18-2626

IN THE

United States Court of Appeals
For the Second Circuit

ZHANG JINGRONG ET AL.,

Plaintiffs - Counter-Defendants - Appellees,

—against—

CHINESE ANTI-CULT WORLD ALLIANCE, INC., (CACWA) ET AL.,

Defendants - Counter-Claimants - Appellants,

DOES 1 – 5, inclusive,

Defendants.

On Appeal from the United States District Court
for the Eastern District of New York

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JURISDICTIONAL STATEMENT

The district court has subject matter jurisdiction pursuant to 28 U.S.C. Section 1331 because this case arises under the laws of the United States; namely, 42 U.S.C. Section 1985(3) and 18 U.S.C. Section 248.

On May 30, 2018, the district court issued a Memorandum and Order certifying for interlocutory appeal under 28 U.S.C. Section 1292(b) the two issues presented here. *Zhang v. Chinese Anti-Cult World All., Inc.*, 314 F. Supp. 3d 420, 443-44 (E.D.N.Y. 2018) (*Zhang II*).

On June 11, 2018, Defendants motioned this Court for leave to appeal pursuant to 28 U.S.C. Section 1292(b), and the Court granted the motion on September 5, 2018. J.A. at 2287.

This Court therefore has jurisdiction over this appeal.

STATEMENT OF ISSUES PRESENTED

The district court certified these two questions for interlocutory appeal:

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

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

STATEMENT OF THE CASE[1]

A. Falun Gong is a religion.

Falun Gong is a well-established Buddhist sect that offers its believers spiritual salvation, enlightenment, and transcendence of the mortal realm. *See Zhang v. Chinese Anti-Cult World All., Inc.*, 311 F. Supp. 3d 514, 525-31 (E.D.N.Y. 2018) (*Zhang I*). Through its practices, Falun Gong believers seek to transcend their cycle of reincarnation and find reconciliation with the divine. *See id.* at 526.

Falun Gong has a foundational scriptural text that tells of an unchangeable and immutable law of the universe; describes metaphysical realms inhabited by deities; and teaches followers the purpose of life, the nature of the afterlife, and their means of salvation. *Id.* at 527-28. Falun Gong adherents avoid alcohol, celebrate holidays, and venerate sacred images and symbols, like the "law wheel." *Id.* at 525.

Based on these and many other factors—including expert testimony that Defendants introduced—the district court found that Falun Gong is a religion. *Id.* at 558-60. Notably, Defendants do not dispute this finding for purposes of this appeal. *See generally* Appellants' Opening Brief (AOB).

[1] Given the procedural posture of this appeal—interlocutory review of certified questions on a summary-judgment record—although some of the facts presented here are from the Plaintiffs' perspective, that is appropriate since Plaintiffs are the nonmoving party and are therefore entitled to all inferences in their favor. *See Gary Friedrich Enter., LLC v. Marvel Characters, Inc.*, 716 F.3d 302, 312 (2d Cir. 2013).

B. Falun Gong faces persecution in China and the U.S.

Unfortunately, however, Falun Gong faces intense persecution. *See* J.A. at 429. In China, the government labels it an "evil cult," and practitioners there are regularly confined in labor camps or prisons, where they suffer "psychiatric and other medical experimentation, sexual violence, torture, and organ harvesting." *Id.* The Chinese government also persecutes Buddhists, Muslims, and Christians by banning possession of religious materials and destroying their holy places, though Falun Gong is particularly reviled. J.A. at 427-29.

The Chinese Anti-Cult Alliance (CACA) works in China to carry out this campaign of violent oppression. *See* J.A. at 1245 (describing CACA's mission as "actively wag[ing] war against evil cult organizations"). Not content with persecuting religious minorities at home, CACA works to "establish anti-cult organizations in countries where Falun Gong is active, such as America." J.A. at 1247. To develop these foreign offshoots, CACA funnels money through Chinese state-owned enterprises that operate overseas. *See* J.A. at 1247-48.

Defendant Chinese Anti-Cult World Alliance (CACWA) is one such offshoot, sharing an express mission to persecute Falun Gong believers. *See Zhang I*, 311 F. Supp. 3d at 532; J.A. at 1251-52, 467; Suppl. App. at 2. CACWA's certificate of incorporation describes its mission as "educat[ing] society about the dangers of the Falun Gong cult and its anti-human and anti-society practices." J.A. at 462. Spelling this out, CACWA's newsletter describes its work as "carrying out a spear-to-spear

violent suppression." J.A. at 467. Other defendants include CACWA's leadership and volunteers. J.A. at 60-62; *see also Zhang I*, 311 F. Supp. 3d at 532-33.

C. Defendants attacked Falun Gong adherents at their designated worship sites in Flushing, Queens.

Plaintiffs are, or were believed by Defendants to be, practitioners of Falun Gong. *See Zhang I*, 311 F. Supp. 3d at 522; J.A. at 55-60. Defendants waged a campaign of systematic persecution against Plaintiffs because of that. *See Zhang I*, 311 F. Supp. 3d at 523. Plaintiffs describe numerous instances of violence, intimidation, and harassment at Defendants' hands. *Id.* at 533-35.

In one of the many attacks, a mob of twenty to thirty people surrounded one woman, grabbed her shoulder bag, and yelled "grab her and hold her," "kill her," and "beat her to death," assailing her until the police finally arrived. *Id.* at 533-34. Another defendant invoked organ-harvesting practices in China, threatening, "[y]ou are worse than a dog, and I will take out your heart, your liver, and your lungs." *Id.* at 533. And yet another defendant knocked religious materials off Plaintiffs' table, then held up a piece of paper that said "I will eradicate you all from the United States. I have a list of all of your names on my paper." *Id.* at 535.

These attacks occurred at designated worship sites in the immediate vicinity of the Falun Gong Spiritual Center, located at 41-70 Main Street, Queens, New York 11335. *See id.* at 532-33; J.A. at 53-60, 1764-65. At the Spiritual Center, adherents

pray, meditate, and study their holy texts. *See* J.A. at 1820; *see also* J.A. at 1737, 1764-65.

Falun Gong adherents also worship at five designated sites where they were attacked. *See Zhang I*, 311 F. Supp. 3d at 564. The New York Police Department granted Falun Gong authorization to operate these sites at the following five specific locations in Flushing, Queens: 136-06 Roosevelt Avenue, 41-17 Main Street, 41-65 Main Street, 41-28 Main Street, and 41-70 Main Street. *Id.* at 533; J.A. at 1761, 1764-65. All these sites are one to three blocks from the Spiritual Center and serve as extensions of the Center. J.A. at 1737-38, 1764-65.

Every day, Plaintiffs engage in religious activity at these sites from 10:00 A.M. to 4:00 P.M. J.A. at 1737. According to the Spiritual Center director, these sites are "part of our spiritual center. It's like an extension to help to preach and tell the truth, to spread good works to people." J.A. at 1738. Moreover, adherents at the extension sites "proselytize and meditate—both recognized forms of worship"—using tables, posters, and other materials. *Zhang I*, 311 F. Supp. 3d at 564.

While worshipping at these designated extension sites, Plaintiffs were repeatedly and violently attacked in the various manners described in part above. *See id.* at 533-35. Plaintiffs thereafter filed suit in the Eastern District of New York,

alleging a violation of the Freedom of Access to Clinic Entrances Act (FACEA), among other claims. J.A. at 90-91.[2]

D. FACEA protects practitioners at a "place of religious worship."

Congress enacted the relevant provision of FACEA to protect people who face violence and persecution at their places of religious worship. J.A. at 2022, 2097. Specifically, FACEA states in pertinent part that:

> Whoever ... [1] by force or threat of force or by physical obstruction, [2] intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with [3] any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom [4] at a place of religious worship shall be subject to the penalties provided in ... the civil remedies provided in subsection (c).

18 U.S.C. § 248(a)(2). The initial spark for FACEA's introduction came from *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), which limited federal protections under 42 U.S.C. Section 1985 against violence and intimidation for women seeking abortions. *See Zhang v. Chinese Anti-Cult World All., Inc*., 314 F. Supp. 3d 420, 429 (E.D.N.Y. 2018) (*Zhang II*). In response, Congress enacted FACEA to bolster those protections. *Id.*

To broaden the statute's reach to cover other constituencies also known to face violence and intimidation, the Senate amended the bill to protect religious

[2] The present controversy harkens back to the violent persecution of Quakers in colonial Flushing. That persecution led to the Flushing Remonstrance, one of the earliest declarations of religious liberty in America. *See* Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 B.Y.U. L. Rev. 1385, 1474-75.

liberty. J.A. at 2097, 2021-22. Senator Orrin Hatch introduced the amendment to "ensure that the first amendment right of religious liberty receives the same protection from interference that FACEA(a)(1) would give abortion [seekers]." J.A. at 2022. As Senator Hatch put it, through this amendment to the bill, "religious liberty would . . . be protected against private intrusion—in exactly the same way that [the bill] would protect abortion." *Id.*

Senator Hatch did not single out certain religions for protection. *See generally* J.A. at 2022-23. Instead, he emphasized that religious liberty is "the first liberty guaranteed in the Bill of Rights"—a liberty that protects all faiths. J.A. at 2022.

The Conference Report likewise stressed Congress's "profound concern" about "private intrusions on religious worship." J.A. at 2097. In light of that threat, Congress determined "religious liberty deserves federal protection" in the manner that FACEA provides. *Id.*

E. The district court found: (1) Falun Gong is a religion; (2) "place of religious worship" encompasses more than fixed structures; and (3) FACEA is constitutional.

The district court issued two lengthy summary-judgment rulings, one upholding the religious-liberty dimensions of FACEA's application to Plaintiffs, and the other affirming the Act's constitutionality under the Commerce Clause.

In its April 23, 2018 opinion, the district court addressed the parties' summary-judgment motions and the court's *sua sponte* motion. *See Zhang I*, 311 F. Supp. 3d at 523-25. Among other things, the court found that Plaintiffs' Fa study,

proselytizing, prayer, and spiritual meditation at the five Spiritual Center extension sites qualify as religious worship under FACEA. *Id.* at 564. Further, the court found that FACEA's plain language "counsels for an expansive interpretation" that includes all places of religious worship. *Id.* at 554-55.

In support of its interpretation, the district court highlighted the "starkly different language in describing religious sites" in FACEA as compared with 18 U.S.C. Section 247 (now known as the Church Arson Prevention Act). *Id.* at 554-55. Whereas FACEA protects people at "place[s] of religious worship," 18 U.S.C. § 248(a)(2), the church-arson statute instead protects "religious real property," 18 U.S.C. § 247(a)(1). The difference between the two statutory schemes, the district court found, shows Congress intended to protect all places of religious worship, rather than merely "fixed structures"—as Defendants would have it. *Zhang I*, 311 F. Supp. 3d at 554-55; *see* AOB at 26.

Moreover, in the district court's view, the more inclusive statutory reading safeguards FACEA's constitutionality. *Zhang I*, 311 F. Supp. 3d at 554. The court observed that limiting the phrase "place of religious worship" to temples and other fixed structures would leave religions that worship elsewhere unprotected. *See* J.A. at 1725 (April 11, 2018 hearing) (taking judicial notice that Native Americans worship in mountains and fields). The court therefore concluded that "'a place of religious worship' in FACEA must be construed broadly to avoid a constitutional issue under the First Amendment: that religions using temples are not privileged

over those that do not." *Zhang II*, 314 F. Supp. 3d at 432. The district court thus held FACEA encompasses Plaintiffs' extension sites. *Zhang I*, 311 F. Supp. 3d at 522-23, 554-55.

In its May 30, 2018 opinion, the district court addressed, and rejected, Defendants' Commerce Clause challenge to FACEA. *Zhang II*, 314 F. Supp. 3d at 423-24. In so doing, the court cited ample evidence that religious activity "contributes substantially to the United States economy." *Id.* at 426-28. Those contributions affect "a number of income generating sectors including education, health care, and social services." *Id.* at 426-27. The "most reasonable" estimate the court relied on placed the annual value of religion for the U.S. economy at $1.2 trillion. *Id.* at 427.

Judge Weinstein thus determined that "the grounding element in the statute"—the term "place of religious worship"—ensured Congress was "regulating an 'economic class of activity,'" so it "possessed the power under the Commerce Clause to pass FACEA." *Id.* at 440. The court emphasized that the Commerce Clause analysis is a rational-basis inquiry. *Id.* In applying that permissive test, the court found that "[b]ased on the evidence and common sense notions about religion, as widely practiced in the United States, religious activity and commerce overlap: Congress had a rational basis for concluding that violence and intimidation at places of religious worship could substantially affect interstate commerce." *Id.*

In sum, the district court found in Plaintiffs' favor on the religious-liberty and commerce points. *Zhang I*, 311 F. Supp. 3d at 555; *Zhang II*, 314 F. Supp. 3d at 440. Then, in light of the constitutional issues involved and the excessive burden a retrial would entail, the court certified the above two questions for interlocutory appeal. *Zhang II*, 314 F. Supp. 3d at 443-44.

This appeal followed.

SUMMARY OF THE ARGUMENT

The district court rejected Defendants' arguments in their motion for summary judgment across two thorough and thoughtful opinions. In so doing, the court upheld against a Commerce Clause challenge FACEA's common-sense protections of religious exercise from violence and intimidation at places of religious worship. It further found those protections cover not only mainstream religions with brick-and-mortar structures but also new and growing faiths without such structures. This Court should affirm, and honor the promise Congress made in FACEA to safeguard our nation's tradition as a welcoming and diverse society.

Congress has sweeping authority over interstate commerce. Specifically, its decision to regulate activity on that score is both presumptively constitutional and subject only to rational-basis review. And although more recent decisions of the Supreme Court show this power is not without limits, it remains the clear and unequivocal law of the land that Congress can regulate activity that substantially

affects interstate commerce provided there is a mere rational basis for doing so. Here, FACEA forbids violence against worshippers at places of religious worship, and, as such and unlike in *Lopez* or *Morrison*, the law is tied directly to these undeniable economic hubs of activity. In short, FACEA is constitutional.

Furthermore, FACEA's statutory text makes clear that it covers violence at any "place of religious worship." Based on this plain text, therefore, the statute applies not only to churches, synagogues, or other fixed structures, but rather all places designated for worship—including, and at the least, the Falun Gong extension sites in this case. Moreover, this inclusive interpretation is supported not just by the plain text—which is all that is necessary to approve it—but the legislative history as well. Finally, the inclusive interpretation is buttressed even further by the doctrine of constitutional avoidance, where Defendants' narrower reading of FACEA—which limits "place of religious worship" to fixed structures—risks violating the Establishment Clause. In short, FACEA protects Plaintiffs.

This Court should affirm the district court on both certified questions, and allow Plaintiffs to seek justice under FACEA for the violence and intimidation they have faced for simply practicing their faith.

ARGUMENT

I. THIS COURT REVIEWS THIS APPEAL DE NOVO.

On an interlocutory appeal, this Court's review is de novo. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 821 F.3d 265, 269 (2d Cir. 2016). That said, where the appeal arises in the summary-judgment context, the evidence and all factual inferences reasonably drawn from the evidence must still be viewed in the light most favorable to the nonmoving party. *Gary Friedrich Enter., LLC v. Marvel Characters, Inc.*, 716 F.3d 302, 312 (2d Cir. 2013). Plaintiffs are the nonmoving party and are thus entitled to that favorable view of the facts. *See Zhang II*, 314 F. Supp. 3d at 423.

II. FACEA'S CONSTITUTIONALITY UNDER THE COMMERCE CLAUSE SHOULD BE AFFIRMED.

A. Congressional power to regulate interstate commerce is capacious; any law purportedly falling in that ambit is presumed valid and subject to rational-basis review.

Congress's power under the Commerce Clause is, "perhaps, the most sweeping" power in Article I of the Constitution. *United States v. King*, 276 F.3d 109, 111 (2d Cir. 2002). As the Supreme Court has put it, when legislating under the Commerce Clause, congressional power is "broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere." *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964).

To be sure, the Supreme Court clarified in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), that the commerce power is not boundless. But in both cases, the Court distinguished rather than overturned its expansive Commerce Clause precedents. *See Morrison*, 529 U.S. at 610-11; *Lopez*, 514 U.S. at 559-60. The Court's two landmark rulings to that end remain good law: *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942), which upheld Congress's power to regulate intrastate production of wheat; and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261-62 (1964), which affirmed congressional authority to outlaw private discrimination in places of public accommodation because of its effect on interstate commerce. *See Lopez*, 514 U.S. at 559-60 (reaffirming continued validity of *Wickard* and *Heart of Atlanta*); *see also Gonzales v. Raich*, 545 U.S. 1, 23 (2005) (dismissing arguments relying primarily on *Morrison* and *Lopez* because "[i]n their myopic focus, they overlook the larger context of modern-era Commerce Clause jurisprudence preserved by those cases").

As the Supreme Court emphasized in *Morrison*, a congressional enactment under the Commerce Clause is presumptively constitutional and can be invalidated only "upon a plain showing that Congress has exceeded its constitutional bounds." 529 U.S. at 607, 613. Moreover, courts ask only the "modest" question whether there was a "rational basis" for Congress to conclude that the regulated activity, when "taken in the aggregate, substantially affect[s] interstate commerce." *Raich*, 545 U.S.

at 22. The particular actions in a given case need not in fact substantially affect interstate commerce—a rational possibility is enough. *Id.*

As the relevant district court opinion and certified question to this Court make clear, Defendants issued only a facial challenge to the constitutionality of FACEA. *Zhang II*, 314 F. Supp. 3d at 435, 444. Therefore, and at a minimum, the Commerce Clause inquiry here is not whether regulating violence against Plaintiffs in the present case in fact affected interstate commerce, but whether there was a rational basis for Congress to conclude that, in the aggregate, violence against practitioners at places of religious worship substantially affects interstate commerce. *See Raich*, 545 U.S. at 22. The question is limited to that narrow inquiry, where, again, courts presume that Congress's exercise of its commerce power is constitutional. *See Morrison*, 529 U.S. at 607.

B. This case concerns *Lopez*'s "third category": activity that substantially affects interstate commerce.

To answer the question whether there was a rational basis for Congress's presumptively constitutional action under the Commerce Clause, the Supreme Court has "identified three broad categories of activity that Congress may regulate under its commerce power." *Lopez*, 514 U.S. at 558. Those three categories are: (1) "the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "those activities that

substantially affect interstate commerce." *Id.* at 558-59. This case concerns the third category. *Zhang II*, 314 F. Supp. 3d at 439.

The Supreme Court, in turn, explained in *Morrison* that courts examine four considerations in evaluating the third *Lopez* category, whether the regulated activity substantially affects interstate commerce: (1) whether the regulated activity is economic in nature; (2) whether the statute contains an express jurisdictional element; (3) whether the text or legislative history of the statute contain findings linking the regulated activity to interstate commerce; and (4) whether the link between the regulation and interstate commerce is unattenuated. 529 U.S. at 610-12.

As described in detail below, FACEA is constitutional under the Commerce Clause because there is a rational basis for Congress to conclude that the regulation of the activity here—that is, violence against persons seeking to practice their faith at places of religious worship—constitutes a regulation of economic activity, and there is no attenuation between that activity and such commerce.

C. FACEA regulates economic activity; as such, it substantially affects interstate commerce.

The district court correctly ruled that FACEA regulates economic activity insofar as it seeks to deter violence against people exercising or seeking to exercise their religious freedom "at a place of worship." *Zhang II*, 314 F. Supp. 3d at 439-40. A mountain of evidence shows places of religious worship often operate as hubs of commerce. *See id.* at 426-28, 440 (citing overwhelming evidence on the commercial

dimension to places of religious worship). Consequently, violence against people seeking to practice their faith at such places substantially affects commerce.

As the district court emphasized, "[r]eligious activity contributes substantially to the United States economy." *Id.* at 426 (citing landmark peer-reviewed study by Brian J. Grim & Melissa E. Grim, *The Socio-economic Contribution of Religion to American Society: An Empirical Analysis*, 12 Interdisc. J. of Res. on Religion 1 (2016)). Places of worship are also marketplaces of commercial activity. Violence and intimidation at these places therefore necessarily hinders participation in such religious-based, commercial activity. *See Zhang II*, 314 F. Supp. 3d at 440; *see also* Partners For Sacred Spaces, *The Economic Halo Effect of Historic Sacred Places* 4-11 (2016), https://sacredplaces.org/uploads/files/16879092466251061-economic-halo-effect-of-historic-sacred-places.pdf ("[T]he average historic sacred place in an urban environment generates over $1.7 million annually in economic impact.").

In addition to "common sense notions about religion, as widely practiced in the United States," Judge Weinstein cited the following evidence in finding that "Congress had a rational basis for concluding that violence and intimidation at places of religious worship could substantially affect interstate commerce":

- Religious activity in the United States has been estimated to have an annual economic impact of anywhere from $378 billion to $4.8 trillion
- The approximately 330,000 houses of worship in the United States generate approximately $74.5 billion in annual revenue

- Religious giving accounts for 1% of Gross National Product and half of all charitable giving
- Hundreds of thousands are employed by religious organizations
- Many places of worship offer commercial services
- Many houses of worship operate on a fee-for-service model, where congregants pay for membership or donate in order to sustain the costs of upkeep and pay for clergy

Zhang II, 314 F. Supp. 3d at 426-28, 440.

Against this backdrop, the district court correctly determined there was a rational basis for Congress to conclude that places of religious worship represent a large interstate marketplace that substantially affects interstate commerce and that interference or intimidation aimed at disrupting that marketplace must be prevented. *Id.* at 440. Indeed, by establishing a law that bars violence at places of religious worship, Congress protected locations that host a "broad range of activities" impacting interstate commerce, including "social services, educational and religious activities, the purchase and distribution of goods and services, civil participation, and the collection and distribution of funds for these and other activities across state lines." *United States v. Grassie*, 237 F.3d. 1199, 1209 (10th Cir. 2001) (analyzing the intersection of commerce and churches in Section 247 context, and citing its legislative history emphasizing commerce dimension).

And even though subjective considerations in a particular case need not in fact affect interstate commerce as long as there is a rational basis for considering the

regulated activity to be constitutionally regulated in the aggregate, this case illustrates the source of that rational basis for FACEA. Plaintiffs, for example, proselytize at their extension sites using "flyers and other materials that are printed in other states and countries and travel through interstate commerce" and which rest on "tables whose parts may do the same." *Zhang II*, 314 F. Supp. 3d at 440. What's more, "people travel from out of state to participate" in Plaintiffs' worship. *Id.* Because Plaintiffs' religious activity "costs money and takes time," *id.*, Defendants' campaign of violence and intimidation directly suppresses interstate commerce.

Notably, just as the statute in *Heart of Atlanta* was a valid exercise of the Commerce Clause power because it was grounded in discrimination at motels, FACEA's "place of religious worship" requirement similarly grounds the statute in violence at places of worship, thereby cabining the proscribed conduct to an economic class of activities that substantially affects interstate commerce. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 247 (1964). Indeed, it is this "grounding element" that easily distinguishes FACEA from the statute at issue in *Morrison*—the Violence Against Women Act, 42 U.S.C. Section 1391—which was tethered to no economic activity at all. *Zhang II*, 314 F. Supp. 3d at 440.

Defendants claim that the economic-activity consideration for the Commerce Clause analysis is the violence that is prohibited. *See* AOB at 16. Not so. Although violence is not an economic activity, places of religious worship are indeed sites of

commerce. Violence against worshippers there violates their religious liberty and interferes with their participation in the commerce that flows through such places.

For these reasons, violence at these sites of commerce—i.e., places of religious worship—concerns economic activity and, as such, has a substantial effect on interstate commerce. Given that direct effect on interstate commerce, moreover, there is no attenuation between the regulated activity and such commerce. Therefore, FACEA easily meets the first and fourth *Morrison* considerations.

Given the nexus between places of religious worship and interstate commerce, the district court rightly found Defendants cannot overcome the presumption that FACEA is a constitutional exercise of Congress's commerce power.[3]

D. FACEA's lack of tailored legislative findings or an express jurisdictional hook is immaterial.

Defendants harp on the absence of statute-specific legislative findings and the lack of an express jurisdictional provision in FACEA in their attempt to dodge the presumption of constitutionality. *See* AOB at 20-23. But the lack of statute-specific findings or a jurisdictional hook is of no moment where, as in the case of FACEA, the statute regulates economic activity that directly affects interstate commerce. That is all the Commerce Clause requires.

Although congressional findings in a given piece of legislation "are certainly helpful" in discerning Congress's intent, they are not dispositive and, even more

[3] "That many religious institutions operate as non-profits does not change the religious-economic situation." *Zhang II*, 314 F. Supp. 3d at 440.

importantly to the present case, are not required. *Gonzales v. Raich*, 545 U.S. 1, 22 (2005). As the Supreme Court made clear in *Raich*, "the absence of particularized findings does not call into question Congress's authority to legislate." *Id.*

For that matter, requiring statute-specific legislative findings is particularly inappropriate in a case such as this where the link to commerce is clear. Among other things, and as the district court emphasized, insofar as the court has concluded the "relationship between commerce and religion is observable through judicial notice, explicit congressional findings are unneeded." *Zhang II*, 314 F. Supp. 3d at 442.

As the D.C. Circuit observed in *Rancho Viejo, LLC v. Norton*, legislative findings are not necessary where, as here, "the naked eye requires no assistance." 323 F.3d 1062, 1069 (D.C. Cir. 2003).

Furthermore, and as the district court also stressed, Congress has repeatedly affirmed the connection between religion and commerce in the findings associated with other statutes. *See Zhang II*, 314 F. Supp. 3d at 437-38 (citing church-arson statute, 18 U.S.C. § 247, and federal hate-crimes statute, 18 U.S.C. § 249). In passing the Church Arson Prevention Act, for example, Congress found it could criminalize damage to religious property and interference with religious observance under the Commerce Clause since there was "ample evidence to establish that [it was] regulating an activity that ha[d] a 'substantial effect' upon interstate commerce." 142 Cong. Rec. S6522 (daily ed. June 19, 1996) (statement of Senator Kennedy) (finding places of worship affect interstate commerce through "a wide array of social

services, such as inoculations, day care, [and] aid to the homeless"); *see also Zhang II*, 314 F. Supp. 3d at 442 (finding it "proper to rely on Congress' findings for these [other] statutes").[4]

Finally, the absence of an independently-stated jurisdictional hook in FACEA's statutory text is likewise unimportant. As the late District Judge Sandra Townes aptly observed: "the 'jurisdictional element' discussion in *Lopez* did not impose an additional requirement on lawmakers that each statute include an express jurisdictional element." *United States v. Ahmed*, 94 F. Supp. 3d 394, 415-16 (E.D.N.Y. 2015). And, as Judge Townes added, "[t]he Supreme Court merely explained that Congress could reach conduct not traditionally thought of as affecting national commerce if, as an element of the offense, the Government proved that a defendant's specific acts affected interstate commerce." *Id.*; *see also Rancho Viejo*, 323 F.3d at 1068 (noting that in the absence of a jurisdictional element, "courts must determine independently whether the statute regulates activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect[ ] interstate commerce." (quoting *United States v. Moghadam*, 175 F.3d 1269, 1276 (11th Cir. 1999))).

[4] Additionally, the district court observed that because "the court looks at a specific provision within the context of the statutory scheme," congressional findings with regard to FACEA's abortion provisions can bolster the religious provision's constitutionality, particularly in light of the political compromise involved in adopting both provisions and the concerns of some about the constitutionality of the abortion provisions standing alone. *Zhang II*, 314 F. Supp. 3d at 441.

In sum, statute-specific findings or jurisdictional hooks are inconsequential where there is a well-documented effect on interstate commerce; here, violence at places of religious worship.

E. Unlike the statutes in *Morrison* and *Lopez*, FACEA is well-tethered to interstate commerce.

FACEA's religious-liberty provision comports with the Commerce Clause, as it protects against violence at places of religious worship that are sites of economic activity. Nonetheless, Defendants persist in contending *Morrison* and *Lopez* render it unconstitutional. *See* AOB at 13. They are wrong.

In *Morrison*, the Supreme Court struck down the Violence Against Women Act, 42 U.S.C. § 1391 (VAWA), on commerce grounds. 529 U.S. at 613. Specifically, the Court invalidated VAWA because, as it put it, "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Id.* But the scope of *Morrison* is narrow, as the Court itself made clear in emphasizing that it did not even "adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide [Commerce Clause] cases." *Id.*

Similarly, in *Lopez*, the Supreme Court invalidated the Gun-Free School Zones Act of 1990 as an unconstitutional exercise of the Commerce Clause because, in its view, that statute had "nothing to do with 'commerce.'" 514 U.S. at 561. But in *Lopez*, the restrictive nature of the statute there—in regulating only possession of

a gun by "a local student at a local school"—necessarily rendered it untethered to interstate commerce. *Id.* at 567.

As the Supreme Court thereafter stressed in *Raich*, the utter lack of connection to interstate commerce was critical to the Court's holdings in both *Morrison* and *Lopez*. *See* 545 U.S. at 23-24 (cautioning against reading *Morrison* and *Lopez* "too broadly" and emphasizing that the laws there did not regulate any economic activity at all).

As the district court similarly recognized here, this case is a far cry from *Morrison* and *Lopez*. In contrast, FACEA reaches only acts that occur at a "place of religious worship." 18 U.S.C. § 248. And these acts "inherently require[] interference with commerce." *Zhang II*, 314 F. Supp. 3d at 441.

Given the commercial nature of religious exercise—whether in the case of Plaintiffs or otherwise—the "place of religious worship" provision ties FACEA's protection against violence directly to interstate commerce, providing the inescapable connection between regulated activity and interstate commerce that VAWA and the Gun-Free School Zones Act so conspicuously lacked.

III. THIS COURT SHOULD REJECT DEFENDANTS' CRAMPED AND CONSTITUTIONALLY DUBIOUS INTERPRETATION OF FACEA THAT THREATENS MINORITY FAITHS LIKE FALUN GONG.

A. The district court correctly ruled that FACEA covers all places of religious worship, not just buildings.

The district court properly found that FACEA's protections extend to all places of religious worship, not just churches and temples. *Zhang I*, 311 F. Supp. 3d at 522-23. In so ruling, the court rightly rooted its decision in the statutory text and buttressed it through the canon of constitutional avoidance. *Id.* at 553-55.

Examining the text, the district court focused on the ordinary meaning of the term "'place,' meaning a 'physical environment' or 'space.'" *Id.* at 554. Additionally, the court emphasized Congress's choice of the term "place of religious worship" in FACEA instead of "religious real property," which Congress had already protected in 18 U.S.C. Section 247 (now known as the Church Arson Prevention Act). *Id.* at 554-55. This choice, in the court's view, "suggests congressional intent to protect *all* places of religious worship and not just fixed structures in the FACEA." *Id.* at 553-55.[5]

[5] Defendants' contention that the district court defined a place of worship as any place anyone might happen to pray is dubious. *See* AOB at 12. The court's definition rests on a place that religions use (or designate) for worship, and not what a particular person may or may not do that is religious. *See Zhang I*, 311 F. Supp. 3d at 522-23 (observing that a narrow reading of FACEA to include only covered buildings "would discriminate between religions that use formal temples and [religions] that do not [use formal structures]").

Addressing the Establishment Clause concern raised by Defendants' narrow reading, the district court found that "[i]nsofar as this statute may be read to protect religions differently based on whether the religion has fixed temples or prayer takes place in transitory locations, it would be unconstitutional." *Id.* at 554. The district court therefore rejected Defendants' narrow interpretation of FACEA on both statutory and constitutional grounds and read the statute to cover Plaintiffs' extension sites. *Id.* at 555.

Because FACEA's plain text, the canon of constitutional avoidance, and the statute's legislative history all counsel in favor of an inclusive interpretation of the term "place of religious worship," this Court should affirm the district court's ruling.

B. The plain meaning of "place of religious worship" covers all places designated for worship, including Plaintiffs' extension sites.

The task of interpreting a statute starts with the text. *See Murphy v. Smith*, 138 S. Ct. 784, 787 (2018) ("As always, we start with the specific statutory language in dispute."). Where the meaning of the statutory text is plain, the analysis ends there as well. *See Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."); *Dobrova v. Holder*, 607 F.3d 297, 301 (2d Cir. 2010). Courts "do not start from the premise that [statutory] language is imprecise." *United States v. LaBonte*, 520 U.S. 751, 757 (1997). Rather, they presume "Congress said what it meant." *Id.*

"When terms used in a statute are undefined, we give them their ordinary meaning." *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). Ordinary meaning is the way a term is "normally understood." *See Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 569 (2012). Absent a statutory definition, as here, courts turn to the dictionary. *See id.* at 569 (relying on dictionaries from the time of the statute's enactment to find ordinary meaning); 18 U.S.C. § 248(e).

The ordinary meaning of "place of religious worship" is any locale designated or regularly used for such worship. After all, a "place" is defined by the dictionary as "a building *or locality* used for a special purpose." *Place*, *Merriam-Webster's Third New International Dictionary* (1993) (giving "place of worship" as an example) (emphasis added); *see also Place*, *Oxford English Dictionary* (2d ed. 1989) (defining "place" as "a building, apartment, *or spot* devoted to a specified purpose" and giving "place of worship" as an example (emphasis added)). Thus, a "place of religious worship" need not be a building.

Other sections of the U.S. Code likewise confirm that Congress intended "place of religious worship" to encompass more than fixed structures. *See Boumediene v. Bush*, 553 U.S. 723, 776 (2008) ("When interpreting a statute, we examine related provisions in other parts of the U.S. Code."). That Congress used the phrase "place of religious worship," and not the common expression "house of worship," which carries an undeniable connotation of a building, makes the text's meaning even clearer. *Compare* 18 U.S.C. § 248(a)(2), *with* 18 U.S.C.

§ 1388(c)(3)(C) (2006) (amended 2012) (prohibiting disruption of military funerals at "houses of worship"). Similarly, as the district court noted, Congress's decision to use "place of religious worship" instead of "religious real property," as it did in 18 U.S.C. Section 247, further underscores that Congress intended "place of religious worship" to mean something more than religious buildings. *Zhang I*, 311 F. Supp. 3d at 554-55.

Defendants contend the district court erred in relying on the dictionary definition of the word "place" in construing the statutorily undefined phrase "place of religious worship." *See* AOB at 26-27. But courts commonly look to definitions of a phrase's component parts to understand the whole. *See, e.g.*, *Wall v. Kholi*, 562 U.S. 545, 551-53 (2011).

Moreover, Defendants show the futility of their own purported rule, relying on their preferred meaning of the word "place" in asking the Court to construe "*place* of religious worship" as "*a fixed location* of religious worship." AOB at 26 (emphases added). As such, Defendants' purported disagreement over the method of interpretation is illusory.

And, regardless, Defendants' attempt to limit "place" to "fixed structures" is both unsupported and unnatural. Unlike Plaintiffs' interpretation (and that of the district court), Defendants' definition materializes out of thin air; they do not invoke any dictionaries, cases, or other tools of statutory interpretation. *See* AOB at 26-29. Moreover, Plaintiffs' construction of "place" is more intuitive than Defendants'

construction, especially in light of the dictionary and the alternatives. *See ante* at 26-27 (regarding statutory options of "house of worship" and "religious real property").

This Court must reject Defendants' interpretive method and its tortured result.

C. Defendants' constrained interpretation of FACEA risks violating the Establishment Clause.

1. *Courts construe statutes to avoid constitutional problems.*

To the extent that the meaning of "place of religious worship" is ambiguous—it is not—the Court should apply the canon of constitutional avoidance. Put simply, the avoidance canon compels the broader interpretation of that phrase because Defendants' narrow construction risks violating the Establishment Clause. *See Zhang I*, 311 F. Supp. 3d at 554.

Under the avoidance canon, where one plausible interpretation of an ambiguous statute "would raise serious constitutional problems," courts are directed to construe the statute in a way that avoids confronting the constitutional question. *Pierre v. Holder*, 738 F.3d 39, 48 (2d Cir. 2013) (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575 (1988)); *see also Pacheco v. Serendensky*, 393 F.3d 348, 355 (2d Cir. 2004) ("The canons of construction, however, require us to construe statutes in such a way as to avoid raising such constitutional concerns."); *Allstate Ins. Co. v. Serio*, 261 F.3d 143, 150

(2d Cir. 2001) (noting that courts will construe statutes "in order to avoid a constitutional difficulty").

2. *Defendants' interpretation of FACEA raises serious constitutional questions.*

Defendants' narrow reading of FACEA as protecting only brick-and-mortar structures such as churches and synagogues risks violating the Establishment Clause. *See* AOB at 26. In *Larson v. Valente*, the Supreme Court explained that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." 456 U.S. 228, 244 (1982). There, the Court struck down a statute that imposed tax-reporting requirements on all religions, but nonetheless violated the Establishment Clause by disproportionately burdening new faiths. *Id.* at 230, 246 n.23 (holding the provision unconstitutional because it "effectively distinguishe[d] between 'well-established churches' . . . and 'churches which are new and lacking in a constituency'" (quoting Court of Appeals)).

Likewise, in *Torcaso v. Watkins*, the Court ruled unconstitutional Maryland's requirement that public officials declare their belief in the existence of God. 367 U.S. 488, 489, 496 (1961). *Torcaso* affirms the Establishment Clause's neutrality principle, emphasizing that "neither a State nor the Federal Government can constitutionally . . . aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." *Id.* at 495; *see also id.* at 495 n.11 ("Among religions in this country which do not teach what would generally be

considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."). These cases show that when statutes exclusively provide benefits to certain faiths to the exclusion of others, they run afoul of the Establishment Clause.

If Defendants are correct that "place of religious worship" means only religious buildings, FACEA would risk a similar constitutional violation. As in *Larson* and *Torcaso*, a FACEA interpretation that covers only faiths whose believers worship in buildings would impermissibly distinguish between religious groups. It would protect worshippers who pray in churches, synagogues, and mosques, while leaving Native Americans and Falun Gong adherents, among others, out in the cold.[6]

This Court should therefore affirm the district court's interpretation of the term "place of religious worship," which avoids the risk of violating the Establishment Clause based on Defendants' strained interpretation.

Pointing to *Hernandez v. Commissioner*, Defendants argue that a narrow definition of FACEA that would protect only those religions with buildings is presumptively constitutional because it is facially neutral. *See* AOB at 33-34 (citing 490 U.S. 680 (1989)). But *Hernandez* is inapposite. There, the Court upheld a law

[6] Excluding those minority faiths from FACEA protection is especially problematic in light of the persecution they face. *See Zhang I*, 311 F. Supp. 3d at 533-35; *see also, e.g.*, Barbara Perry, *Silent Victims: Hate Crimes Against Native Americans* 1-3 (2008) (observing that hate crimes against Native Americans are both commonplace and under-reported).

that treated as tax deductible donations to, but not purchases from, churches. *Hernandez*, 490 U.S. at 690, 695. Unlike FACEA, however, the tax provision in *Hernandez* treated all religions equally based on whether practitioners made a donation or purchase. *Id.* at 695-96.

But even if this Court disagrees that the statute violates formal neutrality principles, the constitutional inquiry does not end. It then applies the *Lemon* test.[7] As the Supreme Court put it in *Hernandez*, "*Larson* teaches that, when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions. If no such facial preference exists, we proceed to apply the customary three-pronged Establishment Clause inquiry derived from *Lemon*." 490 U.S. at 695 (citation omitted). And under the *Lemon* test, Defendants' narrow reading teeters under constitutional scrutiny.

Lemon asks whether the statute (1) has a secular purpose; (2) has the primary effect of either advancing or inhibiting religion; and (3) fosters an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13

[7] Supreme Court justices have repeatedly called into question *Lemon*'s continuing vitality. *See Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality opinion). Nonetheless, in the absence of its being formally overturned, this Court applies the test in Establishment Clause cases. *See, e.g.*, *Jewish People for the Betterment of Westhampton Beach v. Vill. of Westhampton Beach*, 778 F.3d 390, 395 (2d Cir. 2015). The issue is again before the Supreme Court. *See Am. Legion v. Am. Humanist Ass'n*, No. 17-1717 (U.S. argued Feb. 27, 2019). In any event, this Court need not rely on *Lemon* to rule for Plaintiffs. *See Larson*, 456 U.S. at 246; *see also Cutter v. Wilkinson*, 544 U.S. 709, 720-23 (2005) (upholding statute protecting the religious liberty of all inmates, while not applying *Lemon*).

(1971). If FACEA is read to protect only religious buildings, it risks violating at least the first and second prongs of this test.

Regarding the first prong, under Defendants' interpretation of "place of religious worship," FACEA may not have a secular purpose. A government policy lacks a secular purpose when it blesses one or more religions with a benefit it denies others. *See Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 690, 696 (1994) (striking down a facially neutral law drawing a New York school district exclusively for a Hasidic Jewish town because it aided only one religious group); *Stone v. Graham*, 449 U.S. 39, 41-42 (1980) (per curiam) (finding no secular purpose in mandating that, as a matter of legal history, a copy of the Ten Commandments be posted in every Kentucky classroom). Here, FACEA, under Defendants' reading, protects only religions that worship in fixed structures and therefore may lack a secular purpose.

A narrow reading of FACEA may also impermissibly advance certain faiths in violation of *Lemon*'s second prong. A statute advances religion when it creates the perception of endorsement or appears to take sides in religious debates. *See Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 430 (2d Cir. 2002) (holding fraud statute that defined "kosher" impermissibly advanced religion since it "prefer[ed] the dietary restrictions of Orthodox Judaism over those of other branches" of that religion).

To repeat, reading FACEA to exclusively protect religions that worship in fixed structures would risk placing the government on the side of those faiths against all others. Judge Weinstein recognized this potential constitutional infirmity and avoided it by reading FACEA to protect all faiths. This Court should follow suit.

3. *By contrast, the plain meaning of FACEA is comfortably constitutional.*

Plaintiffs' interpretation of FACEA, on the other hand, is eminently constitutional. The Supreme Court "has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987).

Time and again, Congress has legislated to expressly protect religious worshippers and alleviate burdens on their practice. For example, in the Religious Land Use and Institutionalized Persons Act (RLUIPA), Congress broadly protected religious land use and the religious exercise of those in prison from substantial burdens imposed by otherwise neutral laws, rules, and regulations. 42 U.S.C. §§ 2000cc, 2000cc-1. And despite the seemingly special benefit given to religious land owners and inmates, the Supreme Court and this Court have upheld those protections against Establishment Clause challenge. *See Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (prison inmates); *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 355-56 (2d Cir. 2007) (land use); *see also Corp. of Presiding Bishop*

of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 336-37 (1987) (upholding Title VII exemption for religious employers). Plaintiffs' reading of FACEA falls squarely within this constitutional tradition. And this is so regardless of whether *Lemon* controls. *See ante* at n.7.

Indeed, under *Lemon*, protecting all religious worshippers from violence and harassment is a secular purpose. *See Jewish People for the Betterment of Westhampton Beach v. Vill. of Westhampton Beach*, 778 F.3d 390, 395 (2d Cir. 2015) ("Neutral accommodation of religious practice qualifies as a secular purpose under *Lemon*."). Further, protecting all worshippers does not unconstitutionally advance religion because it merely allows religion to flourish unimpeded. *See Amos*, 483 U.S. at 337 ("A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence.").

Finally, providing a judicial remedy does not impermissibly entangle the government with religion. *See Hernandez v. Comm'r*, 490 U.S. 680, 696-97 (1989) ("[R]outine regulatory interaction which involves no inquiries, . . . into religious doctrine, no delegation of state power to a religious body, . . . and no 'detailed monitoring and close administrative contact' between secular and religious bodies . . . does not of itself violate the nonentanglement command." (citations omitted) (quoting *Aguilar v. Felton*, 473 U.S. 402, 414 (1985))).

In any event, the Court does not need to apply *Lemon* to find Plaintiffs' interpretation constitutional. In an analogous context, the Supreme Court in *Cutter* upheld RLUIPA without reference to *Lemon*, asking instead whether the legislation at issue alleviates an exceptional burden on religion, imposes no burden on nonbeneficiaries, and "does not differentiate among" religions. 544 U.S. at 720-23. Plaintiffs' interpretation of FACEA does all these things: It alleviates the burden of violence against religious worshippers; it imposes no burdens on others; and it protects all faiths equally.

In sum, because Defendants' interpretation of FACEA steers into the teeth of the Establishment Clause, the Court should adopt Plaintiffs' constitutionally sound approach.[8]

D. FACEA's legislative history also supports Plaintiffs.

FACEA's text is clear, so the Court need not examine its legislative history. *See Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."); *Dobrova v. Holder*, 607 F.3d 297, 301 (2d Cir. 2010) (noting that a statutory interpretation inquiry ends once

[8] In describing the evolution of the bill that would become FACEA, the district court also noted the concern of some commentators that FACEA without the religious-liberty provision could be unconstitutional. *Zhang II*, 314 F. Supp. 3d at 432 (citing Michael Paulsen & Michael McConnell, *The Doubtful Constitutionality of the Clinic Access Bill*, 1 Va. J. of Soc. Pol'y & L. 261, 287 (1994)).

the text is clear). That said, FACEA's purpose and legislative history also favor Plaintiffs' interpretation.

When faced with interpreting ambiguous statutory language, courts turn to the statute's underlying purpose. *See Dolan v. USPS*, 546 U.S. 481, 486 (2006); *Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 143-44 (2d Cir. 2002). And in this analysis, conference reports are the most reliable indicators of legislative intent. *See Disabled in Action of Metro. N.Y. v. Hammons*, 202 F.3d 110, 124 (2d Cir. 2000) ("Because a conference report represents the final statement of terms agreed to by both houses, next to the statute itself it is the most persuasive evidence of congressional intent." (quoting *Ry. Labor Exec. Ass'n v. ICC*, 735 F.2d 691, 701 (2d Cir. 1984))).

The Conference Report for FACEA clarifies its purpose: to assuage the "profound concern of the Congress over private intrusions on religious worship" and act on Congress's judgment that "religious liberty deserves federal protection." J.A. at 2097. In defining the scope of this protection, the Report construes the amendment to cover "place[s] of religious worship, such as a church, synagogue or other structure or place used primarily for worship." *Id.* The distinct inclusion of "other structure *or place*" shows the scope of FACEA's protections is broad, and clearly not limited to buildings. Moreover, the Report's phrasing is non-exhaustive given its prefatory use of the term "such as." *See, e.g.*, *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423 n.9 (1985) (interpreting the use of "including" by the statute there to indicate the list was "not exclusive"); 2A N. Singer & J. Singer, Sutherland on

Statutory Construction § 47.7 (7th ed. 2018). FACEA's scope comfortably covers Plaintiffs' extension sites.

Further, protecting Plaintiffs falls squarely within the Hatch amendment's intent and purpose, as defined by Senator Hatch when introducing the legislation. He decried the "interstate campaign of harassment, physical assaults, and vandalism" against groups seeking to worship peacefully. J.A. at 2022. Falun Gong believers suffer from such a coordinated campaign: They are the targets of systematic violence and harassment while worshipping at their designated and city-permitted locations. *See Zhang I*, 311 F. Supp. 3d at 533-35. To insist that Plaintiffs are not protected by FACEA because their worship does not occur within a brick-and-mortar structure is to defy the amendment's purpose.

Defendants invoke a brief colloquy between Senators Hatch and Kennedy to argue FACEA's worship protections are limited to religious buildings. *See* AOB at 28-29. There, the two senators shared an understanding that "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[.]" J.A. at 2023.

But, as Defendants acknowledge, that colloquy did not arise in the context of city-permitted daily worship sites like Plaintiffs', but rather impromptu sidewalk protests. *See* AOB at 4 (noting Senator Kennedy's "concern[] that the Hatch Amendment would actually create additional rights under FACEA for abortion

protestors"). Regardless, the Conference Report, which conveys the statute as agreed to by both chambers of Congress, trumps the brief exchange of two Senators. *See Hammons*, 202 F.3d 110 at 124 (emphasizing authority of conference report in legislative history analysis). And, in any event, this is all academic given the plain meaning of the statute and principles of constitutional avoidance.

E. Because FACEA is unambiguous, the rule of lenity does not apply.

Grasping at straws, Defendants argue this Court should rely on the rule of lenity to interpret FACEA narrowly. *See* AOB at 30. But that rule has no application here. The rule of lenity applies only where there exists "a grievous ambiguity or uncertainty in the statute." *United States v. DiCristina*, 726 F.3d 92, 104 (2d Cir. 2013) (quoting *Barber v. Thomas*, 560 U.S. 474, 488 (2010)). Because FACEA's meaning is plain, the rule of lenity is entirely foreign to the analysis.

But even if FACEA were somewhat ambiguous—it is not—the Court should not apply the rule of lenity unless "after seizing everything from which aid can be derived" it can make "no more than a guess as to what Congress intended." *Muscarello v. United States*, 524 U.S. 125, 138 (1998) (quoting *United States v. Wells*, 519 U.S. 482, 499 (1997)). Here, Congress's intent is not nearly so inscrutable. In addition to plain meaning, the canon of constitutional avoidance and the legislative history make Congress's intent clear: protecting all worshippers, including Plaintiffs, in places designated and regularly used for religious worship.

IV. EVEN IF FACEA WERE LIMITED TO ACTS AT OR IN THE IMMEDIATE VICINITY OF A FIXED STRUCTURE, THE SITES HERE ARE COVERED.

FACEA protects all "place[s] of religious worship," fixed or not. *Zhang I*, 311 F. Supp. 3d at 522-23. But even if the Court were to accept Defendants' strained construction limited to fixed structures, the extension sites at issue here are covered.

Defendants assert in a conclusory manner that "place of religious worship" means "a fixed location of religious worship, such as a church or a synagogue." AOB at 26; *see also* AOB at 27 (limiting "place of religious worship" to "an established and fixed location such as a church, synagogue, mosque or other religious center"). Plaintiffs' extension sites, however, are precisely such a "fixed location of religious worship." Rather than migrating around the neighborhood, the sites are always found in the same city-permitted locations. J.A. at 1737, 1764-65.

If Defendants' argument is taken at face value—that a dedicated building is both necessary and sufficient for coverage under FACEA, *see* AOB at 27—it produces the unjust result that only religious communities that can afford a dedicated building receive FACEA protection. A church community with wealthy congregants and a building of its own would receive special protection, while another church community that meets weekly in the multipurpose room of a community center would not be covered despite having identical beliefs and worship practices. Thus, even if the Court adopts Defendants' interpretation, it should at a minimum interpret

FACEA to cover all such "fixed location[s] of religious worship" and not just churches or synagogues. AOB at 26.

Furthermore, if the Court construes "place of religious worship" to protect only religious buildings, as Defendants advocate, at a minimum FACEA's legislative history suggests that it should be read to include at least sites "at *or in the immediate vicinity of* a place of religious worship." J.A. at 2097 (emphasis added). Thus, even the narrowest reading is not as limited as Defendants claim, but offers protection for worship conducted around the premises of religious buildings.

Under this reading, the worship at issue here is protected in any event. Plaintiffs practiced their faith at designated and city-permitted sites situated between one block and three blocks from the Falun Gong Spiritual Center. J.A. at 1761 (map of table locations in relation to the Spiritual Center). Such a close proximity places Plaintiffs well within the range of FACEA's protection.

CONCLUSION[9]

Religious liberty is a founding principle of America, and one of the reasons so many faiths find it to be a safe and welcoming home. Congress exercised its power under the Commerce Clause to protect that proud tradition against violence that would threaten it, and that protection extends not only to members of established

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religions with brick-and-mortar structures but to all who practice at any designated place of worship, fixed structure or not.

This Court should affirm, and protect Plaintiffs from further attack.

March 18, 2019 By: s/ Terri E. Marsh

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