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

BRIEF OF YOUNG AMERICA'S FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS[1]

Young America's Foundation ("YAF") is a 501(c)(3) nonprofit educational organization whose mission is to educate and inspire young Americans with ideals of individual freedom, free speech, free enterprise, and traditional values. One way that YAF fulfills its mission is through student-led YAF chapters on campuses of public high schools, colleges, and universities across the nation. Unfortunately, in these days of increasing political polarization, YAF chapters are consistently berated, penalized, and banned by school administrators and student governments. In what might be called "creeping infringement," these denials of rights guaranteed by the U.S. Constitution have been promulgated not just by educational institutions, but by governments of all types and at all levels. Moreover, the creeping infringement has not only attacked YAF chapters and members, but organizations of all types – particularly on the right, but sometimes on the left as well.

YAF files this amicus in support of the Petition for Certiorari in this Docket ("Petition") of the National Religious Broadcasters Noncommercial

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[1] Pursuant to SUP. CT. R. 37.2, amicus certifies that notice was provided to all parties of record of YAF's intention to file this brief, on March 13, 2024, more than 10 days prior to the brief due date. Pursuant to SUP. CT. R. 37.6, amicus certifies that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amicus or its counsel made such a monetary contribution.

Music License Committee ("Petitioner" or "NRBNMLC").

SUMMARY OF ARGUMENT

This case presents a unique and important opportunity for the Court to discourage and rein in creeping infringement, not just of freedom of religion, but of constitutional rights broadly and generally. The Copyright Royalty Board ("CRB") and D.C. Circuit both ignored a long line of decisions by this Court holding that the burden shifts to the government to justify, under "strict scrutiny," any facial deprivation of rights guaranteed by the Constitution that is not both "neutral" and "of general applicability."

When a restraint of rights is challenged, in nearly every case the government will defend by asserting the law or restraint is a "valid and neutral law of general applicability." The challenge for someone who believes they were singled out for disparate treatment is that the public may not know for sure. Even if the victim has a well-founded belief that government action against them was not neutral or not of general applicability, they may lack access to the facts or resources needed to prove that case. This Court has tried to solve that problem in a number of cases by putting the burden of proof on the government.

Despite the Court's best efforts to put the burden on the government in cases like the one below, the CRB did exactly the opposite, as did the D.C. Circuit in affirming the CRB. Reversing the burden of proof

in this way makes it too easy for governments to infringe on rights and too hard for individuals and organizations to defend their rights. That both the agency and Circuit Court failed to properly allocate the burden of proof in this case strongly indicates the need for the Court to provide further guidance consistent with its prior holdings, and to do so in the most clear and emphatic manner possible.

ARGUMENT

I. Introduction

A long line of decisions of this Court have established that governmental restrictions on the free exercise of religion and other fundamental rights may be constitutionally permissible, but only if they are shown to be "neutral" and "generally applicable", after "strict scrutiny" as to their effect on those rights.[2] Nevertheless, lower courts are still failing to properly identify and apply these requirements all too often. This case is a prime example and thus offers an opportunity for the Court to adopt a framework for lower courts to: 1) identify cases that put a strict scrutiny burden on the government, in order to 2) prove that a restraint is both "neutral" and "generally applicable."

[2] See discussion and cases cited in Sec. III.A., *infra*.

II. There is a Pressing Need for a Framework to Guide Lower Courts Regarding When a Restriction on Rights is Merely Incidental

A. When is a governmental restraint on a right merely incidental, such as a "Gas Tax?"

Putting aside possible government restrictions motivated by political polarization and animosities, the mere growth in the size, scope, and powers of governments promotes creeping infringement of rights. Indeed, it is axiomatic that the purpose of every new law is to supplant the will or action of the individual with the will or action of the government. The vast majority of new laws do so without any undue or uneven harm to any rights guaranteed by the Constitution. For illustration, consider the gas tax. True, every car that turns into the church parking lot on Sunday will have paid that tax. Equally so, every car that passes by the church will have paid the exact same tax. It is well-established that something like a "gas tax" is permissible because it does not restrict religion (or other guaranteed rights) either in intent or in effect:

> "It is a permissible reading of the text, in the one case as in the other, to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended. [Citations omitted]."

E*mployment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872, 878 (1990).

Most new laws are like a gas tax, causing no or only incidental restraints on constitutional rights. However, every so often a new law will have, or appear to have, a disparate adverse impact on the rights of an individual or group. Consider, hypothetically, that instead of a gas tax a city sends a tax bill of $0.10 to parishioners every time they turn their cars into the church parking lot, asserting the goal is to encourage use of public transit. Is such a tax "neutral and uniformly applied" to secular activities as well as to church attendance? Possibly, but individual parishioners really can't know. All they may know for sure is they must pay a tax to exercise the right to practice their religion. Do cars that park at grocery stores pay the same tax, in the same amount? Does the tax law exempt smaller parking lots such that it only affects attendees of a few churches in the city and no other businesses? Does the tax law or its administration allow some parking lot owners to negotiate for an exemption or lower rate for secular activities on some basis not available to the churches?

This hypothetical, and the questions it raises, illustrates the need for a foundational framework for allocating the burden of proof between the government and the individual when there is a facially apparent burden placed on a constitutionally guaranteed right. Arguably this court has done so in a number of cases. Yet, somehow, in this case the CRB and D.C. Circuit failed to meet the requirement

to place the burden of proof on the government, rather than on the party whose rights were, on their face, infringed.

B. Despite Precedent, Creeping Infringement is Common and Increasing.

Given the undisputed facts of disparate impact on religious versus secular activities in the case below, coupled with an express reversal of the burden of proof, the Petition will, if granted, afford the Court an ideal opportunity to clarify and strengthen applicable law. This case and numerous recent cases across the country provide ample indicators that a strong foundational framework for analysis is sorely needed. In so doing, the Court can better empower the public to protect their rights, even when the essential facts are known only to the government.

Unfortunately, the instant CRB case is not unique. Moreover, religious liberty is not the only constitutional right that is at risk. In contrast to legitimate, neutral, exercises of government power, there are constantly new actions by governments that improperly infringe on individuals' rights in numerous ways. In many cases, they appear to be well-meaning, if unconstitutional nevertheless, such as the recent string of COVID cases. *See, e.g., Tandon v. Newsom,* 593 U.S. 61 (2021); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020)(*per curiam*). In many other cases, government actions restricting – instead of recognizing – First Amendment rights appear to be based on bias and

intentional favoritism of one particular point of view over another by governments and governmental agencies.

In recent years YAF itself has been the victim of these non-neutral restrictions by government and public institutions. For example, members of the YAF chapter at the University of Florida were required to pay a mandatory "activities fee." *See, e.g.,* https://adfmedia.org/press-release/pro-liberty-student-group-sidelined-and-excluded-sues-university-florida; *see also* Verified Complaint For Injunctive And Declaratory Relief, Monetary Damages, And Attorneys' Fees And Costs, *Young Americans for Freedom, et al. v. University of Florida Board of Trustees, et al.*; Case No. 1:18-cv-00250-MW-GRJ (U.S.D.C., N.D. of Fla., Filed Dec. 21, 2018)("Florida YAF Case")(accessed via PACER). The fee, collected from all students by the University as a condition of attendance, created a pool of money that was supposed to be available to all clubs. The University delegated to the student government, as a sub-agent of the University, the power to allocate those funds. However, the student government denied YAF any and all funding from the pool. *See* Florida YAF Case. Later, upon closer examination, YAF learned that the student government had been granting funding to groups on one side of the ideological/political aisle but denying YAF equal access. *See id.* The student government had the discretion to decide which ideas received funding, and they abused that discretion to support only the ideas they favored. *See id.* YAF filed suit in the Northern District of Florida alleging denial of numerous First

and Fourteenth Amendment rights. *Id.* Only after suit was filed did the University agree to a viewpoint-neutral funding system. https://adfmedia.org/case/young-americans-freedom-v-university-florida (lawsuit reported settled in favor of YAF); *see also* Florida YAF Case, PACER Dkt. Nos. 21 and 24 (expectation of settlement and dismissal as filed with the Court).

Another example of denial of the rights of YAF chapters and members occurred at SUNY Buffalo recently. *See generally,* Verified Complaint; *University At Buffalo Young Americans For Freedom, et al. v. University At Buffalo Student Association Inc., et al.*; Case 1:23-cv-00480-LJV (U.S.D.C., W.D. N.Y., filed Jue 1, 2023)("YAF SUNY Case")(accessed via PACER). Student organizations at the University at Buffalo must plan events through the student government. Unfortunately, student government officers made the process next to impossible for the YAF chapter there. *See* First Amended Verified Complaint, PACER Dkt. No. 21, YAF SUNY Case.[3] In early 2023 the chapter invited commentator Michael Knowles to speak on campus, and student government officers simply refused to sign the event contract. The officers gave no reason, but ambiguously said they would sign it soon. *Id.* While the YAF Chapter suspected the student government was targeting them because of their conservative ideas, they had no way of knowing whether other

[3] As of March 19, 2024 (last access), the YAF SUNY Case is still pending and not fully resolved. The documents in PACER reflect the allegations and positions of the parties.

groups received the same brush off in contract matters. Then, two weeks after the event, the student government showed their hand. The student government passed a rule banning a subsection of student clubs from being associated with any national organization. *Id.* This ban was directly and expressly aimed at the YAF chapter which had repeatedly hosted conservative speakers. *Id.* The student government lifted the ban only when YAF filed a lawsuit. *Id.*

While the YAF is much more familiar with creeping infringement of First Amendment freedoms by left-leaning interests, to use the common vernacular, against conservative causes, the problem is definitely a two-way street. For example, administrators at the University of Kentucky initially threatened discipline against a student for criticizing pro-life activists on campus. https://www.thefire.org/news /updated-university-kentucky-violates-state-federal-law-vowing-investigate-students-over-viral (ver. Feb. 3, 2022). Fortunately, very quickly after the Foundation for Individual Rights in Education ("FIRE") sent a demand letter to the President, the University apparently changed its position. *See id.* (ver. Feb. 4, 2022)(copy of letter linked in article).

The YAF case examples are a good illustration of why the Court needs to adopt a clear and strong framework to put the burden on the government to prove that a restriction of rights **is** neutral, rather than on the victim to prove that it **is not** neutral. Often YAF knows it is being restricted but does not know or know for sure how the government is treating other organizations.

III. The CRB's Royalty Scheme and Rates Enacted in the Case Below Demanded "Strict Scrutiny," Which Was Not Accorded.

A. The CRB's Rate Enactments Needed to Pass "Strict Scrutiny" Because they Are Not a "Gas Tax" in Practice or Effect.

This Court has for many decades "consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground [of] his religion….'" *See, e.g., Employment Div. v. Smith,* 494 U. S. at 879, and cases cited therein. The test of whether a restraint on free exercise is proper under the First Amendment is most often stated as two parts, *i.e.* that is both "neutral **and** generally applicable." *E.g., Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 592 U.S. 14, 18 (2020)(*per curiam*)(emphasis added). The reason it is two-part is that this Court has consistently held that "Failing **either** the neutrality or general applicability test is sufficient to trigger strict scrutiny." *Kennedy v. Bremerton,* 597 U.S. 507, 526 (2022)(emphasis added); *see also Fulton v. Philadelphia*, 593 U.S. 522, 541 (2021)(free exercise); *Reed v. Town of Gilbert*, 576 U. S. 155, 171 (2015)(free speech); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U. S. 520, 546 (1993)(free exercise). In other words, a restraint on rights must be a "gas tax" with only incidental impacts on religious practice, not a law that singles

out religious activities, whether by design or by happenstance.

If a restraint on free exercise fails either of the two requirements, it must be struck down unless the government can satisfy the rigors of "strict scrutiny." To meet strict scrutiny, the government must clear two hurdles:

> "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "'interests of the highest order'" and must be narrowly tailored in pursuit of those interests. [citations omitted]." *Lukumi,* 508 U.S. at 546.

The CRB's actions establishing a variety of different copyright royalty schemes and rates was certainly not treated by the CRB as an interest of high order, as discussed below.

B. <u>The CRB's Royalty Setting Scheme is Inherently **NOT** Uniform; Rather, it is Subjective and Inconsistent.</u>

A gas tax is inherently uniformly applied because the only variable is the number of gallons of gasoline purchased, not an evaluation of how the gas is used. In contrast, the copyright statutes do not fix uniform royalty amounts for secular and religious webcasters or any other classifications of webcaster.

The law gives the CRB discretion to set royalties and to set different amounts for different categories of webcasters. Rather than trying to find uniformity between noncommercial secular and religious rates, the D.C. Circuit deferred to the CRB's "broad discretion" to set different rates:

> "The Board's decision to reject the NPR Agreement as a benchmark, as well as the Committee's rate proposals that were based on the NPR Agreement, was reasonable and supported by substantial evidence. We note that '**appellants face[] an uphill battle** in challenging the Board's selection of its benchmarks. … **The Board's 'broad discretion'** encompasses its selection or rejection of benchmarks, as well as its adjustment of benchmarks to 'render them useful.' [citations omitted]." *National Religious Broadcasters Noncommercial Music License Committee v. Copyright Royalty Board, et al.,* 77 F.4th 949, 962-63 (D.C. Cir. 2023)(hereafter, "*NRBNMLC D.C. Cir.*").

In short, the entire process is rife with exemptions. The outcomes are based on subjective judgments of the CRB after an epic "battle of the experts." [4] Compounding its failure to comply with "strict scrutiny," the D.C. Circuit imposed an "uphill battle" on the NRBNMLC, when the burden to prove that the governmentally-enforced restraint on free exercise of

[4] The 900,000 page record further attests to the inherent variability of the process.

religion was constitutional – because it was generally applied to secular webcasters equally. It was the CRB that should have faced the uphill battle.

The CRB's rate scheme as applied below is inherently **not** "generally applicable." It is a scheme that expressly allows for differences in rates and rate structures – on top of exceptions for secular webcasters which somehow are able to settle with the copyright owners, such as NPR here. Given the complexity, coupled with discretion to create exemptions and differing rates, no court should be able to hold that the CRB's rate scheme is "generally applicable. As discussed further below, "A government policy will fail the general applicability requirement if it … provides 'a mechanism for individualized exemptions.'" *Kennedy,* 597 U. S. at 526. More explicitly, "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Fulton v. Philadelphia,* 593 U. S. 522, 534 (2021)(quoting Smith, 494 U.S. at 884. As discussed below,[5] there was no compelling reason for the CRB not to extend the NPR rate exemption to noncommercial religious webcasters represented by the NRBNMLC.[6]

Returning to the gas tax illustration briefly, the CRB's mechanism is as if drivers had an opportunity "settle" at the pump with the government on an

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[5] Sec. III.E., *infra*.

[6] While Petitioner NRBNMLC represents the interests of a group of religious broadcasters and webcasters with regard to the royalties at issue in this case, it does not itself pay royalties.

agreed tax rate and scheme based on how they planned to use the gasoline. Or, failing a settlement, the drivers would have to provide evidence on where they would drive with the gas purchased and expert testimony on what amount would be a fair tax, then submit for consideration of pages of record evidence and opinion testimony on a "reasonable" tax rate. Similarly, the fundamental nature of the CRB's royalty scheme is that it can be complex, inconsistent, and most definitely subjective. These variable features, which are the antithesis of "neutral and generally applicable," were expressly approved by the D.C. Circuit when it deferred to the CRB's "broad discretion." *NRBNMLC D.C. Cir.,* 77 F.4th at 962-63.

C. Enactment of Royalties 18 Times Higher for Noncommercial Religious Webcasters is Not a "Neutral" or "Generally Applicable" Gas Tax.

Despite the plethora of numbers and a huge record below, identification of a facial burden on free exercise in this case is actually quite simple. The Court need not wade through complex math and details of the numerous rate-setting theories below to see it. All the Court needs to do is compare ***two*** numbers, which the Petitioner has done for the Court. Petition at 9-10. One number is the rate charged to secular webcasters, primarily NPR-affiliated webcasters. [7] The other

[7] Like NRBNMLC (see Note 6, *supra*), NPR itself does not pay royalties, but represented the interests of its affiliated radio stations and webcasters, including certain named public radio

number is the rate charged to religious webcasters represented by NRBNMLC. Indeed, the numbers themselves are not even necessary. So long as the Court can determine that the religious number (NRBNMLC) is **bigger** than the secular number (NPR), that is prima facie evidence that the CRB has denied free exercise of religion.

Here, the fact that religious webcasters pay more than secular was admitted by the government in its briefing to the D.C. Circuit. *E.g.* Final Br. for Appellees at 85 (D.C. Cir. Jan. 12, 2023). Likewise, it is readily visible to the Court in the record. *See* Petition at 9-10 (with analysis and citations to the Joint Appendix). And the difference is not *di minimis*. Religious webcasters must pay royalties more than 18 times as much as those paid by NPR[8] stations. *E.g., id.* at Note 3. The royalty payments are not for some remote adjunct to the practicing of religion. Religious broadcasts and webcasts are an integral part of conveying the religious message itself.[9] Most works that are streamed are subject to copyright laws passed by Congress. In general,

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groups eligible for Corporation for Public Broadcasting funding and negotiated what is referred to herein as the "NPR rate" or "number" for those all those stations.

[8] This difference is for streams above a rather modest "218-listener threshold" as fully detailed in the Petition at 9-10.

[9] As part of their proselytizing to non-believers and preaching to believers religious broadcasters wish to stream (perform) works online to convey or support their message. However, to be clear, the Court has not required the showing of a "compelling state interest" only when the conduct prohibited is "central" to the individual's religion. *See, e.g., Employment Div. v. Smith,* 494 U. S. at 886-87.

Federal law bars any such streaming unless royalties are paid in the amounts set, and under the mechanisms established, by the CRB.

Because religious webcasters cannot exercise their religious rights freely without complying with copyright laws, First Amendment issues of free speech and free exercise are raised. The CRB certainly could have reconciled copyright royalty rates with the First Amendment by making the effort to follow this Court's long-standing guidance. But setting rates for religious webcasters one or two times higher – let alone 18 times higher – reflects zero effort to recognize the Petitioner's First Amendment rights. On its face, the grossly disparate outcome certainly does not look like a "gas tax"; *i.e.,* "incidental," "neutral," and "generally applicable."

Given that Petitioner clearly called out the undisputed disparate treatment of religious interests, there was a prima facie case of an impending violation of the First Amendment. The burden of proof was thus on the government to demonstrate, under "strict scrutiny," that the 18 times greater marginal rate was nevertheless "neutral" and "of general applicability" to secular and religious interests alike. *See, e.g., Kennedy,* 597 U.S. at 408 ("the government must demonstrate its course was justified"); *Tandon* 593 U.S. at 62 ("the government has the burden to establish that the challenged law satisfies strict scrutiny").

D. While the CRB Failed to Accord "Strict Scrutiny" to the Royalty Rate Imposed on Religious Webcasters, it Could Not Have Met the Test Regardless.

As noted above, to have met the requirement of strict scrutiny the CRB would have to have shown that its rates and rate scheme were necessary to achieve an interest of "highest order" and do so in the most "narrowly tailored" fashion. [10] What high order the CRB and the Circuit Court were furthering is a mystery, since neither body undertook the strict scrutiny that was required. If the "high order" was to mandate fairly compensable royalties whenever an artist's works are streamed by non-profits, then the CRB could have done so by simply setting the same or very similar rate for all non-profit webcasters, including the Petitioner. However, under this Court's precedents the CRB's actions themselves belie any possibility that it was furthering any legitimate high order whatsoever.

> "Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling. It is established in our strict scrutiny jurisprudence that 'a law cannot ... be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage

[10] See discussion and cases cited at III.A, *supra.*

> to that supposedly vital interest unprohibited.' [citations omitted]." *Lukumi,* 508 U.S. at 547.

In restricting the free exercise of religion 18 times more severely than secular interests, the CRB failed the *Lukumi* test miserably. The D.C. Circuit brushed aside the First Amendment issues by erroneously holding that the Petitioner did not make the "initial showing of unfavorable treatment of religious webcasters" to the CRB. *NRBNMLC D.C. Cir.*, 77 F.4th at 967. To support that claim the CRB not only had to improperly reject proffered evidence from the Petitioner, it also had to ignore the royalty rates themselves, which are prominent in the record and decisions below. All of the final ***rates had to be in the record*** or else the CRB could not enact and enforce them.

Given the 18-fold difference in marginal rates imposed on religious versus secular streamers, the CRB had an affirmative duty to ensure royalties did not violate the free exercise clause:

> "The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the

> burdens of law and regulation are secular." *Lukumi,* 508 U.S. at 547.

This Court has admonished governments to do so by "narrowly tailoring" restraints on religion. Here, it is impossible to characterize the CRB's grossly disparate treatment of religious practices as a "narrow tailoring" of an interest. To tailor "narrowly," the CRB would have had to do **some <u>tailoring</u>**. It did not. It readily accepted a settlement of the rates for a large segment of secular noncommercial webcasters, which it was empowered to do. But then it summarily rejected the Petitioner's attempts to get similar treatment for noncommercial religious webcasters because they had been excluded from the NPR settlement. This, in a nutshell, is the problem. Copyright royalty rates 18 times higher for religious webcasters than for comparable secular webcasters are not narrowly tailored.

> "The proffered objectives are not pursued with respect to analogous nonreligious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree. The absence of narrow tailoring suffices to establish the invalidity of the ordinances. *See Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 232 (1987)." *Lukumi,* 508 U.S. at 546.

The CRB did not fail narrow tailoring by accident. Instead, it affirmatively rejected NRBNMLC's dogged pursuit of a rate scheme that would meet the "valid and neutral law of general

applicability" test established by this Court. *See NRBNMLC D.C. Cir.*, 77 F.4th at 967. The CRB and D.C. Circuit swept the Petitioner's interests under the rug, burying the dichotomy in the overall complexity of the rate scheme and faulting Petitioner, which did not bear the burden of proof. *See, e.g., id.* at 963 ("The Board properly placed the burden on the Committee….").

E. The CRB's Reliance on the "Settlement" Mechanism to Justify the Disparate Rates For NPR Was Wholly Improper.

The CRB offered no justification for treating religious webcasters so much worse than secular NPR other than the settlement and imposition of a backwards burden of proof. The reliance on the settlement is not just unavailing, it is actually another nail in the coffin for the government's restrictions on free exercise. Again, in a number of cases this Court has held that "[the government] may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices…." *Lukumi,* 508 U.S. at 547. *See also, Fulton*, 593 U.S. at 533; *Smith*, 494 U.S. at 884. Reliance on a settlement that one party – but not others – was able to achieve is precisely the kind of "mechanism" that may not be used – overtly or covertly – to deny rights guaranteed by the Constitution.

It must be remembered that were it not for government intervention and enforcement of copyright laws, the agreed "settlement" rate for all

webcasters would be **$0.00.** Without the force of the copyright laws passed by Congress and the CRB's implementation there would be **NO** willing buyers. Thus, to explain away acceptance of the NPR rate as evidence of the rate of a "willing buyer and willing seller" is purely a convenient fiction. But for government compulsion, every webcaster would freely stream any song or recording they wished for free and without any adverse consequences.

The CRB did not offer, and the record does not appear to contain, a reason why NPR was able to settle so favorably whereas the Petitioner was unable to settle at any rate. Was it bias on the part of the copyright owners or merely greater bargaining leverage on the part of NPR? While that is certainly an intriguing question, here it likely does not matter. Regardless of the motivations of the settling parties, the CRB's allowance of a favorable rate for secular NPR stations, while at the same time rejecting comparable rates for religious webcasters, created exactly the kind of "mechanism for individualized exemptions" for restraint of a constitutional right that this Court has long rejected. *See, e.g., Fulton*, 593 U.S., at 533 (law not "generally applicable" if exemptions); *Lukumi,* 508 U.S. at 537 (if exemptions "are available, the government 'may not refuse to extend [them to religion]'".)

"Settlement" by secular interests cannot be permitted to have the effect of enabling a government to restrain the religious freedom of parties who are unable to settle. Reliance on the settlement was not a "compelling reason" for the secular/religious disparity. On the contrary, it was a dereliction of duty

by the CRB – failing to engage in its own "strict scrutiny" of the huge rate disparities.

IV. This Case Presents an Opportunity to Curb Creeping Infringement of First Amendment Rights Enabled by Improper Shifting of the Burden to its Victims.

For the reasons discussed above and in the Petition, it is clear that the CRB undertook no real scrutiny of the First Amendment issues. Because the CRB made no reasonable effort to ensure that religious webcasters were treated in a "similar way" to secular webcasters, the CRB's royalty rates could not upheld as being "generally applicable." *See Fulton*, 593 U.S., at 534. Moreover, both the CRB and the D.C. Circuit excused their failures with the erroneous conclusion that the burden of proof was on the Petitioner. This was wrong and, more troublesome than that, it bodes for even more restraints on people and groups trying to exercise their constitutional rights against the tendency toward creeping infringement at all levels of governments. Here, the record was clear on the huge extent of the disparate treatment, at least by the time the case reached the D.C. Circuit.[11] But in so many other situations the overall nature and impact of a

[11] However, much of the record on the numbers the CRB considered and supporting evidence was filed under seal pursuant to a protective order. Indeed, much of the D.C. Circuit's decision is redacted and not public.

government's restrictive actions is a "black box" to the public.

The motivations and neutrality – or lack thereof – of the actions of a government or governmental official toward political or religious organizations are often inscrutable. For example, at the University of Wisconsin-Madison vandals defaced public school property, causing tens of thousands of dollars in damage, in protest of the YAF chapter's Matt Walsh event in 2022. *See* https://captimes.com/news/education/uw-madison-event-featuring-conservative-speaker-matt-walsh-leads-to-graffiti-protest/article_238b4680-d359-541e-a6bf-0420c7569db1.html. This crime was never prosecuted and the school is staunchly withholding information, even cutting surveillance video obtained by YAF through a public records request, seemingly to protect the identity of the vandals. Because the school is withholding information, YAF members and supporters have no way of knowing whether the school is choosing not to prosecute because it lacks sympathy for the conservative club or for some legitimate reason that is viewpoint neutral.

University of Wisconsin-Madison has also recently started to assess "security" charges as a condition of certain YAF events, speakers, and programs on campus, which do not appear to be equally applied to all groups. *See* https://issuu.com/young.americas.foundation/docs/final_uw_letter_combined_3-8-24_redacted. Similarly, an admin-istrator at College of Lake County demanded YAF change the font on a poster advertising an upcoming speech by Governor Scott Walker and threatened to suspend the

YAF Chapter there if it did not comply. *See* https://yaf.org/news/college-administrator-threatens-to-suspend-yaf-chapter-over-sopranos-themed-flyer-promoting-gov-scott-walkers-upcoming-lecture/. Conservatives at the College had no way of knowing whether this threat should be considered "bullying" of conservatives, or whether the administrator had other, proper and neutral, concerns.

In the YAF examples here and above, more often than not, the victim of denial of a right may have absolutely no idea how the government is treating other groups or individuals with the same or differing viewpoints. The government will parrot back the magic words of this court that the restriction is "neutral" and "generally applicable." If it is not something like a gas tax, but involves discretionary actions, both the motivations and the effects of the restraint may not be at all apparent to the public. Indeed, a government that knows it is discriminating will be highly motivated to obfuscate and prevaricate because full and honest disclosure would jeopardize the government's ability to achieve its hidden goals.

To ensure government does not gradually and almost imperceptibly whittle away at constitutional rights, the burden of justifying restraints must be put squarely and unambiguously on the government in all cases involving a facial restriction of a right. The Court should articulate that principle not just as to this case, but more broadly to send a message to government actors and reviewing courts alike.

CONCLUSION

If the peoples' rights are to be protected, the Court must enable people to protect their rights. Requiring governments to bear the burden to demonstrate that facial restraints on rights are truly neutral and uniformly applied is the most practical and effective means to accomplish that. The Petition should be granted.

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