No. 23-927

IN THE
Supreme Court of the United States

NATIONAL RELIGIOUS BROADCASTERS NONCOMMERCIAL MUSIC LICENSE COMMITTEE,
Petitioner,

v.

COPYRIGHT ROYALTY BOARD, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION OF RESPONDENT SOUNDEXCHANGE, INC.

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QUESTIONS PRESENTED

The Copyright Royalty Board (the Board) determined statutory royalty rates for the years 2021 to 2025 for all noncommercial webcasters, including nonprofit religious webcasters, who did not negotiate a separate rate settlement. The Board also approved a settlement between Respondent SoundExchange and noncommercial public broadcasting webcasters adopting an overall rate structure that the Board determined did not provide a suitable benchmark for setting the statutory rates. The questions presented are:

1. Whether the D.C. Circuit correctly held that the Religious Freedom Restoration Act and the First Amendment are not implicated where Petitioner failed to establish that religious webcasters are disadvantaged relative to the settling public broadcasters.

2. Whether the D.C. Circuit correctly held that the Board properly excluded an internal SoundExchange document that contained a rate structure and fees negotiated pursuant to a Webcaster Settlement Act (WSA) agreement, as required by 17 U.S.C. § 114(f)(4)(c)'s bar on "admi[tting] as evidence or otherwise tak[ing] into account" the "provisions of any agreement entered into pursuant to" the WSA.

3. Whether the D.C. Circuit correctly held that the Board's requirement of expert testimony and allocation of the burden of proof in rejecting Petitioner's rate proposals was reasonable.

CORPORATE DISCLOSURE STATEMENT

SoundExchange, Inc. has no parent corporation and no publicly held company holds 10% or more of its stock.

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INTRODUCTION

Petitioner asks this Court to review whether the Copyright Royalty Board (the Board) violated the Religious Freedom Restoration Act (RFRA) and the First Amendment. Petitioner's case is premised on the factual assertion that the statutory rate structure the Board adopted for noncommercial webcasters, including religious webcasters, establishes higher rates than the very different rate structure that applies to public broadcasting webcasters like National Public Radio (NPR) pursuant to a settlement agreement (the NPR Agreement).

There is no basis in the record for that factual assertion. During its lengthy proceedings, the Board examined whether the NPR Agreement provided a suitable benchmark for setting statutory rates for other noncommercial webcasters when it considered and rejected Petitioner's rate proposals. Among other reasons, the Board found that the NPR Agreement contained valuable features (including annual lump-sum payments and consolidated reporting requirements) missing from Petitioner's rate proposals that prevented a simple comparison of per-performance rates when those features were absent.

On appeal, the D.C. Circuit saw no error in those findings. It further held that Petitioner's RFRA and First Amendment arguments—which Petitioner never presented to the Board—were meritless. As the D.C. Circuit correctly concluded, Petitioner's "RFRA and Free Exercise arguments are premised on a factual assertion" that the rate religious webcasters pay "is

higher than the rate enjoyed by NPR under the NPR Agreement," but "there is no record finding to support that assertion." Pet. App. 668a-669a. On the contrary, the Board found—and the D.C. Circuit affirmed—that the significantly different features and structure of the NPR Agreement, coupled with Petitioner's failure to present testimony addressing those differences, provided "overwhelming" reason to conclude that the NPR Agreement could not be compared to the statutory rate structure adopted for noncommercial broadcasters. Pet. App. 536a.

The absence of this factual predicate is an insurmountable, threshold obstacle to this Court's review of Petitioner's RFRA and First Amendment claims. Without this factual predicate, Petitioner's alleged circuit splits as to whether heightened scrutiny was warranted in this case are illusory: all of the cases Petitioner cites take as given that heightened scrutiny applies only where some showing of disparate treatment relative to a secular comparator has been established. The D.C. Circuit's decision below is entirely consistent with those cases.

Recognizing this fundamental flaw in its case, Petitioner presents this Court with a new assertion that it never advanced before the Board or the D.C. Circuit: that the rates religious webcasters (and other non-settling noncommercial webcasters) pay are "18 times" in excess of rates paid by NPR stations. That purported quantification is false and misleading. At the most basic level, it ignores that the vast majority of noncommercial webcasters, including the vast majority of religious

noncommercial broadcasters, pay only a nominal flat fee ($1,000) for all the music they stream in a year. Even for the largest noncommercial webcasters, Petitioner's quantification ignores the benefit they receive from a deep discount on a significant part of their usage and rests on assumptions about usage that are incorrect for the reasons described herein. Most important, the purported quantification ignores the very features and benefits of the NPR Agreement that led the Board to conclude that it was not comparable to the rate structure it ultimately adopted. The NPR Agreement and the noncommercial rate structure are apples and oranges; Petitioner's new false quantification only confirms that point.

Petitioner additionally seeks review of various routine evidentiary determinations the Board made in the course of finding that the NPR Agreement was not a suitable benchmark for setting statutory rates. But these additional questions presented satisfy none of this Court's criteria for certiorari. They are plainly factbound—including, for instance, a question as to whether the Board erred in excluding a single, internal SoundExchange document—and Petitioner identifies no split in authority or broader importance to these questions requiring this Court's consideration.

Because these ancillary questions do not warrant this Court's review, and because the primary question presented lacks a necessary factual predicate, the petition for certiorari should be denied.

STATEMENT

I. Statutory and Regulatory Background

The Copyright Act grants copyright owners certain exclusive rights to their works. 17 U.S.C. § 106. In the case of sound recordings, those rights include the rights to reproduce their recordings and perform them publicly "by means of a digital audio transmission." §§ 106(1), (6). These rights are subject to statutory licenses that permit eligible digital music services to reproduce and perform sound recordings without the copyright owner's authorization if they comply with statutory license requirements, including payment of royalties. *See, e.g.*, §§ 112(e), 114(d)(2), (f).

The Copyright Royalty Judges constituting the Copyright Royalty Board—an administrative body that is part of the Library of Congress—set statutory royalty rates for five-year rate periods by applying a standard set forth in the Act. *See* §§ 114(f)(1)(A), 804(b)(3). That standard requires that the Board determine statutory rates "that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." § 114(f)(1)(B). That is, royalty rates are to reflect the fair market value of the rights conveyed by the statutory license. *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings (Web I)*, 67 Fed. Reg. 45,240, 45,244 (July 8, 2002) (explaining that the willing buyer/willing seller standard "is strictly fair market value").

Board proceedings follow litigation procedures significantly determined by statute and further defined in the Board's regulations. Each participant is to file a rate proposal and written statements with evidence supporting them. 17 U.S.C. § 803(b)(6)(C)(i), (ii); 37 C.F.R. §§ 351.4, .11. After discovery, there is a hearing allowing participants to examine witnesses, and at which the Board makes determinations concerning the admissibility of evidence. 17 U.S.C. § 803(a)(2), (b)(6)(C)(i)-(vii); 37 C.F.R. §§ 351.8-.10. As relevant here, 17 U.S.C. § 114(f)(4)(C) prohibits the Board from "admi[tting] as evidence or otherwise tak[ing] into account" "any provisions of any agreement entered into pursuant to" the Webcaster Settlement Act ("WSA") of 2009, Pub. L. No. 111-36, 123 Stat. 1926, a statute that permitted parties to reach a settlement as to the rates they would pay in lieu of the statutory rates set by the Board during a short period of time in 2009.

II. History of Statutory Royalty Rates for Noncommercial Webcasters.

Respondent SoundExchange is a non-profit collective management organization representing the owners of sound recording copyrights and the artists who created those recordings. SoundExchange has been authorized by the Board to collect and distribute the royalties and fees at issue in this case to copyright owners and artists.

For over 20 years, SoundExchange has reached settlements with the Corporation for Public Broadcasting (CPB) and NPR concerning statutory royalty rates for public broadcasting entities. These

settlements have all had the same structure. CPB pays a lump-sum annual fee to cover use of sound recordings by all NPR stations up to a cap on the total hours of music usage across the entire NPR system. CPB/NPR also provide SoundExchange with a single, consolidated monthly report of music usage across the NPR system, which SoundExchange uses to distribute the lump sum paid by CPB to recording artists and copyright owners. Over the years, CPB/NPR have honed a process for delivering high-quality data in such reports. *See, e.g.*, 37 C.F.R. §§ 380.31(a), .32(b). SoundExchange also has a long history of settlements with college broadcasters. *See, e.g.*, 37 C.F.R. § 380.21.

SoundExchange has largely been unable to reach settlements with Petitioner, which represents some of the highest-usage and best-funded noncommercial webcasters. The proceeding below marks the third time that Petitioner has attempted to use a CPB/NPR settlement as a benchmark in litigation of statutory royalty rates, and the third time the Board rejected such a benchmark as so different from Petitioner's rate proposal that the two could not be compared.

In the proceeding known as *Web II*, the Board adopted the current noncommercial webcaster royalty rate structure (with lower rates) based in part on a settlement between SoundExchange and CPB/NPR. Specifically, the Board used the settlement to identify 159,140 aggregate tuning hours (ATH) per month as a level of operation at which a noncommercial webcaster "could not be viewed as a serious competitor for commercial enterprises in the webcasting

marketplace."[1] *Digital Performance Right in Sound Recordings and Ephemeral Recordings (Web II)*, 72 Fed. Reg. 24,084, 24,099-100 (May 1, 2007). Below that level, noncommercial webcasters (including religious broadcasters and other noncommercial webcasters) pay only a nominal minimum fee. Above that level, noncommercial webcasters pay for incremental usage at the same per-play rate as their commercial competitors. *Id.* at 24,100.

Importantly, this arrangement provides *all* noncommercial webcasters (religious or secular) a large discount as compared to commercial webcasters, because commercial webcasters must pay per-play royalties on all of their usage. For a webcaster with usage exactly at the 159,140 ATH per month threshold, that discount, which applies to religious webcasters, is about 99% off of commercial rates.

In *Web II*, the Board rejected Petitioner's proposal to use the CPB/NPR settlement as a benchmark to generate a per-station rate for noncommercial webcasters because it found that Petitioner did not provide sufficient supporting evidence. *Id.* at 24,098-99. The D.C. Circuit affirmed that conclusion over an appeal by Petitioner. *See Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 571 F.3d 69, 84-86 (D.C. Cir. 2009).

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[1] ATH is a measure of listenership. For example, if 100 people each stream 10 hours of music in a month from a given webcaster, that would result in 1000 (100 x 10) aggregate tuning hours for that month.

In the proceeding known as *Web IV*, Petitioner proposed creating a new "tiered and capped flat fee structure." *Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web IV)*, 81 Fed. Reg. 26,316, 26,391 (May 2, 2016). It sought to justify that proposal with reference to a settlement between SoundExchange and CPB/NPR. The Board rejected reliance on that settlement, finding that it "differs so fundamentally in so many ways from what [Petitioner] is proposing that it cannot serve as a support for that proposal." 81 Fed. Reg. at 26,394. Instead, the Board maintained the *Web II* structure with updated rates.

By 2018, the year before the proceeding below commenced, there were approximately 900 noncommercial webcasters, excluding the NPR stations and college broadcasters that operated pursuant to settlements. Those 900 webcasters included the noncommercial religious broadcasters represented by Petitioner and many others. Under the prevailing rate structure, all but 20 of them (approximately 97%) paid only the minimum fee. The larger religious broadcasters, like other large noncommercial webcasters, paid more than the minimum fee, although evidence showed that the statutory royalties they paid represented only a small sliver of their revenues and expenses.

III. The Proceeding Before the Board

In the proceeding below, SoundExchange again reached a settlement with CPB/NPR (the NPR Agreement) and a settlement with college broadcasters,

leaving it to litigate against Petitioner and various commercial webcasters. The Board heard oral testimony from 33 witnesses (including 13 experts) over the course of a 5-week hearing and considered written testimony from 8 additional witnesses. The Board admitted into evidence 748 exhibits, consisting of over 900,000 pages of documents. Pet. App. 7a-8a.

With respect to noncommercial webcasting, Petitioner's original rate proposal was similar to the proposal the Board rejected in *Web IV* – a series of flat-fee rate tiers. On the eve of the hearing, Petitioner put forth the rate proposal discussed in the petition. That proposal included two alternatives, both purportedly modeled on the NPR Agreement. "Alternative 1," which would apply to all noncommercial webcasters, was similar to the longstanding *Web II* statutory royalty rate structure with an annualized version of the 159,140 ATH per month threshold, but with much lower rates for incremental usage over that threshold. "Alternative 2" was an arrangement for a subset of webcasters selected by Petitioner that incorporated some (but not all) of the features of the NPR Agreement but otherwise provided "Alternative 1" rates for other noncommercial webcasters. Pet. App. 506a-508a.

In the course of assessing Petitioner's rate proposal, the Board found that significant differences in the rate structure of Petitioner's rate proposal as compared to the rate structure of the NPR Agreement prevented a straightforward comparison of per-performance rates. These differences include:

- The NPR Agreement features a lump sum, up-front payment that provides SoundExchange predictability, administrative and cost-of-money benefits, and the possibility that usage will be less than permitted, while avoiding bad debt, collection issues, audit costs, and disputes. Alternative 1 did not have any of those features. As a result, the Board faulted Petitioner for "not adjust[ing] the per-performance rate that it purportedly derives from the [NPR] Agreement to reflect the discount for advance payments." Pet. App. 533a. Alternative 2 included a lump sum payment, but Petitioner did not respond meaningfully to criticisms of how that payment was calculated, and in any event, Alternative 2 provided that Alternative 1 would apply to all webcasters not named by Petitioner. *See* Pet. App. 532a-533a.

- Under the NPR Agreement, SoundExchange receives a single, consolidated monthly report of usage. Neither of Petitioner's proposals required consolidated reporting or data quality assurances. *See* Pet. App. 533a-534a. Rather, SoundExchange would have received the reporting it gets now: separate reporting from about 900 webcasters, often with poor data quality. The Board found that the "record reflects that consolidated reporting has value to SoundExchange," and that SoundExchange would have incurred substantial additional administrative costs to process those separate reports. Pet. App. 535a. The Board further found

that the omission of consolidated reporting meant that Petitioner's rate proposal "differs materially from the proposed benchmark [of the NPR Agreement]," and that Petitioner "makes no attempt to adjust its proposed rate to compensate for this material difference." *Id.*

- The NPR Agreement settled the litigation between SoundExchange and CPB/NPR. The Board found that this, too, affected the suitability of the NPR Agreement as a benchmark because "settlement agreements . . . are not free from trade-offs motivated by avoiding litigation cost, as distinguished from the underlying economics of the transaction." Pet. App. 519a (internal quotation marks omitted). Yet Petitioner's "economic experts did not perform any analysis to disaggregate trade-offs motivated by avoiding litigation cost from the underlying economics of the deal," nor "even acknowledged the existence of the issue." Pet. App. 520a.

In particular, to support its rate proposals, Petitioner provided expert testimony from two economists. One of them (Dr. Cordes) did not even mention the NPR Agreement in his written testimony. Instead, he advocated using SoundExchange's settlement with college broadcasters as a benchmark. Petitioner's other expert economist (Dr. Steinberg) increasingly embraced the NPR Agreement as a benchmark over the course of the proceeding, but he failed to address any of the criticisms the Board made when rejecting Petitioner's NPR Agreement benchmark in *Web IV*. *See* Pet. App.

520a. As relevant here, Dr. Steinberg also sought to analyze per-performance rates based on a SoundExchange document containing a rate structure and fees under a WSA settlement. The Board excluded that document under 17 U.S.C. § 114(f)(4)(C)'s statutory bar on the admission or consideration of such evidence. *See* Pet. App. 528a-531a.

In the end, the Board again determined that the familiar *Web II* rate structure with rates updated to reflect current marketplace conditions best satisfied the statutory willing buyer/willing seller standard. It rejected Petitioner's third attempt to use an NPR settlement for essentially the same reasons it had rejected the two previous attempts: Petitioner failed to meet its burden of proof because Petitioner did too little to establish that an NPR settlement radically different from Petitioner's rate proposal could be used to support that proposal. According to the Board, there was "insufficient expert testimony to determine the extent to which the similarities between the [NPR] Agreement and the target market support its use as a benchmark or the degree to which the differences between the agreement and the target market detract from that use (or require adjustments to the benchmark rates)." Pet. App. 522a. Indeed, in the Board's view, the various problems it had identified together "constitute[d] an overwhelming argument for rejecting entirely the [NPR Agreement] as a benchmark." Pet. App. 536a.

IV. The Decision Below

Petitioner, among other participants to the Board proceeding,[2] sought review of the Board's determination in the D.C. Circuit. *See* 17 U.S.C. § 803(d)(1). The focus of Petitioner's appeal was the Board's rejection of its NPR Agreement benchmark. Petitioner raised its RFRA and First Amendment arguments in the final 3 pages of its 55-page initial brief.

The D.C. Circuit affirmed the Board's determination in all respects, including as to Petitioner's challenges. *See generally* Pet. App. 633a-678a. The court held that "[t]he Board's decision to reject the NPR Agreement as a benchmark, as well as [Petitioner's] rate proposals that were based on the NPR Agreement, was reasonable and supported by substantial evidence." Pet. App. 658a. In particular, the D.C. Circuit concluded that the "Board reasonably rejected [Petitioner's] rate proposals due to their failure to account for economically significant aspects of the NPR Agreement," including "(1) the avoidance of litigation costs by the parties to the NPR Agreement; (2) the value of NPR's advance, lump-sum payments to SoundExchange; and (3) NPR's consolidated reporting of data from individual stations to SoundExchange." Pet. App. 660a-661a.

The D.C. Circuit also held that the "Board appropriately concluded that it was statutorily barred

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[2] Before the D.C. Circuit, SoundExchange sought review of the Board's determination of rates for commercial webcasters; it also intervened in support of the Board regarding the noncommercial rates at issue in this petition, as well as other aspects of the Board's determination regarding commercial rates.

from considering the royalty rates contained in the 'NPR Analysis,' an internal SoundExchange document created in 2015," because the "rate structure came from an old settlement agreement negotiated pursuant to the [WSA]" and thus could not be considered under 17 U.S.C. § 114(f)(4)(C). Pet. App. 662a. And the D.C. Circuit further concluded that the "Board reasonably decided that expert testimony was required to establish comparability," and that Petitioner "misstates th[e] Board precedent" in objecting to the Board's position that Petitioner bore the burden of proof to quantify the adjustments needed to account for material differences in Petitioner's proposed benchmark. Pet. App. 659a, 661a n.5.

The Court then rejected Petitioner's RFRA and First Amendment claims. The Court explained that those claims "are premised on a factual assertion that the rate for noncommercial webcasters under the compulsory license is higher than the rate enjoyed by NPR under the NPR Agreement," but "there is no record finding to support that assertion." Pet. App. 668a-669a. That conclusion followed from Petitioner's failure to establish the NPR Agreement as a suitable benchmark. Pet. App. 669a. Because the "record … contain[ed] no basis for the Board, or th[e] court, to effectively determine whether noncommercial webcasters subject to the compulsory license are paying higher rates than the NPR stations covered by the NPR Agreement," the D.C. Circuit concluded that Petitioner "cannot establish a violation of the RFRA or the First Amendment." *Id.*

REASONS FOR DENYING THE PETITION

I. THIS CASE DOES NOT PRESENT ANY RFRA OR FIRST AMENDMENT QUESTION, LET ALONE A SPLIT OF AUTHORITY.

A. Petitioner Fails to Establish the Necessary Factual Predicate Underlying its RFRA and First Amendment Claims.

Certiorari is not warranted with respect to the first question presented regarding RFRA and the First Amendment because Petitioner has not made the required initial showing that religious webcasters are disadvantaged under the Board's statutory rate structure relative to what NPR pays under the NPR Agreement.

In the course of rejecting Petitioner's attempt to invoke the NPR Agreement as a suitable benchmark in setting the statutory rate, the Board found that the NPR Agreement includes valuable terms (including lump-sum payments, consolidated reporting, and the value of settlement itself) that were not accounted for in Petitioner's rate proposals. Petitioner now relies on the same kind of oversimplified comparisons to contend that the statutory rate structure the Board ultimately adopted for all non-settling, noncommercial webcasters forces religious webcasters to pay higher rates than NPR does, in violation of RFRA and the First Amendment. But as the D.C. Circuit correctly concluded, Petitioner's RFRA and First Amendment claims are premised on a "factual assertion that the rate for noncommercial webcasters under the compulsory license is higher than the rate enjoyed by NPR under

the NPR Agreement," and "there is no record finding to support that assertion." Pet. App. 668a-669a.

Petitioner belatedly attempts to establish this missing factual premise by including a new, back-of-the-envelope calculation in the petition for certiorari that purports to establish that religious webcasters pay 18 times as much as NPR does. But that calculation was never raised below, cannot substitute for the Board's reasoned conclusion that the NPR Agreement is not a reliable benchmark for setting the statutory rate, and, in any case, fails on its own terms to provide a proper basis for comparison.

1. The NPR Agreement Is Not Comparable Because It Has a Fundamentally Different Rate Structure.

Petitioner argues that the rates paid by CPB under the NPR Agreement provide a suitable secular analogue for purposes of the RFRA and First Amendment analysis. But, as reflected in the Board's treatment of Petitioner's rate proposals, comparing the statutory royalty rates religious webcasters pay to the lump sum paid by CPB compares apples and oranges. The NPR Agreement includes at least three economically significant features identified by the Board that are not captured in Petitioner's comparison of the "per-performance" rates associated with each rate structure.

First, CPB agreed to make large, annual, lump-sum payments as part of the NPR Agreement. That lump-sum payment is valuable to SoundExchange. Indeed, enshrined in the NPR Agreement is explicit recognition

that the Agreement includes a "discount that reflects the administrative convenience … of receiving annual lump sum payments that cover a large number of separate entities, as well as the protection from bad debt that arises from being paid in advance." 37 C.F.R. § 380.31(b)(3). In its final determination, the Board found that the "parties to the [NPR] Agreement prominently highlight the 'administrative convenience' and 'protection from bad debt' that result from the advance payment structure as being economically significant elements of the agreement that justify a discount in the royalty rate," yet Petitioner's rate proposal "does not adjust the per-performance rate that it purportedly derives from the [NPR] Agreement to reflect the discount for advance payments." Pet. App. 533a. The same issue arises again with Petitioner's attempt to compare the statutory rate the Board adopted (which does not include lump-sum payments) to the CPB payment.

Second, CPB/NPR agreed to provide consolidated usage reporting in the NPR Agreement. The Board found that the "record reflects that consolidated reporting has value to SoundExchange." Pet. App. 535a. Such reporting is valuable because it, too, greatly simplifies the administrative process. As the Board explained, the NPR Agreement "continue[s] the practice of consolidating reports of use through CPB," and even one of Petitioner's experts "recognized that consolidated reporting . . . represents a cost savings to SoundExchange." Pet. App. 533a, 535a. Once again, simply comparing the statutory rate (which does not include consolidated reporting) to a per-performance

number purportedly derived from the NPR Agreement does not capture this feature of the NPR Agreement.

Third, the settlement rate in the NPR Agreement includes the value of avoiding protracted litigation. As the Board explained, "settlement agreements, unlike voluntary agreements reached outside the context of litigation, are not free from trade-offs motivated by avoiding litigation cost, as distinguished from the underlying economics of the transaction." Pet. App. 519a (internal quotation marks omitted). Thus, "[t]o be informative on the question of willing buyer/willing seller rates," a rate proposal that relies on a settlement as a benchmark "must take into account trade-offs motivated by avoiding litigation cost." Pet. App. 519a-520a. Before the Board, Petitioner's "economics experts did not perform any analysis to disaggregate trade-offs motivated by avoiding litigation cost from the underlying economics of the deal," nor did they "even acknowledge[] the existence of the issue." Pet. App. 520a. Petitioner continues to ignore this element in undertaking its comparison of the rate religious webcasters pay and the lump sum CPB pays.

Taken together, the Board found that these valuable but unaccounted-for features of the NPR Agreement "constitute an overwhelming argument for rejecting entirely the [NPR] Agreement as a benchmark." Pet. App. 536a. The D.C. Circuit similarly concluded that all of these features were material and affected the rate that NPR pays. *See* Pet. App. 660a-661a (listing these differences). The Board's reasoning, as approved by the D.C. Circuit, provides ample support for the D.C.

Circuit's conclusion that Petitioner has not established that religious webcasters are disadvantaged relative to secular public webcasters.

The Board's extensive reasoning also refutes Petitioner's suggestion that the Board somehow sought to "insulate" its determination from an (unarticulated) RFRA and First Amendment challenge by failing to make a finding as to the relative rates paid by religious webcasters and public webcasters. Pet. at 12. The Board did nothing of the sort. To the contrary, the Board extensively analyzed that question in assessing Petitioner's rate proposal and concluded that Petitioner had failed to establish that the NPR settlement was a suitable benchmark in setting the statutory rate.

Petitioner further suggests that the D.C. Circuit erred in not undertaking its own "independent examination" into that question. Pet. at 19 (citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 567 (1995)). But none of Petitioner's cited cases apply this principle to a rate-setting context like this one, in which any rate set could implicate First Amendment issues. Petitioner's suggested expansion of this doctrine would therefore require reviewing courts to examine *all* such rate-setting decisions de novo, a proposition that Petitioner does not defend let alone demonstrate is the subject of a circuit split. Regardless, the D.C. Circuit did undertake a thorough examination of the Board's determination and concluded that the "record . . . contains no basis for

the Board, *or this court*, to effectively determine whether noncommercial webcasters subject to the compulsory license are paying higher rates than the NPR stations covered by the NPR Agreement." Pet. App. 669a (emphasis added). Nothing further was required.

2. Petitioner's Assertion in the Petition for Certiorari that Religious Webcasters Pay Eighteen Times What Public Webcasters Pay Is Incorrect.

Before this Court, Petitioner attempts to quantify for the first time the purported disparity in rates paid by religious broadcasters and public broadcasters. Petitioner asserts that religious webcasters pay 18× as much as CPB pays for use by NPR webcasters. But this 18× figure is an invention of counsel at the certiorari stage. *See* Pet. at 10. It appears nowhere in Petitioner's briefing before the D.C. Circuit, and it should not be credited by this Court.

In any case, taken on its own terms, Petitioner's computation ignores the statutory rate structure and makes contestable assumptions that render it meaningless as a basis for comparing the rates paid by religious webcasters and CPB.

First, as just stated, Petitioner's calculation of the "average NPR per-performance fee" fails to account for any of the features of the NPR Agreement, including the valuable benefits SoundExchange received under the NPR Agreement. The calculated per-performance rate of $0.000137 appears *nowhere* in the NPR Agreement

and is derived simply by dividing the lump-sum amount that CPB pays each year by the total pool of "Music ATH" available to NPR stations in 2024, using an assumed 15 performances per hour. Pet. at 10 & n.2. That self-described "simple computation" makes no adjustments to account for the value of receiving lump-sum payments and consolidated reporting, and avoiding years of costly litigation. It also ignores actual usage by NPR stations, which the record showed has in some years been well less than the applicable cap, and differences in music programming (including use of long classical works on NPR stations). Taking those factors into account would lead to a higher derived per-performance rate. As reflected in the Board's extensive proceedings, questions of how to compare the rates paid by two groups are difficult and often require economic analyses and expert testimony. Petitioner's belated, purported calculation of the relative rates over two pages of the petition for certiorari ignores this reality.

Second, even assuming Petitioner's derived per-performance rate has any salience for the comparability analysis—it does not—Petitioner further assumes that the 2024 level of "Music ATH" should be used as its denominator. This, too, loads the deck somewhat in favor of Petitioner because, under the terms of the NPR Agreement, the pool of available usage increases over time. Using the 2024 amount therefore reduces public broadcasters' derived per-performance rate and ignores that CPB paid a higher implied per-performance rate in 2021-2023.

Third, Petitioner's 18× comparison is of a very specific and gerrymandered kind: it compares the purported *average* NPR per-performance rate with the noncommercial rate for usage above the 159,140 monthly ATH threshold. This comparison ignores the massive discount that *all* non-settling noncommercial webcasters, including religious broadcasters, receive on their first 159,140 ATH of usage each month. As a result of that key feature of the statutory rate structure, the vast majority of noncommercial religious broadcasters pay only the $1,000 minimum fee. And even those that exceed the 159,140 monthly ATH threshold still pay only $1,000 a year for those first 159,140 hours.

Fourth, the fundamental unreliability of Petitioner's figure can be demonstrated by changing some of Petitioner's unrealistic assumptions. Instead of looking at a religious broadcaster with a very high level of usage, consider a more typical religious webcaster that operates at exactly the monthly threshold of 159,140 ATH. (The record showed that 97% of noncommercial webcasters had usage below that threshold.) Under Petitioner's logic, that religious broadcaster would pay *only one quarter* of the amount that an NPR station would on a per-performance basis.[3]

In short, Petitioner's new back-of-the-envelope comparison cannot supply a reliable basis for concluding

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[3] Under Petitioner's counterfactual presentation of the NPR Agreement, an NPR station would pay 159,140 monthly ATH × 12 months × 15 performances/hour × $0.000137 = $3,924.39, or roughly 4× the $1,000 annual minimum fee that the noncommercial religious broadcaster would pay.

that religious webcasters pay a higher rate than NPR does. That comparison should not replace the Board and D.C. Circuit's reasoned conclusion that the statutory noncommercial rate structure and the NPR Agreement are not comparable.

B. Absent Disparate Treatment, the Circuit Splits Regarding RFRA and the Free Exercise Clause Are Not Implicated.

The absence of any finding that religious webcasters are disadvantaged relative to secular webcasters creates a threshold obstacle to this Court's review of the RFRA and First Amendment questions. In addition, however, the absence of this factual predicate means that neither of the alleged circuit splits presented in the petition actually arises. Indeed, in both cases, Petitioner does not identify a split at all, but rather cites cases that all adhere to the same general rule that heightened scrutiny applies when a religious claimant has shown a substantial burden on religion or worse treatment than any comparable secular entity. The D.C. Circuit's decision is entirely consistent with those decisions: where no such showing has been made, heightened scrutiny is not required.

RFRA. Under RFRA, actions of the federal government cannot "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless it is the "least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(a)-(b); *see generally Tanzin v. Tanvir*, 592 U.S. 43, 45-46 (2020). Petitioner contends that the D.C. Circuit's refusal to apply strict

scrutiny conflicts with this Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 735 (2014), as well as decisions from the Seventh, Ninth, and Tenth Circuits. *See* Pet. at 17-18 (citing *Korte v. Sebelius*, 735 F.3d 654, 671 (7th Cir. 2013); *United States v. Christie*, 825 F.3d 1048, 1055 (9th Cir. 2016); and *United States v. Friday*, 525 F.3d 938, 946 (10th Cir. 2008)).

There is no split. All of the cited cases recognize that strict scrutiny is required only where the RFRA claimant has made a *prima facie* case that their religious practice has been substantially burdened. The Seventh Circuit case on which Petitioner relies thus holds that strict scrutiny applies only "[o]nce a RFRA claimant makes a *prima facie* case that the application of a law or regulation substantially burdens his religious practice." *Korte*, 735 F.3d at 673. Only thereafter does the "burden shift[] to the government to justify the burden under strict scrutiny." *Id.* Similarly, the Ninth Circuit case on which Petitioner relies states that, under RFRA, "sincere religious objectors must be given a pass to defy obligations that apply to the rest of us, *if* refusing to exempt or to accommodate them would impose a substantial burden on their sincere exercise of religion." *Christie*, 825 F.3d at 1055 (emphasis added); *see also id.* (recognizing that the "Christies first had to establish a *prima facie* case"). And the cited Tenth Circuit case, too, holds that strict scrutiny applies only "[o]nce [the RFRA claimant] shows that applying a statute to him will substantially burden his religion." *Friday*, 525 F.3d at 946.

The D.C. Circuit said nothing in its opinion that conflicts with these cases. It correctly stated that "Under the RFRA, federal government action cannot 'substantially burden a person's exercise of religion even if the burden results from a rule of general applicability,'" unless strict scrutiny is satisfied. Pet. App. 668a (quoting 42 U.S.C. § 2000bb-1(a)-(b)). And it simply determined that no *prima facie* showing of substantial burden had been made because Petitioner's "RFRA . . . arguments are premised on a factual assertion," not established by Petitioner, that "the rate for noncommercial webcasters under the compulsory license is higher than the rate enjoyed by NPR under the NPR Agreement." Pet. App. 668a. In reaching that conclusion, the D.C. Circuit conformed to the well-established principles set forth in Petitioner's cases.

Indeed, Petitioner *concedes* that a "substantial burden" arises under RFRA only if the Court somehow concludes that religious webcasters pay more than CPB does. As Petitioner explains, "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." Pet. at 16. Similarly, in summarizing its RFRA claim, Petitioner asserts that the "D.C. Circuit ignores the substantial burden imposed by forcing religious stations to *pay more* than NPR stations." Pet. at 15 (emphasis added). But that factual predicate has not been established.

Free Exercise. A similar problem arises with respect to Petitioner's Free Exercise claim. Petitioner alleges that the decision below conflicts with this Court's decision in *Tandon v. Newsom*, 593 U.S. 61 (2021) (per curiam) and decisions applying *Tandon* from the Second, Sixth, and Ninth Circuits. Pet. at 22-27 (citing *Antonyuk v. Chiumento*, 89 F.4th 271, 349-50 (2d Cir. 2023), *petition for cert. filed*, 92 U.S.L.W. 3217 (U.S. Feb. 22, 2024) (No. 23-910); *Resurrection Sch. v. Hertel*, 35 F.4th 524, 529 (6th Cir.) (en banc), *cert. denied*, 143 S. Ct. 372 (2022); *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 686 (9th Cir. 2023) (en banc)).

However, *Tandon* provides only that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62. The cited circuit court cases simply reference the same general rule. *See Antonyuk*, 89 F.4th at 349 (citing *Tandon*); *Resurrection Sch.*, 35 F.4th at 529 (same); *Fellowship of Christian Athletes*, 82 F.4th at 686 (same).

The D.C. Circuit's decision does not conflict with *Tandon*'s rule. To the contrary, the D.C. Circuit faithfully adhered to *Tandon* by crediting the Board's conclusion that the NPR Agreement is *not* "comparable" to the rates that religious webcasters and other non-settling, noncommercial webcasters must pay. Pet. App. 668a. Indeed, because the statutory rate structure applies equally to religious and secular non-settling

noncommercial webcasters, it is a law of a general applicability that does not treat any comparable secular entity better than the religious webcasters.

Petitioner mischaracterizes the D.C. Circuit's opinion as impermissibly "'[r]equiring a showing of more'" than "favoring comparable secular activity" to implicate the Free Exercise Clause. Pet. at 27 (quoting *Fellowship of Christian Athletes*, 82 F.4th at 686). That is not what the D.C. Circuit did. Rather, it concluded only that Petitioner had not made the initial showing that a "comparable" secular activity had been treated more favorably. As the D.C. Circuit explained, "[w]ithout making that initial showing of unfavorable treatment of religious webcasters, [Petitioner] cannot establish a violation of the RFRA or the First Amendment." Pet. App. 669a. Thus, with respect to this claim as well, the alleged circuit split is illusory.

C. For Similar Reasons, Petitioner's Free Speech Claim Is Not Properly Presented in this Case.

Finally, Petitioner also presses a Free Speech claim. *See* Pet. at 28-30. That claim, too, is premised on the theory that the challenged government action is "favor[ing] some speakers over others," as Petitioner acknowledges. *See* Pet. at 28 (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 170 (2015)). But that is not the case here. The statutory rate structure treats Petitioner's members the same as all other similarly situated noncommercial entities, whether above or below the monthly ATH threshold. Petitioner suggests that the default rate scheme "target[s] a subgroup of religious

webcasters who have more than a minimal audience," Pet. at 28, but that conclusion is dependent on Petitioner's rough calculation ignoring central features of the NPR settlement, and it in any case ignores the longstanding reasons why the Board requires payment at the commercial rate for usage above the threshold—namely because at that level, noncommercial entities begin to compete with commercial entities such as the commercial religious broadcasters considered by the Board. *See, e.g.*, Pet. App. 545a-546a.

Moreover, this case would be a poor vehicle to address this issue. Petitioner does not allege any split on this question; it was briefed in only a single paragraph in Petitioner's opening brief in the D.C. Circuit; and the D.C. Circuit did not pass on it below. And, as Petitioner acknowledges, *see* Pet. at 12, 29, the Free Speech question arises in a novel context (royalty rates) that merits more considered analysis by the lower courts before it is addressed by this Court.[4]

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[4] The D.C. Circuit's opinion notes additional "substantial and open question[s]" questions that could complicate this Court's ability to reach the RFRA and First Amendment questions. Pet. App. 670a. As the court explained, Petitioner "fails to cite any precedent that would give the Board the power to impose a statutory license that . . . would be available only to select members of a particular trade organization, rather than to a category of webcasters. We are aware of none. Nor did [Petitioner] argue to the Board that the religious broadcasters it represents form a distinct market segment for purposes of the 2021-2025 proceeding." Pet. App. 699a-670a (internal citation omitted).

II. THE OTHER QUESTIONS PRESENTED DO NOT WARRANT THIS COURT'S REVIEW.

The petition includes two additional questions contesting the Board's evidentiary determinations with respect to Petitioner's rate proposal. Neither of those questions implicates any of this Court's criteria for certiorari—as Petitioner essentially concedes. These questions are factbound and splitless, and in any case were correctly decided below.

A. The Board's Application of the Exclusionary Rule in 17 U.S.C. § 114(f)(4)(C) Is Factbound, Implicates No Split, and Is Unlikely to Recur.

The second question presented asks "[w]hether 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." Pet. at i. Section 114(f)(4)(C) prohibits the Board from "admi[tting] as evidence or otherwise tak[ing] into account" the "provisions of any agreement entered into pursuant to" the Webcaster Settlement Act of 2009, Pub. L. No. 111-36, 123 Stat. 1926, including "any rate structure" and "fees." The Board invoked this statutory bar in its final determination to exclude consideration of an internal SoundExchange document—the "NPR Analysis"—that it determined included "rates derived from a non-precedential WSA agreement." Pet. App. 530a.

Whether the Board properly excluded this particular document is plainly not a question warranting this

Court's review. Petitioner does not identify any split in authority as to the interpretation of this provision. Nor is one likely to emerge: Petitioner does not cite a single other case addressing this provision, and no such case appears to exist. And as the time period governed by the WSA recedes into the past, it is increasingly unlikely that parties will seek to introduce documents setting forth provisions of those agreements.

At most, Petitioner suggests that the Board's exclusion of the NPR Analysis conflicts with an opinion of the Register of Copyrights as to the scope of § 114(f)(4)(C). *See Scope of the Copyright Royalty Judges' Continuing Jurisdiction*, 80 Fed. Reg. 58,300, 58,305 (Sept. 28, 2015). Petitioner argues for that result by suggesting the rates in the NPR Analysis were used in the NPR settlement governing 2016-2020—after the WSA agreements had expired. But that alleged conflict, too, does not pose a certworthy question.

In any case, the Board's decision does not conflict with the Register's opinion. The Board carefully considered the opinion and concluded that it was "inapt." Pet. App. 531a. As the D.C. Circuit explained in affirming the Board's determination, the Register's opinion "allows the Board to consider voluntary license agreements that incorporate WSA settlement terms, as well as the effect of the WSA on private-settlement negotiations," but "it does not require or even allow the Board to consider documents like the NPR Analysis." Pet. App. 663a. That is because, as a factual matter, the NPR Analysis "documents WSA rates that may have been used to *propose* terms for a subsequent

agreement," but "[i]t does not document any post-WSA terms." Pet. App. 663a. Thus, in the D.C. Circuit's view, the Board "appropriately concluded that it was statutorily barred from considering the royalty rates contained in the 'NPR analysis.'" Pet. App. 662a. That factbound conclusion—based on the nature of the NPR Analysis in relation to the scope of § 114(f)(4)(C)—does not present a question of broader significance appropriate for this Court's review.

B. The Board's Determinations Regarding Expert Testimony and Burden of Proof Are Factbound and Implicate No Split of Authority.

The third question presented similarly seeks review of factbound and splitless issues relating to the Board's treatment of expert testimony and the burden of proof. Petitioner argues that the Board's determinations on these two issues were arbitrary and capricious because they departed from past practice. *See* Pet. at 32. But the Board's determinations reflect reasoned decisionmaking and do not require further review from this Court.

Expert Testimony. With respect to expert testimony, Petitioner asserts that the Board adopted a "new *per se* requirement of expert testimony to demonstrate a proffered rate benchmark's comparability." Pet. at 32. But Petitioner does not allege any split associated with this issue; rather, this question presented is simply a request to correct a purported error in the Board's determination.

In any case, the Board did not err. Before the Board, SoundExchange disputed that the NPR Agreement provided a suitable benchmark, not only because it was a settlement rather than the product of adversarial litigation, but also because the NPR Agreement involved "*different* buyers (CPB as opposed to individual webcasters), *different* sellers (SoundExchange as opposed to individual record companies), *different* sets of works (all commercial sound recordings as opposed to an individual record company's repertoire) and *different* rights and obligations." Pet. App. 521a. The Board agreed that, "as enumerated by SoundExchange," the target market and the NPR Agreement "differ in their particulars." Pet. App. 522a. Given these complications in this particular case, the Board simply concluded, on the record before it, that "[t]here is insufficient expert testimony to determine the extent to which the similarities between the [NPR] Agreement and the target market support its use as a benchmark or the degree to which the differences between the agreement and the target market detract from that use (or require adjustments to the benchmark rates)." Pet. App. 522a.

This careful, context-dependent analysis is hardly the arbitrary departure from past practice that Petitioner asserts. Indeed, the D.C. Circuit has held that appellants seeking to challenge the "Board's selection of its benchmarks" face an "uphill battle" because "it is within the discretion of the [Board] to assess evidence of an agreement's comparability and decide whether to look to its rates and terms for guidance." Pet. App. 658a-659a (quoting *SoundExchange, Inc. v. Copyright Royalty Bd.*, 904

F.3d 41, 50-51 (D.C. Cir. 2018) (internal quotation marks and citations omitted)); *see also Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755 (D.C. Cir. 2009) (per curiam); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 127 (D.C. Cir. 2015).

Moreover, it is not even apparent that the Board adopted any such "*per se*" rule requiring expert testimony that would have implications beyond this case. To the contrary, the Board made clear that it did not view the question of whether a settlement agreement could provide a suitable comparator as capable of categorical resolution. *See* Pet. App. 519a (acknowledging that the NPR Agreement "is a settlement of ongoing rate litigation" but clarifying that it "d[id] not agree that a settlement of a rate proceeding is categorically barred from use in a benchmarking exercise"). Similarly, the D.C. Circuit said nothing about any such *per se* rule. Its opinion concluded only that requiring expert testimony was warranted "in this case," Pet. App. 659a, and that there was Board precedent for such a requirement. *See* Pet. App. 660a (citing *Web IV*, 81 Fed. Reg. at 26,327). These conclusions are eminently reasonable and pose no issue that this Court need review.

Burden of Proof. Finally, Petitioner is incorrect to suggest that the Board arbitrarily changed who bears the burden of proof regarding adjustments to proffered benchmarks. Petitioner points to Board precedent that required the challenger of an "otherwise proper and reasonable benchmark" to quantify further proposed

adjustments. Pet. at 36 (quoting *Web IV*, 81 Fed. Reg. at 26,387). But as the D.C. Circuit explained, Petitioner's "citations are all inapposite," and the *Web IV* example "is distinguishable because the NPR Agreement was not an 'otherwise proper and reasonable' benchmark." Pet. App. 661a & n.5. And, contrary to Petitioner's contention that "*Web IV* accepted a settlement-based benchmark without litigation cost adjustments," Pet. App. 662a n.5, the D.C. Circuit explained that *Web IV* did so "only as 'support for *some* elements of SoundExchange's rate proposal' and '*not* for the proposed rate for usage beyond the ATH threshold,' which is exactly what [Petitioner] attempted here." Pet. App. 662a n.5 (quoting *Web IV*, 81 Fed. Reg. at 26, 394 (emphasis in D.C. Circuit opinion)).

Petitioner offers nothing in response to these distinctions drawn by the D.C. Circuit, nor identifies any broader significance associated with this issue. The inclusion of the second and third questions in the petition for certiorari only confirms that the record as this case comes to the Court does not cleanly present the RFRA and First Amendment challenges that Petitioner raises.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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