**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

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| ZHANG Jingrong, ZHOU Yanhua, ZHANG Peng, ZHANG Cuiping, WEI Min, LO Kitsuen, CAO Lijun, HU Yang, GUO Xiaofang, GAO Jinying, CUI Lina, XU Ting, BIAN Hexiang, | : | |
| Plaintiffs, | : | 15 CV 1046 (JBW) (VMS) |
| v. | : | |
| Chinese Anti-Cult World Alliance (CACWA), Michael CHU, LI Huahong, WAN Hongjuan, ZHU Zirou, and DOES 1-5 Inclusive, | : | |
| Defendants. | : | |

**DEFENDANTS' REPLY BRIEF REGARDING THE UNCONSTITUTIONALITY OF 18 U.S.C. § 248(a)(2)**

Defendants Chinese Anti-Cult World Alliance, Michael Chu, Li Huahong, Zhu Zirou and Wan Hongjuan (the "Defendants") hereby submit this reply brief regarding whether 18 U.S.C. § 248(a)(2) is unconstitutional.

## PRELIMINARY STATEMENT

The Defendants' constitutional challenge to 18 USC § 248(a)(2) is a **facial** challenge, which applies a straightforward application of the controlling *Morrison/Lopez* precedents to the non-economic activity that 18 USC § 248(a)(2) purports to sweepingly criminalize – a statute that curiously (and unlike 18 USC § 247) contains no jurisdictional element that the activity involve interstate commerce.

Faced with this formidable facial challenge to 18 USC § 248(a)(2), the best that the Plaintiffs can do is argue that they would have taken more discovery to address an **as applied** challenge to the statute. But that argument dodges the critical facial challenge presented in this

case – an important issue that no court in the nation has yet had occasion to address. The issue in this case does not involve an "as applied" challenge. Rather, the issue presented is whether 18 USC § 248(a)(2) is facially unconstitutional for the same reasons articulated in the key *Lopez* and *Morrison* decisions. The answer to that question is clearly yes.

Thus, all of Plaintiffs' "as applied" arguments, and their alleged need for discovery to address any as applied challenge, are red herrings.

With no real argument against the facial challenge to the statute, the Plaintiffs incredibly accuse the Defendants' counsel of having strategically kept this challenge in its back pocket, only to be unleashed at this summary judgment stage. Such accusations are facially implausible. The obvious truth is that undersigned counsel detected the constitutional issue shortly after pondering the scope of 18 USC § 248(a)(2) after this Court suggested at oral argument that, in light of the Establishment Clause, the statute might be broadly be applied to criminalize intimidation **at any location** – thus representing a virtually limitless power to criminalize truly local, non-commercial activity. No nefarious or strategic tactics were involved. Rather, undersigned defense counsel listened to Your Honor, remembered *Lopez* and *Morrison* and the separation of powers principles of those cases, and immediately called this profound and important issue to the Court's attention as soon as it was detected – prior to the Court's ruling on summary judgment.

Once the issue was flagged, what becomes even more compelling is that Congress in passing amendments to 18 USC § 247 actually identified the problems with Section 248 years ago. That counsel for both sides only realized these fundamental problems after Your Honor raised other profound Establishment Clause issues is not the result of any attorney's strategic gamesmanship. Rather, this constitutional issue unfolded as a result of this Court stepping back and engaging at oral argument regarding larger questions concerning constitutional issues. This

is precisely a benefit of Your Honor's practice of having hearings in connection with summary judgment – to get to the heart of the issues before trial.

At bottom, Section 18 USC § 248(a)(2) is unconstitutional for the very reasons articulated in *Lopez/Morrison*: the extent to which it purports to literally criminalize non-economic activity would result in a situation where there would be no meaningful limitation to congressional power. Such limitless power would contradict a fundamental structural protection for individual liberty that the Founders etched clearly into the Constitution: that the federal legislative branch has limited and enumerated powers, and that there is some outer limit to criminalizing non-economic activity – activity that otherwise would be the subject of local law enforcement. Nothing short of this Court's solemn duty to implement the Founder's vision of limited federal power is at stake by the profound issue raised in this case.

## ARGUMENT

### I. DEFENDANTS' MOTION TO AMEND THEIR ANSWER IS NOT UNTIMELY AND NOT PREJUDICIAL TO PLAINTIFFS

Because Plaintiffs realize that 18 U.S.C. § 248(a)(2) faces a formidable constitutional challenge on the merits, they expend many pages of their brief suggesting that there are procedural grounds to avoid having the Court rule on this critical and threshold legal issue. In that regard, although the Court has already allowed the facial constitutional challenge to be asserted, the Plaintiffs spend pages repeating their argument that the constitutionality issue is raised too late, and is prejudicial. While it is understandable why the Plaintiffs do not want the facial challenge to be decided on the merits, it is equally clear that the facial challenge is not late, and that the Plaintiffs are in no way prejudiced by the timing of the facial challenge. Indeed, the Plaintiffs have

had a full opportunity as part of this supplemental pretrial briefing, to fully research and brief the facial challenge, which in no way involves any need for discovery, either from parties or non-parties.

To being with, as this Court already recognized, it is unclear whether a facial challenge to the constitutionality of a statute is properly viewed as an affirmative defense. *See* April 27, 2018 Order (Doc. 154) at 1 (citing *Century Indem. Co. v. Marine Grp., LLC*, 848 F. Supp. 2d 1238 (D. Or. 2012)). *See also S. Track & Pump, Inc. v. Terex Corp.*, No. CV 08-543-LPS, 2013 WL 5461615, at *2 (D. Del. Sept. 30, 2013), *rev'd on other grounds,* 618 F. App'x 99, 2015 WL 4081493 (3d Cir. 2015) ("The Court concludes that Terex has not waived its constitutional challenge. Rule 8(c)(1) provides a list of affirmative defenses that must be raised in an answer, but it does not include a challenge to a statute's constitutionality. Plaintiff cites no binding authority for the proposition that a constitutional challenge to a statute is waived under Rule 8(c) if not pled as an affirmative defense in the answer.").

The reason that it is unclear whether a facial constitutional challenge is an affirmative defense is because, as is the case here, a facial challenge to a statute typically does not involve issues concerning which a party needs notice of early on in order to engage in discovery. That is, whether a statute is facially unconstitutional typically turns on the nature of the statute, its legislative history, and the application of appellate authority – all matters that are readily ascertainable to the parties, do not involve discovery, and can be decided at any time prior to trial.

Indeed, to allow a trial concerning a statute that is facially unconstitutional would be illogical and contrary to judicial economy. If this Court becomes convinced that 18 USC § 248(a)(2) is facially unconstitutional, it makes no sense to suggest that the Court must now go through the robotic exercise of requiring a full-blown jury trial as to a claim based on a statute that

the Court knows is facially invalid. To suggest that the court system and jury must undertake the time and resources for the parties to try a case under a statute that is unconstitutional defies logic and common sense, which is exactly why federal courts have properly questioned whether a facial challenge is truly an affirmative defense. If a statute is unconstitutional on its face, common sense dictates that the Court should so rule prior to trial and be done with it.

This Court cited the decision in *Century Indem. Co. v. Marine Grp., LLC*, 848 F. Supp. 2d 1238 (D. Or. 2012), "noting the 'uncertainty of federal law' about whether the defense of unconstitutionality must be pled[.]" April 27, 2018 Order (Doc. 154) at 1. That decision quotes authority pointing out that a facial challenge to the constitutionality of a statute is not ordinarily an issue upon which evidence must be presented at trial or about which one must be forewarned in order to prepare evidence for trial, as it involves issues of law. Here, the outcome of this important constitutional issue will turn on readily available public information such as: the Congressional findings supporting the statute; and the fact that the section of FACE being challenged indisputably purports to criminalize non-commercial activity involving the types of local crime that the Supreme Court in *Morrison* held cannot be regulated under the Commerce Clause power.

Moreover, even assuming, *arguendo*, that the facial unconstitutionality of a statute is an affirmative defense (which it is not), this would not prevent the Court from properly considering and ruling on that issue, which was raised prior to the Court's ruling on summary judgment, and months before trial. Courts routinely allow assertion of affirmative defenses where there is no prejudice to the adversary, as is the case here. *Steinberg v. Columbia Pictures Industries, Inc.*, 663 F.Supp. 706, 715 (S.D.N.Y. 1987). "[A]bsent prejudice to the plaintiff, a defendant may raise an affirmative defense in a motion for summary judgment for the first time." *Monahan v. City of New*

*York Dept. of Correction*, 10 F.Supp.2d 420, 423 (S.D.N.Y. 1998); *see also Steinberg*, 663 F.Supp. at 715. As explained above, Plaintiffs have not been prejudiced by Defendants raising the facial unconstitutionality issue for the first time on summary judgment.

Plaintiffs' argument that Rule 16(b) somehow prevents the Court from considering the critical constitutional issue raised is similarly unavailing. Plaintiffs' pointing to Rule 16(b) again begs the question of whether unconstitutionality is an affirmative defense. As this Court's April 27, 2018 Order noted, there is uncertainty as to whether a facial constitutional challenge to a statute is an affirmative defense. April 27, 2018 Order (Doc. 154) at 1.

Second, Rule 16(b) provides that scheduling orders may be modified for good cause and with the judge's consent. Fed. R. Civ. P. 16(b)(4). Here, there is both good cause, and consent of the Court, to raise this important threshold issue. April 27, 2018 Order (Doc. 154) at 1 ("The court takes the April 21st letter as a request by defendants' to amend their answers. Defendants' may amend their answers to include the defense of the unconstitutionality of the FACEA.").

Here, there is obviously good cause to allow consideration of the threshold constitutional issue months before trial. If the Court becomes convinced that 18 U.S.C. § 248(a)(2) is unconstitutional under *Lopez* and *Morrison*, then it would be a terrible waste of judicial resources to conduct a full-blown trial on Plaintiff's claim based on this statute.

## II. PLAINTIFFS' ARGUMENTS DO NOTHING TO ALTER THAT 18 U.S.C. 248(A)(2) IS A FACIALLY UNCONSTITUTIONAL ATTEMPT TO BROADLY OUTLAW LOCAL, NON-ECONOMIC ACTIVITY IN EXACTLY THE WAY MORRISON AND LOPEZ PROHIBIT

### A. Plaintiffs Half-Heartedly Suggest A Literal Reading of the Dubious *Salerno* "No Set of Circumstances" Test, When Instead the *Morrison/Lopez* Analysis Applies

Plaintiffs ultimately concede that whether 18 U.S.C. 248(a)(2) is facially unconstitutional turns on the four-factor test articulated in the *Morrison*.

However, before turning to the relevant four-factor *Morrison* analysis, the Plaintiffs first half-heartedly recite a discredited standard (made in dicta in a 1987 Supreme Court decision) regarding facial constitutional challenges – a standard that the Supreme Court, lower courts and numerous scholars have pointed out is not controlling and cannot be taken literally. In that regard, the Plaintiffs cite *United States v. Salerno*, 481 U.S. 739 (1987), and assert that "the proponent of a facial challenge must establish that **no set of circumstances** exists under which the Act would be valid." Plaintiff's Br. at 10.

Taken literally, the notion that a facial challenge could only be successful if one could not imagine *any* circumstances where a statute would be constitutional would mean that facial challenges to a statute would be virtually impossible. For this very reason, subsequent Supreme Court decisions, lower courts and scholars have rejected the *Salerno* dicta as the controlling standard for facial challenges to a statute.

For example, in *City of Chicago v. Morales*, a plurality of the Supreme Court asserted that "[t]o the extent we have *consistently* articulated a clear standard for facial challenges, it is not the Salerno formulation, which has never been the decisive factor in any decision of this Court, including Salerno itself." 527 U.S. 41, 55 n. 22 (1999) (plurality opinion). *See also Washington v. Glucksberg*, 521 U.S. 702, 739-40 (Stevens, J., concurring) (criticizing the strictness of the *Salerno* test and noting the debate over the appropriate standard); *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1175 (1996) (Stevens, J., respecting denial of cert.) ("*Salerno's* rigid and unwise dictum has been properly ignored in subsequent cases even outside the abortion context."); *Doe v. City of Albuquerque*, 667 F.3d 1111, 1124 (10th Cir. 2012) ("The idea that the Supreme Court applies the 'no set of circumstances' test to every facial challenge is simply a fiction, readily dispelled by a plethora of Supreme Court authority."); *United States v.*

*Castil*lo, 140 F.3d 874, 879 n. 3 (10th Cir.1998) (noting that "there has been some debate over the continued vitality of Salerno" and that "the Supreme Court may have overruled it, at least in some contexts"); *Sonnier v. Crain*, 613 F.3d 436, 463-64 (5th Cir.2010) (Dennis, J., dissenting) (arguing that the "no set of circumstances" language from *Salerno* constituted "nothing more than a controversial dictum" and noting that "diligent research" had failed to turn up "a single Supreme Court case—including *Salerno* itself—in which the holding actually relied on the `no set of circumstances' test"), reiterated on reh'g, 634 F.3d 778, 779 (5th Cir.2011) (Dennis, J., dissenting); *A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684, 687 (7th Cir. 2002) (finding that the *Salerno* test is a "suggestion" and that it "must give way" to more recent Supreme Court precedent.); *Evans v. Kelley*, 977 F. Supp. 1283, 1313, n. 31 (E.D. Mich. 1997) ("On the one hand, to hold, as *Salerno* does, that a statute is not constitutionally overbroad if the statute operates permissibly on any single conceivable set of circumstances impacted by it ignores the realities of life; if a statute brings within its prohibitive sweep 99 percent of activities which would be protected by the Constitution, the statute gives too little breathing room for the exercise of constitutionally protected rights.").[1]

Scholars have similarly pointed out that the one-sentence snippet from Salerno cannot be, and has not been applied, literally. *E.g.*, *See, e.g.,* Catherine G. O'Grady, The Role of Speculation in Facial Challenges, 53 Ariz. L. Rev. 867, 875 (2011) ("Although the Court has relied extensively on the *Salerno* test to analyze facial challenges, the standard has been controversial and criticized

[1] The Supreme Court has roundly ignored *Salerno* in several other instances outside the commerce clause context, including in *Hill v. Colorado*, 530 U.S. 703 (2000); *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000); *City of Chicago v. Morales*, 527 U.S. 41 (1999); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Bowen v. Kendrick*, 487 U.S. 589 (1988); and *Frisby v. Schultz*, 487 U.S. 474 (1988).

by some Justices as nearly impossible to satisfy. Recently, the Roberts Court suggested that to succeed in a facial attack a challenger must establish either that no set of circumstances exists under which the statute would be valid, or that the statute lacked any 'plainly legitimate sweep.' Taking the 'plainly legitimate sweep' test a step further, the Court has recognized in the First Amendment context a second type of facial challenge" under which a law may be invalidated on its face as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."); Marc E. Isserles, Overcoming Overbreadth: Facial Challenges & the Valid Rule Requirement, 48 Am. U. L. Rev. 359, 386 (1998) ("*Salerno* is best understood, not as a facial challenge 'test' at all, but rather as a descriptive claim about a statute whose terms state an invalid rule of law…"); Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235, 236 (1994) ("However, as I illustrate with numerous cases decided both before and after Salerno, the Court has failed to apply this test. This discrepancy suggests that the Salerno 'no set of circumstances' principle does not accurately characterize the standard for deciding facial challenges.").

The discrepancy between the "no set of circumstances" language and the actual decision in *Salerno* was pointed out by Justice Stevens in his opinion in *Janklow v. Planned Parenthood Sioux Falls Clinic*, 517 U.S. 1174 (1996):

> The Court's opinion in *United States v. Salerno*…correctly summarized a long established principle of our jurisprudence: The fact that [a legislative] Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid. Unfortunately, the preceding sentence in the Salerno opinion went well beyond that principle. That sentence opens Part II of the opinion with a rhetorical flourish, stating that a facial challenge must fail unless there is "no set of circumstances" in which the statute could be validly applied. That statement was unsupported by citation or precedent. It was also unnecessary to the holding in the case, for the Court effectively held that the statute at issue would be constitutional as applied in a large fraction of cases." *Janklow v. Planned Parenthood Sioux Falls Clinic*, 517 U.S. 1174, 1175-76 (1996) (Stevens, J., mem. opinion denying cert.).

In *Washington v. Glucksberg*, 521 U.S. 702, (1997), Justice Stevens' concurring opinion pointed out: "I do not believe the Court has ever actually applied such a strict standard, not even in Salerno itself, and the Court does not appear to apply Salerno here." 521 U.S. 702, 740 (Stevens, J., concurring in judgments); *see also Janklow v. Planned Parenthood Sioux Falls Clinic*, 517 U.S. 1174, 1175-76, (1996) (Stevens, J., mem. opinion denying cert.) (stating that "Salerno's rigid and unwise dictum has been properly ignored in subsequent cases," and that it "does not accurately characterize the standard for deciding facial challenges, and neither accurately reflects the Court's practice with respect to facial challenges, nor is it consistent with a wide array of legal principles.").

In *Chicago v. Morales*, 527 U.S. 41 (1999), Justice Stevens, in a plurality opinion joined by Justices Souter and Ginsburg, affirms "[t]o the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court." 527 U.S. 41, 55 n. 22 (1999) (plurality opinion) (Stevens, J., Souter, J., and Ginsburg, J.).

In *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442 (2008), Justice Thomas, writing for the majority, acknowledged the criticisms of the *Salerno* made by his fellow Justices, and invoked the "plainly legitimate sweep" standard in order to reach the Court's conclusion, noting that all of the Justices agreed that this standard was an appropriate test of facial challenges. *See Washington State Grange,* 552 U.S. at 449.

In addition to criticizing the *Salerno* test, the Supreme Court has, on various occasions, flatly ignored and defied *Salerno* in deciding various types of facial challenges. Indeed, this trend is particularly evident in the context of challenges to statutes passed under the authority granted by the commerce clause. *See Wilkinson*, 626 F. Supp. 2d. 184 at 188 ("…the Supreme Court has not applied the *Salerno* test to facial challenges in Commerce Clause cases at least since *Lopez.*).

That the Salerno "no circumstances" test is not literally applied is illustrated by the decision in In *United States v. Lopez*, 514 U.S. 549 (1995). In *Lopez*, the Supreme Court upheld a facial constitutional challenge to a federal statute banning possession of firearms on school grounds. The court held that carrying a firearm was not a commercial activity, and, noting that the statute lacked "a jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce," reasoned that because the connection between the prohibited activity and interstate commerce was too attenuated for the statute to substantially affect interstate commerce, the statute was an invalid exercise of congressional power. *Id.* at 561-568.

In reaching its conclusion, the *Lopez* court completely ignored *Salerno*, and instead applied the substantial-effects test, which asks "whether the class of activities as a whole substantially affects interstate commerce, not whether any specific activity within the class has such effects when considered in isolation." *Id.* at 600.

Indeed, the *Lopez* court struck down the statute at issue even though it is easy to imagine situations where the firearms at issue would have been procured through interstate commerce. The same applies to *Morrison*: it is easy to imagine acts of violence against women that involve interstate commerce. The reason the statutes were deemed facially unconstitutional in both cases is because the sweep of both statutes purported to broadly criminalize non-economic activity, which is exactly the case with 18 USC 248(a)(2).[2]

Thus, both *Morrison* and *Lopez* make clear that the *Salerno* test, which asks whether or not one can imagine a single set of circumstances in which the act would be valid, is not the appropriate

[2] Some courts have read *Lopez* to mean that if the activity that Congress purports to regulate is non-economic, then by definition there is no set of circumstances where it can substantially effect interstate commerce. *See Nebraska v. EP*A, 331 F.3d 995, 998 (D.C. Cir. 2003).

standard for assessing facial challenges to a statute's constitutional validity[3] Rather, the appropriate question is whether the plain sweep of the statute is so broad as to cover activity that Congress is not authorized to regulate. *See Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 449 (2008). Just because one can imagine non-economic activity, like an act of violence, having some effect on interstate commerce, this does not save the statute from a facial challenge under the Commerce Clause. If the statute purports to broadly outlaw local acts of crime that do not involve economic activity, then there would be no limit to congressional power, and the act is facially invalid under *Morrison*.

Defendants acknowledge that in *U.S. v. Sage*, 92 F.3d 101 (2d Cir. 1996), the Second Circuit cited the *Salerno* test in case involving a Commerce Clause challenge. However, the outcome in *Sage* turned on the general sweep of the statute, and did not turn on whether there was literally no set of circumstances where the statute would be valid. *See id* at 106 (holding that the statute at issue was constitutionally valid because it could fairly be considered to regulate conduct that congress was authorized to regulate.) Moreover, *Sage* was decided prior to the Supreme Court decision in *Morrison*, which highlights why *Salerno* is not the governing standard in assessing challenges to facial limitations to Congress' power under the Commerce Clause.

Indeed, subsequent Second Circuit decisions have suggested that the *Salerno* test is not the proper standard for assessing facial challenges to statutes. *See United States v. Quinones*, 313 F.3d 49, 60, n. 8 (2d Cir. 2002) (A plurality of the Supreme Court has recently indicated that the standard for mounting a facial challenge is not as severe as *Salerno* had suggested.); *Lerman v. Bd. of*

[3] While the *Lopez* and *Morrison* decisions do not expressly indicate that the challenges at issue were facial challenges, they clearly were. *See United States v. Wilkinson*, 626 F. Supp. 2d 184, 188 (D. Mass. 2009).

*Elections of New York*, 232 F.3d 135, 144, n. 10 (2d Cir. 2000) ("It is not even clear that Salerno 's 'no set of circumstances' test articulates an exclusive standard for making facial challenges outside the First Amendment context, as a plurality of the Supreme Court recently has noted.").

In light of the above, the applicable standard for assessing a facial challenge is the *Lopez* and *Morrison* analysis of whether the statute at issue purports to sweepingly criminalize non-economic activity – not whether the Court can imagine one hypothetic scenario where the statute could be applied constitutionally. If that were the test, the Supreme Court in *Lopez* and *Morrison* would not have stricken down the statutes at issue.

**B. Plaintiffs Concede That the *Morrison* Four-Factor Test Applies, Concede The Statute Fails One Factor, and Unconvincingly Try to Defend the Statute Under the Other Three**

The Plaintiffs concede that the four-factor test of Morrison applies. Pl. Br. at 10.

Having admitted that the *Morrison* four-factor test applies, the Plaintiffs also concede that 18 U.S.C. § 248(a)(2) fails under the factor that considers whether there is a jurisdictional element. Pl. Br. at 11. That is, it is undisputed that – unlike Section 247 -- the statute contains no requirement that the activity involve interstate commerce.

Next, the Plaintiffs essentially admit that Section 248(a)(2) fails another *Morrison* factor: they admit that "church-related acts of violence are not necessarily commercial in nature. . . ." Pl. Br. at 14. Although they caveat the sentence with the phrase "not necessarily," acts of intimidation anywhere in a locality are no more connected to interstate commerce that acts of violence against women that was found insufficient under *Morrison*.

For the same reason, the Plaintiffs cannot meet yet a third factor in *Morrison*, namely whether the link between the activity purported to be criminalized and the effects on interstate commerce is simply too attenuated to survive the *Morrison* standard.

Finally, Plaintiffs attempt to argue that the statute fare well under the *Morrison* factor that considers whether Congress made findings regarding the activity's effect on interstate commerce. Here, it is undisputed that Congress made no such findings in passing Section 248. Forced to concede this, Plaintiffs place heavy reliance on congressional findings that were made in passing 18 U.S.C. § 247. Pl. Br. at 11-12. Plaintiffs' reliance on congressional findings as to Section 247 is without merit for several reasons.

First, the elephant in the room is that in passing amendments to Section 247, Congress repeatedly recognized that in light of the Supreme Court's decision in *Lopez,* a jurisdictional element for statutes protecting religion was critically important. 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).

Second, Plaintiffs place reliance on congressional findings as to Section 247, including the involvement of churches in economic activity and the effect of such activities on interstate commerce. Pl. Br. at 11-12. Plaintiffs' reliance on these findings as to a different statute do not rescue Section 248(a)(2). First, as noted, Congress was acutely aware that these findings would alone be insufficient, and for this

reason included a jurisdictional element in Section 247. Moreover, the non-economic activity covered by Section 248(a)(2) 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 this Court understands 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.

The same exact logic applies here. The scope of Section 248 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.

## CONCLUSION

For the foregoing reasons, this Court should find 18 U.S.C. § 248(a)(2) unconstitutional and dismiss Plaintiffs' claims asserted under this act.

Dated: New York, New York
May 25, 2018

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