No. 21-1429

In the Supreme Court of the United States

ZHANG JINGRONG, ET AL.,

Petitioners,

v.

CHINESE ANTI-CULT WORLD ALLIANCE, INC., ET AL.,

Respondents.

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

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether historical practices and understandings show that outdoor gatherings like Petitioners' are "places of religious worship."

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INTEREST OF THE *AMICUS CURIAE*[1]

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm that protects the free expression of all religious faiths. Becket has represented agnostics, Buddhists, Christians, Hindus, Jains, Jews, Muslims, Native Americans, Santeros, Sikhs, and Zoroastrians, among others, including in multiple cases at this Court.

Becket has frequently represented religious people and entities that have sought a place to worship, including outdoors. See, *e.g.*, *Apache Stronghold* v. *United States*, No. 21-15295 (9th Cir. argued Oct. 22, 2021) (outdoor worship by San Carlos Apache); *Slockish* v. *U.S. Dep't of Transp.*, No. 21-35220 (9th Cir. en banc rehearing denied May 6, 2022) (outdoor worship by Klickitat and Cascade Tribes of Yakama Nation); *Agudath Israel of Am.* v. *Cuomo*, 141 S. Ct. 889 (2020) (indoor and outdoor worship by Orthodox Jews during COVID pandemic); *Capitol Hill Baptist Church* v. *Bowser*, 496 F. Supp. 3d 284 (D.D.C. 2020) (outdoor worship by Baptist church during COVID pandemic; amicus); *Bear Lodge Multiple Use Ass'n* v. *Babbitt*, 175 F.3d 814 (10th Cir. 1999) (outdoor worship by Cheyenne River Sioux and other tribes; amicus).

Becket offers this brief to demonstrate that from the perspective of history and tradition, outdoor religious gatherings have always been considered places of religious worship.

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[1] No counsel for a party authored any portion of this brief or made any monetary contribution intended to fund its preparation or submission. All parties have consented to the filing of this brief. Notice was provided in accordance with Rule 37.2.

INTRODUCTION

For all of known human history, people have worshipped outside. From Mount Sinai to the Sermon on the Mount, from the pilgrimage to Canterbury to the Prayer Pilgrimage for Freedom, outdoor worship has been a primary and essential form of religious practice across many traditions, countries, and centuries.

As we explain below, there is a long and rich history that treats outdoor religious gatherings, whether planned or spontaneous, as "places of religious worship." Indeed, across Anglo-American history, many minority religious groups—Lollards, Quakers, Virginia Baptists, American slaves—were persecuted for worshipping outdoors and fought back against those prohibitions.

Outdoor worship was well known to the Founding generation, both because of their knowledge of outdoor gatherings described in the Bible, and because of long experience in England and the colonies. They knew about celebrity field preacher George Whitefield, who attracted tens of thousands to his open-air sermons, and about the itinerant Virginia Baptist preachers, whose imprisonment outraged the young James Madison.

After the Founding, outdoor worship played a pivotal role in major religious and social movements in this country, including in the camp meetings and tent revivals of the 19th and 20th centuries, and in the Civil Rights movement. And to this day, Americans of many religious traditions engage in outdoor worship in diverse forms, from Sukkot to Holi to Apache sunrise ceremonies and Christian worship services during the COVID pandemic.

The existence of this unbroken history of religious practice has both constitutional and statutory consequences. No account of the First Amendment could plausibly exclude the ability of religious believers to gather outdoors for worship. And no account of the FACE Act could pretend that the Act was meant to *narrow* the set of places of worship already protected by the First Amendment, or that in 1994 Congress silently excluded most outdoor religious gatherings from the statutory category "places of religious worship." The historical baseline does not permit such absurd inferences.

Here, Petitioners' practice of gathering at sidewalk booths to pray and proselytize for the Falun Gong faith falls squarely within the historical tradition. The Second Circuit concluded otherwise only by grafting atextual limitations onto the FACE Act, holding that "places of religious worship" qualify as such only when their "primary purpose" is worship, as determined by an undefined religious "leader" or "collective." Those limitations would have disqualified most historical outdoor worship, which was frequently practiced in multipurpose locations (*e.g.*, fields, parks, streets) and by people at odds with the religious "leader[s]" and "collective[s]" of their day.

More troubling still, the Second Circuit's rule would remove the FACE Act's protections from a large array of outdoor worship activities commonly practiced by many different faith traditions. An American celebrating Sukkot, Eid, Holi, baptism in a river, or a eucharistic procession should not enjoy any less protection under the FACE Act than someone worshipping inside a church, synagogue, mosque, or temple.

In short, the Second Circuit's protestations notwithstanding, that court effectively read into the statute a principle that arbitrarily disfavors outdoor worship. Requiring official designation of a location as a "place of worship" by a hierarchical authority means that many outdoor worship activities will not meet the Second Circuit's standard. Such a principle is no more tenable than claiming that outdoor pickup games or impromptu political protests are not true sporting events or political assemblies because no hierarchical authority provided some official designation beforehand. The Court should therefore grant the petition.

ARGUMENT

I. Historical practices and understandings confirm that outdoor religious gatherings are "places of religious worship."

In *Town of Greece* v. *Galloway*, the Court recognized that whatever other test might apply, the Establishment Clause "must be interpreted by reference to historical practices and understandings." 572 U.S. 565, 576 (2014) (cleaned up). Applying that same principle to the Religious Land Use and Institutionalized Persons Act of 2000, this Court recently looked to the "rich history of clerical prayer" in holding that the Texas Department of Criminal Justice was required to accommodate a prisoner's religious exercise at the time of execution. *Ramirez* v. *Collier*, 142 S. Ct. 1264, 1278 (2022). That same historical inquiry should inform the Court's analysis here. As we show below, historical practices and understandings treat outdoor gatherings as places of religious worship.

A. Historical practices and understandings before the Founding treated outdoor gatherings as places of religious worship.

The history of religious exercise before the Founding—in England, the colonies, and elsewhere—demonstrates that outdoor gatherings were treated as places of religious worship.

1. In the first instance, the worship traditions described in the Bible—the touchstone of English and American religious belief for many centuries—plainly encompassed outdoor gatherings.[2] Thus Exodus recounts that "Moses brought the people out of the camp to meet God; and they took their stand at the foot of the mountain"—Mount Sinai—where the Ten Commandments were handed down. Exodus 19:17[3]; see also Exodus 20:1-17. The Israelites later constructed the Mishkan, or Tabernacle, to serve as their portable place of worship during their 40 years of wilderness wandering. See Exodus 25-30, 36-40. The people made burnt offerings on the altar in the Tabernacle's open-air courtyard. See Exodus 27:1-8, 38:1-7; Leviticus 1.

The role of sukkot, or booths, in Jewish practice bears special mention given the nature of Petitioners' religious practice. In the book of Leviticus, the people

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[2] "The Bible, more than any other written word, informed the world of the founding fathers and the society around them." Daniel L. Dreisbach, *Reading the Bible with the Founding Fathers* 5 (2017). And as leading English evangelist Charles Spurgeon later recognized, outdoor worship was squarely within the biblical tradition: "[I]t can be argued, with small fear of refutation, that open air preaching is as old as preaching itself." C.H. Spurgeon, *Open Air Preaching* 5 (1877).

[3] All biblical citations are to the Revised Standard Version.

of Israel were instructed to observe Sukkot, or the "feast of booths." Leviticus 23:33-44. During the holiday, Jews are to build and inhabit booths—temporary open-air structures—in order to "commemorate the booths in which the Israelites dwelled during the desert sojourn." Jeffrey L. Rubenstein, *A History of Sukkot in the Second Temple and Rabbinic Periods* 18 (2020).

Other examples of outdoor gatherings for worship are common in the Christian New Testament. John the Baptist preached "in the wilderness of Judea" and baptized people "in the river Jordan." Matthew 3:1, 6. Jesus delivered the Sermon on the Mount to disciples and crowds gathered "on the mountain." Matthew 5:1. And the Apostle Paul addressed the "[m]en of Athens" both "in the market place" and on Mars Hill. Acts 17:17, 22.

2. Aside from the biblical examples that were well-known to the Founding generation, the history of religious practice in England reflects a long and varied tradition of outdoor worship.

Outdoor eucharistic processions—fostered especially in the 11th century by Archbishop of Canterbury Lanfranc of Bec—were a longstanding feature of Catholic worship. See Terence Bailey, *The Processions of Sarum and the Western Church* 116 (1971). The earliest of these were Palm Sunday processions, which were "almost always out of doors," and in which "it became the practice to carry the Blessed Sacrament to represent the person of Christ." *Ibid.*

Pilgrimages were also outdoors, the most prominent example being the pilgrimage to Canterbury Ca-

thedral, where Archbishop Thomas Becket was murdered in 1170. See Howard Loxton, *Pilgrimage to Canterbury* 64-72 (1978). "Over the next three centuries the pilgrimage to Canterbury became one of the most important in all Christendom." *Id.* at 11. A written record from the jubilee year of 1420 reports that "the people, in estimate, then arrived to the number of one hundred thousand men and women." Ben Nilson, *Cathedral Shrines of Medieval England* 113-114 & n.154 (1998) (quoting Raymonde Foreville, *Le Jubilé de Saint Thomas Becket* 180 (1958)). Chaucer famously memorialized the pilgrimage experience in his *Canterbury Tales*. See I *Chaucer's Canterbury Tales* 1 (Alfred W. Pollard ed., 1894) ("Thanne longen folk to goon on pilgrimages").

3. Religious dissenters worshipped outside from the beginning. In the late 14th century, itinerant preachers known as the Lollards began to propagate the dissenting religious views of Oxford theologian John Wyclif, who was condemned as a heretic. See generally Anne Hudson, *The Premature Reformation: Wycliffite Texts and Lollard History* (1988). Although the location of Lollard gatherings "varied according to the degree to which secrecy was necessary," *id.* at 153, Lollards frequently preached or gathered outdoors. The medieval historian Henry Knighton records that when Lollard William Swinderby was "suspend[ed] * * * from preaching in the said chapel, or in any other church or churchyard in the diocese," he "made his pulpit" between "a pair of millstones for sale, standing in the street," and "preached there many times in defiance of the bishop." *Knighton's Chronicle 1337-1396* 311-313 (G.H. Martin ed. & trans., 1995).

The government responded by suppressing outdoor religious gatherings. In 1382, Parliament condemned "wicked persons" who "go from county to county and from town to town," and "preach daily, not only in the churches and churchyards, but also in markets, fairs, and other public places where there is a large congregation of people." Joseph H. Dahmus, *The Prosecution of John Wyclyf* 98 (1952) (quoting *Rotuli Parliamentorum* 3, 124-125). In 1401, Parliament established the death penalty for heretics who among other things "make unlawful Conventicles." *De hæretico comburendo*, 2 Hen.IV c.15 (1401).[4] Lollards nevertheless continued to "practise[] their faith" by gathering in illegal conventicles that met both in "private homes" and "out of doors," including in parks. *Lollards of Coventry 1486-1522* 35-36 (Shannon McSheffrey & Norman Tanner eds. & trans., 2003).

4. After the Reformation, the cycle of religious persecution leading to outdoor worship continued, now directed at both Catholic and nonconformist Protestant worship.

Much Catholic worship was thrust outdoors after 1559, when Elizabeth I's Act of Uniformity required adherence to the Church of England. See Lisa McClain, *Without Church, Cathedral, or Shrine: The Search for Religious Space Among Catholics in England, 1559-1625*, 33 The Sixteenth Century J. 381, 381-382 (2002). As Protestants "converted Catholic churches, chapels, and cathedrals to sites of Protestant worship," *ibid.*, Catholics "were compelled

[4] "Conventicle" was the legal term for an unauthorized religious meeting.

to perform mass outdoors" (and in "humble farms, cottages, alehouses, and barns"). Alexandra Walsham, *The Reformation of the Landscape: Religion, Identity, and Memory in Early Modern Britain and Ireland* 177 (2011).

Nonconformist Protestants were also targeted after the restoration of the Stuart monarchy in 1660, which "led to the full reestablishment of the Church of England." Jack N. Rakove, *Beyond Belief, Beyond Conscience: The Radical Significance of the Free Exercise of Religion* 28 (2020). The new King Charles II "was willing to seek practical accommodations with religious dissenters," but "the long Cavalier Parliament (1661-1678) had other intentions." *Ibid.* What followed was a series of statutes to restrict religious speech and reduce non-conformity, including the Act of Uniformity 1662, the Conventicle Act 1664, the Five Mile Act 1665, the Second Conventicle Act 1670, and the Test Act 1673. Michael J. Braddick, *State Formation in Early Modern England c. 1550-1700* 315-316 & n.85 (2000); see also Geoffrey Holmes, *The Making of a Great Power: Late Stuart and Early Georgian Britain, 1660-1722* 454-457 (1993) (summarizing statutes).

The Act of Uniformity 1662—which required all clergy to declare their "unfeigned assent and consent" to the revised Book of Common Prayer, 14 Car.II, c.4—resulted in the ejection or resignation of more than 900 clergy. See Holmes 41 (approximately 2,029 ministers, lecturers, and fellows were ejected from their posts between 1660 and 1662). The Conventicle Act 1664 made it illegal to attend a meeting of more than five people, excluding members of the same household, for worship ("under colour or pretence of any Exercise of Religion")

outside the Church of England. 16 Car.II, c.4.[5] The Second Conventicle Act 1670 introduced greater fines against preachers and anyone hosting the meeting. 22 Car.II, c.1. And the Five Mile Act 1665 forbid the ejected ministers and other unlicensed preachers from coming within five miles of their former parishes or of any city or town. 17 Car.II, c.2.

Nonconformists turned to outdoor worship when the church doors were closed to them. In one famous example, William Penn and fellow Quaker William Mead were arrested in August 1670 for "preaching in the street" just outside a Quaker Meeting House in London that the government had closed under the Conventicle Act. Andrew R. Murphy, *Liberty, Conscience, and Toleration: The Political Thought of William Penn* 59 (2016). As Penn later told the jury, "we were by force of arms kept out of our lawful house, and met as near it in the street as their soldiers would give us leave." *Id.* at 59-60. The two were arrested and charged with disturbing the peace and addressing a tumultuous assembly. See *id.* at 60. A jury acquitted the two men following a "dramatic sequence of events" at trial that "included a contempt of court charge because they wore hats in the courtroom." John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* 24 (2012). "The case gained renown throughout England and the American colonies." *Ibid.* "[E]very Quaker in America knew of the ordeal suffered by the founder of Pennsylvania," and "every American lawyer

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[5] Notably, the Conventicle Acts expressly forbade outdoor worship gatherings, levying fines against anyone hosting such a meeting "in his or her House, Outhouse, Barne[,] Roome[,] Yard or Backside Woods or Grounds." 16 Car.II, c. 4; 22 Car.II, c.1 (same).

with a practice in the appellate courts was familiar with it, either directly or through its connection with its still more famous aftermath." Irving Brant, *The Bill of Rights: Its Origin and Meaning* 67-68 (1965).

Even as the Conventicle Acts drove the Quakers to preach in the streets, dissenting Scottish Presbyterian "Covenanters" took to the fields to do the same. Approximately 350 Scottish ministers—"upwards of one-third of the whole number"—were ejected from their pulpits in 1662. James Taylor, *The Scottish Covenanters* 41 (1887). The ejected ministers first performed religious services in their homes, and "when the number of their hearers increased they repaired to the open fields." *Id.* at 43. "[I]nspired by the conduct of 'primitive' Christians under the Roman Empire," these conventicles became "the most readily identifiable feature of Scottish presbyterian dissent in the Restoration era." Neil McIntyre, *Presbyterian Conventicles in Restoration Scotland*, 45 Scottish Church History 66, 68 (2016).

After a brief period of moderation, the Scottish Parliament enacted the oppressive "Act against Conventicles" in 1670. RPS 1670/7/11. Ejected ministers were prohibited from preaching or even praying except in their own houses and to members of their own family. Heavy fines were imposed on anyone who attended a conventicle. And preaching or praying at "field conventicles" was punishable by death:

> Whosoever without licence or authority shall preach, expound Scriptures, or pray at any of these meetings, in the field, or in any house where there be more persons than the house contains, so as some of them be without doors

> (which is hereby declared to be a field-conventicle) * * * shall be punished with death and confiscation of their goods.

Ibid. But "[t]he more * * * that these conventicles were forbidden and punished, the more they multiplied." Taylor 72. Field conventicles were "usually requested by local laymen" and advertised by "word-of-mouth," a method that "could be remarkably successful." McIntyre 76-77. "By 1677 both presbyterians and the authorities were reporting attendances in their thousands at outdoor conventicles." *Id.* at 75.

5. Outdoor worship featured prominently in the religious life of the American colonies, most notably in the open-air preaching of George Whitefield. See Rakove 62. During Whitefield's grand tour of the colonies in 1739-40, "[w]ord of his coming ran in advance, and farmers would drop their tools to hurry to the meeting site, which was often an open field where Whitefield would preach atop his traveling stool." *Ibid.*; see also Michael J. Crawford, ed., *The Spiritual Travels of Nathan Cole*, 33 Wm. & Mary Q. 89 (1976) (recounting a farmer's journey to see Whitefield).

Whitefield—an Anglican priest and early proponent of the Methodist movement—began "preaching out of doors" in England, a practice that allowed him to "accommodate many more listeners," and to "preach in places where he was banned from the pulpit." Thomas S. Kidd, *George Whitefield: America's Spiritual Founding Father* 65 (2014). Upon arriving in Philadelphia in November 1739, Whitefield "spoke from the Philadelphia courthouse stairs to a crowd he estimated at six thousand," who "'stood in awful silence' as they listened." *Id.* at 89 (internal citation omitted). By October 1740, Whitefield preached to a

"mammoth throng" on Boston Common that "was larger than the population of Boston, and possibly the largest ever gathered in the history of the English colonies." *Ibid.*

6. The Founders were also familiar with outdoor worship because of the experience of the Virginia Baptists, who "were still being horsewhipped and jailed as late as 1774 for preaching without a license." Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2119 (2003). Itinerant Baptist ministers in the 1770s preached not only in private homes and meeting-houses, but also outdoors. See Robert Baylor Semple, *I History of the Rise and Progress of the Baptists in Virginia* 4 (rev. 1894). One account, taken from a June 15, 1771 diary entry by the Baptist minister Daniel Fristoe, reads as follows:

> The next day (being Sunday) about 2000 people came together; after preaching, heard others that proposed to be baptized, 13 of which were deemed properly qualified. Then went to the water where I preached and baptized 29 persons. The trees about the water were so overloaded with spectators that some trees came down, but none hurt * * * . When I had finished we went to a field and making a circle in the center, there laid hands on the persons baptized.

Lewis P. Little, *Imprisoned Preachers and Religious Liberty in Virginia* 242-243 (1938) (internal citation omitted).

Imprisoned Baptist ministers continued to preach through the "grates"—the iron bars that secured the

cell windows—to gathered crowds outside. Little 105. For example, when William Webber and Joseph Anthony were imprisoned in December 1770 for "misbehaviour by Itinerant preaching," "[t]hey made regular appointments for preaching twice a week, and, as they could not go to the congregations, the congregations came to them." *Id.* at 210, 212 (internal citations omitted). "The space around the jail was the meeting place, and the sill of the jail window was the desk upon which lay their Bible and hymn book." *Id.* at 212 (internal citation omitted). When the imprisoned Baptists persisted in preaching to crowds outside the jail, "a wall, or fence, was built around the Chesterfield jail to prevent the people from hearing the imprisoned preachers when they preached through 'the grates.'" *Id.* at 355-357 (collecting sources).

The persecution of the Virginia Baptists particularly outraged James Madison. In 1774, when a group of itinerant Baptist ministers was imprisoned for preaching without a license in a neighboring county, Madison "railed against the narrow prejudices of the established clergy who pressed the charges," calling them a "Quota of Imps." Rakove 1. In a letter to a college friend, Madison wrote that "5 or 6" men were imprisoned in an "adjacent County" for "publishing their religious Sentiments," and decried "[t]hat diabolical Hell conceived principle of persecution rages among some." James Madison, Letter to William Bradford (Jan. 24, 1774), reproduced in National Archives, *Founders Online,* https://founders.archives.gov/documents/Madison/01-01-02-0029.

Given this history, by the time the First Amendment was adopted and ratified, the concept of outdoor worship—and its equal station—was very familiar to

the Founders. The First Amendment and freedom of religion generally can only be understood in light of that historical tradition.

B. Historical practices and understandings from the Founding until 1994 treated outdoor gatherings as places of religious worship.

Experience after the Founding, including the adoption of the Fourteenth Amendment, carried on the understanding of outdoor worship as an integral part of religious practice.

1. During the antebellum period, outdoor worship played a central role in the lives of slaves in the American South, for whom religion "was both institutional and noninstitutional, visible and invisible." Albert J. Raboteau, *Slave Religion: The "Invisible Institution" in the Antebellum South* 212 (2004).

Some slave owners did not allow their slaves to attend church, either because they refused to believe their slaves had souls, Raboteau 220, or because they feared that "religion was leading to abolition and to slave rebellion." Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 Fla. L. Rev. 909, 984 (2013). Other slave owners "did permit—some even required—their slaves to worship on the Sabbath, either at the local church or at meetings conducted on the plantation by white ministers or slave preachers." Raboteau 220. But "[s]ermons urging slaves to be obedient and docile were repeated ad nauseam" in these authorized church services. *Id.* at 213.

It was "[i]n the secrecy of the quarters or the seclusion of the brush arbors"—known as "hush harbors"—that slaves "made Christianity truly their own." Raboteau 212. At these "illicit, or at least informal, prayer meetings," "[p]reachers licensed by the church and hired by the master were supplemented by slave preachers licensed only by the spirit." *Ibid.* To avoid detection, slaves held religious gatherings in their cabins or in "secluded places—woods, gullies, ravines, and thickets," where they could "pray and sing as they desired." *Id.* at 215. Peter Randolph, a former slave in Prince George County, Virginia, described the location of one secret prayer meeting as follows:

> Not being allowed to hold meetings on the plantation, the slaves assemble in the swamp, out of reach of the patrols. They have an understanding among themselves as to the time and place of getting together. This is often done by the first one arriving breaking boughs from the trees, and bending them in the direction of the selected spot.

Peter Randolph, *Sketches of Slave Life: or, Illustrations of the 'Peculiar Institution'* 68 (1855).

Slaves faced draconian penalties if they were caught attending secret prayer meetings. In the decades preceding the Civil War, "southerners established harsh laws restricting slaves' ability to exercise their religion, including draconian regulations on black religious assemblies." Calabresi & Salander, 65 Fla. L. Rev. at 984. In South Carolina, for example, it was "unlawful for 'assemblies of slaves, free negroes, mulattoes and mestizoes' to meet 'in a confined or secret place,'" and violations were punishable by "such corporal punishment, not exceeding twenty lashes,

upon such slaves, free negroes, &c., as [the magistrate] may judge necessary for deterring them from the like unlawful assemblage in the future." Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. Rev. 1106, 1134 n.133 (1994) (internal citation omitted). In the District of Columbia, "all meetings for religious worship, beyond the hour of ten o'clock at night, of free negroes, mulattoes or slaves" were "declared to be unlawful." *Ibid.* (internal citation omitted). Other laws "prohibited slaves from preaching or religious practice unless in the presence of whites," and "prohibit[ed] blacks from reading the Bible, becoming ministers, [and] preaching." Calabresi & Salander, 65 Fla. L. Rev. at 984-985 (internal citations omitted).

Abolitionists saw the cumulative effect of these laws as "devastating slaves' ability to exercise their religious faith." Lash, 88 Nw. U. L. Rev. at 1137. Proclaiming these violations of religious freedom as "one of the greatest evils of the peculiar institution," abolitionists "joined a growing chorus of voices calling for a broader interpretation of the original Bill of Rights." *Ibid.* That coalition ultimately led to the adoption of the Fourteenth Amendment. See *id.* at 1146.

2. Yet another strain of outdoor worship after the Founding appears in the tradition of American revival gatherings known as the "Second Great Awakening," which began with the "camp meetings" of the early 19th century. In July 1800, a multi-day communion service at the Gasper River meetinghouse in Logan County, Kentucky, "drew people from distances of 'even a hundred miles.'" Paul K. Conkin, *Cane Ridge: America's Pentecost* 60 (1990). Because the numbers

exceeded the capacity of the meetinghouse, "woodsmen cleared away the underbrush around the tiny church and built a preaching stand and simple log seats." Charles A. Johnson, *The Frontier Camp Meeting: Religion's Harvest Time* 36 (1955). At a still larger gathering in August 1801, thousands flocked to Cane Ridge, Kentucky, for a six-day communion service that featured tumultuous crowds—one attendee described the noise as "like the roar of Niagara"—and "continual" preaching from "both the meetinghouse and the tent." Conkin 88-89. That "climactic event" at Cane Ridge precipitated a series of outdoor revivals in Kentucky that "attracted a cumulative attendance of over 100,000 people, even by conservative estimates." *Id.* at 115. Similar events erupted in New England, New York, and New Jersey in 1800 and 1801, and "by the 1820s Charles Finney led revivals * * * in upstate New York that rivaled in fervor those in Kentucky." *Id.* at 117.

Future generations of evangelists—to include Dwight L. Moody, Billy Sunday, and Aimee Semple McPherson, among others—adapted the outdoor revival tradition to the urban context. "Theaters, abandoned warehouses, outdoor pavilions, dance halls, and roller rinks could all serve as meeting houses for revivals"—but "[o]ne of the most common gathering places * * * was the tent." Josh McMullen, *Under the Big Top: Big Tent Revivalism and American Culture, 1885-1925* 24 (2015). Nearly every evangelist at the turn of the twentieth century "at some point in their ministerial career found themselves preaching inside a tent." *Id.* at 25. The use of tents and "tabernacles"—temporary structures erected to house revivals, see *id.*

at 26-27—allowed traveling evangelists to both "distance themselves from the established churches" and "connect their ministry to the simple camp meetings of early evangelicalism." *Id.* at 49-50. In 1949, it was a tent revival in Los Angeles—held in a massive circus tent known as the "Canvas Cathedral"—that famously launched the career of evangelist Billy Graham. William C. Martin, *A Prophet with Honor: The Billy Graham Story* 116, 123 (rev. 2018).

3. Still further examples of outdoor worship gatherings appeared at critical stages of the American civil rights movement. In 1957, Martin Luther King, Jr. announced plans for the Prayer Pilgrimage for Freedom to Washington, DC, publicly stating that the march "will be rooted in deep spiritual faith." *We'll March: Prayer Pilgrimage to Capital Planned*, The Baltimore Afro-American, Feb. 23, 1957, at 1. On May 17, 1957, nearly 27,000 people gathered on the steps of the Lincoln Memorial, where "[t]he prayers of the clergy for divine guidance in the struggle for human rights were re-inforced by the pleas of veteran civil rights advocates." *27,000 Prayer Pilgrims Hear Randolph, Wilkins And King in D.C. March*, Cleveland Plain Dealer, May 24, 1957, at 1. The written program for the event resembles an order of worship. It includes a clergy-led invocation, numerous hymns (such as "A Mighty Fortress Is Our God"), Old Testament and New Testament Scripture readings, prayer, musical solos (by prominent gospel singer Mahalia Jackson), remarks by King, and a benediction. "Prayer Pilgrimage Program, 1957," *Papers of A. Philip Randolph* (on file with Library of Congress).

In 1965, the civil rights marchers in Selma, Alabama, engaged in spontaneous acts of outdoor worship

at key moments of those historic demonstrations. On March 7—thereafter known as "Bloody Sunday"—John Lewis and Hosea Williams led roughly 600 demonstrators across the Edmund Pettus Bridge, where they were blocked by state troopers and ordered to disperse. Robert A. Pratt, *Selma's Bloody Sunday: Protest, Voting Rights, and the Struggle for Racial Equality* 1 (2017). "Hosea and John knelt down, and the hundreds of marchers likewise knelt in a wave behind them. John began to pray out loud." Bernard Lafayette, Jr. & Kathryn Lee Johnson, *In Peace and Freedom: My Journey in Selma* 125 (2013). As Lewis prayed, "the troopers lined up and prepared themselves for battle, putting on their gas masks and pulling out their nightsticks." Pratt 60. "And then all hell broke loose." *Ibid.*

Two days later, King led some 2,000 marchers across the Pettus Bridge to the city limits of Selma. Once again, the crowd was ordered to disperse—and once again, they prayed instead.

> After the singing of "We Shall Overcome" King then knelt and asked Rev. Ralph Abernathy to lead the demonstrators in prayer. "We come to present our bodies as a living sacrifice," Abernathy prayed. "We don't have much money, but we do have our bodies, and we lay them on the altar today."

Pratt 73. After the prayer, King rose and led the marchers back across the bridge. He would later call the second Selma march a "Confrontation of Prayer." Lafayette & Johnson 128.

4. There are also many non-Christian religious traditions that have long held outdoor gatherings in this country.

For example, Native Americans have conducted outdoor religious ceremonies on sacred lands since before recorded history. See generally Joseph Epes Brown & Emily Cousins, *Teaching Spirits: Understanding Native American Religious Traditions* (2001). In recent decades, these practices have frequently resulted in litigation. See, *e.g.*, *Apache Stronghold* v. *United States*, No. 21-15295 (9th Cir. argued Oct. 22, 2021) (outdoor worship by San Carlos Apache at sacred site on government land); *Slockish* v. *U.S. Dep't of Transp.*, No. 21-35220 (9th Cir. en banc rehearing denied May 6, 2022) (outdoor worship on government land by Klickitat and Cascade Tribes of Yakama Nation); *Bear Lodge Multiple Use Ass'n* v. *Babbitt*, 175 F.3d 814 (10th Cir. 1999) (outdoor worship on government land by Cheyenne River Sioux and other tribes).

As they have for millennia, Jews celebrate Sukkot by building sukkot and then sleeping and eating meals there during the weeklong festival. See, *e.g.*, Annie Groer, *A Home for the Holiday: Prefab Sukkahs Help Preserve a Centuries-Old Jewish Tradition*, Wash. Post, Oct. 9, 2003. Hindus celebrate the spring holiday of Holi outdoors. See, *e.g.*, Natalie Eilbert, *For Hindus in Green Bay and Fox Valley, Holi Festival splashes vibrant colors across a world dulled by a pandemic*, Green Bay Press-Gazette, Mar. 22, 2022. Muslims typically pray the special Eid prayers outdoors in a musalla, or large prayer ground. See *Musalla*, 3 *The Grove Encyclopedia of Islamic Art and Architecture* 32 (Jonathan M. Bloom & Sheila S. Blair eds., 2009).

5. The tradition of outdoor gatherings continued during the COVID pandemic. Facing unprecedented restrictions on indoor religious worship, believers of many traditions gathered to worship outdoors, including in parks and parking lots. See, *e.g.*, *Agudath Israel of Am.* v. *Cuomo*, 141 S. Ct. 889 (2020) (indoor and outdoor worship by Orthodox Jews); *Maryville Baptist Church, Inc.* v. *Beshear*, 957 F.3d 610 (6th Cir. 2020) (drive-in Easter service by Baptist church); *Capitol Hill Baptist Church* v. *Bowser*, 496 F. Supp. 3d 284 (D.D.C. 2020) (outdoor worship by Baptist church); see also Marian Fam, *US Muslims Try to Balance Eid Rituals with Virus Concerns*, Associated Press, May 24, 2020 (mosque in Florida "held the Eid prayer outdoors in the parking lot after announcing social distancing rules").

II. Gatherings like Petitioners' fall squarely within traditional notions of "places of religious worship."

As Petitioners have ably shown, the Second Circuit's cramped and atextual definition of "place of religious worship" does not square with the language of the FACE Act, 18 U.S.C. 248. See Pet. 13-20. That conclusion is buttressed by the "rich history" of outdoor worship over many centuries—indeed, millennia—of human experience. See *Ramirez*, 142 S. Ct. at 1278.

Petitioners' practice of gathering at sidewalk booths to pray and proselytize for the Falun Gong faith (see Pet. 7-8) falls squarely within that historical tradition. As we have explained, see Section I above, the practice of gathering for outdoor worship has been part of human culture since time immemorial, has continued through each stage of American history, and continues today.

Ignoring this tradition, the Second Circuit grafted additional limitations onto the face of the statute. Under the Second Circuit's rule, only places "primarily" used for worship are protected by FACE Act, and a place satisfies that "primary purpose" requirement only when a religious "collective" or "leader" deems it so. Pet.App.27a-29a. But these novel criteria would have disqualified the vast majority of historical instances of outdoor worship. Indeed, for entire generations of persecuted minority groups—the Lollards, the Quakers, the Virginia Baptists, the American slaves—the *very reason* they worshipped outdoors is that the religious "leader[s]" and "collective[s]" of their day expressly prohibited their religious practice. And most historical examples of outdoor worship have taken place in multipurpose outdoor locations like fields, parks, and streets.

To be sure, the Second Circuit suggested in dicta that there might be a fact pattern where one form of outdoor worship—Native American religious ceremonies at sacred sites—might qualify for FACE Act protection during a "given" (but unspecified) "period of time." Pet.App.29a-30a. But the rule the Second Circuit announced in fact disfavors spontaneous or non-hierarchically determined outdoor religious observances, withdrawing the protections of the FACE Act. It also wrongly treats some religious worship practices worse than other forms of worship.

A prime example would be sukkot, which are generally placed where a family chooses to place them, not where a religious authority designates them to be placed. Because this appeal also involves booths, sukkot will be at special risk if the Second Circuit's rule is left in place.

Many other religious worship practices would also be put in peril. Protestant worship services in a park, Catholic religious processions, Muslim Eid celebrations, Hindu festivals like Holi—all could well be withdrawn from the protections of the FACE Act.

* * *

Worship does not take place only behind closed doors. And sometimes it is spontaneous. The Second Circuit's atextual and ahistorical rule runs directly counter to these realities and should not stand.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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