No. 23-927

In the
Supreme Court of the United States

NATIONAL RELIGIOUS BROADCASTERS NONCOMMERCIAL MUSIC LICENSE COMMITTEE,
Petitioner,

v.

COPYRIGHT ROYALTY BOARD, ET AL.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF AMICUS CURIAE CATHOLIC RADIO ASSOCIATION IN SUPPORT OF PETITIONER NATIONAL RELIGIOUS BROADCASTERS NONCOMMERCIAL MUSIC LICENSE COMMITTEE

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INTEREST OF AMICUS CURIAE[1]

The Catholic Radio Association ("CRA") is the principal trade association for 419 Catholic radio stations owned and operated by 135 individual organizations. Of the CRA's terrestrial radio stations, the majority are also webcasters that stream their radio broadcast signals over the Internet. The CRA supports Catholic webcasters in all areas of operations, from technical engineering to policy advocacy, so that each webcaster can fulfill its mission of inviting listeners to learn and grow in their faith.

The CRA has a strong interest in defending the interests of all Catholic radio stations, including the 285 Catholic radio stations that are not CRA members, and protecting the freedoms of expression and religion. The CRA has a long history of advocating for Catholic radio stations before the Federal Communications Commission ("FCC") and lobbying against attempts to limit radio stations' freedom to broadcast according to their religious convictions. This case directly affects how Catholic webcasters operate and threatens the viability of many stations. The CRA is concerned with both this case's dire financial effects on Catholic webcasters and its broader impact on religious liberty—the principle

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[1] Pursuant to Rule 37.2, all parties received timely notice of amicus curiae's intent to file this brief. Pursuant to Rule 37.6, amicus curiae affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus curiae and its counsel made a monetary contribution to its preparation or submission.

on which Catholic radio stations daily rely as they broadcast and webcast their programs.

SUMMARY OF ARGUMENT

This case raises matters of grave urgency to CRA's members. The Copyright Royalty Board's (the "Board") 2021 royalty rate determination for non-commercial webcasters, unless reversed, will immediately and negatively impact Catholic (and other religious) webcasters. The Board doubled the prior minimum-fee payment from $500 to $1,000 per station and required non-commercial Catholic webcasters to pay the same per performance royalty rate as commercial non-subscription webcasters if those non-commercial Catholic webcasters reach more than 218 listeners a month on average. *Compare* 37 C.F.R. § 380.10(a)(2) (2016), *with* 37 C.F.R. § 380.10(a)(2).

Non-commercial Catholic webcasters rely wholly on donors and underwriters. Some webcasters' budgets are so small that the increase in the Board's royalty rates for non-commercial webcasters may force them to stop webcasting. The Board's determination risks forcing small Catholic webcasters to fold or to limit their reach. The fewer Catholic webcasters and the smaller their reach, the less diverse perspectives available to listeners. The less diverse the perspectives, the less listeners can learn from different approaches to the Catholic faith to enrich their own understanding and experience of the faith.

The financial impact of this decision alone confirms its importance. But this case is about more than royalty rates. It burdens the freedom of

religion—what the Founders declared an inalienable natural right. *See, e.g.*, Va. Bill of Rights (1776); Del. Decl. of Rights (1776); PA. CONST. of 1776; MD. CONST. of 1776; N.C. CONST. of 1776; VT. CONST. of 1786. This Court has recently established tests to determine when the government has overstepped its bounds in enacting laws that burden religious exercise. By affirming the Board's royalty rate determination, the D.C. Circuit upended precedent in *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021), and declined to apply the tests in *Tandon v. Newsom*, 593 U.S. 61 (2021), and *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2609 (2020) (Kavanaugh, J., dissenting).

First, the D.C. Circuit failed to apply strict scrutiny to the Board's royalty rate structure, which creates a "formal mechanism for granting exceptions" and, thus, is not generally applicable under *Fulton*. 593 U.S. at 537. *Second*, the D.C. Circuit declined to apply each step of the Court's test under *Tandon* and thus subject the Board's royalty rate determination to strict scrutiny. *See* 593 U.S. at 63. *Third*, the D.C. Circuit did not apply the four-category framework articulated in Justice Kavanaugh's dissent in *Calvary Chapel* and therefore apply strict scrutiny or find that the Board may have been motivated by hostility toward religion. *See* 140 S. Ct. at 2612 (Kavanaugh, J., dissenting).

The CRA urges the Court to grant certiorari and reverse the D.C. Circuit's decision below.

ARGUMENT

I. THE BOARD'S 2021 ROYALTY RATE DETERMINATION THREATENS HUNDREDS OF CATHOLIC WEBCASTERS.

A. Catholic Webcasters Already Struggle to Remain Financially Viable.

Catholic webcasters rely heavily on external support and can struggle to remain financially viable. Because these webcasters are religious, they do not receive federal money through the Corporation for Public Broadcasting ("CPB"). *See* Steven Waldman and the Working Group on Information Needs of Communities, *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age*, FEDERAL COMMUNICATIONS COMMISSION at 186, Jun. 9, 2011, https://www.fcc.gov/sites/default/files/the-information-needs-of-communities-report-july-2011.pdf ("CPB rules prohibit the provision of federal Community Service Grants to noncommercial stations that 'further the principles of . . . religious philosophies.'"); *In re Noncommercial Educational Station Fundraising for Third-Party Non-Profit Organizations*, 32 FCC Rcd. 3411, 3414 n.15 (2017) ("Programs that 'further the principles of particular . . . religious philosophies' are not considered CPB-qualified programming.") (citations omitted). And, because many religious webcasters that webcast their terrestrial broadcasts are also non-commercial, they cannot earn revenue by webcasting "spots" (announcements advertising goods and services). *See* 47 C.F.R. §§ 73.503, 73.621; 47 U.S.C. § 399b. Thus, Catholic webcasters depend on underwriters or

donations from listeners or supporters to support their operations. *See, e.g.*, *WJMJ Radiothon*, OFFICE OF RADIO & TELEVISION, (last visited Mar. 25, 2024), https://www.ortv.org/WJMJ/radiothon/radiothon.htm. The net result is that Catholic webcasters, like most non-commercial religious webcasters, operate on a shoestring budget and are particularly sensitive to copyright royalty rate increases.

The CRA exists precisely to help Catholic webcasters that would not otherwise be able to continue webcasting without external support. The CRA supports its members financially by assisting them with fundraising, radiothons, promotions, and underwriting. *See Technical Assistance*, CATHOLIC RADIO ASSOCIATION (last visited Mar. 25, 2024), https://catholicradioassociation.org/tech-assistance. Because music licensing fees constitute a significant portion of Catholic radio stations' costs, the CRA seeks to reduce its members' costs by determining which music licenses would be appropriate for the members' webcasts and offering related analyses and consultations. *See Music Licensing Guide / Fact Sheet*, CATHOLIC RADIO ASSOCIATION (Mar. 23, 2024), https://files.ecatholic.com/32478/documents/2022/6/CRA%20ML%20guide%20031222.pdf?t=1711348806000.

Catholic webcasters also face significant challenges to build and maintain their stations due to equipment and maintenance expenses. For example, Catholic webcasters that also broadcast may require engineers to perform interference and expansion studies. *See Technical Assistance*, CATHOLIC RADIO ASSOCIATION (last visited Mar. 25, 2024),

https://catholicradioassociation.org/tech-assistance. Catholic webcasters that also broadcast may need to pay for services to convert their broadcasts into webcasts, radio station app services, weather services, radio station brokers, fundraising services, web design or hosting, studio equipment, and program production. *See Preferred Providers/Discounts*, CATHOLIC RADIO ASSOCIATION (last visited Mar. 25, 2024), https://catholicradioassociation.org/preferred-providers-discounts.

B. The Board's Royalty Rate Determination Will Hurt Catholic Webcasters Even More and Discourage Them from Growing Their Audience.

Given these financial constraints, Catholic webcasters are much more sensitive to rate increases. The most recent determination was the second time in the past decade that the rates applicable to non-commercial religious webcasters increased significantly. As a result of the Board's 2021 determination, the Board doubled the annual minimum fee for all stations from $500 to $1,000. *Compare* 37 C.F.R. § 380.10(a)(2) (2016), *with* 37 C.F.R. § 380.10(a)(2) (increasing the fee from $500 to $1,000). Prior to the Board's 2021 determination, the usage rates that almost all non-commercial religious webcasters paid had more than doubled between 2015 and 2016 alone after the much lower Webcaster Settlement Act rates they had negotiated to override the Board's rates expired. *See* Notification of Agreements Under the WSA of 2009, 74 Fed. Reg. 40614, 40620–26 (Aug. 12, 2009) (agreement between non-commercial religious webcasters and

SoundExchange, among others, for non-commercial religious webcasters to pay $0.00083 per performance in 2015, less than half of the per performance rate in 2016); Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recording (*Web IV*), 81 Fed. Reg. 26,316, 26,409 (May 2, 2016). As a result of the *Web IV* proceeding in 2016, non-commercial religious webcasters were also forced to pay the full commercial royalty rates above the aggregate tuning hour ("ATH") threshold. *See Web IV*, 81 Fed. Reg. at 26,409; Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings (*Web III*), 79 Fed. Reg. 23,102, 23,132 (Apr. 25, 2014). Put bluntly, because non-commercial religious webcasters cannot pass their royalty fees onto listeners or advertisers, those stations without substantial funding from underwriting or donations may be forced to stop webcasting.

Even if Catholic webcasters do not stop webcasting, the Board's 2021 royalty rate determination will cause many Catholic webcasters to limit their reach. The Board's determination requires Catholic webcasters to pay double the minimum license fee compared to the fee from 2016 to 2020, and the same royalty rates as commercial webcasters, if they webcast over 159,140 ATH a month, which equates to an average audience of over 218 people. *See* 37 C.F.R. § 380.10(a)(2); 37 C.F.R. § 380.10(a)(2) (2016); Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies To Facilitate Those Performances

(*Web V*), 86 Fed. Reg. 59,452, 59,566 (Oct. 27, 2021). Thus, the Board's 2021 royalty rate determination discourages Catholic webcasters from reaching more than 218 listeners a month on average—less than the size of a typical university lecture course.

C. The Board's 2021 Royalty Rate Determination Will Hurt the Diversity of Internet Radio.

"Losing the smallest webcasters will likely result in a loss of diversity that makes Internet radio special." Allison Kidd, *Mending the Tear in the Internet Radio Community: A Call for a Legislative Band-Aid*, 4 N.C. J.L. & TECH. 339, 363 (2003). Similarly, losing the smallest Catholic webcasters will result in a loss of diversity among Catholic webcasters and non-commercial religious and secular webcasters generally.

The loss of even the smallest Catholic webcasters hurts listeners, who may rely on the diversity of Catholic webcasters to find suitable resources to learn about their faith. In a survey conducted by the CRA, ninety-four percent of listener respondents stated that they were more spiritually engaged and inspired by listening to Catholic radio. *Catholic Radio—More Essential Than Ever*, CATHOLIC RADIO ASSOCIATION (last visited Mar. 25, 2024), https://files.ecatholic.com/32478/documents/2022/8/CRAmore%20essential%20than%20ever.pdf?t=1660314815000. Over fifty percent of listeners have become more engaged in the life of their parish, and sixty-five percent of listeners give more to their parish and other charities. *Id.* Thus, even the smallest of Catholic

webcasters play a crucial role in providing faith-filled messages and resources to Americans. By losing these webcasters, listeners would also lose the depth and variety of spiritual resources currently available to them.

II. THE DECISION BELOW CONFLICTS WITH *FULTON V. PHILADELPHIA* BECAUSE IT FAILS TO APPLY STRICT SCRUTINY.

Under *Fulton v. Philadelphia*, the D.C. Circuit should have found that the Board's royalty rate determination gives the government discretion to grant "individualized exemptions" and therefore should be subject to strict scrutiny. 593 U.S. at 544. Even if the mechanism for exemptions in *Fulton* differs from the one in the statutory provisions under which the Board sets royalty rates, that difference is immaterial. The existence of a mechanism for exemptions and the government's enormous discretion to select royalty rates *after* considering exempted parties' rates bring the Board's 2021 royalty rate determination under *Fulton*.

In *Fulton*, the City of Philadelphia had previously contracted with Catholic Social Services ("CSS"), a foster care agency, to refer children to CSS. *Id.* at 530. In 2018, the City changed its policy and stated that it could no longer enter into a full foster care contract with CSS, claiming CSS's refusal to certify same-sex couples violated a non-discrimination provision in CSS's contract with the City. *Id.* at 530–31. CSS and three foster parents argued that the City, among other defendants, had violated the Free

Exercise and Free Speech Clauses of the First Amendment. *Id.*

The key question in *Fulton* was whether the law was neutral and generally applicable. *Id.* at 532–33. The Court made clear that a law is not generally applicable if it "'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions'" or "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* at 533–34 (first citing *Employment Div., Dep't of Hum. Res. of Ore. v. Smith*, 494 U.S. 872, 884 (1990) and then citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 542–46 (1993)). The Court held that "[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless [of] whether any exceptions have been given, because it 'invite[s]' the government to consider which reasons for not complying with the policy are worthy of solicitude." *Id.* at 537 (citing *Smith*, 494 U.S. at 884). If a law is not generally applicable, a court must apply strict scrutiny. *Id.* at 533 (citing *Smith*, 494 U.S. at 878–82).

The statutory provisions governing the Board's 2021 royalty rate determination for non-interactive webcasting are not generally applicable because they exempt parties that enter into an agreement with individual copyright owners. Under 17 U.S.C. § 114(f)(1)(A), the Board determines "reasonable rates and terms of royalty payments for transmissions subject to statutory licensing under subsection (d)(2)"—that is, for non-interactive webcasting.

However, under 17 U.S.C. § 801(b)(7)(A), the Board can also adopt privately negotiated rates among "some or all of the participants in a proceeding" and "adopt [them] as a basis for statutory terms and rates or as a basis for the distribution of statutory royalty payments." Thus, like the policy in *Fulton* that created a "formal mechanism for granting exceptions," the statutory provisions governing the Board's 2021 royalty rate determination formally provides for an exemption from the statutory license under 17 U.S.C. § 114(f)(1)(A).

The statutory provisions governing the Board's 2021 royalty rate determination are not generally applicable under *Fulton*. The Board, like the City official in *Fulton*, has enormous discretion over which parties are functionally exempt from the compulsory rates set for non-commercial religious webcasters. *See Fulton*, 593 U.S. at 537. Under 17 U.S.C. § 801(b)(7)(A), the Board can choose to adopt rates independently negotiated between parties to the proceeding as statutory rates applicable to non-parties to the proceeding. However, under 17 U.S.C. § 114(f)(1)(A), the Board can also decide to set much higher rates for other non-commercial webcasters. Thus, in practice, the Board determines which webcasters will pay the same rate as the settling webcasters and which will be functionally "exempt" from the rate agreed upon by the settling webcasters and pay a higher rate.

The D.C. Circuit should have applied *Fulton* to this case. Had the D.C. Circuit done so, it would have found that the statutory provisions governing the Board's 2021 royalty rate determination for non-

commercial webcasters creates a "formal mechanism" for granting exceptions and "[i]nvites the government to consider which reasons for not complying with the [compulsory royalty rates] are worthy of solicitude." *Id.* at 537. The D.C. Circuit should have subjected the statutory provisions to strict scrutiny.

III. THIS CASE IS AN EXCELLENT VEHICLE TO APPLY THE "MOST FAVORED NATION" TEST IN *TANDON V. NEWSOM*.

The Court incorporated the "most favored nation" theory of religious exemptions in *Tandon*. Under *Tandon*, a law is not neutral and generally applicable, and thus is subject to strict scrutiny, if it treats "*any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 593 U.S. 61, 63 (2021) (*per curiam*). To determine whether two activities are "comparable," they "must be judged against the asserted government interest that justifies the regulation at issue." *Id.* Notably, and unlike in *Lukumi*, the Court did not specify that the secular and religious activities needed to *undermine* the government interest in a similar way. *See Lukumi*, 508 U.S. at 542–46. The Court merely required that the activities be compared according to the asserted government interest.

The D.C. Circuit could have applied the *Tandon* test and subjected the Board's 2021 royalty rate determination to strict scrutiny. In this case, the Board clearly treats a secular activity (NPR-affiliated webcasting) more favorably than religious exercise (religious webcasting) by requiring religious webcasters to pay *18 times the royalty rate* applicable

to NPR-affiliated webcasters if they reach an average of more than 218 audience members. *See Web V*, 86 Fed. Reg. at 59,589; *Web IV*, 81 Fed. Reg. at 26,409.

The government interest in giving the Board authority to determine royalty rates—though not asserted expressly by the Board in this case—is to "permit qualified parties to use multiple copyrighted works without obtaining separate licenses from each copyright owner." *See About Us*, UNITED STATES COPYRIGHT ROYALTY BOARD (last visited Mar. 25, 2024), https://www.crb.gov/. In other words, at least one government interest in establishing compulsory licenses and setting royalty rates by statute is to make it easier for webcasters to use copyrighted music. The government did not assert that its interest in creating compulsory licenses is to ensure copyright owners are paid fairly nor to increase the copyright owners' royalties beyond what "would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. § 114(f)(1)(B).

The D.C. Circuit should have compared NPR-affiliated webcasting and religious webcasting against the government interest of "permit[ting] qualified parties to use multiple copyrighted works without obtaining separate licenses from each copyright owner." *About Us*, UNITED STATES COPYRIGHT ROYALTY BOARD (last visited Mar. 25, 2024), https://www.crb.gov/. A fair application of *Tandon* would consider how the activity of NPR-affiliated or religious webcasting *itself* relates to that government interest. Since those activities alone do not meaningfully impact the government interest, the D.C. Circuit should have analyzed how the secular

activity and religious exercise at issue would affect how qualified parties can use copyrighted music without negotiating with each individual copyright owner. The secular activity here is NPR-affiliated royalty payments under the agreement between NPR and CPB on one side and SoundExchange on the other. In *Tandon*, the religious exercise at issue was the activity the plaintiffs *sought* to do. 593 U.S. at 63. Thus, the religious exercise to compare to the secular activity in this case is also what the petitioners seek—paying the same royalty payments applicable to NPR-affiliated webcasters.

Here, the NPR Agreement furthers the government interest in facilitating non-commercial webcasters' use of copyrighted music because the agreement allows NPR-affiliated webcasters to use copyrighted music without negotiating with each individual copyright owner. Likewise, the religious exercise at issue—religious webcasters' broadcasting while paying the same royalty rate as NPR-affiliated webcasters' rate under the NPR Agreement—would further this government interest. If religious webcasters pay the rate applicable to NPR-affiliated webcasters, they will still be permitted to "use multiple copyrighted works without obtaining separate licenses from each copyright owner." *About Us*, UNITED STATES COPYRIGHT ROYALTY BOARD (last visited Mar. 25, 2024), https://www.crb.gov/.

Because both the secular and religious activities in this case would further the government interest in facilitating webcasters' use of copyrighted music, the D.C. Circuit should have found that the two activities were "comparable" under *Tandon*. Because

the two activities are "comparable" under *Tandon*, and yet the government treats the secular activity more favorably than the religious exercise, the D.C. Circuit should have subjected the Board's rates for religious and non-religious non-commercial webcasters to strict scrutiny.

IV. THIS CASE IS ALSO AN EXCELLENT VEHICLE TO APPLY THE FOUR-CATEGORY FRAMEWORK IN *CALVARY CHAPEL V. SISOLAK*.

The Board's 2021 royalty rate determination also fits squarely into the framework Justice Kavanaugh proposed in *Calvary Chapel Dayton Valley v. Sisolak*. 140 S. Ct. 2603, 2609–13 (2020) (Kavanaugh, J., dissenting). In that case, Justice Kavanaugh stated that the Court's precedents address four categories of laws burdening religious exercise. Since *Calvary Chapel*, scholars have argued that the Court in *Tandon* adopted the theory Justice Kavanaugh articulated in his dissenting opinion in *Calvary Chapel*. *See, e.g.*, Josh Blackman, *The "Essential" Free Exercise Clause*, 44 HARV. J.L. & PUB. POL'Y 637, 717 (2021); Jim Oleske, Tandon *Steals* Fulton's *Thunder: The Most Important Free Exercise Decision Since 1990*, SCOTUSBLOG (Apr. 15, 2021), https://www.scotusblog.com/2021/04/tandon-steals-fultons-thunder-the-most-important-free-exercise-decision-since-1990/. Had the D.C. Circuit applied the four-category framework in *Calvary Chapel*, it would have applied strict scrutiny to the Board's 2021 determination or even found that the Board may have been motivated by hostility toward religion.

As Justice Kavanaugh stated in *Calvary Chapel*, there are four types of laws that affect religion: (i) laws that expressly discriminate against religious organizations *because* they are religious; (ii) laws that expressly favor religious organizations, giving them benefits that are not afforded to comparable secular institutions; (iii) laws that treat religious and secular organizations the same and are facially neutral but may burden religious claimants; and (iv) laws that "supply no criteria for government benefits or action, but rather divvy up organizations into a favored or exempt category and a disfavored or non-exempt category." *Calvary Chapel*, 140 S. Ct. at 2610–12 (Kavanaugh, J., dissenting).

For laws in the third category, the religious claimant may seek an exemption from the law as applied or attack it on the grounds that the legislature was motivated by hostility toward religion. *Id.* at 2611 (citing *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2070 (2020), *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006), and *Lukumi*, 508 U.S. 520).

For laws in the fourth category, the Court should apply a two-step analysis: first, the Court should ask whether the law creates favored or exempt organizations and whether religion falls into that class; and second, if the religious organizations are not favored, whether the government has provided "sufficient justification" for the unfavorable treatment. *Id.* at 2611 (citing Douglas Laycock, *The Remnants of Free Exercise*, 1990 S. CT. REV. 1, 49–50; *Smith*, 494 U.S. 872 (1990); and *Lukumi*, 508 U.S. at 537–38).

Because the Board's 2021 royalty rate determination at least falls under the fourth category, the D.C. Circuit should have applied strict scrutiny. The Board's 2021 royalty rate determination "divv[ies] up" non-commercial webcasters into two categories: those subject to lower NPR rates and those subject to much higher non-commercial rates where the webcaster reaches more than 218 listeners on average. Here, religious webcasters fall into the class of disfavored organizations. *See Web V*, 86 Fed. Reg. at 59,589. Accordingly, under the framework in *Calvary Chapel*, the D.C. Circuit should have applied strict scrutiny.

Even if the Board's 2021 royalty rate determination below were facially neutral, the D.C. Circuit failed to grant religious webcasters an exemption or examine whether the Board was motivated by hostility toward religion, including whether any other "interest suggested by [the Board] [could] justify the scheme." *Minneapolis Star and Tribune Co. v. Minnesota Comm'r Revenue*, 460 U.S. 575, 592 (1983).

In *Minneapolis Star*, the State of Minnesota imposed a use tax on the cost of paper and ink products consumed in the production of a publication. *Id.* at 577. Although the same use tax law applied prima facie to all publishers in the State, only 11 publishers—those that published more and thus used more than $100,000 worth of ink and paper in a calendar year—producing under 4% of the paid circulation newspapers in the State paid a tax in one year. *Id.* at 578. The next year, only 13 publishers, producing just over 4% of the paid circulation

newspapers in the state, paid the tax. *Id.* at 579. This Court found that the State's power to "tailor the tax so that it singles out a few members of the press" actually "present[ed] such a potential for abuse that no interest suggested by [the State] [could] justify the scheme." *Id.* at 592. That is, this Court found a law targeting a few First Amendment-protected actors per se unconstitutional.

Here, as in *Minneapolis Star*, the rate structure applies prima facie to all non-commercial webcasters. However, only certain webcasters—the non-NPR-affiliated broadcasters that are almost exclusively religious and that play more than 159,140 ATH—will actually pay the royalty beyond the minimum fee that all webcasters must pay. As in *Minneapolis Star*, the royalty rate structure for non-commercial webcaster resembles "more a penalty for" religious webcasters. *Id.* Since "no interest suggested by" the Board could justify this penalty, the D.C. Circuit should have considered whether the Board was motivated by hostility toward religion. *Id.*

CONCLUSION

For the foregoing reasons, the CRA urges the Court to grant the petition.

Respectfully submitted,

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