No. 21-

IN THE

Supreme Court of the United States

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

Cross-Petitioners,

v.

ZHANG JINGRONG, ZHOU YANHUA, ZHANG PENG, ZHANG CUIPING, WEI MIN, LO KITSUEN, CAO LIJUN, HU YANG, GAO JINYING, CUI LINA AND XU TING

Cross-Respondents.

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

CONDITIONAL CROSS-PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether 42 U.S.C. § 248(a)(2), the section of the Freedom of Access to Clinic Entrances Act that prohibits intimidation and other wrongful acts against worshipers at places of worship, is unconstitutional, as exceeding Congress's authority under the Commerce Clause.

PARTIES TO THE PROCEEDING

Cross-petitioners Chinese Anti-Cult World Alliance, Inc., Michael Chu, Li Huahong, Wan Hongjuan, and Zhu Zirou were appellants in the court of appeals and defendants and counter-plaintiffs in the district court. This cross-petition will refer to cross-petitioners as "Defendants."

Cross-respondents Zhang Jingrong, Zhou Yanhua, Zhang Peng, Zhang Cuiping, Wei Min, Lo Kitsuen, Cao Lijun, Hu Yang, Gao Jinying, Cui Lina, and Xu Ting were the appellees in the court of appeals and the plaintiffs and counter-defendants in the district court. This cross-petition will refer to cross-respondents as "Plaintiffs."

Bian Hexiang was an appellee in the court of appeals and a plaintiff and counter-defendant in the district court.

Does 1-5 were defendants in the district court.

CORPORATE DISCLOSURE STATEMENT

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

RELATED PROCEEDINGS

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

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

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

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

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Chinese Anti-Cult World Alliance, Inc., Michael Chu, Li Huahong, Wan Hongjuan, and Zhu Zirou respectfully submit this conditional cross-petition for a writ of certiorari pursuant to this Court's Rule 12.5 to review the judgment of the U.S. Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 16 F.4th 47 and reproduced at Pet. App. 1a-46a.[1] The court of appeals' order on rehearing and rehearing en banc is not reported but is reproduced at Pet. App. 210a-211a. The district court's April 23, 2018 order is reported at 311 F. Supp. 3d 514 and is reproduced at Pet. App. 47a-157a. The district court's May 30, 2018 order is reported at 314 F. Supp. 3d 420 and is reproduced at Pet. App. 158a-209a. An earlier order of the district court is reported at 287 F. Supp. 3d 290.

JURISDICTION

The court of appeals entered judgment on October 14, 2021 (Pet. App. 1a-46a) and denied a timely petition for rehearing and rehearing en banc on December 7, 2021 (Pet. App. 210a-211a). On February 11, 2022, Justice Sotomayor extended the time for filing a petition for a writ

1. "Pet." refers to the petition for a writ of certiorari in No. 21-1429. "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 21-1429.

of certiorari to May 6, 2022. The petition in No. 21-1429 was filed on that date and placed on the Court's docket on May 10, 2022. This conditional cross-petition is being filed pursuant to this Court's Rule 12.5. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Since 28 U.S.C. § 2403(a) may apply and the United States is not a party hereto, copies of this conditional cross-petition are being served on the Solicitor General of the United States pursuant to this Court's Rule 29.4(b). Undersigned counsel has no knowledge of the court of appeals having certified to the Attorney of the United States the fact that the constitutionality of an Act of Congress was drawn into question because there is no indication of that on the Second Circuit's docket. However, notice of the constitutional challenge was previously served on the Attorney General during the proceedings in the district court pursuant to Rule 5.1(a) of the Federal Rules of Civil Procedure.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides: "The Congress shall have Power…To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The Freedom of Access to Clinic Entrances Act of 1994 ("FACEA"), 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)…

18 U.S.C. § 248(a)(2).

STATEMENT OF THE CASE

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

This action involves claims brought by Plaintiffs under Section 248(a)(2) of FACEA, which prohibits intimidation and other wrongful acts against any person lawfully exercising his or her First Amendment right of religious freedom at a place of religious worship. Section 248(a)(2) purports to outlaw threats, intimidation and interference at places of worship, creating a cause of action against anyone who "by force or threat of force or by physical obstruction, intentionally interferes, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship." 18 U.S.C. § 248(a)(2).

Plaintiffs, who are adherents to Falun Gong, allege that Defendants harassed, intimidated, and interfered with them when they were engaged in activities at five tables located on the sidewalk in Flushing, Queens, New York. Pet. App. 18a-19a n.6. Plaintiffs *do not* allege that any of the confrontations occurred why Plaintiffs or Defendants were crossing state lines. The undisputed facts and Plaintiffs' testimony confirm that all of the alleged confrontations involved local incidents on Main Street, Flushing, such as tussling over a camera or engaging in verbal altercations. Pet. App. 18a-19a n.6.

B. The Legislative History of FACEA

As Defendants explained below, the section of FACEA under which Plaintiffs have asserted claims – dealing with interference at places of worship – was introduced relatively late in the legislative process by Senator Orrin Hatch (the "Hatch Amendment"). *See* Pet. App. 175a-182a. The genesis and focus of FACEA, and all of the legislative history concerning the effects on interstate commerce, dealt with access to abortion clinics – not with intimidation at places of religious worship. *See* Pet. App. 175a-182a.

Notably, while the text of the bill contained a section providing a Congressional Statement of Findings and Purpose, all of the findings regarding the effect on interstate commerce pertained only to the access to abortion clinics, not with places of worship. Pet. App. 43a-44a. Those findings included language stating that conduct that interferes with access to abortion clinics burdens interstate commerce, including by interfering with business activities of medical clinics involved in interstate commerce and by forcing women to travel from

States where their access to reproductive health services is obstructed to other States. Pet. App. 43a-44a.

Indeed, unlike the portion of the bill regarding access to abortion clinics, Congress did not identify the religious exercise provision of FACEA, 18 U.S.C. § 248(a)(2) as commercial and there were no Congressional findings with respect to any impact that the conduct would have on interstate commerce. Pet. App. 44a.

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

> Mr. KENNEDY: So, to be clear on this, the amendment would cover only conduct actually occurring at *an established place of religious worship, a church or synagogue, rather than any place where a person might pray, such as a sidewalk*?

Mr. HATCH: *That is correct.*

Pet. App. 180a (added).

Similarly, the Conference Report on Senate Bill 636 also addressed Senator Kennedy's concern stating that 18 U.S.C. § 248 "covers only conduct occurring at or in the immediate vicinity of a place of religious worship, such as a church, synagogue or other structure or place used primarily for worship." Pet. App. 20a-21a.

C. Proceedings Below

Plaintiffs filed this action in the Eastern District of New York on March 3, 2015, asserting, *inter alia*, claims under Section 248(a)(2) of FACEA. Pet. App. 17a. After the close of discovery, the parties filed cross-motions for partial summary judgment. The district court *sua sponte* notified the parties that it was considering all claims and counterclaims on summary judgment. Pet. App. 18a. After a multi-day evidentiary hearing, including testimony from witnesses and experts, the parties submitted supplemental briefing on the FACEA claim. Pet. App. 18a.

Defendants sought dismissal of Plaintiffs' FACEA claim on the ground that the tables were not "a place of religious worship" under 18 U.S.C. § 248(a)(2) because they are not used primarily for worship. Pet. App. 19a. In addition, Defendants challenged the constitutionality of the Section 248(a)(2) of FACEA on the ground that it represents an illegitimate exercise of Congressional power under the Commerce Clause of the United States Constitution. Pet. App. 160a. Specifically, Defendants argued that under the principles that the Supreme Court

articulated in striking down the Violence Against Women Act, Section 248(a)(2) is plainly attempting to outlaw broad categories of local, non-commercial, non-economic activity – threats and intimidation at places of religious worship and related non-commercial activity – which do not substantially affect interstate commerce. *See United States v. Morrison*, 529 U.S. 598, 621–624 (2000).

The district court rendered its decision in orders issued on April 23, 2018 and May 30, 2018. In the April 23, 2018 order, the district court denied Defendants' motion as to the Plaintiffs' FACEA claim, concluding that the Flushing tables qualify as "a place of religious worship." Pet. App. 147a. Despite the legislative history making clear that the ambiguous phrase "place of religious worship" cannot mean a sidewalk, the district court further held that in order to avoid violating the Establishment Clause, "[a]ny place a religion is practiced – be it in underneath a tree, in a meadow, or at a folding table on the streets of a busy city – is protected by this and other statutes[.]" Pet. App. 51a.

In its May 30, 2018 order, the district court considered Defendants' facial constitutional challenge to Section 248(a)(2). Pet. App. 160a. The district court acknowledged that in passing the statute, Congress made no legislative findings as to how intimidation of places of religious worship affects interstate commerce, and that the statute also contains no jurisdictional element requiring that the activities at issue affect interstate commerce. Pet. App. 203a. Nevertheless, the district court denied Defendants' motion, concluding that the criminalization of local crime such as harassment – that may take place at any local street given the expansive reading that the district court

gave to the statute – represented a valid exercise of congressional power under the Commerce Clause. Pet. App. 197a-200a, 208a.

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

On appeal, the Second Circuit reversed the district court's grant of partial summary judgment to Plaintiffs and its corresponding denial of summary judgment to Defendants, holding that "a place of religious worship" "means a space devoted primarily to religious worship activity—that is, anywhere that religious adherents collectively recognize or religious leadership designates as a place primarily to gather for or to hold religious worship activities." Pet. App. 23a. The court of appeals then concluded that "no reasonable jury could find that the Flushing tables are 'a place of religious worship' in the sense that they are a place whose primary purpose is religious worship." Pet. App. 30a. Because the court of appeals held that the FACEA claim fails on this statutory ground, the majority of the court of appeals panel held that it did not reach the Commerce Clause issue. Pet. App. 22a.

However, in a concurring opinion, the Honorable John M. Walker, Jr. expressed his view that Section 248(a)(2) is unconstitutional, as exceeding Congress's Commerce Clause power, and that the court should reach the issue and strike down the statute as unconstitutional.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

Plaintiffs have petitioned this Court for review of the court of appeal's decision holding that, for purposes of 18 U.S.C. § 248(a)(2), "'a place of religious worship' means anywhere that religious adherents collectively recognize or religious leadership designates as a space primarily to gather for or hold religious worship activities." Pet. 13. As will be set forth more fully in their forthcoming opposition to Plaintiffs' petition, Defendants oppose Plaintiffs' request for review on several grounds, including, but not limited to, that the court of appeals' decision was correctly decided, it does not create a conflict among the circuits, and it will be unlikely to have a significant effect on the behavior prohibited by 18 U.S.C. § 248(a)(2) because the government has admitted that it does not rely on the statute to prosecute crimes, in light of other, more constitutionally valid, statutes being available, such as 18 U.S.C. § 247.

However, if the Court grants Plaintiffs' petition for certiorari, it should also grant this conditional cross-petition, which raises the even more important issue of whether Section 248(a)(2) represents an unconstitutional exercise of Congressional power under the Commerce Clause – the conclusion reached by Circuit Judge the John M. Walker, Jr. in his concurring opinion. As Defendants

argued below, and as set forth in the court of appeals' concurring opinion, the conduct prohibited by Section 248(a)(2) far exceeds the limitations of Congress's Commerce Clause power. In his concurrence below, the Honorable John M. Walker, Jr. explains that he "would reach and sustain the Commerce Clause challenge to the religious exercise provision of FACEA, 18 U.S.C. § 248(a)(2)," emphasizing that this Court has "expressly rejected the notion that the commerce power reaches 'noneconomic, violent criminal conduct' of the sort proscribed here 'based solely on that conduct's aggregate effect on interstate commerce.'" Pet. App. 37a (citing *United States v. Morrison*, 529 U.S. 598, 617 (2000) and *United States v. Lopez*, 514 U.S. 549, 565–67 (1995)). Even the district court recognized that "[t]he Court of Appeals for the Second Circuit or the United States Supreme Court may well disagree with [the district] court's analysis finding FACEA constitutional." Pet. App. 205a.

Indeed, what is at stake here is not just the claims or parties in this case, but the notion that individual liberty is protected when the independent judiciary enforces the limitations of enumerated powers granted to Congress in the Constitution. This issue goes to the heart of the Founders' profound belief in the separation of powers. Thus, if this Court elects to grant Plaintiffs' petition seeking review of the court of appeals' decision on their 18 U.S.C. § 248(a)(2) claims, it should also grant this cross-petition seeking to challenge the constitutionality of that provision.

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE 18 U.S.C. § 248(a)(2) IS AN UNCONSTITUTIONAL EXERCISE OF CONGRESSIONAL POWER

A. The Conduct Regulated by 18 U.S.C. § 248(a)(2) is Beyond Congress's Commerce Authority Under *Lopez* and *Morrison*

As the Defendants argued below and as the concurring opinion agreed, under well-established case law addressing the limits of Congressional power under the Commerce Clause, it is clear that Congress lacked power to outlaw (and indeed, criminalize) the non-economic activity – intimidation and other wrongful acts at places of religious worship – that it purported to in passing 18 U.S.C. § 248(a)(2). Pet. App. 37a-46a. Thus, the court below should have considered Defendants' constitutional challenge and found that 18 U.S.C. § 248(a)(2) is a facially unconstitutional exercise of Commerce Clause power.

Modern analysis of the limits of Congressional power under the Commerce Clause focuses on two Supreme Court decisions that clarified that the Commerce Clause power is indeed limited and cannot be used to federalize local law enforcement issues, particularly where, as here, Congress purports to regulate non-economic activity. The first decision was *United States v. Lopez*, 514 U.S. 549, 567 (1995), where the Court upheld a challenge to a federal statute criminalizing the possession of firearms in proximity to schools. The second decision, and the one that is most analogous to the situation in this case, is *United States v. Morrison*, 529 U.S. 598, 621–624 (2000), which upheld a Commerce Clause challenge to the Violence Against Women Act.

In clarifying the limits of Congress' commerce powers, the *Lopez* Court identified the three categories of activity that Congress has authority to regulate under the Commerce Clause. *Lopez*, 514 U.S. at 588. The Court held that Congress (1) may "regulate the use of the channels of interstate commerce;" (2) may "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce;" and (3) may "regulate those activities having a substantial relation to interstate commerce…i.e., those activities that substantially affect interstate commerce." *Id*. at 558–59. Any exercise of Congress' commerce power must fall into one of these three Lopez categories or the regulation will be struck down as unconstitutional. The *Morrison* Court subsequently confirmed this limitation on Congress' commerce powers. *Morrison*, 529 U.S. at 617-18.

As Defendants argued below and as the concurrence agreed, "in prohibiting violence against worshippers at places of religious worship, FACEA regulates local, non-economic conduct that has at best a tenuous connection to interstate commerce." Pet. App. 37. Both the district court and the concurrence below correctly found that the regulated conduct in this case – intimidation and other wrongful acts against worshippers at places of religious worship claimed here – can reasonably pertain only to the third category of *Lopez*. Pet. App. 38a, 198a.

However, it is impossible to justify regulation of such local, non-economic activity under the standard that the Supreme Court clarified in *United States v. Morrison*, 529 U.S. 598 (2000). As argued by the Defendants and set forth in the concurring opinion below:

> To determine whether a regulated activity substantially affects interstate commerce, we consider four factors: (i) whether the statute regulates economic activity, (ii) whether the statute contains an "express jurisdictional element" to establish a connection to interstate commerce, (iii) whether the legislative history includes express findings on the activity's effects on interstate commerce, and (iv) whether the link between the activity and a substantial effect on interstate commerce is too attenuated to bring the activity within the Commerce Clause's reach.

Pet. App. 38a.

Under the four factors identified in *Morrison*, it becomes clear that the non-economic activity purportedly outlawed by 18 U.S.C. § 248(a)(2) cannot be regulated under the Commerce Clause. Indeed, the concurring opinion found that each of these factors counsels against upholding Section 248(a)(2). Pet. App. 38.

As argued by the Defendants and set forth in the concurrence below, "[f]irst, and most importantly, nothing about the regulated conduct [under 18 U.S.C. § 248(a)(2)] is economic in nature. Pet. App. 38a." The *Lopez* Court emphasized that it has considered only economic intrastate activity, as opposed to non-economic intrastate activity, to substantially affect interstate commerce. Pet. App. 38a. Surveying congressional Acts that it had upheld, which included those that regulated intrastate coal mining, extortionate intrastate credit transactions, restaurants using substantial interstate supplies, inns

and hotels catering to interstate guests, and production and consumption of homegrown wheat, the Court emphasized in *Lopez* that "the pattern is clear": statutes that regulated economic intrastate activity have been sustained as proper exercises of Congress' commerce power. Pet. App. 38a-39a.

The Court reaffirmed the centrality of the economic activity component in *Morrison*, which concerned a Commerce Clause challenge to the Violence Against Women Act. Pet. App. 39a. There, the Court struck down the law because the regulated conduct, gender-motivated violence, was "not, in any sense of the phrase, economic activity." Pet. App. 39a. The Court criticized petitioners and the dissent for "downplay[ing] the role that the economic nature of the regulated activity plays in our Commerce Clause analysis," a consideration the Court found "central" to its analysis in past cases. Pet. App. 39a.

Although the Court stopped short of "adopt[ing] a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases," the Court emphasized that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature. Pet. App. 39. Absent an economic nexus or a jurisdictional requirement in the statute tying the conduct to interstate commerce, congressional findings standing alone could not sustain VAWA's constitutionality.

As set forth by the Defendants and in the concurrence below, the regulated conduct, intimidation and other wrongful acts at places of religious worship, cannot be viewed as economic activity. Pet. App. 42a. As the concurring opinion below explains:

> Whether the relevant regulated activity under 18 U.S.C. § 248(a)(2) is either religious practice at a "place of religious worship" or violence against those worshippers and proselytizers at places of religious worship, neither activity is economic. Neither worship nor violence against worshippers affects the production, distribution, or consumption of a commodity in an interstate (or any) market.

Pet. App. 42a.

The concurrence also correctly distinguishes the conduct regulated under Section 248(a)(2) from the conduct at issue in *Wickard v. Filburn*, 317 U.S. 111 (1942) and *Gonzales v. Raich*, 545 U.S. 1 (2005). Pet. App. 42a. While "the precise activities at issue in *Wickard* and *Raich* were not commercial, in that the subsets of wheat and marijuana were not being purchased or sold…they were economic enterprises that, in the aggregate, would have a direct economic effect on the interstate market for each commodity." In addition, the statutes at issue in *Wickard* and *Raich*, "limited the extent to which one may forestall resort to the market by producing to meet his own needs." Pet. App. 42a (internal citations and quotations omitted). Here, neither plaintiffs, by practicing their religion, proselytizing, or protesting the Chinese government's opposition to Falun Gong, nor defendants, by engaging in violence against plaintiffs, fulfill a need locally that they would otherwise fulfill by purchasing some commodity on an interstate market. Pet. App. 42a.

Similarly, "[t]he second and third *Lopez/Morrison* factors, the presence of a jurisdictional requirement in

the statute limiting the statute's reach to conduct with a connection to interstate commerce, and legislative findings on the activity's effect on interstate commerce, each also weigh against upholding § 248(a)(2)." Pet. App. 43a. As with the statutes in *Morrison* and *Lopez*, there is no jurisdictional element in 18 U.S.C. § 248(a)(2). Pet. App. 43a. That is, there is no requirement that, in order to establish a violation of this provision, it be demonstrated that the activity at issue took place in or involved interstate commerce. In addition, in passing Section 248(a)(2), Congress made no findings concerning any effect that intimidation or threats at places of religious worship had on interstate commerce, and certainly did not make any findings that such non-economic activity had substantial effects on interstate commerce. Pet. App. 44a.

Finally, as the Defendants argued below and as set forth in the concurring opinion, any arguable link between the activity purported to be criminalized – intimidation at places of religious worship (however local, even on any street) – and any purported effects on interstate commerce, is simply too attenuated to survive the standard clarified in *Morrison*. Pet. App. 45a. The *Morrison* Court made clear that "[t]he Constitution requires a distinction between what is truly national and what is truly local," lest the commerce power engulf the general police power reserved to the States. Pet App. 45a (quoting *Morrison*, 529 U.S. at 617). Indeed, upholding § 248(a)(2) would all but eliminate that fundamental distinction. Pet. App 45a.

As the concurring opinion below held:

> Even accepting that some religious organizations may offer commercial services,

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

Pet. App. 45a-46a.

Thus, for the reasons set forth above, if this Court decides to grant Plaintiffs' petition seeking review of the Second Circuit's interpretation of the statute, then it should also grant this conditional cross-petition seeking to challenge the constitutionality of Section 248(a)(2).

II. THE LEGISLATIVE FINDINGS FROM STATUTES THAT INCLUDED A JURISDICTIONAL ELEMENT

As both the concurrence below and district court correctly acknowledged, in passing FACEA, Congress made no findings whatsoever as to how intimidation at places of religious worship affected interstate commerce. Pet. App. 43a, 203a. Instead, the district court relied solely on Congress' findings in passing other statutes, namely the Church Arson Prevention Act of 1996, 18 U.S.C. § 247, and the Matthew Shepard and James Byrd

Jr. Hate Crimes Prevention Act, 18 U.S.C. § 249. Pet. App. 192a-195a. However, as the Defendants argued below, and the concurring opinion agreed, the district court's reliance on Congressional findings made in connection with other statutes was faulty for an obvious reason: as the District Court was forced to acknowledge, both statutes whose legislative history it relied on expressly included jurisdictional elements which satisfy the commerce clause problem presented in this case. Pet. App. 192a-193a ("Both statutes contain commerce-linked jurisdictional elements." (citing 18 U.S.C. § 247(b) and 18 U.S.C. § 249(a)(2)(B)); Pet. App. 44a-45a.

Specifically, in protecting against threats to people exercising religious beliefs and protecting religious property, 18 U.S.C. § 247 expressly requires as an element that the "offense is in or affects interstate or foreign commerce." 18 U.S.C. § 247(b). Similarly, 18 U.S.C. § 249, which protects against hate crimes, requires that "the conduct … interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or …otherwise affects interstate or foreign commerce." 18 U.S.C. § 249(a)(2)(B).

Indeed, as Defendants highlighted below, in passing Section 247, Congress expressly cited the Supreme Court decision in *Lopez* in explaining why it was necessary to include a jurisdictional element. House Report 104-621 ("The Committee is aware of the Supreme Court's ruling in *United States v. Lopez*, 115 S. Ct. 1624 (1995), in which it struck down as unconstitutional legislation which would have regulated the possession of firearms in a school zone. In that case, the Court found that the conduct to be regulated did not have a substantial effect on interstate

commerce, and was therefore not within the Federal government's reach under the interstate commerce clause of the Constitution. *H.R. 3525, by contrast, specifically limits its reach to conduct which can be shown to be in or to affect interstate commerce.* Thus, if in prosecuting a particular case, the government is unable to establish this interstate commerce connection to the act, section 247 will not apply to the offense.") (available at https://www.gpo.gov/fdsys/pkg/CRPT-104hrpt621/html/CRPT-104hrpt621.htm) (emphasis added).

Thus, what the district court never confronts is that, while the legislative histories of the other statutes it cited do contain findings regarding the economic effects of acts of violence, as well as the economic aspects of religion, those types of economic effects are no different than the types of economic effects that were found in *Morrison* to stretch the Commerce Clause beyond any meaningful limitation. That is precisely why 18 U.S.C. § 247 and 18 U.S.C. § 249 contain the important jurisdictional element.

Indeed, the non-economic activity covered by Section 248(a)(2) – intimidation and other wrongful acts – goes far beyond any meaningful connection to interstate commerce. Section 248(a)(2) broadly applies to literally any intimidation at any place of religious worship – regardless of whether there is any economic activity involved. If, as is in this case, Falun Gong practitioners are purporting worship in the street, engaged in absolutely no economic activity, and if the Defendants engage in purely non-economic acts of alleged intimidation, Section 248(a)(2) (as the lower court understood the statute) purports to criminalize such activity. Use of past congressional findings in other contexts to go this far in outlawing non-commercial conduct was squarely rejected in *Lopez*:

> The Government argues that Congress has accumulated institutional expertise regarding the regulation of firearms through previous enactments. We agree, however, with the Fifth Circuit that importation of previous findings to justify § 922(q) is especially inappropriate here, because the prior federal enactments of Congressional findings do not speak to the subject matter of section 922(q) or its relationship to interstate commerce. Indeed, 922 plows thoroughly new ground and represents a sharp break with the long-standing pattern of federal firearms legislation.

Lopez, 514 U.S. at 563. The same exact logic applies here. The scope of Section 248(a)(2) plows thoroughly new ground, far beyond Section 247 – purporting to outlaw non-commercial activity, with no jurisdictional element whatsoever. Such expansive criminalization of non-economic activity cannot survive scrutiny under the *Lopez/Morrison* precedents.

Thus, because Plaintiffs is seeking this Court's review of 18 U.S.C. § 248(a)(2), if the Court decides to grant Plaintiffs' petition, it should also grant this conditional cross-petition.

III. STRIKING DOWN 18 U.S.C. § 248(a)(2) AS UNCONSTITUTIONAL WILL NOT RENDER PLACES OF RELIGIOUS WORSHIP UNPROTECTED

Finally, as Defendants highlighted to the courts below, there could be a concern by the Court that commentators

and the public at large could be critical of a Court that protects abortion clinics, but does not protect places of religious worship. However, this concern can be easily anticipated and overcome by the Court if it forcefully points out that a striking down of Section 248(a)(2) in no way leaves places of religious worship unprotected by federal law.

In fact, 18 U.S.C. § 247 already provides strong protection for places of religious worship, albeit in a way that is consistent with constitutional limitations on Congressional power. *See* Pet. App. 202a-203a. Indeed, the Department of Justice as of June 29, 2016 acknowledged that it never brought a charge under Section 248(a)(2), and instead relies on the ample protection afforded to religious institutions under Section 247. Pet. App. 202a-203a. Thus, a decision striking down Section 248(a)(2) will not leave places of religious worship unprotected, nor would such a holding interfere with the Department of Justice's prosecutions. Rather, it will simply require, consistent with the Constitution, that for someone to be charged with a crime or liability under federal law, an element of the claim that must be established is that the specific activity in question affected interstate commerce.

Thus, striking down Section 248(a)(2) would be consistent not only with leaving in place a statute that protects religions locations consistent with the Constitution, but it would also protect the liberties of all Americans by respecting the limitations of power that prevent the federal legislative branch from overreaching when it decides what conduct can be criminalized.

CONCLUSION

For the foregoing reasons, if this Court grants Plaintiffs' petition for a writ of certiorari, it should also grant Defendants' conditional cross-petition.

Respectfully submitted,

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