NO. 23-927

IN THE

Supreme Court of the United States

NATIONAL RELIGIOUS BROADCASTERS NONCOMMERCIAL MUSIC LICENSE COMMITTEE,
Petitioner,

v.

COPYRIGHT ROYALTY BOARD AND LIBRARIAN OF CONGRESS,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement in the Petition for Writ of Certiorari remains unchanged.

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REPLY ARGUMENT SUMMARY

NRBNMLC's petition is not "built on a rejected factual premise." U.S.Opp.12. It is built on a simple comparison of NPR rates and those for noncommercial webcasters, revealing a substantial (18x above-threshold) disparity. Pet.9–10, 19. Indeed, the government admitted below that religious webcasters pay "higher" rates than those "agreed to by the settling noncommercial services," i.e., secular NPR stations. Pet.20. And no amount of backpedaling, see U.S.Opp.18, can change that. That acknowledged disparity is all that is required for this Court to reach the merits of the RFRA/First Amendment issue.

That merits analysis is clear-cut. Strict scrutiny applies to the government's discrimination against religious broadcasters and their speech, as confirmed by decisions of this Court and the Seventh, Ninth, and Tenth Circuits. Pet.15–22. And Respondents do not argue the Board's disparate rates for secular and religious broadcasters satisfy that demanding standard. Moreover, the government cannot justify treating religious entities worse than secular entities simply because some other secular entities are treated just as poorly.

The Court should also review the Board's arbitrary upheaval of its rules. 17 U.S.C. 114(f)(4)'s exclusionary rule is limited, and the Board's expansion of it thwarts a Congressional directive. And the Board's arbitrary, unexplained expert-testimony mandate and burden-of-proof reversal regarding benchmark adjustments undermine basic fairness and are entwined in the D.C. Circuit's rejection of NRBNMLC's First Amendment claims.

The petition should be granted.

REPLY ARGUMENT

I. This Court should resolve the RFRA and free-exercise circuit splits and review the D.C. Circuit's failure to apply strict scrutiny under the Free Speech Clause.

A. The D.C. Circuit's refusal to apply strict scrutiny under RFRA directly contradicts this Court's precedent and rulings by three circuits.

1. Respondents contend that RFRA doesn't apply. The government says the D.C. Circuit took no meaningful "legal position" on RFRA, U.S.Opp.20. And both say the court held that "no *prima facie* showing of substantial burden had been made," Sound Exchange.Opp.25; U.S.Opp.11. The first argument is belied by the D.C. Circuit's opinion. Pet.15–22. The second is just plain wrong.

"The burden of establishing a prima facie case of disparate treatment is not onerous." *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981). Under RFRA, religious broadcasters merely had to show the Board's disparate rates "substantially burden[ed]" their "sincere … religious exercise" by "a preponderance of the evidence." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428–29 (2006) (cleaned up); accord SoundExchange. Opp.24–25.

That low bar is met here. The disparity is established by comparing rates published in the Federal Register. Pet.9–10. The Board compelled religious broadcasters to pay above-threshold fees over 18 times higher than the fees the Board set for secular NPR-affiliated broadcasters. *Ibid.* Game over.

Respondents point to certain non-fee features of the NPR terms—advance payment, consolidated reporting, and litigation cost savings—that they say exempts the gaping fee disparity from strict scrutiny. U.S.Opp.21; SoundExchange.Opp.9–11, 15–19. Not so. The government conceded that—notwithstanding these administrative convenience features—"the rates established by the Judges [for religious stations] *were higher than* the rates agreed to by the [NPR] settling noncommercial services." That didn't matter, the government said, because the Board's "rationale" for setting higher rates was "not specifically directed at religious practice" and because "any noncommercial broadcast *that is not covered by* [NPR rates] pays the same rate." Final.Br.Appellees.85–86 (cleaned up; emphasis added). The D.C. Circuit had no power to erase that concession. *Amgen Inc.* v. *Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 470 n.6 (2013); contra U.S.Opp.18. And the government cannot do so now by pleading "inartful[ ]" drafting. *Ibid.* That judicial admission—which NRBNMLC relied on below, Final.Reply.Br.NRBNMLC.1, 3, 7—remains binding and is consistent with the numbers.

Further, SoundExchange is the beneficiary of the alleged administrative convenience from consolidated reporting and advance payment and thus the *only* entity that can meaningfully quantify any benefit. NRBNMLC sought such quantification in discovery, repeatedly, but SoundExchange provided only information showing that it had *not* quantified any purported benefits. J.A.1568–70. The Board previously held that such "administrative convenience" factors do not warrant adjustment of a benchmark where the party proposing the adjustment does not quantify them. Determination of Rates and Terms for

Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. 23054, 23068–69 (Apr. 17, 2013). And SoundExchange's claimed benefit does not change the fact that religious webcasters pay far more to reach above-threshold listeners than under NPR rates.

Notably, NRBNMLC proposed a rate structure that *included* advance aggregate payment, and it was rejected. Pet.App.535a. And any litigation cost savings would have benefitted NPR more than SoundExchange, as NPR exited litigation but SoundExchange continued to litigate noncommercial rates. Finally, even if the factors were quantified, it defies credulity to assume their value would have remotely offset the *18-fold* above-threshold fee disparity.

Simply put, Respondents' reliance on such non-fee features is a makeweight to avoid the strict scrutiny of the Board's rates that RFRA and the First Amendment require. Equally important, it contradicts the reality that the government admitted a rate disparity below. Pet.20.

Respondents say the 18x calculation is new. U.S.Opp.15; SoundExchange.Opp.1–2, 16. But NRBNMLC's brief below compared rates for above-threshold religious webcasters and concluded that they paid multiple times more than they would have under NPR average rates. Opening.Br.NRBNMLC.9–10. And at oral argument, counsel asserted both an average disparity and marginal disparity of 17x (for 2023) based on the rates themselves. Yet the D.C. Circuit did not even consider the disparity—whether shown by the rates themselves or by an examination of how the respective fees caused above-threshold webcasters to limit their listeners.

Separately, Respondents conflate a substantial burden under RFRA with benchmark comparability. U.S.Opp.8–9, 14, 16; SoundExchange.Opp.10–12, 14–18, 20. That's wrong. Even if the Copyright Act allowed the Board to impose significantly higher rates on religious stations than secular NPR stations, RFRA would still demand strict scrutiny. RFRA applies "even if the burden [on religious stations' free exercise] results from a rule of general applicability." 42 U.S.C. 2000bb-1(a). So Respondents' appeals to benchmark analysis and the Board's unbounded discretion miss the mark. U.S.Opp.10, 12; SoundExchange.Opp.23.

Similarly misguided is Respondents' spotlight on noncommercial religious stations that stay below the 218-average-listener threshold and pay only a minimum fee. U.S.Opp.3–6, 12–13, 15–17; Sound Exchange.Opp.2–3, 7, 22. Even many smaller religious stations pay more than NPR rates. And noncommercial stations, large and small, are pressured by the rate structure to suppress their listenership—impairing their missions—to avoid paying commercial-level rates for listeners above a 218-listener average, pressure that NPR stations do not face. Pet.3. The Board's actions injure both groups, and the harm is widespread, as unaffiliated broadcasters attest. Gateway.Creative.Amicus.Br.5–7, 17–19; Catholic.Radio.Ass'n.Amicus.Br.4–9.

Additionally, that commercial webcasters regularly pay higher rates is irrelevant. They represent a distinct market segment, U.S.Opp.3–5, and sell advertising to pay higher fees, which noncommercial religious stations—who rely on donations—can't do, Catholic.Radio.Ass'n.Amicus.Br.4–5.

SoundExchange also argues that NPR stations did not use all of their Music ATH allotment in some license years. SoundExchange.Opp.21. But in at least part of the period, NPR stations were on track to exceed significantly the allotment. J.A.1723. NPR regulations do not contemplate any additional payment for such additional NPR usage, 37 C.F.R. 380.31, nor were any such payments made, contrary to the government's suggestion, U.S.Opp.7–8; TX5625.64 (admitted J.A.900; Dkt.22463 (J.A.44)). Along the same lines, SoundExchange says some NPR stations play classical music of longer duration, which could reduce the disparity. SoundExchange.Opp.21. But the relevant comparison is what religious stations pay under both structures.

Finally, Respondents dispute appellate courts' independent duty to review the whole record when First Amendment rights are at stake. U.S.Opp17; SoundExchange.Opp.19. Yet this standard is well-established, and NRBNMLC timely raised it below. Pet.19. And because religious stations' RFRA and First Amendment claims are "properly before the [C]ourt, the [C]ourt is not limited to the particular legal theories advanced by the parties [here or below], but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen* v. *Kemper Fin. Servs.*, 500 U.S. 90, 99 (1991).

In the end, the precise degree of the rate disparity is a sideshow. Religious stations' free exercise is substantially burdened whether they pay eight or 18 times as much in royalties compared to their secular NPR counterparts, which, in fact, pay $0 to webcast because the government subsidizes them. Pet.10, 16; Catholic.Vote.org.Amicus.Br.22. There is no serious dispute a disparity exists.

2. On the merits, Respondents hardly discuss Petitioner's RFRA claim. Neither suggests the Board's actions satisfy strict scrutiny. They make only the circular argument that because RFRA isn't triggered, there is no circuit split. U.S.Opp.17; SoundExchange.Opp.2, 24. Because NRBNMLC showed a substantial burden on religious exercise by a preponderance of the evidence, RFRA applies and the D.C. Circuit's split with the Seventh, Ninth, and Tenth Circuits remains. Pet.17–18.

Respondents also cite a remedial reason invented by the D.C. Circuit, which the Board refused to rule on: whether the Board may "impose a statutory license … available only to select members of a particular trade organization, rather than to a category of webcasters." Pet.App.518a, 562a, 669a–70a; U.S.Opp.7 n.3, 18; SoundExchange.Opp.28 n.4. That violates a "fundamental rule of administrative law": that courts "must judge … agency action solely by the grounds [they] invoked." *Calcutt* v. *FDIC*, 598 U.S. 623, 624 (2023) (per curiam) (cleaned up). Courts cannot "supply a reasoned basis for the agency's action that the agency itself has not given." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (cleaned up).

This concern is also baseless. RFRA is a "super statute," *Bostock* v. *Clayton Cnty.*, 590 U.S. 644, 682 (2020), that grants courts power to grant "appropriate relief against a government" that isn't rigidly constrained by the Copyright Act, 42 U.S.C. 2000bb-1(c). RFRA "plainly contemplates that courts would recognize exceptions [to generally applicable laws]—that is how the law works." *Gonzales*, 546 U.S. at 434.

In short, religious stations may obtain RFRA-compliant statutory-rates unless the government shows that its interests satisfy strict scrutiny. The government makes no such claim here, and both of NRBNMLC's alternatives proposed rates applicable to noncommercial webcasters generally.

B. In declining to apply strict scrutiny under the Free Exercise Clause, the D.C. Circuit flouted *Tandon* and split with three circuits.

Under *Tandon* v. *Newsom*, 593 U.S. 61, 62 (2021) (per curiam), general applicability depends on whether religious and secular activities pose "similar risks" to "the asserted government interest that justifies the regulation at issue." Here, the Board justified setting above-threshold commercial-level rates by the purported "risk that large noncommercial webcasters may draw listeners from commercial webcasters." Pet.App.562a. But that purported risk—which NRBNMLC disputes—is no higher for non-NPR large noncommercial stations than for large NPR stations. Indeed, in establishing the noncommercial structure, the Board "looked to evidence of the largest NPR stations for evidence of convergence," *Intercollegiate Broad. Sys., Inc.* v. *CRB*, 571 F.3d 69, 89 (D.C. Cir. 2009) (per curiam), and adopted the 218-average-listener threshold based on 2004 average *NPR* station listenership, Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24084, 24099 (May 1, 2007).

While the Board has found that noncommercial webcasters overall occupy a distinct submarket, Pet.App.538a, it has never carved out a separate submarket for NPR stations alone. That makes these noncommercial groups comparators, and the Board's regulations not generally applicable, under *Tandon*. Pet.23–24; accord *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 534 (2021) (comparing religious and secular conduct). Ironically, the Board's noncommercial rate structure originates heavily from NPR evidence, but NPR stations are the only stations not burdened by it.

C. Strict scrutiny also applies under this Court's free-speech precedent.

Regarding NRBNMLC's Free Speech claim, SoundExchange feigns that the Board's regulations treat all noncommercial webcasters "the same" by *excluding NPR stations*. SoundExchange.Opp.27–28. But "[r]egulations that discriminate … among different speakers within a single medium[ ]" (religious stations and NPR stations) are the free-speech problem, not the solution. *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 659 (1994). The Board's adoption of lower statutory rates applicable to NPR stations—and higher rates applicable to religious and other noncommercial stations—is just one kind of "favoring some speakers over others," seemingly for content-based reasons, *Reed* v. *Town of Gilbert*, 576 U.S. 155, 170 (2015) (quotation omitted). It is discrimination the Board cannot adopt or enforce, *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984); Pet.20, 28–29.

SoundExchange also raises vehicle concerns that carry no weight. SoundExchange.Opp.28. NRBNMLC made a free-speech claim below. Opening.Br. NRBNMLC.54; En.Banc.Pet.3, 9–10. And neither the

lower court nor the government alleged that NRBNMLC's briefing was inadequate. Moreover, this Court—and the Third and Fifth Circuits—have already extended the rule established in *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575, 590–91 (1983); *i.e.*, government can't target a subset of larger speech producers, outside the tax context. Pet.28–29. Percolation won't overhaul the landscape; it will simply confirm that not applying strict scrutiny violated the Free Speech Clause. Accord *BellSouth Corp.* v. *FCC*, 144 F.3d 58, 68–69 (D.C. Cir. 1998).

II. This Court should resolve the conflict between the Register's and the Board's construction of 17 U.S.C. 114(f)(4)'s exclusionary rule, and enforce Congress's mandate that the former controls.

This Court often reviews matters of federal statutory construction. Yet Respondents paint the second question presented as unsuitable, largely because there's no circuit split. U.S.Opp.20–21; SoundExchange.Opp.3, 29–31. But no split is possible because the D.C. Circuit has exclusive jurisdiction. Pet.11. That's precisely why this Court's oversight of the Board's and D.C. Circuit's rate-setting decisions is needed. Pet.19, 36.

What's more, the Register's and the Board's conflicting interpretations of 17 U.S.C. 114(f)(4)'s exclusionary rule—in the copyright realm—approximate a split. The Register said that section 114(f)(4)'s bar applies only to Webcaster Settlement Act (WSA) agreements, not later agreements copied from or influenced by them. Pet.30. The CPB/NPR analysis was merely influenced by a WSA agreement, and

SoundExchange said it reflected its analysis of non-WSA NPR rates. J.A.1568–70 (identifying SOUNDEX_W5_NATIVE_PROD_002588 as non-WSA NPR valuation). Yet the Board still excluded it. Pet.31. That was unlawful.

Respondents' explanation is that *new agreements* are admissible, even if they *mirror* WSA agreements, yet *new analyses* used to reach them are barred, even if they're only *influenced* by WSA agreements. U.S. Opp.20–21; SoundExchange.Opp.30–31. That distinction is irrational and doesn't eliminate the conflict. The government also suggests that the document analyzes "past" WSA agreements. U.S.Opp.20. But that's belied by SoundExchange's characterization of this document. J.A.1568–70. Nor is this conflict of fleeting importance; as the government concedes, the Board's rate-setting proceedings turn on data, analyses, and rates from prior years. U.S.Opp.8, 12–14, 16.

Review is also warranted to restore Congress's administrative design, which puts the Register and the Board in separate lanes. When "novel material question[s] of substantive [copyright] law" arise, Congress requires that the Board "request a decision of the Register" and "apply the [Register's] legal determinations" to the case. 17 U.S.C. 802(f)(1)(B)(i).

Here, the Board should have applied the Register's opinion or requested another. Instead, it "distinguish[ed]" the opinion and construed the exclusionary rule itself, U.S.Opp.20; SoundExchange. Opp.30, violating Congress's orders. Pet.App.662a–63a.

III. The Board's arbitrary and unexplained departures from precedent are intertwined with the free-exercise analysis, meriting review.

1. The D.C. Circuit exempted the Board from basic APA rules based on blind deference to agency discretion. Pet.32–37. Such deference is a developing, frontline issue. This case presents the opportunity to address it—for the first time—in the context of the Board's rate-setting proceedings.

2. Respondents also say the departures are "case-specific" and "factbound," U.S.Opp.20; SoundExchange.Opp.31. But the Board long has articulated a benchmark comparability test assessing the similarity of buyers, sellers, and licensed rights in a proffered benchmark and repeatedly accepted benchmarks negotiated by the same types of buyer/seller representatives who negotiated the proposed NPR rates here for the same scope of works and rights. Pet.33–34. While SoundExchange claims that buyers, sellers, works, and licensed rights "differ in their particulars," SoundExchange.Opp.32 (quotation omitted), there is nothing case-specific or unique about the buyers, sellers, or licensed rights and works regarding the NPR benchmark that differentiate it from numerous other benchmarks that the Board accepted without question and without requiring expert testimony. Pet.33–34.

Regarding adjustments, Respondents conflate the comparability test with benchmark adjustments. They argue circularly that because the NPR benchmark is allegedly not comparable, Petitioner, not SoundExchange, should have to quantify SoundExchange's proffered adjustments. U.S.Opp.21;

SoundExchange.Opp.34. But whether a benchmark satisfies the same-buyers-sellers-rights test is a separate inquiry from whether any proposed adjustments to that benchmark should be made. Further, the Board itself held that its inversion of the burden of quantifying adjustments applied *even if* NPR rates were found "to be a sound benchmark." Pet.App.531a.

Petitioner's third question presented matters for two reasons. The first is fundamental fairness. Participants in Copyright Royalty Board proceedings should be able to rely on the Board's articulated rules from prior proceedings when presenting their cases and not have those rules changed mid-stream, especially without warning or opportunity to comply. Pet.37. The second is entwinement, because inverting the burden of proof resulted in the Board and D.C. Circuit discarding the CPB/NPR benchmark, Pet.App.518a–19a, 660a–61a, and the latter rejecting Petitioner's RFRA and free-exercise claims, Pet.App.668a–69a.

CONCLUSION

For the foregoing reasons, and those discussed in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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