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.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
DANIEL TENNY
JENNIFER L. UTRECHT
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

The Copyright Act of 1976, 17 U.S.C. 101 *et seq.*, entrusts to the Copyright Royalty Board the responsibility to periodically establish reasonable rates and terms for a statutory license governing noninteractive "webcasting"—that is, the public performance of copyrighted sound recordings over the Internet. 17 U.S.C. 801(b)(1), 114(f). The Act encourages copyright owners and users to negotiate mutually agreeable rates and terms, and it empowers the Board to "adopt" such negotiated settlements "as a basis for statutory terms and rates." 17 U.S.C. 801(b)(7). Absent a settlement covering all services, however, the Board must conduct a contested royalty ratesetting proceeding to determine the royalty rates and terms "that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. 114(f)(1)(B).

Petitioner challenges the rates and terms established by the Board for noncommercial services from 2021 until 2025. Petitioner claims that those rates and terms violate the First Amendment and the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, because, in petitioner's view, those terms are less favorable than the ones agreed to by public radio stations who reached settlements with copyright owners. The question presented is as follows:

Whether the court of appeals correctly concluded that petitioner had failed to establish that the rates and terms established by the Board are less favorable than those enjoyed by public radio stations covered by a negotiated settlement.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statutes, regulations, and rule:

Statutes, regulations, and rule—Continued: Page

Miscellaneous: Page

In the Supreme Court of the United States

No. 23-927

NATIONAL RELIGIOUS BROADCASTERS NONCOMMERCIAL MUSIC LICENSE COMMITTEE, PETITIONER

v.

COPYRIGHT ROYALTY BOARD, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 633a-678a) is reported at 77 F.4th 949.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2023. A petition for rehearing was denied on September 27, 2023 (Pet. App. 681a-682a). On December 15, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 25, 2024. On January 9, 2024, the Chief Justice further extended the time to and including February 23, 2024, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves an appeal of a final ratesetting determination by the Copyright Royalty Board. The Board is an administrative tribunal established within the Library of Congress that sets and adjusts the rates and terms for statutory copyright licenses and provides for the distribution of royalties collected under certain licenses. See Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341 (17 U.S.C. 801 *et seq.*).[1] The Board determination challenged here establishes the rates and terms for the statutory license for webcasting—*i.e.*, the noninteractive transmission of copyrighted sound recordings over the Internet—from 2021 until 2025. Pet. App. 1a-632a; see 17 U.S.C. 112(e)(4), 114(d)(2) and (f)(2).

The Copyright Act of 1976, 17 U.S.C. 101 *et seq.*, encourages copyright owners and users to negotiate mutually agreeable rates and terms for statutory licenses, and it empowers the Copyright Royalty Board to "adopt" such negotiated settlements "as a basis for statutory terms and rates." 17 U.S.C. 801(b)(7)(A). If a particular record label and webcaster negotiate a settlement agreement, that agreement controls instead of the Board's compulsory license. Absent a settlement covering all webcasters, however, the Board must

---

[1] Under the Copyright Act, a "statutory license" grants access to a copyrighted work to any person who satisfies conditions set by law, including payment of a defined royalty. Statutory licenses apply only to specific uses of copyrighted works, such as the retransmission of over-the-air television content by cable operators (17 U.S.C. 111); the use of musical, pictorial, graphic, and sculptural works by public broadcasting entities (17 U.S.C. 118); and, as relevant here, the making of ephemeral recordings (17 U.S.C. 112) and the public performance of sound recordings by means of a digital audio transmission (17 U.S.C. 114).

conduct a contested royalty ratesetting proceeding. Such proceedings take the form of multi-party administrative trials, complete with discovery, expert witnesses, documentary evidence, and often live oral testimony to support the parties' competing rate proposals. See 17 U.S.C. 803(b); 37 C.F.R. Pt. 351.

At the conclusion of that contested proceeding, the Board must establish for the license "reasonable rates and terms" that "most clearly represent" what "would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. 114(f)(1)(B). The Board must base that determination on the "economic, competitive, and programming information presented by the parties." 17 U.S.C. 114(f)(1)(B)(i). As one means of deriving such rates and terms, the Board "may consider the rates and terms for comparable types of audio transmission services and comparable circumstances under voluntary license agreements" submitted by the parties. 17 U.S.C. 114(f)(1)(B)(ii). These voluntarily negotiated agreements are often referred to as "benchmarks" for appropriate license rates and terms. See *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, 67 Fed. Reg. 45,240, 45,246-45,249 (July 8, 2002) (*Web I*).

In addition, the Board's determination must "distinguish among the different types" of services that qualify for the webcasting statutory license, based on, among other factors, the "quantity and nature of the use of sound recordings" by the streaming services and the degree to which that type of service substitutes for or promotes purchases of music. 17 U.S.C. 114(f)(1)(B). On this basis, the Board has historically distinguished between—and set different rates and terms for—

commercial and noncommercial webcasting services, and between subscription-based and ad-based commercial services. See, *e.g.*, *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 72 Fed. Reg. 24,084, 24,097 (May 1, 2007) (*Web II*); *Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings*, 81 Fed. Reg. 26,316, 26,346 (May 2, 2016) (*Web IV*).

2. a. In January 2019, the Board commenced the ratesetting proceeding that is at issue here. 84 Fed. Reg. 369 (Jan. 24, 2019); see 17 U.S.C. 803(b)(3)(B). Twenty parties filed petitions to participate, including intervenor SoundExchange—who participated on behalf of several entities representing artists and copyright owners—and petitioner National Religious Broadcasters Noncommercial Music License Committee, who represented the interests of certain religious noncommercial broadcasters that transmit their broadcast programming online. C.A. App. 296.

As relevant here, the Board received two negotiated settlements covering a small portion of webcasting services. Pet. App. 5a-6a. The first was between SoundExchange, National Public Radio (NPR), and the Corporation for Public Broadcasting (CPB), and it addressed the rates and terms for internet transmissions by certain public radio stations. *Id.* at 6a. The second was between SoundExchange and College Broadcasters, Inc., and it addressed the rates and terms for internet transmissions by college radio stations and other noncommercial educational webcasters. *Ibid.* The Board received no comments on either proposal, and it approved both settlements. 85 Fed. Reg. 11,857 (Feb. 28, 2020); 85 Fed. Reg. 12,745 (Mar. 4, 2020).

After extensive discovery and multiple rounds of motion practice, the Board commenced a five-week evidentiary hearing concerning the reasonable rates and terms for transmissions not covered by the settlements. During that proceeding the Board heard oral testimony from 33 fact and expert witnesses, and it admitted into evidence 748 exhibits comprising more than 900,000 pages of documents. Pet. App. 7a-8a.

b. In October 2021, at the conclusion of that proceeding, the Board issued a final determination. Pet. App. 1a-632a; see *Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies To Facilitate Those Performances*, 86 Fed. Reg. 59,452 (Oct. 27, 2021) (*Web V*). Consistent with past practice, that final determination established within the webcasting statutory license separate rates and terms for three different types of services: subscription-based commercial services, ad-supported commercial services, and noncommercial services. Pet. App. 637a-641a. The petition for a writ of certiorari concerns only the portion of the Board's decision that established rates and terms for noncommercial services.

As relevant here, the Board's determination largely maintained the rate structure that has governed noncommercial services since 2006. Under that preexisting rate structure, the Board has set significantly lower rates for noncommercial services based upon evidence that "up to a point," noncommercial webcasters operate in "a distinct segment of the noninteractive webcasting market" and do not generally compete for listeners with commercial webcasters. *Web II*, 72 Fed. Reg. at 24,097. To that end, noncommercial webcasting stations pay only a minimum annual fee that covers a monthly

allowance of 159,140 aggregate tuning hours. Pet. App. 641a; see *Web IV*, 81 Fed. Reg. at 26,405-26,406.[2] For performances above that monthly usage threshold, noncommercial webcasters pay the same marginal rate as commercial non-subscription webcasters. Pet. App. 641a. In practice, the vast majority of noncommercial webcasters do not exceed the monthly usage threshold and thus pay only the minimum fee. C.A. App. 271-273. In 2018, for example, there were more than 900 nonsettling noncommercial webcasters, *id.* at 275, and only 20 of them paid more than the minimum fee, *id.* at 271-272.

In the proceeding at issue here, the Board maintained that overall structure for noncommercial webcasters, but it increased the minimum fee—which had remained unchanged since 2006—from $500 to $1000 per station. Pet. App. 640a-641a, 644a. In so doing, the Board rejected two alternative proposals offered by petitioner that would have significantly lowered the rates paid by noncommercial webcasters. See *id.* at 656a.

Petitioner's first proposal would have maintained the same usage allowance and $500 minimum fee, while allowing noncommercial webcasters to pay one-third of the commercial rate for above-threshold per-performance

---

[2] A "performance" is the transmission of one recording to one listener (*i.e.*, one "stream" of the recording over the Internet). 37 C.F.R. 380.7. The term "aggregate tuning hours" refers to the total hours of programming (each hour of which may contain multiple performances) that a licensee has transmitted from all of its channels and stations to all of its listeners in the United States. *Ibid.* If a licensee transmits one hour of programming to ten listeners, that constitutes ten aggregate tuning hours. If the licensee transmits ten hours of programming to a single listener, that also constitutes ten aggregate tuning hours. *Ibid.*

usage. Pet. App. 656a & n.2. Its second proposal would have allowed petitioner to pay a lump sum of $1.2 million to cover the royalties of up to 795 radio stations designated by petitioner. *Id.* at 656a n.2. Those stations would have an aggregate usage cap of 540 million aggregate tuning hours in 2021, which would then increase by 15 million hours per year. *Ibid.* Petitioner's second proposal contained no terms for the designated stations' usage above that cap. *Ibid.* For all other nonsettling noncommercial webcasters not designated for inclusion in petitioner's list of 795 stations, petitioner proposed that they pay the rates contained in the first proposal. *Ibid*; see *id.* at 533a.[3]

In support of its rate proposals, petitioner asked the Board to use as a benchmark the settlement agreement between SoundExchange, NPR, and CPB (the NPR Agreement). But the Board found that the NPR Agreement did not support petitioner's proposals. Pet. App. 518a-536a. Most fundamentally, although petitioner purported to derive a per-performance usage fee from the NPR Agreement, *id.* at 514a, 533a, the NPR Agreement did not actually specify a per-performance fee to be paid by the settling broadcasters, see *id.* at 532a-533a. Instead, the NPR Agreement imposed an upfront $800,000 annual license fee covering an aggregate amount of music to be shared by up to 530 public radio stations, with any additional performances subject to

[3] Although the Board rejected petitioner's proposals for other reasons, see Pet. App. 562a n.341, the court of appeals expressed skepticism about the Board's authority to impose rates that apply only to members of a particular trade organization without evidence that the organization represents an economically distinct segment of the webcasting market, see *id.* at 669a-670a.

the rates and terms established by the Board. See *id.* at 532a; 37 C.F.R. 380.31(a).

Petitioner attempted to bridge the gap between the NPR Agreement and its own rate proposal by noting the statement in the NPR Agreement that the $800,000 annual fee was calculated to reflect both an unspecified "annual minimum fee" for each covered public radio station and unspecified "[a]dditional usage fees" for some stations. 37 C.F.R. 380.31. Petitioner's expert claimed that the "usage fees" that made up the lump-sum payment amounted to a usage rate roughly equivalent to petitioner's proposal. Pet. App. 510a-514a. The Board found, however, that the expert's testimony was not credible in several respects, and that his analysis should be afforded "little weight." *Id.* at 526a; see *id.* at 528a. Among other things, the Board found that the expert's analysis was premised on several inferences that lacked a reliable foundation in the record, *id.* at 522a-528a, and that the analysis relied, at least in part, on terms contained in older agreements entered into pursuant to the Webcaster Settlement Act of 2009, Pub. L. No. 111-36, 123 Stat. 1926, which the Board was statutorily barred from considering. Pet. App. 528a-531a; see 17 U.S.C. 114(f)(4)(C).

In addition, the Board expressed concern that petitioner's expert had not attempted to account for potential ways in which the rates and terms in the NPR Agreement differed from the rates that would be negotiated to cover *all* transmissions in a hypothetical, competitive marketplace. Pet. App. 520a-522a. The Board further found that the expert's analysis did not properly account for several economically significant aspects of the NPR Agreement, including (1) the value of advance, lump-sum payments that are contemplated by that

settlement but are not ordinarily available under a statutory license; (2) the requirement that the hundreds of settling public radio stations provide consolidated reporting of their usage data to SoundExchange; and (3) the avoidance of litigation costs by settling in advance of the Board's contested proceedings. *Id.* at 519a-520a, 531a-535a.

Considering all of those factors together, the Board concluded that there was not sufficient evidentiary support to treat the NPR Agreement as a reliable benchmark for the rates and terms to which willing buyers and sellers would agree in a hypothetical marketplace. Pet. App. 519a, 535a-536a.

3. On appeal, see 17 U.S.C. 803(d)(1), petitioner argued that the Board should have accepted, as a benchmark for the rates that would govern all noncommercial services, the usage rate that petitioner had derived from the NPR Agreement. Pet. C.A. Br. 15. In so arguing, petitioner disputed the Board's numerous evidentiary findings regarding the reliability of petitioner's valuation of the NPR Agreement. *Id.* at 21-39. Petitioner did not, however, contest the Board's factual finding that petitioner's rate proposals failed to account for economically significant aspects of the NPR Agreement. Instead, petitioner contended that it was not obligated to account for the value of those terms. *Id.* at 26-32. Finally, petitioner argued that the Board's determination violated the First Amendment and the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, because the rates set for noncommercial services were, in petitioner's view, higher than the rates agreed to by the settling public broadcasters. Pet. C.A. Br. 52-55.

The court of appeals affirmed the Board's decision in its entirety. Pet. App. 633a-678a. As relevant here, the court observed that Congress had granted the Board broad discretion to decide whether to look to a voluntarily negotiated settlement agreement as a benchmark for the rates and terms that will govern the statutory license. *Id.* at 658a-659a. The court held that the Board had properly exercised that discretion in finding the evidence insufficient to show that the NPR Agreement could serve as a reliable benchmark for a compulsory license rate for noncommercial webcasters. *Id.* at 659a-663a.

The court of appeals further concluded that petitioner's First Amendment and RFRA claims were "premised on a factual assertion" that was not supported by the record: that the Board had established rates and terms for noncommercial services (including petitioner's religiously affiliated members) that are less favorable than those applicable to parties covered by the NPR Agreement. Pet. App. 668a-669a. The court observed that the Board had rejected petitioner's valuation of the NPR Agreement, and it faulted petitioner for failing to account for economically significant features of the Agreement. *Id.* at 669a. Because the record consequently contained no evidence regarding the actual per-performance rates paid by NPR stations, the court held that there was no evidentiary basis for petitioner's assertion that "noncommercial webcasters subject to the compulsory license are paying higher rates than the NPR stations covered by the NPR Agreement." *Ibid.* In the absence of such evidence of "unfavorable treatment of religious webcasters," the court held, "[petitioner] cannot establish a violation of the RFRA or the First Amendment." *Ibid.*

ARGUMENT

Petitioner's First Amendment and RFRA arguments are premised on its belief that the rates and terms established by the Board for noncommercial webcasters, including petitioner's members, are less favorable than those enjoyed by NPR and other public radio stations covered by a voluntary settlement agreement. The court of appeals held that this disputed factual claim was not supported by the Board's findings or the administrative record. That record-specific determination was correct and does not warrant review by this Court. Petitioner's remaining claims of error in the decision below likewise lack merit and do not identify any legal issue of ongoing or widespread importance. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly held that the Board's rate determination does not violate the First Amendment or RFRA.

a. The Free Exercise Clause provides that "Congress shall make no law * * * prohibiting the free exercise" of religion. U.S. Const. Amend. I. Pursuant to that protection, a government entity may not "burden[] [a person's] sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable'" unless the action is "narrowly tailored in pursuit of" a "compelling state interest." *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022) (quoting *Employment Div. Dep't of Human Res.* v. *Smith*, 494 U.S. 872, 881 (1990)). RFRA provides that, even under a facially neutral policy, federal government action 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) and (b).

Petitioner disclaims any argument that "paying royalty fees alone burdens [its members'] exercise of religion," contending instead that "[t]he substantial burden comes from the government's discriminatory rate structure." Pet. 16. Petitioner similarly invokes the Free Speech Clause of the First Amendment only insofar as that Clause prohibits "differential fees" or fees that "'discriminate'" against religious expression. Pet. 28 (citation omitted). Petitioner's First Amendment and RFRA claims therefore are premised entirely on its belief that the settlement agreement between secular public radio stations and copyright owners permits those stations to pay lower usage rates for the same performance rights than the rate structure that applies to nonsettling noncommercial services (both religious and secular) under the Board's determination. But the Board found that the record does not support petitioner's claims regarding the rates paid by NPR stations, see Pet. App. 519a-536a, and the court of appeals upheld that finding as reasonable and supported by the evidence, see *id.* at 659a-663a. Petitioner's claims before this Court are thus built on a rejected factual premise. See *id.* at 668a-669a.

b. During the administrative proceedings, petitioner urged the Board to significantly lower the already-reduced rates paid by noncommercial webcasting services. See Pet. App. 667a. As noted above, noncommercial webcasting stations have traditionally paid only a minimum annual fee—set in this proceeding at $1000 annually—for the right to play a monthly allotment of 159,140 aggregate tuning hours of sound recordings. See p. 5, *supra*. For any performances exceeding that

substantial threshold, noncommercial stations pay the same rate as commercial services. See p. 6, *supra*. During the current ratesetting proceeding, petitioner requested that the Board reduce the rates for above-threshold usage to one-third of the prevailing rate paid by commercial services, arguing that NPR-affiliated stations pay roughly that amount under the NPR Agreement. See pp. 6-7, *supra*. The Board examined the evidence that petitioner had proffered and found it to be unreliable and insufficient to support petitioner's proposal. Pet. App. 519a-536a.

As the Board explained, the NPR Agreement requires an annual lump-sum payment of $800,000, covering a capped annual allotment of transmissions to be shared by up to 530 public radio stations. Pet. App. 532a. By the agreement's terms, that $800,000 fee covers only a limited number of performances, leaving any additional above-threshold performances subject to the usage rates established by the Board for noncommercial webcasters. See 37 C.F.R. 380.31(a). In addition, the NPR Agreement makes clear that the $800,000 "[l]icense fee" was calculated to reflect an unspecified "minimum fee" for each covered station, as well as "[a]dditional usage fees" for "certain" stations, and an unspecified "discount" reflecting the settling webcasters' agreement to provide upfront, lump-sum payments. 37 C.F.R. 380.31(b).

Critically, however, the NPR Agreement does not specify how many of the 530 covered stations would pay only the (unspecified) minimum fee. The NPR Agreement likewise does not state what portion of the pooled allotment of hours those stations would be entitled to, or how the remaining performances would be allocated among the stations paying "additional" usage fees. It is

therefore impossible to discern from the face of the settlement how much any individual NPR station pays per performance.

Petitioner's expert witness nonetheless claimed that he could derive a per-performance usage rate from the NPR Agreement by analyzing usage data found in the "NPR Analysis," an internal SoundExchange document created in 2015. See Pet. App. 510a-514a, 522a; see also *id.* at 662a. But the witness's conclusion required a chain of inferences that the Board found "may be plausible individually but are unconvincing in the aggregate." *Id.* at 526a.

Further, the rates in the NPR Agreement reflected several economically significant terms for which petitioner did not account, including: (1) the avoidance of litigation costs by the parties to the NPR Agreement; (2) the value of NPR's upfront, lump-sum payments to SoundExchange; and (3) the agreement to provide consolidated reporting data from individual stations to SoundExchange. See Pet. App. 519a-520a, 531a-535a. The Board thus reasonably concluded that the usage rate petitioner had derived from the NPR Agreement could not serve as a benchmark without significant adjustments to "adequately capture the value of the Agreement." *Id.* at 661a. But petitioner provided no evidence regarding the value of those terms, nor did it explain why any adjustment for those economically significant terms was unnecessary. See *id.* at 660a-661a. These omissions further supported the Board's rejection of petitioner's rate proposals and undermined petitioner's claim before the court of appeals that NPR stations pay lower prices for the same rights.

c. As discussed, petitioner's proposals, like the rate structure the Board ultimately adopted, included a

minimum fee and then a per-performance rate for usage above a specified threshold. See Pet. App. 507a-508a. In the court of appeals, petitioner, like the rest of the parties and the court, discussed the rate structure in those terms. See, *e.g.*, Pet. C.A. Br. 12; Pet. App. 641a, 656a & n.2. In this Court, however, petitioner offers a new set of calculations that purports to compare the "average" cost of a performance under the NPR Agreement with the rates that noncommercial webcasters must pay for performances that exceed the monthly threshold covered by the annual minimum fee. See Pet. 9-10. That comparison was not presented to the Board or the court of appeals, and this Court should not evaluate it in the first instance. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (noting that this Court is one "of review, not of first view").

In any event, the comparison is without merit. To the extent the two distinct rate structures can meaningfully be compared, the proper comparison would not involve some hypothetical average per-performance fee that would be paid by a licensee streaming large volumes of music under each scheme. As discussed, see p. 6, *supra*, because the overwhelming majority of noncommercial webcasting stations do not have sufficiently large audiences to exceed the monthly allotment, each such station ordinarily pays only $1000 for the right to play up to 1,909,680 aggregate tuning hours annually. Petitioner's proffered "average" makes no effort to account for that reality.

Petitioner also does not accurately describe what NPR stations actually pay. Under the NPR Agreement, costs are pooled, and the record does not demonstrate how much the minimum fee is or how many entities pay it, for what amount of music. See p. 13, *supra*.

Further, the Board found that petitioner's evidence regarding the effective marginal rates paid by NPR stations under the Agreement was not sufficiently reliable to draw any conclusions regarding how much NPR stations actually pay. See Pet. App. 522a-528a. The Board also concluded that petitioner's calculations were artificially low because they did not capture the value of economically significant terms contained within the NPR Agreement to which the noncommercial webcasters were not subject. See *id.* at 519a-520a, 531a-535a.

Petitioner attempts to sidestep those difficulties by positing "a noncommercial Christian station webcasting 15 songs per hour to an average audience of over 1,000 people." Pet. 10. Petitioner's own math demonstrates how atypical such a station would be. As petitioner acknowledges, it is estimating 1000 individuals who listen for 24 hours per day, 365 days per year. See Pet. 10 n.4. That is roughly 8.8 million hours of music per year, or 730,000 hours per month, nearly five times the minimum-fee threshold (159,140 tuning hours per month) that very few noncommercial stations ever exceed. Such a station cannot plausibly be described as the "average."

Petitioner's repeated invocation of "218 listeners," *e.g.*, Pet. 9, illustrates the errors in its analysis. That figure was taken from the portion of the Board's analysis that derived the 159,140 aggregate-tuning-hour threshold for noncommercial webcasters' minimum fee: 159,140 is the number of tuning hours if 218 users listen 24 hours per day, 365 days per year, and the number 218 was selected because it was the average online listenership for NPR stations in 2004. See Pet. App. 500a & n.311. But again, see p. 6, *supra*, most noncommercial stations pay only the minimum fee and thus have fewer

cumulative listeners than that over the course of a year (even if there might be times in which a handful of stations have more than 218).

In short, as the court of appeals correctly held, the record does not support petitioner's claim that "noncommercial webcasters subject to the compulsory license are paying higher rates than the NPR stations covered by the NPR Agreement." Pet. App. 668a-669a. The court's record-based conclusion was correct, does not conflict with any decision of another court of appeals, and does not warrant this Court's review.

d. Relying on this Court's decision in *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), petitioner contends that the court of appeals should have conducted an "'independent review'" of the record rather than substantial-evidence review of the Board's findings. Pet. 19 (citation omitted). But petitioner did not raise that argument before the court of appeals; indeed, it did not even cite *Bose* in its appellate briefing. See *OBB Personenverkehr AG* v. *Sachs*, 577 U.S. 27, 37-38 (2015) (adhering to this Court's general practice of "not entertain[ing] arguments not made below"). In any event, the court of appeals concluded that "[t]he 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). As discussed, petitioner provides no compelling basis for its contrary assessment of the record. See pp. 12-16, *supra*.

Petitioner asserts (Pet. 20) that the government previously conceded that petitioner's members pay higher rates than the settling webcasters subject to the NPR

Agreement. That is incorrect. In the court of appeals, as here, the government argued at length that petitioner's effort to compare the NPR Agreement with the terms of its own proposals overlooked critical differences that made any such comparison unreliable. Gov't C.A. Br. 66-78. Petitioner points to a single sentence at the end of the relevant discussion in the government's brief, which observed that factually higher rates would not give rise to a Free Exercise violation if they were explained by nondiscriminatory motives. See *id.* at 85 ("That the rates established by the [Board] were higher than the rates agreed to by the settling noncommercial services does not show that the [Board's] determination was discriminatory."). In that sentence the government (perhaps inartfully) assumed arguendo that the rates under the Board's order were higher, and contested petitioner's argument about the legal implications of that assumption, without reiterating its earlier statements that the government disputed the premise. See *ibid.* But the court of appeals properly relied on the record itself and the parties' arguments rather than any supposed concession from that single sentence. Pet. App. 668a-669a.

Petitioner takes aim (see Pet. 25) at the court of appeals' remark that petitioner's "arguments are also problematic in other respects" insofar as petitioner challenged only "the rates paid by the religious broadcasters that are members of its trade association," without accounting for the fact that "the compulsory license applies to all noncommercial webcasters." Pet. App. 669a. The court made this statement in observing that the Board might not have authority to set a separate noncommercial rate for members of a particular trade association. *Id.* at 669a-670a; see n.3, *supra*. Contrary

to petitioner's suggestion, however (Pet. 21), the court did not thereby hold that "it makes no difference * * * under RFRA or the Free Exercise Clause if the above-threshold noncommercial webcasters paying commercial rates are almost exclusively religious." Pet. 21 (internal quotation marks and brackets omitted). Rather, the court merely noted without deciding that, in addition to petitioner's inability to demonstrate adverse treatment as a factual matter, there was a potential legal barrier under the Copyright Act to petitioner's argument.

Finally, petitioner suggests (Pet. 22-27) that the existence of any secular entity that pays lower rates than a religious entity would render the Board's order impermissible. The decisions on which petitioner relies, however, involved distinctions between similarly situated entities. See *Tandon* v. *Newsom*, 593 U.S. 61, 62 (2021) (per curiam) (holding that "government regulations are not neutral and generally applicable" if they treat "*comparable* secular activity more favorably than religious exercise") (emphasis added); *Kennedy*, 597 U.S. at 526 (noting that a law triggers strict scrutiny if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests *in a similar way*") (emphasis added; citation omitted). Here, however, petitioner has not demonstrated that NPR stations were similarly situated to petitioner's members yet were treated more favorably. Those stations, unlike petitioner's members, reached a settlement agreement with copyright owners that exempted them from the Board's compulsory license. And as discussed, petitioner has not demonstrated that the rates and terms of the settlement are more favorable than those applicable to petitioner's members.

In short, petitioner's First Amendment and RFRA claims were rejected not because the court of appeals adopted any legal position that would justify a grant of certiorari, but because petitioner had not established the factual predicates for its argument. Because this Court "do[es] not grant * * * certiorari to review evidence and discuss specific facts," *United States* v. *Johnston*, 268 U.S. 220, 227 (1925), petitioner's claims do not warrant this Court's review.

2. Petitioner's remaining claims of error (Pet. 30-37) raise technical and case-specific arguments that plainly do not satisfy this Court's criteria for certiorari. See Sup. Ct. R. 10. Those arguments lack merit in any event.

First, petitioner contends that the court of appeals misapplied 17 U.S.C. 114(f)(4)(C), which governs the admissibility of agreements that were entered under the Webcaster Settlement Act of 2009 and "that were in force, at the latest, only *through 2015*." Pet. 30. Petitioner's italicized language highlights the diminishing practical importance of the dispute on this admissibility issue. And the court correctly interpreted Section 114(f)(4)(C) in any event. See Pet. App. 662a-663a. The court agreed with the Board that Section 114(f)(4)(C) precluded reliance on an analysis of rates from past Webcaster Settlement Act agreements, distinguishing a Register of Copyrights opinion that had interpreted Section 114(f)(4)(C) to permit the Board's consideration of *new* agreements that merely incorporated terms of prior inadmissible ones. *Ibid.*; see *id.* at 531a. That distinction makes sense. While reliance on an analysis of past Webcaster Settlement Act agreements is, in effect, reliance on the prohibited agreements themselves, a new agreement negotiated outside the Act has

independent evidentiary weight even if it incorporates terms from a prior agreement.

Second, petitioner argues (Pet. 33-36) that the court of appeals improperly upheld the Board's insistence on expert testimony to demonstrate that petitioner's proposed benchmark is comparable to a compelled license for noncommercial webcasters. See Pet. App. 659a-660a; *id.* at 520a-522a; see also 17 U.S.C. 114(f)(1)(B)(ii). But in situations like this one, where petitioner's proposed benchmark is on its face markedly different from petitioner's proposed license, see Pet. App. 517a-520a, 522a, it is reasonable to require the proponent to demonstrate their comparability. See *id.* at 659a ("Requiring expert testimony in this case was consistent with the 'highly technical nature' of administrative rate determinations.") (citation omitted).

Petitioner asserts that the comparison mandated by the statute "simply requires identifying parties to, and rights licensed in, a benchmark." Pet. 35. That might be the case where, unlike here, the terms of the proposed benchmark are not fundamentally different from a party's proposal. Petitioner's suggestion (Pet. 34) that the Board was deviating from past practice ignores that distinction. And petitioner does not meaningfully distinguish a prior occasion in which the Board "demanded expert testimony" regarding comparability. Pet. App. 660a (citing *Web IV*, 81 Fed. Reg. at 26,327).

Petitioner is similarly mistaken in arguing (Pet. 36-37) that the Board impermissibly deviated from precedent in criticizing petitioner's failure to adjust its rate proposals to account for economically significant aspects of its proposed benchmark (such as the NPR Agreement's consolidated-usage-reporting requirement). See Pet. App. 531a-536a. In this case, unlike in

the precedent petitioner cites, petitioner failed to establish that its proffered benchmark was comparable to its own rate proposals in the first place. See *id.* at 661a n.5 ("Although *Web IV* required the challenger of an 'otherwise proper and reasonable benchmark' to quantify further proposed adjustments, that case is distinguishable because the NPR Agreement was not an 'otherwise proper and reasonable' benchmark.") (citation omitted); see also *id.* at 663a (noting the "absence of acceptable benchmarks" for altering the incumbent rate structure). There is no basis in precedent or logic for concluding that the burden of addressing flaws in the proposed benchmark should fall on anyone other than the benchmark's proponent. See *id.* at 535a ("It is not SoundExchange's (or the [Copyright] Judges') responsibility to rescue [petitioner's] faulty benchmark by proposing an appropriate adjustment."); see also *Music Choice* v. *Copyright Royalty Bd.*, 774 F.3d 1000, 1012 (D.C. Cir. 2014) ("The [Board] w[as] under no obligation to salvage benchmarks [it] found to have fundamental problems.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
DANIEL TENNY
JENNIFER L. UTRECHT
Attorneys

MAY 2024