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

REPLY BRIEF FOR PETITIONERS

Terri E. Marsh
HUMAN RIGHTS LAW FOUNDATION
1701 Rhode Island Avenue, NW
Suite 4-717
Washington, DC 20036

Michael W. McConnell
559 Nathan Abbott Way
Stanford, CA 94305

James A. Sonne
Counsel of Record
STANFORD LAW SCHOOL RELIGIOUS LIBERTY CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 723-1422
jsonne@law.stanford.edu

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

The Freedom of Access to Clinic Entrances Act (FACEA) prohibits violence against persons exercising their right to religious freedom at a "place of religious worship." 18 U.S.C. § 248(a)(2). Although FACEA does not modify the term, the Second Circuit held that "place of religious worship" should reach only places "religious adherents collectively recognize or religious leadership designates as a place primarily to gather for or hold religious worship activities."

The question presented is:

Whether the statutory text and First Amendment permit FACEA's protection from violence at a "place of religious worship" to apply only to places religious adherents collectively recognize or religious leadership designates as a place primarily to gather for or hold religious worship activities.

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INTRODUCTION

The Second Circuit's parsimonious application of FACEA's protections against violence at a "place of religious worship" defies both the statute's text and the First Amendment—to the pressing harm of the marginalized. By requiring a victim to show not only that the place she suffered was used for worship but that a "collective" or "leader" agrees her worship was the place's "primary" purpose, the Court of Appeal's test violates core statutory-interpretation principles, discriminates against minority faiths, and augurs the unconstitutional entanglement of courts in questions of religious priority, collectivism, and hierarchy.

Remarkably, nowhere in their opposition brief do Respondents defend the constitutionality of any part of the Second Circuit's test or the resulting harm of that test to religious minorities. Nor do Respondents anywhere justify the Second Circuit's insistence on group or leader buy-in as a statutory matter. This silence on the central aspects of the petition's question presented—on which two dozen states and a coalition of leading religious-liberty advocates also urge review as amicus—alone vitiates Respondents' opposition.

Alternatively, Respondents try to dodge review by saying that (a) FACEA's legislative history justifies modifying "place of religious worship"; (b) there is no formal split on the Second Circuit's interpretation of FACEA; (c) FACEA protections are unnecessary; and (d) the case is on interlocutory review. And as they ask in a conditional cross-petition, Respondents add that, if this Court grants review, it should also do so on whether FACEA violates the Commerce Cause.

But none of these sideline attacks detract from the need for this Court to address the statutory and

constitutional damage of the Second Circuit's test—a test that, again, Respondents nowhere defend. And in any event, each fails for the reasons given below. This includes the colloquy of Senators Kennedy and Hatch Respondents rely on. Beyond not tracking the panel's test, that exchange was targeted to avoiding tension with FACEA's clinic protections by prayer someone might happen to incidentally engage in outside such a facility, not the distinct use of a place for worship.

ARGUMENT

I. The petition's question remains undisputed.

A. The Second Circuit's test defies the statutory text and First Amendment.

The Second Circuit's restriction of FACEA to places "primarily" used for worship, and then only where such use is endorsed by a "collective" or "leadership," imposes modifiers nowhere in the text. Pet. App. 23; 18 U.S.C. § 248(a)(2). Nor do these modifiers track contemporaneous dictionaries, which speak only of places used for worship, or hold up in light of other laws where Congress chose to provide expressly the sort of limits the panel engrafted. *See* Pet. 15 (describing dictionaries); Pet. 16-18 (listing Code sections modifying use, purpose, or place). And although the Court of Appeals purported to rely on legislative history, not only does the text control, that history nowhere supports the multi-step modifier the court imposed. *See Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (warning against using legislative history for clear text); H.R. Rep. No. 103-488, at 9 (Conf. Rep.) (1994) (offering nonexclusive description of "place of religious worship" and no mention of group or leader buy-in); Pet. App. 180a (Hatch-Kennedy

colloquy lacking reference to primary purpose, collective recognition, or leadership designation).

Regarding the First Amendment, the Second Circuit's test creates unconstitutional entanglement and discrimination in numerous ways. As to the former, it urges religious entanglement by requiring courts to delve into the subjective importance of faith practices with a primary-purpose inquiry and also by demanding courts examine the internal dynamics of faith groups and leaders. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2069 (2020) (warning against scrutiny of religious standing); *Emp. Div., Dept. of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 887 (1990) (frowning on religious-primacy inquiry). As for discrimination, the Court of Appeals' primary-use requirement discriminates in favor of established religions with brick-and-mortar buildings and against those that courts misunderstand or that utilize mixed-use places, while its group-leader criterion disfavors non-hierarchical faiths or those lacking an established community. *See Carson v. Makin*, 142 S. Ct. 1987, 2001 (2022) (rejecting court evaluation of religious use as inherently problematic); *Our Lady*, 140 S. Ct. at 2064 (warning against favoring well-known faiths).[1]

Further, the Second Circuit's approach will cause significant harm. Although surely unintentionally, it conjures a pre-founding history of persecution against unconventional forms of worship—including outdoors and in Flushing, no less—that the First Amendment

[1] At a minimum, a GVR might be appropriate given this Court's intervening warnings about judicial scrutiny of religiosity in *Carson*, 142 S. Ct. at 2001, and its emphasis on history as the "rule" for certain religious-liberty cases in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2428 (2022).

condemned. *See* Pet. 33-34 (citing historical sources); Becket Br. 8-15 (detailing experience in England and colonies). As the Becket brief observes, the panel's test threatens a diverse and rich tradition of outdoor and organic worship that dates back millenia, was a feature in the founding era, was championed in the abolition and Civil Rights movements, and continues to this day. Becket Br. 5-6, 12-22. Indeed, this case cries out for review due to its threat to vulnerable minorities today—particularly in New York based on its nexus of religious diversity and hate crimes. *See* Pet. 35-36 (citing data); Inazu Br. 10-12 (outlining alarming trend of anti-religious violence).

B. Respondents nowhere defend the panel's test as valid or harmless.

In their opposition brief, Respondents discuss a number of things. Strikingly, however, at no point do they defend under the First Amendment the Second Circuit's test for FACEA protections at a "place of religious worship"—whether in its imposition of the primary-purpose, collective, and leadership modifiers, or otherwise. *See generally* Opp. In fact, Respondents decline to engage the First Amendment at all. The petition's constitutional challenge, which is in many ways its most consequential, stands unopposed.[2]

Regarding the petition's statutory dimension, Respondents notably fail to defend the Second

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[2] In addition to nowhere contesting the petition's constitutional challenge to the Second Circuit's test, Respondents further fail to rebut variations on that challenge offered by amici. *See* First Liberty Br. 18 (stressing sincere use of place for worship); States Br. 18 (emphasizing sincerity); Inazu Br. 14 (urging assembly dynamics); Becket Br. 4 (recommending look to history).

Circuit's test in that respect, too. For although they discuss the panel's insistence that a covered place be used "primarily" for worship, Respondents nowhere justify—or even address—its further rule that this purpose be confirmed by what "religious adherents collectively recognize or religious leadership designates." Pet. App. 23a; *see generally* Opp. (failing to address group or leader buy-in). The statutory challenge therefore stands unopposed as well.

This silence should come as no surprise. After all, the conditions the Second Circuit imposed for FACEA protection violate myriad constitutional commands concerning religious entanglement, discrimination, and autonomy. *See* Pet. 22-32 (outlining violations); States Br. 16-22 (describing disfavoring of religious practices, practitioners, and groups); First Liberty Br. 5-10 (detailing church-autonomy violations).

Moreover, nothing in the statute's text, dictionary definitions, parallel statutes, or even the legislative history comes close to supporting the Second Circuit's insistence on the support of a religious group or leader for FACEA protection. *See* Pet. 13-20 (detailing these errors). And although Respondents try to defend the court's "primary purpose" condition—Opp. 12-13, 21-22—that condition is only part of the test being challenged. Furthermore, and as detailed in this reply's next section, even if one assumed that "primary purpose" was the only condition—it is not—neither the text nor legislative history support it.

Finally, in failing to dispute at all the petition's constitutional challenge and defending only part of the Second Circuit's test as a statutory matter, and obliquely, Respondents concede the test's harms as well. Whether it's Petitioners at their booths, Jewish

families during Sukkot, Christians at tourist sites, Muslims during Eid, or minority-faith assemblies in general, many are at risk. *See* Pet. 6-9 (describing Petitioners' booths and suffering there); Becket Br. 23 (describing Sukkot as a "prime example" of worship imperiled by panel's test); First Liberty Br. 10-12 (stressing vulnerability of worship at tourist sites); States Br. 17-22 (surveying range of at-risk faith practices, including Muslims at Eid); Inazu Br. 9-12 (describing threat to minority assemblies). This is not what Congress wrote and hardly what it intended in adopting FACEA's protections from anti-religious violence. 18 U.S.C. § 248(a)(2); States Br. 2 ("Congress used an intentionally broad term").

II. Respondents' alternative arguments against review go nowhere either.

A. Respondents' use of legislative history is misplaced in any event.

Clinging to legislative history, Respondents argue FACEA's Conference Report and the Hatch-Kennedy colloquy mean that "place of religious worship" is limited to places where worship is the primary purpose. Opp. 3-4. But again, they nowhere argue that legislative history supports the panel's actual test in grafting onto the statutory text the additional qualifiers of "collective recognition" or "leadership designation." And in any event, not only does the text preclude resort to legislative history, that history fails to support a primary-purpose condition.

As the petition explains, the plain meaning of "place of religious worship" includes no primary-purpose modifier—not to mention a group or leader endorsement. Pet. 14-15. In trying to salvage things,

Respondents invoke the *Oxford English Dictionary*. Opp. 11-12. But the *OED* entry for "place of worship" contemporaneous to FACEA's passage is a "place where religious worship is performed;" and although the entry goes on to reference "a building" as a specific example, it nowhere includes a requirement of primary purpose. 11 *Oxford English Dictionary* 939 (2d ed. 1989); *see also* Pet. 15 (citing entries from other contemporaneous dictionaries in accord).

Notwithstanding that the plain text precludes resorting to legislative history, *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020), that history here fails to require a primary-purpose modifier anyway. The Conference Report mentions that sort of modifier only in a non-exhaustive list "*such as* a church, synagogue or other structure or place used primarily for worship." H.R. Rep. No. 103-488, at 9 (emphasis added). And not only does the Report trump the Hatch-Kennedy colloquy, that exchange reflects only their view that FACEA covers an "established place of religious worship" and not "any place a person might pray, such as a sidewalk." Pet. App. 180a; *Demby v. Schweiker*, 671 F.2d 507, 510 (D.C. Cir. 1981) (on Conference Report's legislative-history primacy).

Nowhere does Senator Hatch or Kennedy mention "primary purpose." And although we cannot be sure what else the late Senators meant—hence the text's primacy—one can infer a particularized concern over FACEA's clinic-access provisions being hamstrung by a person who might engage in an incidental act of worship in the course of an otherwise unlawful protest outside a clinic. The Act's rules of construction reflect as much. *See* 18 U.S.C. § 248(d)(2) (excluding from FACEA "activities protected by the free speech or free

exercise clauses . . . outside a facility"). This is a far cry from the worship at Petitioners' booths, which are in fixed spots that are authorized by the police and operate daily in Flushing. Pet. App. 76a; Pet. 7.[3]

B. Any lack of a head-on split fails to negate the pressing need for review.

Respondents further resist review by saying there is no formal circuit split. Opp. 9. But not only does the Second Circuit's approach conflict with decisions of this and other courts, it raises an important question of federal law warranting review regardless.

For starters, the Second Circuit's holding defies this Court's principles of statutory interpretation—including that judges must look to contemporaneous dictionaries and other Code provisions before resort to legislative history. Pet. 13-18; *see Bostock*, 140 S. Ct. at 1738-39 (taking this approach). And despite Respondents' argument to the contrary—*see* Opp. 11-12—the deviation matters here, where the panel failed to even mention that the relevant *OED* entry for "place of worship" is one "where religious worship is performed" or that FACEA's protection at a "place of religious worship" contrasts with the Church Arson Act's protection of "religious real property" in the immediately prior Code section. 11 *Oxford English Dictionary* 939; 18 U.S.C. § 247; *see* Pet. App. 1a-26a (omitting these points).

The Second Circuit's decision also conflicts with interpretations of "place of" by this and other courts.

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[3] Although Respondents try to dispute it, the summary-judgment record shows Petitioners regularly pray and proselytize at their booths. *See* Pet. App. 12a, 76a; Pet. 7, 10, 12, 27 (citing record).

See Pet. 20-22. And although Respondents dismiss these conflicts because most of these other cases arose outside FACEA—Opp. 14-15—they do not contest that courts had given "place of" an inclusive meaning when Congress adopted the phrase. *See* Pet. 20-21 (citing cases); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322-27 (2012) (describing prior-construction canon).[4]

In any event, review is needed because the panel "decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). As urged by the petition, 24 states, and leading amici in the field, the panel's test for "place of religious worship" violates FACEA's text and a host of constitutional commands when it comes to religious liberty—including protecting the most vulnerable. To secure religious liberty for all, this Court has acted on petitions without straight-on circuit splits. *See* Pet. 34 (collecting cases). It should do so here.

C. The Second Circuit's test thwarts crucial protections FACEA alone provides.

Respondents also challenge review by minimizing FACEA's benefits and arguing that the Church Arson

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[4] Respondents try to narrow "place of religious worship" by citing zoning cases. Opp. 22-23. But those cases don't define the term and their laws concern real property. *See*, *e.g.*, *Dean v. Town of Hempstead*, 163 F. Supp. 3d 59 (E.D.N.Y. 2016). Defendants also cite *Ark Encounter, LLC v. Parkinson*, 152 F. Supp. 3d 880 (E.D. Ky. 2016), and *GeorgiaCarry.org, Inc. v. Georgia*, 764 F. Supp. 2d 1306 (M.D. Ga. 2011). But Ark *Encounter* involved a state establishment clause that the court interpreted in accord with holdings of the state court, 152 F. Supp. 3d at 922-25, and *GeorgiaCarry.org* involved a concealed-carry law in buildings and structures, 764 F. Supp. 2d at 1308, 1317 n.13.

Act, 18 U.S.C. § 247, and Hate Crimes Act, 18 U.S.C. § 249, are options the Justice Department favors. Opp. 16-17. They further cite state RFRAs. Opp. 17. But Respondents ignore aspects of FACEA that make it a critical vehicle for preserving religious liberty—most notably, a civil claim against private violence.

Whereas Sections 247 and 249 require victims to rely on the resources of federal officials to enforce their rights, Congress deemed it necessary in FACEA to allow those facing anti-religious violence to protect themselves through civil action. *Compare* 18 U.S.C. § 247, *with* 18 U.S.C. § 248(c)(1). Congress further encourages private enforcement with the availability of attorney's fees. 18 U.S.C. § 248(c)(1)(B); *see also Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 263 (1975) (noting fee provisions are meant to "encourage private litigation" and "public policy" by private enforcement). FACEA is important precisely where the DOJ fails to act.

Respondents' emphasis on state RFRAs is also misguided. Those laws protect religious exercise against government overreach. Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. Rev. 466, 475-76 (2010). By contrast, FACEA protects against private violence. *See* H.R. Rep. No. 103-488, at 9 (stating "profound concern of the Congress over private intrusions on religious worship"); Inazu Br. 12-14 (emphasizing private violence as FACEA's prime target). State RFRAs are no substitute.

And as the petition stresses, the Second Circuit's narrowing of FACEA risks intimidating victims of anti-religious violence from seeking the redress Congress promised—exacerbating dangers in New

York and across the country. *See* Pet. 36 ("The Second Circuit's decision thus excludes from FACEA's protections those who are most likely to require them, where they are most likely to require them").[5]

D. This Court reviews certified questions.

Respondents' final ground for opposing review is the appeal's interlocutory status. Opp. 18-19. But the lower courts certified the matter of FACEA's coverage as "a controlling question of law" that "materially advance[s] the ultimate termination of the litigation." 28 U.S.C. § 1292(b). And this Court grants petitions involving certified questions, including in the common situation where the parties contest the facts. *E.g.*, *Mach Mining, LLC v. EEOC*, 575 U.S. 480 (2015); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

III. The commerce issue need not be addressed.

In closing, Respondents ask that, were the Court to grant the petition, it should also review FACEA's constitutionality under the Commerce Clause. Opp. 24. Notably, Respondents do not argue that this commerce issue prevents this Court's grant of the petition. *See id.* Regardless, the issue need not be taken up since the Court of Appeals has yet to address it and the district court decided it correctly.

This Court has stressed its practice not to "decide in the first instance issues not decided below." *City of*

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[5] Just this month, the ATF Director flagged anti-religious violence as a top concern. Devan Cole, et al., "*We Have a Problem": New ATF Director Takes Agency's Reins as Country Confronts a Rise in Violent Crime*, CNN (Aug. 11, 2022), https://www.cnn.com/2022/08/11/politics/steve-dettelbach-atf-chief-gun-violence.

Austin v. Reagan Nat'l Adver. of Austin, LLC, 142 S. Ct. 1464, 1476 (2022); *see also Cutter* 544 U.S. at 719 n.7 (refusing to decide constitutional questions "not addressed by the Court of Appeals," and observing the Court is one "of review, not of first view").

Because the Court of Appeals has not decided the commerce issue, this Court shouldn't either. If for some reason, however, this Court takes on the issue, it should affirm Judge Weinstein's decision to uphold FACEA for the reasons described in opposition to the cross-petition. *See* Opp. Br. (No. 21-1556) at 12-24.

CONCLUSION

For the reasons above and in the petition, this Court should grant review.

Respectfully submitted,

Terri E. Marsh
HUMAN RIGHTS LAW FOUNDATION
1701 Rhode Island Avenue, NW
Suite 4-717
Washington, DC 20036

Michael W. McConnell
559 Nathan Abbott Way
Stanford, CA 94305

James A. Sonne
Counsel of Record
STANFORD LAW SCHOOL RELIGIOUS LIBERTY CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 723-1422
jsonne@law.stanford.edu

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