No. 21-1429

IN THE

Supreme Court of the United States

ZHANG JINGRONG, *et al.*,

Petitioners,

v.

CHINESE ANTI-CULT
WORLD ALLIANCE, INC., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Petitioners have demonstrated that this case warrants a grant of a writ of certiorari, where: there is no split in authority on the issue presented; the statute at issue is seldom utilized and other more constitutionally firm statutes offer the same protection as the statute; the Court of Appeals for the Second Circuit decided the issue correctly in the first instance; and if the writ were granted, the Court would need to strike down the statute as unconstitutional under this Court's *Morrison/Lopez* decision, as it involves an illegitimate use by Congress of the Commerce Clause power (making harassment at places of religious worship a violation of federal law).

2. Whether five tables on the sidewalk in Flushing, Queens, New York – where Petitioners 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, 18 U.S.C. § 248.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, respondent Chinese Anti-Cult World Alliance, Inc. discloses that it is not a publicly traded company, has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

RELATED PROCEEDINGS

Zhang Jingrong v. Chinese Anti-Cult World Alliance, 15-cv-1046, U.S. District Court for the Eastern District of New York. Orders entered on April 23, 2018 and May 30, 2018.

Zhang Jingrong v. Chinese Anti-Cult World Alliance Inc., 18-1767, U.S. Court of Appeals for the Second Circuit. Order granting leave to file interlocutory appeal issued on September 5, 2018.

Zhang Jingrong v. Chinese Anti-Cult World Alliance Inc., 18-2626, U.S. Court of Appeals for the Second Circuit. Judgment entered on October 14, 2021.

Zhang Jingrong v. Chinese Anti-Cult World Alliance, Inc., No. 21-1429, Supreme Court of the United States. Petition for a writ of certiorari docketed on May 10, 2022.

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STATEMENT OF THE CASE

A. Petitioners' Claims Under the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248(a)(2)

1. This action involves claims brought by Petitioners under Section 248(a)(2) of the Freedom of Access to Clinic Entrances Act ("FACEA"), which prohibits intimidation and other wrongful acts against any person lawfully exercising his or her First Amendment right of religious freedom at a place of religious worship.

Section 248(a)(2) 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." 18 U.S.C. § 248(a)(2). A person is authorized to sue under Section 248(a)(2) only if she or he 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." 18 U.S.C. § 248(c)(1)(A); Pet. App. 5a. FACEA does not define "a place of religious worship." *Id.*

2. Petitioners, who are adherents to Falun Gong, allege that Respondents harassed, intimidated, and interfered with them when they were engaged in activities at five tables located on the sidewalk in Flushing, Queens, New York.[1] Pet. App. 18a-19a n.6. The undisputed facts

1. The petition presents a misleading and self-serving version of the alleged incidents as statements of fact (Pet. 8-9).

and Petitioners' testimony confirm that all of the alleged confrontations involved local incidents on Main Street, Flushing, such as tussling over a camera or engaging in verbal altercations. Pet. App. 18a-19a n.6.

B. The Legislative History of FACEA

1. As Respondents explained below, and in their cross-petition for a conditional writ of certiorari, the section of FACEA under which Petitioners have asserted claims – dealing with interference at places of religious worship – was introduced relatively late in the legislative process by Senator Orrin Hatch (the "Hatch Amendment"). *See* Pet. App. 175a-182a; Cross-Pet. 4-6. The genesis and focus of FACEA dealt with access to abortion clinics – not with intimidation at places of religious worship. *See* Pet. App. 175a-182a; Cross-Pet. 4-6.

Indeed, it was not until the third version of Senate Bill 636 that the Hatch Amendment was finally introduced and "[i]n a coup for the Senate conferees, the oddly-placed prohibition against interference with religious worship remained a part of the final enactment." Helen R. Franco, *Freedom of Access to Clinic Entrances Act of 1994: The Face of Things to Come?*, 19 NOVA L. REV. 1083, at 1103 n. 132, 1109 (1995) ("Senator Hatch was one of four senators of the seventeen-member Senate Labor and Human Resources Committee to vote against adoption of the proposed Senate Bill 636 on June 23, 1993.").

The Respondents "vehemently dispute each of these accounts, claiming instead that they were in fact the victims, and not the aggressors, in these incidents" (Pet. App. 17a). The undisputed facts recited by the Court of Appeals for the Second Circuit are the facts relevant to this petition.

2. The very little legislative history regarding the Hatch Amendment focused on the scope of the statutory phrase "place of religious worship," and that this phrase was not intended to include prayer on a sidewalk. Notably, during the November 16, 1993 Senate hearing on the amendment, Senator Hatch made absolutely clear that the "place of religious worship" language was *not* intended to cover anywhere someone was praying – such as the street or sidewalk – but, rather, only conduct that occurred at an established place of religious worship. Pet. App. 180. Senator Kennedy, a sponsor of FACEA, was concerned that the Hatch Amendment would actually create additional rights under FACEA for abortion protestors because protestors could claim that they were engaged in worship outside of abortion clinics. Because of his concern, Senator Kennedy clarified the scope of the Hatch Amendment:

> Mr. KENNEDY: 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.*

Pet. App. 180a (emphasis added).

Similarly, the Joint Conference Report on Senate Bill 636 also addressed Senator Kennedy's concern stating that 18 U.S.C. § 248 "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*." Pet. App. 20a-21a, 29a.

C. The Department of Justice Has Not Filed Any Criminal or Civil Actions Under FACEA

On June 29, 2016, the Attorney General's office confirmed in writing that "the Department [of Justice] has not filed any criminal or civil actions under the FACE Act" regarding violence directed at houses of worship. 202a-203a. Instead, the Department of Justice relies on other statutes, such as 18 U.S.C. § 247, to protect religious worship and religious freedom. *Id.* Section 247 "is broader in scope than the FACE Act" and includes the necessary element that the offense be in or affect interstate commerce. Pet. App. 202-203a; 18 U.S.C. § 247(b).

D. Proceedings Below

1. Petitioners filed this action in the Eastern District of New York on March 3, 2015, asserting, *inter alia*, claims under Section 248(a)(2) of FACEA. Pet. App. 17a. After the close of discovery, the parties filed cross-motions for partial summary judgment. The district court notified the parties that it was considering all claims and counterclaims on summary judgment. Pet. App. 18a. After a multi-day

evidentiary hearing, including testimony from witnesses and experts, the parties submitted supplemental briefing on the FACEA claim. Pet. App. 18a.

Respondents sought dismissal of Petitioners' FACEA claim on the ground that the tables were not "a place of religious worship" under 18 U.S.C. § 248(a)(2) because they are not used primarily for worship. Pet. App. 19a. In addition, and as set forth in detail in Respondents' conditional cross-petition, Respondents also challenged the constitutionality of the Section 248(a)(2) of FACEA on the ground that it represents an illegitimate exercise of Congressional power under the Commerce Clause of the United States Constitution. Pet. App. 160a; Cross-Pet. 6-9.

The district court rendered its decision in orders issued on April 23, 2018 and May 30, 2018. In the April 23, 2018 order, the district court denied Respondents' motion as to the Petitioners' FACEA claim, concluding that the Flushing tables qualify as "a place of religious worship." Pet. App. 147a. Despite the legislative history making clear that the ambiguous phrase "place of religious worship" cannot mean a sidewalk, the district court further held that in order to avoid violating the Establishment Clause, "[a]ny 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[.]" Pet. App. 51a.

In its May 30, 2018 order, the district court considered Respondents' facial constitutional challenge to Section 248(a)(2). Pet. App. 160a. As discussed in more detail in Respondents' conditional cross-petition, the district court denied Respondents' motion, despite having

acknowledged that Congress made no legislative findings as to how intimidation of places of religious worship affects interstate commerce, and that the statute also contains no jurisdictional element requiring that the activities at issue affect interstate commerce. Cross-Pet. 6-9, 11-20; Pet. App. 197a-200a, 203a, 208a.

At the same time, the district court acknowledged that "FACEA's constitutionality is not obvious," and that Respondents "make powerful arguments that the statute exceeds Congress' commerce power." Pet. App. 163a. Because the district court believed the issue to be so close that the Second Circuit (or this Court) might disagree, the district court certified two issues for an interlocutory appeal under 28 U.S.C. § 1292(b). Pet. App. 164a. Following entry of the district court's May 30, 2018 order, Respondents filed a petition, pursuant to 28 U.S.C. § 1292(b), seeking leave to file an interlocutory appeal of the April 23, 2018 and May 30, 2018 orders. On September 5, 2018, the Second Circuit granted Respondents' § 1292(b) petition. *See* Pet. App. 6a.

2. On appeal, a three-judge panel of the Second Circuit, in a unanimous decision, reversed the district court's grant of partial summary judgment to Petitioners and its corresponding denial of summary judgment to Respondents. Pet. App. 3a-36a. Recognizing that Petitioners' Section 248(a)(2) claim turns on the meaning of the statutory term "place of religious worship," which FACEA does not define, the court of appeals began by interpreting that term. Pet. App. 23a-30a. After reviewing the statutory text and legislative history of FACEA, the court of appeals determined that "place of religious worship" "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." Pet. App. 23a, 24a-30a. The court clarified that "[i]n 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." Pet. App. 23a n.8. The court of appeals explained that, "[i]n 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." *Id.*

3. The court of appeals then concluded 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." Pet. App. 30a.[2] Importantly, while Petitioners now assert that "[m]uch of the religious activity of Falun Gong adherents involves proselytizing the general public" (Pet. 6), the Second Circuit found that "[t]he record…contains insufficient evidence for a reasonable jury to find that the primary purpose of the tables was proselytizing, a protected religious practice" (Pet. App. 34a).[3] Indeed,

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2. Because the court of appeals held that the FACEA claim fails on this statutory ground, the majority of the court of appeals panel held that it did not reach the Commerce Clause issue. Pet. App. 22a.

3. The petition repeatedly overstates or mischaracterizes the record, as well as the Second Circuit's decision. For example,

"[t]he 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." Pet. App. 30a. As the Second Circuit explained:

> 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."

Pet. App. 35a.

4. Petitioners filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. Pet. App. 210a-211a. The three-judge panel that determined the appeal considered the request for panel rehearing, and the active members of the Court considered the request for rehearing *en banc*. *Id.* In a December 7, 2021 Order,

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Petitioners assert that they "pray regularly at the booths," citing Pet. App. 12a. Pet. 7. However, the court of appeals made no such finding. See Pet. App. 12a; *see generally id.* 2a-36a. To the contrary, the court of appeals highlighted the undisputed evidence, including the Petitioners' own testimony, showing that Petitioners "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." Pet. App. 30a.

the court of appeals denied the petition for rehearing and rehearing *en banc*. *Id.* No judge dissented from that decision or requested a vote on rehearing *en banc*.

REASONS FOR DENYING THE PETITION

I. The Petition Does Not Present a Split of Authority Warranting the Court's Consideration.

Petitioners do not allege that there is any split among the circuit courts with respect to the question presented. Instead, Petitioners attempt to fabricate a conflict based on a theory that the court of appeals misapplied the principles of statutory construction. However, Petitioners' claimed splits in authority are illusory, as none of the cited cases involve Section 248(a)(2) or the question presented here and can be explained by factual differences in the cases.

A. Petitioners Do Not Allege a Conflict With That Of Any Other Circuit Court on the Question Presented.

Petitioners fail to identify a single circuit court decision that conflicts with the Second Circuit's holding that "place of religious worship" under Section 248(a)(2) means "anywhere that religious adherents collectively recognize or religious leadership designates as a space primarily to gather for or hold religious worship activities" (Pet. App. 4a). *See generally* Pet. This is because no such conflict exists.

B. Petitioners' Claimed Splits In Authority Are Illusory.

As there is no conflict among the courts regarding the meaning of "place of religious worship" under Section 248(a)(2), the petition instead presents two alternative theories of alleged "conflict": (i) that "[t]he Second Circuit's construction of 'place of religious worship' flouts core principles of statutory interpretation" (Pet. 13-20); and (ii) that "[t]he Second Circuit's construction of 'place of religious worship' conflicts with related interpretations by this Court and others" (Pet. 20-22). However, for the reasons set forth below, these claimed splits in authority are merely illusory.

1. Petitioners' assertion that the "Second Circuit's construction of 'place of religious worship' flouts core principles of statutory interpretation" (Pet. 13-20) mischaracterizes the court of appeals' analysis. Petitioners argue that the decision below "grafts limitations onto FACEA not found in its text" and "elevates legislative history over that text—and misconstrues the very legislative history it puts on a pedestal." Pet. 13. Petitioners are, at most, disagreeing with the Second Circuit's application of a general rule of statutory construction, and are not able to show that any other court has addressed the scope of this particular statute and come to any different conclusion. The Second-Circuit's decision therefore does not involve any split in authority on the issue at hand, even assuming that the court somehow erred in concluding that the statute was susceptible to different readings and thus clearly justified considering the legislative history. *See* Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous

factual findings or the misapplication of a properly stated rule of law.").

a. Petitioners first take issue with the court of appeals' reference to the current, online edition of the Oxford English Dictionary ("OED") and argue that the court of appeals should have instead considered dictionaries contemporary with FACEA's passage. *Id.* 14-15. Petitioners list several definitions for "place" and "place of religious worship" taken from dictionaries printed between 1987 and 1993 and then conclude, without explanation, that "FACEA's protections against violence at a 'place of religious worship' must apply to places used for religious worship—no matter what the legislative history says." *Id.* 15.

In dismissing the Second Circuit's analysis on the ground that it relied on the wrong version of the OED, Petitioners fail to explain how the OED's current, online definition of "place of religious worship" differs in any material sense from the 1989 print version's definition. Indeed, there does not appear to be a meaningful difference. Whereas the current OED allegedly defines "place of worship" as "a place where believers regularly meet for religious worship, esp. a building designed for or dedicated [to] this purpose" (Pet. 14), the 1989 version of the OED defines "place of worship" as "a place where religious worship is performed; *spec.* a building (or part of one) appropriated to assemblies or meetings for religious worship: a general term comprehending churches, chapels, meeting-houses, synagogues, and other places in which people assemble to worship God" (Pet. 15 n.3).

These definitions both contemplate that a "place of worship" is a fixed structure or building designated for worship. In the least, both definitions identify an ambiguity in whether a "place of worship" must refer to an actual building. Thus, Petitioners' assertion that a review of dictionary definitions that were contemporary to FACEA's passage would have resolved the statutory analysis is false.

b. Next, Petitioners argue that the "Second Circuit failed to examine related provisions Congress enacted in the U.S. Code" which "affirm that 'place of religious worship' encompasses all places so used." Pet. 16. However, Petitioners' arguments here are wholly unpersuasive.

Petitioners first cite 18 U.S.C. § 247 and argue that "in crafting FACEA's civil protections against anti-religious violence, Congress could have chosen to extend the Church Arson Act's parallel criminalization of such violence in the narrower context of 'religious real property[.]'" Pet. 16. However, as explained above, Section 248(a)(2) was a late addition to FACEA and did not receive the same attention as Section 247 or the provisions of FACEA concerning the access to clinics.[4] Even so, the legislative history makes clear that Congress intended for it to "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*." Pet. App. 20a-21a, 29a.

4. As Respondents explain in their Cross-Petition, Congress's failure to adequately address the jurisdictional basis for Section 248(a)(2) renders it an unconstitutional exercise of Congressional power under the Commerce Clause. Cross-Pet. 9-21.

Next, Petitioners cite the Stafford Act, asserting that "Congress could have drawn from well-known provisions in the Stafford Act when it comes to the matter of federal disaster support for a 'house of worship,' 42 U.S.C. § 5172(a)(3)(C)." Pet. 16. However, the original version of the Stafford Act did not address religious locations and the statute's reference to "religious facilities" was not added until 2018, nearly 15 years after the enactment of FACEA.

c. Petitioners also lists a litany of unrelated statutes and argue that, had Congress wanted to impose primary-use or -purpose limits, it would have been clear about that intent. Pet. 16-18. This argument completely ignores the legislative history of Section 248(a)(2) that expressly addresses Congress's intention to limit "place of religious worship" to places used primarily for worship. *See* Pet. App. 20a-21a, 29a.

d. Finally, Petitioners argue that "[b]ecause FACEA's text does not qualify 'place of religious worship,' the Second Circuit should have ended its analysis there and not searched for such qualifiers." Pet. 18. However, this argument assumes, incorrectly, that no ambiguity in the statutory text exists. In reality, as the Second Circuit correctly held, the text of the statute is susceptible to different readings, which under this Court's well-settled rulings, enabled the court of appeals to consider the legislative history.

The court of appeals explained, in detail, the basis for its finding that the statutory language of Section 248(a)(2) was ambiguous with respect to "place of religious worship." Pet. App. 23a-26a. Petitioners fail to rebut this cogent analysis.

Likewise, Petitioners unpersuasively argue that the Second Circuit "failed to properly interpret the Conference Report" because it "used a nonexclusive list to divine Congress's intent" and it "misconstrued the statutory purpose reflected in the Conference Report." Pet. 19. These arguments misstate both the court of appeals' decision, as well as the Congressional Report. *See* Pet. App. 26a-30a.

2. Petitioners' next argument, that the "Second Circuit's construction of 'place of religious worship' conflicts with related interpretations by this Court and others" (Pet. 20-22), is entirely unfounded.

Only one of the cases that Petitioners identify to allege to a "conflict" with how the Second Circuit "address[ed]… 'place of religious worship'" (Pet. 21-22) even addressed Section 248(a)(2). *See New Beginnings Ministries v. George*, 2018 WL 11378829 (S.D. Ohio Sept. 28, 2018). Petitioners assert that the court in *New Beginnings Ministries* "cited with approval Judge Weinstein's interpretation of 'place of religious worship.'" Pet. 22 (citing *New Beginnings Ministries*, 2018 WL 11378829, at *8). However, there, the district court did not address the question presented here and the reference to Judge Weinstein's decision was merely dicta. Moreover, the decision predates the Second Circuit's reversal of the district court's interpretation of "place of religious worship." This lower court decision – not by a court of appeals – presents no split in authority that this Court needs to resolve.

The other cases identified by Petitioners as allegedly conflicting with the Second Circuit's decision do not address Section 248(a)(2) and, thus, have no bearing

on this case, and create no "conflict" in authority as to this statute. *See Daniel v. Paul*, 395 U.S. 298 (1969) (interpreting "place of entertainment" under the Civil Rights Act of 1964, 42 U.S.C. §2000a(b)(3)); *States v. Baird*, 85 F.3d 450, 454 (9th Cir. 1996) (same); *United States v. DeRosier*, 473 F.2d 749, 751-52 (5th Cir. 1973) (same); *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001) (interpreting the application of the Americans with Disabilities Act of 1990's to a "place of public accommodation"); *Bormuth v. Whitmer*, 548 F. Supp. 3d 640 (E.D. Mich. 2021) (lawsuit challenging the constitutionality of Governor's executive order exempting religious worship from restrictions on gatherings put in place in response to pandemic); *Mullen v. Erie Cnty. Comm'rs*, 85 Pa. 288 (1877) (holding that, under Pennsylvania's constitution, state statute exempting "churches, meeting-houses or other places of stated worship" from taxation did not exempt property on which a church was being constructed); *Kurman v. Zoning Bd. of Adjustment of City of Philadelphia*, 351 Pa. 247 (1945) (holding that setback requirements in city's zoning ordinance could constitutionally be applied to properties used for church purposes).

Accordingly, each of the purported conflicts alleged by Petitioners are illusory and there is no split in authority on the question presented here.

II. Petitioners Vastly Overstate the Importance of the Question Presented.

Unable to identify any direct conflict with the Second Circuit's decision, Petitioners claim that "[t]he Second Circuit's construction of 'place of religious worship' defies this Court's constitutional commands" (Pet. 22-

32) and attempt to justify certiorari by conjuring up a parade of horribles they claim will result from the court of appeal's decision. Petitioners insist that review is warranted because the Second Circuit's construction of "place of religious worship" "sparks a constitutional crisis further warranting review by forcing courts to become excessively entangled with religious questions" (Pet. 22) and "results in religious discrimination" (Pet. 28). Pet. 22-32. Petitioners also argue that "[t]he scope of FACEA's protections against violence at a 'place of religious worship' poses a substantial question of statutory and constitutional law that merits this Court's immediate review." Pet. 33, 34-36. These fears are all unfounded.

1. Petitioners' desperate attempt to claim that some great injustice will be done by the Second Circuit's holding ignores the reality that civil claims have rarely been asserted under this statute (as other, constitutionally firm, state and local laws offer protection from threats and attacks at places of worship) and few, if any, criminal charges have been brought for violations of Section 248(a)(2). Indeed, the Department of Justice has admitted that it does not rely on FACEA to prosecute cases of violence directed at houses of worship or interference with the free exercise of religion, in light of other broader, and more constitutionally valid, statutes being available, such as 18 U.S.C. § 247. Pet. App. 202a-203a.

Furthermore, the amicus brief submitted by West Virginia and twenty-three other states ("*amici* States") seems to confirm that Section 248(a)(2) is rarely, if ever, employed by the states. *See* Brief of *Amici* States as Amici Curiae in Support of Petition. In their amicus brief, the *amici* States contend that "[u]ncorrected, [the

Second Circuit's] interpretation could unjustifiably leave our residents at risk when they practice the many faiths their consciences dictate." *Id.* at 5. Yet, nowhere in their brief do the *amici* States identify even a single example of a state or federal prosecution brought under FACEA for a violation of Section 248(a)(2). Presumably, if a broad application of Section 248(a)(2) was as essential to protecting individuals exercising their First Amendment right of religious freedom as *amici* States claim, then they would have cited to actual examples of its use.

2. Moreover, Petitioners (and their amici) ignore that there are other state and federal statutes that protect the free exercise of religion, and protect against threats or attacks made against religious organizations or locations. As noted above, for example, the Justice Department generally relies on other, more constitutionally valid, statues, such as 18 U.S.C. §§ 247 & 249. Pet. App. 192a, 202a-203a. In addition, in their brief, the *amici* States emphasize the "States' consistent emphasis on religious freedom and free exercise" and identify twenty-one States which have passed laws or amendments that resemble the federal government's Religious Freedom Restoration Act. Brief of *Amici* States as Amici Curiae in Support of Petition at 13-14. Thus, any effect that the Second Circuit's interpretation of Section 248(a)(2) may have on its applicability would be mitigated by the availability of these other statutes. The reality is that the sky will not fall if the Second Circuit's reasonable reading of the statute remains the law, unless or until other courts of appeals disagree with the ruling, and a split in authority needs to be resolved.

III. This Case is a Poor Vehicle to Resolve the Question Presented.

Even if the question presented warranted certiorari – *which it does not* – the Court should deny the petition because this case would present a poor vehicle to resolve the question presented.

1. The interlocutory nature of the Second Circuit's decision further warrants denial of the petition. This Court ordinarily does not review cases in an interlocutory posture absent a circuit split or some exceptional circumstance that counsels in favor of immediate review. *See Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); *see also* Stephen M. Shapiro, et al., *Supreme Court Practice* § 4.I.18, at 282 (10th ed. 2013) ("Ordinarily, this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." (internal quotation marks omitted)). There are state law claims that exist in this case and need to be tried. The Petitioners may well not be able to prove that any wrongful conduct – threats, attacks – even occurred. Thus, Petitioners are asking this Court to intervene in the middle of the case, when they may not even prove the related state law claims that make the federal statute here largely superfluous.

It is true that if the circuit courts were divided on the legal question presented here, interlocutory intervention

by this Court might be less extraordinary. However, as set forth above, the Second Circuit's interpretation of "place of religious worship" under Section 248(a)(2) presents no split in authority.

2. Finally, this case presents no emergency. The law professor writing the Petitioner's brief is more interested in an academic issue, rather than a truly important case warranting use of this Court's precious time. As the district court long ago recognized: "Since the instant case was brought, physical confrontations have subsided. The parties appear to have reached a modus vivendi. The New York police are well in control of the situation." Pet. App. 52a.

IV. The Second Circuit Correctly Decided the Issue in Any Event, and Thus There is No Crying Need For This Court's Intervention

Finally, the Court should deny review for the additional reason that the Second Circuit correctly decided the statutory interpretation issue at hand. The Second Circuit correctly held that Section 248(a)(2)'s reference to a "place of religious worship" is ambiguous and, therefore, the court of appeals' review of the legislative history was warranted.

1. The plain text of "a place of religious worship" can obviously be read to suggest to a reasonable reader some fixed location of religious worship, such as a church, synagogue or mosque.

"The meaning of a word or phrase cannot be determined in isolation, but must be drawn from the

context in which it is used." *In re September 11 Property Damage Litigation*, 650 F.3d 145, 155 (2d Cir. 2011). "Whether a statutory term is unambiguous, however, does not turn solely on dictionary definitions of its component words." *Yates v. United States*, 135 S. Ct. 1074, 1081 (2015). "Rather, the plainness or ambiguity of statutory language is determined not only by reference to the language itself, but as well by the specific context in which that language is used, and the broader context of the statute as a whole." *Id*. at 1081-82.

2. Because the Second Circuit correctly found that the phrase "place of religious worship" was ambiguous and susceptible to different readings (some more narrow, and some more broad), as a matter of law the court of appeals legitimately considered the statute's legislative history to help understand the legislature's intention as to what it was criminalizing under federal law. This is precisely what the Second Circuit did. *See* Pet. App. 26a-30a.

It is well-settled that when faced with an ambiguity in a statute, courts must turn to the legislative history to discern what Congress actually meant. *E.g., Hill v. Del. N. Cos. Sportservice, Inc.*, 838 F.3d 281, 288 (2d Cir. 2016) ("Because we are" faced with textual ambiguity, we turn to the legislative history…"); *United States v. Hoskins*, 902 F.3d 69, 81 n. 5 (2d Cir. 2018) ("As a general matter, we may consider reliable legislative history where, as here, the statute is susceptible to divergent understandings and, equally important, where there exists authoritative legislative history that assists in discerning what Congress actually meant.").

Indeed, even if a court believes that the plain text appears to favor one reading, a court should still consider legislative history if such history contains a "clearly expressed legislative intention" contrary to what the language could be read to suggest. *E.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987) ("[T]he plain language of this statute appears to settle the question before us. Therefore, we look to the legislative history to determine only whether there is a 'clearly expressed legislative intention' contrary to that language[.]").

Here, there can be no question that the legislative history of Section 248(a)(2) makes it absolutely clear that the phrase "a place of religious worship," was intended to mean exactly what most people would think it means: a fixed religious location such as a church, temple or mosque, and not any street corner or sidewalk where someone chose to travel and subjectively pray.

There are two important portions of the legislative history that make it clear that a place of religious worship was not intended to mean anywhere someone may pray. Senator Kennedy was concerned that Section 248(a)(2) would create additional rights under FACEA for abortion protestors because protestors could claim that they were engaged in worship outside of abortion clinics. Because of his concern, Senator Kennedy specifically asked the sponsor of the amendment, Senator Hatch, whether the statute could cover prayer on a sidewalk, and the answer was an emphatic "no":

> 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.

Pet. App. 180a.

Similarly, the Conference Report on Senate Bill 636 also addressed Senator Kennedy's concern, stating that 18 U.S.C. § 248 "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." Pet. App. 20a-21a, 29a.

Thus, the text of the statute and the legislative history of Section 248(a)(2) make it absolutely, unequivocally clear that a "place of religious worship" was not intended to cover any location or street that a person might go to, and then purport to engage in silent prayer, such as the street or on the sidewalk.

3. Moreover, multiple courts in the Second Circuit have used the exact phrase – "place of religious worship" – in applying zoning laws, often in the context of restrictions on cabarets or adult entertainment establishments. *See, e.g., Dean v. Town of Hempstead*, 163 F. Supp. 3d 59, 67 (E.D.N.Y. 2016) (analyzing a building ordinance providing that "an adult entertainment cabarets cannot be located 'within a five-hundred-foot radius of any… church or other place of religious worship'"); *Derusso v. City of Albany, N.Y.*, 205 F. Supp. 2d 16, 18 (N.D.N.Y. 2002) (addressing a zoning law that provides limitations on adult entertainment establishments, including that

"they must be located at least 1,000 feet from a church or other place of religious worship'"); *Tri-State Video Corp. v. Town of Stephentown*, 1998 WL 72331, at *6 (N.D.N.Y. Feb. 13, 1998) ("Stephentown Local Law No. 1 of 1997… prohibits adult entertainment businesses from operating within 1000 feet of any…church or other place of religious worship[.]"). The numerous zoning laws using this common phrase, and the court decisions addressing that phrase, provide clear support for the meaning of the phrase "place of religious worship" advanced by the court of appeals. Clearly, if those zoning laws and cases are to make sense, a "place of religious worship" must mean a fixed location principally used for worship, not anywhere on any street corner where one may set up a table and subjectively pray.

Indeed, if Petitioners' definition were to be applied to the many zoning laws addressed by federal courts within the Second Circuit, it could be nearly impossible for any cabaret or adult entertainment establishment to open its doors. Any group of religious followers could, under Petitioners' reading of the phrase, set up a "place of religious worship" on any street corner at any time and thereby block any cabaret or adult entertainment establishment from opening nearby. A cabaret or adult entertainment shop would not be able to identify and take into account fixed places of worship in the vicinity to make sure that it would not violate such zoning regulations.

Federal courts outside of this Circuit have similarly held that the common meaning of the phrase "place of religious worship" denotes a fixed location or building where the primary activity is religious activity, as opposed to other locations, where religious prayer may happen to occur. *Ark Encounter, LLC v. Parkinson*, 152 F. Supp. 3d 880, 923 (E.D. Ken. 2016) ("In a recent case applying

Section 5 of the Kentucky constitution, the Supreme Court used the word 'churches' interchangeably with 'a place of worship.'"); *GeorgiaCarry.Org v. Georgia*, 764 F. Supp. 2d 1306, 1317 n.13 (M.D. Ga. 2011) (finding that the term "place of worship" means a building in which a religious congregation meets, and did not encompass a residence because its primary purpose is not prayer).

Thus, this Court should deny the petition for the additional reason that the Second Circuit's decision was eminently reasonable and correct. Contrary to the Petitioner's claims, the state of American law is not in peril as a result of the Second Circuit's modest and reasonable decision, about a seldom-used statute.

V. If the Court Grants the Petition for a Writ of Certiorari, It should Also Grant Respondents' Conditional Cross-Petition

Finally, while Respondents maintain that the Court should deny the petition, if the Court decides to grant Petitioners' petition for certiorari, it should also grant Respondents' conditional cross-petition, which raises the even more important issue of whether Section 248(a)(2) represents an unconstitutional exercise of Congressional power under the Commerce Clause – the conclusion reached by Circuit Judge the John M. Walker, Jr. in his concurring opinion. While the undersigned counsel would relish the opportunity to make this winning constitutional argument in a full appeal to this Honorable Court, the reality is that this Court should not accept this case at all. The desire for the attorneys in this case to appear before this Court falls to the reality that this case does not warrant a Supreme Court review, especially at this time, when there is no split in authority on the issue at hand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. If, however, this Court decides to grant the petition, it should also grant Respondents' Conditional Cross-Petition in order to fully address the constitutional issues raised by 18 U.S.C. § 248(a)(2).

Respectfully submitted,

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