No. 21-1429

In the Supreme Court of the United States

ZHANG JINGRONG, ET AL.,
Petitioners,

v.

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

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

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 23 OTHER STATES IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the statutory text and First Amendment permit the Freedom of Access to Clinic Entrances Act's protections 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 to hold religious worship activities.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[1]

America's commitment to religious freedom is "essential." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 524 (1993). It constitutes "one of our most treasured and jealously guarded constitutional rights." *Roman Cath. Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 81 (2020) (Sotomayor, J., dissenting). And the *amici* States—West Virginia, Alabama, Arizona, Arkansas, Florida, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and Virginia—are deeply concerned with protecting "our first freedom." *Id.* at 70 (Gorsuch, J., concurring).

Our nation's tradition of free exercise stems in part from a history of religious violence inflicted elsewhere. "Torrents of blood have been spilt in the old world," wrote James Madison, "by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions." *Everson* v. *Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 69 (1947) (cleaned up). Madison and the other "Framers of our Constitution were acutely aware how governments in Europe had sought to control and manipulate religious practices and churches," often through violence. *Trustees of New Life in Christ Church* v. *City of Fredericksburg*, 142 S. Ct. 678, 679 (2022) (Gorsuch, J., dissenting from denial of certiorari). So "[t]hey resolved that America would be different." *Id.* Madison, for instance, led the Virginia Assembly to pass

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[1] Under Supreme Court Rule 37.2(a), *amici* timely notified counsel of record of their intent to file this brief.

Thomas Jefferson's 1786 Virginia Bill for Religious Liberty, which provided that "no man … shall otherwise suffer on account of his religious opinions or belief." *Everson*, 330 U.S. at 13. And Madison and Jefferson didn't stop there. They also helped ensure that the Religion Clauses ultimately enshrined in the federal Constitution "ha[ve] the same objective and … provide the same protection." *Id.*

In the "Access Act"—a statute that state Attorneys General are expressly empowered to enforce, see 18 U.S.C. § 248(c)(3)—Congress reaffirmed our country's broad protections for religious worship by targeting violence directed at religious practices. The law prescribes criminal penalties and civil remedies for acts or threats of violence aimed at those "exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship." *Id.* § 248(a)(2). In referring to a "place of religious worship," Congress used an intentionally broad term. It chose not to tie liability to "religious real property," *id.* § 247, "house[s] of worship," 42 U.S.C. § 5172(a)(3)(C), "religious facilities," 49 C.F.R. § 192.903, or the like. It instead drafted a comprehensive statute to reflect its "profound concern … over private intrusions on religious worship." H.R. REP. NO. 103-488, at 9 (1994).

Petitioners are exactly the sort of worshippers one might expect to find safety in a statute like this. They practice Falun Gong, which places them in "the third-largest group" of those suffering freedom-of-religion or freedom-of-belief restrictions worldwide. U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM ("USCIF"), ANNUAL REPORT 78 (Apr. 2022). The group started in China under a Communist regime hostile to religious pluralism. See, *e.g.*, Carl Hollan, *A Broken*

System: Failures of the Religious Regulatory System in the People's Republic of China, 2014 B.Y.U. L. REV. 733, 735 (2014) (describing how Chinese Communist policy has "vacillated between attempts to control religious organizations and attempts to eradicate religion"). Under that regime, "adherents of groups with perceived foreign influence"—like the Falun Gong—"are especially vulnerable to persecution." USCIF, *supra*, at 16-17; see also, *e.g.*, Mike Maslanik, *Wife Fights for Husband Jailed in China*, N.Y. TIMES (Sept. 4, 2003), https://nyti.ms/3zbtRxy (describing China's "secret police force designed to root out practitioners of Falun Gong"). Many Falun Gong practitioners have thus fled to America. Yet even after coming here, Petitioners allegedly continue to face persecution and abuse from Communist sympathizers. So taking Congress at its word and believing that the Access Act defended them from violence at their places of worship, they sued.

The Second Circuit denied Petitioners the statute's protection by interpreting it to reach only places "primarily" devoted to religious worship. Pet.App.23a. In doing so, it unduly narrowed a statute meant to bar the worst acts of violence in many of America's sacred places. This construction compels victims of religious violence to prove their activity was religious enough, and it enmeshes courts in deciding what constitutes true worship warranting protection.

None of that is right. The Second Circuit's approach offends several aspects of American religious freedom. The "prohibition on governmental preferences for some religious faiths over others" is one; now only religions with designated buildings for worship benefit from the Act. *Rosenberger* v. *Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 855 (1995) (Thomas, J., concurring). Individual

believers' rights to "decide for themselves, free from state interference, matters of ... faith and doctrine" is another; what locations are "primary" to their religious practice are now open for judicial second-guessing. *Kedroff* v. *Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). And the rule against judicial "efforts to 'subject' religious beliefs to 'verification'" is another still; judges are now tasked with deciding whether a place is sufficiently worshipful to warrant protection. *Trustees of New Life in Christ Church*, 142 S. Ct. at 679 (Gorsuch, J., dissenting from denial of certiorari).

The *amici* States urge this Court to remedy the Second Circuit's anti-religion decision and restore the promise of our "Nation['s] unparalleled pluralism and religious tolerance." *Salazar* v. *Buono*, 559 U.S. 700, 723 (2010). *Properly* construed, the Access Act does not ask judges to leave their lanes of "function and [] competence," *Thomas* v. *Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 716 (1981), nor entangle themselves with quintessentially religious assessments. And its broad text is fully consistent with the nation's history of free exercise. But the Second Circuit rewrote it into something else. Particularly when grappling with a statute that takes matters of religious freedom head on, the Second Circuit was wrong to set our history of liberty aside. Religious liberty is fundamental to our federal regime and to day-to-day life in every State. The Court should take this case and reverse.

SUMMARY OF ARGUMENT

The Court should grant the Petition for the reasons Petitioners urge: The decision below is wrong on an issue of national importance that stands at the center of our constitutional tradition. The States highlight two aspects of the lower court's serious errors here. Uncorrected, that

court's interpretation could unjustifiably leave our residents at risk when they practice the many faiths their consciences dictate.

I. The Second Circuit's opinion contradicts our country's history of religious liberty—a history that necessarily informs any understanding of the Access Act. That history instead confirms Petitioners' plain-text construction. Even before the Founding, Americans sought to protect each other when they engaged in religious worship. This long-running embrace of broad religious freedom continues in the modern day. It resonates throughout our state and federal constitutions, state and federal statute books, and state and federal case reporters. Yet the Second Circuit ignored all that and construed the Access Act in one of the narrowest possible ways. The Court should grant certiorari to remove that stain on our tradition of freedom.

II. Further, even though the Access Act was designed to *protect* constitutional liberties, the Second Circuit's opinion actually *creates* constitutional problems under the Religion Clauses. The bounds of "judicial function and judicial competence," *Thomas*, 450 U.S. at 716, exclude the sort of inquiries into religious practice that the Second Circuit's extra-textual reading requires. Individual believers should not have to show that a religious leader or collective would consider their "place of religious worship" a "primary" location. And the Second Circuit has read the statute to require courts to assess religions in ways they cannot and ought not. Quite simply, the lower court's decision invites the type of entanglement that courts usually—rightly—avoid.

REASONS FOR GRANTING THE PETITION

I. The Second Circuit's Construction Flouts America's History Of Religious Liberty, Which Informs The Access Act's Meaning.

The Court should grant review to correct the Second Circuit's missteps in statutory construction for all the reasons Petitioners explain. See Pet. 13-18. But beyond that, the Court should also take up this case because the Second Circuit forgot that "statutory language necessarily derives much of its meaning from the surrounding circumstances." *Civ. Aeronautics Bd.* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 323 (1961).

When "construing any act of legislation," the Court accounts for "the condition and … the history of the law as previously existing … in the light of which the new act must be read and interpreted." *United States* v. *Wong Kim Ark*, 169 U.S. 649, 653-54 (1898). All the more when it comes to matters of religious liberty; even the author of the provision here has recognized that legislative "answers" in this area are "a function of [America's] own unique history and culture." Orrin G. Hatch, *Religious Liberty at Home and Abroad: Reflections on Protecting This Fundamental Freedom*, 2001 B.Y.U. L. REV. 413, 428 (2001). And indeed, the "historical context from which the Act arose" confirms that Petitioners have the right reading of this law. *United Steelworkers of Am., AFL-CIO-CLC* v. *Weber*, 443 U.S. 193, 201 (1979). In other words, even if Petitioners' plain-text analysis left any doubt over the statute's meaning, that backdrop—the context in which Congress acted—would resolve it *against* the lower court's narrow read. See *Dep't of Com.* v. *U.S. House of Representatives*, 525 U.S. 316, 339-40 (1999) (invoking 200 years of "historical context" and

"background" in refusing to construe a statute narrowly). The Court should repair the Second Circuit's unjustified break from our centuries-old tradition of protecting all manner of religious exercise.

A. The Founding and Before

Religious freedom traces to the roots of our Republic.

Many of the colonies embraced religious liberty's virtues over a hundred years before the Framers conceived the Constitution. See *City of Boerne* v. *Flores*, 521 U.S. 507, 551-52 (1997) (O'Connor, J., dissenting) (discussing the history of free exercise of religion in the colonies). As early as 1648, for instance, Lord Baltimore—who had attracted settlers from Boston by promising "free liberty of religion"—secured a promise from Maryland's governor not to disturb Christians in the "free exercise" of their religion. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1425 (1990). Massachusetts Governor John Winthrop, seemingly indignant at the suggestion that his land was a bastion of intolerance, responded that none "of our people … had a temptation that way." *Id.* Maryland's Assembly echoed those sentiments a year later, passing a formal Act Concerning Religion. *City of Boerne*, 521 U.S. at 551. That statute ensured that no Christian sect would be "troubled, Molested or discountenanced" for its beliefs. *Id.*

This example wasn't an outlier, and the pattern continued over the decades. Quaker colonies in New Jersey and Pennsylvania and the Dutch colony in New York embraced notions of religious liberty and tolerance throughout much of the mid- to late-1600s. See Richard Albert, *American Separationism and Liberal Democracy: The Establishment Clause in Historical and*

Comparative Perspective, 88 MARQ. L. REV. 867, 883 (2005) (summarizing "the impressive range and intensity of religious convictions" preceding the Founding). Rhode Island even included the "liberty of conscience" in its founding Charter of 1663. McConnell, *supra*, at 1425. The colony's founder, Roger Williams, wrote "frequently, eloquently, and vituperatively in defense of freedom of conscience." *Id.* As a result, Rhode Island became an intentionally "livelie experiment … with a full libertie in religious concernements." *Id.* at 1426. The other colonies followed suit after independence: "[T]he substance of [Rhode Island's] early provisions" became "the most common pattern in the constitutions adopted by the states after the Revolution." *Id.* at 1427. And Virginians in 1785 and 1786 witnessed the "movement['s] … "dramatic climax," when Jefferson and Madison pressed for an act to ensure no one would be "enforced, restrained, molested or burdened … on account of his religious opinions or belief." *Everson*, 330 U.S. at 11-13.

By 1789, every State except Connecticut protected religious freedom in its constitution. See McConnell, *supra*, at 1455. So by that time, "[f]reedom of religion was universally said to be an unalienable right." *Id.* at 1456; see also John Witte, Jr., Joel A. Nichols, *"Come Now Let Us Reason Together": Restoring Religious Freedom in America and Abroad*, 92 NOTRE DAME L. REV. 427, 436 (2016) ("[T]he founding generation … defend[ed] religious freedom for all peaceable faiths, and wove multiple principles of religious freedom into the new state and federal constitutions of 1776 to 1791").

In truth, "the embodiment" of religious liberty in these constitutions "was simply writing colonial experience into the fundamental law of the land." WILLIAM WARREN SWEET, RELIGION IN COLONIAL AMERICA 339 (1965). The

colonies had long "acknowledged that freedom to pursue one's chosen religious beliefs was an essential liberty." *City of Boerne*, 521 U.S. at 552. And when "religious beliefs conflicted with civil law," early colonists insisted that "religion prevailed unless important state interests militated otherwise." *Id.* In short, the tone had been set well before the Founding.

Unsurprisingly, then, the federal Constitution prioritized religious freedom, too. Before the States ratified the Bill of Rights, the Constitution in the main held that "no religious Test shall ever be required as a Qualification to any office or public Trust under the United States." U.S. CONST. art. VI, cl. 3. Like the early colonists, the Framers did not include this provision as an afterthought: It deliberately affirms that religious freedom is vital. See Carl Zollman, *Religious Liberty in the American Law*, 17 MICH. L. REV. 355, 355-56 (1919); see also U.S. CONST. art. I, § 3, cl. 6; art. II, § 1, cl. 8; and art. VI, cl. 3 (provisions allowing for affirmations instead of oaths). The Bill of Rights brought an even more powerful reminder of religious freedom's importance through the First Amendment's key prescription: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. With this brief statement, the Founders enshrined religious liberty as one of our most fundamental freedoms.

B. Religious Freedom In This Court

Since then, this Court has repeatedly emphasized the ways our laws pursue genuinely free religious exercise. As the country recovered from the Civil War and continued to expand, for example, the Court reiterated that "[r]eligious freedom is guaranteed everywhere

throughout the United States." *Reynolds* v. *United States*, 98 U.S. 145, 162 (1878). Later precedent established that the Fourteenth Amendment extends free exercise protections to the laws of the States as well. See *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-04 (1940). So whether dealing with federal or state law, "[f]reedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted." *Id.* at 303. This freedom even "occup[ies] a preferred position" over others, such as property rights. *Marsh* v. *Alabama*, 326 U.S. 501, 509 (1946). And all Americans enjoy the right. "Whether needy or affluent," "itinerant" or fixed, "profession[al]" or "casual," the First Amendment protects all religious practitioners wherever they "proclaim their faith." *Follett* v. *Town of McCormick*, 321 U.S. 573, 577 (1944).

Free exercise is so important that the Court approaches laws cautiously whenever they might interfere with it. "[U]pon even slight suspicion that" government action "stem[s] from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Church of the Lukumi Babalu Aye*, 508 U.S. at 547. The Court has stressed the "importance of preventing the restriction of enjoyment of these [religious] liberties." *Schneider* v. *New Jersey*, 308 U.S. 147, 151 (1939). And no arm of the government may "act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop, Ltd.* v. *Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1731 (2018). Religious beliefs "need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas*, 450 U.S. at 714. An "honest conviction" will do. *Id.* at 716.

In the end, this Court repeatedly returns to the first principle that the "Constitution commits government itself to religious tolerance." *Masterpiece Cakeshop*, 138 S. Ct. at 1731 (citation omitted). With this constitutionally enshrined safeguard, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972). And when it comes to statutory construction, courts confronted with multiple allowable readings of a statute will prefer those consistent with "the history of the law," *Wong Kim Ark*, 169 U.S. at 653-64, and reject those in tension with essential liberties like religious freedom, *United States* v. *Palomar-Santiago*, 141 S. Ct. 1615, 1622 (2021); cf. *Reynolds*, 98 U.S. at 162 (explaining that the Court looks to "the history of the times in the midst of which the provision was adopted" to determine the meaning of "religion" in the Constitution).

C. Other Congressional Acts

Statutes similar to the Access Act also should have put the Second Circuit on notice that it might be going astray. Courts generally assume that new statutes are "intended to fit into the existing system and to be carried into effect conformably to it." *United States* v. *Jefferson Elec. Mfg. Co.*, 291 U.S. 386, 396 (1934); see also, *e.g.*, *Kokoszka* v. *Belford*, 417 U.S. 642, 650 (1974) (explaining that courts "take in connection with [the statute at issue] the whole statute (or statutes on the same subject) and the objects and policy of the law"). And indeed, Congress passed the Access Act in 1994 among a raft of laws that re-entrenched a broad conception of religious freedom. See, *e.g.*, *Smith* v. *Wade*, 461 U.S. 30, 85 (1983) (Rehnquist, J., dissenting) (drawing inferences about Congress's intent from other

laws "roughly contemporaneous" with the statute to be construed).

In 1993, just one year before the Access Act, Congress passed the Religious Freedom Restoration Act ("RFRA"). 42 U.S.C. §§ 2000bb to 2000bb-4. Congress sought through RFRA to enhance religious liberty by providing that "[g]overnment may substantially burden a person's exercise of religion" only if the measure can satisfy strict scrutiny. *Id.* § 2000bb-1(b). That demanding standard applies "even if the burden result[ed] from a rule of general applicability." *Id.* § 2000bb-1(a). Although this Court later held that applying RFRA to the States exceeded Congress's powers, enacting it in the first place was a telling signal of Congress's commitment to religious freedom: Congress came together to pass the massive bill in fewer than three years. And it was no close vote. The House of Representatives passed it unanimously, and only three Senators opposed it. See *H.R. 1308 (103rd): Religious Freedom Restoration Act of 1993*, GOVTRACK (Oct. 27, 1993), https://bit.ly/3sWzfB2.

A few short years later in 2000, Congress passed the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). In another extraordinary showing of unity, RLUIPA passed both houses unanimously. U.S. DEP'T OF JUSTICE, REPORT ON THE TWENTIETH ANNIVERSARY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT 5 (Sept. 22, 2020), *available at* https://bit.ly/3wP4Re0. That law advances freedom of religion by singling out for protection religious land use and the religious practices of institutionalized persons. See 42 U.S.C. §§ 2000cc to 2000cc-5. When President Bill Clinton signed RLUIPA into law, he praised the way it guarded "a constitutional value of the highest order" that

played a role of central "importance … in our democratic society." U.S. Dep't of Justice, *supra*, at 5.

Between these two bookends, Congress enacted other broad religious-freedom protecting measures with similarly impressive bipartisan support. The Religious Liberty and Charitable Donation Protection Act of 1998 allowed taxpayers to deduct religious contributions, and the Church Arson Prevention Act of 1996 barred acts of destruction targeted at religious property; both passed the House and Senate unanimously. See Pub. L. No. 105-183, 112 Stat. 517 (1998); Pub. L. No. 104-155, 110 Stat. 1392 (1996). The International Religious Freedom Act of 1998 was still another example, this time targeting activities abroad. It too passed without a single objection. See Pub. L. No. 105-292, 112 Stat. 2787 (1998).

Taken together, this contemporary congressional history rebuffs the suggestion that the Congress that passed the Access Act likely intended it to have a narrow reach. The Congress of that era repeatedly and emphatically passed broad acts designed to enshrine religious liberty throughout the U.S. Code. Thus, legislative context confirms that the Second Circuit should have taken the Access Act's broad text at face value.

D. State-Level Developments

If any ambiguity in the Access Act's text exists, more recent developments in state law could also inform the Court's reading of its religious-liberty protections. An "old" and "diversified" practice of "resorting" to state law helps "give meaning and content to federal statutes." *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144, 155-56 (1944). And the *States'* consistent emphasis on religious freedom and free exercise underscores the importance of the issues at stake here.

Most modern state constitutions incorporate broad protections for religious practice. After declaring that "[a]ll men have a natural and indefeasible right to worship … according to the dictates of their own conscience," the Ohio Constitution directs the General Assembly to "pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship." OH. CONST. art. I, § 7. New Hampshire guarantees that no religious practitioners "shall be hurt, molested, or restrained, in [their] person, liberty, or estate, for worshipping … in the manner" they see fit so long as they do not "disturb the public peace or disturb others in their religious worship." N.H. CONST. art. 5. West Virginia's constitution similarly says that no person may be "enforced, restrained, molested or burthened, in his body or goods, or otherwise suffer," because of his or her "religious opinions or belief." W. VA. CONST. art. 3, § 15. Other examples abound. And recent developments show how States continue to cherish religious liberty. For example, 21 States have passed laws or amendments that resemble RFRA.[2]

Thus, "religious freedom is accorded a special status in both our state and federal constitutions," *Coulee Cath. Sch.* v. *Lab. & Indust. Rev. Comm'n*, 768 N.W.2d 868, 891-92 (Wis. 2009), and in both our state and federal statute books. Even at the state level, that freedom "extend[s] to

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[2] See ALA. CONST. art. 1, § 3.01; Ariz. Rev. Stat. § 41-1493.01; Ark. Code Ann. § 16-123-401; Conn. Gen. Stat. § 52-571b; Fla. Stat. § 761.01, *et seq.*; Idaho Code § 73-402; Ill. Rev. Stat. Ch. 775, § 35/1, *et seq.*; Ind. Code § 34-13-9; Kan. Stat. § 60-5301, *et seq.*; Ky. Rev. Stat. § 446.350; La. Rev. Stat. § 13:5231, *et seq.*; Miss. Code § 11-61-1; Mo. Rev. Stat. § 1.302; N.M. Stat. § 28-22-1, *et seq.*; Okla. Stat. tit. 51, § 251, *et seq.*; 71 Pa. Stat. § 2403; R.I. Gen. Laws § 42-80.1-1, *et seq.*; S.C. Code § 1-32-10, *et seq.*; Tenn. Code § 4-1-407; Tex. Civ. Prac. & Remedies Code § 110.001, *et seq.*; Va. Code § 57-2.02.

persons of all creeds and religious beliefs or disbeliefs," not just "orthodox religious practices." *Bond* v. *Bond*, 109 S.E.2d 16, 24 (W. Va. 1959); accord *Brush & Nib Studio, LC* v. *City of Phoenix*, 448 P.3d 890, 896 (Ariz. 2019) (describing how religious freedom is for all, "not only for those who are deemed sufficiently enlightened, advanced, or progressive"); *Holden* v. *Bd. of Educ. of City of Elizabeth*, 216 A.2d 387, 391 (N.J. 1966) (explaining that unless a practitioner "present[s] a clear and present danger to the peace, welfare, and security of the people, they [are to] suffer no testing against human dicta, no matter how unreasonable [their beliefs] may seem"). The States' traditions are also part of the national fabric of religious liberty that Congress and the courts preserve.

E. The Second Circuit's Wrong Turn

The Second Circuit's decision is a jarring break from this long line of diverse, pro-religious-freedom authority. "No part of the judicial code is" "self-contained"—the meaning of most statutory terms to some extent "depend[s] … on external norms." *Phoenix Container, L.P.* v. *Sokoloff*, 235 F.3d 352, 354-55 (7th Cir. 2000) (Easterbrook, J.). But when construing the phrase "place of worship," the Second Circuit lost sight of the American norms and values of religious freedom. Even the Second Circuit recognized that the text easily could have borne an expansive reading. See Pet.App.24a (noting how the words following "place of" can "merely describe an incidental feature of the location"). But it resisted that reading anyway.

Rather than acting with an eye toward America's history of religious respect, the Second Circuit seemed to search for a way to *narrow* a statute that would otherwise fit comfortably within that tradition. The Access Act

reflects a truth Congress has known for a long time: increased penalties and protections are sometimes "needed to deter future violence and to demonstrate governmental commitment to protecting free exercise." *Protecting Religious Exercise: The First Amendment and Legislative Responses to Religious Vandalism*, 97 HARV. L. REV. 547, 555 (1983). The lower court's approach is thus not only atextual as Petitioners explain—a fatal flaw on its own—but is at odds with Congress's efforts to render the right to worship meaningful against the backdrop of other constitutional and statutory religious protections.

The Court should grant certiorari to set the statute right and show "respect for this Nation's pluralism, and the values of neutrality and inclusion that the First Amendment demands." *Am. Legion* v. *Am. Humanist Ass'n*, 139 S. Ct. 2067, 2094 (2019) (Kagan, J., concurring).

II. The Second Circuit's Construction Creates Serious Constitutional Concerns.

The Court should also intervene because the Second Circuit construed a statute intended to protect religious practice in a way that *invites* entanglement and free exercise concerns. Even spotting the lower court that the term "place of worship" has more than one fair reading, it should have applied the construction that "avoid[ed] not only the conclusion that [it is] unconstitutional, but also grave doubts upon that score." *Palomar-Santiago*, 141 S. Ct. at 1622 (cleaned up). This constitutional avoidance canon "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark* v. *Martinez*, 543 U.S. 371, 381-82 (2005). In this

way, it is "a means of giving effect to congressional intent, not of subverting it." *Id.* But the Second Circuit's approach discounted constitutional concerns for the sake of preserving its narrower course.

In effectively redrafting the statute, the Second Circuit ran headlong into multiple, serious constitutional doubts. "[T]he very process of inquiry" into religious doctrine and dogma "may impinge on rights guaranteed by the Religion Clauses." *NLRB* v. *Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979). Here, the Second Circuit tried to avoid this problem by purportedly not "imposing any particular conceptual, physical, or temporal requirements" on what counts as a "place of religious worship." Pet.App.28a. But asking whether a protected site has a "primary" religious purpose endorsed by "leadership" or some unspecified "collective[]," *id.* at 28a-29a, *is* a "conceptual" requirement. Holding as a blanket matter that certain places are not covered—"such as one's home"—is likewise a "physical" requirement. *Id.* at 28a; contrast with Charles E. Hummel, *The Church at Home: The House Church Movement*, CHRISTIANITY TODAY (1986), *available at* https://bit.ly/3zf94cL (last visited June 6, 2022) ("Yet in every century Christians have met in homes in small groups to supplement their more formal church life."). And rejecting sites of worship unless (it seems) the worship is regularly scheduled is a "temporal" requirement. See Pet.App.33a-34a (contrasting a religion that holds "daily or weekly church services" with the Falun Gong's purportedly more "sporadic instances of worship at the tables"). These new requirements create no fewer than three substantial issues.

First, the Second Circuit applied its newfound "primary" requirement in a way that forced the court to categorize religious practices based on the court's

subjective of assessment of "primary" versus "incidental" religious practices. The First Amendment does not "permit[] governments or courts to inquire into the centrality to a faith of certain religious practices—dignifying some, disapproving others." *Haight* v. *Thompson*, 763 F.3d 554, 566 (6th Cir. 2014); see also *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 336 (1987) ("[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious."). Likewise, courts have no role "in deciding or even suggesting" whether acts that take place at a given site are "legitimate or illegitimate" acts of worship. *Masterpiece Cakeshop*, 138 S. Ct. at 1731. Courts should instead ask only whether "a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God." *United States* v. *Seeger*, 380 U.S. 163, 165-66 (1965).

Problem is, the Second Circuit never mentioned sincerity. Instead, the court below drew an "[un]intelligible" line, *Widmar* v. *Vincent*, 454 U.S. 263, 270 n.6 (1981), dismissing Petitioners' conduct as unprotected "political and social action [that] may be rooted in religious belief," Pet.App.35a. Because it marched into the "forbidden process of interpreting and weighing church doctrine," *Presbyterian Church in U.S.* v. *Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 451 (1969), this Court should haul it back. The Court should intervene to make clear that essential principles like those *Seeger* and *Masterpiece Cakeshop* described apply when construing the Access Act, too. The First Amendment is "plainly jeopardized" when courts deign to weigh into "controversies over religious doctrine and practice." *Md. & Va. Eldership of Churches of God* v.

Church of God at Sharpsburg, Inc., 396 U.S. 367, 368 (1970) (Brennan, J., concurring).

Second, the decision below improperly downgrades individual religious practitioners. Remember: Under the Second Circuit's interpretation, it is not enough that the alleged intimidation and violence occur at a place of religious worship the believer herself considers "primary." The religion's adherents must "collectively recognize" it that way, or else some "religious leadership" must "designate" it so. Pet.App.4a. It seems the only one whose "sincere and meaningful" beliefs do *not* matter are the practitioner's—that is, the person suffering the violence and intimidation Congress meant to prevent. *Seeger*, 380 U.S. at 165-66.

Nothing is right about insisting on an "official stamp of approval" for an individual believer's religious practice. It's outside "the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of *particular litigants' interpretations* of those creeds." *Hernandez* v. *Comm'r*, 490 U.S. 680, 699 (1989) (emphasis added). So too for "inquir[ing] whether the petitioner or his fellow worker more correctly perceived the commands of their common faith." *Thomas*, 450 U.S. at 716. More generally, "[a] personal religious faith is entitled to as much protection as one espoused by an organized group"—no government may insist that members of a faith tradition "espouse all, and only, those beliefs that have the support of the sect's leadership." *Vinning-El* v. *Evans*, 657 F.3d 591, 593 (7th Cir. 2011) (Easterbrook, J.); see also *Follett*, 321 U.S. at 577 ("The protection of the First Amendment is not restricted to orthodox religious practices."). But that's what the Second Circuit did, and what judges in other Circuits will likely do if this decision stands.

This approach is even more troubling—and thus calls more urgently for review—given a cold reality: In places where religious freedom is weakest, giving veto power to a religious leader or collective is *how* governments persecute and control individual practitioners. This threat is a real one for religions like Falun Gong. The Chinese Communist Party has capitalized on the lack of "strong hierarchical structures" in Buddhism and Daoism to "establish[] an oversight organization to control religious believers … by selecting and promoting leadership that was loyal to the Communist cause." Hollan, *supra*, at 740-41; see also, *e.g.*, Sophie Goodman, *A Country Burning for Religious Freedom: The New Draft Law on Freedom of Religion in Vietnam*, 26 MICH. ST. INT'L. L. REV. 159, 164-65 (2017) ("[T]he [Vietnamese Communist Party] supervises the training and education of church leadership of every religious organization."). Yet the decision below forces worshippers at risk of violence and intimidation to barter statutory protection for centralized religious control. In our tradition, religious liberty has always meant more.

Third, the Second Circuit's extra-textual reading unduly "privilege[s] religious traditions with formal organizational structures over those that are less formal." *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020). As Petitioners point out and the district court recognized, Pet.3-4; Pet.App.51a, the decision below stands in tension with the Establishment Clause's "clearest command … that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982). "Falun Gong does not have many formal physical or organizational structures" at all, Pet.App.66a, so this isn't a case of individual believers out-of-step with leadership or choosing to worship in unorthodox locations. At a

minimum, the Second Circuit's decision to read the Access Act "to protect religions differently based on whether the religion has fixed temples or prayer takes place in transitory locations" raises serious constitutional concerns. Pet.App.124a-125a.

And the decision below reflects more than a one-time problem for this one religion; other sects practice in much the same way. Quakerism, for instance, historically "did not erect edifices for worship and did not have clergy." Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions from Madison's Memorial and Remonstrance*, 87 CORNELL L. REV. 783, 804 (2002). Other Christian groups, such as the Wild Church Network, continue to "question the wisdom and consequences of regarding 'church' as a building where you gather away from the rest of the world for a couple hours on Sundays." *Rewilding Christianity*, PROGRESSIVECHRISTIANITY.ORG, https://bit.ly/3xa2JfU (last visited June 7, 2022).

Even those religions that have traditional buildings often worship and praise outside those ordinary places. Christians might gather riverside to celebrate and worship through baptism. See, *e.g.*, Danielle Mueller, *Cherryville Baptist Holds Riverside Baptism*, NJ.COM (July 28, 2016), https://bit.ly/3GTzxhI. Jewish worshippers might meet in their backyard, in a sukkah, to celebrate Sukkot. See Jill Altman, *Sukkot: Why It's The Favorite Holiday At Our House*, INTERMOUNTAIN JEWISH NEWS (Sept. 17, 2021), https://bit.ly/3NZ86oP. Muslim worshippers might pray and worship on outdoor sidewalks to prevent the spread of COVID-19. See Pauline Bartolone, *Sacramento Muslims Celebrate Eid — Outside And Six Feet Apart*, CAPRADIO (Aug. 3, 2020),

https://bit.ly/3Q1vWSQ. Yet worshippers like these and others will go selectively unprotected, too.

In short order, the decision below managed to:

- exclude entire *categories* of religious practice that fail to occur at a "primary" place of worship;
- remove the *practitioners themselves* from the equation in favor of a larger collective and leadership that may not even exist; and
- prefer some *religions* over others by requiring discernable practices, leadership, and physical structures.

The decision below was wrong—very. Its consequences are troublingly broad. And on its own facts it withholds our country's robust tradition of religious protection from adherents of the third-largest group in the world currently facing religious persecution. The Court should grant review before the damage can get worse.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse.

Respectfully submitted.

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