18-2626

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ZHANG JINGRONG, ZHOU YANHUA, ZHANG PENG, ZHANG CUIPING, WEI MIN, LO KITSUEN, CAO LINJUN, HU YANG, GUO XIAOFANG, GAO JINYING, CUI LINA, XU TING, BIAN HEXIANG,

Plaintiffs-Counter-Defendants-Appellees,

—against—

CHINESE ANTI-CULT WORLD ALLIANCE INC., (CACW), MICHAEL CHU, LI HAUHONG, WAN HONGJUAN, ZHU ZIROU,

Defendants-Counter-Claimants-Appellants,

DOES 1-5, inclusive,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-COUNTER-CLAIMANTS-APPELLANTS

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Counter-Claimant-Petitioner Chinese Anti-Cult World Alliance Inc. discloses that it is not a publicly held corporation, has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because this case arose under the laws of the United States, namely 42 U.S.C. § 1985(3) and 18 U.S.C. § 248.

This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1292(b). On May 30, 2018, the District Court issued a Memorandum and Order ("May 30, 2018 Order") certifying for interlocutory appeal the two issues presented herein. A-2282-83.[1] On June 11, 2018, Defendants made a motion for leave to appeal pursuant to 28 U.S.C. § 1292(b). This Court granted Defendants' motion on September 5, 2018. A-2288.

ISSUES PRESENTED

1. Did the United States Congress possess the power to pass the Freedom of Access to Clinic Entrances Act of 1994 ("FACEA") as it relates to religion?

2. What is the scope of FACEA as it affects the instant dispute?

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)

The Plaintiffs in this action assert claims under the Freedom of Access to Clinic Entrances Act of 1994 ("FACEA"), 18 U.S.C. § 248(a)(2). A-90-91 (Compl.

[1] Citations to "A-__" refer to the Joint Appendix dated December 18, 2018.

¶¶ 169-175). 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' Complaint alleges that all of the incidents giving rise to their claims occurred on the sidewalks of Main Street, Flushing – namely, at the Falun Gong tables that are located on the busy sidewalks of Flushing, Queens. E.g., A-1826-30; A-55-56 (Compl. ¶ 20). Plaintiffs' Complaint does not allege that any of the confrontations occurred while Plaintiffs or Defendants were crossing state lines. A-1826-30; A-55 (Compl. ¶ 19).

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. A-1826-30.

B. The Legislative History of FACEA

The section of FACEA under which Plaintiffs have asserted claims – dealing with interference at places of worship – was added relatively late in the legislative process. A-1982-94. 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 id.*

In 1992, a bill similar to the House of Representatives version of the enacted law was first introduced in Congress.[2] While the House of Representatives introduced the next version of FACEA on February 3, 1993, it was the Senate proposal, Senate Bill 636, which was ultimately presented to President Bill Clinton on May 17, 1994 and signed into law on May 26, 1994. *Id.*

The text of the bill contained a section providing a Congressional Statement of Findings and Purpose. A-1968-71. All of the findings regarding the effect on interstate commerce pertained only to the access to abortion clinics, not with places of worship. *Id*. These 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[.]" A-1970.

Indeed, it was not until November 16, 1993 and the third version of Senate Bill 636 that the language regarding interference with places of religious worship was finally introduced. A-1987. This language was introduced by Senator Orrin

[2] Helen R. Franco, *Freedom of Access to Clinic Entrances Act of 1994: The Face of Things to Come?*, 19 NOVA L. REV. 1083, at 1098 (1995).

Hatch (the "Hatch Amendment") and "[i]n a coup for the Senate conferees, the oddly-placed prohibition against interference with religious worship remained a part of the final enactment." Franco, supra note 2, 19 NOVA L. REV. 1083, at 1103 n. 132, 1109 ("Senator Hatch was one of four senators of the seventeen-member Senate Labor and Human Resources Committee to vote against adoption of the proposed Senate Bill 636 on June 23, 1993."); A-1997.

Unlike the portion of the bill regarding access to abortion clinics, Congress did not identify the conduct in the Hatch Amendment – dealing with interferences with "places of religious worship" – as commercial **and there were no Congressional findings with respect to any impact that the conduct would have on interstate commerce**. A-1983-86.

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. A-2023. 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*.

A-2023.

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." A-2097.

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

On June 29, 2016, the Attorney General's office confirmed in writing that "the Department [of Justice] has not filed any criminal or civil actions under the FACE Act" regarding violence directed at houses of worship. A-2190. Instead, the Department of Justice uses 18 U.S.C. § 247 to protect religious worship and religious freedom. *Id*. Unlike Section 248(a)(2), Section 247 includes the necessary element that the offense be in or affect interstate commerce. 18 U.S.C. § 247(b).

D. Procedural History of Constitutional Challenge

On April 21, 2018, the Defendants asserted that the section of FACEA under which Plaintiffs assert claims, 18 U.S.C. § 248(a)(2), is unconstitutional because it represents an illegitimate exercise of Congressional power under the Commerce Clause of the United States Constitution. *See* Doc. 150 at 5.[3] 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).

On April 25, 2018, the District Court issued an order ruling that the issue of the constitutionality of Section 248(a)(2) is "worthy of full discussion." A-1889. The Court ordered that briefs on the issue be submitted by May 21, 2018, and that a hearing on the constitutional issue shall be heard on May 29, 2018. *Id.*

On April 27, 2018, the Court deemed the April 21, 2018 letter by the Defendants as a request to add the defense of unconstitutionality, and ordered the Defendants to amend their answers promptly to assert such defense. A-1890. In

[3] Citations to "Doc.___" refer to the District Court docket numbers for documents that were filed with the District Court, but that were not reproduced in the Joint Appendix.

accordance with the Court's April 27, 2018 Order, the Defendants filed amended answers that assert the unconstitutionality of Section 248(a)(2) as a defense. A-1892-1931; A-1932-1950.

On April 23, 2018 the District Court issued an Order that denied in part and granted in part the Defendants' motion for summary judgment. *Zhang Jingrong v. Chinese Anti-Cult World All.*, 311 F. Supp. 3d 514 (E.D.N.Y. 2018) (Weinstein, J.); A-1881-82. As to Plaintiffs' claim under FACEA, the District Court denied the Defendants' motion for summary judgment. Despite the legislative history making clear that the ambiguous phrase "place of religious worship" cannot mean a sidewalk, the District Court held that the statute covered the incidents alleged here, which all occurred on a sidewalk – Main Street, Flushing. A-1859-62; A-1878.

On May 30, 2018, the District Court issued an Order in which it considered Defendants' facial constitutional challenge to Section 248(a)(2). *Zhang Jingrong v. Chinese Anti-Cult World All.*, 314 F. Supp. 3d 420 (E.D.N.Y. 2018) (Weinstein, J.); A-2246-83; A-2246-83. 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. A-2279. Nevertheless, the District Court concluded 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. A-2280.

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." A-2251. 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). A-2282. Following entry of the District Court's Order, Defendants filed a petition, pursuant to 18 U.S.C. § 1292(b), for leave to appeal the interlocutory order. On September 5, 2018, the Second Circuit granted Defendants' § 1292(b) petition. A-2288.

SUMMARY OF THE ARGUMENT

This action presents the Court with a critical legal issue that has not yet been squarely addressed by any Court of Appeals: whether the section of the Free Access to Clinic Entrances Act ("FACE") at issue in this case – 18 U.S.C. § 248(a)(2), which purports to criminalize intimidation at places of worship – represents an unconstitutional exercise of Congressional power.

This is not merely an academic legal issue to fill pages of the Federal Reporter, but goes to the heart of our Founders' profound belief in the separation of powers. What is at stake 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.

The well-established principles regarding the limitations of Congress' power under the Commerce Clause were clarified and reiterated in a key Supreme Court decision which struck down the Violence Against Women's Act. *United States v. Morrison*, 529 U.S. 598 (2000). Under the reasoning of *Morrison*, 18 U.S.C. § 248(a)(2) clearly exceeds the power granted to Congress under the Commerce Clause.

First, this provision does not involve regulation of economic activity. Instead, this provision purports to outlaw violence or intimidation at places of religious worship. Acts of violence or intimidation at places of worship are not economic activity, and are plainly analogous to the acts of violence covered by the Violence Against Women Act that the Supreme Court expressly held in *Morrison* cannot properly be considered economic activity. Indeed, in *Morrison*, the Supreme Court made clear 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*."

Second, as in *Morrison*, there is no jurisdictional element in 18 U.S.C. § 248(a)(2). 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 affects

interstate commerce. This stands in stark contrast to another statute that protects religious locations, the Church Arson Prevention Act of 1996, 18 U.S.C. § 247. In passing Section 247, Congress was careful to include a jurisdictional element, namely, that the offense took place in or affects interstate. It is noteworthy that the Department of Justice has admitted that it principally relies on Section 247 to protect religious liberty – presumably because the government is keenly aware that Section 247 contains the necessary jurisdictional element that Section 248(a)(2) glaringly omits.

Third, 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. Of course, even if Congress had bothered to do so, such findings would not survive constitutional review for the same reasons that the Supreme Court rejected such findings by Congress as to violence against women: such a theory of aggregating the effect of local crimes would allow Congress to exercise virtually limitless power, by simply finding that the aggregate effect of local crime had a substantial effect on interstate commerce.

Fourth, given the absence of any legislative finding, the District Court relied on Congressional findings regarding the commercial aspects of religion when it passed an entirely different statute, 18 U.S.C. § 247. However, the District Court's

reliance on those findings is faulty because Section 247 contained a jurisdictional element, namely that the "offense is in or affects interstate or foreign commerce." 18 U.S.C. § 247(b). Indeed, the *reason* that Congress included the jurisdictional element in Section 247 was the Supreme Court's decision in *Lopez*. Congress expressly acknowledged that without a jurisdictional element, Section 247 would not pass constitutional muster.

Defendants are aware of an optical problem that may arise if the Court is faithful to the constitutional limitations mandated in *Morrison* and rules that 18 U.S.C. § 248(a)(2) exceeds Congress' Commerce Clause power. A critic might try to assert that with such a result, this Court will have defended a law protecting abortion clinics, while striking down a law that protects places of worship. But the Court can anticipate and forcefully reject that false dichotomy. There is another statute – 18 U.S.C. § 247 – that already provides strong protections for places of religious worship, and which is also consistent with constitutional limitations on Congressional power, because that statute contains a jurisdictional element that ensures that the activity outlawed affects interstate commerce. Indeed, the Department of Justice as of June 29, 2016 made clear that it has not brought enforcement actions under Section 248(a)(2), and instead uses Section 247 to protect places of religious worship. A-2190. 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.

The District Court also erred in giving Section 248(a)(2) an expansive reading such that it would apply in circumstances that Congress clearly did not intend. In its April 23, 2018 decision, the District Court turned the statute's text and purpose upside down, and held that it was required to read the phrase "a place of religious worship" extremely broadly to include not just places of religious worship, but also any "transitory locations," such as a street corner, where a person might travel and then subjectively claim he or she was "worshiping." A-1860. The District Court's reasoning was that the Establishment Clause required such an expansive reading, or else more established religions that tended more to have fixed structures would be given preferential treatment. The District Court clearly erred in this regard, by ignoring a long line of authority making clear that if a statute is facially neutral with respect to different religions, the mere fact that it might benefit some religions more than others does not violate the Establishment Clause. Thus, the expansive reading that the District Court gave to Section 248(a)(2), which contradicts the plain text and legislative history of that statute, was not compelled by the Establishment Clause.

Thus, for the reasons set forth more fully below, the Defendants respectfully request that this Court reverse the District Court's denial of Defendants' motion for summary judgment with respect to Section 248(a)(2).

ARGUMENT

I. STANDARD OF REVIEW

The issues certified for interlocutory appeal are to be reviewed *de novo*. *United States v. Weingarten*, 632 F.3d 60, 63 (2d Cir. 2011) ("We review *de novo* a district court's legal conclusions, including its interpretations of federal statutes and determinations regarding their constitutionality.").

II. THE DISTRICT COURT ERRED IN FINDING THAT CONGRESS HAD POWER UNDER THE COMMERCE CLAUSE TO ENACT 18 U.S.C. § 248(a)(2)

A. 18 U.S.C. § 248(a)(2) is Unconstitutional Under the Supreme Court's Decisions in *Lopez* and *Morrison*

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 – violence and intimidation at places of religious worship – that it purported to in passing 18 U.S.C. § 248(a)(2). Thus, 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 ("VAWA").

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.

The District Court correctly held that the only category of Commerce Clause activity that could conceivably be argued to be implicated by 18 U.S.C. § 248(a)(2) is the third one identified in *Lopez*: that, somehow, intimidation or violence that takes place anywhere where one might worship (including on any local street,

according to the District Court's unduly expansive reading of the statute) – "substantially affects" interstate commerce. A-2275. 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).

In *Morrison*, the Court further clarified the boundaries of Congress' authority under *Lopez's* third category prong. The Court reaffirmed four "significant considerations" to consider in determining whether an activity substantially affects interstate commerce. *Id.* at 609. First, a court must examine whether the activity involves regulation of economic activity. *Id.* at 611. Second, an express jurisdictional element may establish its connection with or effect on interstate commerce. *Id.* at 611–12. Third, the statute or its legislative history may include express congressional findings of the activity's effects on interstate commerce. *Id.* at 612. Fourth, the court must consider whether the link between the activity and a substantial effect on interstate commerce is too attenuated. *Id.*

In *Morrison,* the Court weighed these four considerations in striking down 42 U.S.C. § 13981, a statute which provided a civil remedy for victims of gender-motivated violence. *Id. at 619*. The Court found that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity," and noted that the statute "contained no express jurisdictional element." *Id.* at 611–13. And although Congress there (unlike here) *did* make express findings as to how the

activity in question affected interstate commerce (it made findings that violence against women purportedly had a substantial effect on interstate commerce), the Court in *Morrison* did not defer to such findings, and held that the logic by which Congress made this determination would eviscerate any limiting principle on the use of Congressional power. The Supreme Court rejected Congress' logic that violence against women affects interstate commerce, because if that were accepted, then the collective impact of any crime, however local, could also be said to affect interstate commerce – and thus there would be under that reasoning no practical limit on congressional power.

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.

First, this provision does not involve regulation of an economic activity. Instead, this provision purports to outlaw violence or intimidation at places of religious worship. Acts of violence or intimidation at places of worship are not economic activity, and are analogous to the acts of violence covered by the Violence Against Women Act that the Supreme Court expressly held in *Morrison* cannot properly be considered economic activity. 529 U.S. at 614. The Supreme Court made clear that, under the third category identified in *Lopez* – regulation of activity that substantially affects interstate commerce – "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*." *Id.* (emphasis added).

Second, as in *Morrison*, there is no jurisdictional element in 18 U.S.C. § 248(a)(2). 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.

Third, 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.

Fourth, as in *Morrison*, 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*. In *Morrison*, the Court had before it a situation where Congress had painstakingly made numerous findings that violence against women had a broad and substantial impact on interstate commerce. And yet the Supreme Court rejected these findings because under such a theory of aggregating the impact of non-economic activity such as acts of violence, the Court pointed out that there would effectively be no meaningful limit to the Congress' power under the Commerce Clause:

> In these cases, Congress' findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers. Congress found that gender-motivated violence affects interstate commerce "by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; ... by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products." H.R. Conf. Rep. No. 103–711, at 385, U.S. Code Cong. & Admin. News 1994, pp. 1803, 1853. Accord, S. Rep. No. 103–138, at 54.
>
> Given these findings and petitioners' arguments, the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded. See *Lopez*, *supra*, at 564, 115 S. Ct. 1624. The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

Morrison, 529 U.S. at 615.

The District Court correctly held that the courts that have addressed the constitutionality of FACEA have thus far only addressed the portion of the statute that addressed access to abortion clinics, 18 U.S.C. § 248(a)(1). A-2268-69. In upholding regulation of access to abortion clinics as a constitutional exercise of Congressional power, these courts have stressed the fact that abortion services

clearly involve *commerce* – doctors performing abortions for compensation, and women paying for abortions. These cases also stressed that Congress made specific findings regarding the commercial aspects of abortion services and the effect of this commercial activity in interstate commerce. *See United States v. Weslin*, 156 F.3d 292, 296 (2d Cir. 1998) ("The legislative history of FACE shows that Congress specifically found that 'women travel interstate to obtain reproductive health services' … Similarly, and in part because of a shortage of doctors willing to perform abortions, doctors travel from state to state and often cover great distances to perform abortions. Congress also found that clinics purchase medical and other supplies in interstate commerce."); *United States v. Bird*, 124 F.3d 667, 678 (5th Cir. 1997) ("Congress made findings, supported by the testimony presented to the House and Senate committees charged with considering the Act, that there was an interstate commercial market for abortion services."); *United States v. Gregg*, 226 F.3d 253, 262–63 (3d Cir. 2000) ("In contrast to gender-motivated crime, the activity regulated by FACE—the physical obstruction and destruction of reproductive health clinics and the intentional interference and intimidation of persons obtaining and providing reproductive health services—is activity with an effect that is economic in nature.

Reproductive health clinics are income-generating businesses that employ physicians and other staff to provide services and goods to their patients.").[4]

The focus in the cases that upheld the abortion clinic access portion of FACEA (18 U.S.C. § 248(a)(1)) was on the indisputably commercial nature of abortion services, and preventing interference with doctors performing medical services for profit – commercial activities which clearly distinguished that aspect of FACEA from the Violence Against Women's Act. The logic of these decisions highlight why the portion of FACEA relevant here – the section that criminalizes ***intimidation at places of worship*** (which the District Court ruled could include any local street) – no more affects commercial activity than did the Violence Against Women Act.

B. The District Court Incorrectly Relied on Legislative Findings from Statutes that Included a Jurisdictional Element

The District Court correctly acknowledged that, in passing FACEA, Congress made no findings whatsoever as to how intimidation at places of religious worship affected interstate commerce. A-2279. Instead, the District Court relied solely on Congress' findings in passing *other* statutes, namely the Church Arson Prevention

[4] *See also Norton v. Ashcroft*, 298 F.3d 547, 558 (6th Cir. 2002) ("the legislative record indicates that there is a national market for abortion services. . . . . Owing to a national shortage in reproductive health services where only 17% of counties have an abortion provider . . . patients must often travel interstate to obtain reproductive health services.").

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. A-2271-72; A-2279-80.

However, 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. A-2271 ("Both statutes contain commerce-linked jurisdictional elements.") (citing 18 U.S.C. § 247(b) and 18 U.S.C. § 249(a)(2)(B)). 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, 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) – acts of intimidation – 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.

C. Striking Down 18 U.S.C. § 248(a)(2) as Unconstitutional Will Not Render Places of Religious Worship Unprotected

Defendants are fully aware of the optical problem that could be said to arise if the Court is faithful to the constitutional limitations mandated in *Morrison* by striking down 18 U.S.C. § 248(a)(2). Specifically, 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, as discussed above, Section 247 already provides strong protection for places of religious worship, albeit in a way that is consistent with constitutional limitations on Congressional power.

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. A-2190. 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.

III. THE DISTRICT COURT ERRED BY BROADLY CONSTRUING SECTION 248(a)(2)'S LANGUAGE – "A PLACE OF RELIGIOUS WORSHIP" – TO INCLUDE ANY TRANSIENT LOCATION, INCLUDING BUSY STREET CORNERS, WHERE SOMEONE MIGHT PURPORT TO WORSHIP

The plain text of Section 248 and its legislative history together make it clear that the statute was intended to outlaw acts of intimidation in the immediate vicinity of "a place of religious worship," as that phrase would commonly be understood, such as churches, temples, mosques and other religious buildings or established locations. By analogy to protecting against the blocking of abortion clinics, or acts of harassment at abortion clinics, the clear intention was to prevent wrongdoers from going to houses of worship, and intimidating people who are exercising their private worship.

In its April 23, 2018 decision, the District Court turned the statute's text and purpose upside down, and held that it was required to read the phrase "a place of religious worship" extremely broadly to include not just places of religious worship, but also any "transitory locations," such as a street corner, where a person might travel and then subjectively claim he or she was "worshiping." A-1860. The District Court's reasoning was that the Establishment Clause required such an expansive reading, or else more established religions that tended more to have fixed structures would be given preferential treatment. The District Court's reasoning is seriously flawed for several reasons.

A. The Plain Meaning of "A Place of Religious Worship," Means Established, Fixed Locations for Worship – Such as Churches and Synagogues – and Not Sidewalks, as the Legislative History Makes Clear

First, the ordinary meaning of the plain text of "a place of religious worship," taken together with the statute's legislative history, makes clear that it was intended to protect against intimidation and assaults in the immediate vicinity of established locations where people worship. The plain text and common sense meaning of that phrase would suggest to a reasonable reader a fixed location of religious worship, such as a church or a synagogue, and certainly was not intended to cover any street corner where someone may go and subjectively pray or meditate.

In justifying an unlimited and expansive meaning of the phrase, the District Court considered the word "place" in isolation, and, using the dictionary definition of "place," concluded that this supported an expansive reading of the statute such that Section 248(a)(2) covered intimidation where any person might travel, and then engage in subjective prayer or meditation. A-1861-62.

However, in artificially considering the word "place" in isolation, the District Court ran afoul of well-established law mandating that courts read phrases in statutes together in context to understand and enforce the ordinary meaning of the phrase. "The meaning of a word or phrase cannot be determined in isolation, but must be drawn from the context in which it is used." *In re September 11 Property Damage Litigation*, 650 F.3d 145, 155 (2d Cir. 2011). Thus, using the dictionary definition

of the word "place," in isolation, was error. "Whether a statutory term is unambiguous, however, does not turn solely on dictionary definitions of its component words." *Yates v. United States*, 135 S. Ct. 1074, 1081 (2015). "Rather, the plainness or ambiguity of statutory language is determined not only by reference to the language itself, but as well by the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 1081-82.

Reading the phrase "place of religious worship" in context as required, as opposed to simplistically looking at the dictionary definition of the world "place" in isolation (as the District Court mistakenly did), the common meaning of that phrase clearly suggests to a reasonable reader an established and fixed location such as a church, synagogue, mosque or other religious center.

However, even assuming *arguendo* that the phrase "place of religious worship" was ambiguous and susceptible of a reading to mean any location where any person might travel and engage in subjective prayer – including a busy street corner – then as a matter of law a court should resolve that ambiguity by taking into consideration the statute's legislative history to help understand the legislature's intention as to what it was criminalizing under federal law.

It is well-settled that when faced with an ambiguity in a statute, courts must turn to the legislative history to discern what Congress actually meant. *E.g.*, *Hill v. Del. N. Cos. Sportservice, Inc.*, 838 F.3d 281, 288 (2d Cir. 2016) ("Because we are

faced with textual ambiguity, we turn to the legislative history . . . ."); *United States v. Hoskins*, 902 F.3d 69, 81 n. 5 (2d Cir. 2018) ("As a general matter, we may consider reliable legislative history where, as here, the statute is susceptible to divergent understandings and, equally important, where there exists authoritative legislative history that assists in discerning what Congress actually meant.").

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

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

There are two important portions of the legislative history that make it clear that a place of religious worship was not intended to mean anywhere someone may pray. Senator Kennedy was concerned that Section 248(a)(2) would create

additional rights under FACEA for abortion protestors because protestors could claim that they were engaged in worship outside of abortion clinics. Because of his concern, Senator Kennedy specifically asked the sponsor of the amendment, Senator Hatch, whether the statute could cover prayer on a sidewalk, and the answer was an emphatic "no":

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

A-2023.

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." A-2097.

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

B. By Reading This Criminal Statute So Broadly, the District Court Violated the Rule of Lenity

The District Court also ignored another important principle of interpreting statutes that criminalize activity. Under the well-established rule of lenity, where a criminal statute is susceptible of more than one reading, courts must apply the reading that outlaws a narrower category of activity, to avoid serious due process issues that would arise from the more expansive reading.

The "[a]pplication of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015). The Supreme Court has held that "if our recourse to traditional tools of statutory construction leaves any doubt about the meaning of [a term in the statute], we would invoke the rule that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Id.*

Because Section 248(a)(2) is a criminal statute, the rule of lenity and the important policy behind it are clearly implicated in interpreting its proper scope. "Before a man can be punished as a criminal under the Federal law his case must be 'plainly and unmistakably' within the provisions of some statute." *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 649 (2d Cir. 1993) (quoting *United States v. Gradwell*, 243 U.S. 476, 485 (1917)). The rule of lenity springs from this fair

warning requirement. This expedient "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States v. Dauray*, 215 F.3d 257, 264 (2d Cir. 2000).

In light of this principle, the District Court erred in reading the statute in an expansive way that would render it potentially unconstitutional as imposing vague criminal liability. Under the statute's plain meaning, and consistent with its legislative history, an actor would be on fair warning: if one goes to a fixed place of religious worship, such as a church or temple, and intimidates or assaults someone who is at their house of prayer, that person is obviously on notice that he is committing a serious wrongful act that may result in criminal liability.

In contrast, the District Court ignored the legislative history making clear that it was not intended to cover someone who might subjectively be praying on a sidewalk. Such an expansive reading creates the very threat presented here. Under the District Court's reading of the statute, anyone who might travel to a busy street and subjectively pray would now be deemed to have created a transient "place of religious worship," and any passerby reacting to such person (who, in addition to engaging in subjective prayer, has also injected political views on the street, as Plaintiffs did here) in the street could now unexpectedly face *federal criminal liability* if their reaction to the person "praying" was arguably intimidating or a

threat. This creates the very risk of expansive criminal liability in ambiguous circumstances that the rule of lenity was aimed at avoiding.

Because Section 248 is a criminal statute, the District Court's expansive reading of the statute clearly violates the rule of lenity. Any street altercation could become the subject of a federal prosecution, even where the defendant did not affirmatively take action to go to a place of religious worship to intimidate people. This is yet another reason why the District Court's reading of Section 248(a)(2) was contrary to law.

C. Contrary to the District Court's Holding, Limiting the Scope of 18 U.S.C. § 248(a)(2) to Places of Religious Worship, and Not Any Street a Worshiper May Appear, Does Not Violate the Establishment Clause

In its April 23, 2018 decision, the District Court turned the statute's text and purpose upside down, and held that it was required to read the phrase "a place of religious worship" extremely broadly to include not just places of religious worship, but also any "transitory locations," such as a street corner, where a person might travel and then subjectively claim he or she was "worshiping." A-1860. The District Court's reasoning was that the Establishment Clause required such an expansive reading, or else more established religions that tended more to have fixed structures would be given preferential treatment. The District Court clearly erred in this regard, by ignoring a long line of authority making clear that if a statute is facially neutral

with respect to different religions, the mere fact that it might benefit some religions more than others does not violate the Establishment Clause.

It is well settled that if a statute serves a secular purpose and is neutral among religions on its face, the fact that some religious denominations might benefit more from the statute than others, does not create an Establishment Clause violation. *E.g., Hernandez v. Comm'r*, 490 U.S. 680, 695-96 (1989) (although statute allowing tax deductions might benefit certain religious groups more than others, "a statute primarily having a secular effect does not violate the Establishment Clause merely because it happens to coincide or harmonize with the tenets of some or all religions."); *Commack Self-Service Kosher Meals, Inc. v. Hooker*, 680 F.3d 194, 209 (2d Cir. 2012) (same).

In assessing whether a statute violates the Establishment Clause, courts apply the three factors articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). *See Hooker*, 680 F.3d at 205. To survive such a challenge, a statute must first "have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; and third, the statute must not foster an excessive government entanglement with religion. *Id*.

Applying the *Lemon* factors here, Section 248(a)(2) clearly does not violate the Establishment Clause. There is a neutral secular purpose in outlawing

intimidation and violence, and the statute on its face in no way favors one religion over another.

The District Court expressed concern that requiring a brick and mortar place of worship in order to receive protection under the statute would unfairly not cover a religion that might not use buildings, and offered the example of mountain worship. A-1724-25. But the mere fact that, hypothetically, some religions might benefit more from the protections offered by the statute does not in any way even come close to violating the Establishment Clause. *Hernandez v. Comm'r*, 490 U.S. 680, 696 (1989) ("[A] statute primarily having a secular effect does not violate the Establishment Clause merely because it happens to coincide or harmonize with the tenets of some or all religions."); *Commack Self-Service Kosher Meals, Inc. v. Hooker*, 680 F.3d 194, 209 (2d Cir. 2012) (same).

While a court may attempt to read a statute so that it is constitutional, it may not rewrite a statute. *Puerto Rico v. Franklin California Tax-Free Tr.*, 136 S. Ct. 1938, 1949 (2016) ("[O]ur constitutional structure does not permit this Court to rewrite the statute that Congress has enacted."). Given the text and legislative history of Section 248(a)(2), the Court's reading of FACEA to try to save it from what is a false Establishment Clause problem constituted clear legal error. The lower court erred by broadly construing "place of religious worship" to include any sidewalk where someone might purport to pray, when the text and legislative history

makes clear that this is exactly the opposite of what Congress intended. The District Court's excuse for misreading the statute in this unbounded and expansive way – that it had to do so to avoid running afoul of the Establishment Clause – was clearly incorrect as a matter of law.

CONCLUSION

For the foregoing reasons, the Defendants respectfully request that this Court reverse the District Court's denial of Defendants' motion for summary judgment with respect to Section 248(a)(2).

Dated: New York, New York
December 18, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,110 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(5) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-Point font.

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