No. 21-1556

IN THE

Supreme Court of the United States

CHINESE ANTI-CULT WORLD ALLIANCE, INC., ET AL.,

Petitioners,

v.

ZHANG JINGRONG, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION

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QUESTION PRESENTED

Whether this Court should determine, without the prior review of any court of appeal, that Congress had no rational basis to conclude it could forbid acts of violence at places of religious worship based on their substantial effect on interstate commerce.

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BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION

INTRODUCTION

Unlike the lead petition, the conditional cross-petition presents a question that has not yet been addressed by any court of appeal and is unworthy of this Court's consideration in any event.

The cross-petition asks this Court to decide whether the district court erred in finding Congress had a rational basis to conclude it had power under the Commerce Clause to forbid violence at a "place of religious worship" through the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 (FACEA). But not only did the Second Circuit decline to address that constitutional question in the first instance when it (erroneously) determined that FACEA did not protect Plaintiffs' sidewalk booths as "places of religious worship," no other court of appeal has considered the question either—on a full record or otherwise.

Additionally, the matter of the constitutionality of FACEA's "place of worship" protection would almost certainly be determined in the affirmative. As the late Judge Jack Weinstein found below, "[b]ased on the evidence and common sense notions about religion, as widely practiced in the United States, . . . Congress had a rational basis for concluding that violence and intimidation at places of religious worship could substantially affect interstate commerce." Pet. App. 199a. [1] This Court's intervention on the question

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[1] Pet. App. references are to the appendix to Plaintiffs' petition for a writ of certiorari in No. 21-1429 (filed May 6, 2022).

would therefore be not only premature but unnecessary.

This Court should deny the cross-petition. If for any reason the Court disagrees, however, it should at least grant both petitions rather than denying them.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 16 F.4th 47. The order denying panel rehearing and rehearing en banc (Pet. App. 210a) is not reported. The district court opinions (Pet. App. 47a, 158a) are reported at 311 F. Supp. 3d 514 and 314 F. Supp. 3d 420.

JURISDICTION

The court of appeals entered judgment on October 14, 2021 and denied a timely petition for rehearing on December 7, 2021. On February 11, 2022, Justice Sotomayor extended the time to file a petition for a writ of certiorari until May 6, 2022, and Plaintiffs' petition in No. 21-1429 was filed on that date and docketed on May 10, 2022. Defendants' conditional cross-petition was filed on June 9, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Plaintiffs' FACEA claims are directly tied to interstate commerce.

This case arises from a multi-year campaign of violence by a hate group linked to the Chinese Communist Party (CCP) targeting the Falun Gong religious community on a busy street in Flushing,

New York. Pet. App. 74a–80a.[2] The campaign sought to eliminate fixed religious sites in Flushing that depend on an interstate network of products, donations, and Falun Gong adherents.

Falun Gong is an Eastern religion that emphasizes as a matter of faith the cultivation of truthfulness, compassion, and tolerance in daily life. CA2 App. 227. In Flushing, a Falun Gong Spiritual Center maintains five sidewalk booths in fixed spots on or near Main Street that are permitted by the police. Pet. App. 76a. At the booths, Plaintiffs pray frequently and proselytize by handing out pamphlets and literature, displaying posters, and speaking to pedestrians. Pet. App. 9a–12a, 76a. This proselytizing fulfills Falun Gong's command to spread the truth of the faith and publicize the persecution of adherents by the CCP. Pet. App. 216a. This latter witness is no mere political action, but aims to help others avoid producing negative karma and thereby attain salvation. Pet. App. 214a–217a.

Pertinently, the Falun Gong booths in Flushing depend on interstate commerce as follows:

- The Spiritual Center orders nearly 50,000 leaflets and newspapers about 50 times per year from a New Jersey printing house for use in proselytizing at the booths. CA2 App. 2214.
- The Spiritual Center also orders 75,000 books, more than 6,000 booklets, and 1,500 DVDs

[2] The facts of the case are set out in more detail in the statement of Plaintiffs' petition for a writ of certiorari (No. 21-1429), which presents the sole question addressed by the Court of Appeals—regarding the meaning of "place of religious worship" under FACEA. Facts relevant to the conditional cross-petition are set out herein.

from a Taiwanese company each year. CA2 App. 2214.

- The Spiritual Center orders about 200 banners and posters to display at the spiritual booths and other events from a California company. CA2 App. 2214.
- Out-of-state individuals donate money to the Spiritual Center to fund these purchases. CA2 App. 2215.
- Falun Gong practitioners travel across state and international borders to practice their religion at the booths. Pet. App. 200a; CA2 App. 56–57.

Defendants are affiliates of the Chinese Anti-Cult World Alliance (CACWA). Pet. App. 74a–75a. To further a violent crackdown against Falun Gong, the CCP's extrajudicial security apparatus organizes, funds, and supports a network of "Anti-Cult Associations" in China. Pet. App. 72a–74a. These associations have established foreign offshoots where Falun Gong is active, using Chinese overseas enterprises to supply funding. CA2 App. 1247–48. CACWA is one such offshoot founded in New York. Pet. App. 74a–75a. CACWA and its affiliates aim to "'eliminat[e]' . . . Falun Gong from Flushing," a goal they justify by describing believers as "subhuman" and "the scum of humanity." Pet. App. 75a.

Beginning in 2009, CACWA and its affiliates attacked and issued death threats against Falun Gong at the sidewalk booths. Pet. App. 76a, 80a. For purposes of this action, Plaintiffs endured twelve separate instances of such treatment. Pet. App. 76a–80a. For example, in April 2011 Defendant Li threatened to disappear Plaintiff Gao, declaring that

the "Chinese Embassy has a blacklist of all of you." Pet. App. 77a. Defendants also damaged the booths and proselytization materials: Defendants Zhu and Wan tore apart the spiritual booths and displays and interfered with Plaintiffs' flyers several times. *See, e.g.*, Pet. App. 77a–78a, 80a.

B. Economic activity is central to the operation of places of worship more generally.

As a prominent feature of American life, religious activities contribute billions of dollars per year to the national economy. Places of religious worship facilitate these contributions through direct expenditures, commercial services, and contributions to surrounding areas.

The preeminent empirical study on the economic contributions of religion in America found that faith-based organizations generate up to $1.2 trillion each year. Brian J. Grim & Melissa E. Grim, *The Socio-economic Contribution of Religion to American Society: An Empirical Analysis*, 12 Interdisc. J. Rsch. on Religion 1, 24 (2016). This figure amounted to 6 percent of the national gross domestic product. *See Gross Domestic Product: 4th Quarter and Annual 2016 (Third Estimate)*, U.S. Dep't Com., Bureau Econ. Analysis (Mar. 30, 2017), https://www.bea.gov/news/2017/gross-domestic-product-4th-quarter-and-annual-2016-third-estimate-corporate-profits-4th.

More directly, these economic dynamics are concentrated at places of worship. Churches and other places of worship (1) "contribute large sums of money to charitable and educational efforts that fund activities in other states;" (2) "purchase goods and services that flow in interstate commerce, both to

support the buildings themselves and many communit[y] activities;" and (3) recruit employees nationwide and "pay significant amounts of money. . . in salaries and benefits." *Church Burnings: Hearing 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 (1997) [hereinafter *Church Burnings*] (appendix to the prepared statement of James E. Johnson and Deval L. Patrick). One study of 90 churches and synagogues across three cities found that the average congregation contributed $1.7 million in economic value per year. Partners for Sacred Places, *The Economic Halo Effect of Historic Sacred Places* 6 (2016).

Places of worship generate economic value in many ways. First, congregations collect donations and dues—one study estimated that the total income of 344,894 U.S. congregations representing 150,686,156 adherents was more than $74 billion. *See* Grim & Grim, *supra*, at 8–9. Congregations spend these funds on their operations. *See id.* at 21.

Second, congregations often provide services to their members at their places of worship, such as day care and classes. One study of 90 congregations found that 34 percent of congregations had such offerings, and those offerings had a value of more than $650,000 per congregation. *See* Partners for Sacred Places, *supra*, at 7.

Third, religious congregations stimulate economic activity in surrounding areas. Visitors travel to places of worship for spiritual and entertainment purposes; more than 100,000 congregations attract visitors,

which is more than 3.3 times the number of museums that do the same. *See* Grim & Grim, *supra*, at 15.

Places of worship host community events, like weddings and funerals, that attract visitors who spend at local businesses. *See* Grim & Grim, *supra*, at 14–15, 20. Religious groups also engage in social-ministry activities, such as hosting substance-abuse support meetings or feeding the needy. *See id.* at 15–19. In fact, more than 75 percent of congregations collaborate on social programs, and almost all congregations recruit volunteers. *See id.* at 15–16. The economic value created by these activities is about $335 billion on top of the more than $80 billion in direct expenditures. *See id.* at 21.

C. The procedural history on the commerce question includes the lower court's decision to withhold judgment on it.

Seeking to defend their ability to practice their religion in peace at their booths, Plaintiffs brought claims under FACEA in the U.S. District Court for the Eastern District of New York. FACEA affords a civil remedy against anyone who "by force or threat of force or by physical obstruction, intentionally injures, intimidates, or interferes 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).

The district court issued two summary-judgment rulings. On April 23, 2018, the court granted partial summary judgment to Plaintiffs on their FACEA claims, finding that their booths are protected places of religious worship under the statute. Pet. App. 147a–148a. Then, on May 30, 2018, the court affirmed FACEA's constitutionality under the Commerce

Clause. Pet. App. 163a. In this latter opinion, Judge Weinstein relied on extensive empirical evidence showing that places of worship are hubs of interstate commerce and found that Congress had ample basis to conclude that violence against persons at those places would "deter people from participating in religious-based commercial activity," substantially affecting interstate commerce. Pet. App. 198a–204a.

On appeal by certified question, the Second Circuit reversed the district court—but only on the meaning of "place of religious worship," holding instead that Plaintiffs' booths do not qualify. Pet. App. 4a. Having resolved the case on statutory grounds, the court of appeals panel declined to pass judgment on Congress' exercise of commerce power under FACEA. Pet. App. 5a.

Nevertheless, Judge Walker wrote a concurring opinion on the Commerce Clause. Pet. App. 37a. In disagreement with the district court, he argued that FACEA does not regulate economic activity. Pet. App. 42a. In support, Judge Walker contended that worship has no connection to commerce and that only "some religious organizations" offer commercial services. Pet. App. 45a–46a. In his view, FACEA would pass constitutional muster only if it were cabined to prohibit violence targeting social services or property at places of worship. Pet. App. 46a. While conceding Congress found that damage to religious property could substantially affect commerce based on the disruption of economic activities there in the context of the Church Arson Prevention Act, Judge Walker concluded Congress could not rationally find the same as to violence against religious adherents at those places under FACEA. Pet. App. 44a–46a.

Plaintiffs' petition for rehearing was denied without comment. Pet. App. 210a–211a. On May 6, 2022, Plaintiffs petitioned for a writ of certiorari, seeking review of the Second Circuit's interpretation of the phrase "place of religious worship" in FACEA. On June 9, Defendants filed their conditional cross-petition challenging the constitutionality of FACEA—an issue that the Court of Appeals declined to address.

REASONS FOR DENYING THE PETITION

Although Plaintiffs' petition for a writ of certiorari should be granted, Defendants' conditional cross-petition should be denied.

Most directly, Defendants make no attempt in their cross-petition—nor could they—to explain why this Court should review a question not yet decided by the Second Circuit, much less any court of appeals. Rather than have this Court reach out to address the constitutionality of FACEA in the first instance, therefore, Plaintiffs respectfully submit that remand following its addressing the statutory question of FACEA's application to Plaintiffs' booths as "a place of religious worship" would be the more appropriate approach. This would not only allow the Second Circuit to address the constitutionality of FACEA in the normal course and on a considered record, the matter would most likely be resolved in Plaintiffs' favor, making this Court's involvement unnecessary.

Indeed, and in any event, Defendants are wrong on the merits of the constitutional question. As the district court correctly and thoughtfully found, because places of religious worship are hubs of economic activity, Congress could rationally conclude that violence against religious adherents at those places is inextricably connected with commercial

activity for purposes of satisfying the Commerce Clause.

I. The question presented does not merit the Court's review because it was not decided below or by any other court of appeals.

Defendants ask this Court to review whether Congress exceeded its authority under the Commerce Clause in enacting FACEA. Cross Pet. 9. But they gloss over that this question was not passed on by the Second Circuit, or indeed by any Circuit. What's more, Defendants offer no reason why this Court should abandon its normal practice to reach out to decide a question in the absence of a decision on that question below or in any court of appeals. To the contrary, should this Court rightly grant Plaintiffs' petition for a writ of certiorari and reverse, the Second Circuit can address the issue on remand.

1. The Court has repeatedly emphasized it is one "of final review, 'not of first view.'" *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). Accordingly, when the Court reverses "on a threshold question," it "typically remand[s] for resolution of any claims the lower courts' error prevented them from addressing." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1476 (2022) (quoting *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012)).

Here, the Second Circuit only construed "place of religious worship" under FACEA and found that Plaintiffs' booths do not qualify. Pet. App. 4a. Because the panel resolved the appeal on statutory grounds, it withheld judgment on the novel question of FACEA's constitutionality under the Commerce Clause. Pet.

App. 5a. As Plaintiffs explain in their petition for a writ of certiorari, the panel's definition of "place of religious worship" defies the plain text of the statute and requires inquiries forbidden by the First Amendment. And while this Court should correct those grave errors, the Second Circuit can address the commerce question in due course on remand.

2. Defendants suggest that this Court's review is warranted merely because a member of the panel commented on the Commerce Clause in a concurring opinion. Cross Pet. 9–10. This thin reed does not justify a deviation from the Court's standard practice. Where the court below did not address the question presented, this Court is "without the benefit of thorough lower court opinions to guide" the analysis. *Zivotofsky*, 566 U.S. at 201. And this is true even where one member of a panel at the court of appeals discussed the question. *See id.* (remanding for consideration of question already addressed by one member of the panel below); *cf. Cutter*, 544 U.S. at 718 n.7 (declining to address in the religious-liberty context constitutional challenges decided by the district court but not addressed by the court of appeals, stressing that the Supreme Court is "a court of review, not of first view").

If this Court were to rightly reverse the Second Circuit's decision on Plaintiffs' petition, the court of appeals can address the commerce question in due course. This is sufficient reason alone to deny the conditional cross-petition as premature.

II. FACEA falls within Congress' commerce power in any event.

A. Congress may regulate activity it has a rational basis to conclude substantially affects interstate commerce.

Congress has the power to "regulate Commerce with foreign Nations, and among the several states." U.S. Const. Art. I, § 8. Accordingly, it may regulate the following three categories of activity: (1) "the use of the channels of interstate commerce;" (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce;" and (3) "activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

The third category, which is the relevant one in this case, includes not merely commercial business but economic activity that, "viewed in the aggregate, substantially affects interstate commerce." *Id.* at 561. And to evaluate congressional action in this category, courts consider whether: (1) the regulated activity is economic; (2) the statute contains a commerce-based jurisdictional element; (3) the statute or its legislative history includes findings on the effect on interstate commerce; and (4) the link between the regulated activity and interstate commerce is not attenuated. *United States v. Morrison*, 529 U.S. 598, 610–12 (2000).

Notably, court review of the foregoing criteria is holistic; none of the considerations is dispositive and they can be considered in any order. *See, e.g.*, *Morrison*, 529 U.S. at 613–14; *United States v. Peters*, 403 F.3d 1263, 1273 (11th Cir. 2005). Furthermore, in reviewing the matter of a substantial effect on interstate commerce, courts ask only the "modest"

question of whether there was a "rational basis" for Congress to so conclude, not whether a substantial effect exists in fact. *Gonzales v. Raich*, 545 U.S. 1, 22 (2005). "Due respect for the decisions of a coordinate branch of Government demands that [the Court] invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *Morrison*, 529 U.S. at 607.

B. In forbidding violence at places of religious worship, FACEA necessarily regulates conduct that substantially affects interstate commerce.

1. As this Court has explained, a statute regulates activity that substantially affects interstate commerce when that activity "arise[s] out of or [is] connected with a commercial transaction." *Lopez*, 514 U.S. at 561. Here, the regulated activity is violence against those exercising their rights to religious freedom at places of religious worship. 18 U.S.C. § 248(a)(2). Accordingly, and as the district court found, FACEA is connected with a commercial transaction because it forbids conduct that inhibits the offering and obtaining of religion-based commercial services at places of religious worship and ensures unobstructed access to those services. Pet. App. 199a.

Among other things, attacks on adherents at places of religious worship substantially affects the commerce that flows through such places because the organizations that operate them for the benefit of such adherents do so through the purchase of goods and services in interstate commerce that would naturally be inhibited by the violence. *See Church Burnings*, *supra*, at 37 (appendix to the prepared statement of James E. Johnson and Deval L. Patrick). They also

collect and contribute funds for related activities across state lines. *See id.* Indeed, the more than 330,000 congregations in America collect more than $74 billion each year to carry on their religious activities. *See* Grim & Grim, *supra* at 8–9, 21. Many congregations also offer services like day care and classes. *See* Partners for Sacred Places, *supra*, at 7; Pet. App. 45a. And places of worship attract visitors, offer social ministry, and facilitate volunteering. *See* Partners for Sacred Places, *supra*, at 11; Grim & Grim, *supra*, at 16. The added value of this activity amounts to $335 billion. Grim & Grim, *supra*, at 21.[3]

Because places of worship are substantial sites of economic activity, the district court indeed came to the rightful conclusion that "violence and intimidation at places of religious worship can deter people from participating in religious-based, commercial activity." Pet. App. 199a. As such, "FACEA's religion provision regulates an economic class of activities." Pet. App. 198a. And this conclusion adheres to this Court's caselaw. For example, while discrimination may not be an economic activity in isolation, Congress can prohibit it at places of interstate commerce, such as hotels and restaurants. *See Lopez*, 514 U.S. at 559 (describing the prohibition on discrimination in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964) and *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964) as a regulation of "economic activity").

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[3] Defendants concede—as they must—that places of worship offer "commercial services, such as childcare." Cross Pet. 16–17 (quoting Pet. App. 45a). But as explained here, affected religious congregations participate in commerce well beyond offering commercial services.

This case illustrates the point. To proselytize at the sidewalk booths, Falun Gong practitioners order pamphlets, books, and displays that are designed and produced in other states and countries and then shipped to New York. *See* CA2 App. 2214. These materials are purchased using out-of-state donations, and practitioners travel from out of state to practice their religion at the booths. *See* CA2 App. 56–57, 2215; Pet. App. 200a. Defendants' contention that the violence here was local and unrelated to economic activity, Cross Pet. 4, 19, is false. There is no question that if Defendants prevented Plaintiffs' religious activity, the interstate commerce supporting it would cease.

In their cross-petition, Defendants echo Judge Walker's narrow view of Congress' commerce power. Cross Pet. 13–15. But as noted above, the commerce power is not so limited; rather, it includes the regulation of activities that *either* "arise out of" *or* "are connected with a commercial transaction." *Lopez*, 514 U.S. at 561; *see also United States v. Wilson*, 73 F.3d 675, 685 (7th Cir. 1995) ("[W]e find no support for reading *Lopez* as permitting only regulation *of* economic activities exclusive of regulations that reach or affect economic activities."); *United States v. Dinwiddie*, 76 F.3d 913, 920 (8th Cir. 1996) (same).

2. Indeed, this Court has repeatedly stressed the economic nature of religious organizations. For example, in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 567, 573 (1997), the Court concluded that a nonprofit corporation operating a Christian Science summer camp with "supervised prayer, meditation, and church services" was involved in interstate commerce as a purchaser

and provider of goods and services. Likewise, in *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 292, 296–99 (1985), the Court concluded that a nonprofit religious foundation was an enterprise engaged in commerce under the Fair Labor Standards Act based on operations that aimed to "preach[] and spread[] the gospel to the public" and to care for converted and rehabilitated staff. *See also United States v. Grassie*, 237 F.3d 1199, 1209 n.7 (10th Cir. 2001) (noting that places of worship generate billions of dollars in economic impact and describing the connections between religious organizations and commerce as "self-evident to an informed observer of this nation").

3. Contrary to Defendants' assertion, FACEA differs from the statutes in *Morrison* and *Lopez*. While this Court explained that "[g]ender-motivated crimes of violence are not . . . economic activity," *Morrison*, 529 U.S. at 613, the prohibition in the Violence Against Women Act lacked any element tethering the violence to places where commerce occurs. By contrast, FACEA proscribes violence only when it occurs at places of worship, and thus can interfere with the economic activities there. And while merely possessing a firearm near a school might conceivably, if rarely, disrupt the economic activities at schools, *see Lopez*, 514 U.S. at 551, FACEA's prohibition of violence against religious practitioners at places of religious worship is specifically targeted at conduct that affects economic activity.

4. Additionally, commerce-based challenges to FACEA's parallel provisions on reproductive health services are instructive. Along with banning violence at places of religious worship, FACEA bans violence

against persons seeking or providing such services. *See* 18 U.S.C. § 248(a)(1). Analyzing these provisions, courts of appeal have concluded time and again that these provisions regulate economic activity because the violence is connected to economic transactions. *See, e.g.*, *United States v. Gregg*, 226 F.3d 253, 262 (3d Cir. 2000); *Norton v. Ashcroft*, 298 F.3d 547, 556 (6th Cir. 2002); *Dinwiddie*, 76 F.3d at 921; *Cheffer v. Reno*, 55 F.3d 1517, 1520 (11th Cir. 1995). FACEA's worship protections likewise regulate economic activity because they forbid violence that deters the movement of religious congregants and the economic activities they carry out at places of religious worship.

5. Finally, and as Plaintiffs and numerous *amici* explain in support of the lead petition, the Second Circuit's interpretation of FACEA excludes many commonly used places of religious worship across a diversity of faiths. *See* Pet. 28–32 (No. 21-1429); Br. of First Liberty Institute as Amicus Curiae 9–15; Br. Amicus Curiae of the Becket Fund for Religious Liberty 21–24; Br. of Amici Curiae State of West Virginia and 23 Other States 21–22. And while some places of religious worship may lack connections to interstate commerce under the inclusive test urged by Plaintiffs and *amici* as a matter of religious liberty, this does not undermine Congress' commerce power.

Where a statute regulates activity that has a "*substantial relation to commerce*, the *de minimis* character of individual instances arising under the statute is of no consequence." *Lopez*, 514 U.S. at 558 (emphasis in original) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968)); *see also Gonzales*, 545 U.S. at 17 ("When Congress decides that the '"total incidence"' of a practice poses a threat to a national

market, it may regulate the entire class." (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971)). Because most places of worship involve commerce, Congress can prohibit violence at all such places.

C. The link between FACEA's regulation of violence at places of religious worship and interstate commerce is direct and substantial.

Because FACEA regulates violence that affects economic activity, the link between the regulated conduct and interstate commerce is direct and substantial—not "attenuated." *Morrison*, 529 U.S. at 612. When persons violently target congregants at places of worship, congregants are discouraged from attending those places and participating in the commercial, social, and other activities that take place there. *See supra* at 13–15; *see also Gregg*, 226 F.3d at 265–67 (reasoning that the violence and intimidation targeting places where commerce occurs have a "direct and substantial" link to interstate commerce because they deter the economic activity); *Norton*, 298 F.3d at 558 (same).

To be sure, this Court has found attenuation when identifying the effect of the regulated activity required piling "inference upon inference." *Lopez*, 514 U.S. at 567. In *Lopez*, for example, the government relied only on speculative chains of causation to argue that gun possession in a school zone could substantially affect interstate commerce; namely, that (1) the possessor of a firearm could display or use the firearm; (2) the gun use could be in a crime of violence; and (3) crime of violence could impose costs borne by insurance, decrease the willingness of individuals to travel to school zones, and threaten effective learning, reducing

the productivity of the citizenry and national economic well-being. *See id.* at 563–64. And while the statute in *Morrison* regulated actual and not speculative violence, the government's theory similarly relied on hypothetical chains of causation: that such violence, wherever it occurs, would deter victims from travelling, working, and making purchases. *See Morrison*, 529 U.S. at 615.

By contrast, however, FACEA requires no such inferential leaps. The statute prohibits intentionally injuring persons at places of religious worship, and, as discussed above, it is well-established that places of religious worship are sites of substantial economic activity. The causal link is therefore direct: when people interfere with such hubs of interstate commerce, transactions and services there decline.

The concurring judge below based his contrary view on an unduly narrow understanding of the economic activity of places of religious worship and its inextricable role in their operation. Specifically, Judge Walker suggested that only "some" religious entities offer "commercial services, such as childcare" and the "purchase and distribution of goods." Pet. App. 45a–46a. But economic activities at places of religious worship are not limited to a few commercial services; the average congregation collects more than $200,000 in dues or contributions that pay for goods, services, and salaries; and places of worship operate as magnets, attracting travelers and events that spur exponential economic activity. *See supra* at 5–7; Grim & Grim, *supra*, at 9.

Moreover, Judge Walker contended that "the act of worship—separate from whatever commercial endeavors religious organizations may also engage

in—is in no sense a commercial or economic activity." Pet. App. 46a. But this ignores the fact that FACEA protects not just those in some sort of isolated mental prayer at places of religious worship; rather, the statute protects anyone "lawfully exercising . . . [their] religious freedom" at such places—which, as exemplified by the present case, commonly includes the use of purchased or sold religious articles or texts, commercial space, prayer or proselytizing materials, personal travel, etc. *See supra* at 3–4. What's more, separating the supposed economic and religious activities of a religious entity is an enterprise fraught with church-state balancing concerns. *See Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970) (warning against justifying a church property-tax exemption on the degree of "social welfare services" the entity offers); *see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 193–94 (2012) (rejecting "stopwatch" approach to assess importance of ministry activity). At a minimum, it would seem a matter for the panel to address in the first instance.

The economic activity at places of worship is pervasive; and little of it would occur if congregants were deterred from participating in religious-based, commercial activities due to realistic fears of violence and intimidation.

D. Legislative findings for other religious-practice statutes show that FACEA is a commerce-based regulation.

While Congress did not make direct legislative findings about the relationship between violence at places of religious worship and interstate commerce in passing FACEA, it has done so with statutes on the same subject. Because courts look to legislative

findings solely as an aid to "evaluate the legislative judgment that the activity . . . substantially affected interstate commerce," *Lopez*, 514 U.S. at 563, findings that damage to religious real property substantially affects interstate commerce are relevant.

1. The Church Arson Prevention Act prohibits intentional damage and destruction to "religious real property," including churches, synagogues, and mosques. 18 U.S.C. § 247. Pertinently, members of Congress heard evidence that churches collect and spend funds across state lines, purchase goods and services from other states, and pay salaries and benefits to employees, some of whom are recruited nationally. *See Church Burnings*, *supra*, at 37 (appendix to the prepared statement of James E. Johnson and Deval L. Patrick). Members stressed that such "places of worship" offer "[a] wide array of social services, such as inoculations, day care, aid to the homeless" and other "[a]ctivities that attract people from a regional, interstate area." 142 Cong. Rec. S6517–04, *S6522 (1996) (statement of Sen. Kennedy). Consequently, damage to churches would diminish these economic activities and "inhibit[] the interstate travel many churches organize for their parishioners." *Church Burnings*, *supra*, at 37.

These findings likewise support the conclusion that violence against persons at places of religious worship would substantially affect interstate commerce. While "place of religious worship" is a broader category than "religious real property," the two overlap as the latter includes churches, synagogues, and mosques. Indeed, legislators specifically referenced Section 247 in passing FACEA. *See, e.g.*, H.R. Rep. No. 103-488, at 9 (1994). And the

link between the regulated activity and commerce in both statutes is nearly identical: just as damage to religious property diminishes the economic activities at such properties, violence against persons at places of worship diminishes the economic activities that occur there. Accordingly, the district court rightly looked to these findings. Pet. App. 203a.

2. Defendants argue that *Lopez* rejected looking at findings in other statutes. Cross Pet. 19–20. Not so.

In *Lopez*, this Court cautioned against looking to other findings that do not "speak to the subject matter" of the regulation under review or the relationship between the conduct and interstate commerce. 514 U.S. at 563. It did so in response to the government's argument that Congress had general expertise from regulating the possession and transfer of firearms. *See id.* Here, however, the subject is the same between 18 U.S.C. § 247 and FACEA: the effect of violent acts at places of worship on interstate commerce.

In straining to argue that 18 U.S.C. § 247 is on a different subject, Defendants try to have it both ways. But they cannot simultaneously argue that "[Section] 247 already provides strong protections for places of religious worship," Cross Pet. 21, and that 18 U.S.C. § 247 speaks to an entirely different subject than FACEA.

Unlike Section 247, rather, FACEA creates a private right of action for victims of anti-religious violence at places of religious worship and authorizes victims to obtain punitive damages and attorney's fees; it thus provides distinct and stronger protection for victims than the Church Arson Protection Act. *Compare* 18 U.S.C. § 248(c)(1), *with* 18 U.S.C. § 247.

What's more, the two statutes cover a similar subject: the protection of vulnerable communities in the exercise of the fundamental right to worship.[4]

E. The absence in FACEA of a commerce-based jurisdictional element makes no difference.

Because common sense, empirical evidence, and legislative history establish that places of religious worship are significant hubs of interstate commerce independently accounting for more than one percent of gross domestic product, the fact that FACEA includes no commerce-based jurisdictional element is of no moment. As the district court correctly held, "[r]equiring as an express element of the statute an explicit nexus to commerce is unnecessary when the link to commerce is clear." Pet. App. 204a.

Indeed, consistent with this Court's precedents, the courts of appeal have stressed that "the absence of an express jurisdictional element is not fatal to a statute's constitutionality under the Commerce Clause." *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1068 (D.C. Cir. 2003); *see also Gregg*, 226 F.3d at 263; *Norton*, 298 F.3d at 557. Rather, in such cases, courts merely "determine independently whether the statute regulates 'activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect[] interstate

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[4] Defendants' argument that the findings for Section 247 are irrelevant because that statute contains a jurisdictional element, Cross Pet. 19, ignores that such findings are only an aid to evaluate Congress' basis for concluding an activity substantially affects interstate commerce. *See Lopez*, 514 U.S. at 563; *see also id.* at 562 ("Congress normally is not required to make formal findings as to" burdens on commerce).

commerce.'" *United States v. Moghadam*, 175 F.3d 1269, 1276 (11th Cir. 1999) (quoting *United States v. Olin Corp.*, 107 F.3d 1506, 1509 (11th Cir. 1997)).

No express jurisdictional hook is therefore necessary in the text of the statute here.

CONCLUSION

For these reasons, the conditional cross-petition for certiorari should be denied.

Respectfully submitted,

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