

No. 21-1429

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IN THE  
**Supreme Court of the United States**

ZHANG JINGRONG, ET AL.,

*Petitioners,*

v.

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

*Respondents.*

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**On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Second Circuit**

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**BRIEF OF PROFESSOR JOHN D. INAZU  
AS *AMICUS CURIAE* IN SUPPORT OF  
PETITIONERS**

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## INTEREST OF THE *AMICUS CURIAE*<sup>1</sup>

Professor John D. Inazu is the Sally D. Danforth Distinguished Professor of Law and Religion at Washington University in St. Louis.<sup>2</sup> He is widely considered one of the nation's leading authorities on the First Amendment's Assembly Clause. In his ten years as a law professor, he has published two books on the subject: *Liberty's Refuge: The Forgotten Freedom of Assembly* (Yale University Press, 2012) and *Confident Pluralism: Surviving and Thriving Through Deep Difference* (University of Chicago Press, 2016). He has also authored twelve articles that analyze the Assembly Clause and related rights.<sup>3</sup>

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<sup>1</sup> All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amicus curiae* or their counsel made a monetary contribution intended to fund the preparation of this brief. This brief was prepared in part by a clinic operated by Yale Law School but does not purport to represent the School's institutional views, if any.

<sup>2</sup> Professor Inazu submits this brief in his individual capacity, not as a representative of Washington University.

<sup>3</sup> John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 *Tenn. L. Rev.* 485 (2010); John D. Inazu, *The Forgotten Freedom of Assembly*, 84 *Tul. L. Rev.* 565 (2010); John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 *Conn. L. Rev.* 149 (2010); John D. Inazu, *Factions for the Rest of Us*, 89 *Wash. U. L. Rev.* 1435 (2012); John D. Inazu, *Virtual Assembly*, 98 *Cornell L. Rev.* 1093 (2013); John D. Inazu, *The Freedom of the Church (New Revised Standard Version)*, 21 *J. Contemp. Legal Issues* 335 (2013) [hereinafter Inazu, *Freedom of the Church*]; John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 *N.C. L. Rev.* 787 (2014) [hereinafter

Professor Inazu has lectured on the Assembly Clause at Yale Law School, Harvard Law School, Stanford Law School, Duke Law School, the University of Virginia, the Newseum, the United States Department of State, and the United States Commission on Civil Rights, and he has written about the Assembly Clause for *The Atlantic*, *The Washington Post*, and *USA Today*.

This case presents an important opportunity to recognize the role that the Assembly Clause, and the doctrinal underpinnings of assembly rights, have historically played, and should continue to play, in protecting and defining the rights of religious groups. Accordingly, Professor Inazu urges the Court to consider the Assembly Clause dimensions of this case.

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Inazu, *Four Freedoms*]; John D. Inazu, *More Is More: Strengthening Free Exercise, Speech, and Association*, 99 *Minn. L. Rev.* 485 (2014); John D. Inazu, *The First Amendment's Public Forum*, 56 *Wm. & Mary L. Rev.* 1159 (2015); John D. Inazu, *A Confident Pluralism*, 88 *S. Cal. L. Rev.* 587 (2015); Marion Crain & John Inazu, *Re-Assembling Labor*, 2015 *U. Ill. L. Rev.* 1791 (with Marion Crain); John Inazu, *Unlawful Assembly as Social Control*, 64 *UCLA L. Rev.* 2 (2017).

## INTRODUCTION AND SUMMARY OF ARGUMENT

Throughout American history, the freedom to assemble—the right of individuals to form and participate in peaceable noncommercial groups—has been crucial to protecting religious pluralism, creating space for dissent from majoritarian views, and ensuring a robust civil society. Without the ability to freely, publicly, and safely gather, the remaining First Amendment freedoms would ring hollow. See generally John D. Inazu, *Confident Pluralism: Surviving and Thriving Through Deep Difference* 30-36 (2016).

When considering the Freedom of Access to Clinic Entrances Act (FACEA), Congress considered extensive testimony from religious communities facing threats to this most basic freedom. Members of Congress described how “[t]he right of Americans of various religions to attend their places of worship in peace [was] under attack throughout the country” because of “an interstate campaign of harassment, physical assaults, and vandalism.” See, e.g., 139 Cong. Rec. 29,361 (1993) (statement of Sen. Orrin Hatch). Members of Congress also repeatedly expressed concerns that “members of the congregation ... exercising their First Amendment right of free speech” continue to face threats and even violence for speaking out on social and political issues. 140 Cong. Rec. 5408 (1994) (statement of Rep. Barbara Vucanovich); see also, e.g., 140 Cong. Rec. 10,295 (1994) (statement of Rep. Duke Cunningham). In response, Congress included in FACEA protection for persons “lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship.” 18 U.S.C. § 248(a)(2). The protection for religious freedom encompasses not only the free exercise of religion but also

related First Amendment freedoms of speech and assembly.

Today, this protection remains crucial as religious communities continue to confront violent attacks, threats, and intimidation when they gather. *E.g.*, Niala Boodhoo & Russell Contreras, *Attacks Rise on Houses of Worship*, Axios (Oct. 26, 2021), <https://perma.cc/8YVR-UARR> (documenting attacks).

This case asks the Court to consider what qualifies as a “place of religious worship” in FACEA, a phrase the statute does not specifically define but clearly gives an expansive scope. Even if this Court concludes that the plain text is not dispositive, additional tools of statutory interpretation confirm it must be read broadly. *First*, our nation’s history reinforces the undisputed importance of religious assembly to the formation of religious communities and to religious worship. *Second*, the legislative history makes clear Congress’s concern for threats to religious assemblies. And *third*, the challenge of translating a theologically complex concept like “worship” into a workable statutory definition—while avoiding religious entanglement, see Pet. 22-27—requires a religiously neutral test.

By looking to the *places where individuals gather as a religious community*, courts will be able to make sense of the statute’s text and legislative history without having to translate and define the outer bounds of inherently theological concepts like “worship.”

So understood, FACEA extends to the five booths on the sidewalks of Flushing, as they are undoubtedly a place where Petitioners gather as a religious community to pray and proselytize. See Pet. 7-9; Pet. App. 147a (finding that “Plaintiffs and others proselytize and meditate” at the booths).

The Second Circuit saw things differently, manufacturing two (atextual) hurdles to invoking FACEA's protections. The court required places of religious worship to be (1) recognized by church leadership or by "religious adherents collectively" as (2) places used "primarily" for religious worship. Pet. App. 28a-29a. This approach dramatically narrows FACEA's protections. It excludes many mixed-use spaces, disfavors idiosyncratic forms of worship, and denies FACEA protections to "a religion [which] may disavow the concept of designating any particular locations for worship." *Id.* at 29a. And it requires courts to accept threshold determinations by religious leaders or "collectives" of FACEA's scope and coverage, which should apply to religious believers engaged in religious worship irrespective of these hierarchical determinations. This Court should reject the Second Circuit's deeply problematic reading of FACEA and affirm that "places of religious worship" cannot be so narrowly circumscribed.

## ARGUMENT

FACEA both constrains and safeguards exercises of assembly. It constrains assemblies traditionally regulated or limited by the state—assemblies that aim at intimidating or harming others—by attaching civil and criminal penalties to violence and threats of violence at places of religious worship. 18 U.S.C. § 248(b)-(c). But it does so in the service of protecting peaceful assembly, helping to ensure that individuals can freely, safely, and publicly gather as religious communities. Cf. John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* 3 (2012) (describing "prayer or meditation group[s]" as quintessential examples of gatherings that require distinct assembly protection).

Though the constitutional right of assembly has all but been read out of the Constitution, see *id.* at 61-62, the need for, and the intuition behind, this important constitutional principle remains. The pure act of gathering—even without any outwardly expressive elements—can have significant social and personal value. See *id.* at 2 (“The rituals and liturgy of religious worship often embody deeper meaning than an outside observer would ascribe to them.”). And for many religious believers, these restrictions are requirements, not just suggestions. Cf. John Inazu, *Close the Churches*, *The Atlantic* (Mar. 18, 2020), <https://perma.cc/W89A-6DPV> (documenting religious practices that require or encourage in-person gatherings).

A meaningful right of assembly not only limits unjustified government interference, *e.g.*, *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937), but also requires private actors to allow its peaceable exercise. FACEA reinforces this latter protection. FACEA’s legislative history confirms that Congress sought to secure the right to assemble free from violence and threats by private actors.

### **I. Protecting Religious Assemblies Is Necessary for Religious Communities to Worship.**

The ability of individuals to gather is a necessary precursor to forming a defined religious community and engaging in shared worship practices. The importance of free assembly was not lost on our Founders (who rejected a bid to remove this right from the Constitution “by a ‘considerable majority,’” Inazu, *Liberty’s Refuge*, *supra*, at 25). But assembly must also be protected from private actors seeking to “eradicate” religious communities, and who use threats and violence to disrupt religious gatherings with this goal in mind.

Petitioners' religious practices are especially susceptible to such attacks both because their religious exercise includes proselytizing on public sidewalks and because their religiously motivated social and political views generate strong opposition from groups and individuals, including Respondents. See Pet. 29 (noting the "particular risk to religions for whom a history of subjugation or persecution may provide reason for their worship to include a political dimension"). Petitioners allege they suffered violence while gathered as a religious community to pray and proselytize. This is exactly what Congress was concerned about when it enacted FACEA.

**A. Religious assembly is the seedbed of religious worship.**

The ability of individuals to gather freely and peaceably is a necessary first step to the flourishing of religious, social, and political communities. Civic organizations do not spring into being fully formed. Instead, organic assemblies—often without a set purpose or goal—serve as important precursors to the organizations and associations which eventually exercise the freedoms of speech, worship, or expressive association. See Inazu, *Four Freedoms, supra*, at 798 ("Most assemblies flow out of groups of people who gather to eat and talk and share and pray long before they make political speeches or enact agendas.").

As Professor Michael McConnell has observed, "the freedom of assembly is preparatory to the freedom of speech. The freedom of speech presumably suffices to protect what is said at an assembly. Freedom of assembly or association is necessary to protect the seedbed of free speech: the group that plans and guides the speech." Michael W. McConnell, *Freedom by Association*, *First Things*, Aug./Sept. 2012, at 39, 41. For a religious community, this "seedbed" may often take the

form of small, informal gatherings. *E.g.*, *Acts* 2:42 (“They devoted themselves to the teaching of the apostles and to the communal life, to the breaking of the bread and to the prayers.”); Inazu, *Confident Pluralism*, *supra*, at 39-41 (describing prayer gatherings of Muslim Student Associations).

Religious, social, and political communities often assemble in public spaces. Cf. McConnell, *supra*, at 40 (“[F]reedom of assembly by its nature involves public spaces ....”); Inazu, *Confident Pluralism*, *supra*, at 108–11 (describing impact of protests and boycotts, including the Claiborne County Boycott). When the Boston Female Anti-Slavery Society gathered in 1835, for example, antiabolitionists—recognizing that this public gathering might undermine their own cause—fomented a riotous crowd to disrupt the public assembly. Inazu, *Liberty’s Refuge*, *supra*, at 34. And, throughout much of our country’s history, Black Americans faced frequent restrictions on their efforts to gather in public. *Id.* at 32-33 (restrictions on assembly “suppress[ed] worship”). As Akhil Amar notes, the right of assembly for religious worship was “a core right that southern states had violated.” Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 245 (1998).

Years later, Martin Luther King, Jr. saw immense value in public assembly, recognizing that the ability to freely gather was foundational to the Civil Rights Movement. As Dr. King explained on the eve of his assassination, “[i]f I lived in China or even Russia, or any totalitarian country, ... maybe I could understand the denial of certain basic First Amendment privileges, because they hadn’t committed themselves to that over there. But somewhere I read of the freedom of assembly.” Martin Luther King, Jr., *I’ve Been to the Mountaintop* (Apr. 3, 1968).

What King and so many others recognized is that neither political movements nor religious communities can flourish without the ability to assemble freely and peaceably.

**B. Attacks on religious assembly threaten religious communities and stifle worship.**

Minority religious communities have faced threats, persecution, and even attempts at “extermination” throughout this country’s history. These attacks have often been motivated not only by competing religious beliefs but by fear and distrust of social or political views out of step with majoritarian norms.

In the nineteenth century, members of the Church of Jesus Christ of Latter-day Saints suffered brutal persecution and faced calls for “extermination,” as much for their political and social beliefs (including their hostility to slavery) as for their religious convictions. See Mo. Exec. Order No. 44 (1838), <https://perma.cc/57TP-ADNJ>; Archibald Cox, *The Court and the Constitution* 189 (1987) (describing mobs destroying Latter-day Saints communities in Missouri and Illinois and driving adherents west “to the Utah deserts”). Cf. *Pet. App. 93a* (describing *Reynolds v. United States*, 98 U.S. 145 (1879)).

Decades later, Jehovah’s Witnesses also encountered widespread public and private violence against them. See Inazu, *Four Freedoms*, *supra*, at 803. The Witnesses suffered extreme persecution because of their religiously motivated positions on social and political issues—like their pacifist stance and their refusal to salute the American flag while the nation was engaged in two world wars. See Shawn Francis Peters, *Judging Jehovah’s Witnesses: Religious Persecution and the Dawn of the Rights Revolution* 2-4 (2000); see

also Pet. App. 95a (describing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)). Jehovah’s Witnesses were also especially vulnerable to persecution because their religious exercise included impassioned public proselytizing, door-to-door canvassing, and preaching on street corners. See Cox, *supra*, at 189 (calling the Jehovah’s Witnesses “[t]he principal victims of religious persecution in the United States in the twentieth century”).

Today, religious communities still face threats, violence, and intimidation due to their religious beliefs, their religiously motivated social and political views, and their mere identity. Places of religious worship—including Buddhist and Sikh temples, Islamic mosques, Jewish synagogues, and Christian churches—have suffered devastating attacks meant to deter worship, stamp out faith communities, and silence unpopular opinions. Adherents of Falun Gong allege similar challenges. See Pet. 8-9; Pet. App. 77a (cataloguing threats of violence, including threat of “extermination and strangulation” directed at Petitioners).

Violent attacks on religious communities are not always the result of religious disagreement. Sometimes attackers target the political views and ethnic or religious identities of those gathering for religious worship. In the past few years, a historically Black church was attacked in retaliation for the Black Lives Matter protests, Margaret Barthel & Nathan Diller, *Proud Boys Leader Takes Credit for Burning D.C. Church’s Black Lives Matter Banner*, NPR (Dec. 21, 2020), <https://perma.cc/E6LM-7U75>; a Buddhist temple in Los Angeles was vandalized because of anti-Asian sentiment, see Justin Whitaker, *Buddhist Temple in Los Angeles Vandalized amid Rise in Hate Crimes*, *Buddhistdoor Glob.* (Mar. 2, 2021), <https://perma.cc/>

MT9L-XRHN; and many attacks on Jewish synagogues have been motivated by anti-Semitic rhetoric, Ruth Graham, *F.B.I. Director Calls Texas Synagogue Attack an Act of Antisemitism*, N.Y. Times (Jan. 20, 2022), <https://perma.cc/WQ8R-HQDC>.

Just last month, a gunman targeted a Taiwanese Presbyterian congregation in California, reportedly motivated by the political history of China and Taiwan. Amy Taxin et al., *Authorities: Hate Against Taiwanese Led to Church Attack*, U.S. News & World Rep. (May 17, 2022), <https://perma.cc/G7C6-6U3H> (noting the Presbyterian Church was “closely identified ... with the Taiwan independence cause”).

Some of the most deadly and despicable attacks in recent memory have had similar motivations. In Charleston, South Carolina, a white supremacist murdered nine Black worshippers at Emanuel African Methodist Episcopal Church. Debbie Elliott, *5 Years After Charleston Church Massacre, What Have We Learned?*, NPR (June 17, 2020), <https://perma.cc/GGF7-4BRZ>. And in Pittsburgh, Pennsylvania, a gunman shouting anti-Semitic slurs opened fire inside the synagogue of the Tree of Life Congregation, killing eleven congregants and wounding six others. Campbell Robertson et al., *11 Killed in Synagogue Massacre; Suspect Charged with 29 Counts*, N.Y. Times (Oct. 27, 2018), <https://perma.cc/9T9K-HZ3E>. These attacks on places of worship are far from rare, isolated incidents. For example, the United States Conference of Catholic Bishops has documented at least 134 attacks across 35 states on Catholic Churches alone since May 2020. *Arson, Vandalism, and Other Destruction at Catholic Churches in the United States*, U.S. Conf. of Cath. Bishops, <https://perma.cc/7YP4-3HJT> (last visited May 22, 2022).

These attacks also stifle religious adherents more broadly. Reflecting on the violence perpetrated against Jewish communities in recent years, one news source summed up community sentiment this way: “[r]ecent attacks on Jewish institutions ... have cast a dark shadow on the simple act of walking into a Jewish institution.” Kiara Alfonseca, *Synagogue Attack Puts Jewish Community on Edge*, ABC News (Jan. 19, 2022), <https://perma.cc/RV86-8TKB>. As one Jewish leader explained, “[t]he basis of our religion is the community”; “[i]f people are afraid to take their kids to a JCC or to summer camp or afraid to go to synagogue to pray with their community, that would be the ultimate tragedy.” *Id.*

The purpose and effect of these attacks is to stifle religious assemblies. Whether it is during a weekday prayer meeting or weekend service, attacks on places of religious worship tend to focus on times and places where religious individuals *gather*. And if religious individuals cannot assemble in peace, neither can they form and maintain religious communities. *Supra* at 7.

### **C. Congress enacted FACEA with primary concern for protecting religious assemblies.**

In passing FACEA, Congress—recognizing the danger posed to religious communities by violent attacks—made clear that one of its central concerns was protecting religious persons from violence and intimidation in their communal gatherings and assemblies. Senators, Representatives, witnesses, and outside commentators alike discussed ongoing threats to religious assemblies and places of worship, typically as a result of the political speech taken by members of these religious communities.

In introducing the language into FACEA that expanded its protections to places of worship, Senator Orrin Hatch highlighted “an interstate campaign of harassment, physical assaults, and vandalism” and noted a wide variety of incidents targeting Christian and Jewish communities. 139 Cong. Rec. 29,361 (1993). Senator Hatch expressed concern not merely with attacks on physical structures, but with “attacks against Catholic leaders,” and other “congregation[s],” and “churchgoers,” based on their perceived social and political views. *Id.* (discussing, *e.g.*, multiple incidents involving the throwing of condoms at congregants in connection with church stances on sexuality). Other Members of Congress echoed similar concerns, noting that recent “violence directed at places of worship” arose from instances “when members of the congregation have been exercising their [F]irst [A]mendment right of free speech.” 140 Cong. Rec. 5408 (1994) (statement of Rep. Barbara Vucanovich) (discussing arson and vandalism connected with religious stances on political and social issues); see also 140 Cong. Rec. 10,295 (1994) (statement of Rep. Duke Cunningham) (referring to ACT UP protest); 140 Cong. Rec. 5412 (1994) (statement of Rep. Bob Dornan) (likewise referencing the ACT UP protest).

Religious communities and commentators opposing the bill also highlighted destructive protests resulting from the Catholic Church’s stance on sex education and abortion rights. See, *e.g.*, *Abortion Clinic Violence: Hearings Before the Subcomm. on Crime & Crim. Just. of the H. Comm. on the Judiciary*, 103d Cong. 135 (1993) (statement of Rabbi Yehuda Levin); George F. Will, Opinion, *Inviolable Clinics*, Wash. Post, Dec. 9, 1993, at A25. Bishop James McHugh of the USCCB highlighted an incident where “those seeking to interfere with peaceful pro-life gatherings at Catholic

churches”—political expression motivated by religion—“poured glue into the locks of five churches and parish buildings.” That incident of targeting made its way into the House Conference Report explaining the protection for houses of worship. See H.R. Rep. No. 103-488, at 9 (Conf. Rep.) (1994) (“pouring glue in the locks” of a house of worship counts among “[e]xamples” of conduct “giv[ing] rise to a civil cause of action under this Act”).

The right of peaceable public assembly and its necessary protection—from private as well as public actors—was therefore top of mind in the public debate about FACEA and its protection for places of worship.

## **II. FACEA Protects a Broad Understanding of Religious Assembly.**

Courts should look to places where individuals assemble as a religious community to define “a place of religious worship” under FACEA. This approach is consistent with FACEA’s text, supported by legislative history, and avoids the pitfalls of the Second Circuit’s atextual reading. Under this approach, the Falun Gong’s religious booths would indisputably qualify as a place of religious worship.

### **A. FACEA supports an assembly-based understanding of the phrase “place of religious worship.”**

While “a place of religious worship” is not defined in FACEA, the statute’s plain text, together with the canon of constitutional avoidance, require a broad interpretation of this phrase. See Pet. App. 124a-126a; *id.* at 126a (“The FACEA’s language counsels for an expansive interpretation.”); see also Pet. 13-18 (explaining why FACEA’s text cannot support the Second Circuit’s narrowing construction). This interpretation

clearly includes Petitioners' booths as places of religious worship. See *infra* at 17–18.

However, should this Court conclude (as the Second Circuit did) that the phrase “a place of religious worship” is susceptible to multiple interpretations, it should adopt a broad interpretation rooted in concepts of religious assembly. Both the legislative record and our nation’s history confirm that the District Court’s reading of FACEA’s scope—protecting all places where “religious worship” (broadly understood) occurs—is the best reading. See Pet. App. 124a-126a (further defining “place of religious worship”).

Looking to the legislative history of FACEA, it is clear that Congress was concerned with protecting religious gatherings. As explained above, the threats and attacks Congress was reacting to were perpetrated against individuals gathering in religious communities. *Supra* at 12–14. These threats also were not limited to, or solely motivated by, specific religious beliefs. Instead, they frequently targeted the political and social views of those gathered. *Supra* at 13. This is also consistent with attacks on religious places of worship throughout our nation’s history. *Supra* at 9–12.

As also explained above, these attacks on religious assemblies undermine the formation and flourishing of religious communities—and that is frequently the attackers’ goal. *Supra* at 12. This makes protecting religious assembly not only crucial for promoting religious pluralism but is also directly responsive to the history of religious attacks in our nation that Congress sought to prevent. Protecting any location where individuals clearly assemble as a religious community is the best way to define “a place of religious worship.” The benefits of this approach are numerous.

First, defining a place of religious worship by reference to the assembly of a religious community helps translate a statutory provision that relies on a deeply religious concept like “worship” (which has widely varied meanings across religious denominations, *infra* at 18–19), into a religiously neutral test that looks at the observable act of gathering. This interpretation also ensures minority religious communities receive equal treatment under FACEA in two ways. It protects informal religious gatherings not formally designated as such by hierarchical leaders. And it protects non-traditional locations used by some religious communities who may not be able to afford designated, single-use religious spaces. *Infra* at 19–21; cf. Pet. 6-7 (“Falun Gong ... traditionally lacks fixed worship spaces and clergy ...”).

Second, this approach best addresses the harm Congress sought to address in passing FACEA: violent attacks and threats to religious communities. *Supra* at 12–14. History and common sense both confirm that religious adherents are most vulnerable when they gather as religious communities, regardless of their size. Thus, protecting the places where those religious communities gather best serves the interests Congress sought to advance.

Finally, this approach avoids the serious translation problems inherent in the Second Circuit’s atextual reading of FACEA. Courts will not be called upon to make the fraught determination of *how much* or *what percentage* of religious activity at a specific location qualifies as “worship.” See Pet. 22-27. Nor would courts need to scrutinize the religious group’s leadership structure or determine the consensus position of its adherents. See *id.* Notably, these translation challenges would be especially hard for courts evaluating

Falun Gong’s “decentralized” structure and its lack of distinct congregations and leadership. See *id.* at 6-7.

**B. Petitioners’ booths are a place of religious worship under FACEA.**

Petitioners’ booths undoubtedly qualify as a “place of religious worship” under FACEA. While the evidence regarding whether the “primary” use of the booths is for worship may be mixed (and sorting it out entangling), the evidence is clear that Petitioners’ booths are a place where Falun Gong adherents gather as a religious community.

“Petitioners pray and proselytize daily at five sidewalk booths,” “which are located in fixed spots within three blocks of the [Spiritual] Center.” Pet. 7. This is abundantly supported by the record, which confirms that Falun Gong practitioners gather at these booths as a religious community. *E.g.*, Pet. App. 147a (“Plaintiffs and others proselytize and meditate” at the booths). Even the Second Circuit begrudgingly acknowledged as much, though it found the booths not “primarily” religious. *Id.* at 33a (“Certainly, the record contains some evidence that volunteers who staffed the tables would pray or promote the Fa there.” (cleaned up)); *id.* at 9a (tables arranged by Spiritual Center leadership). And the record further confirms that the booths “are ‘like an extension’ of the Spiritual Center,” *id.* at 12a, which is undisputedly a place “where Falun Gong practitioners gather,” *id.* at 9a.

In addition, Petitioners’ religious exercise is precisely the type of assembly most vulnerable to threats and violence—and thus most in need of protection. By gathering as a religious community in highly trafficked public locations to pray and proselytize, Petitioners are exposed to threats and violence from any-

one who might approach them. And their fixed physical location and daily use of the same booths further make Petitioners an easy target for attacks, as their whereabouts are known in advance. The record thus confirms that Petitioners have alleged precisely the type of threats and harassment Congress sought to prevent by passing FACEA. Pet. 8-9.

**C. The Second Circuit’s atextual approach wrongly assumes courts will be able to adequately define “religious worship.”**

By requiring courts to determine whether a place is used *primarily* for “religious worship,” the Second Circuit’s gloss on FACEA runs headlong into religious translation problems. See Inazu, *Freedom of the Church, supra*, at 338-41 (describing the “three-step” “process of translation” and how the “increasingly diverse forms of religious belief in the United States” make “draw[ing] meaningful boundaries” around theological concepts almost impossible). The Second Circuit’s approach assumes courts can define the outer boundaries of what constitutes “worship” for each of the over 230 religious groups practicing in the United States. See Clifford Grammich et al., *U.S. Religion Census: Religious Congregations and Membership Study, 2010 (County File)*, Ass’n of Religion Data Archives, <https://perma.cc/FRV3-W6Y9>. But relying on secular courts to make these determinations will undoubtedly privilege well-established religious institutions over minority and upstart religious assemblies. See Pet. 28-30.

Religious communities have diverse, sometimes competing understandings of what it means to engage in religious worship and where that worship may occur. For many, worship encompasses far more than traditional prayer. It may include activities like dancing, see Krishna Maheshwari, *Worship*, *The Hindu*

Encyclopedia, <https://perma.cc/86TR-K8DZ> (last visited May 24, 2022) (describing certain forms of dance as an aspect of worship), or singing, see 4 Karl Barth, *Church Dogmatics* pt. 3, § 72, at 866 (G.W. Bromiley & T.F. Torrance eds., G.W. Bromiley trans., T&T Clark 1961). For some, it may also include carrying out charitable projects, see *What Do Jehovah's Witnesses Believe?*, Jehovah's Witnesses, <https://perma.cc/K85E-PS96> (last visited Mar. 7, 2022) (describing “[s]haring in disaster relief” and “[c]onstructing and maintaining ... facilities used to further [their] worldwide Bible educational work” as “[k]ey aspects of [their] worship”); *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970) (agreeing that “some churches” provide “social welfare services or ‘good works’” for the community). For others, religious worship might involve soliciting donations, see *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 645 (1981); *Int'l Soc'y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 433-34 (2d Cir. 1981) (describing the role of the solicitation of contributions for practitioners). And for still other religious groups, engaging in political activity can itself be a form of worship. See Vaughn E. James, *The African-American Church, Political Activity, and Tax Exemption*, 37 Seton Hall L. Rev. 371, 388-96 (2007) (describing the inextricable relationship between the African-American Church and political advocacy); Ellis M. West, *The Free Exercise Clause and the Internal Revenue Code's Restrictions on the Political Activity of Tax-Exempt Organizations*, 21 Wake Forest L. Rev. 395, 396 (1986) (“For some religious persons, political activity may even be a form of worship.”).

And while majoritarian understandings of “a *place of religious worship*” may focus on sacred spaces, cf.

Jürgen Wolf, *Place, Sacred*, in 3 THE BRILL DICTIONARY OF RELIGION (Kocku von Stuckrad ed., 2006), this does not hold true for all religious communities. Many religious communities meet in locations that are not exclusively or primarily used for religious purposes. See Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1303-04 (2021) (describing the significance of sacred, land-based sites to worship for Indigenous peoples); Cathy Lynn Grossman & Natalie DiBlasio, *'Instant Churches' Convert Public Schools to Worship Spaces*, USA Today (July 19, 2011), <https://perma.cc/L44L-52JU> (describing religious communities that worship in public schools); G. Jeffrey MacDonald, *Churches Without the Church*, Christian Sci. Monitor (June 4, 2009), <https://perma.cc/8B7E-F525> (describing religious communities that meet in coffeehouses, on hiking trails, in canoes, and in outdoor amphitheaters).

Many religious communities also use public sites for their advocacy. Some Baptist ministers preach on sidewalks and street corners, see, e.g., *Kunz v. New York*, 340 U.S. 290, 292 (1951). Jehovah's Witnesses share their good news "door to door," see *Murdock v. Pennsylvania*, 319 U.S. 105, 106-07 (1943). Members of religious communities like the Church of Jesus Christ of Latter-day Saints and the International Society for Krishna Consciousness distribute religious literature in public spaces. See Reid L. Neilson, *Mormon Mission Work*, in THE OXFORD HANDBOOK OF MORMONISM 182, 185 (Terryl L. Givens & Philip L. Barlow eds., 2015); Amitava Ray, *Circumventing Sankirtan: Public Spaces, Religious Solicitation, and Decisions of the United States Supreme Court*, 7 NUJS L. Rev. 1, 42-43 (2014) ("*S*ankirtan included chanting, preaching, dis-

tributing literature, recruiting members, and soliciting donations in public spaces ... like airport lounges, national parks, and state fairs.”). Some Christian clergy hold public prayer vigils for political causes, see, e.g., *The Vigil for Civil Rights*, Christianity Today, June 5, 1964, at 45, 45, <https://perma.cc/4BU6-2YLQ> (describing, for example, a group of seminarians who “maintain[ed] a round-the-clock vigil at the Lincoln Memorial” to support passage of the Civil Rights Act).

In an effort to translate “religious worship” into a generally applicable legal test, the Second Circuit inadvertently cabined this concept in a way that ignores the text, undermines the purpose of FACEA, and fails to protect religious minorities. This Court should grant certiorari to correct these grave errors and to recognize the central importance of protecting the ability of religious individuals of all faith traditions to gather. Looking to religious assembly would better reflect our longstanding commitment to religious pluralism and the many forms and sites of religious worship that flourish within that pluralism.

**CONCLUSION**

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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