No. 23-927

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

BRIEF FOR MEDIA RESEARCH CENTER AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The Copyright Royalty Board sets default royalty rates for webcasting sound recordings. The Board adopted rates requiring noncommercial religious webcasters to pay over 18 times the secular National Public Radio (NPR) webcaster rate to communicate religious messages to listeners above a 218-average listener threshold. The D.C. Circuit upheld that disparate burden because the Board treated some secular webcasters as poorly as religious webcasters. The resulting costs suppress online religious speech.

The D.C. Circuit also affirmed 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 the following 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.

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INTEREST OF AMICUS CURIAE[1]

As a nonprofit organization dedicated to educating the public on bias in the media, *amicus curiae* Media Research Center has a strong interest in promoting the freedom of speech. That interest is at its apex where, as here, the disfavored speech is religious speech—speech that implicates two distinct yet related First Amendment rights. *Amicus* therefore respectfully submits this brief to underscore the importance of this Court's guidance where, as here, the government starkly disfavors religious speech.

SUMMARY OF ARGUMENT

I. The First Amendment enshrines rights fundamental to a free society, including rights to speak and worship freely. As the Framers well understood, these rights are closely linked, but nowhere closer than in the principle that the government may favor neither one speaker nor religion over another. This Court's First Amendment jurisprudence has given effect to this antidiscrimination principle by requiring the government to justify partiality to or against any viewpoint or religion by showing a compelling interest, the lack of any viable alternative, and an exceptionally close fit between the ends chosen and means employed.

II. Here, the Board's action created a content-based, tiered rate structure, which imposes a disproportionate burden on religious expression and, by extension,

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[1] All parties' counsel of record were timely notified via email on April 29, 2024, of the intent to file this brief under Rule 37.2. Under Rule 37.6, no counsel for any party authored this brief, in whole or in part, nor did counsel for any party or either party make a monetary contribution intended to fund this brief in whole or part. No person or entity other than *amicus* and counsel for *amicus* contributed monetarily to this brief's preparation or submission.

freedom of speech. The Board charges National Public Radio ("NPR"), a left-wing, secular outlet one royalty rate; it charges similarly situated religious broadcasters another, higher rate. This disparate treatment reflects a viewpoint-based preference that impermissibly distinguishes between secular and religious messages. This government-backed economic advantage amplifies public concerns about media bias and erodes public confidence in the First Amendment's guarantees.

III. This case is an ideal vehicle to apply this Court's free-exercise jurisprudence in the free-speech context, holding that the government cannot treat comparable secular expression more favorably than religious expression, even though it appears to be neutral or generally applicable. The Court currently evaluates content neutrality differently under those two First Amendment clauses and, as a result, there is a disparity between how religious expression is treated under the two doctrines. This case is a good vehicle to resolve that disparity because applying such unified doctrine is plainly dispositive and requires no further percolation.

ARGUMENT

The Court should grant certiorari in this case because it presents fundamental issues of First Amendment jurisprudence and offers an ideal opportunity to clarify the law. *See* S. Ct. R. 10(c).

As the Framers knew, freedom of thought and expression are essential to sustaining a free society. *See, e.g.*, Va. Declaration of Rights art. XII, available at https://avalon.law.yale.edu/18th_century/virginia.asp. The right to speak freely was so important to the Framers' new nation that they placed it second only to the freedom of religion in the Bill of Rights. U.S. Const. amend. I. The decision of the Copyright Royalty Board,

which the D.C. Circuit affirmed, violated those principles. The Board created a rate structure that suppresses free speech. That rate structure, which differentiates between (1) NPR and its affiliates and (2) religious noncommercial webcasters, constitutes a content-based disparate treatment of ideologically divergent speakers. Such a tiered system, preferring secular expression over religious expression, is unconstitutional. Worse still, such a system undermines public confidence in the free-speech protections guaranteed to all citizens.

The Court has already held that the government cannot use ostensibly neutral laws to disproportionally burden First Amendment protected activities. In the context of religious exercise, such laws would trigger strict scrutiny under both the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-2000bb-4, and, independently, the First Amendment itself. The D.C. Circuit decided the case in a way that would plainly conflict with relevant decisions of this Court's free-exercise jurisprudence. This case presents an ideal vehicle to provide much needed guidance, clearly extending this Court's protective First Amendment jurisprudence to the freedom of speech as well.

I. Freedom of Speech Is a Core American Right That Ensures a Functioning Free Society.

The freedom to speak, like the freedom to worship according to one's religious beliefs, has been central to American life since the Founding. The Framers unequivocally thought them essential. They had strong historical reason to believe as much.

The Framers knew, and this Court has recognized, that these rights ensure a functioning and free society. Indeed, "freedom of thought and speech . . . is the matrix, the indispensable condition, of nearly every other form

of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784, 794 (1969). For over two hundred years, this Court has reaffirmed that the government cannot favor speech based on its content or viewpoint save for the best of justifications and the narrowest of circumstances. This constitutional rule is rooted not only in this Court's precedents, but in the very concept of free expression.

A. The idea that the individual should be free to think and speak publicly as his conscience dictates extends back to ancient Athens, where citizens counted the right to speak freely as "most treasured" and "a cornerstone of [their] democracy." Keith Werhan, *The Classical Athenian Ancestry of American Freedom of Speech*, 1 SUP. CT. REV. 293, 296 (2008). The Framers were familiar with the rights of citizens in antiquity. *See generally* John P. Murphy, *Rome at the Constitutional Convention*, 51 CLASSICAL OUTLOOK 112 (1974); *see also* Arthur Schlesinger, *America: Experiment or Destiny?*, 82 AM. HIST. REV. 505, 507-08 (1977); THE FEDERALIST No. 34, 1788 WL 448, at *1 (A. Hamilton). After all, "knowledge of classical authors was universal among colonists with any degree of education." Bernard Bailyn, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 23 (1972).

These ancient ideas carried forward through the Enlightenment's thought leaders, who informed and invigorated the Framers. Schlesinger, *supra*, at 507-08; Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1095-1101 (2004). Seventeenth-century authors believed that free men had the right to "speak their minds" and that a just government would recognize that they possessed the "liberty to speak forth

his mind and judgment." Clark W. Gilpen, THE MILLENARIAN PIETY OF ROGER WILLIAMS 55 (1979). This freedom was essential because, as Locke put it, "first, no one has the final say on what is true, and second, no one has any personal or superior authority in determining what is or is not the truth." Jonathan Rauch, KINDLY INQUISITORS 46 (1993) (discussing Locke's epistemology and political philosophy). And Immanuel Kant believed that freedom to speak and write ensured two objectives of a free society: the search for greater and more perfect justice, and the enlightenment of the populace. Kristi Sweet, *Kant on Free Speech: Criticism, Enlightenment, and the Exercise of Judgment in the Public Sphere*, 29 KANTIAN REV. 61, 61-62 (2024).

By the time of the Founding generation, the concept of free speech had begun to solidify in Europe and America. Although certainly not a free speech absolutist, even Sir William Blackstone said "[e]very free man has an undoubted right to lay what sentiments he pleases before the public." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, *15. Therefore, Blackstone believed, "[t]he liberty of the press is indeed essential to the nature of a free state." *Id.* Further, George Mason's Virginia Declaration of Rights held forth that "the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments." Va. Declaration of Rights art. XII, available at https://avalon.law.yale.edu/18th_century/virginia.asp.
And the post-revolutionary French government declared that "[t]he free communication of ideas and opinions is one of the most precious of the rights of man." Declaration of the Rights of Man and the Citizen of 1789 art. XI, available at https://avalon.law.yale.edu/18th_century/rightsof.asp.

When it came time to ratify the Constitution, two figures emerged as leaders for the introduction of the Bill of Rights. James Madison, drafter and Father of the Constitution, was deeply opposed to further amendments, and he agreed to the Bill of Rights only to ensure the adoption of the Constitution and the unification of the American States. Peter Wallenstein, *Flawed Keepers of the Flame: The Interpreters of George Mason*, 102 VA. MAG. OF HIST. & BIOGRAPHY 229, 259 (1994). George Mason, on the other hand, at first fully committed to the creation of a new government, opposed the Constitution by the end of the Convention and refused to sign it. *Id.* at 238. Mason did, however, by his conscientious dissent, force the adoption of the Bill of Rights, *id.* at 256, 259, and Madison, reticent though he was, promised his support for the Amendments to his deeply antifederalist, Virginian constituents, Stuart Leibiger, *James Madison and Amendments to the Constitution, 1787-1789:* "*Parchment Barriers*," 59 J.S. HIST. 441, 441 (1993).

But Madison eventually came to believe that the enumeration of certain rights would protect the new Nation from unjust popular majorities and would "substitute for several features of government that he had vainly sought to include in the Constitution." *Id.* at 442. Madison urged the adoption of "simple, acknowledged principles, the ratification [of which] will meet with but little difficulty." 1 Annals of Cong. 738 (Aug. 15, 1789). He would later express that "the censorial power is in the people over the government, and not in the government over the people." 4 Annals of Cong. 934 (1794). This simple idea was so widely adopted as essential and foundational that there was hardly any debate over it. 1 Annals of Cong. 731-49 (Aug. 15, 1789).

After the Federalists and Antifederalists debated, they coalesced around the provisions now found in the Bill of Rights. *See* Leibiger, *supra*, at 443-44. Only through the freedom to dissent and to speak freely on matters of opinion, political philosophy, and governmental theory did this great triumph of compromise occur. *Cf.* William E. Nelson, *Reason & Compromise in the Establishment of the Federal Constitution, 1787-1801*, 44 WILLIAM & MARY Q. 458, 476-77 (1987). Ultimately, the Framers provided that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The Framers followed Mason's amendments "in order to prevent misconstruction or abuse of [the Constitution's] powers." Resolution of the First Congress Submitting Twelve Amendments to the Constitution, available at https://avalon.law.yale.edu/18th_century/resolu02.asp. But equally important, that text was deliberately chosen to "extend[] the ground of public confidence in the Government." *Id.*

B. Just as the Framers understood free speech to be the cornerstone supporting all other rights, so too has this Court placed philosophical primacy on promoting free speech. These time-honored concepts endured through the early years of the Nation and, when later tested, became central to this Court's precedents. *See* James V. Campbell, II, Comment, *Freedom of Speech: Evolution of the Enlightenment Function*, 29 MERCER L. REV. 811, 811-14 (1978). Although not the first free-speech case, Justice Brandeis's concurrence to *Whitney v. California*, 274 U.S. 357, 372-80 (1927), *overruled by Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), is perhaps one of the best-known early writings on the subject. In it, Justice Brandeis laid the foundation for the Court's future speech jurisprudence. And he set the tone for the

Court's view of the First Amendment by emphasizing the importance of the Framers' intent and the philosophical context they imparted to the Constitution.

Justice Brandeis explained that the revolutionary generation "believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary." *Id.* at 375. The freedom to speak and think was indispensable to the pursuit of truth because it "affords ordinarily adequate protection against the dissemination of noxious doctrine." *Id*. A state of repression was to be avoided because "repression breeds hate; [and] that hate menaces stable government." *Id.* The Constitution thus "eschew[s] silence coerced by law." *Id.* at 375-76.

Justice Brandeis's exposition informed his colleagues' First Amendment writings and those that would come in the following century. Justice Holmes's now-famous dissent echoes to this day: "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate." *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929). And as Justice Jackson said, "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Nevertheless, as Justice Brandeis acknowledged nearly 100 years ago, the right of free speech, although fundamental, has never been absolute—there are

circumstances under which the government may limit expression. *Whitney*, 274 U.S. at 373. The Framers knew "that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones." *Id.* at 375. As Justice Brandeis believed, "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Id.* at 377. Thus, limits on free speech have long been imposed only "to protect the state from destruction or from serious injury, political, economic or moral." *Id.* at 373.

The Court then developed Justice Brandeis's concurrence into a "working principle." *Bridges v. California*, 314 U.S. 252, 263 (1941). Freedom of speech would be "susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." *Barnette*, 319 U.S. at 639. Such a standard was understood as a form of "strict scrutiny." *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). Eventually, the Court began describing this standard as requiring a "compelling" state or governmental interest in restricting any First Amendment liberty. *Sweezy v. New Hampshire*, 354 U.S. 234, 265 (1957) (Frankfurter, J., concurring). The Court also began to apply this strict scrutiny to other sensitive areas of liberty, especially those enumerated in the First Amendment. *See NAACP v. Button*, 371 U.S. 415, 438 (1963).

As the "strict scrutiny" concept developed, the Court's precedents made clear that, in addition to requiring a compelling governmental interest, courts should view restrictions on speech "in the light of less drastic means for achieving the same basic purpose." *Wooley v. Maynard*, 430 U.S. 705, 716-17 (1977). Thus, the

government's burden has historically included a necessary showing that its restrictive law is "closely drawn to avoid unnecessary abridgment." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)).

These standards, coupled with the primacy of religious activity and expression granted in the Free Exercise Clause, ultimately solidified into a now-familiar rule.

> In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the [government] must . . . satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

Widmar v. Vincent, 454 U.S. 263, 269-70 (1981).

As the Court continued to develop this constitutional rule, the Court's commands became clearer. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."). In private speech, the government may not favor one speaker over another. *Id.* And the imposition of "financial burdens on certain speakers, based on the content of their expressions" is forbidden. *Id.* It "makes no difference" to the Constitution whether the government is regulating the creation, distribution, or consumption of speech. *Masterpiece Cakeshop, Ltd. v. Co. Civil Rights Comm'n*, 584 U.S. 617, 658 (2018) (Thomas, J., concurring in part) (citing *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 792 n.1 (2011)).

This Court's strict rule, which finds its philosophical roots deep in the aforementioned historical debate and

the evolution of human thought, Campbell, *supra*, at 811-14, holds that "[v]iewpoint discrimination doom[s] the [law enacting it]," *Iancu v. Brunetti*, 588 U.S. 388, 393 (2019). Whether examined under the Free Exercise Clause or the Free Speech Clause, the question is the same: does the governmental restriction serve a compelling interest, and is it narrowly tailored to that end? *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 532 (2022). If not, the law fails. As the Court recently explained, "[t]hese Clauses work in tandem." *Id.* at 523. Both are "a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent." *Id.* at 524.

II. The Board's Content-Based, Tiered System of Disparate Treatment Impermissibly Disfavors Religious Speech and Expression.

Here, the Board created a content-based, tiered rate structure that required religious broadcasters to pay far more than NPR stations to communicate with an audience above a mere 218 people. That result forces religious broadcasters to pay royalty rates 18 times higher than those to which NPR will be subject. The Board's actions impose a disproportionate burden on religious expression and, by extension, freedom of speech.

NPR and its affiliates who received comparatively better treatment represent one side of the ideological coin. The religious broadcasters burdened by the Board's determination represent the other. The former are granted substantially lower royalty rates, while the latter and their message are substantially burdened in comparison. This disparate treatment reflects viewpoint-based discrimination that impermissibly distinguishes between secular and religious speakers. The discrimination is particularly troubling because secular NPR public

broadcasting wields a government-backed economic advantage over religious broadcasters. That result not only amplifies concerns about media bias but erodes the confidence in constitutional guarantees that the Framers understood as essential for a free society.

A. As petitioner explains, the religious broadcasters it represents will pay royalty rates 18 times higher than those NPR will be subjected to. Pet. 9-10. For example, a religious broadcaster playing 15 songs per hour to 1,000 listeners will incur a $257,000 per year royalty cost. NPR will incur only $18,000 for the same use. *Id.* at 10. Said differently, the Board gave NPR a 93% discount over the rate given to religious broadcasters. And the record shows that religious broadcasters are the only group meaningfully affected by these rates. *Id.* at 9 (citing D.C. Cir. J.A.1363-64 & n.312, 18467-47).

Of course, this extreme differential in economic advantage, imposed by an arm of the federal government, constitutes a substantial burden. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 719-20 (2014). As this Court has recognized, imposing disparate financial burdens on expressing varying viewpoints "penalizes" the decision to express that viewpoint and puts "substantial pressure" on a speaker to modify or silence his message. *See Espinoza v. Mt. Dept. of Rev.*, 591 U.S. 464, 486 (2020); *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981). As petitioner and others have articulated, that is exactly the case here: religious webcasters face a choice to carry a disproportionate financial burden or cease their protected expression. That this choice flows from the Board's rate structure should come as no surprise. The chilling power of fees and fines to suppress speech and other activities undesirable to the governing status quo has long been recognized. "Excessive fines can be used,

for example, to retaliate against or chill the speech of political enemies." *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019). And, of course, any number of government-imposed charges can "discourag[e activities] by making their continuance onerous." *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922).

B. The effect of such disparate treatment—and the attendant viewpoint discrimination—is particularly clear in this case. As noted above, the NPR rate is nominally 18 times lower than the rate that religious broadcasters must pay. But in practice, NPR and its affiliates, the relevant comparator group, pay *nothing* for the right to use copyrighted recordings. NPR receives public funding: the Corporation for Public Broadcasting (CPB) will pay all of the royalty costs for NPR and its affiliates, Pet. 10 (citing 37 C.F.R. § 380.32(a); D.C. Cir. J.A.926), and the CPB, in turn, receives its funding from the federal government. CPB FAQ, https://www.cpb.org/faq (last visited May 8, 2024). This is not speech by the government to "express itself"—the American public simply foots the bill. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015). In contrast, the religious broadcasters do not rely on such funding and must pay for their own royalty fees. Thus, an NPR station's rate is effectively zero—meaning that religious broadcasters must pay an infinitely higher rate in practice.

At the same time, NPR and its affiliates express a viewpoint that is starkly secular and liberal, in contrast to the religious and largely conservative broadcasters that petitioner represents. To give one example, NPR has pushed back against even the CPB's attempts to encourage balance in reporting. *See* David Folkenfilk, *CPB Memos Indicate Level of Monitoring*, MORNING EDITION, June 30, 2005,

https://www.npr.org/2005/06/30/4724317/cpb-memos-indicate-level-of-monitoring; Jeffrey A. Dvorkin, *Media Bias on NPR—It Seems Obvious to Some*, NPR PUBLIC EDITOR, June 21, 2005, https://www.npr.org/sections/publiceditor/2005/06/21/4712584/media-bias-on-npr-it-seems-obvious-to-some (asserting that fitting the "liberal journalism" mold "results in the best of American journalism").

Charges of left-wing bias in NPR's reporting and editorializing have prompted widespread public scrutiny. Commentators have lamented for years that "anyone who's listened to NPR for more than five minutes scarcely needs to be convinced of its extreme liberal bias." Joe Concha, *The Time Has Come: Defund the Hopelessly Biased NPR*, THE HILL, July 22, 2022, https://thehill.com/opinion/campaign/3551625-the-time-has-come-defund-the-hopelessly-biased-npr/. And the newly appointed CEO of NPR publicly lambasts conservative figures and causes. Mary Kay Linge, *NPR's New CEO Katherine Maher Haunted by Woke, Anti-Trump Tweets as Veteran Editor Claims Bias*, N.Y. POST, Apr. 13, 2024, https://nypost.com/2024/04/13/us-news/nprs-new-ceo-katherine-mahers-woke-tweets-arise-as-editor-claims-bias/. Indeed, Ms. Maher has called the First Amendment a "tricky" obstacle to her objective of eliminating "bad information." A CONVERSATION WITH FORMER WIKIMEDIA CEO, KATHERINE MAHER, June 22, 2021, https://www.youtube.com/watch?v=y-JRPJnVvOU, at 36:37-37:30.

The charges of NPR's bias against religious and conservative ideas came to a head last month. Uri Berliner, a long-time NPR editor, recently published his "findings and conclusions" exposing alleged biases at NPR. Uri

Berliner, *I've Been at NPR for 25 Years. Here's How We Lost America's Trust*, THE FREE PRESS, Apr. 9, 2024, https://www.thefp.com/p/npr-editor-how-npr-lost-americas-trust. In his resignation letter, Mr. Berliner wrote, "I cannot work in a newsroom where I am disparaged by a new CEO whose divisive views confirm the very problems at NPR I cite in my Free Press essay." @uriberliner, Apr. 17, 2024, https://twitter.com/uberliner/status/1780610524411048183?lang=en. According to Mr. Berliner, the NPR leadership has lost all viewpoint diversity and has become consumed by race and identity politics. Benedict Smith, *NPR ignoring stories because of Left-wing diversity push, editor claims*, THE TELEGRAPH, Apr. 10, 2024, https://www.telegraph.co.uk/us/news/2024/04/10/npr-us-radio-ignoring-stories-left-wing-diversity-push/.

Indeed, by merely selecting what stories are covered, NPR influences "what issues are at the center of our politics." Howard Husock, *The Real Bias at NPR: Story Selection*, NATIONAL REVIEW, Apr. 21, 2024, https://www.nationalreview.com/2024/04/the-real-bias-at-npr-story-selection/. "This is how NPR has come to understand its taxpayer-supported mission. On any given day, the stories of NPR and those, for instance, of Fox News can seem to be reports from different Americas . . . Moreover, the same events can be reported with sharply different emphases." *Id.* Howard Husock, a senior fellow at the American Enterprise Institute, explains that "[a]ll such decisions as to what to cover and what about it to emphasize are effectively efforts to set the national cultural and political agenda," which "is the real media bias." *Id.*

The charges against NPR's bias have become so loud that they triggered a recent congressional oversight

inquiry. *House Republicans Open Probe of NPR Amid Allegations of Political Bias*, INSIDE RADIO, May 1, 2024, https://www.insideradio.com/free/house-republicans-open-probe-of-npr-amid-allegations-of-political-bias/article_f6f2de2c-07fe-11ef-b196-fb7889d2f9d3.html. And they have prompted an open letter published by seven United States Senators denouncing NPR for "pursu[ing] a narrative-driven approach rather than evidence-based journalism." Letter from Sen. Cramer et al. to Katherine Maher (Apr. 29, 2024), available at https://senatorkevincramer.app.box.com/s/onanzo-iim9oo6h46mixszdniek7jk5an.

Right or wrong, these charges of bias show the fragile relationship between government funding and trust in the media. Of course, NPR is free to espouse a certain viewpoint—but the government is not free to prefer that viewpoint over others through a discriminatory rate structure. When, as here, the government burdens conservative and religious voices, that result merely fuels the perception of government-funded favoritism of NPR. The tiered, content-based rate structure based on that preference cannot be viewed as anything other than viewpoint discrimination in violation of the First Amendment. The Court should thus grant certiorari and reverse the D.C. Circuit to remove any suggestion of a government preference for left-leaning, secular media.

III. This Case Is an Ideal Vehicle to Unify the Principles Governing Ostensibly Neutral Laws That Burden First Amendment Rights.

This case further presents an ideal vehicle to apply the reasoning of *Tandon v. Newsom*, 593 U.S. 61 (2021), and similar free-exercise cases to determine whether a law impermissibly treats comparable secular expression more favorably than religious expression, even though it

appears to be neutral or generally applicable. The Court's jurisprudence in the Free Speech and Free Exercise Clauses make clear that an apparently facially neutral law is not always so. The Court, however, evaluates content neutrality differently under the two clauses and, as a result, there is a disparity between how religious expression is treated under the two doctrines.

A. In the free-speech context, this Court has explained that "a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics." *McCullen v. Coakley*, 573 U.S. 464, 480 (2014). Rather, "a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* (cleaned up). However, regulating speech by subject matter and by "function or purpose" are both "distinctions drawn based on the message a speaker conveys." *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015).

The Free Exercise Clause, on the other hand, "extends beyond facial discrimination," to prohibit "subtle departures from neutrality" and "covert suppression of . . . religious beliefs." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (citations omitted). "[R]eligious gerrymanders" therefore violate the Constitution. *Id.* Thus, the Court's precedents have demanded a more exacting inquiry into the effects of a law allegedly in violation of the Free Exercise Clause than under the Free Speech Clause. While a law may not "impose special disabilities on the basis of religio[n]," *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 461 (2017), it may have an "incidental effect on [religious] speakers . . . but not others," *McCullen*, 573 U.S. at 480. This Court has clarified that, under the

Free Exercise Clause, a law is subject to the highest scrutiny "whenever [it] treat[s] *any* comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62. And, applying a disproportionate-burden analysis, the Court has made clear that this rule cannot be avoided by pointing out that "some comparable secular businesses or other activities [are treated] as poorly as or even less favorably than the religious exercise at issue." *Id.*

While a substantial burden on religion enacted by a neutrally worded law is thus subject to strict scrutiny, an artfully drafted law that imposes a disproportionate burden on the expression of a particular viewpoint has not typically triggered the same level of scrutiny. The Court's precedents limit the inquiry under the Free Speech Clause through the "incidental effect" rule. Thus, an arguably view-point or content-based law may fall through the cracks only because it doesn't discriminate *enough* or because the disproportionate effect is not drastic *enough*.

The Court should resolve this dilemma by applying the logic of *Tandon* and similar cases. As noted above, many laws that appear neutral are not. A law that treats a comparable expression of one ideology more favorably than expression of another ideology violates the Free Speech Clause. Such a holding would not eviscerate the incidental effect rule, which grants governments leeway to regulate non-speech in a way that burdens speech. Rather, it would supplement that rule by requiring courts to look beyond the incidental nature of the burden to ask whether that burden disproportionately affects expression of a particular ideology and therefore constitutes view-point discrimination. Only this Court's intervention

can provide the necessary guidance in analyzing these burdens. *E.g. Church of Lukumi*, 508 U.S. at 533-35.

For example, in his dissent in *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2609-15 (2020), Justice Kavanaugh outlined four categories of laws that might be examined in the Free Exercise context. These four categories could be restated for the Free Speech context as:

> (1) laws that expressly discriminate against [a particular viewpoint]; (2) laws that expressly favor [a particular viewpoint]; (3) laws that do not classify on the basis of [a viewpoint] but apply to [all viewpoints] alike; and (4) laws that expressly treat [an expression of a particular viewpoint] equally to some [contrary expressions] but better or worse than other [contrary expressions].

Id. at 2610 (Kavanaugh, J., dissenting).

For those laws that reside in the fourth category, the government must have a "sufficient justification" for treating one viewpoint differently—*i.e.* it must pass the required degree of scrutiny. *Tandon*, 593 U.S. at 62; *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 29 (2020) (Kavanaugh, J., concurring). And, as this Court has made clear, viewpoint discrimination is subject to the highest scrutiny. *Kennedy*, 597 U.S. at 532.

B. This case presents an ideal vehicle to eliminate that disparity. Here there can be no question that the Board's determination would fall within Justice Kavanaugh's fourth category of prohibited regulations. It treats religious noncommercial broadcasters—who espouse and express a particular ideology—worse than some secular noncommercial broadcasters—who espouse and express a contrary, or at least different, ideology. The court of appeals erred by failing to address, and

therefore implicitly by rejecting, petitioner's free-speech arguments. If nothing else, under principles discussed above, the Board's determination should be vacated as "contrary to a constitutional right." 5 U.S.C. § 706(2)(B). The Board's rate structure impermissibly treats one viewpoint (the religious one) less favorably than a comparable secular activity. *Tandon*, 529 U.S. at 62.

That some secular voices are treated as badly as religious ones provides no justification for respondents. *Id.* The court of appeals said that because the Board properly disregarded the NPR Agreement as a benchmark, there was no evidence of disparate treatment or of a burden on religious expression. But that is plainly wrong: the record reflects the rates set forth in the Board's determination and the rates contained in the NPR Agreement were published in the federal register in both proposed and final forms. 84 Fed. Reg. 57,833 (Oct. 29, 2019); 85 Fed. Reg. 11,857 (Feb. 28, 2020). The court of appeals could have readily examined the burden on the religious broadcasters' expression and determined that secular viewpoints were treated better. Without a compelling governmental interest to protect, then, the Board cannot justify setting discriminatory rates. This Court should grant certiorari to set aside the Board's determination as unlawful.

This case is an exceedingly good vehicle for the Court to develop its First Amendment jurisprudence in this media-licensing context. The issues in this case are not susceptible to further percolation: the D.C. Circuit possesses exclusive jurisdiction over respondents. 17 U.S.C. § 803(d)(1). Moreover, the Court's role is never more important than in interpreting and protecting the fundamental freedoms from which the American way of governance, life, and moral leadership grow. The Court has

done so throughout the last 100 years, has done so recently, and should do so again. *See 303 Creative LLC v. Elenis*, 600 U.S. 570, 584-87 (2023). In addition to the free-exercise arguments capably presented by petitioner and others, this case's free-speech implications amplify the need for this Court's review.

Ultimately, the Court has long hewed to the Framers' intent as expressed in the Free Speech Clause. And the Court has sought to apply that Clause as informed by the philosophy underpinning the Framers' belief in free speech. But the rule applied to determine whether a law impermissibly burdens religion under the Free Exercise Clause is currently different from the one applied to determine whether that same law impermissibly engages in viewpoint discrimination in violation of the Free Speech Clause. There is no principled reason for that disparity to persist. This Court should grant certiorari to reconcile these bodies of First Amendment jurisprudence and provide much-needed clarity.

CONCLUSION

The Court should grant a writ of certiorari and reverse the judgment of the court of appeals.

Respectfully submitted.

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