NO. _____

IN THE

Supreme Court of the United States

NATIONAL RELIGIOUS BROADCASTERS NONCOMMERCIAL MUSIC LICENSE COMMITTEE,
Petitioner,

v.

COPYRIGHT ROYALTY BOARD AND LIBRARIAN OF CONGRESS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Copyright Royalty Board sets default royalty rates for webcasting sound recordings. Recently, the Board adopted rates requiring noncommercial religious webcasters to pay over 18 times the secular NPR-webcaster rate to communicate religious messages to listeners above a modest 218-average-listener threshold. The D.C. Circuit upheld that disparate burden based on the Board treating some secular webcasters as poorly as religious webcasters. The result is suppression of online religious speech.

The D.C. Circuit also affirmed unexplained Board departures from precedent regarding who bears the burden of proof in 17 U.S.C. 114(f) rate-setting proceedings and the evidence required to meet that burden. Its decision presents three important legal questions:

1. Whether approving noncommercial rates that favor NPR's secular speech over religious speech violates the Religious Freedom Restoration Act (RFRA) or the First Amendment.

2. Whether 17 U.S.C. 114(f)(4)'s bar on considering Webcaster Settlement Act (WSA) agreements in rate-setting proceedings extends to analyses valuing rates in non-WSA agreements.

3. Whether the Board's unexplained inversion of the burden of proof in a 17 U.S.C. 114(f)(1) rate-setting proceeding—including its unexplained new requirement of expert testimony to meet that burden—violates the Administrative Procedure Act.

PARTIES TO THE PROCEEDING

Parties below are Appellant/Intervenor National Religious Broadcasters Noncommercial Music License Committee (NRBNMLC), Appellees Copyright Royalty Board and Librarian of Congress, Appellant/Intervenors National Association of Broadcasters and SoundExchange, Inc., and Intervenors Google LLC, Sirius XM Radio Inc., and Pandora Media, LLC.

CORPORATE DISCLOSURE STATEMENT

The NRBNMLC is the noncommercial arm of the National Religious Broadcasters Music License Committee (NRBMLC). The NRBMLC is a standing committee of the National Religious Broadcasters (NRB), a trade association representing more than 1,300 radio and television stations, program producers, multimedia developers, and related organizations around the world. The NRB is a non-profit corporation with no parent corporation, and no publicly held company has a 10% or greater ownership interest in the NRB.

LIST OF RELATED PROCEEDINGS

U.S. Court of Appeals for the D.C. Circuit, No. 21-1243, consolidated with Nos. 21-1244 and 21-1245, *National Religious Broadcasters Noncommercial Music License Committee* v. *Copyright Royalty Board*, opinion issued July 28, 2023, en banc review denied September 27, 2023.

Copyright Royalty Board, Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies To Facilitate Those Performances (*Web V*), 19-CRB-0005-WR (2021–2025), opinion issued July 22, 2021, published in the Federal Register on October 27, 2021, at 86 Fed. Reg. 59,452.

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The D.C. Circuit's opinion affirming the Board is reported at 77 F.4th 949 (D.C. Cir. 2023) and reprinted at App.633a. The D.C. Circuit's order denying rehearing en banc is not reported but is available at 2023 WL 6319401 (D.C. Cir. Sept. 27, 2023) and reprinted at App.681a.

STATEMENT OF JURISDICTION

The D.C. Circuit had jurisdiction under 17 U.S.C. 803(d)(1), entered judgment on July 28, 2023, and denied rehearing en banc on September 27, 2023. On December 15, 2023, the Chief Justice extended the time to file this petition until January 25, 2024. On January 5, 2024, the Chief Justice further extended the time to file this petition until February 23, 2024. This Court has jurisdiction under 28 U.S.C. 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. Const. amend I.

The Religious Freedom Restoration Act of 1993 ("RFRA") provides that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," 42 U.S.C. 2000bb–1(a), unless "it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest," 42 U.S.C. 2000bb–1(b). "[T]he term 'exercise of religion' means religious exercise, as defined in section 2000cc–5 of this title." 42 U.S.C. 2000bb–2(4). "The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000cc–5(7).

The Administrative Procedure Act ("APA") tells reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. 706(2)(A) & (B).

17 U.S.C. 114(f) and other relevant statutes and regulations are set forth in the appendix.

INTRODUCTION

This Court's immediate review is required to correct constitutional and statutory errors committed by the Copyright Royalty Board in its 17 U.S.C. 114(f) rate-setting for webcasting sound recordings.

The D.C. Circuit deferred broadly to the Board's decision, affirming exponentially higher royalty rates for noncommercial religious webcasters than for secular National Public Radio (NPR) noncommercial webcasters. The result is a two-tier noncommercial rate structure with secular NPR stations at the top and religious stations on the bottom. Under the Board's system, NPR webcasters are able to reach a large audience at reasonable royalty rates paid by the federal government. But religious stations pay *18 times* the average NPR rate above a modest average of 218 listeners. This discriminatory treatment elevates secular content and suppresses religious speech online, putting religious stations at a severe disadvantage in the marketplace of ideas.

In these circumstances, RFRA and the First Amendment require that the government burden satisfy strict scrutiny. Yet the D.C. Circuit refused to apply that exacting standard, gave broad deference to the Board, affirmed this imbalanced rate structure, and made it effectively impossible for religious stations to obtain NPR-comparable rates in the future. Only this Court may correct its errors. It should do so now because religious webcasters are already being forced to reduce their listenership to avoid paying the artificially high royalty rates.

The D.C. Circuit's refusal to apply strict scrutiny under RFRA conflicts with this Court's precedent and rulings by the Seventh, Ninth, and Tenth Circuits.

And the lower court's free-exercise analysis, which relies—in part—on the Board treating some secular webcasters as poorly as religious webcasters, is incompatible with this Court's decision in *Tandon* v. *Newsom*, 593 U.S. 61 (2021) (per curiam), and rulings by the Second, Sixth, and Ninth Circuits. This Court's review is necessary to ensure that the D.C. Circuit and the Board take religious liberty and free speech seriously, not only here but in the myriad appeals the D.C. Circuit considers from federal agencies.

The D.C. Circuit also affirmed several Board errors of copyright and administrative law that benefit copyright owners and make it even harder for noncommercial religious webcasters to escape from disparate rates in future license periods. The lower court misread 17 U.S.C. 114(f)(4)'s exclusionary rule to bar more religious-broadcaster-proffered evidence from consideration than the statute contemplates, in conflict with a binding Copyright Office ruling. And the court affirmed the Board's imposition of a new *per se* requirement—applied arbitrarily and without warning or explanation—that parties supporting their rate proposals through so-called "benchmark" agreements must establish the comparability of those benchmarks through expert testimony rather than other forms of evidence it had previously accepted.

Finally, the court affirmed the Board's capricious inversion of the burden of proof, again in copyright owners' favor, to require the proponent of a proffered rate benchmark—rather than its challenger—to anticipate and quantify any proposed adjustments that a challenger may raise. This change, too, was made without warning or explanation, in violation of the Administrative Procedure Act.

More than 25 years after Congress established a webcasting statutory license, this Court has yet to weigh in on the Board's and D.C. Circuit's rate-setting decisions. Absent this Court's course correction, the Board is likely to continue to disregard RFRA and the First Amendment in its rate-setting determinations. The Board already adopted much higher rates for noncommercial religious webcasters than for secular NPR broadcasters in the prior license term, and there is no indication the Board will mend its ways in future rate-setting proceedings.

Further, no percolation of these issues among the circuits will occur, as the D.C. Circuit is the only court that reviews Board determinations. Thus, the Board's and the D.C. Circuit's rulings would benefit greatly from this Court's immediate review to assess their compliance with governing constitutional and statutory standards.

In sum, this case is an ideal vehicle for the Court to exercise supervision of Board rate-setting proceedings, and the time is ripe for that guidance. The Court should grant review.

STATEMENT OF THE CASE[1]

I. Regulatory background

Congress granted copyright owners certain exclusive rights in their works, including the right to make public performances of certain types of works. 17 U.S.C. 106. For sound recordings, Congress limited that right by (a) restricting it to certain digital audio transmissions (including webcasting) and (b) creating a statutory license for "noninteractive" transmissions—i.e., where listeners cannot select content. *Id.* 106(6), 112(e), 114(d). Congress ordered the Copyright Royalty Board to set royalty rates under this and a related statutory license—covering ephemeral recordings to facilitate those transmissions—every five years if parties are unable to negotiate agreed-upon rates. *Id.* 804(b)(3).

Under this regime, webcasters can make noninteractive digital audio transmissions and ephemeral recordings of copyrighted sound recordings if they provide notice and pay royalty rates set by the Board. 17 U.S.C. 112(e)(6)(A), 114(f)(3)(B). The Board must "establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. 114(f)(1)(B). These rates must also "distinguish among the different types of services," such as commercial versus noncommercial webcasters. *Ibid.* The Board may "consider the rates and terms for comparable types of audio transmission services and comparable circumstances under voluntary license agreements." *Id.* 114(f)(1)(B)(ii).

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[1] Record citations to sealed evidence are to the Joint Appendix filed below, cited as "D.C. Cir. J.A.__."

Despite the Board's willing-buyer-willing-seller mandate, noncommercial rates in early years of the statutory license were based on seller-proposed structures rather than actual noncommercial agreements. Determination of Reasonable Rates and Terms for Digital Performance of Sound Recordings and Ephemeral Recordings (*Web I)*, 67 Fed. Reg. 45240, 45258–59 (July 8, 2002); Digital Performance Right in Sound Recordings and Ephemeral Recordings (*Web II*), 72 Fed. Reg. 24084, 24097–98 (May 1, 2007). This resulted in royalty rates so high that noncommercial and other webcasters obtained congressional relief via Webcaster Settlement Act (WSA) legislation, which temporarily facilitated voluntary (nonprecedential) rate agreements. 17 U.S.C. 114(f)(4). This legislation enabled noncommercial religious and other webcasters to avoid paying the Board's higher rates from 1998 through 2015 because they reached negotiated agreements with SoundExchange, the record companies' representative and Board-designated collective to administer these statutory licenses. *E.g.*, Notification of Agreements Under the WSA of 2009, 74 Fed. Reg. 40614, 40620–26 (Aug. 12, 2009); 37 C.F.R. 380.2(a). SoundExchange reached these agreements with commercial webcasters and three groups of noncommercial webcasters—NPR stations; student-run stations, represented by College Broadcasters, Inc. (CBI); and religious webcasters represented by Petitioner NRBNMLC. *E.g.*, 74 Fed. Reg. at 40616–26.

In 2016-2020, after WSA-authorized agreements expired and SoundExchange refused to negotiate lower rates with religious noncommercial stations, religious webcasters were forced to pay—for the first time—much higher, Board-set royalty rates under a

structure that SoundExchange, the seller's representative, proposed. 37 C.F.R. 380.10(a)(2) (2016); Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (*Web IV*), 81 Fed. Reg. 26316, 26392–96 (May 2, 2016). Those rates included an annual minimum fee to webcast to approximately 218 average monthly listeners *plus commercial-level fees* to reach additional listeners. Yet the Board adopted much lower rates and terms for certain other noncommercial webcasters, which Sound-Exchange and each buyer representative—NPR and CBI—jointly proposed. 37 C.F.R. pt. 380, subpts. C–D (2016); *Web IV*, 81 Fed. Reg. at 26405. For the first time, the Board required religious broadcasters to pay far more than NPR stations to communicate with listeners above a modest average audience of 218—the size of a small church or college lecture hall.

II. The Board's 2021–2025 determination

For 2021–2025, the Board again adopted statutory royalty rates for NPR webcasters that had been jointly proposed by NPR and SoundExchange. D.C. Cir. J.A.1413. Petitioner proposed two rate alternatives—modeled after the NPR rates—to ensure larger religious webcasters could communicate with listeners on equal footing with secular NPR stations. D.C. Cir. J.A.1366–70. The NPR benchmark rates fell squarely within the Board's established test for assessing comparability with the target market: they were negotiated by similar noncommercial buyers and the same record company sellers, plus covered the same statutory rights and license term—all reflected in an arms-length agreement. *E.g.*, *Web I*, 67 Fed. Reg. at 45245 (applying same-buyer-seller-rights test

for assessing benchmark comparability); Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings (*Web III Remand*), 79 Fed. Reg. 23102, 23111 (Apr. 25, 2014) (same). Indeed, among noncommercial webcasters, NPR and religious webcasters are the *only* significant noncommercial groups with online audiences above the 218-average-listener threshold. D.C. Cir. J.A.1363–64 & n.312, 1846–47.

Yet the Board rejected Petitioner's proposal and instead adopted SoundExchange's suggested $1,000 minimum fee per channel for 159,140 aggregate tuning hours ("ATH")/month (where one ATH generally is one programming hour transmitted to one listener, 37 C.F.R. 380.7) *plus commercial-level rates for additional webcasting*—currently $0.0025/performance, where a performance generally is one sound recording transmitted to one listener, App.499a. So religious webcasters pay commercial-level rates above an average of only 218 listeners. App.500a.

By contrast, the average NPR per-performance fee is a tiny fraction of what religious broadcasters pay above this 218-listener threshold. On behalf of NPR, the federal government through the Corporation for Public Broadcasting (CPB) pays $800,000 annually for hundreds of NPR stations to use one massive pool of "Music ATH"—i.e., ATH "of website Performances of sound recordings"—and that pool increases by 10,000,000 Music ATH each year. 37 C.F.R. 380.30, 380.31. The 2024 allotment is 390,000,000 Music ATH, an average price of

$0.00205/Music ATH, or $0.000137/performance.[2] 37 C.F.R. 380.31(a)(4).

So the Board compelled religious broadcasters to pay above-threshold fees that are *over 18 times* higher than the fees the Board set for secular NPR-affiliated broadcasters.[3] In real terms, a noncommercial Christian station webcasting 15 songs per hour to an average audience of only 1,000 people must pay over $257,000 annually.[4] By contrast, the average annual fee for secular NPR stations to reach that same audience is less than $18,000[5]—a 93% discount. This rate disparity widens each year of the license term, as NPR stations' per-Music-ATH rates decrease while religious broadcasters' rates increase with inflation. Compare 37 C.F.R. 380.31(a) (constant fee for annual increases in NPR stations' webcasting), with *id.* 380.10(c) (noncommercial religious broadcasters pay annual inflation increases). What's more, NPR-affiliated webcasters do not even pay this lower royalty fee—the federal government pays it for them through CPB. 37 C.F.R. 380.32(a); D.C. Cir. J.A.926.

The rate disparity between secular NPR stations and religious webcasters was not the only problem in these proceedings. The Board also interpreted 17

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[2] $800,000/390,000,000 Music ATH equals $0.00205/Music ATH. Using SoundExchange's ATH-to-performance conversion factor of 15 performances/Music ATH, $0.00205/Music ATH equals $0.000137/performance ($0.00205/15). D.C. Cir. J.A.1844 n.31.

[3] 18.25 = ($0.0025/$0.000137).

[4] $257,887 = $1,000 + [$0.0025/performance * 15 performances/ hour * 24 hours/day * 365 days/year * (1,000-218) listeners].

[5] $17,958 = $0.00205/Music ATH * 24 ATH/day * 365 days/ year * 1,000 listeners.

U.S.C. 114(f)(4)'s bar on considering WSA agreements to prohibit a mere analysis of NPR stations' non-WSA rates, in conflict with a binding Register of Copyrights ruling that only "WSA agreements themselves" are barred. Mem. Op. on Novel Material Questions of Law at 3-4, 11, Docket No. 14-CRB-0001-WR (Sept. 18, 2015), https://bit.ly/49eQ1xF (Register Op.). And the Board imposed a higher burden of proof on parties seeking to modify prior rates (i.e., buyers) than on parties seeking to perpetuate them (i.e., sellers), despite Congress instructing the Board to set rates anew each five-year term. Compare D.C. Cir. J.A. 1371–80, with D.C. Cir. J.A.1380–81, 1391; 17 U.S.C. 114(f)(1)(B) (the Board "shall establish" willing-buyer-willing-seller rates for each "5-year period").

Finally, the Board departed from several long-standing practices without explanation. The Board imposed a new *per se* requirement that parties present expert testimony that a proffered rate benchmark is comparable to the target market. App.520a–22a. And the Board inverted the burden of proof by requiring the proponent of a rate benchmark to predict and quantify any adjustments to that benchmark a challenger might raise, even though the Board had long required benchmark challengers to bear that burden. App.521a–22a, 535a.

III. The D.C. Circuit's ruling

Religious broadcasters appealed to the D.C. Circuit, which has exclusive jurisdiction over the Board's rulings. 17 U.S.C. 803(d)(1). Petitioner NRBNMLC challenged the Board's noncommercial rates under the Religious Freedom Restoration Act (RFRA), the First Amendment, the Copyright Act, and the Administrative Procedure Act (APA).

As to RFRA and the Free Exercise Clause, the D.C. Circuit found no substantial burden on religion imposed by the disparate rates. Its rationale was that, even though rates are simple computations that can be calculated and understood by anyone, the Board made "no record finding" that religious broadcasters paid a "higher … rate" than secular "NPR" stations. App.668a. "Without making that initial showing of unfavorable treatment of religious webcasters," the court said, Petitioner could not "establish a violation of the RFRA or the First Amendment." App.669a. The effect of the Board's failure to make the computation was to insulate its ruling from judicial review.

The D.C. Circuit also said it didn't matter "if the above-threshold noncommercial webcasters [paying commercial-level, above-threshold rates] are almost exclusively religious" because the Board's "overall rate structure … applies to all noncommercial webcasters." App.669a (quotation omitted). In other words, formally treating some secular non-NPR stations as poorly as religious broadcasters forestalled any RFRA or free exercise problem. The D.C. Circuit did not discuss RFRA's requirement that the government satisfy strict scrutiny even when a substantial burden on the free exercise of religion "results from a rule of general applicability." 42 U.S.C. 2000bb–1(a). Nor did it address this Court's holding that it is no answer to a free exercise violation that the government "treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue." *Tandon*, 593 U.S. at 62 (citation omitted). And the court did not address the free-speech argument the religious broadcasters raised. NRBNMLC Final Br. 52–55 (D.C. Cir. Jan. 12, 2023).

As to the Copyright Act, the D.C. Circuit affirmed the Board's ruling "that it was statutorily barred from considering … an internal SoundExchange document" that valued NPR rates applicable in a non-WSA period because "the rate structure came from an old settlement agreement negotiated" under the 2009 WSA. App.662a. The statute on which the court relied—17 U.S.C. 114(f)(4)—bars the admissibility of WSA agreements in future rate proceedings. But the SoundExchange document was *not* a WSA agreement, only an internal analysis of rates adopted for a non-WSA term. The court failed to explain how the statute barred such a document.

The D.C. Circuit also affirmed the Board's imposition of a lopsided burden of proof on parties seeking to change prior rates rather than to perpetuate them. App.647a–48a; accord App.656a, 665a n.6. The court did so even though the Copyright Act requires the Board to "determine" rates anew every five years that "most clearly represent" willing-buyer-willing-seller rates for that period. 17 U.S.C. 114(f)(1)(A)–(B).

Finally, the D.C. Circuit affirmed the Board's new *per se* rule that proposed benchmark rates must now be supported by expert evidence of comparability. App.659a–60a. And the court affirmed the Board's unexplained departure from precedent that (1) requires the challenger of a benchmark to quantify any requested adjustments to that benchmark and (2) accepts the benchmark without adjustments if the challenger failed to do so. App.660a–61a & n.5. The court blessed the Board's new rule requiring the benchmark's proponent to anticipate and quantify any adjustments a challenger may raise. *Ibid.*

REASONS FOR GRANTING THE WRIT

The Court should grant the petition and review the D.C. Circuit's and Board's actions, which effectively create a two-tier noncommercial rate structure that favors secular speech over religious expression. In the top tier, the Board allows secular NPR-affiliated stations to reach a large internet audience at modest royalty rates paid by the federal government. On the bottom tier, the Board forces religious stations to pay exponentially higher royalty fees to reach more than 218 average monthly listeners—with no public subsidy.

Applying a highly deferential standard of review, the D.C. Circuit affirmed the Board *in toto*. The result is government suppression of religious speech online, skewing "the modern public square" in favor of secular content in violation of RFRA and the First Amendment. *Packingham* v. *North Carolina*, 582 U.S. 98, 107 (2017).

What's more, the lower court approved the Board's misconstruction of a key evidentiary bar in the Copyright Act, in defiance of a binding Register of Copyrights decision. And the court of appeals affirmed the Board's arbitrary and unexplained decision to change the rate-setting rules midstream in violation of the APA. This Court's review is needed to prevent religious voices from being priced out of the marketplace and to ensure the Board's decisions receive the same level of judicial scrutiny given other agencies.

I. The Court should review the D.C. Circuit's refusal to apply strict scrutiny to the Board's discriminatory rates under RFRA or the First Amendment.

A. The D.C. Circuit's refusal to apply strict scrutiny under RFRA conflicts with this Court's precedent and rulings by the Seventh, Ninth, and Tenth Circuits.

The D.C. Circuit deemed the Board's "overall rate structure" generally applicable because it nominally "applies to *all* noncommercial webcasters." App.669a (emphasis added). So the court refused to engage in strict scrutiny under RFRA and applied highly deferential review. *E.g.*, App.658a–59a.

But RFRA demands strict scrutiny "*even if* the burden [on religious exercise] results from a rule of general applicability." 42 U.S.C. 2000bb-1(a) (emphasis added). And the D.C. Circuit ignored the substantial burden imposed by forcing religious stations to pay more than NPR stations. This is just the latest instance in which the D.C. Circuit has refused to take RFRA seriously. *E.g.*, *Archdiocese of Wash.* v. *Wash. Metro. Area Transit Auth.*, 897 F.3d 314 (D.C. Cir. 2018); *Priests for Life* v. *U.S. Dep't of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014). The Court's review is imperative to ensure the enhanced judicial scrutiny that Congress intended.

Under RFRA, when a federal agency like the Board "substantially burden[s]" religious exercise, the agency must show that applying that burden to believers like religious noncommercial webcasters furthers "a compelling governmental interest" and is "the least restrictive means of furthering that … interest." 42 U.S.C. 2000bb-1(b). This heightened

standard applies to "*all* Federal law, and the implementation of that law," regulatory or otherwise, 42 U.S.C. 2000bb-3(a) (emphasis added), and to every "department, agency, instrumentality, and official … of the United States," 42 U.S.C. 2000bb-2(1).

Here, the Board denied the same royalty rates enjoyed by secular NPR stations to religious broadcasters—which exist to communicate faith-based messages—and imposed rates that are over 18 times higher when their audience surpasses a modest 218-listener threshold. That substantially burdens religious stations' religious exercise by forcing them to suppress their faith-based message or pay far more to share it. Under RFRA, that triggers strict scrutiny. Cf. *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 691 (2014) (significant monetary disadvantage imposed a substantial burden).

To be clear, religious webcasters do not claim that paying royalty fees alone burdens their exercise of religion. The substantial burden comes from the government's discriminatory rate structure, which suppresses faith-based stations' religious speech through exponentially higher royalty costs and amplifies NPR stations' secular expression through lower costs and subsidies. The Board is free to "make an exception" from its noncommercial-webcasting rates for secular NPR stations, but if it does, RFRA requires the Board to make an exception for religious stations, too. *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006).

"RFRA provides very broad protection for religious liberty," *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2383 (2020) (cleaned up). It "operates as a kind of

super statute, displacing the normal operation of other federal laws." *Bostock* v. *Clayton Cnty.*, 590 U.S. 644, 682 (2020). So this Court accords great solicitude to believers' requests for religious exemptions from general agency rules under RFRA. *E.g.*, *Hobby Lobby*, 573 U.S. at 735; *Zubik* v. *Burwell,* 578 U.S. 403, 408 (2016) (per curiam); *Wheaton Coll.* v. *Burwell,* 573 U.S. 958 (2014); *Little Sisters of the Poor Home for the Aged, Colo.* v. *Sebelius*, 571 U.S. 1171 (2014).

Other circuits follow suit and conduct a particularized exemption inquiry under RFRA. For example, the Seventh Circuit has explained that "RFRA creates a broad statutory right to case-specific exemptions from laws that substantially burden religious exercise …, *unless* the government can satisfy the compelling-interest test." *Korte* v. *Sebelius*, 735 F.3d 654, 671 (7th Cir. 2013). The Seventh Circuit holds that "once … RFRA claimant[s] [like religious broadcasters] make[ ] a prima facie case that the application of a law or regulation substantially burdens [their] religious practice, the burden shifts to the government to justify the burden under strict scrutiny." *Id.* at 673.

The Ninth Circuit also says that "RFRA gives each person a statutory right not to have his sincere religious exercise substantially burdened by the government, save for cases expressly denominated exceptional." *United States* v. *Christie*, 825 F.3d 1048, 1055 (9th Cir. 2016) (cleaned up). And that means "RFRA allows the federal government to" apply its default rules to religious believers "only if [it] meets a two-part [compelling-interest and least-restrictive-means] test." *Id.* at 1055.

Similarly, the Tenth Circuit recognizes that "[o]nce a defendant shows … applying a statute to him will substantially burden his religion, the government must justify the burden by establishing a sufficiently compelling interest and showing that it could not accommodate religion more without serving that interest less." *United States* v. *Friday*, 525 F.3d 938, 946 (10th Cir. 2008).

So if Board decisions were subject to review outside the D.C. Circuit, the Seventh, Ninth, and Tenth Circuits would require the Board's 18x rate disparity for religious webcasters to meet RFRA's "exceptionally demanding" test. *Hobby Lobby*, 573 U.S. at 728. The Board's rates are highly unlikely to meet that standard. In fact, the government effectively conceded the point below by failing to argue that applying exponentially higher above-threshold rates to religious webcasters is the least restrictive means of achieving a compelling interest. Yet the D.C. Circuit applied deferential review anyway and effectively gave the Board's disparate rates a free pass. And it did so even though laws that "operate[ ] so as to make the practice of … religious beliefs more expensive in the context of business activities impose[ ] a burden on the exercise of religion." *Id.* at 710.

The D.C. Circuit said it could not apply strict scrutiny because the Board made "no record finding" of a rate disparity between religious stations and NPR stations. App.668a–69a. In other words, the Board insulated itself from judicial review by not calculating a figure that showed the discrimination against religious webcasters vis-à-vis secular NPR webcasters. The D.C. Circuit was incorrect for four reasons.

First, where "First Amendment issues" are at stake, "an appellate court has an obligation to make an independent examination of the whole record." *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (quoting *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 284–86 (1964)); accord *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 567 (1995) (court had "a constitutional duty to conduct an independent examination of the record as a whole, without deference"). Had the lower court conducted such an independent review here, it would have readily discerned the fee disparity simply by comparing the Board's NPR and non-NPR rates, published in federal regulations. And religious stations demonstrated the rate disparity using the similar 2016-2020 rate structures in their briefing below. NRBNMLC Final Opening Br. 9–10. So the D.C. Circuit did not need to engage in complex analysis.

The regulations show this disparity increases over time because NPR stations' per-Music-ATH rates decrease annually, while religious broadcasters' rates increase with inflation. Compare 37 C.F.R. 380.31(a), with *id.* 380.10(c). And the disparate burden on religious expression is only heightened by the government's complete subsidization of NPR stations' fees, removing even their modest fee burden. 37 C.F.R. 380.32(a); D.C. Cir. J.A.926. This Court's oversight is imperative to ensure that the D.C. Circuit takes its independent-review obligation under RFRA seriously instead of blindly deferring to agency discretion. Only this Court can correct the D.C. Circuit's legal errors, which harm hundreds of religious broadcasters nationwide and also the public by skewing "the modern public square" in favor of secular messaging. *Packingham*, 582 U.S. at 107.

Second, the government conceded the rate disparity in its brief below, admitting that religious broadcasters pay "higher" rates than those "agreed to by the settling noncommercial services," i.e., secular NPR stations. Final Br. for Appellees 85. The government cannot seriously dispute that disparity now. In the D.C. Circuit, the government's *only* excuse for disfavoring religious webcasters was that the NPR rates are a "settlement" and thus distinct from the Board's statutory rates. *E.g.*, *id.* at 6, 19. That is inaccurate and irrelevant. Though the NPR rates were proposed as statutory rates by certain parties, the Board adopted them as statutory rates binding nonparties. App.5a–6a; accord D.C. Cir. J.A.1105. So the published NPR rates are not private settlement rates but public statutory rates. And the Board cannot, "directly or indirectly," give "[p]rivate biases" against noncommercial religious broadcasters "effect." *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984).

Third, the Board had no reason to find a rate disparity below, so that absence is irrelevant. The default royalty rates for noncommercial webcasters were set—and susceptible of comparison with NPR rates—only *after* the Board issued the final determination at issue here. So Petitioner did not know, and could not contest, the current rate disparity before the Board, though Petitioner did note a wide disparity in the Board's 2016–2020 rates for secular NPR versus religious webcasters. NRBNMLC's Corrected Proposed Findings of Fact and Conclusions of Law, Docket No. 19-CRB-0005-WR (2021–2025), Doc. 22819, Part II.D (Oct. 15, 2020).

Last, a RFRA or Free Exercise Clause violation does not depend on an official "finding" of unequal treatment or substantial burden on religion. App.668a. Government bureaucrats regularly deny both. But that has never stopped the Court from looking beyond "facial discrimination" to protect the free exercise of religion. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 534 (1993).

Take *Lukumi*, where the City of Hialeah claimed ordinances banning animal killings were "[f]acial[ly] neutral" and thus constitutional. *Ibid.* The Court disagreed because many "secular killings" were, in fact, exempt from the ban and "religio[us] [killings] alone [bore] the burden of the ordinances." *Id.* at 544. Yet despite *Lukumi*, the D.C. Circuit perpetuated the Board's error, saying it makes no difference to the court under RFRA or the Free Exercise Clause "if the above-threshold noncommercial webcasters [paying commercial rates] are almost exclusively religious." App.669a (quotation omitted).

Or consider *Hobby Lobby*, where federal agencies said the contraception mandate promulgated under the Affordable Care Act did not burden objectors' religious exercise. *Hobby Lobby*, 573 U.S. at 723. This Court rejected that claim because the regulations had "substantial economic consequences" for people of faith seeking "to conduct business in accordance with their religious beliefs." *Id.* at 686 (emphasis omitted). The same is true here, as federal regulations show, because the Board's rates force religious broadcasters to pay exponentially higher fees—a ratio of 18:1 that worsens every year— to reach a moderate audience than the fees secular NPR stations pay.

Federal agencies "wield[ ] vast power and touch[ ] almost every aspect of daily life." *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). And the D.C. Circuit reviews many of their decisions. This Court's guidance is imperative to correct the D.C. Circuit's legal errors and ensure that agencies' substantial burdens on religion receive the enhanced judicial scrutiny that RFRA demands.

B. The Court should grant review to correct the D.C. Circuit's disregard of *Tandon* and resolve the conflict between the decision below and rulings by the Second, Sixth, and Ninth Circuits.

Review is also warranted to correct the D.C. Circuit's failure to apply the Free Exercise Clause standard this court articulated in *Tandon*.

Under the First Amendment, government may not "prohibit the free exercise" of religion. U.S. Const. amend. I. This Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), construed this language to stop government from "burden[ing] … sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'" *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022) (quoting *Smith*, 494 U.S. at 881). For decades, this Court addressed *Smith*'s standard in only one other case, *Lukumi*, where the government's departure from neutrality and general applicability was obvious.

As a result, "confusion and disagreement" reigned in the lower courts as to "how [to] apply [the] general-applicability test when a government edict falls in between a regulation that was obviously general (as

in *Smith*) and one that was obviously not (as in *Lukumi*)." *Pleasant View Baptist Church* v. *Beshear*, 78 F.4th 286, 305 (6th Cir. 2023) (Murphy, J., concurring in the judgment) (quoting *Calvary Chapel Dayton Valley* v. *Sisolak*, 140 S. Ct. 2603, 2611 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief)).

This Court attempted to resolve that confusion in *Tandon*. There, California imposed restrictions to combat the COVID-19 pandemic. But these restrictions treated "at-home religious exercise" worse than "some comparable secular activities," such as "hair salons, retail stores, [and] movie theaters." *Id.* at 63. That was true even though those "comparable secular activities" posed an equal risk to California's stated goals as "at-home religious exercise." *Ibid.* This Court clarified that "government regulations are not neutral and generally applicable … whenever they treat *any* comparable secular activity more favorably than religious exercise." *Ibid.*

"In effect … *Tandon* adopted a 'most-favored nation status' for religious exercise: the government must treat religious conduct as favorably as the least-burdened comparable secular conduct." *Pleasant View Baptist Church*, 78 F.4th at 303–04 (Murphy, J., concurring in the judgment) (citing *Calvary Chapel Dayton Valley*, 140 S. Ct. at 2611 (Kavanaugh, J., dissenting)). It provided "clear guidance on how to decide whether a regulation is neutral and generally applicable." *Id.* at 303. This Court later confirmed *Tandon*'s rule, explaining that a law triggers strict scrutiny "if it 'prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way.'" *Kennedy*,

597 U.S. at 526 (quoting *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 534 (2021)).

Under *Tandon*'s "clear guidance," *Pleasant View Baptist Church*, 78 F.4th at 303 (Murphy, J., concurring in the judgment), the Board's discriminatory rates fail constitutional muster. The Board imposed an above-threshold royalty rate on religious broadcasters that is over 18 times higher than the rate the Board applies to secular NPR-affiliated broadcasters. The government even conceded in briefing that religious broadcasters pay "higher" rates than those "agreed to by the settling noncommercial services," i.e., secular NPR stations. Final Br. for Appellees 85. So the Board does not treat religious broadcasters as favorably as secular NPR stations even though both noncommercial groups are engaged in the same activity—webcasting programming to their listeners.

Other factors exacerbate the discrimination. The disparity between NPR stations' and religious stations' rates worsens over time because NPR stations' per-Music-ATH rates decrease, while religious broadcasters' rates increase with inflation. Compare 37 C.F.R. 380.31(a), with *id.* 380.10(c). And NPR stations do not even pay the modest royalty fees the Board established—the federal government foots the bill through CPB. 37 C.F.R. 380.32(a); D.C. Cir. J.A.926–27. (Whether this favorable treatment is itself a Free Exercise problem is an open question. See *Carson* v. *Makin*, 596 U.S. 767, 778 (2022) (noting that this Court has "repeatedly held" that government "violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits").)

The Board's disparate rates trigger strict scrutiny, as religious webcasters do not enjoy the same privileges as NPR stations who are the least-burdened comparable secular webcasters. In other words, the Board's rates "treat [NPR stations'] comparable secular activity more favorably than [faith-based stations'] religious exercise." *Tandon*, 593 U.S. at 62. So "[t]his case falls outside *Smith*" and strict scrutiny applies. *Fulton*, 593 U.S. at 533.

The D.C. Circuit turned this requirement on its head, reasoning that the Board's "overall rate structure … applies to *all* noncommercial webcasters," App.669a (emphasis added), i.e., not just religious stations but secular stations, too. But that's incorrect. The Board adopted lower rates for both secular NPR stations and secular student-run stations. App.5a–6a. Beyond that, "[i]t is no answer that [the government] treats some comparable secular … activities as poorly as … religious exercise." *Tandon*, 593 U.S. at 62. And "categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Lukumi*, 508 U.S. at 542. Here, the Board approved far lower royalty rates for hundreds of NPR-affiliated stations and exponentially higher above-threshold rates for religious stations. When the government treats "*any* comparable secular activity more favorably than religious exercise," it "trigger[s] strict scrutiny." *Tandon*, 593 U.S. at 62.

By applying deferential review instead of strict scrutiny, the court of appeals contravened this Court's precedents and created a conflict with the rulings of at least three other circuits. These courts recognize that "it does not suffice for [officials] to point out that, as compared to [religious entities], *some* secular

[organizations] are subject to similarly severe or even more severe" treatment. *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 592 U.S. 14, 29 (2020) (Kavanaugh, J., concurring).

In *Antonyuk* v. *Chiumento*, 89 F.4th 271, 349–50 (2d Cir. 2023), the Second Circuit addressed a challenge to a New York law that banned carrying firearms in places of worship but not in shopping malls. Shopping malls were also potentially subject to "shootings," "a site for constitutionally protected free speech," and locations where "vulnerable persons and children may gather." *Ibid.* So, the court said, "[t]hat [secular] example alone would perhaps be enough to subject the place of worship provision to strict scrutiny under *Tandon*." *Id.* at 350. Yet here the D.C. Circuit wholly disregarded the NPR exception.

Or consider *Resurrection School* v. *Hertel*, 35 F.4th 524, 527 (6th Cir. 2022) (en banc), in which the en banc Sixth Circuit resolved a private school's challenge to Michigan's mask mandate. The court deemed the case moot but recognized, in contemplating "future masking order[s]," that free-exercise law is substantially different after this Court's decision in *Tandon*. *Id.* at 529. Now, the court said, "'government regulations' are subject to strict scrutiny … 'whenever they treat *any* comparable secular activity more favorably than religious exercise.'" *Ibid.* (quoting *Tandon*, 593 U.S. at 62). So *any* favored secular "exceptions" to the general rule—like NPR's—are key to the free-exercise analysis. *Ibid.*; accord *Clark* v. *Governor of N.J.*, 53 F.4th 769, 780 (3d Cir. 2022). But again, the D.C. Circuit ignored the exception for secular NPR stations.

The en banc Ninth Circuit held much the same in *Fellowship of Christian Athletes* v. *San Jose Unified School District Board of Education*, 82 F.4th 664, 673–75 (9th Cir. 2023) (en banc), which involved a public school's derecognition of a Christian student club. *Tandon*, the Ninth Circuit said, "clearly rejected … a 'targeting' requirement for demonstrating a Free Exercise violation." *Id.* at 686. "Instead, favoring comparable secular activity is sufficient" to render a law not generally applicable and subject to strict scrutiny. *Ibid.* "[R]equiring a showing of more," in the Ninth Circuit's view, is "clearly irreconcilable with intervening Supreme Court authority." *Ibid.*

Yet "requiring more" is exactly what the lower court did. The D.C. Circuit rejected *Tandon*'s rule that "[o]nce you have even a single exception that cuts against the justification of a regulation, religious exercise must get that same treatment." *Canaan Christian Church* v. *Montgomery Cnty.*, 29 F.4th 182, 205 (4th Cir. 2022) (Richardson, J., concurring in the judgment). Only this Court may resolve the conflict and course-correct the lower court, which alone considers appeals from Board determinations.

C. The D.C. Circuit's approval of rates targeting the most effective noncommercial religious webcasters violates the Free Speech Clause.

This Court also should grant review to correct the D.C. Circuit's refusal to apply strict scrutiny to rates that target some, but not all, noncommercial online speech. That ruling violates this Court's precedent construing the Free Speech Clause, including *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983).

Under the First Amendment, "the Free Exercise Clause protects religious exercises, whether communicative or not, [and] the Free Speech Clause provides overlapping protection for expressive religious activities." *Kennedy*, 597 U.S. at 523. Religious stations exist to broadcast faith-based content. So the First Amendment "doubly protects" their "religious speech." *Ibid.* But that is far from the only free-speech issue with the Board's approved rates.

"Regulations that discriminate … among different speakers within a single medium[ ] often present serious First Amendment concerns." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 659 (1994). That is especially true when a regulation "favor[s] some speakers over others" and that "preference reflects a content preference." *Reed* v. *Town of Gilbert*, 576 U.S. 155, 170 (2015) (quotations omitted). Here, the Board's approved rates bolster NPR stations' secular speech, allowing them to reach a large audience at little-to-no royalty cost, while suppressing faith-based stations' religious speech by charging them exponentially higher rates to reach more than a minimal audience (i.e., over 218 average listeners). So the Board's rates promote secular speech and depress religious speech online, triggering "strict scrutiny." *Ibid.* (quotation omitted).

Further, the Free Speech Clause bars government from imposing differential fees targeting a handful of larger speech-producing entities. That was this Court's holding in *Minneapolis Star*, which invalidated an ink-and-paper tax on a small group of high-volume newspapers. 460 U.S. at 590–91. The Board's rates similarly target a subgroup of religious webcasters who have more than a minimal audience, i.e., those most effective in spreading their faith-

based message. Cf. *id.* at 591 ("Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers.").

While this case involves royalty rates, that is no impediment. The Court has applied *Minneapolis Star*'s free-speech guidance in numerous contexts, ranging from must-carry provisions for cable operators, *Turner*, 512 U.S. at 659–61, to laws barring mass media from printing sexual assault victims' names, *The Florida Star* v. *B.J.F.*, 491 U.S. 524, 540–41 (1989). Accord *Pitt News* v. *Pappert*, 379 F.3d 96, 110–12 (3d Cir. 2004); *Time Warner Cable, Inc.* v. *Hudson*, 667 F.3d 630, 638–40 (5th Cir. 2012). So the principle remains that the Board's "differential treatment" of secular and religious noncommercial webcasters "suggests that the goal of the regulation is not unrelated to suppression of expression." *Minneapolis Star*, 460 U.S. at 585. For when the Board's default noncommercial webcasting above-threshold rates affect only "a narrowly defined [and almost exclusively religious] group," the rates "resemble more a penalty for a few of the largest [religious] webcasters" than a neutral fee. *Id.* at 592.

The D.C. Circuit did not even acknowledge the disparate targeting by the Board's rate structure of some, but not all, of the most effective noncommercial online speakers by making it far more expensive for successful religious speakers to communicate—much less subject that structure to strict scrutiny. The lower court's decision thus violates this Court's Free Speech Clause jurisprudence prohibiting government targeting of speaker subgroups. Absent review by this Court, the Board's unconstitutional rate structure is likely to continue in perpetuity.

II. The Court should grant review to correct the D.C. Circuit's misconstruction of 17 U.S.C. 114(f)(4)'s exclusionary rule, which conflicts with Copyright Office precedent.

Review is also warranted to correct the D.C. Circuit's misreading of 17 U.S.C. 114(f)(4)(C) to preclude consideration of a rate analysis outside that statute's narrow exclusionary scope. Indeed, the court's statutory analysis is so deferential to the Board that it is practically inscrutable. More is required from Article III courts reviewing decisions by "hundreds of federal agencies poking into every nook and cranny of daily life." *City of Arlington* v. *FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

Section 114(f)(4)C) renders inadmissible agreements negotiated under various WSAs that were in force, at the latest, only *through 2015*. 17 U.S.C. 114(f)(4)(A), (C)-(D); Webcaster Settlement Act of 2008, Pub. L. No. 110-435, 122 Stat. 4974; Webcaster Settlement Act of 2009, Pub. L. No. 111-36, 123 Stat. 1926; Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780. In addition, the Register of Copyrights—in an opinion that binds the Board, 17 U.S.C. 802(f)(1)(B)(i)—interpreted 17 U.S.C. 14(f)(4)(C) as barring only the consideration of "WSA agreements themselves," Reg. Op. 3–4. According to the Register, the Board *may* consider the "general effect on the marketplace or particular negotiations" of WSA agreements, as well as non-WSA agreements even if "copied verbatim from," "substantively identical to," or "influenced by" WSA agreements. Reg. Op. 3–4, 11, 14. In other words, only pre-2016 agreements themselves are inadmissible, not analyses of their effects.

Yet the Board invoked section 114(f)(4)'s evidentiary bar to exclude not a WSA agreement but a SoundExchange-described analysis of NPR royalty rates for 2016-2020—after all WSA agreements had expired. D.C. Cir. J.A.1569; accord D.C. Cir. J.A.1376–77, 1568–70, 1616. That analysis reflected SoundExchange's attempt to place a dollar figure on the value of the various fees and other benefits reflected in 2016–2025 NPR rates—not rates in force during any WSA period. D.C. Cir. J.A.1569. And the non-WSA nature of SoundExchange's document was confirmed by the document's own markings stating its purpose. D.C. J.A.1616.

This rate analysis was key support for the religious broadcasters' position. App.663a. Despite the Register's narrow construction of section 114(f)(4), the Board applied the Copyright Act's evidentiary bar in expansive terms, refusing to consider SoundExchange's rate analysis for NPR stations because it used expired WSA rates to value *non-WSA rates* for the 2016-2020 term. D.C. Cir. J.A.1376–77.

The D.C. Circuit affirmed, holding that "the Board was not required to accept [the NRBNMLC's] inference that the rates were actually used" in valuing "non-WSA" NPR rates. App.663a. But no inference is needed to reach that conclusion—SoundExchange itself characterized the analysis as valuing non-WSA NPR rates, and the document's own markings reinforce that conclusion. D.C. Cir. J.A.1568–70, 1616. This Court should grant review to correct the Board's and lower court's misconstruction of 17 U.S.C. 114(f)(4), in conflict with the Register's binding interpretation. 17 U.S.C. 802(f)(1)(B)(i).

III. The D.C. Circuit's affirmance of the Board's arbitrary and unexplained departures from precedent on the burden of proof and expert testimony violates the APA.

Finally, review is warranted to correct the Board's arbitrary and unexplained departures from its precedent in violation of the APA. Under that statute, courts "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). Agency action is arbitrary and capricious when it reflects "an unexplained inconsistency" or "change from [prior] agency practice." *Encino Motorcars, LLC* v. *Navarro*, 579 U.S. 211, 222 (2016) (cleaned up). While "[a]gencies are free to change their existing policies," they must provide "a reasoned explanation for the change" and "display awareness [they are] changing position." *Id.* at 221 (cleaned up). Agencies cannot "depart from a prior policy *sub silentio*." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

The D.C. Circuit blessed two such arbitrary and unexplained administrative changes: (1) a new *per se* requirement of expert testimony to demonstrate a proffered rate benchmark's comparability and (2) the burden of proof regarding adjustments to such benchmarks. Review is warranted to correct these APA violations and safeguard rate-setting participants against the Board changing its rules midstream for no good reason, in ways that favor copyright holders and disfavor religious webcasters.

A. The Court should grant review to correct the lower court's APA violation in allowing the Board to impose an unexplained new expert-testimony requirement midstream.

The Board and its predecessor, the Copyright Arbitration Royalty Panel (CARP), long held that benchmark agreements involving comparable rights to those valued in a rate-setting proceeding are the best evidence of willing-buyer-willing-seller rates. *E.g.*, Report of the CARP at 38–39, 43, Docket No. 2000-9 CARP DTRA 1&2 (Feb. 20, 2002), https://bit.ly/47TLmQM (CARP Report); *Web II*, 72 Fed. Reg. at 24091–92, 24095. The Board's comparability test assesses whether a proposed benchmark involves similar buyers, sellers, and statutory rights as those involved in the current rate-setting proceeding.

For instance, where "the buyers are DMCA [Digital Millennium Copyright Act]-compliant services, the sellers are record companies, and the product sold consists of blanket licenses for each record company's repertory of sound recordings," the CARP said that "the most reliable benchmark rate would be established through license agreements negotiated between these same parties for the rights described."[6] CARP Report at 24, 44. The rates agreed to by SoundExchange and NPR—which the Board adopted as statutory rates—easily satisfy this

[6] Accord, *e.g.*, Determination of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio & "Preexisting" Subscription Services, 83 Fed. Reg. 65210, 65214 (Dec. 19, 2018); *Web III Remand*, 79 Fed. Reg. at 23111; *Web I*, 67 Fed. Reg. at 45245.

comparability test vis-a-vis noncommercial webcasting rates, as they were agreed to by similar noncommercial webcasters and identical record company sellers, and they involve the same statutory rights. App.5a–6a.

Even though the buyers, sellers, and licensed rights are plain from the face of the proposed NPR rate agreement, the Board refused to take that benchmark agreement at face value. Instead, it invented a new and previously unannounced requirement that parties offer expert testimony to show a benchmark's comparability. App.520a–22a. That arbitrary decision contravenes robust prior Board precedent, which accepted similar benchmarks without requiring expert testimony. Just one example is the Board's previous acceptance of Sound Exchange's own settlement with a noncommercial entity as "persuasive evidence that SoundExchange's proposal satisfies the willing buyer/willing seller standard" without discussing any expert testimony regarding comparability. *Web III Remand*, 79 Fed. Reg. at 23111, 23120, 23123; accord *Web I*, 67 Fed. Reg. 45252; *Web IV*, 81 Fed. Reg. at 26355–56, 26393–94, 26405.

The Board's new, *per se* rule mandating expert testimony to establish a benchmark's comparability is arbitrary and capricious, for three reasons.

First, as explained above, agencies cannot change the rules with no acknowledgment or explanation. That principle is doubly true in circumstances like those here, where the Board made the expert-testimony change after-the-fact, and when parties who relied on the existing rubric had no opportunity to comply with the new standard.

Second, the Board's expert-testimony requirement is the definition of arbitrary. Comparing buyers, sellers, and licensed rights is not a matter of economics or other special expertise. It simply requires identifying parties to, and rights licensed in, a benchmark. No expert is necessary.

Last, noncommercial and smaller entities, including many religious webcasters, are hard-pressed to pay for prohibitively expensive expert testimony, which commercial giants may readily afford. So the Board's new rule effectively bars entities lacking resources to hire such experts from participating in rate-setting proceedings. That will leave SoundExchange's rate proposal uncontested by this important segment of the marketplace.

Yet the D.C. Circuit affirmed the Board's arbitrary new *per se* rule, feigning that it should come as no surprise because the Board "previously demanded expert testimony in an analogous situation." App.660a (citing *Web IV*, 81 Fed. Reg. at 26,327). But the referenced scenario involved analyses regarding the economic effect of webcasting services on other forms of music consumption, a technical matter where expert testimony was warranted. *Web IV*, 81 Fed. Reg. at 26327. That situation is not remotely analogous to this one, which merely involves reading an agreement to identify the parties and licensed rights, and comparing them with the parties and rights in the current rate proceeding. Here, the inquiry requires no economic expertise, merely the sort of apples-to-apples comparing that agencies (and courts) do all the time—a comparison the Board performed routinely in the past *without* expert testimony.

The Board's imposition of a novel expert-testimony rule midstream, with no explanation or acknowledgment, was arbitrary and capricious. And the lower court's extreme deference to the agency was legally erroneous and robbed the APA of its force. Cf. *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2417–19 (2019) (rejecting courts' unbounded deference to agencies); *id.* at 2425 (Gorsuch, J., concurring in the judgment) (same). This Court should grant review and hold the Board to the same level of oversight that courts give other agencies—not a blank check.

B. Review is needed to correct the Board's inversion of the burden of proof without explanation by requiring benchmark proponents, rather than challengers, to quantify proposed adjustments.

When a party challenges a benchmark agreement as noncomparable, the Board's longstanding practice was to place the burden of proof on the *challenger* to quantify proposed adjustments to an otherwise proper royalty benchmark. The Board said that if a party "seek[ing] to increase (or decrease) an otherwise effective benchmark rate to account for other items of potential value cannot or has not provided evidence of such value," the Board "cannot arbitrarily adjust or ignore that otherwise proper and reasonable benchmark." *Web IV*, 81 Fed. Reg. at 26386. In other words, the Board's established practice was to accept the royalty benchmark without adjustment if a challenger had "not quantified or otherwise estimated the monetary value of [any alleged] differences." *Web III Remand*, 79 Fed. Reg. at 23111–12, 23114. And the D.C. Circuit affirmed this principle just six years ago.

E.g., *SoundExchange, Inc.* v. *Copyright Royalty Bd.*, 904 F.3d 41, 52 (D.C. Cir. 2018).

Yet here, the Board did an about-face in analyzing Petitioner's proposed rate benchmark. With no prewarning or explanation, the Board required NRBNMLC, the rate benchmark's *proponent*, to anticipate and quantify various adjustment factors suggested by SoundExchange, the benchmark's challenger. App.521a–22a, 532a–36a. And the D.C. Circuit affirmed this arbitrary departure from precedent, even though the Board changed the fundamental burden of proof in its final determination—when it was too late for NRBNMLC to offer any argument or evidence to meet the Board's newly inverted burden. App.659a–61a.

The lower court's ruling is impossible to square with the APA and this Court's precedent. This Court's review is necessary to protect rate-setting participants' basic procedural rights and forestall arbitrary rule changes disfavoring religious broadcasters in future rate-setting proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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