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 Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF FIRST LIBERTY INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

First Liberty Institute ("First Liberty") is a nonprofit, public interest law firm dedicated exclusively to defending religious liberty for all Americans. Through pro bono legal representation of both individuals and institutions, First Liberty's clients include people of diverse religious beliefs, including individuals and institutions of the Catholic, Protestant, Islamic, Jewish, Falun Gong, and Native American faiths.

Because First Liberty frequently represents persons and groups with religious beliefs that are outside of the mainstream, we are aware of the damage that can be caused when a court imposes its presumptions about religion onto situations in which the religious minority does not hold the same religious views as those on the court. Indeed, we have seen an increase in situations in which courts have ignored nuances in religious adherents' positions, leading to unjust outcomes. First Liberty recently represented a church involved in such a case: *Trustees of the New Life in Christ Church v. City of Fredericksburg*, 142 S. Ct. 678 (2022) (mem. op.) (order denying cert.). That case involved an analogous issue to the one presented here: a court told the New Life in Christ Church that its ministers were not ministers, much as the Second Circuit in this matter

[1] All parties were timely notified of and consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

told members of the Falun Gong that their religious worship was not religious worship.

As an amicus, First Liberty maintains an interest in ensuring that all Americans of faith—even those of minority religions—are protected and able to practice their faith without the government imposing a religious framework upon them.

SUMMARY OF ARGUMENT

The Second Circuit interpreted the FACE Act's phrase "place of worship" to require that such a place have the "primary purpose" of worship, violating the principles of the ecclesiastical abstention and church autonomy doctrines. While the Second Circuit acknowledges that its "primary purpose" test is not required by the FACE Act's language, the Second Circuit nevertheless turned to one brief bit of legislative history to support such a requirement, ignoring the essential canons of constitutional avoidance and constitutional doubt, which require courts to avoid statutory interpretations that raise significant constitutional questions and to give statutes constitutional interpretations over unconstitutional interpretations if possible.

The Second Circuit's "primary purpose" test effectively requires (1) defining necessary characteristics of worship (to contrast them with non-worship activities), (2) requiring a religious authority to designate the place of worship, or (3) requiring worship to occur in a certain kind of structure. All such criteria rest on theological assumptions about the nature of worship or religious authority, which a court

does not have constitutional authority to determine. When applied as the Second Circuit did, such a test is woefully underinclusive in effect, stripping even some major churches of the FACE Act's protection.

Consistent with religious liberty principles, a constitutional interpretation must look to the intent of the religious adherent to determine which places are "places of worship." The FACE Act's motive requirement as to the defendant limits the act's practical scope, which also comports with how courts interpret the FACE Act in abortion clinic cases.

ARGUMENT

I. Reading a "Primary Purpose" Test into the FACE Act's Definition of "Place of Worship" Renders It Unconstitutional and Should Be Avoided.

"It is an elementary principle of statutory interpretation that an ambiguous statute must be interpreted, whenever possible, to avoid unconstitutionality." *United States v. Davis*, 139 S. Ct. 2319, 2350 (2019) (Kavanaugh, J., dissenting). In reading a "primary purpose" test into the FACE Act's definition of "place of worship," the Second Circuit abandoned that elementary principle and imposed its religious presumptions on the Falun Gong members to impermissibly deny them the protections of the FACE Act.

The Second Circuit's opinion acknowledges that its interpretation of the FACE Act's "place of worship" term is not the only possible interpretation of the

statute.[2] *Zhang v. Chinese Anti-Cult World All., Inc.*, 16 F.4th 47, 58 (2d Cir. 2021) ("A 'place of religious worship,' as used in the statute, could reasonably be interpreted to refer to a place primarily dedicated to religious worship. . . . [T]his is not the only possible construction of the statute . . . ."). But in its rush to consult selected legislative history to interpret the FACE Act, the Second Circuit overlooked the fundamental canons of constitutional avoidance and constitutional doubt. Because the Second Circuit selected an interpretation of the FACE Act that violates the principles of the church autonomy and ecclesiastical abstention doctrines, these elementary canons of statutory construction make the Second Circuit's opinion suitable for summary reversal.

The constitutional avoidance canon "disfavors interpretations that . . . would render a statute to be unconstitutional." Antonin Scalia & Bryan A. Garner, *Reading Law* 66, 247 (2012). Therefore, "when a statute is reasonably susceptible of two interpretations, by one of which it is unconstitutional and by the other valid, the court prefers the meaning that preserves to the meaning that destroys." *Pan. Refin. Co. v. Ryan*, 293 U.S. 388, 439 (1935) (Cardozo, J., dissenting); *see Davis,* 139 S. Ct. at 2350 (Kavanaugh, J., dissenting) ("This Court's duty is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations. . . . In discharging that duty, every reasonable construction must be resorted to, in order to

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[2] Whether or not the statute itself is in fact ambiguous, the Second Circuit's reasoning collapses on its own terms.

save a statute from unconstitutionality." (quoting *Civ. Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 571 (1973); *Hooper v. California*, 155 U.S. 648, 657 (1895) (internal quotation marks omitted))).

The similar constitutional doubt canon goes further and counsels avoiding the constitutional questions altogether: "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter." *United States ex rel. Att'y Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909); *see* Scalia & Garner 247. Both canons operate to prefer constitutionally valid constructions over interpretations that undermine a statute's validity. *See* Scalia & Garner 247.

A. The Second Circuit's "primary purpose" test violates the principles of the church autonomy and ecclesiastical abstention doctrines.

The Second Circuit's "primary purpose" test runs afoul of these canons, because it violates the principles of the church autonomy and ecclesiastical abstention doctrines. The church autonomy doctrine protects the ability of religious congregations to determine for themselves what they believe. The First Amendment "forbids civil courts" from determining "the interpretation of particular church doctrines and the importance of those doctrines to the religion." *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Church*, 393 U.S. 440, 450 (1969). Courts may not resolve disputes "on the basis of religious

doctrine and practice," and they may not consider "doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith." *Jones v. Wolf*, 443 U.S. 595, 602 (1979); *see Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976) (assuming that "civil determination of religious doctrine" would inherently "violate the First Amendment"); *see also Watson v. Jones*, 80 U.S. 679, 733–34 (1871).

Although church autonomy questions often arise in the context of church property disputes, *see, e.g.*, *Watson*, 80 U.S. 679, church governance disputes, *see, e.g.*, *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94 (1952), or employment disputes, *see, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012), the basic First Amendment principle that civil courts may not adjudicate theology applies in this case. The Second Circuit's "primary purpose" test requires courts to make theological determinations, particularly distinguishing between worship and non-worship activities. The decision below defines "place of worship" as "a space devoted primarily to religious worship activity—that is, anywhere that religious adherents collectively recognize or religious leadership designates as a place primarily to gather for or to hold religious worship activities." *Zhang*, 16 F.4th at 57. In practice, the Second Circuit parsed the activities that the Petitioners conducted at the booths and determined that *it* believed the Petitioners' activities were primarily political, not primarily religious. *Id.* at 61–62. But distinctions between a religious organization's religious and secular activities are difficult to draw, and such granular inquiry inevitably

requires the court to make theological determinations. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 343–44 (1987) (Brennan, J., concurring) ("What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident. As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis. . . . While a church may regard the conduct of certain functions as integral to its mission, a court may disagree.").[3] External observers may perceive distinctions between religious, political, and commercial conduct that are artificial for the person actually engaging in religious practice. Indeed, as the Second Circuit itself noted, at least one of the Petitioners testified that he considered the conduct to be religious that the Second Circuit dismissed as merely political. *See Zhang,* 16 F.4th at 51–52 ("Plaintiffs' witness Yu Yuebin, the director of the Spiritual Center, testified . . . ['I]t's a kind of religion for us to practice—to reveal the lies that Chinese [C]ommunist party wrongfully blame Falun Gong['] . . . . Yu further explained that practitioners who staffed the tables engaged in 'prayer and promoting the Fa [meaning "law" of Falun Gong]' there."). In effect, what the Second Circuit deemed political, the Falun Gong considered to be "infused with a religious purpose." *Corp. of Presiding Bishop*, 483

[3] Although Justice Brennan discussed his concern with religious-secular distinctions under the excessive entanglement prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the problem is better characterized as a church autonomy problem given *Lemon*'s dubious status.

U.S. at 344. This is why any court-determined, objective standard of worship is constitutionally infirm, whether a court is looking for primary purpose or not.

But the "primary purpose" test makes the problem acute. It asks courts to parse out various activities, define their religious or secular nature, and weigh them against each other to determine which is primary. All these questions require theological determinations about the nature of worship, which a court does not have constitutional authority to make. And although the decision below pays lip service to looking for religious adherents to define their religious worship for the court, *see Zhang*, 16 F.4th at 59–60, the only way the Second Circuit avoids creating a dispute of material fact in this case is by making that determination itself, *see id.* at 61–62, and "substitut[ing] its own inquiry" for the Petitioners' beliefs, *Milivojevich*, 426 U.S. at 708.

The Second Circuit's attempts to define the contours of its "primary purpose" test only highlight the constitutional problems. First, the requirement that a religious body, authority, or tradition define the place as primarily for worship, *see Zhang*, 16 F.4th at 57 n.8, gives defendants an easy loophole to divest courts of jurisdiction over FACE Act claims: All a defendant has to do is challenge the validity of the religious authority the plaintiff identifies. Then, the case becomes a church leadership dispute, and the court loses jurisdiction under the ecclesiastical abstention doctrine. *See Watson*, 80 U.S. at 733 ("But it is a very different thing where a subject-matter of dispute, strictly and purely ecclesiastical in its character,—a matter over which the civil courts exercise no jurisdiction,—a matter which

concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them,—becomes the subject of its action."). In any event, courts have no business requiring any religious adherent to submit to any particular religious authority. *See Holt v. Hobbs,* 574 U.S. 352, 362 (2015) ("[T]he District Court went astray when it relied on petitioner's testimony that not all Muslims believe that men must grow beards. . . . [E]ven if [Petitioner's belief] were [idiosyncratic], the protections of RLUIPA, no less than the guarantee of the Free Exercise Clause, is 'not limited to beliefs which are shared by all of the members of a religious sect.'" (quoting *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 715–16 (1981))); *Lee v. Weisman*, 505 U.S. 577, 592 (1992) ("A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed."); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

Second, the "primary purpose" test would rule out obvious places of worship such as churches that meet in schools, *see, e.g.*, *Bronx Household of Faith v. Bd. of Educ. of New York Cmty. Sch. Dist. No. 10*, 855 F. Supp. 2d 44, 54 (S.D.N.Y. 2012). To avoid this problem, the Second Circuit carves out an illusory temporal consideration, in which the place of worship is

determined based on primary use at the time, not overall. *See Zhang*, 16 F.4th at 59. But the Second Circuit evidently does not mean it, because when it applied its "primary purpose" test to the Petitioners, all mention of time vanishes. Even though it acknowledges that Petitioners conducted at least some worship at the booths, *see id.* at 60–61, the Second Circuit did not consider whether they were conducting worship at the time they were attacked, *see id.* Instead, the court determined that, in its opinion, the booths *overall* were primarily used for political purposes rather than worship. *Id.* at 61–62.

Ultimately, it is not within a court's authority to adjudicate whether worship is the primary purpose. And the "primary purpose" test cannot be consistently administered—every court's opinion will differ, often unpredictably. The test becomes an "I-know-it-when-I-see-it" standard inconsistent with the rule of law and the promises of the First Amendment.

B. The Second Circuit's "primary purpose" test is underinclusive, resulting in absurd outcomes in particular situations.

The underinclusiveness of the Second Circuit's "primary purpose" test highlights its unpredictability. For example, consider a site in which hundreds of thousands of tourists each year pay to see the site's architecture, which includes representations of modern

warfare,[4] or its artifacts like statues of Darth Vader[5] and Abraham Lincoln[6], or a moon rock brought back by the astronauts of Apollo 11.[7] A small fraction of that number, however, visit the site for religious worship.[8] By any objective standard, the overall primary purpose of that site is best described as a museum, not a place of worship. But that place is the Cathedral Church of Saint Peter and Saint Paul—better known as the National Cathedral. Under the Second Circuit's "primary purpose" test, the FACE Act would not apply to an anti-Christian protestor blocking congregants from attending worship services in the sixth largest cathedral in the world. Even if the Second Circuit actually applied its time-based analysis, a worshipper attending a smaller weekday religious gathering while the National Cathedral is also open for tourists would

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[4] *See* Graham Meyer, *Mysteries of the Washington National Cathedral*, *Washingtonian*, https://www.washingtonian.com/2007/09/01/mysteries-of-the-washington-national-cathedral/ (Sept. 1, 2007) (describing mushroom cloud carving).

[5] *See* Washington National Cathedral, "Darth Vader 'Gargoyle,'" https://cathedral.org/what-to-see/exterior/vader-2/ (accessed May 31, 2022).

[6] *See* Washington National Cathedral, "Lincoln Bay," https://cathedral.org/what-to-see/interior/lincoln-bay/ (accessed May 31, 2022).

[7] *See* Washington National Cathedral, "The Space Window," https://cathedral.org/cathedral-age/the-space-window/ (accessed May 31, 2022).

[8] Washington National Cathedral, "Fiscal Year 2020 Annual Report," https://cathedralorg.wpengine.com/wp-content/uploads/2020/12/FY2020-AR-with-cover-web.pdf (accessed May 31, 2022) (noting that the National Cathedral can seat 3,000 persons).

be excluded from the FACE Act's protection. Effectively, the Second Circuit's reading of the FACE Act means that churches cannot be too attractive or welcoming to those outside the church lest they lose protection for their congregants.

The Second Circuit's "primary purpose" test not only excludes some large and well-respected churches from its definition of a "place of worship," it also impermissibly excludes many places of worship that are not traditional religious sites. Although the Second Circuit presumed homes are not places of worship under its "primary purpose" test, *Zhang*, 16 F.4th at 59 (describing "one's home" as not having the primary purpose of religious worship), a home may often serve as a "place of religious worship" for small congregations, such as Jewish shuls[9] or Christian "house churches,"[10] and the Second Circuit's purported

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[9] *See, e.g.*, Eric Nicholson, *After Years of Wandering, a Dallas Synagogue Finds a Home—and a Chilly Welcome*, Dallas Observer (Apr. 30, 2015), https://www.dallasobserver.com/news/after-years-of-wandering-a-dallas-synagogue-finds-a-home-and-a-chilly-welcome-7182328?showFullText=true.

[10] *See* Michael Alison Chandler and Arianne Aryanpur, *Going to Church by Staying at Home*, Washington Post (June 4, 2006), https://www.washingtonpost.com/wp-dyn/content/article/2006/06/03/AR2006060300225.html ("A growing number of Christians across Washington and around the country are moving to home churches—both as a way to create personal connections in the age of the megachurch and as a return to the blueprint of the Christian church spelled out in the New Testament, which describes Jesus and the apostles teaching small groups in people's homes."); Laurie Goodstein, *Search for the Right Church Ends at Home*, New York Times (Apr. 29, 2001), https://www.nytimes.com/2001/04/29/us/search-for-the-right-church-ends-at-home.html; Rita Healy and David Van Biema, *There's No Pulpit Like Home*, Time Magazine (Mar. 6,

consideration of the place's primary purpose *at particular points in time,* if consistently applied, should protect those and other homes when they are used in a particular moment for worship.

That temporal consideration itself, however, results in absurd outcomes for many nontraditional places of worship, which is likely why the Second Circuit did not actually apply its temporal consideration in this case.[11] For example, given the recent COVID-19 pandemic, which forced millions of congregants to worship from their homes with services live-streamed over the internet, the FACE Act, under the Second Circuit's stated test, would extend the FACE Act's protections to homes when the majority of the family members are participating in the worship but not when a minority of the family are religious adherents. For example, a person who lives alone in an apartment and dedicates the living room to religious worship every Sunday morning would clearly be in a place that, for that given period of time, is primarily used for worship. And the FACE Act may very well protect that person if an anti-religious neighbor, upset at hearing the person's Sunday-morning singing each week, began cutting power to the person's apartment during the live-

2006), https://web.archive.org/web/20060615011625/http://www.time.com/time/archive/preview/0,10987,1167737,00.html.

[11] *See supra* I.A. Also, the Second Circuit's assumption that homes are never places of worship, *Zhang*, 16 F.4th at 59, suggests the temporal consideration is generally illusory and not merely illusory in this case. Perhaps the temporal consideration is "less of a headache if you just ignore it." *Star Trek: Voyager: Endgame* at 44:53–44:59 (UPN television broadcast May 23, 2001) (concerning the temporal prime directive).

streamed service. If, however, the live-streaming congregant were joined by an unbelieving spouse, the protection of the FACE Act may disappear under the Second Circuit's test. The "primary purpose" test is, however, ambiguous as to what would happen if the power were cut while the unbelieving spouse stepped away to make a sandwich. That such considerations could even be contemplated, however, demonstrates the problems inherent in the Second Circuit's "primary purpose" test, even with its nominal recognition that a place can have different primary purposes at different times.

The "primary purpose" test also fails when traditional religious gatherings occur in non-traditional locations, such as a group gathering regularly for religious worship in a pub.[12] As with the National Cathedral, the Second Circuit's "primary purpose" test strips protections from anyone who worships in too popular of a location such that there are more non-worshippers than there are worshippers in the place.

Whether religious believers create intriguing churches that draw unbelieving tourists, cope with the limitations imposed by a pandemic, or simply desire to meet in a comfortable environment, Americans regularly worship in places that cannot be described as having the "primary purpose" of worship. But just because these Americans do not fit within the mold of religion envisioned by the judges of the Second Circuit does not mean that their worship should be—or

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[12] *See, e.g.*, PBS, *Churches in Pubs*, *Religion and Ethics Newsweekly,* https://www.pbs.org/wnet/religionandethics/2015/02/20/february-20-2015-churches-pubs/25265/ (Feb. 20, 2015).

constitutionally can be—denied the protections that the FACE Act grants to the Presbyterian or the Baptist worshipping in a traditional church or the Jewish person worshipping in a traditional synagogue.

II. Looking to the Intent of Both the Plaintiffs and the Defendants in a FACE Act Claim Constitutionally Resolves the Scope of the FACE Act in a Manner that Comports with Both Religious Liberty Principles and How Courts Interpret the FACE Act with Regard to Abortion Clinics.

In the same way that courts may not dispute the truth of religious beliefs, they also may not define worship to take particular forms, to occur at particular kinds of locations, or to occur only at the direction of a religious authority. As in other cases involving religious liberty principles, a court can ask what religious beliefs an adherent sincerely holds. In this situation, that means asking whether the Petitioners *intended* to use the place for worship, whatever that worship looks like and whatever the place and its primary use may be. The FACE Act's motive or intent requirement with respect to the *defendant* in a FACE Act claim provides the limiting principle, requiring the defendant to have intended to interfere with the plaintiff's religious worship. This prevents an unreasonable plaintiff from attempting to apply the FACE Act too broadly. It is also consistent with how the FACE Act has been applied in the abortion clinic context.

A. Consistent with religious liberty principles, constitutionally defining "place of worship" under the FACE Act must look to the plaintiff's intent to use the place in question for worship.

Resolving legal questions involving religious beliefs requires looking to the adherents to articulate their beliefs and practices, not to the court to define them. *See, e.g.*, *Holt,* 574 U.S. at 362 ("[T]he District Court went astray when it relied on petitioner's testimony that not all Muslims believe that men must grow beards. . . . [E]ven if [Petitioner's belief] were [idiosyncratic], the protections of RLUIPA, no less than the guarantee of the Free Exercise Clause, is 'not limited to beliefs which are shared by all of the members of a religious sect.'" (quoting *Thomas*, 450 U.S. at 715–16)); *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 724 (2014) ("HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step."); *Thomas*, 450 U.S. at 715 ("[T]he judicial process is singularly ill equipped to resolve such differences [among different adherents] in relation to the Religion Clauses."); *see also Watson*, 80 U.S. at 731 ("[T]he civil tribunal tries the civil right, and no more, taking the ecclesiastical decisions out of which the civil right arises as it finds them."); *Milivojevich*, 426 U.S. at 711–12 ("In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive.").

Here, however, the Second Circuit intruded into ecclesiastical matters in two ways: first, by declaring that the booths were not "places of worship" even though at least one Falun Gong religious leader testified that they were[13]; and, second, by determining that the Falun Gong members' distribution of literature was not an act of worship but of political protest, again despite testimony that at least some of the Petitioners considered their distribution of literature to be a religious act.[14] As Justice Gorsuch recently noted when Fredericksburg, Virginia, told a Presbyterian church that it was not correctly interpreting the Presbyterian Book of Church Order as to who qualified as a minister, "In this country, we would not subscribe to the 'arrogant pretension' that secular officials may serve as 'competent Judge[s] of Religious truth.' Instead, religious persons would enjoy the right 'to decide for themselves, free from state interference, matters of . . . faith and doctrine.'" *Trs. of New Life in Christ Church,* 142 S. Ct. at 679 (Gorsuch, J., dissenting from denial of cert.) (quoting Memorial and Remonstrance Against Religious Assessments, in Selected Writings of James Madison 21, 24 (R. Ketcham ed. 2006); *Kedroff*, 344 U.S. at 116). Unfortunately, the Second Circuit is engaging in the

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[13] *Zhang v. Chinese Anti-Cult World All., Inc.,* 311 F. Supp. 3d 514, 564 (E.D.N.Y. 2018) (quoting Petitioners' testimony).

[14] *Zhang*, 16 F.4th at 51–52 (describing plaintiff's testimony that "the tables are 'like an extension' of the Spiritual Center 'to help to preach and tell the truth, to spread good works to people'"). That plaintiff also described distributing organ harvesting literature as raising awareness about a sin. *Id.* at 52.

very same conduct that Fredericksburg, Virginia, did there.[15]

Accordingly, interpreting the FACE Act's "place of worship" term requires a court to ask the plaintiff whether he or she intended to use the place at issue for worship. This framework is consistent with how courts resolve other legal claims concerning religious beliefs—by asking whether the plaintiff is sincere in his beliefs, not whether his beliefs are objectively true. To the extent a limiting principle is warranted, it comes from the FACE Act's motive and conduct elements with respect to the defendant.

B. The FACE Act's motive element as to defendants provides a limiting principle to prevent an unreasonable plaintiff from attempting to apply the FACE Act too broadly.

While the Second Circuit seems to have been motivated to create its "primary purpose" test to limit the FACE Act's scope, artificially limiting "place of worship" based on extra-textual and unconstitutional primary-use determinations is not the appropriate method. Instead, the FACE Act's motive element naturally limits the statute's scope. A FACE Act

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[15] Unfortunately, judges' imposing their own concept of proper religion upon religious adherents is not unique to these cases. *See, e.g.*, *Kennedy v. Bremerton Sch. Dist.,* 4 F.4th 910, 926 (9th Cir. 2021) (Smith, J., concurring in denial of rehearing *en banc*) ("I personally find it more than a little ironic that Kennedy's 'everybody watch me pray' staged public prayers (that spawned this multi-year litigation) so clearly flout the instructions found in the Sermon on the Mount on the appropriate way to pray.").

violation requires the plaintiff to "demonstrate that Defendants used or attempted to use (1) force, threat of force, or physical obstruction; (2) with the intent to; (3) injure, intimidate, or interfere with a person; (4) because that person is exercising or is seeking to exercise his or her right of religious freedom at a place of worship." *New Beginnings Ministries v. George*, No. 2:15-CV-2781, 2018 WL 11378829, at *3 (S.D. Ohio Sept. 28, 2018) (citing *Lotierzo v. A Woman's World Med. Ctr.*, 278 F.3d 1180, 1182 (11th Cir. 2002)). Courts already define the motive element's contours in the abortion clinic context, and it operates to ensure that a defendant cannot unintentionally or unknowingly commit a FACE Act violation. The FACE Act targets specific conduct[16] committed for specific reasons to "ensur[e] that FACE does not federalize a slew of random crimes that might occur in the vicinity" of an abortion clinic or place of worship. *United States v. Dinwiddie*, 76 F.3d 913, 923 (8th Cir. 1996). While most cases interpreting the FACE Act's motive requirement occur in the abortion clinic context, that motive requirement is the same for both the abortion clinic and the place of worship provisions. *New Beginnings Ministries*, 2018 WL 11378829, at *3; *compare* 18 U.S.C. § 248(a)(1) *with id.* § 248(a)(2). In this sense, it is similar to laws like Title VII, which

[16] The FACE Act survived many void-for-vagueness challenges to the conduct that it encompasses, and multiple courts held that the terms "force," "threat of force," "physical obstruction," "injure," "intimidate," or "interfere with," are specific and clear as to what conduct the FACE Act punishes. *See Dinwiddie*, 76 F.3d at 924; *United States v. White*, 893 F. Supp. 1423, 1437 (C.D. Cal. June 23, 1995) (collecting cases).

prohibit certain employment actions based on their discriminatory motive. *Dinwiddie*, 76 F.3d at 923.

In this present case, the district court correctly sought to follow this approach by defining "place of worship" broadly and then submitting to the jury the question of whether the Respondents took their actions in opposition to the Petitioners' religious beliefs. *Zhang v. Chinese Anti-Cult World All., Inc.*, 311 F. Supp. 3d 514, 564 (E.D.N.Y. 2018) ("Disputed factual issues remain about who was responsible for any attacks and whether the defendants' conduct was intended to interfere with religious practice or a respectful political dispute. This claim under 18 U.S.C. § 248 will proceed to trial.").

* * *

Ultimately, the Second Circuit's opinion effectively concedes that a strict primary purpose requirement is unconstitutional, and the court reads in temporal and word-of-authority work-arounds that focus more on the intent of the worshippers than on determining the primary use of the location. It is a disputed question in the record, however, whether the Petitioners intended to use the booths for worship, and the Second Circuit seemed intent upon granting summary judgment to the Respondents. To resolve this issue, the Second Circuit then applied its "primary purpose" test without the still-problematic work-arounds that it articulated. Letting this decision stand will create "I-know-it-when-I-see-it" adjudications that give no predictable protection to religious worshippers, result in absurd outcomes, and present no good way of handling the analytical problem down the road.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the Second Circuit's decision granting summary judgment to Respondents be summarily reversed.

Respectfully submitted,

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