# 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

## REPLY BRIEF FOR DEFENDANTS-COUNTER-CLAIMANTS-APPELLANTS

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### I. PLAINTIFFS INCORRECTLY ASSERT THAT THEY ARE ENTITLED TO ALL INFERENCES IN THEIR FAVOR

Plaintiffs' assertion that, as the purported nonmoving party, they are "entitled to all inferences in their favor" (Pl. Br.[1] at 2 n.1), is incorrect. It is well-settled that, even in the summary judgment context, this Court reviews a pure issue of law *de novo*. *Bldg. Trades Emplrs. Educ. Ass'n v. McGowan*, 311 F.3d 501, 507-508 (2d Cir. 2002) ("We review a district court's summary judgment ruling *de novo*,…. Although we must interpret the facts in the light most favorable to the non-moving party, the facts in this case are not in dispute; rather, we are faced with two purely legal questions."). Where, as here, the facts are undisputed, and the Court is being asked to consider a fascinating issue of law, neither party gets the benefit of "all inferences in their favor."

Moreover, the Plaintiffs fail to acknowledge that it was the District Court that moved under Federal Rule of Civil Procedure 56(f) to require briefing on the claim brought under Section 248(a)(2). *Zhang v. Chinese Anti-Cult World Alliance*, 311 F. Supp. 3d 514, 523 (E.D.N.Y. 2018) ("The court *sua sponte* moved for partial summary judgment after providing notice in accordance with Federal Rule of Civil Procedure 56(f)."); A-1810;[2] Doc. 130. Thus, the Court was the actual movant, and

[1] "Pl. Br." refers to Appellees' response brief. "Def. Br." refers to Appellants' opening brief.

[2] "A-__" refers to pages in the Joint Appendix.

for this reason as well, on the pure issues of law here, neither side gets any benefit or presumption. The Court rules on these purely legal issues *de novo*.

## II. PLAINTIFFS FAIL TO REBUT THE UNCONSTITUTIONALITY OF 18 U.S.C. § 248(a)(2)

### A. Plaintiffs are Incorrect that Section 248(a)(2) Regulates Economic Activity

The Plaintiffs agree with the Defendants that under the *Morrison*/*Lopez* analytical framework for assessing whether Congress overstepped its Commerce Clause power, the only category of Commerce Clause power that could justify enacting the statute at issue (18 U.S.C. § 248(a)(2)) is the third one identified in *Lopez*: the power to regulate "those activities that substantially affect interstate commerce." Pl. Br. at 14-15 (citing *United States v. Lopez*, 514 U.S. 549, 558-59 (1995)). The District Court held this as well. A-2275; *Zhang v. Chinese Anti-Cult World Alliance*, 314 F. Supp. 3d 420, 439 (E.D.N.Y. 2018) ("The question is: does it substantially affect interstate commerce, the third category?").

The Plaintiffs also agree with the Defendants that, as to this third *Lopez* category, in *Morrison* the Supreme Court in turn clarified the four "significant considerations" to determine whether Congress acted within its constitutional limits. Pl. Br. at 15 (citing *United States v. Morrison*, 529 U.S. 598, 610-12 (2000)). These considerations include: (1) whether the conduct being regulated is economic in nature (that is, whether "the activity in question [is] some sort of economic

endeavor") (*id*. at 611); (2) whether the statute contains "an express jurisdictional element" (*id*. at 611-12); (3) whether the statute or its legislative history contains "express congressional findings regarding the [activity's] effects on interstate commerce" (*id*. at 612); and (4) whether "the link between the [activity] and a substantial effect on interstate commerce was attenuated" (*id*.).

However, in applying the first of these four factors, the Plaintiffs incorrectly assert that the Freedom of Access to Clinic Entrances Act ("FACEA") "regulates economic activity." Pl. Br. at 15. Under *Morrison*, it is clear that the conduct being outlawed under FACEA is noneconomic in nature. Specifically, the actions being regulated (indeed, being criminalized) are *acts of violence and intimidation* at places of religious worship. Under *Morrison*, acts of violence and intimidation are clearly deemed to be noneconomic activity, even if such noneconomic conduct may have economic effects. As the Supreme Court explained in *Morrison*, "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." 529 U.S. at 613. Indeed, the District Court acknowledged that "[v]iolence and intimidation, *Morrison* tells us, is not economic." A-2275; 314 F. Supp. 3d at 440.[3]

[3] It is significant that in its briefing in the District Court, the Plaintiffs acknowledged that the activities outlawed here (violence and intimidation) were not economic activities. 314 F. Supp. 3d 420, 440; A-2275; Doc. 171 at 14 ("While church-related acts of violence are not necessarily commercial in nature…."); Doc 173 at 4 ("This is so even when the activity controlled is not itself commercial.") (quoting *United States v. Weslin*, 156 F.3d 292, 296 (2d Cir. 1998)). The Plaintiffs have now reversed course and conveniently mislabel the regulated activity as commercial activity, while omitting from their appellate brief this Court's holding in *Weslin* which held the opposite.

The fact that FACEA regulates noneconomic activity was made clear by this Court when it addressed the constitutionality of the portion of FACEA (Section 248(a)(1)) that prohibits violence and intimidation directed at those seeking access to abortion clinics. In *United States v. Weslin*, 156 F.3d 292 (2d Cir. 1998), this Court acknowledged that violence and intimidation directed to those seeking access to abortion clinics "is not itself commercial." *Id.* at 296. The Fifth Circuit, addressing the same issue, also acknowledged that FACEA's prohibition of acts of violence and intimidation directed at those seeking access to abortion clinics clearly regulates *noncommercial* conduct. *United States v. Bird*, 124 F.3d 667, 675 (5th Cir. 1997) (Section 248(a)(1) is "federal criminal statute that regulates intrastate, noncommercial conduct . . . .").

Having properly acknowledged that the regulated activity in FACEA was *noneconomic*, what permitted this Court in *Weslin* to uphold the constitutionality of Section 248(a)(1) was the inherently economic and commercial nature of the activity being inhibited by the acts of violence and intimidation. That is, because abortion services inherently involve commercial and economic transactions, this Court reasoned that the regulation of admittedly noncommercial activity was nevertheless aimed at inhibiting inherently commercial transactions, and this was sufficient to

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Thus, the Plaintiffs strategically omitted citing the significant decision in *Weslin*, even though they were aware of it and cited it in the District Court.

enable the Court to conclude that Congress had the power under the Commerce Clause to regulate such conduct. 156 F.3d at 296 ("Congress may regulate to prevent the inhibition or diminution of interstate commerce.").

The Fifth Circuit in *Bird* used similar, though somewhat different, reasoning, in concluding that the outlawing of noneconomic actions of violence and intimidation at abortion clinics in FACEA could nevertheless fall within Commerce Clause powers. The Fifth Circuit reasoned that since abortion services are indisputably commercial services, and that Congress found that there is a nationwide market for abortion services, the obstruction of abortion clinics by acts of violence or intimidation could have a sufficient effect on the indisputably commercial market for abortion services to fall within the scope of the power conferred to Congress under the Commerce Clause. *Bird*, 124 F.3d at 677.

Once the activity that is regulated by FACEA is properly acknowledged to be noneconomic in nature – a fact that this Court in *Weslin*, the Fifth Circuit in *Bird*, and even the District Court in this case readily acknowledge – it then becomes clear how truly difficult it is to justify the use of the Commerce Clause power here under the teachings of *Lopez* and *Morrison*. This is because, unlike the situation with Section 248(a)(1) – where the violence and intimidation by definition are interfering with what indisputably are commercial transactions for abortion services – the

section of FACEA here (Section 248(a)(2)) is *not* outlawing conduct that by definition is interfering with commercial transactions.

The portion of FACEA at issue in this case is Section 248(a)(2), which outlaws violence and intimidation at places of religious worship. Although there surely are commercial and economic aspects to religion and places of religious worship, it is also indisputable that there is much activity at places of religious worship that are not in any way commercial activities. Indeed, much of the activity that occurs at places of religious worship (such as prayer, noncommercial ceremonies, contemplation, and introspection) are the antithesis and the exact opposite of commercial activity, particularly because religions typically stress the importance of the noncommercial aspects of human existence.

Thus, acts of intimidation and violence at places of religious worship will often have no connection to commerce at all, or only an indirect, attenuated connection to commerce that any act of violence would have, such as was the case in *Morrison*. It is obvious that in many cases, neither the act of violence being regulated by FACEA, nor the prayer, introspection or contemplation being protected, would involve any commercial activity. This distinguishes the access to abortion clinics cases (dealing with Section 248(a)(1)) in a fundamental and important way for the purposes of the *Lopez/Morrison* analysis. Put simply, in the access to abortion clinics cases, courts were able to rely on the fact that the violence

and intimidation, by definition, were interfering with what are inherently commercial transactions: that is, abortion services performed by state licensed medical professionals who are paid for those services. In contrast, acts of violence towards those at places of religious worship will often not involve any interference whatsoever with any commercial transaction.

Because this fundamental and important distinction leads to the powerful argument that Section 248(a)(2) is unconstitutional under *Lopez/Morrison*, the Plaintiffs resort in their opposition brief to an exaggeration of the nature of religion as an inherently and essentially commercial endeavor – a somewhat startling position, and one that some members of this Court (and certainly religious leaders and followers) will find to be an almost insulting characterization of the nature of religious institutions.

We are told by the Plaintiffs, without any sarcastic intent, that places of religious worship "operate as hubs of commerce" (Pl. Br. at 15); that they are "marketplaces of commercial activity" (*id*. at 16); and that they are "a large interstate marketplace" (*id*. at 17). These descriptions are obviously heavy in rhetoric and disturbingly exaggeratory, to the point of being insensitive to the reality of the largely noncommercial aspects and mission of religious institutions. Importantly, Plaintiffs' brief omits any mention or acknowledgement that many of the activities and aspects of places of religious worship are indisputably noncommercial in nature.

Indeed, we are told that places of worship are "hubs of commerce" so many times, that if intelligent life on another planet read the Plaintiffs' description, the reader would not know that the essence of religious institutions and many of their activities focus on the noncommercial aspects of life, and that religious leaders typically ask their followers to take a "time out" from money, work and commerce, and instead participate in introspective activities. The Plaintiffs make places of worship sound like shopping centers, instead of what they are: places of worship that stress not commercial activities, but instead – dare we say – prayer, worship, introspection, noncommercial ceremonies, and a broad range of other noneconomic activities.

The reason that Plaintiffs have mislabeled the regulated activity as "economic activity," and then mischaracterize places of religious worship as "hubs of commerce," is because once the true nature of the regulated activity (noncommercial acts of violence and intimidation) and the true nature of much of the activity that takes place at religious institutions (noncommercial prayer, introspection, volunteer and other noncommercial social activity), is frankly admitted, the constitutionality of Section 248(a)(2) is properly called seriously into question. Specifically, because there is so much activity covered under Section 248(a)(2) that will not involve any commercial activity by the actor being regulated or the person protected by the statute, it becomes impossible to distinguish this case from *Lopez* or *Morrison*.

*Morrison* teaches 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." 529 U.S. at 613. Here, since the activity being regulated (violence and intimidation) is noneconomic, for this reason alone, Section 248(a)(2) faces serious constitutional problems. In addition, as noted above, unlike the case with Section 248(a)(1), where the acts of violence and intimidation interrupt abortion services which are by definition commercial transactions, here it must be admitted that much of the activity protected will be noncommercial as well. Thus, through the *Morrison* lens, Section 248(a)(2) must instead rely on the cumulative effect that acts of violence have on the commercial aspects of places of worship. And yet, under *Morrison*, reliance on the cumulative effect of the noneconomic activity on the commercial aspects of religion in general falls into the problem that *Morrison* articulated: that under such logic, it would be difficult to imagine any principled limit to Congressional power.

In *Morrison*, the Supreme Court was confronted with a statute where Congress made very specific findings as to the massive economic effects caused by violence against women. The Supreme Court recited these findings, including deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business. 529 U.S. at 614. The Supreme Court also recited the effect on commerce by virtue of the medical costs

necessarily involved with violence against women. *Id.* And yet, the Supreme Court roundly rejected the notion that the massive effects that violence has on commerce was sufficient. The reason for this was that if the aggregate effects that violence has on the economy would suffice for Commerce Clause purposes, there would be no principled outside limits to Congressional power under the Constitution. Thus, *Morrison* concluded: "We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Id*. at 617.

The District Court and the Plaintiffs here assert that because FACEA outlaws violence and intimidation *at places of religious worship*, the requirement of the physical location cabins the scope of Congressional power in a principled way, sufficient to survive *Lopez* and *Morrison*. But since places of religious worship involve a broad range of activities that have no commercial aspect, the Plaintiffs and the District Court do not adequately explain *why* this logic survives *Lopez* and *Morrison*. For example, schools are locations that are no less involved in commercial activity than places of worship are. Indeed, when the government tried to defend the constitutionality of the statute in *Lopez* that outlawed possession of guns in the vicinity of schools, the government made the exact same argument that the District Court here and the Plaintiffs make here, and it was rejected.

Specifically, in *Lopez*, because the statute at issue outlawed the possession of guns in the vicinity of a school, the government argued that by grounding the noneconomic activity to a particular *place* that has economic aspects – there a school – this provided enough connection to commerce. *Lopez*, 514 U.S. at 563-64.[4] And yet the Supreme Court roundly rejected that logic. As the Supreme Court explained, "if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." 514 U.S. at 564. Indeed, most buildings in every local city and municipality in America has at least the same amount of economic activity as does a school or a place of religious worship. Under the Plaintiffs' logic, violence in the vicinity of any local building or school could be made a federal crime. And yet *Lopez* and *Morrison* clearly held that such general police power is *not* granted to Congress under the Commerce Clause. *Morrison*, 529 U.S. at 618 ("[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.").

[4] Just as the Plaintiffs and the District Court do here, the government in *Lopez* argued mightily that the physical connection to schools, and the economic aspects of such, should have sufficed to authorize the Commerce Clause power of Congress to outlaw gun possession near schools. *Lopez*, 514 U.S. at 563-64 (reciting government's arguments that: the costs of violent crime near schools, including costs of insurance and reducing the willingness of individuals to travel to areas within the country; the presence of guns in schools posing a substantial threat to the educational process by threatening the learning environment; and a handicapped educational process; all combine to affect interstate commerce and will result in a less productive citizenry).

Because there are so many aspects to places of religious worship that involve no commercial activity, the Plaintiffs' reliance on *Heart of Atlanta* is misplaced. Pl. Br. at 18 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 247 (1964)). As explained in *Lopez*, in *Heart of Atlanta*, the Supreme Court affirmed the regulation of a commercial activity, the booking of motel rooms. *Lopez*, 514 U.S. 549, 559. Obviously, offering motel rooms in exchange for money is a commercial transaction, and thus the activity being regulated inherently involves commercial activity. In contrast, here the regulated activity is noncommercial – violence and intimidation – and much of the activity that takes place at places of religious worship also does *not* involve a commercial transaction.

Grasping at straws, the Plaintiffs cite the decision in *Gonzales v. Raich*, in efforts to justify the Commerce Clause power being exercised here. Pl. Br. at 13-14 (citing *Gonzales v. Raich*, 545 U.S. 1 (2005)). The holding in *Raich* is inapposite. In *Raich*, the Supreme Court upheld the criminalization of the growing of local marijuana. The Supreme Court explained that noneconomic intrastate activity, which itself does not substantially affect interstate commerce, may nonetheless be the subject of a valid regulation if it is a part of a larger, more comprehensive scheme of *commercial* regulation. *See Raich*, 545 U.S. at 22 ("Thus,…when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity,

Congress was acting well within its authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce ... among the several States.'").

Because, in *Raich*, Congress had enacted a broad, comprehensive scheme of legislation that regulates the commercial enterprise of drug manufacture and sale, including illegal narcotics, the local growing of marijuana was held to fall within the scope of that inherently commercial regulatory scheme. Here, the Plaintiffs do not even assert, because they cannot, that the federal government has enacted some broad regulatory scheme over religion. Religion does not involve regulation of a commodity and is not inherently commercial, as in *Raich*. Also, First Amendment principles would prohibit any broad regulatory scheme over religion. Section 248(a)(2) is not part of a broad regulatory scheme over religion or religious transactions, and the holding in *Raich* is completely inapposite.

The District Court reasoned that although the activity being regulated was noneconomic, "the grounding element in the statute – 'a place of religious worship' – transforms the provision into one tethered to commerce." 314 F. Supp. 3d 420, 440; A-2275-76. Yet *Lopez* and *Morrison* teach the opposite: merely because the location affected (schools in *Lopez*) or the people affected (women in *Morrison*) have tremendous economic connections and aspects, and participate dramatically in the national economy, the Supreme Court held that the cumulative effect on violence in inhibiting participation in schools, or inhibiting women participating in the

national workforce, is too attenuated a connection to commerce in order to survive constitutional scrutiny. Thus, what the District Court held "transforms" the statute as "tethered" to commerce, is the very "bridge too far" that the Supreme Court clearly held the Constitution does not permit.

It is noteworthy that the District Court's broad reading of Section 248(a)(2) to mean that a "place of religious worship" could include every street corner (even though the plain text and legislative history make clear that it was intended to apply to more fixed locations, such as churches, synagogues and mosques) only highlights why the physical location does nothing meaningful to connect the statute to commerce, any more than schools connected gun possession to commerce in *Lopez*. According to the District Court, intimidation against any person at any street corner who is subjectively engaging in noncommercial activity, such as silent prayer or handing out home-made fliers about religion, may be outlawed by Congress. Yet *Lopez* and *Morrison* make it absolutely clear that Congress has no such general police power.

The District Court conceded that Defendants' arguments are "powerful" and that "FACEA's constitutionality is not obvious" (314 F. Supp. 3d at 424; A-2251) and certified this issue for interlocutory appeal – something that the Honorable Judge Weinstein remarked that he could not remember having ever done before in his 50 years on the bench (A-2237). Indeed, when the undersigned counsel pointed out that

it seems impossible to distinguish this case from the holdings in *Lopez* and *Morrison*, the District Court candidly remarked: "Well, maybe so." A-2241 (line 10). The District Court was so concerned not to conduct a long trial concerning a statute that appears to face such a powerful constitutional challenge here, that it urged this interlocutory appeal, seeking this Court's careful guidance. Thus, while the District Court made its honest judgment, while correctly acknowledging that this case clearly presents incredibly weighty issues, the Plaintiffs' briefing in contrast unfortunately glosses over these critical issues by simply pointing to the many ways that places of worship, like schools and everything else in American life, affect commerce.

If this Honorable Court were to affirm the District Court, it would, in effect, create an unrecognized exception to *Lopez* and *Morrison* that in reality would swallow the rules articulated in those decisions. There would be no way to affirm the District Court, yet not also agree that a federal statute outlawing violence or intimidation in the vicinity of all schools and buildings in every local town, city and village in the entire nation must pass muster under the Commerce Clause. Indeed, schools and buildings have no less economic aspects than do places of religious worship. Yet, criminalization of local acts of violence in this way was emphatically rejected by the Supreme Court in *Lopez* and *Morrison*, and this Court is duty bound to respect and follow those decisions. Thus, affirming the District Court would

conflict with the Supreme Court's decisions and create massive inconsistency and confusion in the law.

The more pragmatic and principled road would be for this Court to acknowledge that the portion of FACEA that criminalizes violence and intimidation at places of religious worship goes one step too far under *Lopez/Morrison*; but also for this Court to point out that as a practical matter, another federal statute that accomplishes the same protections for places of worship (18 U.S.C. § 247) thankfully contains a jurisdictional element that ensures that it passes constitutional muster. Thus, this Court can remain faithful to the Supreme Court's teachings, and to the important principles of limited powers, while at the same time making clear that this Court's ruling in no way prevents the federal government from vigorously protecting religious institutions, as it does under Section 247.[5]

### B. Plaintiffs are Incorrect that the Lack of Legislative Findings is "Immaterial"

In their opening appellate brief, Defendants pointed out the undisputed fact that FACEA contains absolutely no legislative findings regarding the connection between acts of violence or intimidation at places of religious worship and their

[5] As set forth in Defendants' opening brief, the Attorney General's office "has not filed any criminal or civil actions under the FACE Act" regarding violence directed at houses of worship. A-2190; Def. Br. at 5. Instead, the Department of Justice uses 18 U.S.C. § 247 to protect religious worship and religious freedom. *Id*.

connection to interstate commerce. Under *Morrison's* four factor test, this is the third factor, and Section 248(a)(2) fails to satisfy this factor. Def. Br. at 21-23.

In response, Plaintiffs assert that the lack of any legislative findings is "immaterial" and that, in any event, courts can rely on legislative findings made in connection with the enactment of other statutes. Pl. Br. at 19-22. However, these arguments fail upon inspection.

First, under *Morrison*, the utter lack of any legislative findings is clearly one of four significant factors that weigh against the statute being constitutional. For the Plaintiffs to say that the lack of legislative findings is "immaterial" simply talks past the binding authority in *Morrison*. In any event, it is important to acknowledge that Section 248(a)(2) indisputably fails the third factor, as there is no legislative history or findings in that statute that even attempt to explain how Section 248(a)(2) affects interstate commerce.

Second, Plaintiffs argue that Congress did not need to make legislative findings in connection with Section 248(a)(2) because the Court can rely on Congress' findings in 18 U.S.C. § 247 and 18 U.S.C. § 249. *See* Pl. Br. at 20-21. While it is true that courts can look to the legislative findings associated with other statutes, *Lopez* cautioned that courts that do so must ensure that the legislative findings are made in a context that fits the same breadth as the statute under review. *United States v. Lopez*, 514 U.S. 549, 563-64 (1995). In *Lopez*, the Court rejected

the use of prior legislative findings because they did not sufficiently support the relationship between the specific activity being regulated and commerce. *See* 514 U.S. at 562-63.

Here, the warning in *Lopez* not to automatically assume one can rely on findings from other statutes is especially apt. Indeed, as pointed out in the Defendants' opening brief, the very legislative history of Section 247 being pointed to by the Plaintiffs and the District Court actually acknowledged that the decision in *Lopez* created a constitutional problem, in that the activity being regulated was not economic, and this same legislative history thus concluded that it would be prudent to include in the statute a jurisdictional element. Def. Br. at 20-23. To address the constitutional limitations, which Congress candidly recognized, Congress expressly included in 18 U.S.C. § 247 a jurisdictional element, requiring as an element of the crime that the activity effects interstate commerce. This jurisdictional element easily solved the constitutional problem that the legislative history admitted existed.

In contrast, of course, Section 248(a)(2) contains no jurisdictional element, thus failing the second of the four *Morrison* factors. Thus, it is especially inappropriate for the Plaintiffs to rely on the legislative history for Section 247. That is, even after Congress listed religion's connections to interstate commerce in connection with Section 247, Congress nevertheless acknowledged that in light of *Lopez*, a jurisdictional element was required. Since Section 248(a)(2) failed to

include a jurisdictional element, the legislative history of Section 247 actually further supports that Section 248(a)(2) is unconstitutional.

## III. PLAINTIFFS FAIL TO REBUT THAT THE DISTRICT COURT ERRED BY BROADLY CONSTRUING SECTION 248(a)(2)'S LANGUAGE TO INCLUDE ANY TRANSIENT LOCATION WHERE SOMEONE MIGHT PURPORT TO WORSHIP

### A. Plaintiffs Fail to Rebut that the Plain Meaning and the Legislative History Make Clear that "Place of Religious Worship" Refers to More Fixed Locations, Not Every Street Corner Where One May Subjectively Pray

In their opening brief, Defendants argued that the plain meaning of the phrase "place of religious worship," in common usage would typically connote more fixed locations, such as churches, synagogues or mosques, as opposed to every street corner where one may set up a table and purport to subjectively worship, as the Plaintiffs allege they did here with the five tables that they set up on the busy streets of Main Street, Flushing. Def. Br. at 26.

In their appellate brief, Plaintiffs argue that Defendants' position is "unsupported and unnatural," "materializes out of thin air," and has no support in any cases or tools of statutory interpretation. Pl. Br. at 27. Yet this accusation is false. First, far from coming out of "thin air," the reading advanced by the Defendants finds clear, unmistakable support in the legislative history of the very statute in question, which Defendants cited and quoted in their opening brief. In the Conference Report for Section 248(a)(2), Congress made clear that "places of

religious worship" "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. In addition, the legislative history made clear that the statute does not cover any place where a person might pray, such as a street corner. A-2023.

Second, multiple courts in the Second Circuit have used the exact phrase – "place of religious worship" – in applying zoning laws, often in the context of restrictions on cabarets or adult entertainment establishments. *See, e.g., Dean v. Town of Hempstead*, 163 F. Supp. 3d 59, 67 (E.D.N.Y. 2016) (analyzing a building ordinance providing that "an adult entertainment cabarets cannot be located 'within a five-hundred-foot radius of any…church or other *place of religious worship*'"); *Derusso v. City of Albany, N.Y.*, 205 F. Supp. 2d 16, 18 (N.D.N.Y. 2002) (addressing a zoning law that provides limitations on adult entertainment establishments, including that "they must be located at least 1,000 feet from a church or other *place of religious worship*'"); *Tri-State Video Corp. v. Town of Stephentown*, 1998 WL 72331, at *6 (N.D.N.Y. Feb. 13, 1998) ("Stephentown Local Law No. 1 of 1997…prohibits adult entertainment businesses from operating within 1000 feet of any…church or other *place of religious worship*[.]"). The numerous zoning laws using this common phrase, and the court decisions addressing that phrase, provide clear support for the common meaning of the phrase "place of religious worship" as

advanced by the Defendants. Clearly, if those zoning laws and cases are to make sense, a "place of religious worship" must mean a fixed location principally used for worship, not anywhere on any street corner where one may set up a table and subjectively pray.

Indeed, if Plaintiffs' definition were to be applied to the many zoning laws addressed by federal courts within this Circuit, it could be nearly impossible for any cabaret or adult entertainment establishment to open its doors. Any group of religious followers could, under Plaintiffs' reading of the phrase, set up a "place of religious worship" on any street corner at any time and thereby block any cabaret or adult entertainment establishment from opening nearby. A cabaret or adult entertainment shop would not be able to identify and take into account fixed places of worship in the vicinity to make sure that it would not violate such zoning regulations.

Federal courts outside of this Circuit have similarly held that the common meaning of the phrase "place of religious worship" denotes a fixed location or building where the primary activity is religious activity, as opposed to other locations, where religious prayer may happen to occur. *Ark Encounter, LLC v. Parkinson*, 152 F. Supp. 3d 880, 923 (E.D. Ken. 2016) ("In a recent case applying Section 5 of the Kentucky constitution, the Supreme Court used the word 'churches' interchangeably with 'a place of worship.'"); *GeorgiaCarry.Org v. Georgia*, 764 F.

Supp. 2d 1306, 1317 n.13 (M.D. Ga. 2011) (finding that the term "place of worship" means a building in which a religious congregation meets, and did not encompass a residence because its primary purpose is not prayer).

As far as dictionaries are concerned, instead of taking "place" out of context, dictionary definitions of the phrase "place of religious worship" in context actually agree that its common meaning denotes a building or other fixed location where worship commonly occurs. *Collins English Dictionary*, https://www.collinsdictionary.com/us/dictionary/english/place-of-worship (2019) (defining "place of worship" as "a ***building*** where people gather to worship together, such as a church, synagogue, or mosque"). This dictionary definition matches exactly what the legislative history makes clear that the plain text of Section 248(a)(2) was intended to mean.

Given that legislative bodies and courts have no trouble reading "place of religious worship" to means fixed locations, clearly Defendants' interpretation does not "materialize out of thin air." Contrary to Plaintiffs' assertions, reading "place of religious worship" to mean fixed locations is a reasonable and, indeed, the ordinary meaning of the plain text of the phrase.

In light of the support that exists for Defendants' reading of the phrase "place of religious worship," combined with the legislative history clearly supporting Defendants' reading, the Plaintiffs' position that their reading is the only reasonable

one must fail. To begin with, even if Plaintiffs were correct that the plain language of the phrase "place of religious worship" means anywhere, including any street corner, as a matter of law this Court should *still* consider the statute's legislative history. The Supreme Court has made clear that even if the statutory language is not ambiguous, courts must still consider legislative history if the legislative history expresses clear legislative intention as to the meaning. *See I.N.S. 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 'clearly expressed legislative intention' contrary to that language[.]"). Here, the legislative history is unmistakably clear that the phrase "places of religious worship" was meant to connote fixed locations used primarily for religious worship.

Second, the phrase "place of religious worship" is *in the least* susceptible to more than one reading – as evidenced by the legislative history and the common use of that phrase as set forth in Defendants' opening brief and case law cited therein and above. Because the meaning of "place of religious worship" is, in the least, ambiguous as to whether it means any street corner where someone may purport to pray, the Court can surely consult 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.").

The District Court incorrectly ruled, as a matter of law, that the five Falun Gong tables on the street corners of Flushing are, "places of religious worship," and thus improperly took this issue away from the jury. 311 F. Supp.3d at 564; A-1878-79. This was clear error, because under the statute's plain text and legislative history, it is in the very least an issue of fact for the jury to determine whether the five tables were places, "such as a church, synagogue or other structure or place used primarily for religious worship," as the Conference Report makes clear is what was intended to be covered. A-2097. There was ample evidence in the record, including admissions by the Plaintiffs at their depositions, that the tables were primarily used to promulgate political propaganda against the Chinese government, not engage in religious worship. A-776 at 13 (lines 21-22) ("**We have tables, and that's where also we have propaganda material.**"); A-777 at 147 (lines 10-15) ("At a table we pass out fliers. **We try to tell the truth of how the Chinese communist party persecute the Falun Gong practitioner. We try to tell the truth about how the communist party harvest organs.**"); A-1784 at 108 (line 24) to 109 (line 5) (In response to the question "are the tables actually a place of worship where you actually engage in worship," Plaintiff Lo answered: "**No. No. It's not mainly for worship, no. Mostly they are for distribution of our fliers**.").

Thus, even if Section 248(a)(2) survived constitutional scrutiny under the Commerce Clause, the tables on the street are not covered by the statute. In any event, it should still be, in the least, a question of fact for the jury whether these five tables, admittedly used to promote political propaganda against the Chinese government, in fact constitute "places of religious worship" covered under the statute.

### B. Plaintiffs Fail to Rebut that The Establishment Clause Does Not Require Section 248(a)(2) To Be Read to Apply to Sidewalks

In their opening brief, Defendants demonstrated that the District Court erred by concluding that it was required to read "places of religious worship" to apply to sidewalks – a result that was the exact opposite of what the statute was intended to cover – or else the statute would violate the Establishment Clause. As set forth in Defendants' brief, under the *Lemon* test, prohibiting violence at places of religious worship as the legislature intended (not to sidewalks where one might set up a table to distribute political literature) is facially neutral, does not have a primary effect of promoting any particular religion, and certainly does not involve any "excessive government entanglement" with religion. Def. Br. at 33-35.

In response, Plaintiffs cite two cases that are plainly distinguishable. The first case Plaintiffs cite is *Larsen v. Valente*, 456 U.S. 228 (1982). Pl. Br. at 29. In *Larsen*, the Supreme Court confirmed the well-established rule that a facially neutral statute is constitutional, even if it has a disparate impact on some religions. *See*

*Larsen* 456 U.S. at 247 n.23. However, in *Larsen*, the plain text of the statute made "explicit and deliberate" distinctions between different religions, because it provided tax exemptions only to religions based on what percentage of the donations they received were from non-members. *See id*. The statute thus expressly contemplated that certain religions would not meet the criteria. Because of this facial, deliberate distinction amongst religions, the Supreme Court found the statute facially unconstitutional. *See id.*

In contrast, FACEA does not facially distinguish between religions at all, and protects all religions equally at their fixed places of religious worship. Notably, this would not in any way discriminate against the Falun Gong, because in addition to the five tables that the Falun Gong has set up on sidewalks to engage in political denunciation of the Chinese government (which are properly not covered by the statute), the Falun Gong claims that it also has a spiritual center which is located in a building on Main Street. 311 F. Supp. 3d 514, 529; A-1819-1820; Pl. Br. at 5. That center, if the Plaintiffs prove that it truly is a place principally used for religious worship, would be equally protected by Section 248(a)(2) as is a church or synagogue.[6]

[6] The truth is, Plaintiffs would not be satisfied with Section 248(a)(2) being limited to covering their spiritual center because none of the Defendants ever went to the Plaintiffs' place of religious worship.

Conversely, Christians and people of the Jewish faith, for example, who might set up tables on Main Street, Flushing to hand out literature on political topics such as abortion or the Chinese government, similarly and equally would not be covered by Section 248(a)(2), properly read. That is, the statute is completely neutral on its face, and does not differentiate between religions in the way that occurred in *Larsen*.

Furthermore, while one may be able to imagine a religion that has no fixed location of religious worship, Plaintiffs by their own account are not one of them (again, the Plaintiffs claim that they have a building on Main Street which contains a spiritual center). Thus, it appears that the District Court is attempting to solve a hypothetical Establishment Clause problem that does not exist.

The second case cited by Plaintiffs, *Torcaso v. Watkins*, is similarly inapposite. 367 U.S. 488 (1961). There, the contested statute required elected officials to swear their allegiance to God in order to take public office. *See Torcaso*, 367 U.S. at 489. A statute with such a blatantly inappropriate requirement, *requiring* officials to attest their fidelity to God in order to take office, is in no way facially neutral, but rather imposes a clear denominational preference that directly favors Christianity, which facially violates the Establishment Clause. Section 248(a)(2) does not require any such allegiance to a deity, and instead outlaws violence at places of religious worship.

By ruling as a matter of law that the five Falun Gong tables located on the sidewalk are automatically protected under Section 248(a)(2) because some Plaintiffs proffered affidavits on summary judgment that they are subjectively praying there,[7] the District Court turned the intention of the statute completely upside down. The District Court incorrectly took away from the jury an important issue of fact: namely, whether in fact the tables are principally used for religious worship, as opposed to what Plaintiffs admitted in their depositions was the anti-Chinese government rhetoric that is the principal purpose of the tables.

[7] As set forth above, these affidavits contradicted previous live testimony given by the Plaintiffs. *See, e.g.*, A-1784 at 108 (line 24) to 109 (line 4) (In response to the question "are the tables actually a place of worship where you actually engage in worship," Plaintiff Lo answered: "No. No. It's not mainly for worship, no.").

## CONCLUSION

For the foregoing reasons, as well as those contained in Defendants' opening brief, 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
April 1, 2019

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 6,772 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-Point font.

Dated: New York, NY
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