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

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BRIEF OF *AMICUS CURIAE* CATHOLICVOTE.ORG EDUCATION FUND IN SUPPORT OF PETITIONER

Scott W. Gaylord
Elon Law Appellate Advocacy Clinic
201 North Greene Street
Greensboro, NC 27401
Phone: (336) 279-9331
Email: sgaylord@elon.edu

Counsel for Amicus Curiae CatholicVote.org Education Fund

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CatholicVote.org Education Fund ("CVEF") is a nonpartisan voter education program devoted to promoting religious freedom for people of all faiths. Given its mission, CVEF is concerned that the D.C. Circuit's opinion in *Nat'l Religious Broadcasters Noncommercial Music License Comm. v. Copyright Royalty Bd.*, 77 F.4th 949 (D.C. Cir. 2023) improperly narrows the safeguards afforded free exercise under *Tandon v. Newsom*, 593 U.S. 61 (2021), *Carson v. Makin*, 596 U.S. 767 (2022), and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*. ("RFRA"). These protections of religious freedom are critical to ensure that the government does not trench upon free exercise under the guise of neutral, generally applicable laws that favor comparable secular activity, deny religious claimants benefits that are available to secular groups, or substantially burden religious activity. Given that religious webcasters were treated worse than comparable NPR stations and were excluded from the benefits that the Corporation for Public Broadcasting ("CPB") provides to secular webcasters, the D.C. Circuit should have applied strict scrutiny instead of deferring to the Copyright Royalty Board ("Board"). It did not, and religious webcasters (as well as other religious groups in the D.C. Circuit) now face the threat of discriminatory practices, such

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[1] Counsel of record for all parties received notice of *amicus*'s intention to file an *amicus curiae* brief at least ten days prior to the due date. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

as the disparate rates imposed in this case. CVEF, therefore, comes forward to urge this Court to grant certiorari to ensure that the D.C. Circuit, which has exclusive jurisdiction over Board determinations and hears myriad agency actions, does not impermissibly cabin the free exercise safeguards set out in *Tandon*, *Carson*, and RFRA.

ARGUMENT

Since 1990, *Employment Div. v. Smith*, 494 U.S. 872 (1990) has cast a broad shadow over this Court's First Amendment jurisprudence, subjecting neutral, generally applicable laws that incidentally burden religion only to rational basis review. In *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, this Court held that strict scrutiny applies to laws that " 'impose[] special disabilities on the basis of … religious status.' " 508 U.S. 520, 533 (1993) (citation omitted). More recently, this Court confirmed that strict scrutiny also applies "whenever [government regulations] treat *any* comparable secular activity more favorably than religious exercise," *Tandon*, 593 U.S. at 62, or "when [the government] excludes religious observers from otherwise available benefits." *Carson*, 596 U.S. at 778. In addition, RFRA requires strict scrutiny when the federal government imposes a substantial burden on sincere religious activity. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 705 (2014).

The D.C. Circuit disregarded these teachings, deferring broadly to the Board even though its two-tiered rate system treated religious webcasters less favorably than comparable NPR stations, enshrined CPB's discriminatory funding of NPR stations, and imposed a substantial burden on the free exercise of

religious broadcasters. Given that the D.C. Circuit has exclusive jurisdiction to hear appeals from the Board's final determinations, 17 U.S.C. § 803(d)(1), and it denied en banc review, this case provides a clean vehicle for review of the important First Amendment question presented to this Court, which is the only court that can protect the free exercise rights of religious webcasters.

I. The D.C. Circuit completely ignored *Tandon*'s comparability analysis despite the similar impact NPR and religious webcasters have on the government's interests in promoting public radio.

Although the Committee raised a free exercise challenge, the Board focused its attention on whether the NPR Agreement provided a proper benchmark for the rate a willing buyer would pay to a willing seller for copyright license fees. The Board said "no," and the D.C. Circuit agreed, concluding that the NPR Agreement was an improper benchmark because of the "economically significant features of the Agreement," 77 F.4th at 967, which "benefited one or both of the settling parties but were not reflected in the Committee's proposed rates." *Id.* at 963. These benefits included "(1) the avoidance of litigation costs by the parties to the NPR Agreement; (2) the value of NPR's advance, lump-sum payments to SoundExchange; and (3) NPR's consolidated reporting of data from individual stations to SoundExchange." *Id.*

While any resulting "distort[ion of] the Agreement's pricing," *id.* at 964, might bear on the statutorily prescribed benchmark analysis, it is conceptually (and constitutionally) distinct from the

comparability analysis that *Tandon* requires. Under *Tandon*, a government regulation is neither neutral nor generally applicable whenever it "treats *any* comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62. The D.C. Circuit did not undertake this comparability review, apparently taking solace in the fact "the compulsory license applies to all noncommercial webcasters." 77 F.4th at 967.

Yet *Tandon* obliges the D.C. Circuit to look at *all comparable* secular noncommercial webcasters, not just noncommercial broadcasters subject to the compulsory rate: "[i]t is no answer that [the government] treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue." 593 U.S. at 62; *Lukumi*, 508 U.S. at 542 ("[A]ll laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice."). That some secular non-NPR webcasters are subject to the same higher rate as religious webcasters does not change the fact that NPR webcasters pay a lower rate. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 29 (2020) (Kavanaugh, J., concurring) (explaining that strict scrutiny applies even if the government "point[s] out that, as compared to houses of worship, *some* secular businesses are subject to similarly severe or even more severe restrictions"). Nor does it account for the additional financial advantage NPR stations receive from having CPB pay NPR's License Fee. 37 C.F.R. § 380.32(a) ("CPB shall pay the License Fee to [SoundExchange] in five equal installments of $800,000 each."). Where, as here, the government

"creates a favored class of businesses, … [it] must justify why [religious webcasters] are excluded from that favored class." *Roman Catholic Diocese*, 592 U.S. at 29 (Kavanaugh, J., concurring).

The critical question, which the D.C. Circuit did not address, is whether NPR webcasters and religious webcasters are "comparable" as that term is defined in *Tandon*, not why NPR was able to negotiate a specific rate. According to *Tandon*, "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." 593 U.S. at 62. In *Tandon*, the government interest was in stopping the spread of COVID-19, hence the Court' s comparability analysis was "concerned with the risks various activities pose, not the reasons why people gather." *Id.* Neither the Board nor the D.C. Circuit ever considered the relevant government interests: "to encourage the growth and development of public radio … broadcasting, including the use of such media for instructional, educational, and cultural purposes" and "to complement, assist, and support a national policy that will most effectively make public telecommunication services available to all citizens of the United States." 47 U.S.C. § 396(a)(1) and (a)(7). To advance these goals, Congress charged the Board with determining "reasonable rates" based on (1) the impact "use of the service" may have on record sales and the "copyright owner's other streams of revenue," and (2) "the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public." 17 U.S.C. § 114(f)(1)(B)(i)(I) and (II).

Both secular and religious webcasters advance these interests, broadening the reach and variety of programming made available to the public and affecting copyright owners in the same way. As a result, they *are* comparable. That NPR reached a favorable agreement with SoundExchange highlights NPR's access to benefits that are unavailable to religious broadcasters, but it has no bearing on comparability. Just as *Tandon* did not consider whether people met in identical spaces for similar reasons, the D.C. Circuit should not have focused on the specific terms of the NPR Agreement and the reasons why NPR was able to secure such terms. Because all noncommercial broadcasters advance the government's interests in public radio, the free exercise issue hinged on whether the NPR stations paid a lower rate than religious ones. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 285 (1964)) (confirming that "in cases raising First Amendment issues," an appellate court has an obligation "to 'make an independent examination of the whole record' "). They did, as evidenced by the government's admission and the rates for NPR and non-NPR stations published in the federal regulations. Petitioner's Brief at 24. Accordingly, the Board's rate structure was neither neutral nor generally applicable, and the D.C. Circuit should have applied strict scrutiny. *Tandon*, 593 U.S. at 62. Because it did not, religious webcasters were denied the protection afforded by "the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 521.

Even though the D.C. Circuit never considered comparability, its opinion still bears on that analysis in two important ways. First, the panel effectively

acknowledged that the NPR Agreement rate was lower than the compulsory rate the Board imposed on non-NPR webcasters. The Board rejected the Committee's proposals because they did not reflect the "economically significant features" of the NPR Agreement, which features "benefited one or both of the settling parties to the NPR Agreement but were not reflected in the Committee's proposed rates." 77 F.4th at 963. These "significant features" and "benefit[s]" enabled NPR to negotiate a more favorable (*i.e.*, lower) rate.

The D.C. Circuit rejected the Committee's proposals because they needed to be adjusted upward to account for the special features of the NPR Agreement. *Id.* at 963-64 (explaining that adjustments to the Committee's proposed rates "were necessary to adequately capture the value of the Agreement … even though the Board did not determine the precise amount by which each of these factors distorted the Agreement's pricing"). Although the Board did not specify the value of each "benefit," it adopted a compulsory rate based on a hypothetical agreement that did not contain such significant economic features. In so doing, the Board treated comparable activities (NPR and religious webcasting) differently even though both advanced Congress's interests in promoting public radio and addressing local and national issues through noncommercial programming.

Second, the D.C. Circuit's opinion is also inconsistent with the *Tandon* dissent's much narrower view of comparability. According to the dissent, two activities are comparable only if they are the same type of activity—*e.g.*, in-home secular

and in-home religious gatherings. Because California limited both religious and secular in-home gatherings to three households, the dissent concluded that California "complied with the First Amendment." 593 U.S. at 65 (Kagan, J., dissenting). The dissent rejected the majority's claim that States must "treat at-home religious gatherings the same as hardware stores and hair salons—and thus unlike at-home secular gatherings, the obvious comparator here." *Id.* While acknowledging that "finding the right secular analogue may raise hard questions," *Tandon* did not present such a situation for the dissent because California treated in-home religious and in-home secular gatherings the same. *Id.*

The problem is that, even under this narrower conception of comparability, NPR and religious webcasters *are* comparable. Both are noncommercial broadcasters that webcast copyrighted programming to their listeners, covering a variety of topics and community issues. The only difference is that NPR stations are secular while religious ones are not. To avoid a free exercise violation, the Board would have to "adopt[] a blanket [rate] on [noncommercial broadcasting] of all kinds, religious and secular alike" or survive strict scrutiny. *Id.* Because the Board failed to do the former, the D.C. Circuit should have applied strict scrutiny even under the dissent's more stringent comparability standard.

Of course, if strict scrutiny is triggered under the dissent's narrower interpretation, it necessarily applies under the majority's more capacious understanding of comparability, which does not require identical activity but encompasses all activities that implicate "the asserted government

interest that justifies the regulation at issue." *Id*. at 62; *Pleasant View Baptist Church v. Beshear*, 78 F.4th 286, 304 (6th Cir. 2023) (Murphy, J., concurring) (describing how "the test for comparing more-restricted religious conduct and less-restricted secular conduct turns on 'the *interests* the State offers' for its restriction. The test does not turn on 'whether the religious and secular conduct involve similar forms of activity.' ") (citation omitted).

In *Tandon*, the unique features of in-home gatherings (that were so important to the dissent) did not prevent the majority from holding that larger gatherings at retail stores and other businesses were comparable. Why? Because the interest in preventing the spread of COVID-19 was the same—regardless of the different reasons people gathered in different locations. The same is true in the present case. Regardless of the terms of the NPR Agreement, secular and religious webcasters affect Congress's interests in the same way. Whether the significant economic features of the NPR Agreement warrant imposing a different rate on secular and religious stations goes to the Board's ability to survive strict scrutiny, not whether the Board "treat[ed] *any* comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62; *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431-32 (2006) (noting "that '[c]ontext matters in applying the compelling interest test' and … that 'strict scrutiny *does* take "relevant differences" into account—indeed that is its fundamental purpose.' ") (citation omitted).

The upshot of all of this is that the D.C. Circuit contravened *Tandon* and, in the process, created a circuit split with the Second, Sixth, and Ninth Circuits, all of which have recognized that a law is not neutral and generally applicable if it "favor[s] comparable secular activity." *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664 686 (9th Cir. 2023) ("*FCA*"). These Circuits take *Tandon* to establish the "bedrock requirement[]" that "the government may not 'treat … comparable secular activity more favorably than religious exercise.' " *Id*. (quoting *Tandon*, 593 U.S. at 62); *Antonyuk v. Chiumento*, 89 F.4th 271 (2d Cir. 2023) (same); *Pleasant View*, 78 F.4th at 303 (Murphy, J., concurring) (noting that "*Tandon* adopted a 'most-favored nation status' for religious exercise: the government must treat religious conduct as favorably as the least-burdened comparable secular activity"). Contrary to the D.C. Circuit, these Circuits recognize that comparable does not mean that the activities must be identical in every detail. *Monclova Christian Acad. v. Toledo-Lucas County Health Dep't*, 984 F.3d 477, 481-82 (6th Cir. 2020); *Pleasant View*, 78 F.4th at 304 (Murphy, J., concurring).

Because the D.C. Circuit held "that a Free Exercise violation requires a showing of more" than the Board's favoring a comparable secular activity, it is "clearly irreconcilable" with *Tandon*. *FCA*, 82 F.4th at 686 (internal punctuation and citation omitted). Whereas *Tandon* mandates strict scrutiny "whenever [government regulations] treat *any* comparable secular activity more favorably than religious exercise, 593 U.S. at 62, the D.C. Circuit enshrined a two-tiered system—NPR stations and

(mostly) religious non-NPR stations. Both groups are noncommercial and both webcast programming to their listeners, advancing the interests Congress articulated in the Public Broadcasting Act of 1967. The former get a lower rate while the latter pay more. The Free Exercise Clause precludes such discrimination. *FCA*, 82 F.4th at 689 (quoting *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)) ("[R]egardless of design or intent—the government may not create 'religious gerrymanders.' "); *Lukumi*, 508 U.S. at 542 (explaining that "categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice").

Moreover, the Board's broad discretion in determining the compulsory rate raises an additional constitutional problem. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2611-12 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief) (expressing concern over laws that "supply no criteria for government benefits or action, but rather divvy up organizations into a favored or exempt category and a disfavored non-exempt category"). The Board's unbridled authority to impose a higher rate on religious webcasters "runs headlong into more recent Supreme Court authority … holding that the mere existence of government discretion is enough to render a policy not generally applicable." *FCA*, 82 F.4th at 685. As this Court explained in *Fulton*, "[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given." 141 S. Ct. at 1879. In the present case, the Board

has the exclusive ability to establish the compulsory rate that applies to religious webcasters, using or rejecting secular agreements as benchmarks subject only to the D.C. Circuit's deferential review. 17 U.S.C. § 114(f)(1)(B)(ii) (emphasis added) (stating that Copyright Royalty Judges "*may* consider the rates and terms for … comparable circumstances under voluntary license agreements"). The exercise of such discretion in this case enabled the Board to impose different rates on secular and religious webcasters, with religious stations paying a rate 18 times higher than their secular NPR counterparts. Petitioner's Brief at 24.

To make matters worse, the Board did so without even considering how CPB's and NPR's discriminatory policies excluded religious broadcasters from obtaining the significant economic benefits that the D.C. Circuit believed justified NPR's paying a lower rate. As in *Fulton*, this " 'invite[s]' the [Board] to decide which reasons for not [considering a settlement agreement to be a reasonable rate benchmark] are worthy of solicitude—here, at the [Board's] 'sole discretion.' " *Fulton*, at 537 (quoting *Smith*, 494 U.S. at 884). As a result, the panel should have applied strict scrutiny and "scrutinized the asserted harm of granting specific [rates] to [these] particular religious claimants." *O Centro*, 546 U.S. at 431. Because the panel never considered the Board's discretion or how it undermined the general applicability of the rate-fixing structure, the D.C. Circuit's opinion is in direct tension with *Fulton*.

II. The D.C. Circuit's opinion conflicts with *Carson* because it permits CPB to deny religious webcasters the public benefits NPR stations receive, including CPB's direct funding and License Fee payments.

As this Court recently confirmed in *Carson*, the government "violates the Free Exercise Clause when it excludes religious observers from otherwise available benefits." 596 U.S. at 778; *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."). The benefits CPB makes available to NPR stations are twofold—direct financial support through grants and annual lump sum payments of $800,000 to cover the License Fee. While public radio differs from the rubberized playground surfaces in *Trinity Lutheran Church of Colombia, Inc. v. Comer*, 582 U.S. 458 (2017), the scholarship funds in *Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. 2246 (2020), and the tuition assistance in *Carson*, the nature of the discrimination against religious exercise is the same. In all of these cases, the government denied significant financial benefits to religious groups because they were religious. Here, religious broadcasters are precluded from receiving federal benefits for the same reason. 37 C.F.R. § 380.31(a); CPB's 2023 Radio Community Service Grants General Provisions and Eligibility Criteria, I.4.C and I.13.C, II (October 2022) (available at https://www.cpb.org/sites/default/files/radio_community_service_grant_-csg-_general_provisions_and_eligibility_criteria_fy_2023.pdf).

In the education context, this Court has explained that "[a] State need not subsidize private education … [b]ut once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Espinoza*, 140 S. Ct. at 2261. The same is true with respect to the federal government's decision to subsidize public radio. The government was not required to do so, but it did, declaring in the Public Broadcasting Act that "it is in the public interest to encourage the growth and development of public radio and television broadcasting, including the use of such media for instructional, educational, and cultural purposes," "it is necessary and appropriate for the Federal Government to complement, assist, and support a national policy that will most effectively make public telecommunications services available to all citizens of the United States," and "public television and radio stations … constitute valuable local community resources for utilizing electronic media to address national concerns and solve local problems through community programs and outreach programs." 47 U.S.C. § 396(a)(1), (a)(7), and (a)(8). To effectuate these policies, Congress created the CPB, establishing a nine member Board of Directors "appointed by the President, by and with the advice and consent of the Senate," 47 U.S.C. § 396(c)(1), and subsidizing the CPB to the tune of $525,000,000 for fiscal year 2024. CPB's Federal Appropriation, Past Appropriations (available at https://www.cpb.org/ appropriation/history). The CPB, in turn, earmarked $127,940,000 of its requested 2024 funds for public radio stations and programming grants. CPB's Detailed FY 2024/2026 Request (available at https://www.cpb.org/ appropriation).

Having decided to subsidize noncommercial public radio, *Carson* and *Trinity Lutheran* preclude the government's disqualifying some noncommercial stations simply because they are religious: "The Free Exercise Clause 'protects religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" *Trinity Lutheran*, 582 U.S. at 458 (quoting *Lukumi*, 508 U.S. at 533, 542); *Espinoza* 140 S. Ct. at 2254 (same). But that is precisely what CPB has done. While NPR stations are eligible for and receive federal funding distributed through CPB, 47 U.S.C. § 396(k)(3)(A)(iii), religious broadcasters are precluded from receiving these benefits. Pursuant to CPB's Community Service Grants criteria, a "Grantee must comply with the operational requirements," which mandate that "[t]he substantial majority of Grantee's daily total programming hours … be devoted to CPB-Qualified Programming." CPB Community Service Grants, I.4.C. In addition, a Grantee's use of CSG funds is restricted to such "CPB-Qualified Programming," *id.* at I.13.C, and CPB pays the License Fee for specified Public Broadcasters, which include NPR and any other "public radio station that is qualified to receive funding from CPB pursuant to its criteria." 37 C.F.R. § 380.30.

So far, so good—until one considers the CPB's definition of "CPB-Qualified Programming." CPB-Qualified Programming is defined as any "[g]eneral audience programming broadcast that serves a station's demonstrated community needs of an educational, informational, or cultural nature" but expressly excludes "programming that furthers the

principles of particular political or religious philosophies." Community Service Grants at II.Q.1.[2] Secular educational, informational, and cultural stations are eligible for CPB funding and the benefit of CPB License Fee payments; religious stations are not. That is, while religious noncommercial stations "remain[] 'free to continue operating as [religious stations],' [they can] enjoy that freedom only 'at the cost of automatic and absolute exclusion from the benefits of a public program for which [they are] otherwise fully qualified.' " *Carson*, 596 U.S. at 779 (quoting *Trinity Lutheran*, 582 U.S. at 462). "To be eligible for government aid," a religious webcaster "must divorce itself from any religious" content. *Espinoza*, 140 S. Ct. at 2256. The constitutional problem is that "[p]lacing such a condition on benefits or privileges 'inevitably deters or discourages the exercise of First Amendment rights.' " *Id.* (quoting *Trinity Lutheran*, 582 U.S. at 463). By "disqualifying the religious from government aid," CPB effectively " 'punishe[s] the free exercise of religion.' " *Id.* (citation omitted). Such discrimination is based on religious status and, consequently, is " 'odious to our Constitution' and [can]not stand." *Id.* (citation omitted).

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[2] NPR's ByLaws similarly discriminate against religious stations: "All stations licensed to (or operated by) the Member and broadcasting NPR programming must produce a daily broadcast schedule devoted to programming of good quality for a general audience which serves demonstrated community needs. A program schedule designed: (1) to further the principles of a particular religious philosophy … does not meet the definition of this criterion." ByLaws of National Public Radio, Inc., 1999, Art. II.2.1(e) (available at http://www.current.org/pbpb/documents/NPRbylaws99.html).

The D.C. Circuit did not consider whether this Court's recent public benefit precedents governed CPB's discriminatory treatment of religious webcasters. In *Trinity Lutheran*, a wide-range of nonprofit organizations could receive playground resurfacing grants. In *Espinoza* and *Carson*, a wide-variety of private schools could receive tuition assistance from Montana and Maine, respectively. The same is true here. "NPR, American Public Media, Public Radio International, and Public Radio Exchange, and up to 530 Originating Public Radio Stations as named by CPB" are eligible for funding and License Fee payments. 37 C.F.R. §§ 380.30-31. Although the "wording" of the various programs differs, "their effect is the same: to 'disqualify some [religious groups]' from funding 'solely because they are religious.' " *Carson*, 596 U.S. at 780 (quoting *Espinoza*, 140 S. Ct. at 2261). By " 'condition[ing] the availability of benefits' " in this way, the federal government " 'effectively penalizes the free exercise of … constitutional liberties.' " *Trinity Lutheran*, 582 U.S. at 462 (quoting *McDaniel v. Paty*, 435 U.S. 618, 626 (1978)). Accordingly, the federal government's funding of public radio through CPB is not neutral and is subject to strict scrutiny. *Id.* at 781 ("[T]here is nothing neutral about Maine's program. The State pays tuition for certain students at private schools—so long as the schools are not religious. That is discrimination against religion.").

Furthermore, if the D.C. Circuit's analysis is correct, Maine could have achieved the same funding outcome—which this Court concluded violated the First Amendment—simply by creating a Corporation for Public Education that directed funds to CPE-Qualified schools to cover tuition expenses. Maine

could have then defined "CPE-Qualified schools" to exclude any school "that furthers the principles of particular … religious philosophies." Community Service Grants at II.Q.1. Under this program, state financial assistance would flow only to secular schools, just as CPB grants are available only to secular webcasters.

Such an end-run around *Carson*, though, would still violate the Free Exercise Clause: " 'the definition of a particular program can always be manipulated to subsume the challenged condition,' and to allow States to 'recast a condition on funding' in this manner would be to see 'the First Amendment … reduced to a simple semantic exercise.' " *Carson*, 596 U.S. at 784 (quoting *Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc.*, 570 U.S. 205, 215 (2013)). Because the First Amendment safeguards against even "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988), the D.C. Circuit erred by not evaluating CPB's discriminatory funding practices.

Whether the denial of such benefits violates the Free Exercise Clause raises an important and novel question regarding the scope of First Amendment protection of religious entities. The D.C. Circuit did not engage this Free Exercise question despite the similarities between CPB's exclusion of religious stations and the discrimination this Court found to be unconstitutional in *Trinity Lutheran*, *Espinoza*, and *Carson*. In so doing, the D.C. Circuit disregarded, what this Court has identified as, "the 'unremarkable' conclusion that disqualifying

otherwise eligible recipients from a public benefit 'solely because of their religious character' imposes 'a penalty on the free exercise of religion that triggers the most exacting scrutiny.' " *Espinoza*, 140 S. Ct. at 2255 (quoting *Trinity Lutheran*, 582 U.S. at 462). Review is necessary, therefore, to ensure that religious webcasters receive the protection of the First Amendment that comes from subjecting CPB's discriminatory funding to strict scrutiny.

III. Because the Board's discriminatory rate structure imposed a substantial burden on religious webcasters, RFRA required the D.C. Circuit to apply strict scrutiny to the Board's decision.

The lack of any meaningful discussion of RFRA in the D.C. Circuit's opinion is surprising given the "very broad protection for religious liberty" that RFRA provides. *Hobby Lobby*, 573 U.S. at 693. Like its sister statute, RLUIPA, RFRA secures "expansive protection for religious liberty." *Holt v. Hobbs*, 574 U.S. 352, 358 (2015). In fact, RFRA is to "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g); *Hobby Lobby*, 573 U.S. at 696. Once a religious claimant shows the government has substantially burdened its sincere religious exercise, the burden shifts to the government to establish that the challenged policy is the least restrictive means of furthering a compelling interest. 42 U.S.C. § 2000bb-(1)(b).

Under this strict scrutiny analysis, "it is the obligation of the courts to consider whether exceptions are required under the test set forth by

Congress." *O Centro*, 546 U.S. at 434. In making that determination, it is not enough for the government "merely to explain why it denied the exemption;" rather, the government must "prove that denying the exemption is the least restrictive means of furthering a compelling government interest." *Holt*, 574 U.S. at 364. Consequently, the D.C. Circuit should have " 'scrutiniz[ed] the asserted harm of granting specific exemptions to particular religious claimants' [and …] look[ed] to the marginal interest in enforcing" the compulsory rate against religious webcasters. *Hobby Lobby*, 573 U.S. at 726-27 (quoting *O Centro*, 546 U.S. at 431). "[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 815 (2000).

While the D.C. Circuit acknowledged that an "initial showing of unfavorable treatment of religious webcasters" would "establish a violation of the RFRA," it disclaimed any ability to determine whether secular stations actually paid lower rates than their religious counterparts. 77 F.4th at 967. Contending that "there is no record finding to support" the Committee's claim "that the rate for noncommercial webcasters under the compulsory license is higher than the rate enjoyed by NPR under the NPR Agreement," the panel did not apply RFRA. *Id.* Because the Committee failed to prove the rates were different, it could not establish any burden, let alone a substantial one.

The D.C. Circuit is wrong. In fact, its opinion demonstrates that the Committee carried its burden under RFRA. For starters, the sincerity of the

religious webcasters' beliefs was never challenged—and for good reason. Religious webcasters use their broadcasts to promote and advance their religious views and perspectives, which is why (as discussed above) CPB precludes such stations from receiving CPB funding. That discrimination, in turn, imposes a substantial burden on the free exercise of religious stations. Unlike their NPR counterparts, religious stations cannot secure "[a] discount," 37 C.F.R. § 380.31(b)(3), or negotiate "economically significant features" because they do not reap the benefits of CPB funding. 77 F.4th at 967. As a result, religious webcasters are subject to a compulsory rate that is higher than "the rate enjoyed by NPR under the NPR Agreement." 77 F.4th at 967. This increased cost to broadcast religious programming imposes a substantial burden on religious stations: "a law that 'operates so as to make the practice of … religious beliefs more expensive' in the context of business activities imposes a burden on the exercise of religion." *Hobby Lobby*, 573 U.S. at 710 (quoting *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961)); *United States v. Lee*, 455 U.S. 252, 257 (1982) (finding that "both payment and receipt of social security benefits … violates Amish religious beliefs, … interferes with their free exercise rights[, and, therefore,] ... impose[s] … burdens on religion").

The burden on religious stations is even greater because religious webcasters do not get the benefit of having CPB pay their License Fees. Determination of Royalty Rates and Terms for Making and Distributing Phonorecords, 84 Fed. Reg. 1918, 1935 at 59,572 (Feb. 5, 2019) (explaining how the NPR Agreement's "rate reflects … [a] discount that reflects the administrative convenience to

[SoundExchange] of receiving annual lump sum payments that cover a large number of separate entities, as well as the protection from bad debt that arises from being paid in advance"). In addition, NPR prohibits religious stations from being NPR members, thereby preventing them from being parties to the NPR Agreement—and the lower rate that comes with it. 77 F.4th at 963.

If the compulsory rate was the same as or lower than the NPR rate, the D.C. Circuit would not have concluded that "adjustments [to the Committee's proposals] were necessary to adequately capture the value of the Agreement." *Id.* The adjustments had to be upward to reflect the "benefits" and "economically significant features" of the NPR Agreement. Even though "the Board did not determine the precise amount by which each of these factors distorted the Agreement's pricing," 77 F.4th at 963-64, there is no doubt the compulsory rate was adjusted upward to compensate for any such distortion. In fact, the government acknowledged the disparate rates in its briefing. Final Br. of Appellees 85 (confirming that religious stations pay "higher" rates than those "agreed to by the settling noncommercial services"). Thus, the Board substantially burdened the religious stations' free exercise by imposing the higher compulsory rate. *Hobby Lobby*, 573 U.S. at 720 (finding a substantial burden when a government regulation "would … entail substantial economic consequences").

Given that the Board substantially burdened the religious webcasters, the government was required to "demonstrat[e] that application of the burden to the person—(1) is in furtherance of a compelling

governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). The Seventh, Ninth, and Tenth Circuits take RFRA at its word and conduct the mandated exemption inquiry when confronted with a substantial burden on religious exercise. *Korte v. Sebelius*, 735 F.3d 654, 671 (7th Cir. 2013); *United States v. Christie*, 825 F.3d 1048, 1055 (9th Cir. 2016); *United States v. Friday*, 525 F.3d 938, 946 (10th Cir. 2008). The D.C. Circuit did not and, consequently, undermined the expansive protection RFRA affords religious exercise.

Congress mandated an exemption (from "[t]he schedule of reasonable rates and terms" required under § 114(f)91)(B)) for any "[l]icense agreements voluntarily negotiated between" copyright owners and noncommercial webcasters. 17 U.S.C. § 114(f)(2). The NPR Agreement, therefore, was exempted from the compulsory rate. Having exempted NPR, though, the Board was required to "scrutinize[] the asserted harm of granting specific exemptions" to similarly situated religious webcasters. *O Centro*, 546 U.S. at 431. Inexplicably, the Board and the D.C. Circuit "abdicat[ed their] responsibility, conferred by Congress, to apply [RFRA's] rigorous standard." *Holt*, 574 U.S. at 364. Neither the Board nor the D.C. Circuit attempted "to show with [any] particularity how [any governmental] interest … would be adversely affected by granting an exemption" to religious broadcasters. *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972).

While there is "no cause to pretend that the task assigned by Congress to the courts under RFRA is

an easy one," RFRA requires courts to "strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue." *O Centro*, 546 U.S. at 438. Review is warranted, therefore, because the D.C. Circuit did not fulfill its obligation under RFRA, shifting the balance markedly in the government's favor by not requiring it to show why denying an exception to noncommercial religious webcasters is the least restrictive way to promote its (allegedly) compelling interest.

CONCLUSION

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

Respectfully submitted,

Scott W. Gaylord
Elon Law Appellate Advocacy Clinic
201 North Greene Street
Greensboro, NC 27401
Phone: (336) 279-9331
Email: sgaylord@elon.edu

Counsel for Amicus Curiae CatholicVote.org Education Fund

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