No. 21-___

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Freedom of Access to Clinic Entrances Act (FACEA) prohibits violence against persons exercising their right to religious freedom at a "place of religious worship." 18 U.S.C. § 248(a)(2). Although FACEA does not modify the term, the Second Circuit held that "place of religious worship" should reach only places "religious adherents collectively recognize or religious leadership designates as a place primarily to gather for or to hold religious worship activities."

The question presented is:

Whether the statutory text and First Amendment permit FACEA's protections from violence at a "place of religious worship" to apply only to places religious adherents collectively recognize or religious leadership designates as a place primarily to gather for or to hold religious worship activities.

PARTIES TO THE PROCEEDINGS

Petitioners were the appellees in the court of appeals and the plaintiffs and counter-defendants in the district court. They are Zhang Jingrong, Zhou Yanhua, Zhang Peng, Zhang Cuiping, Wei Min, Lo Kitsuen, Cao Lijun, Hu Yang, Gao Jinying, Cui Lina, and Xu Ting.

Bian Hexiang, who recently passed away, was an appellee in the court of appeals and a plaintiff and counter-defendant in the district court.

Respondents were the appellants in the court of appeals and the defendants and counter-plaintiffs in the district court. They are the Chinese Anti-Cult World Alliance, Inc.; Michael Chu; Li Huahong; Wan Hongjuan; and Zhu Zirou.

Does 1-5 were defendants in the district court.[1]

RELATED PROCEEDINGS

United States District Court (E.D.N.Y.):

Zhang Jingrong v. Chinese Anti-Cult World All. Inc., 311 F. Supp. 3d 514 (E.D.N.Y. 2018).

Zhang Jingrong v. Chinese Anti-Cult World All. Inc., 314 F. Supp. 3d 420 (E.D.N.Y. 2018).

United States Court of Appeals (2d Cir.):

Zhang Jingrong v. Chinese Anti-Cult World All. Inc., 16 F.4th 47 (2d Cir. 2021), petition for reh'g denied, Dec. 7, 2021.

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[1] The Second Circuit's caption listed Plaintiff Cao Lijun's name as "Linjun" and Defendant Li Huahong's name as "Hauhong." Both lower courts also erroneously included Guo Xiofang as a plaintiff.

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PETITION FOR A WRIT OF CERTIORARI

Zhang Jingrong et al. respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

INTRODUCTION

Petitioners practice Falun Gong, an Eastern religion that originated in China and is subject to violent persecution by the Chinese Communist Party. Drawn by America's promise of religious freedom, Petitioners now practice in Flushing, Queens. There, they fulfill Falun Gong's commandment to assist in the salvation of others by praying and proselytizing at sidewalk booths on the neighborhood's Main Street.

Yet, Petitioners face anti-religious violence on American soil as well—even on the streets of New York. On at least twelve documented occasions, individual Respondents, who are affiliates of the CCP-backed Chinese Anti-Cult World Alliance, committed or threatened acts of violence against Petitioners—including beatings, death threats, and destruction of religious materials—while they were worshiping at their booths. Petitioners thus seek protection under 18 U.S.C. § 248(a)(2), a provision of the Freedom of Access to Clinic Entrances Act (FACEA) which forbids violent acts and threats against anyone engaged in religious activity at "a place of religious worship."

On summary judgment, the definition of "place of religious worship" became the central issue. At the district court, the recently deceased Judge Jack Weinstein found that FACEA's plain text and the First Amendment require "place of religious worship" to be interpreted simply as a place used for religious worship, and that Petitioners' booths meet this test.

But the Second Circuit reversed, insisting that "place of religious worship" can reach only those places which "religious adherents collectively recognize or religious leadership designates as a place primarily to gather for or to hold religious worship activities," and that the booths fail to meet these further conditions.

The Second Circuit's decision, however, defies this Court's precedents on statutory interpretation, conflicts with other courts' constructions of similar terms in other statutes, and leads to unnecessary collisions with the First Amendment.

Time and again, this Court instructs that "[w]hen a term goes undefined in a statute, [courts] give the term its ordinary meaning." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). The Second Circuit flouted this command by grafting three conditions onto FACEA's text. Relying on a single line from a conference report listing a "church, synagogue, or other structure or place used primarily for religious worship" as *examples* of places of worship protected by FACEA, the Second Circuit held that *only* places "primarily" for worship are so protected. Moreover, the court added—and this time with no support in the legislative history or elsewhere—that a place qualifies as primarily for worship only if a religious "collective" or "leader" deems it so. But FACEA's text contains no such limitations; indeed, the ordinary meaning of the statutory language, as confirmed by contemporary dictionaries and parallel Code provisions, is to the contrary. And this Court has repeatedly emphasized, "[o]nly the written word is the law." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

By insisting that the place where a victim of anti-religious violence was worshiping must somehow be

deemed a space "primarily" for worship, the Second Circuit has excluded a vast amount of vulnerable activity from FACEA's protections. The court's test not only left unprotected Petitioners' prayer and proselytizing at booths on the streets of Flushing, but it would also exclude pilgrims chanting on the way to shrines, congregations conducting a sunrise Easter service at a public park, Muslim taxi drivers kneeling for prayer in an airport parking lot, or Native Americans conducting spirit quests in a National Forest. And if anything, worshippers in such places may be even more likely targets of bigoted violence than those gathered in a traditional house of worship.

To worsen matters, under the Second Circuit's test, the "primary purpose" finding is made not by looking to the observable fact of whether the location of the attack was being used for religious worship, but by divining the understanding of such use by an undefined religious "collective" or "leadership." This task will enmesh the courts in tricky questions about whose authority to consult and how to determine what they say—when all the statute asks is whether the attack occurred at a "place of religious worship." *See Thomas v. Rev. Bd.*, 450 U.S. 707, 716 (1981) ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith.").

In addition to creating entanglement problems that did not exist in the statute Congress enacted, the Second Circuit's test also violates the Constitution by preferring some religions over others in at least two ways. First, it privileges faiths that worship in single-use spaces—e.g., churches, mosques, synagogues—

over those that choose or need to worship in mixed-use spaces—e.g., outdoors, schools, homes. *See Larson v. Valente,* 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). Second, the circuit court's test favors religions with hierarchical or congregational control of the worship experience as opposed to those that are decentralized or outside the mainstream. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020) (warning against "privileging religious traditions with formal organizational structures over those that are less formal").

This discrimination is especially ironic in light of our country's founding struggle for religious liberty. In the decades before the First Amendment, one of the established church's most notorious abuses was its attempt to favor fixed congregations by banning the worship services of itinerant preachers during the Great Awakening. *See* Elisha Williams, *The Essential Rights and Liberties of Protestants*, *in* Political Sermons of the American Founding Era 52 (Ellis Sandoz ed., 1998). The Second Circuit has (no doubt unintentionally) replicated one of the practices that inspired our revolt against religious establishment.

The Court should grant certiorari and hold that a "place of religious worship" for purposes of statutory protections against religious violence is the place the victims used for religious worship.

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) 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. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion . . . ."

The Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248, provides in relevant part:

> **(a) Prohibited Activities**.—Whoever—
>
> **(2)** 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;
>
> . . . shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c) . . . .

STATEMENT OF THE CASE

A. Factual background

Petitioners practice Falun Gong, an Eastern religion founded by Li Hongzhi in China in the early 1990s. Pet. App. 6a. Li's teachings—which are akin to gospel in the faith—describe the purpose of life, the means of salvation, and the fundamental principles of truthfulness, compassion, and forbearance. Pet. App. 63a-64a. In response to its growth in China, however, Falun Gong has been persecuted by the Chinese Communist Party—which is known to use detention and torture to force practitioners to renounce the faith. Pet. App. 72a-74a.

Falun Gong practice requires frequent ritual exercise, scriptural study, prayer, and proselytization. Pet. App. 212a-213a. Each of these activities "invoke[s] the . . . aid of the divine" and is therefore a form of worship. Pet. App. 216a. For instance, prayer—which adherents perform at least every six hours and call "sending forth righteous thoughts"—is a means of eliminating evil and saving others. Pet. App. 137a, 213a-214a.

Much of the religious activity of Falun Gong adherents involves proselytizing the general public, which Li Hongzhi described as "truth-clarifying work." Pet. App. 8a. This helps others achieve salvation through recognition that "Falun Gong is a righteous form of belief and persecution against it is unjust." Pet. App. 214a-216a.

Given these outward-facing dimensions of the faith, and because Falun Gong is a decentralized, non-hierarchical religion that traditionally lacks fixed worship spaces and clergy, its believers practice in

public spaces—like parks, schools, community centers, and outdoor tables. Pet. App. 7a, 66a-67a.

Many Falun Gong practitioners, including some Petitioners, have fled persecution in China in hope of freely practicing their faith in America. Pet. App. 74a. A vibrant Falun Gong community has since developed in Flushing, Queens, where Petitioners now practice.

In Flushing, Petitioners rent a small office suite for meditation and scriptural study, which they call "the Spiritual Center." Pet. App. 66a. They also perform ritual exercises at local parks. Pet. App. 33a. And, most relevantly here, Petitioners pray and proselytize daily at five sidewalk booths that the Spiritual Center maintains. Pet. App. 76a. These booths, which are located in fixed spots within three blocks of the Center, are authorized for this use by the police. Pet. App. 76a.

Petitioners pray regularly at the booths. Pet. App. 12a. They also hand out pamphlets, display posters, and speak to pedestrians there. Pet. App. 9a-11a. To fulfill Falun Gong's integrated command to spread the truth about the religion while publicizing the CCP's persecution of it, Petitioners' proselytization materials describe both the practice of Falun Gong and the CCP's abuse of its adherents. Pet. App. 15a, 216a. In the Falun Gong faith, distributing materials on these points is a distinctly religious act intended to "help ordinary citizens avoid producing negative karma." Pet. App. 216a-217a. Accordingly, Falun Gong adherents preach against the CCP and its abuses as a means of encouraging others to "abandon atheism," which is "antithetical to the Falun Gong belief system." Pet. App. 215a.

In 2011, Petitioners began to suffer violence while praying and proselytizing at the booths. Pet. App. 76a. The Respondent aggressors are affiliates of the CCP-backed Chinese Anti-Cult World Alliance (CACWA), whose stated mission is to "educate society about the dangers of the Falun Gong cult." Pet. App. 72a-75a. CACWA members call for the violent suppression of Falun Gong practitioners, whom they label "malignant tumors" and "the scum of humanity." Pet. App. 75a.

On multiple occasions, CACWA and its affiliates have also resorted to physical attacks and threats of violence against Flushing's Falun Gong community. Pet. App. 76a. For purposes of this action, Petitioners endured twelve separate instances of such treatment. Pet. App. 76a-80a. To name just a few:

- Respondent Wan knocked religious materials off the booth Petitioner Zhang was tending and said, "I will chase you to the end of the world and I will kill all of you . . . . It's no use for you to call the police." Pet. App. 80a.
- Respondent Li physically attacked and verbally abused Petitioner Lo while he tended one of the booths. Pet. App. 78a.
- Respondent Zhu attacked Petitioner Zhou while he was distributing flyers at a booth; Zhu tore down displays from the booth and struck Zhou several times. Pet. App. 77a-78a.
- Respondent Wan threatened Petitioners Cui and Hu, evoking a CCP practice of harvesting organs from Falun Gong members by saying, "You are worse than a dog and I will take out your heart, your liver, and your lungs. I will

> choke you to death . . . . Somebody will be here to kill you." Pet. App. 77a.

B. Summary judgment proceedings

Seeking to end this violence, Petitioners sued in the Eastern District of New York and asserted claims under the Freedom of Access to Clinic Entrances Act (FACEA) of 1994. FACEA affords a civil remedy against those who "by force or threat of force or by physical obstruction, intentionally 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).[2]

At the close of discovery, each side moved for summary judgment. Pet. App. 86a. After briefing and a multiple-day hearing with testimony from witnesses and experts, the district court granted partial summary judgment to Petitioners on the FACEA claim. In so ruling, Judge Weinstein made three relevant findings. First, he found that Falun Gong is a religion for purposes of U.S. law. Pet. App. 139a.

Second, Judge Weinstein found that FACEA's protections at "a place of religious worship" cover "any place a religion is practiced." Pet. App. 51a. In so interpreting FACEA, the court looked to the ordinary meaning of "place of religious worship," using dictionary entries from the time Congress passed the Act. Pet. App. 126a. Additionally, the court contrasted the narrower terminology used in the Church Arson Act (protecting "religious real property") with the broader terminology in FACEA (protecting "place of

[2] The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 and 1367.

religious worship"). Pet. App. 126a. According to the court, this difference suggests the intent to protect "*all* places of religious worship and not just fixed structures in the FACEA." Pet. App. 126a. In further support of its reading, the court observed it would violate the Establishment Clause to treat "religions differently based on whether the religion has fixed temples or prayer takes place in transitory locations." Pet. App. 124a. Because the court found the phrase "place of religious worship" to be unambiguous, it refused to rely on legislative history, stressing that "the cart of legislative history is pulled by the text, not the other way around." Pet. App. 126a. (quoting *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 137 (2d Cir. 2018) (Lohier, J., concurring)).

Third and finally, Judge Weinstein applied the law to the facts and concluded that there was no genuine dispute of material fact that the sidewalk booths are a "place of religious worship" under FACEA. Pet. App. 147a-148a. In so finding, the court relied on expert testimony and observed that Petitioners "proselytize and meditate—both recognized forms of worship—[at the booths]." Pet. App. 167a-168a. The court also pointed to analogous worship that occurs outside houses of worship, including Hare Krishna chanting, public Pentecostal proofs of faith, and the prayers of civil-rights marchers. Pet. App. 124a-125a.

Respondents later argued that FACEA's religious-liberty protections exceeded Congress's commerce power. But Judge Weinstein disagreed, finding that "Congress had a rational basis for concluding that violence and intimidation at places of religious worship could substantially affect interstate

commerce," and pointing to empirical evidence of economic activity at places of worship. Pet. App. 199a.

Notwithstanding its findings on FACEA's scope and constitutionality, the district court certified those questions for interlocutory review. Pet. App. 164a.

C. The Second Circuit's decision

The Second Circuit reversed, holding that "place of religious worship" 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.

In its analysis, the panel first looked to the online edition of the *Oxford English Dictionary* (*OED*) and its definition of "place of worship" as "a place where believers regularly meet for religious worship, esp. a building designed for or dedicated [to] this purpose." Pet. App. 25a. Although the panel acknowledged that this entry covers a place where adherents so meet for worship, it supposed that the follow-on clause could indicate a place "whose primary purpose is" worship. Pet. App. 25a. The panel thus deemed the phrase ambiguous and looked elsewhere for meaning. Pet. App. 25a-26a.

Then, relying on a line in FACEA's Joint Conference Report stating that the Act applies only to places of worship "*such as* a church, synagogue or other structure or place used primarily for worship," the panel held that the Act applied *only* where the primary purpose of the place is worship. Pet. App. 27a (emphasis added). The court added—though this time without any citation—that this primary purpose must

be designated by religious leadership or collectively recognized by religious adherents. Pet. App. 28a-29a.

Rather than remanding to the district court to apply its new test, the panel then granted summary judgment to Respondents on the view that the booths are not a place of religious worship. In so holding, it reasoned that "political protest activity against the Chinese Communist Party" predominated over the "religious practice [that] took place at the tables." Pet. App. 30a. The court acknowledged that Petitioners' meditation and prayer at the booths are religious activities, but it dismissed evidence that Falun Gong regards its attempts to publicize its persecution by the CCP as another essential aspect of its religion. Pet. App. 31a-35a. This method contrasts with Judge Weinstein's reliance on expert testimony that Li Hongzhi's command to proselytize against the CCP is a call to religious worship. *Compare* Pet. App. 34a-35a, *with* Pet. App. 67a, 147a-148a.

Because the panel found that Petitioners' booths are not a place of religious worship, it did not address the commerce issue. Pet. App. 36a. In concurrence, however, Judge Walker reasoned that Section 248(a)(2) exceeded Congress's authority. Pet. App. 43a.

Petitioners' petition for rehearing was denied without comment. Pet. App. 210a-211a.

REASONS FOR GRANTING THE PETITION

Respondents, who are members of an American anti-Falun Gong hate group connected to the Chinese Communist Party, violently attacked Petitioners while they were praying and proselytizing at street booths authorized by the police for that purpose. The

question is whether these booths are a "place of religious worship" under FACEA.

This case warrants review because the Second Circuit's test flouts interpretive precedent and poses a grave threat to religious liberty—both generally and for vulnerable religious believers in particular. Not only does FACEA's plain text make clear that its protections against violence at a "place of religious worship" include all places so used, to hold otherwise would unduly entangle courts in religious decisions and discriminate against minority faiths.

I. The Second Circuit's construction of "place of religious worship" flouts core principles of statutory interpretation.

The Second Circuit's decision defies two core principles of statutory construction, severely reducing FACEA's coverage.

First, the decision grafts limitations onto FACEA not found in its text. Second, the decision elevates legislative history over that text—and misconstrues the very legislative history it puts on a pedestal. The overall effect is to gut protections against violence for vulnerable religious practitioners—precisely the persecution FACEA intended to prevent.

The decision cries out for this Court's review.

A. The panel's decision imposes atextual limits on FACEA's coverage.

The task of interpreting a statute starts with the text. *See Murphy v. Smith*, 138 S. Ct. 784, 787 (2018) ("As always, we start with the specific statutory language in dispute."). And where the meaning of the statutory text is plain and unambiguous, separation

of powers demands the analysis end with the text as well. *See Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear.").

The Second Circuit's decision, however, defies this cardinal principle of statutory construction. Specifically, the court of appeals limited FACEA's protections to places "religious adherents collectively recognize or religious leadership designates as a place primarily to gather for or to hold religious worship activities." Pet. App. 23a. But none of these qualifiers is in the text. Rather, the meaning of the relevant language is plain and straightforward: The statute applies to "a place of religious worship."

1. The Second Circuit first approached the task of statutory interpretation by consulting dictionaries—but it used the dictionaries in an extraordinary way. Specifically, the Second Circuit ignored this Court's instruction to "interpret[] the statute in accord with the ordinary public meaning of its terms *at the time of enactment*." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020) (emphasis added).

In defining "place of religious worship," the panel relied on the *OED*. Oddly, however, instead of using the entry in the printed edition available at the time FACEA was enacted, it relied on the *current*, *online* entry. Pet. App. 24a. The online edition defines "place of religious worship" as "a place where believers regularly meet for religious worship, esp. a building designed for or dedicated [to] this purpose." *Place*, Oxford English Dictionary, https://perma.cc/LC2T-ZPME (archived Apr. 28, 2022).

But turning to dictionaries contemporary with FACEA's passage—including the print edition of the

OED—"a straightforward rule" defines "place of religious worship." *Bostock*, 140 S. Ct. at 1741. Namely, a "place of religious worship" is a place used for such worship. *Webster's Third New International Dictionary* 1727 (1993) (defining "place" as a "locality used for a special purpose," and providing "place of worship" as an example); 7 *Oxford English Dictionary* 927 (2d ed. 1989) (defining "place of worship" as "a place where religious worship is performed"); *Merriam-Webster's Collegiate Dictionary* 887 (10th ed. 1993) (defining "place" as a "locality used for a special purpose"); *Random House Dictionary of the English Language* 1478 (2d unabr. ed. 1987) (defining "place" as a spot "used for a particular purpose," and providing "place of worship" as an example).[3]

The "words employed" should have been "taken as the final expression of the meaning intended." *United States v. Mo. Pac. R.R.*, 278 U.S. 269, 278 (1929). With the commanding language of the dictionaries, "it is not necessary to go any further." *Babb v. Wilkie*, 140 S. Ct. 1168, 1172 (2020). Contrary to the Second Circuit's approach, therefore, 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. "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only

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[3] The *OED* print edition's full entry defines the phrase "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." 7 *Oxford English Dictionary* 927 (2d ed. 1989).

the written word is the law, and all persons are entitled to its benefit." *Bostock*, 140 S. Ct. at 1737.

2. In its quest to ascertain plain meaning, the Second Circuit did not stop at mishandling dictionaries; it then failed to examine related provisions Congress enacted in the U.S. Code. *See Boumediene v. Bush*, 553 U.S. 723, 776 (2008) ("When interpreting a statute, we examine related provisions in other parts of the U.S. Code."). Those parallel provisions affirm that "place of religious worship" encompasses all places so used.

Indeed, an analysis of the Code leaves "[n]o doubt[] Congress could have taken a more parsimonious approach." *Bostock*, 140 S. Ct. at 1739. For example, 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," 18 U.S.C. § 247. *See* Pet. App. 126a (Judge Weinstein highlighting the contrast between FACEA's protection of "place of religious worship" and the Church Arson Act's protection of "religious real property"). Or, 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).

Similarly, other provisions show that Congress makes its intent clear when it wants to impose primary-use or -purpose limits. *See, e.g.*, 47 U.S.C. § 392(a)(1) (requiring certain grant applicants to show that they are applying on behalf of entities "organized primarily for educational or cultural purposes"); 42 U.S.C. § 3936(a)(1) (authorizing entity to take actions

with respect to "housing and related facilities primarily for the benefit of families and individuals of low or moderate income"); 12 U.S.C. § 3018(a) (limiting entities from making loans for "any structure used primarily for residential purposes"); 26 U.S.C. § 3309(b)(1) (exempting services performed for "an organization which is operated primarily for religious purposes"); 7 U.S.C. § 2014(g)(2)(B)(iii) (including mobile homes "used primarily for vacation purposes" as assets limiting access to a welfare benefit). If Congress wanted to protect only places "that religious adherents collectively recognize or religious leadership designates as a place primarily to gather for or to hold religious worship activities," it would have said so.

And as it has in other statutes, Congress could have written "primary place of" religious worship. *E.g.*, 15 U.S.C. § 3719(g)(3) (using "primary place of" to limit business eligibility to win a cash prize); *see also Bostock*, 140 S. Ct. at 1739 ("As it has in other statutes, it could have . . . written 'primarily because of' [in Title VII]."). Or, Congress could have written "designated place of" religious worship. *E.g.*, 7 U.S.C. § 9(6) (using "designated place of" to limit the hearings at which a witness may be required).

Other provisions of the Code also show that when Congress wants to narrow the phrase "place of," it makes that intent clear with modifiers. *See, e.g.*, 18 U.S.C. § 793(f) (using "proper place of" to limit which custody removals warrant fines); 18 U.S.C. § 3603(6) (using "regular place of" to limit the type of confinement); 18 U.S.C. § 4042(c)(2) (using "expected place of" to limit residence); 5 U.S.C. § 5728(a) (using "actual place of" to limit the residence to which

agencies will provide travel reimbursement); 2 U.S.C. § 382(c)(2) (using "usual place of" to limit the abode at which one can be served).

But "the law we have" includes no such modifiers. *Bostock*, 140 S. Ct. at 1739. Rather, FACEA protects any person exercising the right of religious freedom "at a place of religious worship," 18 U.S.C. § 248(a)(2), and not just where "religious adherents collectively recognize or religious leadership designates as a place primarily to gather for or to hold religious worship." Pet. App. 23a. Congress omitted these additional requirements, and "[t]he absent provision[s] cannot be supplied by the courts." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 94 (2012).

B. The panel's decision elevates legislative history over statutory text.

Because 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. *See United States v. Great N. Ry.*, 287 U.S. 144, 154 (1932) ("We have not traveled, in our search for the meaning of the lawmakers, beyond the borders of the statute."). Instead, the panel elevated legislative history over the statutory text, prioritizing a conference report and then misinterpreting it.

1. This Court has likened the use of excerpts from legislative history to discern meaning to "an exercise in looking over a crowd and picking out your friends." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (quotations omitted). Here, the Second Circuit picked out the Conference Report as its friend and then proceeded to discount the weight of other

history. Pet. App. 27a; *see* H.R. Rep. No. 103-488, at 9 (1994).

Quoting a single line from the fourteen-page report, Pet. App. 27a, the Second Circuit improperly "treats [that] snippet as authoritative evidence of congressional intent even though [it] come[s] from a single report issued by a committee." *Am. Broad. Comp., Inc. v. Aereo, Inc.*, 573 U.S. 431, 458 (2014) (Scalia, J., dissenting).

2. Worse yet, the Second Circuit failed to properly interpret the Conference Report in two critical ways.

First, the panel used a nonexclusive list to divine Congress's intent. It noted that the Conference Report discusses "a place of religious worship, such as a church, synagogue or other structure or place used primarily for worship." Pet. App. 27a (emphasis omitted); H.R. Rep. No. 103-488, at 9.

But like the word "include," the phrase "such as" does not introduce an exhaustive list and cannot imply the exclusion of other things. *See* Scalia & Garner, *supra*, at 132-33 (discussing the presumption of nonexclusive "include"). It therefore does not follow that "Congress did not intend all locations where incidental worship activities occur to qualify as 'place[s] of religious worship.'" Pet. App. 27a.

Second, the panel misconstrued the statutory purpose reflected in the Conference Report. Without citation, it found that the relevant FACEA provision's purpose is "to protect persons subject to injury, intimidation, or interference at certain physical locations." Pet. App. 27a. But the Report makes clear that the statute "is a reflection of the profound concern of the Congress over private intrusions on religious worship." H.R. Rep. No. 103-488, at 9.

Since protecting a place used for religious worship furthers this purpose, whereas imposing "collective," "leadership," and "primarily" qualifiers obstructs it, the Second Circuit should have rejected the latter. Instead, the panel's atextual modifiers stripped Petitioners of protection from attacks on their worship—the antithesis of what FACEA intended.

II. The Second Circuit's construction of "place of religious worship" conflicts with related interpretations by this Court and others.

A. The panel's approach clashes with this Court's construction of "place of" phrases.

The Second Circuit's ruling clashes with the construction that this Court has given the similar phrases of "place of entertainment" and "place of public accommodation."

1. The Second Circuit's insertion of a primary-use qualifier, for example, conflicts with how this Court has read "place of exhibition or entertainment" in the Civil Rights Act of 1964, 42 U.S.C. § 2000a(b)(3).

In applying that Act to a recreation club in *Daniel v. Paul*, 395 U.S. 298 (1969), this Court used the dictionary definition of "entertainment" to reject the argument that "'place of entertainment' refers only to establishments where patrons are entertained as spectators or listeners rather than those where entertainment takes the form of direct participation in some sport or activity." *Id.* at 306. Accordingly, "place of entertainment" is not limited to places where entertainment is the primary activity. *See United States v. Baird*, 85 F.3d 450, 454 (9th Cir. 1996) (deeming a convenience store with two video-game

consoles to be a "place of entertainment"); *United States v. DeRosier*, 473 F.2d 749, 751-52 (5th Cir. 1973) (holding that a bar is a "place of entertainment" due to its use of a juke box and pool table).

2. The Second Circuit's approach also conflicts with how this Court interprets the Americans with Disabilities Act of 1990's application to a "place of public accommodation." 42 U.S.C. § 12182(a).

In *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001), the PGA Tour argued it did not have to grant a golfer's request for a cart in a tournament because, in its view, the ADA's requirement of accommodation at a "place of public accommodation" applied only to "'clients and customers' seeking to obtain 'goods and services.'" *Id.* at 678. In rejecting this limitation, however, this Court stressed both that it is unsupported by the "literal text" and that, in any event, although playing in a tournament may be "more difficult and more expensive" than participating as a spectator, golfers are still a form of "client or customer" in seeking to benefit from the enterprise in that way. *Id.* at 679-80.

To put it in our context, although a tournament golfer may not be a typical "client or customer"—much less one readily designated by tournament brass or collectively viewed as such—the ADA still protects him.

B. The panel's approach deviates from other courts' constructions of "place of religious worship."

Finally, the Second Circuit's test also conflicts with how at least two lower courts and a state court of last resort address the exact language in question—"place of religious worship."

1. In *Bormuth v. Whitmer*, 548 F. Supp. 3d 640 (E.D. Mich. 2021), the court found that the exemption of a "place of religious worship" from a COVID-related gathering restriction encompassed any place used for worship—including "the farm, park, bar, amphitheater" or any other property made available for that purpose. *Id.* at 654. Likewise in *New Beginnings Ministries v. George*, No. 15-cv-2781, 2018 WL 11378829 (S.D. Ohio Sept. 28, 2018), the court cited with approval Judge Weinstein's interpretation of "place of religious worship." *Id*. at *8 (citing Pet. App. 181a).

2. At the state level, the Supreme Court of Pennsylvania has contrasted "place of religious worship" with "actual place of religious worship" and read the former to include any place used for such worship. *Mullen v. Erie Cnty. Comm'rs*, 85 Pa. 288, 291 (1877) (noting that the inclusion "of religious worship" only limits the term "to describe the use made of the place"). The court went on to stress in a later decision that the plain text of "place of religious worship" requires this interpretation. *Kurman v. Zoning Bd.*, 40 A.2d 381, 382 (Pa. 1945).

III. The Second Circuit's construction of "place of religious worship" defies this Court's constitutional commands.

A. The panel's test creates excessive religious entanglement.

Beyond the statutory conflict, 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.

The Second Circuit's approach triggers at least two entanglement tripwires in insisting that, to be protected from violence at a "place of religious worship," a victim must prove that the place she was hurt is used "primarily" for worship as recognized by "religious adherents collectively" or designated by "religious leadership."

First, the "primary purpose" condition requires courts to not only identify but also weigh distinctions between religious and secular activities of a faith. This inevitably forces judges to subjectively assess the religious significance of certain practices—an inquiry the First Amendment forbids.

Second, by conditioning a victim's protection from violence at a place of worship not on her use of the place but on the buy-in of a wider and undefined collective or leader, the Second Circuit's test requires courts to enforce an undefined group orthodoxy—another endeavor forbidden by the First Amendment.

1. The Second Circuit's "primary purpose" test unduly entangles courts in subjective assessments about the significance of religious practices.

From the founding, the ability of civil courts to judge the boundaries of religious belief and worship has been deemed an "arrogant pretension." James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* Selected Writings of James Madison 21, 24 (R. Ketcham ed., 2006).

Accordingly, this Court has agreed it is improper for judges to scrutinize religious doctrine or evaluate the religious importance of a belief. *See Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of

particular litigants' interpretations of those creeds."); *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) (noting that "the very process of inquiry" into a religious creed "may impinge on rights guaranteed by the Religion Clauses"); *see also Trs. of the New Life in Christ Church v. City of Fredericksburg, Va.*, 142 S. Ct. 678, 679 (2022) (Gorsuch, J., dissenting from denial of cert.) ("The First Amendment does not permit bureaucrats or judges to 'subject' religious beliefs 'to verification.'").

The Second Circuit's insistence on a "primary purpose" qualifier, however, violates these limits. While FACEA may require a court to identify whether a place is used for worship, the court of appeals' test requires judges to go further: They must evaluate the primacy of worship relative to other activity to decide if the worship is significant enough to yield FACEA's protections. But "[r]epeatedly and in many different contexts, [this Court has] warned that [judges] must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Emp. Div., Dept. of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 887 (1990) (citing *Thomas v. Rev. Bd.*, 450 U.S. 707, 716 (1981); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969); *Jones v. Wolf*, 443 U.S. 595, 602-06 (1979); *United States v. Ballard*, 322 U.S. 78, 85-87 (1944)). In short, the Second Circuit's approach is a bridge too far.

Indeed, our case illustrates the problem. In the Falun Gong tradition, raising awareness about the faith and its persecution is an integrated "imperative" through which believers aim to "lessen the suffering of their co-religionists . . . and help ordinary citizens

avoid producing negative karma." CA2 App. 1768-69. But despite witness testimony affirming this view, the panel proceeded to parse religious teachings to declare that the conduct at hand was chiefly a call to political action and not religious. Pet. App. 26a-27a. This determination resulted from the court subjectively weighing the significance of Falun Gong practices; specifically, the panel assumed that prayer, scripture study, and meditative exercises were the most salient forms of Falun Gong worship, while proselytizing at the booths was somehow less important to the faith as a form of religious exercise. Pet. App. 33a-34a.

In making these relative assessments of Falun Gong doctrine, the panel transcended the limited role courts must play in religious questions. *See Presbyterian Church*, 393 U.S. at 450 (emphasizing that the First Amendment prohibits courts from judging the relative importance of religious doctrine, tenets, commands, or beliefs).

2. The Second Circuit's approach to FACEA's protections also unduly enmeshes civil courts in religious affairs by conditioning such protections on group or leadership recognition of a worship space.

The First Amendment's excessive-entanglement doctrine protects religious practitioners from being subjected to "governmental monitoring or second-guessing of their religious beliefs and practices." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1261 (10th Cir. 2008) (McConnell, J.). Under the Second Circuit's approach, however, courts are invited to second-guess the religious practice of an affected victim by subjecting her to an undefined orthodoxy test.

Requiring victims of anti-religious violence to prove that their use of a worship space aligns with

that of other "religious adherents" or "religious leadership" is inconsistent with how this Court has instructed judges to treat analogous inquiries.

Intra-faith difference does not invalidate an individual's religious belief. *Thomas*, 450 U.S. at 716 ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith."). Similarly, when called to evaluate the religious nature of an adherent's beliefs or actions, courts look not to an abstract orthodoxy but 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." *United States v. Seeger*, 380 U.S. 163, 165-66 (1965). So it must be for the use of the Falun Gong booths here.

Further complicating things, even if courts were to rely on some sort of collective—they shouldn't—the Second Circuit offered no guidance on what number or percentage of adherents is necessary to constitute collective recognition, or to what degree adherents may disagree on the religious quality of an activity before its status as worship is revoked.

Indeed, the very process of deciding who counts as part of any religious collective "would require courts to delve into the sensitive question of what it means to be a 'practicing' member of a faith." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2069 (2020); *Colo. Christian Univ.*, 534 F.3d at 1264 (noting that requiring government officials to "decide which groups of believers count as 'a particular religion' . . . requires them to wade into issues of religious contention").

The Second Circuit again illustrated the problems in applying its test to the Falun Gong practitioners. Several of the plaintiffs, for example, spoke of how the booths were for proselytizing the faith. *See, e.g.*, CA2 App. 1738, 1772, 1795. Their expert likewise described plaintiffs' booths as a proselytizing effort that "offer[s] salvation" and "salvific grace." Pet. App. 214a, 217a. Since this Court has been clear that proselytization counts as worship, the Second Circuit should have readily characterized the booths as a place of worship. *See Murdock v. Pennsylvania*, 319 U.S. 105, 109 (1943) (insisting that distribution of proselytizing literature "occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits").

Nevertheless, the panel declared that not enough of the practitioners explicitly labeled the activity as "religious worship"—once again violating established constitutional parameters. *See Thomas*, 450 U.S. at 715 ("Courts should not undertake to dissect [a practitioner's] religious beliefs . . . because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ."). In fact, in reaching its decision, the panel violated its own test by dismissing testimony from a religious leader—the director of the plaintiff's spiritual center—that explicitly designated the booths as sites where "practitioners engage in proselytizing and worship." CA2 App. 1764. If the very court that adopted the test cannot apply it accurately, there is little hope for consistency going forward.

B. The panel's test engenders religious discrimination.

In addition to unduly entangling courts in religious matters, the Second Circuit test also results in religious discrimination in three ways.

For starters, the "primary purpose" condition disfavors faiths whose practices do not align with mainstream conceptions of worship—an imbalance that particularly threatens new or minority faiths.

Additionally, any faith that uses mixed-purpose locations is similarly disadvantaged by the "primary purpose" requirement, as a court may find that their religious activity is not "primary" enough to qualify for FACEA's protections.

Finally, the emphasis the Second Circuit placed on collective or leadership recognition invites discrimination against religious believers who lack a community or leader to verify their practice.

1. The "primary purpose" test harms faiths whose worship practices cannot be easily understood by a court. Under the Second Circuit's test, for example, any faith whose activity a court deems political or otherwise secular risks falling outside of FACEA's protections from anti-religious violence—even where the faith conceives of that practice as a form of worship. *See Spencer v. World Vision, Inc.*, 633 F.3d 723, 745 (9th Cir. 2011) (Kleinfeld, J., concurring) ("[W]ork may be a secular or a religious activity, depending on motivation and meaning among those who perform it."); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987) (noting that requiring a religious organization to "predict which of its activities a

secular court will consider religious" would expose it to the risk "that a judge would not understand its religious tenets and sense of mission").

Faith groups that have a longer history of recognition in the United States are more likely to be privileged under the Second Circuit's test because their practices are more widely known. For example, Jehovah's Witnesses engage in proselytization efforts similar to those of Falun Gong practitioners, which include distributing literature at public tables. *See Something New for Manhattan*, Jehovah's Witnesses, https://perma.cc/3R8H-G2HW (archived Apr. 28, 2022) (describing a Jehovah's Witness proselytization initiative that relies on using public display tables and passing out literature). Yet because the religious practices of Jehovah's Witnesses have a longer history of recognition by American courts, their activity at the outdoor tables is less likely to be scrutinized. *See Murdock*, 319 U.S. at 109 (recognizing Jehovah's Witness proselytization as protected religious activity); *Int'l Soc'y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 442 (2d Cir. 1981) ("[T]he sale of religious literature and the solicitation of contributions is central to missionary evangelism, particularly to the Jehovah's Witnesses.").

This dilemma poses a particular risk to religions for whom a history of subjugation or persecution may provide reason for their worship to include a political dimension. *See, e.g.*, Jonathan C. Augustine, *And When Does the Black Church Get Political?*, 17 Hastings Race & Poverty L.J. 87 (2020) (emphasizing that the African Methodist Episcopal Church has historically woven political resistance into their religious practice in response to oppressive

conditions); Catholic News Service, *A Special Mass Celebrates All Immigrants in Los Angeles*, America: Jesuit Rev. (July 21, 2016), https://perma.cc/LM7S-SJG3 (discussing a Catholic Mass by the Archbishop of Los Angeles that coincided with an annual procession of immigrants and was designed to raise awareness for immigration reform); Brian Kaylor, *Sacramental Politics: Religious Worship as Political Action* 1-3 (1st ed. 2014) (describing Mennonite "Prayer and Faxing," which directed congregants to pray and write their congressional representatives about immigration reform as "an act of worship").

2. Additionally, under the Second Circuit's test any faith that otherwise intermingles religious and secular activities is vulnerable to a court finding that its worship is not "primary" enough to qualify the site under FACEA.

Indeed, the panel's treatment of the booths here illustrates this problem, where it found them to be primarily used for political and not worship activity because the plaintiffs shared information about CCP persecution there. But not only does this disrespect Falun Gong doctrine that such activity is in fact worship, it also undervalues the more mainstream types of worship that also occurred at the booths. *See Hosanna-Tabor Evangelical Church & Sch. v. EEOC*, 565 U.S. 171, 193-94 (2012) (rejecting "stopwatch" approach to assess importance of ministry activity).

Members of faiths that do not clearly designate the primacy of worship at a given place, such as synagogues with soup kitchens, indigenous sacred grounds, or Christian bookstores with chapels, stand to be similarly harmed by the Second Circuit's narrowing of FACEA's protections. *See, e.g.*, *Soup*

Kitchen, Hebrew Union College - Jewish Institute of Religion, https://perma.cc/X8VU-WVD6 (archived Apr. 28, 2022) (describing soup kitchen as “a tangible way that we fulfill Isaiah’s prophetic call to share our bread with the hungry and bring the homeless into our house”); Lyuba Zarsky, *Is Nothing Sacred? Corporate Responsibility for the Protection of Native American Sacred Sites*, Sacred Land Film Project 32 (2006), https://perma.cc/R352-TE2U (stressing that the Medicine Lake Highlands in California is a sacred site to Native American groups, notwithstanding the fact that prayer is intermingled with secular activities like “medicinal plant gathering, healing, hunting and obsidian trading”); Abdu’l-Bahá, Shoghi Effendi, & Universal House of Justice, *Haziratu’l-Quds and Mashriqu’l-Adhkar, Functions and Importance of*, Baha’i Library Online (1997), https://perma.cc/VF4X-6BHN (describing how members of the Baha’i faith are encouraged to establish a religious center that mixes the “devotional, social, and administrative”).

3. Furthermore, any faith that lacks formal leadership or an established community would be disadvantaged by the Second Circuit’s requirement that a leader or larger congregation must support a victim’s use of a worship space.

Religions without formal leadership are disfavored in being automatically held to the more subjective standard of collective recognition. *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2064 (insisting that courts cannot “privileg[e] religious traditions with formal organizational structures over those that are less formal”). And although the Second Circuit tries to suggest that a single religious adherent could theoretically designate a place for worship, it allows

for this possibility only if the religion "authorize[s]" such a practice, which still invites courts to assess religious doctrine. Pet. App. 23a n.8.

The lack of clarity surrounding who counts as a religious leader under the Second Circuit's test particularly invites discrimination against minority faiths that do not rely on clear hierarchical designations. *See Hosanna-Tabor*, 565 U.S. at 202 nn.3-4 (Alito, J., concurring) (noting that there is "no class or profession of ordained clergy" in the Muslim faith and "that Jehovah's Witnesses consider all baptized disciples to be ministers").

4. Beyond all these implications, the Second Circuit's test raises more questions than it answers.

Must a religious procession forbid political themes to be protected from violence? Would individuals on a religious pilgrimage lose protection if the site was also a secular tourist destination? What about people praying at statues or monuments?

Would those praying at cemeteries have no recourse because some or all others in their group or elsewhere on the property mourn in other ways? Is it enough for a priest to designate a place of worship or must it be a bishop? Would a Native American faith practitioner with no tribal affiliation be protected?

And, again, what about the taxi driver at the airport, the congregants at the park, the pilgrims going to shrines, and those on a spiritual quest in a forest?

The litany goes on.

IV. The question presented urges review.

The 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—both in its own right and given the grave consequences of the Second Circuit's approach to minority faiths.

Absent review, the Second Circuit's decision will disfavor certain faiths. According to that decision, FACEA protects victims of anti-religious violence only when the violence occurs where "religious adherents collectively recognize or religious leadership designates as a place primarily to gather for or to hold religious worship activities." Pet. App. 23a. So a believer who is attacked while participating in services at a church, synagogue, or mosque may seek redress under FACEA, but a believer who suffers the same violence while worshiping in another place or manner is left vulnerable.

This arbitrary result is not only unjust, it violates the constitutional command that government "effect no favoritism among sects . . . and . . . work deterrence of no religious belief." *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring); *see also Larson*, 456 U.S. at 244 ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

Tellingly, this constitutional mandate sprung in part from colonial Americans' odium toward laws confining religious worship to conventional locations. One of the greatest colonial pleas for religious liberty, for example, came from Elisha Williams' protest of a 1742 Connecticut ban on itinerant preaching—a ban

which prompted Williams to famously proclaim that "[e]very man has an equal right to follow the dictates of his own conscience in affairs of religion." Elisha Williams, *The Essential Rights and Liberties of Protestants*, *in* Political Sermons of the American Founding Era 52, 61 (Ellis Sandoz ed., 1998).

Likewise, and ironically, the renowned Flushing Remonstrance—widely regarded as the precursor to the Religion Clauses—denounced a 1657 ordinance prohibiting the practice of religion outside the established church. *See The Flushing Remonstrance: The Origin of Religious Freedom in America* 3-4 (Haynes Trebor ed., 1957); Doc Hastings, Flushing Remonstrance Study Act, H.R. Rep. No. 113-395, at 1-3 (2014). History thus confirms that treating different believers differently defies our Constitution's promise of religious freedom.

In cases raising a comparably profound specter of religious harm, this Court has granted certiorari absent a full-fledged circuit conflict. *See, e.g.*, *Kennedy v. Bremerton Sch. Dist. II*, 142 S. Ct. 857 (2022) (mem.); *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020); *E. Tex. Baptist Univ. v. Burwell*, 136 S. Ct. 444 (2015); *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987); *Larson*, 456 U.S. 228; *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Niemotko v. Maryland*, 340 U.S. 268 (1951). Indeed, court decisions that impair religious exercise have sparked particular concern. *See, e.g.*, *Trs. of the New Life in Christ Church v. City of Fredericksburg, Va.*, 142 S. Ct. 678, 679 (2022) (Gorsuch, J., dissenting from denial of cert.) ("This case may be a small one, and one can hope that the

error here is so obvious it is unlikely to be repeated anytime soon. But I would correct it.”).

And the need for review is particularly urgent given the realities of religious life in the Second Circuit. Most significantly, New York is not only the most religiously diverse state in the nation but also the state where religious violence is most prevalent. *See* Robert P. Jones & Daniel Cox, PRRI, *America's Changing Religious Identity: Findings from the 2016 American Values Atlas* 8 (Sept. 6, 2017), https://perma.cc/2ZBS-QQ4X; *see also* U.S. Dep't of Justice, *2019 Hate Crime Statistics*, https://perma.cc/U3SP-F3ZU (archived Apr. 28, 2022); U.S. Dep't of Justice, *2018 Hate Crime Statistics*, https://perma.cc/Y9VU-3F3Z (archived Apr. 28, 2022). Indeed, New Yorkers are more likely to become victims of crime because of their religious beliefs than any other protected characteristic. *See 2019 Hate Crime Statistics*, *supra*, https://perma.cc/U3SP-F3ZU (documenting 357 incidents in New York based on religious bias and 254 incidents based on race/ethnicity/ancestry, sexual orientation, disability, gender, and gender identity bias combined).

Nationwide, minority believers are more likely than observers of mainstream religions to become victims of religiously motivated crime. *See* Christopher P. Scheitle & Elaine Howard Ecklund, *Individuals' Experiences with Religious Hostility, Discrimination, and Violence: Findings from a New National Survey*, 6 SOCIUS, Nov. 19, 2020, at 6 https://perma.cc/ZYV4-B7RC. Worse yet, most anti-religious crime occurs away from a house of worship—places left vulnerable under the Second Circuit's test. *See* Statista, *Number of Anti-Religious Hate Crime*

Incidents in the United States in 2020, by Location (Jan. 13, 2022) https://perma.cc/EYW9-T9ZJ (compiling 2020 FBI anti-religious hate crime statistics by location). The Second Circuit's decision thus excludes from FACEA's protections those who are most likely to require them, where they are most likely to require them.

Finally, this Court should not count on having another opportunity to review the issue. Because the Second Circuit's approach limits FACEA's scope while inviting judges to decide religious matters, at-risk plaintiffs will be wary of bringing FACEA claims. Compounding the problem, victims of hate crimes are already reluctant to seek redress for the violence they experience. *See* Bureau of Just. Statistics, *Special Report: Hate Crime Victimization, 2004-2015*, 5 (June 2017), https://perma.cc/M4NL-JJFA (estimating that more than half of hate crimes went unreported to the police during select study period).

This Court should grant certiorari while it has the chance.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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