a court's review of whether a particular system of belief is "religious." The test is "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God." *Int'l Soc. For Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 440 (2d Cir. 1981) (quoting *United States v. Seeger*, 380 U.S. 163 (1965)). "In the absence of a requirement of 'God,' this approach treats an individual's 'ultimate concern' whatever that concern be as his 'religion.'" *Id.*

Eleven plaintiffs have expressed a sincere belief in Falun Gong. Plts.' 56.1 Stm't at ¶¶ 27-39. Falun Gong has many traditional hallmarks of a religion: (1) a leader, (2) foundational texts, (3) a path to salvation, (4) holidays, (5) belief in a higher being, and (6) dietary restrictions. *See supra* Section II(A)(1); *cf. United States v. Meyers*, 95 F.3d 1475, 1483–84 (10th Cir. 1996) (noting that many religions offer "ultimate ideas," "metaphysical beliefs," "moral or ethical systems," are comprehensive beliefs for their followers, as well as possess founders, important writings, rituals, and holidays, among other attributes).

Falun Gong is closely related to, and can be considered a sect of, Buddhism. *See supra* Section II(A)(2)(b) (examining plaintiffs' expert's, Arthur Waldron, testimony that Falun Gong is a branch of Buddhism). Buddhism is generally recognized as a religion in the United States. *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961) ("*Among religions in this country* which do not teach what would generally be considered a belief in the existence of God are *Buddhism*, Taoism, Ethical Culture, Secular Humanism and others.") (emphasis added); Kent Greenawalt, *Religion and the Constitution: Free Exercise and Fairness* 11 (2006) ("No one is our society doubts that Roman Catholicism, Greek Orthodoxy, Lutheranism, Orthodox Judaism, Islam, Hinduism, and *Buddhism (at least in many forms)* are religions.") (emphasis added).

Many of its practitioners dedicate a significant portion of time to Falun Gong's physical requirements: exercising five times daily and praying at six-hour intervals. Plts.' 56.1 Stm't at ¶ 25. Many have martyred themselves for Falun Gong; others have faced torture, detainment, and abuse. *See supra section* II(B).

The fact that Falun Gong's founder does not call it a religion and many practitioners deny it is a religion is not decisive in the present case. Defs.' Counterstatement at ¶ 1; Anne S. Y. Cheung, *In Search of a Theory of Cult and Freedom of Religion in China: The Case of Falun Gong*, 13 Pac. Rim L. & Pol'y J. 1, 21 (2004). Self-definition is not dispositive. *Welsh v. United States*, 398 U.S. 333, 341 (1970) (holding that a contentious objection to the Vietnam War was religiously based despite Welsh's initial

statement that his objection to the war was not religious in nature).

Plaintiffs' experts explained that Falun Gong's founder's claim that it is not a religion is based on differing concepts of religion in China and the United States. In China, religion is often defined by formalities, such as state recognition, fixed places of worship, and clergy. Falun Gong is mostly practiced individually, without the characteristics associated with religious practice in China. *See supra* Section II(A)(2)(a).

Defendants argue that summary judgment is inappropriate because their disagreements with Falun Gong adherents are political and not religious. *See* Defs.' Opp'n Br. at 7-14, ECF No. 107. This argument speaks to a separate issue. Plaintiffs do not ask the court to hold that defendants' actions were motivated by religious animosity; that issue is one for a jury trial. *See* Plts.' Reply Br., ECF No. 109. The question now is limited to whether Falun Gong is a religion in the United States for constitutional and statutory purposes in the present case, a threshold issue to several of plaintiffs' claims.

Defendants argue that they oppose the quasi-scientific views of Falun Gong as non-religious. *See* Defs.' Opp'n Br. at 12-13. The soundness of the tenets of Falun Gong is not relevant to whether it is to be deemed a religion for particular litigation purposes. *See United States v. Ballard*, 322 U.S. 78, 86-87 (1944) ("Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to

others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.").

Expert testimony showed that Falun Gong is at its center concerned with ultimate questions of life and the universe. Dr. Waldron explained his view that Falun Gong is derived from Buddhism and other ancient Chinese religions. There is no genuine dispute for purposes of this case: Falun Gong "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God." *Int'l Soc. For Krishna Consciousness,* 650 F.2d at 440 (2d Cir. 1981).

Falun Gong is a religion for purposes of the instant litigation. The jury will be so instructed.

B. Statute of Limitations

1. Plaintiffs' Claims: Continuing Violations Doctrine

Plaintiffs' three surviving causes of action, assault and battery, New York Civil Rights Law, and Freedom of Access to Clinic Entrances Act, are governed by statutes of limitations of one, three, and four years, respectively. N.Y. CPLR 215; N.Y. CPLR 214; 28 U.S.C. § 1658. Incidents alleged in the complaint took place from 2009 to 2015, shortly before the case was filed. The continuing violations doctrine applies to all of these claims.

Plaintiffs have alleged, and factually supported, a claim of a conspiracy to harass, assault, and intimidate Falun Gong adherents by defendants. *See supra* Section II(C). They recount more than a dozen incidents over a number of years where defendants

used violence and intimidation to block their practice of religion, sometimes at religious sites. *See supra* Section II(C)(1). The individual defendants have organized under the umbrella of CACWA, a defendant in the action, to distribute anti-Falun Gong religious materials.

Some of the alleged incidents took place within the applicable statute of limitations. *See, e.g.*, Plts.' Supp. Facts at ¶ 40 (on January 16, 2015, Defendant Wan confronted and made death threats to Plaintiff Zhang at a Falun Gong table); Compl. at ¶ 22 ("Plaintiff Lo was physically attacked and verbally abused by Defendant Li on December 17, 2014 at the 136-06 Roosevelt Avenue table.").

Based on the pleadings and evidence already presented, plaintiffs have stated a continuing conspiracy and continuing violation of their statutory, constitutional, and common law rights. There has been a continuous practice of discrimination and harassment. *See Cornwell v. Robinson*, 23 F.3d 694, 703 (2d Cir. 1994) ("When a plaintiff experiences a 'continuous practice and policy of discrimination,' [ ] 'the commencement of the statute of limitations period may be delayed until the last discriminatory act in furtherance of it.'"); *Estreicher v. Oner*, 148 A.D.3d 867, 867-68 (N.Y. App. Div. 2017) (applying continuing violations doctrine to a "concerted campaign of harassment"). That some of the disputes may have involved political disagreements does not detract from the fact that the essential disagreement between the parties involved serious diverse religious contentions.

2. Defendants' Claims: Counterclaim Relation Back and Equitable Recoupment

Defendants' counterclaims arise from the same events that led to plaintiffs' complaint. The various counterclaims, although legally separate from one another, are based on the same premises and practices—it was plaintiffs, defendants contend, who initiated the harassment, verbal assaults, and abuse. Under N.Y. CPLR 203, defendants could bring these claims for recoupment, even if they were time bared when the pleading containing them was filed. Plaintiffs concede as much in their reply brief. *See* Plts.' Reply Br. at 10 ("Finally, while the provisions of CPLR 203(d) allow a defendant to assert an otherwise untimely claim which arose out of the same transactions alleged in the complaint, that is only as a shield for recoupment purposes, and does not permit the defendant to obtain affirmative relief. Thus, even if Defendants' counterclaims proceed, which they cannot for the [substantive] reasons explained above, those claims are limited to an offset on Plaintiffs' claims, if they prevail on them.") (internal citations, quotations, and alteration omitted).

Defendants' original answers and counterclaims put plaintiffs on notice of the counterclaims in the amended answer. They were detailed statements of the defendants' version of events, and the new counterclaims share the same facts with the originally asserted counterclaims. They derive from simple assault and battery claims. They would relate back under N.Y. CPLR 203(f) even if they did not under N.Y. CPLR 203(d). *See* N.Y. CPLR 203(f) (providing that a claim asserted in an amended

answer relates back to the pleading it amends "unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading").

C. Plaintiffs' Claims

1. Assault and Battery

Plaintiffs have shown through admissible evidence that they have been in physical altercations with defendants on numerous occasions. *See supra* Section II(C). There are issues of fact as to who attacked whom during the scuffles between the parties, and the reasons for the conflict. This claim will be resolved by the jury.

2. New York Civil Rights Law

The New York Civil Rights Law functions as a civil hate crime statute. Plaintiffs must prove three elements: defendants (1) intentionally committed, (2) damage to a person or property, (3) "because of a belief or perception regarding . . . religion [or] religious practice." N.Y. Civ. Rights Law § 79-n. Plaintiffs have recounted numerous incidents where they were verbally and physically attacked by defendants. *See supra* Section II(C). Intent can be inferred.

Eleven of the plaintiffs practice Falun Gong; two do not. The alleged violence occurred at or around the Falun Gong spiritual center or at tables where plaintiffs were proselytizing. *See supra* Section II(C). Inflammatory rhetoric aimed at Falun Gong was used during many of the attacks, according to plaintiffs. *See, e.g.*, Plts.' Supp. Facts at ¶ 37

("During a . . . verbal attack against Gao Jinying and Cui Lina . . . Defendant Wan made her intent to eliminate Falun Gong believers by strangling or in other ways disappearing them."); *id.* at ¶ 40 (Defendant Wan said, "You are worse than a dog and I will take out your heart, your liver, and your lungs. I will choke you to death. We will destroy you. We will destroy everyone. Somebody will be here to kill you."); *id.* at ¶ 40 (Defendant Wan said, "You can call the police; however, we have people working in the police station. So even though you try to tell them it is a waste of time. Within three months we will kill all of you."). This evidence supports an inference that the attacks were motivated by plaintiffs' belief in Falun Gong.

The New York State Civil Rights Law also protects those who are *perceived* as members of a religion. The plaintiffs who do not practice Falun Gong have a viable claim as perceived members of Falun Gong. There are issues of fact to be tried before the jury including, (1) whether the defendants caused damage to the plaintiffs and (2) whether the defendants did so because of plaintiffs' perceived or actual religious beliefs.

3. Deprivation Clause

The court is dubious that a claim of this kind under the deprivation clause is cognizable after the Supreme Court's decision in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). *See supra* Section III(C)(4).

There is no state action or its equivalent. No state actor is alleged as part of the conspiracy, there is no showing of undue "influence upon state

authorities," *see infra* Section IV(C)(4), and the conspiracy is not of such scope and effect that it has supplanted state action. This is a dispute between two small groups. The police have been able to keep order in the streets. There is no indication of such a breakdown in government control as was contemplated at the time of the passage of the Ku Klux Klan Act. Plaintiffs have no claim to a First Amendment violation protectable under the statute. *United Bhd. of Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott*, 463 U.S. 825 (1983) (holding that state action is required to state a claim for a violation of the First Amendment under the deprivation clause).

Plaintiffs rely on a violation of the right to intrastate travel. Their deposition testimony shows that disruptions in travel were minimal, and only of short durations. Plaintiffs have adduced no evidence to show that their right to intrastate travel—if it exists and if it was violated, two dubious propositions—was an aim of the conspiracy. The deprivation of the constitutional right must "be a conscious objective of the enterprise." *Bray*, 506 U.S. at 275. But plaintiffs have alleged, and strongly supported, the claim that defendants have carried out acts of intimidation and violence in opposition to their religion, Falun Gong. This is the basis of plaintiffs' statutory claims. *See supra* Section IV(C)(2), *infra* Section IV(C)(5). Defendants counter that the dispute is political.

Bray precludes this claim. In *Bray*, women traveled from out of state seeking abortions; some of them were stopped by protesters outside of the clinic. *Id.* at 266, 275-76. The Court rejected the claim that

the protesters were intentionally interfering with the right to travel:

> Our discussion in *Carpenters* makes clear that it does not suffice for application of § 1985(3) that a protected right be incidentally affected. A conspiracy is not "for the purpose" of denying equal protection simply because it has an effect upon a protected right. The right must be "*aimed at*"; its impairment must be a conscious objective of the enterprise. Just as the "invidiously discriminatory animus" requirement, discussed above, requires that the defendant have taken his action "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group," so also the "intent to deprive of a right" requirement demands that the defendant do more than merely be aware of a deprivation of right that he causes, and more than merely accept it; he must act at least in part for the very purpose of producing it. *That was not shown to be the case here, and is on its face implausible. Petitioners oppose abortion, and it is irrelevant to their opposition whether the abortion is performed after interstate travel*.

Id. (internal citations removed) (emphasis added).

There is nothing in the record to indicate that defendants' actions were motivated by a desire to stop plaintiffs from traveling. Such a claim is inconsistent with the gravamen of plaintiffs' claim—that discrimination was based on religion. *Cf. Spencer v. Casavilla*, 839 F. Supp. 1014, 1017

(S.D.N.Y. 1993), *aff'd in part, appeal dismissed in part*, 44 F.3d 74 (2d Cir. 1994) (dismissing deprivation clause claim where the evidence showed that any disruptions in travel were based on racial discrimination and not an intent to deprive the party of his right to travel).

4. Hindrance Clause

There is no evidence to support a claim under the hindrance clause of 42 U.S.C. § 1985(3). Plaintiffs do not claim there is state action; the litigation is based on a private conspiracy of a relatively small group against another. The claim appears to be premised on the constitutional right to intrastate travel, a claim the court doubts exists under the present circumstances. *See supra* Section III(C)(4).

Plaintiffs rely on a few isolated incidents of claimed false arrests, prompted by defendants, and defendants' claims of undue influence over the New York City Police Department ("NYPD") to support their claim. *See* Plts.' Supp. Facts at ¶¶ 76-85. Even assuming that plaintiffs could, as a matter of law, state a claim under the hindrance clause for a private conspiracy to violate their right to intrastate travel, it is not sufficiently factually supported. That the police were called on several occasions is not surprising given the competing allegations of some violence.

There was no evidence of undue influence over the NYPD or that the NYPD acted improperly. Several plaintiffs testified that the police helped Falun Gong members on occasion. *See* Defs.' 56.1 Stm't at ¶¶ 54-60. Any claim of influence over the police is dismissed.

5. 18 U.S.C. § 248: Freedom of Access to Clinic Entrances Act

The FACEA functions somewhat similarly to the New York Civil Rights Law. It prohibits violent interference with religious practice. *See supra* Section IV(C)(2). There are four statutory elements:

> Whoever . . . [1] by force or threat of force or by physical obstruction, [2] intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with [3] any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom [4] at a place of religious worship [may be found liable].

18 U.S.C. § 248(a)(2).

Falun Gong is a religion for the purposes of the instant case. *See supra* IV(A). Many of the incidents of violence and intimidation took place at or around the Falun Gong Temple in Flushing, Queens and at the tables plaintiffs use to proselytize for Falun Gong. *See supra* Section II(C). Both are places of religious worship for purposes of the present case. *See supra* Section III(D). The statute protects temporary structures. *Id.*

Plaintiffs and others proselytize and meditate—both recognized forms of worship—at these tables. Hr'g Tr. 210:5-17 (defendants' expert explaining that the Falun Gong tables contain materials explaining the practice of Falun Gong); *id.* 213:19-214:19 (defendants' expert explaining that he has observed Falun Gong practitioners meditating at the tables); *id.* 251:21-254:9 (director of Falun Gong Spiritual

Center in Queens explaining that the tables are used for proselytizing, protesting the Chinese Communist Party, and praying); *see also Murdock v. Com. of Pennsylvania*, 319 U.S. 105, 110 (1943) ("[S]preading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types.").

Disputed factual issues remain about who was responsible for any attacks and whether the defendants' conduct was intended to interfere with religious practice or a respectful political dispute. This claim under 18 U.S.C. § 248 will proceed to trial.

6. Negligence

This is an intentional tort case, not one based on negligence. Nothing in the record could support an inference that defendants' conduct was negligent, if the jury believes, in whole or in part, either plaintiffs', or defendants', version of events. *Cf. Tatum v. City of New York*, No. 06CV.4290(BSJ)(GWG), 2009 WL 124881, at *10 (S.D.N.Y. Jan. 20, 2009) ("Under New York State law, when a plaintiff brings excessive force and assault claims which are premised upon a defendant's allegedly intentional conduct, a negligence claim with respect to the same conduct will not lie."). The negligence claim is dismissed.

7. Intentional Infliction of Emotional Distress

The weight of authority is that medical evidence is required for an intentional infliction of emotional

distress claim. *See supra* III(f). Plaintiffs have produced no medical evidence. They will be permitted to claim damages based on emotional problems resulting from other claims.

8. Public Nuisance

Plaintiffs' public nuisance claim is dismissed. As an element of a public nuisance claim, plaintiffs must show violation of a public right. *See supra* Section III(I). No such violations have been alleged.

Plaintiffs' claim is premised on defendants' violation of their individual rights—i.e. to practice their religion free from violence and intimidation. This does not implicate a right held by the public. *See N.A.A.C.P. v. AcuSport, Inc.*, 271 F. Supp. 2d 435, 448 (E.D.N.Y. 2003) (stating that a public right is interfered with when "the health, safety, or comfort of a considerable number of persons in New York is endangered or injured, or the use by the public of a public place is hindered").

D. Defendants' Counterclaims

1. Assault and Battery

Defendants' counterclaim for assault and battery may proceed. Defendants have alleged that plaintiffs struck them, Defs.' Counterstatement at ¶¶ 23, threw rocks and sharp objects, *Id.* at ¶¶ 25-26, and grabbed their hair, *Id.* at ¶ 31. These physical acts were allegedly accompanied by threatening remarks.

Plaintiffs argue that defendants' deposition testimony was vague and that they only asserted the counterclaims because the plaintiffs asserted affirmative claims. While some of defendants' testimony may be short on details, several of the

claims—hitting and throwing rocks—are clear. They support an assault and battery claim.

Plaintiffs' argument boils down to the fact that they do not think defendants claims are credible. It is the providence of the jury, the Court of Appeals for the Second Circuit emphasizes, not the trial court on summary judgment, to decide whether defendants are telling the truth. *Rogoz v. City of Hartford*, 796 F.3d 236, 245 (2d Cir. 2015) ("In reviewing the evidence and the inferences that may reasonably be drawn, the court "*may not make credibility determinations or weigh the evidence*.... '*Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.*'") (quoting *Kaytor v. Electric Boat Corp.*, 609 F.3d 537, 545 (2d Cir. 2010) (emphasis in original).

2. Intentional Infliction of Emotional Distress

Defendant Zhu Zirou's claim for intentional infliction of emotional distress is dismissed. It is based on his testimony that he was bullied because of his disability. This conduct does not meet the exacting standard of a claim for intentional infliction of emotional distress. It is not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Chanko v. Am. Broad. Cos. Inc.*, 27 N.Y.3d 46 (N.Y. 2016) (quoting *Howell v New York Post Co.*, 81 NY2d 115, 121 (N.Y. 1993)). It is also subsumed within the assault and battery claim.

Emotional distress may be claimed as an element of damages on that claim.

3. Negligence

This claim is dismissed. A theory of negligence is inconsistent with the intentional torts alleged. *See supra* Section IV(C)(6).

4. New York Civil Rights Law

Defendant Zhu Zirou's claim for a violation of the New York Civil Rights Law may proceed to trial. Defendant Zhu claims that during assaults plaintiffs mocked his disability. Defs.' Counterstatement at ¶ 21.

The Civil Rights Law prohibits violent action taken because of disability. N.Y. Civ. Rights Law § 79-n. Discriminatory statements made during or before an attack permit an inference that the attack was discriminatory. *See supra* Section IV(C)(2). Summary judgment on this claim is denied.

V. Conclusion

As stated above, plaintiffs' motion for summary judgment is granted in part and denied in part; the motion for summary judgment brought by defendants is granted in part and denied in part. The claims to be tried are stated in Section I(B) & Part IV, *supra*. The court does not intend to issue an injunction, which is unnecessary. *See supra* Part I.

Trial shall commence on August 6, 2018 in Courtroom 10 B South at 2:00 p.m. Jury selection shall be that morning by a magistrate judge.

A hearing on motions *in limine* shall be held on July 31, 2018, at 10:30 a.m. in Courtroom 10 B

South. The parties shall exchange and file with the court by July 17, 2018, the following: (1) motions *in limine*; (2) lists of pre-marked exhibits proposed for use at the trial, together with copies of the exhibits, and any stipulations regarding admissibility and authenticity; (3) lists of proposed witnesses together with brief summaries of their proposed testimony; (4) stipulations with respect to undisputed facts; and (5) a full proposed charge to the jury and full jury findings sheets. The parties shall provide the court with courtesy copies of all electronically filed documents.

If self-defense will be raised, it shall be included in the jury finding sheet and included in the proposed charge, accompanied by a brief.

There are serious language issues and a serious problem each plaintiff and defendant have with an understanding of how the American legal system works. To ensure meaningful participation, all individual plaintiffs and defendants shall be present at every session of the court while the case is being tried.

Each party is responsible for providing a certified interpreter at all times at his or her expense when the court is in session. Interpreters can and should be shared to reduce costs. Any document in a foreign language introduced into evidence or filed shall be produced with a properly certified translation into English.

The parties shall attempt to settle the case with the help of the magistrate judge. They shall bear in mind the court's estimate that as presently ordered by the parties, the jury will need to make hundreds of

decisions, seriously complicated by interpretation and translator problems. Time to try the case is estimated at more than two months. Whether a jury can be assembled to hear and decide such a case is doubtful.

The parties shall agree on a briefing schedule. If they cannot agree, the magistrate judge shall decide.

SO ORDERED.

Jack B. Weinstein
Jack B. Weinstein
Senior United States District Judge

Date: April 23, 2018
Brooklyn, New York

VI. Appendix A: Map of Sites of the Alleged Incidents

This map was introduced into evidence at the summary judgment hearing

Ex. H

VII. Appendix B: Pictures of Sites of the Alleged Incidents

The following pictures were introduced into evidence at the summary judgment hearing.

Ex. C

Ex. C

Ex. D

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ZHANG Jingrong, ZHOU Yanhua, ZHANG Peng, ZHANG Cuiping, WEI Min, LO Kitsuen, CAO, Lijun, HU Yang, GUO Xiaofang, GAO Jinying, CUI Lina, XU Ting, BIAN Hexiang, Plaintiffs, – against – Chinese Anti-Cult World Alliance (CACWA), Michael CHU, LI Huahong, WAN Hongjuan, ZHU Zirou, and DOES 1-5 Inclusive, Defendants.	**MEMORANDUM AND ORDER DENYING CONSTITUTIONAL CHALLENGE AND CERTIFYING CASE FOR INTERLOCUTORY APPEAL** 15-CV-1046

JACK B. WEINSTEIN, Senior United States District Judge

Parties

Zhang Jingrong,
Zhou Yanhua,
Zhang Peng,
Zhang Cuiping,
Wei Min,
Lo Kitsuen,
Cao, Lijun,
Hu Yang,
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* * *

I. Introduction

This memorandum and order addresses a question raised by defendants: has Congress exceeded its authority granted by the Commerce Clause of the United States Constitution in passing the portion of the Freedom of Access to Clinic Entrances Act ("FACEA") that protects "place[s] of religious worship." 18 U.S.C. § 248(a)(2).

FACEA was adopted in 1994 primarily to protect women seeking access to abortion services. The abortion clinic part of FACEA has been upheld as constitutional by every circuit court of appeals that has considered the issue. Late in the legislative processes, FACEA was amended to protect "any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship." 18 U.S.C. § 248(a)(2). No court, so far as this court is aware, has considered whether this religion section is constitutional. This court now finds that FACEA is a constitutional exercise of congressional Commerce Clause power.

Nevertheless, the court is dubious about whether the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. ("The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States"), permits government protection of religion by FACEA because the First Amendment, U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"), requires a barrier between religion

and government. A specific amendment to a statute or constitution should have more force than a generalized clause.

It is an anomaly of our religious jurisprudence that the basic structure of the relationship between government and religion requires government to keep its hands off religion. Yet, carrying out the disestablishment rule has not prevented a strong economic relationship between the two: religion and government. Local, state, and federal governments grant religious exemptions and aid with economic advantages, *see, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (holding that a for-profit corporation was exempt from generally applicable contraceptive insurance requirements because of religious belief avoiding a $475 million fine), supply assistance to religious schools, *see, e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding a school voucher program where the majority of students were enrolled in religious schools), Erica L. Green, *De Vos Pushes Federal Aid for Religious Universities*, N.Y. Times, May 10, 2018, at A16, and provide tax benefits, *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 680 (1970) (holding that tax exemptions for religious organizations do not violate the First Amendment); *see also infra* Section IV(B) (Commerce clause analysis), Section III(C)(3) (Commerce clause and religion).

Religion, even when non-profit, is deeply rooted in interstate commerce. It comprises a sizable portion of the United States economy. Houses of religious worship offer numerous valuable services to their congregates, support a large number of personnel, take in and expend considerable funds, own large

tracts of land, and receive free municipal services, such as schooling assistance, roads, and police protection. Huge religious educational institutions operating over the internet draw students and billions of dollars in revenue from all over the country. Religion substantially contributes to our gross national product. Congress could reasonably have concluded that violence and intimidation to keep people out of houses of worship would substantially adversely affect interstate commerce. FACEA is constitutional in its design to protect that national commerce.

This case arises out of a religious and political dispute between adherents of Falun Gong—a Chinese religious group—and a group of their opponents—organized under the umbrella of the Chinese Anti-Cult World Alliance. *See Zhang Jingrong v. Chinese Anti-Cult World All. ("Zhang I")*, No. 15-CV-1046, 2018 WL 1916617, at *1-14, --F.Supp.3d-- (E.D.N.Y. Apr. 23, 2018). The People's Republic of China ("Chinese Government") has allegedly suppressed the practice of Falun Gong in China and is attempting to do so abroad, including in the United States. *Id.* The parties have debated and at times been violent with one another around a temple and tables used by Falun Gong members in Queens, New York for prayer, proselytizing, and protesting against the Chinese Government's position. *Id.*

The tables used by plaintiffs to proselytize have printed materials that are said to come from outside of the state. *See* Decl. of Yuebin Yu ("Yu Decl.") at ¶ 2, ECF No. 171, Ex. 2(f). Parts of tables themselves may flow through commerce. Congregants make substantial donations of time and money to the Falun

Gong temple and tables affecting the stream of commerce. *Id.* at ¶ 8.

A prior opinion decided summary judgment motions and set the case for trial. *See Zhang I*, 2018 WL 1916617. That opinion concluded that Falun Gong is a religion for the purposes of the instant case and construed the scope of FACEA. Defendants then contended that FACEA is unconstitutional. Upon examination of the statute, briefing, argument, and research, the court finds that FACEA is constitutional; it is authorized by Congress' power over interstate and foreign commerce.

FACEA's constitutionality is not obvious. It was passed in 1994—one year before the Supreme Court's Commerce Clause jurisprudential shift—a time when Congress' commerce power was thought to be virtually limitless. *See infra* Section III(C)(1). Defendants make powerful arguments that the statute exceeds Congress' commerce power: (1) "Acts of violence or intimidation at places of worship are not economic activity, and are plainly analogous to the acts of violence covered by the Violence Against Women Act that the Supreme Court expressly held in [*United States v. Morrison*, 529 U.S. 598 (2000)] cannot properly be considered economic activity"; (2) FACEA contains no express commerce-based jurisdictional statement of justification as do other similar statutes, *see, e.g.*, 18 U.S.C. § 247 (requiring as an element a link between a defendant's conduct and commerce); 18 U.S.C. § 249 (same); (3) FACEA contains no legislative findings linking religion and commerce; and (4) the link between religion and commerce is too attenuated to survive scrutiny. Defs.'

Br. on Unconstitutionality ("Defs.' Br.") at 2-3, ECF No. 172, May 21, 2018.

A two month jury trial looms—demanding substantial time, effort, and money of the parties, a jury, and the court. Prudence dictates that this case not be tried with a substantial, dispositive question of constitutional law undecided by any appellate court. This opinion, and the prior opinion construing the scope of FACEA, are therefore certified for an interlocutory appeal. *See infra* Part V.

II. Factual Background

A. Case Background

A comprehensive recitation of the facts is contained in the court's opinion of April 23, 2018. *See Zhang I*, 2018 WL 1916617, at *1-14. A condensed, excerpted version of the facts relevant to this opinion is set out below.

Plaintiffs are members of a group, Falun Gong, developed in the second half of the twentieth century in China. The Chinese Government, they allege, has acted to suppress this group in both China and abroad, including in the United States, because it deems the group a threat to the hegemony of the Chinese State and Communist Party.

Adherents of Falun Gong live in the United States. Some are citizens of this country. It is contended by them as plaintiffs that the Chinese Government has conspired with individuals to harm followers of Falun Gong in the United States by organizing and encouraging the Chinese Anti-Cult World Alliance ("CACWA") and individuals to inflict injuries on those who follow Falun Gong.

Defendants oppose Falun Gong in Flushing, Queens, New York, and elsewhere. They deny that Falun Gong is a religion. Following the position of the Chinese Government, their opposition is based upon characterizing Falun Gong as a "cult" indoctrinating its followers with beliefs that are dangerous, unscientific, and offensive.

For purposes of this litigation, Falun Gong is found to be a religion. *See Zhang I*, 2018 WL 1916617, at *34-35. Plaintiffs proselytize their religion and protest the Chinese Government's opposition to it from tables on Main Street in Flushing near what they consider to be one of their temples.

Plaintiffs set up the tables in a heavily pedestrian-traveled area. At the tables they verbally and with hand-outs, signs, and literature attacked the Chinese Government politically for, among other things, harvesting human organs. They also use the tables to proselytize for Falun Gong, through informative materials, and for meditation and exercise, forms of their worship.

The parties have clashed with one another around the temple and tables. At times the debates became loud, spirited, and mildly physical, with occasional striking out and hitting. The plaintiffs brought this suit on the theory—in addition to others—that defendants' actions were violent and intimidating at a place of religious worship as prohibited under FACEA.

B. Prior Opinion on FACEA

The opinion of this court of April 23, 2018 addressed summary judgment motions of the parties and the court's *sua sponte* motion for summary judgment. *See Zhang I*, 2018 WL 1916617. It held that a broad interpretation of FACEA is necessary to avoid a serious constitutional question under the First Amendment.

> The Federal Freedom of Access to Clinic Entrances Act protects plaintiffs "lawfully exercising . . . [their] First Amendment right of religious freedom at a place of religious worship." 18 U.S.C. § 248(a)(2) (emphasis added). This statute is inclusive of all lawful religious practices and of all places it is practiced. Any place a religion is practiced—be it in underneath a tree, in a meadow, or at a folding table on the streets of a busy city—is protected by this and other statutes and the First Amendment to the Federal Constitution. A contrary reading would render the Freedom of Access to Clinic Entrances Act unconstitutional since it would discriminate between religions that use formal temples and those that do not.

Id. at *1.

A textual reading of the statute supports this conclusion:

> FACEA's language counsels for an expansive interpretation. Congress used the word "place," meaning a "physical environment" or "space." Webster's Third New International

> Dictionary 1727 (1993). By contrast, in 18 U.S.C. § 247, referenced in FACEA's legislative history, Congress used starkly different language in describing religious sites. It outlaws "intentionally defac[ing], damage[ing], or destroy[ing] any religious real property." 18 U.S.C. § 247 (emphasis added). And "religious real property" is defined as "any church, synagogue, mosque, religious cemetery, or other religious real property, including fixtures or religious objects contained within a place of religious worship." *Id.* The difference—between "a place of religious worship" and "religious real property"—suggests congressional intent to protect all places of religious worship and not just fixed structures in FACEA.

Id. at *30.

It was concluded that the tables where plaintiffs' proselytize, meditate, and protest against the Chinese Government are protected "place[s] of religious worship" under FACEA. *Id.* at *39.

> Falun Gong is a religion for the purposes of the instant case. Many of the incidents of violence and intimidation took place at or around the Falun Gong Temple in Flushing, Queens and at the tables plaintiffs use to proselytize for Falun Gong. Both are places of religious worship for purposes of the present case. The statute protects temporary structures.
>
> Plaintiffs and others proselytize and meditate—both recognized forms of

> worship—at these tables. Hr'g Tr. 210:5–17 (defendants' expert explaining that the Falun Gong tables contain materials explaining the practice of Falun Gong); *id.* 213:19–214:19 (defendants' expert explaining that he has observed Falun Gong practitioners meditating at the tables); *id.* 251:21–254:9 (director of Falun Gong Spiritual Center in Queens explaining that the tables are used for proselytizing, protesting the Chinese Communist Party, and praying); *see also Murdock v. Com. of Pennsylvania*, 319 U.S. 105 (1943) ("[S]preading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types.").

Id. (some internal citations omitted).

C. Religion and Commerce

Religious activity contributes substantially to the United States economy. *See generally* Brian J. Grim & Melissa E. Grim, *The Socio-economic Contribution of Religion to American Society: An Empirical Analysis*, 12 Interdisc. J. of Res. on Religion 1 (2016); *cf.* 4 Encyclopedia of Religion 2668-69 (2d ed. 2005) (relationship between economic matters and religion); *id.* at 2670 (relationship between religion and capitalism); *id.* at 2671 (linking the scholarly discussion of economic matters to the analysis of religion); *id.* at 2672 (an idealistic interpretation of the case of modern capitalism centered on religious

matters); *id.* at 2676 (relationship between economic and religious factors in modern life). Religious organizations participate in a number of income generating sectors including education, health care, and social services.

A recent, peer-reviewed study by Brian and Melissa Grim offers three estimates of the impact of religious activity on the United States economy. The first estimate, $378 billion annually, relies solely on revenue produced by religious organizations. Grim & Grim, *supra*, at 27. A second estimate, advocated as the most reasonable by the authors, places the value at $1.2 trillion; "it takes into account both the value of the services provided by religious organizations and the impact religion has on a number of important American businesses." *Id.* The third estimate of $4.8 trillion includes the value of "personal and social religious dynamics" and is offered as an upper end. *Id.*

There are over 330,000 houses of worship in the United States. *See* C. Kirk Hadaway Penny Long Marler, *How Many Americans Attend Worship Each Week? An Alternative Approach to Measurement*, 44 *J. for the Sci. Study of Religion* 307, 311 (2005). Approximately 53.6 million Americans attend religious services weekly, amounting to 20% of the United States population. *Id.* at 316. The revenue for these congregations is estimated to be $74.5 billion. Grim & Grim, *supra*, at 9. "Total church contributions appear to have remained around 1 percent of [Gross National Product] since at least 1955. Religious giving consistently accounts for about half of all charitable giving in the United States (approximately 64 billion dollars in 1995)." Laurence

R. Iannaccone, *Introduction to the Economics of Religion*, 36 J. of Econ. Literature 1465, 1469 (1998). Hundreds of thousands of people are employed by religious organizations. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Employment and Wages: Religious Organizations*, May 2017 (last visited May 24, 2018) https://www.bls.gov/oes/current/naics4_813100.htm (estimating that 193,660 Americans are employed by religious organizations across a spectrum of occupations).

"[H]ouses of worship have provided their constituents with a growing array of commercial services." Michael A. Helfand & Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 Duke L.J. 769, 772 (2015). There are many places of worship that offer commercial services, such as cafes, book stores, and gyms. *See, e.g.*, Peter J. Reilly, *Megachurch Denied Property Tax Exemption For Gym And Bookstore/Cafe*, Forbes, April 10, 2013; Jesse Bogan, *America's Biggest Megachurches*, Forbes, June 26, 2009.

One example of the relationship of organized religion and commerce is Liberty

University. *See* Alec MacGillis, *How Liberty University Built a Billion-Dollar Empire Online*, N.Y. Times Mag., April 22, 2018, at MM46. Liberty University created a large and growing online component in its institution:

> By 2016, Liberty's net assets had crossed the $1.6 billion mark, up more than tenfold from a decade earlier. Thanks to its low spending on instruction, its net income was an

> astonishing $215 million on nearly $1 billion in revenue, according to its tax filing—making it one of the most lucrative nonprofits in the country, based simply on the difference between its operating revenue and expenses, in a league with some of the largest nonprofit hospital systems.

Id.; *see also* Jerry Falwell Jr., *Readers Respond to the 4.22.18 Issue*, May 6, 2018, at 10 ("Since 1971, Liberty University has helped more than 250,000 students develop the critical thinking skills necessary to excel in careers and communities outside our classrooms. . . . [T]he university is undergoing constant construction. We are building a new business school and upgrading our football stadium to N.C.A.A. standards, a testament to our belief that we can always improve the experience of our students. . . . We are proud of the institution we have created and the minds we have expanded, challenged and enlightened, and take matters questioning our dedication to education seriously.").

III. Law

A. Timeliness of Constitutional Challenge

1. Pleading Constitutional Challenges

It is not clear whether a party's constitutional challenge to an act of Congress should be pled as an affirmative defense. *Compare Williams v. Paxton*, 559 P.2d 1123, 1132 n.1 (1976) ("The purpose of the rule requiring [affirmative] defenses to be pleaded is to alert the parties concerning the issues of fact which will be tried and to afford them an opportunity to present evidence to meet those defenses. The

constitutionality of a statute, however, is not ordinarily an issue upon which evidence must be presented at trial or about which one must be forewarned in order to prepare evidence for trial. . . . [It] is a matter of law."), and *S. Track & Pump, Inc. v. Terex Corp.*, No. CV 08-543-LPS, 2013 WL 5461615, at *2 (D. Del. Sept. 30, 2013), *rev'd on other grounds*, 618 F. App'x 99, 2015 WL 4081493 (3d Cir. 2015) ("Terex has not waived its constitutional challenge. . . . Plaintiff cites no binding authority for the proposition that a constitutional challenge to a statute is waived under Rule 8(c) if not pled as an affirmative defense in the answer."), *with Holland v. Cardiff Coal Co.*, 991 F. Supp. 508, 515 (S.D.W. Va. 1997) ("[Defendant's] Fifth Amendment taking defense is an affirmative defense within the definition of that term because in raising that defense, [Defendant] essentially maintains that even if it is found liable under the terms of the Coal Act, [Defendant] cannot be held liable because the Act, as applied, violates the Constitution."); *cf.* Fed. R. Civ. P. 8(c) ("In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense."); Wright & Miller, 5 Federal Practice and Procedure § 1271 (3d ed.) ("As far as the judicial precedents are concerned, the following matters have been held by federal courts to be affirmative defenses under Rule 8(c) in nondiversity cases . . . the unconstitutionality of a statute relied upon by the plaintiff."); *Century Indem. Co. v. Marine Grp., LLC*, 848 F. Supp. 2d 1238, 1262 (D. Or. 2012) (noting the "uncertainty of federal law" about whether the defense of unconstitutionality must be pled).

A constitutional challenge to Congress' power to pass a statute may be raised at any time in a litigation. *Cf.* Wright & Miller, 5 Federal Practice and Procedure § 1277 (3d ed.) ("Many courts permit affirmative defenses to be asserted by motion even when the defenses are not available on the face of the complaint. This is especially true as to those affirmative defenses that seem likely to dispose of the entire case or a significant portion of the case and defenses that require no factual inquiry for their adjudication. In situations such as these, the federal courts appear to be wise in overlooking the formal distinctions between affirmative defenses and motions, which have their primary justification in history rather than logic."); Wright & Miller, 15B Federal Practice and Procedure § 3918.7 (2d ed.) (noting in the criminal context that "[t]he arguments that the statute underlying the prosecution is unconstitutional . . . may be so fundamental that a knowing and voluntary waiver will be difficult to establish"); *Monahan v. New York City Dep't of Corr.*, 214 F.3d 275, 283 (2d Cir. 2000) ("[T]he district court has the discretion to entertain [an affirmative] defense when it is raised in a motion for summary judgment, by construing the motion as one to amend the defendant's answer."). Some arguments, such as "[t]he objection that a federal court lacks subject-matter jurisdiction, may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006) (internal citations omitted).

2. Leave to Amend

"Prior to trial, 'a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.'" *DaCosta v. City of New York*, 296 F. Supp. 3d 569 (E.D.N.Y. 2017) (quoting Fed. R. Civ. P. 15(a)(2)), *reconsideration denied sub nom. DaCosta v. Tranchina*, 285 F. Supp. 3d 566 (E.D.N.Y. 2018). Once a scheduling order has been entered it "'may be modified' to allow the amendment 'only for good cause and with the judge's consent.'" *Id.* (quoting Fed. R. Civ. P. 16(b)(4)). The primary "good cause" consideration is whether "the moving party can demonstrate diligence," but the court may also consider other factors including "prejudice" to the non-movant. *Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 244 (2d Cir. 2007).

"The Federal Rules of Civil Procedure are merits oriented." *DaCosta v. Tranchina*, 285 F. Supp. 3d 566, 578 (E.D.N.Y. 2018); *cf.* Fed. R. Civ. P. 1 ("[The Federal Rules of Civil Procedure] should be construed, administered, and employed by the *court and the parties* to secure the *just,* speedy, and inexpensive determination of every action and proceeding.") (emphasis added). "It is . . . entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of [] mere technicalities." *Foman v. Davis*, 371 U.S. 178, 181-82 (1962); *cf. Krupski v. Costa Crociere S.p.A.,* 560 U.S. 538, 550–51 (2010) (noting the "preference expressed in the Federal Rules of Civil Procedure in general, and Rule 15 in particular, for resolving disputes on their merits").

B. FACEA

Congress passed FACEA in 1994 after the United States Supreme Court decided *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), which restricted claims brought under 42 U.S.C. § 1985(3). *See Zhang I,* 2018 WL 1916617, at *28. *Bray* limited protections for women seeking abortions; Congress sought to address that issue with FACEA. H.R. Rep. No. 103-488, at 7-8, reprinted in 1994 U.S.C.C.A.N. 724, 724–25 (May 2, 1994) (Conf. Rep.) ("Prior to the Supreme Court's decision in *Bray . . .* the conduct described in [FACEA] was frequently enjoined by federal courts in actions brought under 42 U.S.C. 1985(3), but in that case the Court denied a remedy under such section to persons injured by the obstruction of access to abortion-related services.").

Introduced into this Act protecting women seeking abortion services was a provision protecting religion:

> Whoever . . . [1] by force or threat of force or by physical obstruction, [2] intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with [3] any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom [4] at a place of religious worship shall be subject to the penalties provided in . . . the civil remedies provided in subsection (c).

18 U.S.C. § 248(a)(2). Remedies include an award of statutory damages in the amount of $5,000 per violation. 18 U.S.C. § 248(c)(1)(B).

The Senate Report on the bill contains commerce findings about abortion services:

> Congress has clear constitutional authority to enact the Freedom of Access to Clinic Entrances Act under the Commerce Clause, which gives it authority to regulate interstate commerce.
>
> Commerce Clause authority has been broadly interpreted, and an exercise of it will be sustained if Congress has a rational basis for finding that an activity affects interstate commerce, and it[] acts rationally in addressing the activity. Under the Commerce Clause, in conjunction with the Necessary and Proper Clause, Congress has authority to regulate activity that is purely local if that activity has an effect on interstate commerce. Further, once Congress finds that a class of activities affects interstate commerce, Congress may regulate all activities within that class, even if any of those activities, taken individually, has no demonstrable effect on interstate commerce. It has also been considered important to Commerce Clause analysis that the problem Congress is addressing is national in scope and exceeds the ability of a single state or local jurisdiction to solve. Under these principles, [FACEA] falls easily within the commerce power.
>
> Clinics and other abortion service providers clearly are involved in interstate commerce, both directly and indirectly. They purchase

medicine, medical supplies, surgical instruments and other necessary medical products, often from other States; they employ staff; they own and lease office space; they generate income. In short, the Committee finds that they operate within the stream of interstate commerce. In addition, many of the patients who seek services from these facilities engage in interstate commerce by traveling from one state to obtain services in another. . . .

Clinic employees sometimes travel across State lines to work as well. Like Dr. David Gunn, the physician who was killed in Pensacola, FL, some doctors who perform abortions work in facilities in more than one State. In addition, as Attorney General Reno noted, the types of activities that would be prohibited by [FACEA] have a negative effect on interstate commerce. As the record before the Committee demonstrates, clinics have been closed because of blockades and sabotage and have been rendered unable to provide services. Abortion providers have been intimidated and frightened into ceasing to perform abortions. Clearly, the conduct prohibited by [FACEA] results in the provision of fewer abortions and less interstate movement of people and goods. This situation is analogous to Congress[] exercise of the commerce power in passing Title II of the Civil Rights Act of 1964, which was premised on the conclusion that restaurants that discriminated served fewer

> customers, and therefore suppressed interstate commerce. *See Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). Here, of course, the very purpose of those engaging in the conduct addressed by [FACEA] is to suppress the provision of abortion services.

S. Rep. No. 103-117, at 31-32, 1993 WL 286699 (July 29, 1993) (Conf. Rep.).

The religious liberty provision was not part of the bill when this report on FACEA was issued. It was added by an amendment proposed by Senator Orrin Hatch on the floor before the Senate several months after the report. Senator Hatch explained:

> Mr. President, the religious liberty amendment that I am offering is very straightforward. It would ensure that the first amendment right of religious liberty receives the same protection from interference that [FACEA] would give abortion. Simply put, anyone who votes against this amendment or who attempts to dilute it values religious freedom far less than abortion.
>
> Religious liberty is the first liberty guaranteed in the Bill of Rights. As the lead cosponsor, along with Senator KENNEDY, of the Religious Freedom Restoration Act, I have worked to guarantee that religious liberty is protected against Government intrusion. Through this amendment, religious liberty would also be protected against

> private intrusion-in exactly the same way that [FACEA] would protect abortion.

Make no mistake about it: The right of Americans of various religions to attend their places of worship in peace is under attack throughout the country. Various groups, acting on behalf of various causes, have undertaken an interstate campaign of harassment, physical assaults, and vandalism. Consider, for example, some recent episodes:

Just over a week ago, protesters disrupted Scripture reading at the Village Seven Presbyterian Church in Colorado Springs, CO, and pelted the congregation with condoms. Similar protests have occurred throughout the country, and organizers of the Colorado Springs protest said that they planned further disruptions in the future.

In February of this year, the St. Jude's United Holiness Church in St. Petersburg, FL, was burned to the ground by an arsonist. Another arsonist set fire to at least 17 other churches throughout Florida and to churches in Tennessee and Colorado. . . .

Our Nation was founded on the principle of religious liberty. If any right deserves protection from private interference, it is religious liberty. The amendment that I am offering would do no more than give religious liberty the same protection that [FACEA] would give abortion.

The choice for my colleagues is simple: Do they value religious liberty at least as much as abortion? If so, they should vote for my amendment.

139 Cong. Rec. S15660, 1993 WL 470962 (Nov. 3, 1993).

Senator Kennedy, a sponsor of FACEA responded:

> Mr. KENNEDY: As I understand the Senator's amendment, it would simply extend the bill's prohibitions to include the actual or temporary use of force, threat of force, or physical obstruction to intentionally injure, intimidate, or interfere with anyone lawfully exercising or seeking to exercise the first amendment, the right of religious freedom at a place of religious worship and to intentionally damage or destroy property of a place of religious worship.
>
> Am I correct that the amendment would cover only conduct actually occurring or, in the case of an attempt, intending to occur in place of religious worship, such as a church, synagogue or the immediate vicinity of a church?
>
> Mr. HATCH: The Senator is absolutely right.
>
> Mr. KENNEDY: So, to be clear on this, the amendment would cover only conduct actually occurring at *an established place of religious worship, a church or synagogue, rather than any place where a person might pray, such as a sidewalk*?
>
> Mr. HATCH: That is correct.
>
> Mr. KENNEDY: Mr. President, we can accept the amendment. With this understanding, we are prepared to accept the amendment.

Id. (emphasis added).

The House adopted the religious liberty amendment with minor adjustments. H.R. Rep. No. 103-488, at 9, reprinted in 1994 U.S.C.C.A.N. 724, 726 (May 2, 1994) (Conf. Rep.) ("The House recedes with an amendment that modifies the Senate language in two respects. First, it inserts 'religious' before 'worship' in the first reference to 'place of worship.' Second, it makes clear . . . that this Act does not create any new remedies for interference with a person engaging, outside a facility that provides reproductive health services, in worship or other activities that are protected by either the free speech or free exercise clause of the First Amendment to the Constitution.").

Commentators have suggested that the religious freedom provision helped alleviate freedom of speech problems that would be raised if FACEA only protected abortion seekers. *See* Michael Stokes Paulsen & Michael W. McConnell, *The Doubtful Constitutionality of the Clinic Access Bill*, 1 Va. J. Soc. Pol'y & L. 261, 287 (1994) ("The Senate adopted a 'religious liberty amendment' proposed by Senator Hatch . . . . This is an important move in the direction of content-neutrality, as the bill no longer targets only pro-life protest. Without this broadening amendment, the bill would very likely not survive First Amendment scrutiny.").

As already explained, "a place of religious worship" in FACEA must be construed broadly to avoid a constitutional issue under the First Amendment: that religions using formal temples are not privileged over those that do not. *See Zhang I*, 2018 WL 1916617, at *30; *supra* Section II(B). Despite the exchange between Senators Kennedy and

Hatch suggesting only "established place[s] of religious worship" are protected, FACEA should not, based on statutory text and constitutional concerns, be given such a limited interpretation. *See Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 15 (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*.") (emphasis added). The constitutionality of FACEA will be assessed below based on this broad understanding.

C. Commerce Clause

Article I, Section 8, Clause 3 of the United States Constitution, the Commerce Clause, grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. 1. Supreme Court Commerce Clause Jurisprudence From 1937 to 1995, the Supreme Court of the United States did not find any law unconstitutional as exceeding Congress' power granted by the Commerce Clause. *See* Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 247 (4th ed. 2011). During this period, the Commerce Clause was expansively interpreted by the Court, as it upheld myriad statutes. *Id.* at 268.

Limits have since been placed on Congress' power. Modern Commerce Clause doctrine stems from the Supreme Court's decisions in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000). Congress has power to regulate: (1) "the use of the channels of interstate

commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities that substantially affect interstate commerce." *Morrison*, 529 U.S. at 609. Both *Lopez* and *Morrison* addressed the third category.

In *Lopez*, the Court held that the Gun-Free School Zones Act of 1990, criminalizing possession of a weapon close to a school, was unconstitutional. *Lopez*, 514 U.S. at 551. The Court noted that its prior decisions—upholding regulation of wholly intrastate activity—concerned economic conduct. *Id.* at 559-60. "Where *economic activity* substantially affects interstate commerce, legislation regulating that activity will be sustained." *Id.* at 560 (emphasis added). The Gun-Free School Zones Act, had "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.* at 561. Congress did not make any legislative findings tying guns in school zones to interstate commerce and the act did not contain a jurisdictional element, requiring a nexus to interstate commerce in each individual case. *Id.* at 561-63.

The *Lopez* Court concluded:

> These are not precise formulations, and in the nature of things they cannot be. But we think they point the way to a correct decision of this case. The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at

> a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

Id. at 567.

Morrison, decided five years later, struck down the civil remedies provision of the Violence Against Women Act ("VAWA"). The Court focused on four factors: (1) whether the regulated activity was economic; (2) whether the statute contained an express jurisdictional element; (3) whether Congress made legislative findings linking the regulated activity to interstate commerce; and (4) whether there was an attenuated link between the regulation and interstate commerce. *Morrison*, 529 U.S. at 610-12.

The Court found that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity[;] . . . thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Id.* at 613. Congress made significant findings tying the impact of gender-motivated violence to interstate commerce. *Id.* at 613-14. The Court rejected Congress' reasoning:

> Congress' findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers. Congress found that gender-motivated violence affects interstate

> commerce by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.

Id. at 615 (internal quotation marks and citations omitted).

Basing its decision partially on federalism principles, it declared:

> We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.

Id. at 617-18 (internal citations omitted).

In *Lopez* and *Morrison*, the Supreme Court distinguished rather than overturned its expansive Commerce Clause precedents. Cases such as *Wickard v. Filburn*, 317 U.S. 111 (1942)—upholding Congress' power to regulate the intrastate production of wheat—and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964)—granting Congress the power to outlaw private discrimination in places of public accommodation because of its affect on interstate commerce—are still good law. *See Lopez*, 514 U.S. at 557-58 (citing cases approvingly).

Gonzales v. Raich, reviewing the constitutionality of Congress' power to regulate intrastate marijuana use and cultivation, established that Congress' commerce powers remains broad:

> Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce. As we stated in *Wickard,* "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." We have never required Congress to legislate with scientific exactitude. When Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class. In this vein, we have reiterated that when a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances

> arising under that statute is of no consequence.

Gonzales v. Raich, 545 U.S. 1, 17 (2005) (internal citations omitted).

When Congress regulates an economic class of activities, a trial court's task is not to answer the empirical question of whether acts, "taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Id.* at 22. "Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the" Controlled Substances Act and was therefore constitutional. *Id.* at 22. *Gonzales* declared that "[w]hile congressional findings are certainly helpful in reviewing the substance of a congressional statutory scheme, particularly when the connection to commerce is not self-evident, . . . the absence of particularized findings does not call into question Congress' authority to legislate." *Id.* at 21.

Gonzales distinguished *Lopez* and *Morrison*. The Controlled Substance Act, regulated "quintessentially economic" activity—the production of a commodity—unlike the non-economic regulation in *Morrison* and *Lopez*. *Id.* 23-25. "[I]n both *Lopez* and *Morrison,* the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety," while in *Gonzales* there was only a challenge to a part of an otherwise clearly valid statutory scheme. *Id.* at 23. *Morrison* and *Lopez* both appear to address the constitutionality of acts on

their face—*Gonzales* by contrast, appears to address the issue on an as applied basis.

A question posed is: does the court address a commerce clause challenge "as applied" or facially? *See* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209 (2010). Professor Rosenkranz explains:

> [T]he riddle may be solved by focusing on the subject of the clause. The Commerce Clause says: "The Congress shall have power . . . To regulate commerce . . . among the several states . . . ." Like the First Amendment it is written in the active voice and it has a clear subject: Congress. (Unlike the First Amendment, the Commerce Clause is a grant of power rather than a restriction on power, so, strictly speaking, it cannot be "violated" at all; rather, Congress may exceed its power under the Commerce Clause and thus violate the Tenth Amendment.) So, a Commerce Clause challenge, like a First Amendment challenge, is a challenge to an action of Congress. Congress is the subject of the claim and the answer to the who question. And the answer to the when question follows: if Congress makes a law in excess of its power under the Commerce Clause and thus violates the Tenth Amendment, the constitutional violation occurs when Congress makes the law. . . .
>
> [A] Commerce Clause challenge cannot be "as-applied." A Commerce Clause challenge must be a challenge to an action of Congress.

> In a Commerce Clause challenge, it must be that the violation is visible on the "face" of the statute . . . .

Id. at 1273-79. Defendants challenge FACEA on its face. Defs.' Br. at 4 ("[FACEA] should be stricken down as facially unconstitutional.").

2. FACEA Commerce Clause Decisions

The Court of Appeals for the Second Circuit has held that Congress possessed the power to pass the abortion segment of FACEA under the Commerce Clause. *United States v. Weslin*, 156 F.3d 292, 296 (2d Cir. 1998). "Congress specifically found that the activities governed by FACE[A] affect interstate commerce." *Id.* Women often travel between states to receive abortion services, and "because of a shortage of doctors willing to perform abortions, doctors travel from state to state and often cover great distances to perform abortions." *Id.*

All other circuit courts of appeals to have considered the constitutionality of FACEA's abortion provision have reached the same conclusion. *See United States v. Gregg*, 226 F.3d 253 (3d Cir. 2000); *Hoffman v. Hunt*, 126 F.3d 575 (4th Cir. 1997); *States v. Bird*, 124 F.3d 667 (5th Cir. 1997); *Norton v. Ashcroft*, 298 F.3d 547 (6th Cir. 2002); *United States v. Soderna*, 82 F.3d 1370 (7th Cir. 1996); *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996); *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995); *Terry v. Reno*, 101 F.3d 1412 (D.C. Cir. 1996).

3. Commerce Clause and Religion

The Supreme Court has recognized that it can be "difficult to determine whether a particular activity is

religious or purely commercial." *Murdock v. Com. of Pennsylvania*, 319 U.S. 105, 110 (1943).

> In many—and perhaps an increasing number of—instances, religion overlaps with the commercial sphere and courts are obligated to determine whether or not to adopt an entirely hands-off approach simply because the specter of religion lurks on the horizon. . . . [T]he U.S. Supreme Court has treated the two spheres as overlapping. . . . [T]he Supreme Court appears to view religious value as generated through a complex interaction between religious entities and individual adherents.

Bernadette Meyler, *Commerce in Religion*, 84 Notre Dame L. Rev. 887, 912 (2009).

Congress has used its commerce power to justify several other statutes bearing on religion. For example, the Religious Land Use and Institutionalized Persons Act (RLUIPA) prohibits federal, state, and local governments from "impos[ing] or implement[ing] land use regulation in a manner that imposes a substantial burden on the religious exercise of a person," 42 U.S.C. § 2000cc, and from "impos[ing] a substantial burden on the religious exercise of a person residing in or confined to an institution," 42 U.S.C. § 2000cc-1. It contains a commerce linked jurisdictional element. *See* 42 U.S.C. § 2000cc(a)(2)(B) ("This subsection applies in any case in which . . . the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several

States, or with Indian tribes."); *id.* § 2000cc-1(b)(2) (same).

The Court of Appeals for the Second Circuit has affirmed congressional power to pass RLUIPA. *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 354 (2d Cir. 2007) ("[W]here the relevant jurisdictional element is satisfied, RLUIPA constitutes a valid exercise of congressional power under the Commerce Clause."); *cf. Cutter v. Wilkinson*, 544 U.S. 709 (2005) (holding that RLUIPA does not violate the Establishment Clause); *but see* Ada-Marie Walsh, *Religious Land Use and Institutionalized Persons Act of 2000: Unconstitutional and Unnecessary*, 10 Wm. & Mary Bill Rts. J. 189, 190 (2001) ("The RLUIPA is unconstitutional because it violates the Establishment Clause of the First Amendment. In promulgating the RLUIPA, Congress exceeded its power under the Commerce Clause.").

On the facts presented in *Westchester Day School*, the appellate court concluded that the ties to interstate commerce were sufficient to satisfy the jurisdictional element and Commerce Clause analysis.

> [T]he district court found the jurisdictional element satisfied by evidence that the construction of Gordon Hall, a 44,000 square-foot building with an estimated cost of $9 million, will affect interstate commerce. We identify no error in this conclusion. As we have recognized, the evidence need only demonstrate a minimal effect on commerce to satisfy the jurisdictional element. Further, we

> have expressly noted that commercial building construction is activity affecting interstate commerce.

Westchester Day School, 504 F.3d at 354 (internal citations omitted).

Other statutes touching religion have been found to be constitutional exercises of congressional commerce power. *See* 18 U.S.C. § 247 (the Church Arson Prevention Act of 1996, prohibiting "defac[ing], damage[ing], or destroy[ing] any religious real property, because of the religious character of that property"); 18 U.S.C. § 249 (the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act, criminalizing "willfully caus[ing] bodily injury to any person . . . through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, . . . because of the actual or perceived . . . religion . . . of any person").

Both statutes contain commerce-linked jurisdictional elements. *See* 18 U.S.C. § 247(b) ("[T]he offense is in or affects interstate or foreign commerce."); 18 U.S.C. § 249(a)(2)(B) ("[T]he conduct . . . interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or . . . otherwise affects interstate or foreign commerce."). Courts have relied on these jurisdictional elements in affirming Congress' power to pass them. *See, e.g., United States v. Roof*, 252 F. Supp. 3d 469 (D.S.C. 2017) (denying motion for a new trial or judgment of acquittal under § 247 and § 249 and rejecting a commerce challenge to § 247); *United States v. Mason*, 993 F. Supp. 2d 1308, 1317 (D. Or. 2014) ("[T]he jurisdictional element of [§ 249] . . . is

sufficient to satisfy the requirements of the Commerce Clause."); *but see* Jonathan H Adler, *How the Justice Department is using the Commerce Clause to criminalize forcible beard cutting as a federal hate crime*, The Volokh Conspiracy, June 24, 2014 ("[T]he jurisdictional element of [§ 249] is written in such broad terms that many activities satisfy the relevant statutory elements without having any meaningful relationship to commerce . . . [this] makes a mockery of the notion of limited and enumerated powers.").

Congress made findings in passing § 249 about the effects hate crimes have on interstate commerce. As Judge Wynn explained dissenting from a panel opinion of the Court of Appeals for the Fourth Circuit:

> [Section 249's] substantive provisions are preceded by congressional findings regarding the prevalence and impact of violent hate crimes throughout the country, as well as Congress's desire to assist state and local efforts to combat such violence. Distinguishing hate crimes from other violent crimes—which, Congress emphasized, States continue to be responsible for prosecuting—Congress concluded that violent hate crimes "substantially affect[ ] interstate commerce in many ways." Among these effects, Congress explained that:
>
> (A) The movement of members of targeted groups is impeded, and members of such groups are forced to move across State lines

> to escape the incidence or risk of such violence.
>
> (B) Members of targeted groups are prevented from purchasing goods and services, obtaining or sustaining employment, or participating in other commercial activity.
>
> (C) Perpetrators cross State lines to commit such violence.
>
> (D) Channels, facilities, and instrumentalities of interstate commerce are used to facilitate the commission of such violence.
>
> (E) Such violence is committed using articles that have traveled in interstate commerce.

United States v. Hill, 700 F. App'x 235, 243 (4th Cir. 2017) (Wynn, J. dissenting) (internal citations omitted).

Findings were similarly made about religion and commerce when Congress passed § 247:

> To the extent the legislative history is informative on the specific impact of church attacks on interstate commerce, there are references to a broad range of activities in which churches engage, including social services, educational and religious activities, the purchase and distribution of goods and services, civil participation, and the collection and distribution of funds for these and other activities across state lines. *See, e.g.,* 142 Cong. Rec. S7908–04 at *S7909 (1996) (joint statement of floor managers regarding H.R. 3525, The Church Arson Prevention Act of 1996); 142 Cong. Rec. S6517–04, *S6522

(1996) (statement of Sen. Kennedy); *see also Church Burnings: Hearings on the Federal Response to Recent Incidents of Church Burnings in Predominantly Black Churches Across the South Before the Senate Comm. on the Judiciary,* 104th Cong., 37 (1996) (appendix to the prepared statement of James E. Johnson and Deval L. Patrick).

U.S. v. Grassie, 237 F.3d 1199, 1209 (10th Cir. 2001); *see also* 142 Cong. Rec. S7908-04, 142 Cong. Rec. S7909, 1996 WL 396477 (July 16, 1996) (joint statement of Sens. Faircloth and Kennedy & Reps. Hyde and Conyers) ("Many of the places of worship that have been destroyed serve multiple purposes in addition to their sectarian purpose. For example, a number of places of worship provide day care services, or a variety of other social services.").

IV. Application of Facts to Law

A. Timeliness of Constitutional Challenge

Defendants' constitutional challenge has not been waived or forfeited for four reasons. First, defendants did not need to plead unconstitutionality as an affirmative defense and properly raised it by motion. *See supra* Section III(A).

Second, the court granted defendants leave to file amended answers, *see* April 26, 2018 Order, ECF No. 154, and they did so. *See* Third Amended Answers, ECF Nos. 157-58. Plaintiffs argue that this was error because the amendment was untimely and without good cause. The decision granting leave to amend was proper.

There has been no showing that defendants were not diligent. As defendants' counsel represented to the court: "It was only upon further discussion of [defendants' summary judgment filing] that the [unconstitutionality] point [] occurred to me, and it is one that I believe Your Honor will find worthy of analysis." *See* Defs.' Ltr. Br. at 1, ECF No. 150, April 21, 2018. Defendants were entitled to rely on the general presumption that an act of Congress was passed in accordance with its constitutionally delegated power. *Cf. San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 60 (1973) (stating the "first principles of constitutional adjudication [is] the basic presumption of the constitutional validity of a duly enacted state or federal law"); *Beatie v. City of New York*, 123 F.3d 707, 711 (2d Cir. 1997) ("Legislative acts that do not interfere with fundamental rights or single out suspect classifications carry with them a strong presumption of constitutionality.").

The prejudice to plaintiffs is relatively minor. *See Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 244 (2d Cir. 2007) (stating "prejudice" to the non-movant may be considered in assessing whether to allow a pleading amendment). A challenge to Congress' commerce power may be assessed facially. *See supra* Section II(C)(1); *Williams v. Paxton*, 559 P.2d 1123, 1132 (1976) ("The constitutionality of a statute, however, is not ordinarily an issue upon which evidence must be presented at trial or about which one must be forewarned in order to prepare evidence for trial. . . . [It] is a matter of law."). Facts necessary to adjudicate this issue may be recognized by judicial notice. *See infra* Section IV(D). Plaintiffs

fully briefed and argued the issue. Had additional discovery been needed, it would have been allowed.

Third, this challenge bears on the court's subject-matter jurisdiction. FACEA is the sole remaining federal cause of action and basis of original jurisdiction. *Cf.* 28 U.S.C. § 1367(C)(2) ("The district courts may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction."). "The objection that a federal court lacks subject-matter jurisdiction, may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006). This is a quasi-jurisdictional challenge.

Fourth, failure to consider this challenge could lead to a manifest injustice. Consider the absurdity if the statute were unconstitutional but the argument forfeited: defendants would be subject to a two month trial and the possibility of statutory damages under FACEA—at the rate of $5,000 per violation—when the sole basis of this court's jurisdiction is a single remaining federal cause of action that the United States Congress passed without authority. "It is . . . entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of [] mere technicalities." *Foman v. Davis*, 371 U.S. 178, 181-82 (1962).

B. Commerce Clause Analysis

Congress can use its commerce power to regulate: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even

though the threat may come only from intrastate activities"; or (3) "those activities that substantially affect interstate commerce." *United States v. Morrison*, 529 U.S. 598, 609 (2000); *see also supra* Section III(C)(1).

FACEA's prohibition on violence and intimidation at places of religious worship does not seem to fall into either of the first two categories. The question is: does it substantially affect interstate commerce, the third category?

The first step in the analysis is to ask whether FACEA is regulating an "economic 'class of activity.'" *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). The cases offer limited guidance on the meaning of this term. "These are not precise formulations, and in the nature of things they cannot be." *United States v. Lopez,* 514 U.S. 549, 567 (1995). Guns in a school zone and violence against women, the Supreme Court tells us, are not economic. *Id.* at 561; *Morrison*, 529 U.S. at 613. Wheat production, marijuana cultivation, and abortion services are economic. *See Wickard v. Filburn*, 317 U.S. 111 (1942); *Gonzales*, 545 U.S. 1; *United States v. Weslin*, 156 F.3d 292, 296 (2d Cir. 1998).

FACEA's religion provision regulates an economic class of activities. Four elements are necessary to make out a claim: (1) force or the threat of force, (2) intent to injure, intimidate or interfere with (3) a person engaged in First Amendment religious activity (4) at "a place of religious worship." 18 U.S.C. § 248(a)(2). Violence and intimidation, *Morrison* tells us, is not element in the statute—"a place of religious

worship"—transforms the provision into to one tethered to commerce.

Places of religious worship—even interpreted broadly to avoid an issue under the First Amendment—are economic. There are approximately 331,000 formal houses of worship in the United States that have some $74.5 billion in annual revenue. *See supra* Section II(C); Grim & Grim, *supra*, at 9; Hadaway & Marler, *supra*, at 311. This accounts for 1% of gross national product in the United States and half of all charitable giving. Iannaccone, *supra*, at 1469. Many houses of worship operate on a fee-for-service model—congregants pay for memberships or donate in order to sustain the costs of upkeep and pay for clergy. Religion is an important sector of the United States economy; violence and intimidation at places of religious worship can deter people from participating in religious-based, commercial activity.

Against this backdrop—that Congress is regulating an "economic class of activity"—Congress possessed the power under the Commerce Clause to pass FACEA. The inquiry is whether Congress had a "rational basis" for concluding that FACEA could substantially affect interstate commerce. *Gonzales*, 545 U.S. at 22. Based on the evidence and common sense notions about religion, as widely practiced in the United States, religious activity and commerce overlap: Congress had a rational basis for concluding that violence and intimidation at places of religious worship could substantially affect interstate commerce.

That many religious institutions operate as non-profits does not change the religious-economic situation. In *Gonzales*, by way of analogy, the Court held that the cultivation and intrastate sale of marijuana was economic, notwithstanding that the market is illegal. *See also Taylor v. United States*, 136 S. Ct. 2074, 2080 (2016) ("[T]he sale of marijuana, is unquestionably an economic activity. It is, to be sure, a form of business that is illegal under economic. First Amendment activity is probably not inherently economic either—one can conjure "First Amendment" activities that have nothing to do with commerce. But the grounding federal law and the laws of most States. But there can be no question that marijuana trafficking is a moneymaking endeavor—and a potentially lucrative one at that.").

It is of no consequence that FACEA must be interpreted to reach those religious places of worship that take place outside of a formal setting. *See Zhang I*, 2018 WL 1916617, at *1, *28-30. The instant case demonstrates the point. Plaintiffs set up tables on busy streets in Queens where they proselytize, worship, and protest against the Chinese Government's suppression of their religion. They hand out flyers and other materials that are printed in other states and countries and travel through interstate commerce, they set up tables whose parts may do the same, people travel from out of state to participate, and they drive cars that travel through the stream of commerce to get there. Yu Decl. at ¶¶ 2-5. This activity costs money and takes time. *Id.* at ¶ 8. As applied to this case, plaintiffs' activities affect interstate commerce.

C. Distinguishing *Morrison*

Defendants contend that *United States v. Morrison*, 529 U.S. 598 (2000)—striking down the civil remedies provision of VAWA—controls. VAWA and FACEA are similar in some respects: both prohibit violence and protect groups historically subject to violence. Because outlawing violence against women is not commerce, defendants argue, intimidation at places of religious worship should not be considered economic.

Places of religious worship can be areas of commerce. *Cf. United States v. Ferranti*, 928 F. Supp. 206, 212 (E.D.N.Y. 1996), *aff'd sub nom. United States v. Tocco*, 135 F.3d 116 (2d Cir. 1998) (concluding that arson of a retail dress shop was sufficiently related to interstate commerce because a place of commerce was destroyed). VAWA prohibited "gender-motivated violence *wherever it occur[ed]* (rather than violence directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce)." *Morrison*, 529 U.S. at 609 (emphasis added). FACEA, unlike VAWA, inherently requires interference with commerce. Houses of worship substantially contribute to the United States economy by providing their congregants with goods and services. *See supra* Section II(C).

Defendants ignore a lesson of *Gonzales*: the court looks at a specific provision within the context of the statutory scheme. *Gonzales v. Raich*, 545 U.S. 1, 27 (2005). The religious freedom provision in FACEA is a small part of the statute that was primarily designed to protect women seeking abortion services.

See supra Section III(B) (reviewing legislative history).

Considering the religious freedom provision in isolation ignores the realities of compromising in legislating. *See generally* Kenneth A. Shepsle, *Congress Is A "They," Not an "It": Legislative Intent As Oxymoron*, 12 Int'l Rev. L. & Econ. 239 (1992). The religion portion was added as part of an understanding between Senators Kennedy and Hatch. *See supra* Section III(B). Some have suggested that it alleviates freedom of speech issues that would be present if the statute only pertained to abortion services. Michael Stokes Paulsen & Michael W. McConnell, *The Doubtful Constitutionality of the Clinic Access Bill*, 1 Va. J. Soc. Pol'y & L. 261, 287 (1994) ("Without this broadening amendment, the bill would very likely not survive First Amendment scrutiny.").

All circuit courts of appeals, including the Court of Appeals for the Second Circuit, have upheld the constitutionality of the abortion provision of the statute. *See supra* Section III(C)(2). That FACEA's religious liberty provision is seldom used in court does not negate constitutionality. *See* Letter from Assistant Attorney General Peter J. Kadzik to Senators Ted Cruz and Mike Lee, at 4-5 (June 29, 2016), *available at* https://www.cruz.senate.gov/files/documents/Letters/20160927_FACEActResponse.pdf (explaining that the Department of Justice had never brought an enforcement action under the religious liberty portion of FACEA, but "the Department has prosecuted dozens of cases of violence directed at houses of worship and interference with the free exercise of

religion under 18 U.S.C. § 247, a statute that is broader in scope than the FACE Act" including (1) "On July 15, 2014, Macon Openshaw was sentenced to five years in prison firing three rounds from a .22 caliber handgun at a synagogue in Salt Lake City, Utah"; and (2) "On April 29, 2011, Brian Lewis, Abel Mark Gonzalez, and Andrew Kerber were sentenced for defacing and damaging a synagogue, a Roman Catholic church, and a Greek Orthodox church in Modesto, California").

D. Legislative Findings and Jurisdictional Nexus

FACEA lacks two legislative indications that Congress has used to ensure constitutionally under the Commerce Clause: (1) legislative findings, and (2) a commerce-based jurisdictional element. It is unsurprising that Congress made no findings about religion in passing FACEA—the religious freedom provision was added informally after the Senate's report on commerce was completed. *See supra* Section III(B). "While congressional findings are certainly helpful in reviewing the substance of a congressional statutory scheme, . . . the absence of particularized findings does not call into question Congress' authority to legislate." *Gonzales v. Raich*, 545 U.S. 1, 21 (2005). Congress has made commerce findings in analogous statutes, such as 18 U.S.C. § 247, prohibiting damage to religious property, and 18 U.S.C. § 249, prohibiting hate crimes. *See supra* Section III(C)(3). It is proper to rely on Congress' findings for these statutes.

In the instant case, where the relationship between commerce and religion is observable through

judicial notice, explicit congressional findings are unneeded:

> In deciding jurisdictional, standing and other issues fundamental to the present litigation, the court has engaged in extensive background research, but not on the specific frauds charged. . . . It is appropriate and necessary for the judge to do research required by a case in order to understand the context and background of the issues involved so long as the judge indicates to the parties the research and conclusions, by opinions and otherwise, so they may contest and clarify.

Commodity Futures Trading Comm'n v. McDonnell, 287 F. Supp. 3d 213, 230 (E.D.N.Y. 2018) (citing Abrams, Brewer, Medwed, et al., *Evidence Cases and Materials* (10th Ed. 2017) (Ch. 9 "Judicial Notice")).

Requiring as an express element of the statute an explicit nexus to commerce is unnecessary when the link to commerce is clear. In the challenges to the abortion clinic portion of FACEA, courts have not been persuaded that a jurisdictional nexus is necessary because of the link between abortion services and interstate commerce. *See supra* Section III(C)(2); *cf.* Diane McGimsey, *The Commerce Clause and Federalism After Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole*, 90 Cal. L. Rev. 1675 (2002) (arguing that the significance of a jurisdictional element has been overempasized [sic] by lower courts and needs reworking).

V. Certification of Interlocutory Appeal

Federal practice generally does not permit appeals until final judgment is entered. *See generally Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 71 F. Supp. 2d 139 (E.D.N.Y. 1999) (reviewing the history and policy considerations of, and exceptions to, the final judgment rule). But a district court has discretion to permit an interlocutory appeal:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that *such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation*, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b) (emphasis added).

The court certifies an interlocutory appeal of this order and its memorandum and order of April 23, 2018, interpreting FACEA as constitutional. *See*

Zhang I, 2018 WL 1916617, at *28-30. These two opinions present "controlling question[s] of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal . . . may materially advance the ultimate termination of the litigation." 28 U.S.C § 1292(b).

A trial on liability and damages in this case is estimated to take two months. *See Zhang*, 2018 WL 1916617, at *41. Trying the case will require substantial time, effort, and resources of the parties, a jury, and the court.

As now projected by the court, the jury would have to make some 234 unanimous, individual decisions. The fact that interpreters will be needed almost continuously will increase trial difficulty. Issues to be separately decided are as follows (reproduced from *Zhang I*, 2018 WL 1916617, at *15):

Plaintiffs' Claims			
Cause of Action	**Plaintiffs**	**Defendants**	**Number of Issues to be decided**
Assault & Battery	Zhang Jingrong; Zhou Yanhua; Zhang Peng; Zhang Cuiping; Wei Min; Lo Kitsuen; Hu Yang; Gao Jinying; Cui Lina; Xu Ting	All Defendants	50

Bias Related Violence & Intimidation (New York Civil Rights Law § 79-n)	All Plaintiffs	All Defendants	65
Interference with Religious Freedom (18 U.S.C. § 248) (Clinic Access Statute)	Zhang Jingrong; Zhou Yanhua; Lo Kitsuen; Wei Min; Hu Yang; Gao Jinying; Cui Lina; Zhang Peng; Li Xiurong; Cao Lijun	All Defendants	50

Defendants' Counterclaims			
Cause of Action	**Defendants**	**Plaintiffs**	**Number of Issues to be decided**
Assault & Battery	All Defendants	All plaintiffs	65
New York Civil Rights Law § 79-n	Zirou	Bian Hexiang; Zhou Yanhua; Li Xiurong; Xu Ting	4

There is a substantial question as to the constitutionality of FACEA. Passed in 1994—a year before *United States v. Lopez*, 514 U.S. 549 (1995)—the Act does not contain legislative findings or a

commerce-based jurisdictional element. The Court of Appeals for the Second Circuit or the United States Supreme Court may well disagree with this court's analysis finding FACEA constitutional. Prudence requires an appeal of this issue *before* a costly two-month jury trial that may result in mistrial or require reversal.

The court noted in its opinion of April 23, 2018 that FACEA requires a broad interpretation to avoid a constitutional issue under the First Amendment. *See supra* Sections II(B), III(B). Based on this expansive reading, the tables plaintiffs use for proselytizing and protest were found to be covered under FACEA. The scope of FACEA and potential constitutional issues under the First Amendment bear on Congress' power to pass it. This issue is also certified for an interlocutory appeal.

The two questions certified for appeal are:

1) Did the United States Congress possess the power to pass FACEA as it relates to religion?

2) What is the scope of FACEA as it affects the instant dispute?

An immediate appeal of these issues is certified. The parties have ten days to file a notice of appeal. *See* 28 U.S.C § 1292(b).

VI. Conclusion

Defendants' motion to declare FACEA unconstitutional is denied. FACEA was passed in accordance with the power Congress is granted under the Commerce Clause.

This order and the portion of this court's order of April 23, 2018, dealing with the

constitutionality and scope of F ACEA, outlined in Section V, are certified for an interlocutory

appeal pursuant to 28 U.S.C § 1292(b).

SO ORDERED.

Jack B. Weinstein
Jack B. Weinstein
Senior United States District Judge

Date: May 30, 2018
Brooklyn, New York

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 7th day of December, two thousand twenty-one.

Zhang Jingrong, Zhou Yanhua, Zhang Peng, Zhang Cuiping, Wei Min, Lo Kitsuen, Cao Linjun, Hu Yang, Guo Xiaofang, Gao Jinying, Cui Lina, Xu Ting, Bian Hexiang,

Plaintiffs-Counter-Defendants-Appellees,

v.

Chinese Anti-Cult World Alliance Inc., Michael Chu, Li Hauhong, Wan Hongjuan, Zhu Zirou,

Defendants-Counter-Plaintiffs-Appellants,

Does 1-5, inclusive,

Defendants.

ORDER

Docket No.: 18-2626

Appellees filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the

request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[SEAL]
s/ *Catherine O'Hagan Wolfe*

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PLAINTIFFS, ZHANG Jingrong, ZHOU Yanhua, ZHANG Peng, ZHANG Cuiping, WEI Min, LO Kitsuen, CAO, Lijun, HU Yang, GUO Xiaofang, GAO Jinying, CUI Lina, XU Ting, and BIAN Hexiang – v – Chinese Anti-Cult World Alliance (CACWA), Michael CHU, LI Huahong, WAN Hongjuan, ZHU Zirou, & DOES 1-5 Inclusive Defendants.	No. 15-CV-1046 (SLT) (VMS)

DECLARATION OF CAYLAN FORD TO SUPPLEMENT EXPERT TESTIMONY AT EVIDENTIARY HEARING BEFORE THE HONORABLE JACK. B. WEINSTEIN UNITED STATES SENIOR DISTRICT JUDGE, APRIL 4, 2018.

I have been asked to comment further on the religious nature of various Falun Gong activities and related materials. Below are my expert opinions on these matters.

1. The rituals performed in Falun Gong practice, including meditation, prayer

thought ('FZN', or 'sending forth righteous thoughts'), slow-moving qigong exercises, and the study of scripture, are fundamentally religious in character in that they are understood to activate higher dimensional bodies, beings, and powers, and the performance of these practices in the right spirit is aimed at assimilating the adept to the qualities of this spiritual realm (i.e. the characteristic of the universe, Truth, Compassion, and Forbearance, or Zhen-Shan-Ren).

2. The study of Falun Gong scripture is known as 'Fa study' in the practice. As stated by the founder and teacher of the practice, Li Hongzhi, the very act of engaging in Fa study invokes the presence of Buddhas, Daos, and Gods. Thus, engagement in Fa study is no less religious in nature than is the study of the Old or New Testaments.

3. To the extent that worship is defined to include not only prayer, but communion with or invocation of divine forces or energy, the study of Falun Gong scripture is no less a form of worship than Christian communions with or invocations of a divine presence.

4. The second of the abovementioned practices, while not quite a literal confession prayer, serves the same goal, i.e. to cleanse the believer of his or her sins, gaps, or impurities, and to eliminate evil in the cosmos and thus assist in the salvation of sentient beings. In the context of the Falun Gong practice, this

serves an analogous function to that served by the prayer services of Christians and other denominations.

5. These activities are virtually identical in function to Christian, Hebraic or other forms of religious prayer. As more traditional forms of prayer may seek purification or salvation for oneself or others, FZN as a form of thought-prayer involves sitting quietly in meditation, clearing the mind of negative thoughts and distractions, and then projecting positive prayer-thoughts outward to purify the environment surrounding others and clean out negative factors that exist in an unseen, metaphysical plane. It is through the act of FZN that the Falun Gong practitioner activates a relationship to the cosmic characteristic of Zhen-Shen-Ren and seeks to purity both themselves and people in their surroundings of negative elements and influences.

6. For the same reasons as stated supra at ¶ 3, the sending of FZN is also a form of worship.

7. The distribution of literature by Falun Gong believers is also construed through a religious lens and performs a religious function in the Falun Gong system. This is because such acts are part of the Falun Gong religious goal of offering salvation to sentient beings — the belief being that individuals who receive such materials and accept their content as true, namely that Falun Gong is a righteous form of belief and the persecution against it is

unjust and evil, thereby secure salvation, and obtain blessings in current and future incarnations, to the same degree of the sincerity and depth of their feeling. Thus, the distribution of these materials comports with the practice of proselytizing in other religions.

8. The specific distribution of literature suggesting that passers-by separate themselves from the CCP is part of the 'tuidang' effort, which "aspires to provide individual citizens with the means to find a measure of solace, moral redemption, and freedom by severing their psychic and symbolic ties to the Communist Party."[1] As I write in my Master's thesis, the movement "looks mainly to China's religious past for inspiration and is more Confucian than humanist, placing an emphasis on individual moral redemption."[2] None of these materials ask passersby to substitute any political party for the CCP. To the contrary, the goal is merely to allow passers-by to abandon atheism which a belief system that is antithetical to the Falun Gong belief system, much as the worship of other gods is antithetical to the Jewish belief system. *See,*

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[1] Caylan Ford, *Tradition and Dissent in China: The Tuidang Movement and its Challenge to the Communist Party* at 3 (2011), available at http://search. proquest.com/openview/64c5e43504b2a1fb284bf6d66fa221ba/1?pqorigsite=gscholar&cbl=18750&diss=y.

[2] *Ibid.*, p. 23.

e.g., Exodus, at 20:3 ('You shall have no other gods before me.')."

9. In a lecture titled, "Teaching the Fa at the Great Lakes Fa Conference in North America" (December 9, 2000 in Ann Arbor), the founder of Falun Gong indicated the ways in which mere giving of a flier to a non-practitioner not only serves to eliminate negative thoughts about the Fa, but also eliminates their karma through the intervention of the gods. As such, the proselytizing about the nature of the Fa and the Falun Gong practice qualify as forms of worship that effectively invoke the presence and aid of the divine.

10. The activities that Falun Gong practitioners engage in at these tables to generate public awareness of the persecution in China, are understood as imperatives within the Falun Gong canon. In the Falun Gong universe, good and evil are determined according to the criteria of Zhen, Shen, Ren (Truth, Compassion, Forbearance). When a person acts contrary to these qualities, they incur negative karma, which must ultimately be paid for through suffering. Thus, persons who oppose Falun Gong and its principles of Zhen, Shan, Ren—whether by active participation in the suppression campaign, or simply through passive condemnation—are seen as risking karmic retribution. Falun Gong practitioners "clarify the truth" about the persecution not just to lessen the suffering of their co-religionists in China, but also to help

ordinary citizens avoid producing negative karma. In this sense, is understood to be an expression of salvific grace, motivated by selfless compassion.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on this 18th day of April 2018, in Calgary, Canada.

/s
Caylan Ford