NO. 23-927

IN THE
SUPREME COURT OF THE UNITED STATES

NATIONAL RELIGIOUS BROADCASTERS NONCOMMERCIAL MUSIC LICENSING COMMITTEE,
Petitioner,

v.

COPYRIGHT ROYALTY BOARD AND LIBRARIAN OF CONGRESS,
Respondents.

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

BRIEF *AMICUS CURIAE* OF CHRISTIAN LEGAL SOCIETY AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. The court of appeals decided a key question affecting Petitioner's Religious Freedom Restoration Act (RFRA) and First Amendment claims—whether NPR webcasters and religious webcasters are comparable and thus should have comparable license royalty rates—by deferring to the Copyright Royalty Board's determination that NPR rates were not a "benchmark" for other noncommercial webcaster rates. The question is whether that deference violated this Court's decisions requiring independent review of the record under strict scrutiny in cases involving rights under RFRA, the First Amendment, and other constitutional guaranties.

2. The court of appeals also rejected Petitioner's RFRA and First Amendment claims in part because the eighteen-fold higher royalty rate for religious webcasters also applies to a few secular noncommercial webcasters. The question is whether that holding fundamentally misconstrues RFRA and this Court's free exercise decisions.

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INTEREST OF *AMICI CURIAE*[1]

Christian Legal Society is an association of Christian attorneys, law students, and law professors. CLS has long believed that pluralism, essential to a free society, prospers only when the First Amendment rights, especially the free exercise of religion, of all Americans are protected.

The **National Association of Evangelicals** is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves forty member denominations, as well as numerous evangelical associations, missions, social-service charities, refugee and humanitarian aid agencies, colleges, seminaries, and independent churches.

SUMMARY OF ARGUMENT

The Copyright Royalty Board (the Board), acting under its authority to set statutory royalty rates for noninteractive digital transmission of copyrighted sound recordings, set rates that are eighteen times higher for religious webcasters than for webcasters affiliated with National Public Radio (NPR). Petitioner, representing religious broadcasters, challenged this gross disparity in rates between

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[1] Pursuant to Rule 37.2, all parties' counsel of record received timely notice of the intent to file this *amicus curiae* brief. In accordance with Rule 37.6, neither a party nor party's counsel authored this brief, in whole or in part, or contributed money that was intended to fund its preparation or submission. No person (other than the *amici*, their members, or their counsel) made a monetary contribution intended to fund its preparation or submission.

religious and NPR webcasters—by far the largest groups of significant noncommercial webcasters—on the ground that it violated the Administrative Procedure Act (the APA), the First Amendment, and the Religious Freedom Restoration Act (RFRA). But on review, the Court of Appeals for the D.C. Circuit upheld the rate disparity—rejecting, most importantly for purposes of this *amicus* brief, Petitioner's RFRA and First Amendment challenges.

According to the court of appeals, the gross disparity in rates did not show "unfavorable treatment" of religious broadcasters because there was "no basis" for concluding that the situations of NPR and religious webcasters were comparable. App. 669a. In making this assertion, the court rested, as we will explain, on a fundamentally erroneous posture of deference to the Board's determination. The court added that the RFRA and First Amendment claims also failed because "the compulsory license applies to all noncommercial webcasters," not just the religious webcasters represented by Petitioner. *Id.*

The court of appeals' reasoning contains two key errors that make this case important and call out for this Court's review.

I. The court of appeals based its rejection of Petitioner's First Amendment and RFRA claims on deference to the Board's determination on a key question: Whether the activities of NPR and religious webcasters were comparable and therefore should not be subject to such grossly disparate rates. The court fundamentally erred by giving the Board such deference.

A. An eighteen-fold higher rate for religious webcasters compared with their key counterpart—NPR webcasters—constitutes a substantial burden on religious speech and exercise and thus triggers strict scrutiny under RFRA. 42 U.S.C. § 2000bb-1. Likewise, the huge disparity triggers strict scrutiny under the Free Exercise Clause because it treats a "comparable secular activity"—indeed, a large category of secular activity (NPR webcasters)—far more favorably than the activity of religious webcasters (*Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam)).

B. The court of appeals, however, found this gross disparity irrelevant and rejected Petitioner's First Amendment and RFRA claims on the ground that the NPR rates could not be compared to religious webcasters' rates and thus there was no basis for saying that religious webcasters had suffered unfavorable treatment. The court made no independent finding of non-comparability under RFRA or the First Amendment; it simply incorporated its conclusion, in its earlier analysis under the APA, that the Board had "reasonably rejected the NPR Agreement as a benchmark for noncommercial webcasters." App. 669a. And that conclusion under the APA, in turn, explicitly rested on deference to the Board: The court relied on the "broad discretion" that the Board has to set benchmarks. *Id.* at 659a.

C. Whether or not the Board deserved deference under the APA, it certainly cannot receive such deference on key questions under the First Amendment or RFRA. Here, the key question is whether NPR webcasting—the secular activity that the Board treated far more favorably than religious webcasting—is comparable to that religious exercise

(*Tandon*). The deference the court of appeals gave on this question violates bedrock decisions of this Court. Repeatedly, this Court has required "independent examination" of the factual record in First Amendment cases, without deference to trial-court determinations or jury verdicts (e.g., *Bose Corp. v. Consumers' Union of U.S.*, 466 U.S. 485, 499 (1984); *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964)). It has also required independent review of key facts underlying administrative-agency decisions that affect constitutional rights or limitations (*Crowell v. Benson*, 285 U.S. 22 (1932)). Here the court of appeals failed to conduct independent review on the key question of non-comparability. It erroneously transposed deference from APA review to the entirely different context of the First Amendment and RFRA.

D. This deference that the court of appeals gave mattered: It led the court to dismiss Petitioner's multiple arguments that noncommercial religious webcasters' rates should be comparable to NPR Agreement rates because "they were agreed to by similar noncommercial webcasters and identical record company sellers, and they involve the same statutory rights." Pet. 34.

E. The question in this case is recurring and important. Many claims under RFRA arise from decisions by federal agencies; many claims under the Free Exercise Clause arise from decisions by federal or state agencies. If courts apply administrative-law deference to agencies in deciding RFRA and First Amendment questions, the result will be to eviscerate those protections.

F. The issues concerning comparability in this case are unsettled and call out for this Court's guidance.

Whether a given secular activity is "comparable" to religious exercise is crucial in free exercise cases because strict scrutiny applies whenever a law treats such a comparable activity more favorably than religious exercise (*Tandon*). And lower courts are split over how to allocate the burden of proof on the question of comparability. Likewise, the law is unsettled as to how comparable the favored secular activity must be in order to trigger strict scrutiny.

II. The court of appeals committed a second fundamental error when it rejected Petitioner's First Amendment and RFRA claims on the ground that the Board's rate structure "applies to all noncommercial webcasters," not just to religious webcasters. The fact that the eighteen-fold higher rate also applies to a few secular, noncommercial webcasters does not defeat a RFRA or free exercise claim.

RFRA applies strict scrutiny to all "substantial burdens" on religious exercise, "even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1. RFRA's coverage does not depend on whether the law burdens only religious exercise. And under the Free Exercise Clause, a law triggers strict scrutiny if it treats "*any* comparable secular activity more favorably than religious exercise." (*Tandon* (emphasis in original)). "It is no answer that [the law] treats some comparable secular businesses or other activities as poorly as . . . the religious exercise at issue." *Id.* That holding applies squarely here.

ARGUMENT

In raising their First Amendment and RFRA challenges, "[r]eligious broadcasters [represented by Petitioner] do not claim that paying royalty fees alone

burdens their exercise of religion." Pet. 16. But they do suffer a substantial burden from "the government's discriminatory rate structure," which "suppresses [their] religious speech through substantially higher royalty costs" compared with the similarly noncommercial NPR webcasters. *Id.* And there has never been the slightest suggestion that any compelling interest exists to justify this substantial burden. The court of appeals nevertheless rejected Petitioner's First Amendment and RFRA claims. In doing so, the court committed two fundamental errors that conflict with this Court's decisions and demand review.

I. The Court of Appeals Based its Rejection of Petitioner's First Amendment and RFRA Claims on Deference to the Board's Determinations—Thereby Conflicting with this Court's Decisions and Threatening to Eviscerate Religious Freedom Protections.

The court of appeals held that the gross disparity in royalty rates between NPR and religious webcasters did not violate the First Amendment or RFRA. It reached that holding because it erroneously deferred to the Board's determination that NPR webcasters were not a "benchmark" for (in other words, were not comparable to) religious webcasters.

A. An Eighteen-Fold Higher Rate Compared with a Key Counterpart's Rate Is a Substantial Burden on Religious Speech and Exercise.

The Board imposed royalty rates for noncommercial religious webcasters that are eighteen times the rates for noncommercial, secular, NPR-

affiliated webcasters. Pet. 9–10. These "exponentially higher rates" (Pet. 3)—which kick in at the low threshold of 218 audience members—lead to dramatically higher absolute payments for religious webcasters with even modest audiences. "[A] noncommercial Christian station webcasting 15 songs per hour to an average audience of only 1,000 people must pay over $257,000 annually. By contrast, the average annual fee for secular NPR stations to reach that same audience is only $18,000—a 93% discount." Pet. 10. And "[t]his rate disparity widens each year of the license term." *Id.*

It is unquestioned that the vast majority of noncommercial webcasters either are religious in nature (in ownership and program content) or are affiliates of NPR (and thus, among other things, secular). "NPR and religious webcasters are the *only* significant noncommercial groups with online audiences above the 218-average-listener threshold." Pet. 9 (emphasis in original) (citing D.C. Cir. J.A. 1363–64 & n. 312, 1846–47). In other words, the Board has provided the dominant counterpart to religious broadcasters with a 93 percent discount in the royalties it must pay.

That difference alone constitutes a substantial burden on religious exercise under RFRA and the Free Exercise Clause. Of course, government imposition of financial costs regularly counts as a substantial burden. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720 (2014) (holding that substantial "economic consequences" imposed for following a religious belief constituted a substantial burden under RFRA); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (loss of financial benefits, equivalent to "a fine

imposed against appellant for her Saturday worship," burdened free exercise).

Here, the substantial burden consists in the imposition of disparate costs on religious entities compared to others. Disparate treatment of religious claimants likewise regularly counts as a substantial burden on religious exercise. For example, denying religious schools otherwise-available government aid "burdens not only religious schools but also the families whose children attend or hope to attend them," by "penaliz[ing]," and thus discouraging, the families' choice of "sending their children to religious schools," *Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. 2246, 2261 (2020). See also *Thomas v. Review Board*, 450 U.S. 707, 718 (1981) (denial of financial benefits because of religious exercise imposes a substantial burden by "putting substantial pressure on an adherent to modify his behavior and to violate his beliefs"); *Sherbert*, 374 U.S. at 405 (denial of financial benefit "inevitably deterred or discouraged the exercise of First Amendment rights").

The huge disproportion in royalty rates here has the same penalizing, discouraging effect. It "substantially burdens religious stations' religious exercise by forcing them [either] to suppress their faith-based message"—by lowering, indeed slashing, their audience to fall below the modest 218-person threshold—"or [to] pay far more to share [the message]." Pet. 16. "[R]eligious webcasters are already being forced to reduce their listenership to avoid paying the artificially high royalty rates." *Id.* at 3.

The huge disparity therefore constitutes a substantial burden and, under RFRA, triggers strict

scrutiny. 42 U.S.C. § 2000bb-1. Likewise, the huge disparity presumptively triggers strict scrutiny under the First Amendment. Under the Free Exercise Clause, "[g]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon* v. *Newsom*, 593 U.S. 61, 62 (2021) (per curiam) (emphasis in original).[2] Here, the exponentially more favorable treatment of religious webcasters' dominant counterpart triggers strict scrutiny.

B. The Court of Appeals Found the Eighteen-Fold Disparity Irrelevant Because it Erroneously Deferred to the Board's Conclusion that the NPR Rates Were Not a Benchmark for Religious Webcasters' Rates.

Despite this exponential disparity in rates, the court of appeals rejected Petitioner's First Amendment and RFRA claims on the ground that there was no basis to find that "the rate for noncommercial webcasters under the compulsory license is higher than the rate enjoyed by NPR under the NPR Agreement." App. 668a; see *id.* at 669a (asserting that there was no basis to say religious

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[2] As the Petition demonstrates, similar rules under the Free Speech Clause forbid government to engage in differential regulation of different subgroups of speakers—as the Board has done here by favoring the secular speech of NPR affiliates over the religious speech of Petitioner's members and other religious webcasters. See Pet. 27–29 (citing, e.g., *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 590–92 (1983)).

webcasters are suffering "unfavorable treatment"). The court made no independent finding that the situations of NPR webcasters and religious webcasters were non-comparable for purposes of analysis under RFRA and the First Amendment. Rather, it simply incorporated its conclusion, earlier in its opinion, that the Board's rejection of the NPR Agreement as a rate benchmark was not a violation of the APA. The sum of the court's RFRA and First Amendment analysis was: "[A]s we have previously explained, the Board reasonably rejected the NPR Agreement as a benchmark for noncommercial webcasters." App. 669a; see *id.* at 658a–661a (upholding the Board's rejection as reasonable as against APA challenge based on arbitrariness and capriciousness, 5 U.S.C. § 706(a)(2)).

The court's conclusion in the APA section, in turn, explicitly rested on deference to the Board's determination that the NPR Agreement was not a benchmark. The court said there that challenges to the Board's selection of benchmarks "face[ ] an uphill battle" because the Board has "broad discretion" in such selections, and that the Board "properly exercised [that] discretion" and acted "reasonably." *Id.* at 658a–659a.

The court apparently gave the Board discretion in the APA section because the question there was whether the Board had acted "arbitrarily or capriciously" (5 U.S.C. § 706(a)(2)) in rejecting the NPR Agreement as a benchmark and in setting rates. See App. 658a ("[T]he Committee argues that the Board . . . violated the APA by [acting] arbitrarily and capriciously."). Review under the "arbitrary and capricious" standard, at least in many situations, "is

deferential to the agency." *Dept. of Homeland Security v. Regents of Univ. of California*, 140 S. Ct. 1891, 1933 (2020). And the court here clearly gave the Board deference in its APA section. But whether or not the Board deserved deference under the APA, it certainly cannot receive such deference on key questions under the First Amendment or RFRA—as we respectfully now show.

C. The Court of Appeals' Deference to the Board Violates Bedrock Decisions of this Court Requiring Independent Review of Constitutional Facts and in First Amendment Cases.

Both the constitutional and statutory claims are affected by whether the NPR Agreement is comparable to the Board-imposed rates for religious webcasters—and, more precisely, whether any differences between the two situations are sufficient to justify an *eighteen-fold* higher rate for religious webcasters. The deference that the court of appeals gave the Board on this important question, therefore, violated basic holdings of this Court.

1. The Court has repeatedly held that courts in First Amendment cases have "a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court." *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 567 (1995); see also *Bose Corp v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984). The same requirement applies to review of the fact record underlying other decision makers' determinations. For example, the landmark case of *New York Times v. Sullivan*, 376 U.S. 254 (1964), held that the Court must "review the evidence in the

present record to determine whether it could constitutionally support a judgment for" a libel plaintiff based on a jury verdict. *Id.* at 284–85; *id.* at 285 ("We must 'make an independent examination of the whole record'") (quotation omitted).

The court must make this examination "in order to decide "whether a given course of conduct falls on the near or the far side of constitutional protection." *Hurley*, 515 U.S. at 567. "Th[e] Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied." *New York Times*, 376 U.S. at 285. Independent examination is required "to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *Id.*

"The *Bose* rule also logically extends to appellate review under RFRA." *United States v. Friday*, 525 F.3d 938, 950 (10th Cir. 2008). That is because "[t]he statute asks courts to draw on constitutional doctrines developed under the Free Exercise Clause." *Id.*

In short, deference on key constitutional facts is inconsistent with the reviewing court's duty to maintain rights both under the First Amendment (free exercise, free speech) and under religious freedom statutes that protect First Amendment interests.

2. The same foundational duty applies to key constitutional and religious freedom determinations by administrative agencies such as the Board. This Court, in its earliest confrontations with questions posed by the administrative state, laid down

requirements of independent judicial review of agency determinations on "constitutional facts"—the key facts on which constitutional claims hinge.

In *Crowell v. Benson*, 285 U.S. 22 (1932), the Court held that a federal administrative tribunal could make determinations of the amount of workplace-injury compensation due by statute to a longshoreman. But the Court famously said that "[a] different question is presented when the determinations of fact are fundamental or 'jurisdictional,' in the sense that their existence is a condition precedent to the operation of the statutory scheme." *Id.* at 54. The particular key determinations in that case concerned, in part, constitutional questions—"that the injury occurs upon the navigable waters of the United States, and that the relation of master and servant exists"— "because the power of the Congress to enact the legislation turns upon the existence of these conditions." *Id.* at 55. The questions were crucial because "[i]n amending and revising the maritime law, the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction." *Id.* (footnote omitted).

Thus, the Court held:

> In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.

Id. at 60.

3. As we have already shown, the court of appeals here simply failed to make "independent determinations" of fact on important constitutional and religious freedom questions—most notably, on the question whether the gross disparity between NPR rates and religious webcasters' rates was irrelevant because the two situations were not comparable. See *supra* pp. 9–11. The court took deferential standards from APA review and wrongly transposed them to religious freedom questions of constitutional and quasi-constitutional (RFRA) status. *Id.*

This error is fundamental under either RFRA or the First Amendment, and under any framing of the issues in the case. An eighteen-fold disparity in rates itself constitutes a "substantial burden" triggering strict scrutiny under RFRA (see *supra* pp. 6–9)—and when strict scrutiny applies, the court gives the government agency no material deference (not even in the sensitive context of prison security). *Holt v. Hobbs*, 574 U.S. 352, 364 (2015) (citing *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 434 (2006)). But even if a finding that the NPR Agreement is comparable is necessary to trigger strict scrutiny in the first place, a court cannot defer to the agency on that key question for constitutional analysis. As a leading article on "general applicability" warns, that standard will be rendered toothless if courts "compar[e] reasons [for secular and religious exemptions] at the beginning of the case under a much more deferential standard of review" than strict scrutiny and, as a result, "hol[d] that a rule riddled with exceptions is really generally applicable if there appear to be any plausible reasons for the secular exceptions." Douglas Laycock and Stephen T.

Collis, *Generally Applicable Laws and the Free Exercise of Religion*, 95 Neb. 1, 16 (2016).

As section I.E. will show (*infra* pp. 17–19), if courts defer to administrative agencies on key questions under RFRA or the First Amendment, the result will be to eviscerate those religious freedom protections. Agencies have been accorded wide powers, in part because of assurances in cases like *Crowell* that courts will prevent the agencies from trampling on constitutional rights. Those wide powers mean that many agency actions will impose substantial burdens on religious practices—and that deference to agency determinations will allow many such burdens to go unchecked.

D. The Deference the Court Gave the Board Was Crucial to the Court's Rejection of Petitioner's Religious Freedom Claims.

The deference that the court of appeals gave to the Board mattered here. It led the court to dismiss Petitioner's arguments that noncommercial religious webcasters' rates should be comparable to NPR Agreement rates. The two rates should be comparable, as Petitioner points out, because "they were agreed to by similar noncommercial webcasters and identical record company sellers, and they involve the same statutory rights." Pet. 34 (citing App. 5a–6a). These factors—"whether a proposed benchmark involves similar buyers, sellers, and statutory rights"—are those the Board typically uses to determine whether a benchmark is comparable. Pet. 33. See also NRBNMLC Opening Brief, 2023 WL 181263, at *10–11 (D.C. Cir. 2023) (describing various features shared by noncommercial broadcasters that "lower[ ] their [ability and] willingness to pay,"

including "limits [on] their access to capital" and reliance on donations rather than ad revenue).

The court of appeals dismissed Petitioner's multiple arguments that the two situations were comparable, not different. For example, the court deferred to the Board's conclusion that the NPR Agreement differed because it was a settlement that "avoid[ed] litigation costs." App. 660a. But as Petitioner explains, the NPR rates are not just a settlement agreement, because the "Board adopted them as statutory rates binding nonparties." Pet. 20. The court also upheld the Board's erroneous decision to exclude evidence of an internal document of Sound Exchange, "the record companies' representative and the Board's designated representative to administer these statutory [digital-performance] licenses." *Id.* at 7. That document, an analysis of NPR royalty fees and the value they reflected, would have provided (as the court of appeals acknowledged) "support for a discounted above-threshold rate for noncommercial webcasters" (App. 663a)—that is, for religious as well as NPR webcasters. See Pet. 30 (arguing that "the court's statutory analysis [allowing the document's exclusion] is so deferential to the Board that it is practically inscrutable").

Amici do not seek here to re-argue these various contentions about the alleged basis for the disparity in rates. The point is that the court of appeals adopted a fundamentally flawed standard in evaluating the disparity under religious freedom provisions. The court deferred to the Board on the question of "benchmark" or comparability for purposes of APA review—and then wrongly relied on that deference-

based finding to dismiss the RFRA and First Amendment claims.

2. Even if the Board identified some differences between the NPR Agreement and the religious webcasters' situation, it utterly failed to show that these differences were so great as to justify an *eighteen-fold* difference in rates. The Board failed to justify a disparity that would require a religious webcaster with a modest 1,000-person audience to pay $257,000 yearly while an NPR affiliate with the same audience paid only $18,000.

The court of appeals acknowledged that when the Board identified the various factors that supposedly distinguished the NPR Agreement, it "did not determine the precise amount by which each of these factors distorted the Agreement's pricing." App. 661a. The court nevertheless concluded that the eighteen-fold disparity reflected "rational economic reasoning"—again, a highly deferential standard. *Id.*

E. This Question Is Important Because Deference to Agency Determinations Would Eviscerate Constitutional and Statutory Religious Freedom Protections.

The question in this case concerning deference to agencies is recurring and important. Many claims under RFRA arise from decisions by federal agencies, and many claims under the Free Exercise Clause arise from decisions by federal or state agencies. If courts apply administrative-law deference to agencies in deciding RFRA and First Amendment questions, the result will be to eviscerate those protections.

Consider just a few examples:

- Suppose a law-enforcement agency adopts a requirement forbidding facial hair and offers a medical exception but asserts that a claimed religious exemption is not comparable to the medical exemption. If courts defer to the agency's assertion, then Muslims, Sikhs, and other religious believers will be excluded from work in law enforcement. Cf. *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (finding the medical exception comparable and requiring a religious exemption under heightened scrutiny).
- The U.S. Citizenship and Immigration Services (USCIS) denies a visa to a church's non-citizen minister if it determines that the church has not sufficiently documented its "'intention and ability to compensate'" the applicant. See *National Capitol Presbytery v. Mayorkas*, 567 F. Supp. 3d 230, 242 (D.D.C. 2021) (quoting USCIS regulations). If churches provide such evidence, but courts simply defer to USCIS's assertion that the evidence is insufficient, congregations will be denied their vital interest in calling the minister of their choice. Cf. *id.* (rejecting USCIS's assertion that the evidence of compensation was insufficient).
- Finally, as an especially prominent example: Suppose the Court in *Hobby Lobby* had deferred to the Department of Health and Human Services (HHS), the primary federal agency imposing the mandate on employers to cover contraception in employees' insurance. HHS adopted an "accommodation" under which

employees in nonprofit religious organizations were covered by the employer's insurer or a third-party administrator, and this Court held that the same arrangement could easily extend—and thus under RFRA must extend—to closely held for-profit corporations with religious objections. 573 U.S. at 730–32. But suppose that HHS had asserted the "accommodation" would not be workable as to for-profit companies. If this Court were to defer to such a judgment as the court of appeals deferred to the Board here, the objectors would be forced to violate their religious beliefs without a showing of necessity—and RFRA would fail in its purpose of "'striking sensible balances between religious liberty and prior governmental interests.'" 42 U.S.C. § 2000bb(a)(5) (quoted in *Hobby Lobby*, 573 U.S. at 736).

F. Lower Courts Are Split Over Important Questions of How to Assess Comparability in Free Exercise Cases.

This case also presents issues concerning comparability that are unsettled and that call for this Court's review. The question whether a given secular activity is "comparable" to religious exercise is crucial in cases under the Free Exercise Clause because "more favorabl[e]" treatment for any such comparable secular activity is presumptively invalid. *Tandon*, 593 U.S. at 62.

However, this Court has not yet given detailed guidance on "how to determine when a secular exemption is 'comparable' to the religious conduct at issue (i.e., how to determine whether a law 'permit[s]

secular conduct that undermines the government's asserted interests in a similar way')." William T. Sharon, *Religious and Secular Comparators*, 30 Geo. Mason L. Rev. 763, 787 (2023) (bracket in original; quotation omitted). As a result, lower "courts have applied inconsistent evidentiary standards in assessing comparability." *Id.* at 768. They have divided over "how courts should make the relevant comparisons, who should bear the burdens, the level of proof required, or the level of deference that should be accorded the government's stated reasons for granting secular exemptions." *Id.* at 787. See also Justin Collings and Stephanie Hall Barclay, *Taking Justification Seriously: Proportionality, Strict Scrutiny, and the Substance of Religious Liberty*, 63 B.C. L. Rev. 453, 457 (2022) ("[S]cholars and jurists alike legitimately debate what religious and secular conduct is analogous.").

This case implicates at least two unsettled issues on which lower courts need this Court's guidance.

1. Burden of proof.

The first question—which has plainly divided lower courts—is who bears the burden to prove whether a secular activity that has received more favorable treatment is comparable or not to the religious exercise in question. Here the court of appeals placed a severe burden on the religious freedom claimant to show comparability. As already noted, the court dismissed the religious freedom challenges to the exponential rate disparity by incorporating its conclusion that the Board had acted reasonably enough to meet the deferential "arbitrary and capricious" standard. See *supra* pp. 9–11.

Other decisions have required free-exercise claimants to bear the burden of showing that an exempted secular activity was comparable—although even these decisions did not adopt the degree of deference to the government that the court of appeals did here. The Second Circuit, for example, refused a preliminary injunction against a state COVID-19 vaccine mandate for healthcare workers, saying that the "sparse" record did "not support a conclusion that [the] [p]laintiffs ha[d] borne their burden of demonstrating that the medical exemption [from the mandate] . . . and the religious exemption sought [were] likely comparable." *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 286, 288 (2d Cir.), opinion clarified, 17 F.4th 368 (2d Cir. 2021). See also Sharon, *supra*, at 806–07 & n.304 (discussing similar allocation of burden of proof by the Ninth and Tenth Circuits).

In contrast, other courts have placed the burden of proof on the government. For example, the Third Circuit held that a Native American religious practitioner could continue to possess black bears without paying the state license fee because the statutory fee provisions contained categorical exemptions for zoos and circuses and therefore was not generally applicable. *Blackhawk v. Pennsylvania*, 381 F.3d 202, 211 (3d Cir. 2004). "The state's [asserted] interest in raising money is undermined by any exemption," the court said, "and the Commonwealth has not argued, much less shown, that religiously based exemptions, if granted, would exceed the exemptions for qualifying zoos and circuses." *Id.* Similarly, although the state asserted an interest in "discouraging the keeping of wild animals in captivity except where doing so provides [them] a

'tangible' benefit," it "has not explained how circuses provide [such] tangible benefits." *Id.*; see also *id.* (same as to zoos). See Sharon, *supra*, at 807–08 (discussing court of appeals cases placing burden of proof on the government).

2. Degree of comparability.

Another "daunting" and unsettled question is whether and "when two entities are comparable enough, despite marginal, relevant differences." Sharon, *supra*, at 827.

That unsettled question is highly important in this case. As we have already observed, even if the NPR- and religious-webcaster situations have some different factors, the Board made no showing that those factors were so different as to support an eighteen-fold disparity in rates—and the court of appeals required no such showing. See *supra* pp. 16-17. The court upheld the rates, under its deferential "rationality" standard, even though it acknowledged that the Board "did not determine the precise amount by which each of these factors distorted the Agreement's pricing." App. 661a.

Determining the degree of comparability may be a daunting task in many cases. But this case presents the Court with a simple opportunity to say that unfavorable treatment of religious exercise cannot be justified based on a barely "rational" determination that the two situations are different—without some more precise quantification of their differences.

II. The Fact that the Eighteen-Fold Higher Compulsory-License Rate Applies to a Few Nonreligious, Noncommercial Webcasters Does Not Defeat a RFRA or Free Exercise Claim.

The court of appeals rejected Petitioner's RFRA and First Amendment claims in part on the basis that the Board's "overall rate structure . . . applies to all noncommercial webcasters," not just to religious webcasters. App. 669a. We agree with Petitioner that this reflects basic error, whether under RFRA or under the Free Exercise Clause. Pet. 25–26.

1. As to Petitioner's claim under RFRA: That statute applies strict scrutiny to all "substantial burdens" on religious exercise, "even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1. RFRA's applicability does not depend on whether the regulation imposing the burden singles out religious exercise. And here the eighteen-fold disparity in rates is indeed a substantial burden. Therefore, the court of appeals simply committed a basic error. It does not matter that the rates applicable to religious broadcasters are also applicable to a few noncommercial webcasters who are secular.

2. As to Petitioner's claim under the Free Exercise Clause: To reiterate, laws lack general applicability, and therefore trigger strict scrutiny, "whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62 (emphasis in original; citation omitted). "It is no answer that a [law] treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue." *Id.*

Therefore, the court of appeals again committed a fatal error, contravening this Court's decisions: "[I]t is n1o answer that" the Board, in setting rates, treated a few secular noncommercial webcasters "just as poorly as . . . the religious exercise [religious broadcasters] here at issue." *Id.* It is enough that the Board "treat[ed a] comparable secular activity"—the NPR-affiliated webcasting—"more favorably than religious exercise." *Id.* Moreover, the secular activity that the Board treated "more favorably than religious exercise" is hardly some single isolated instance. NPR affiliates make up the only significant category of above-threshold noncommercial webcasters outside of religious webcasters. Pet. 9. The Board subjected religious broadcasters to an exponentially higher rate than their dominant—their only significant—counterpart.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted.

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