No. 25A____

IN THE

Supreme Court of the United States

BROADCAST MUSIC, INC.,

Applicant,

v.

NORTH AMERICAN CONCERT PROMOTERS ASSOCIATION,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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CORPORATE DISCLOSURE STATEMENT

Applicant Broadcast Music, Inc. hereby certifies that Otis Parent, Inc. is its sole parent corporation. Otis Parent, Inc. owns 100% of Applicant's stock. Otis Parent, Inc. is not a publicly held company.

APPLICATION

To the Honorable Sonia Sotomayor, Associate Justice of the United States Supreme Court and Circuit Justice for the Second Circuit:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), Applicant Broadcast Music, Inc. (BMI) respectfully requests a 45-day extension of time within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case. The new deadline would be August 20, 2026.

1. The Second Circuit issued its decision on February 24, 2026. *See Broad. Music, Inc.* v. *N. Am. Concert Promoters Ass'n*, 168 F.4th 86 (2d Cir. 2026) (Appendix A). BMI sought panel rehearing and rehearing en banc, which the court denied on April 6, 2026 (Appendix B). Unless extended, the time to file a petition for certiorari will expire on July 6, 2026. This application is being filed more than ten days before the petition is currently due. *See* Sup. Ct. R. 13.5. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

2. In the decision below, the Second Circuit badly erred in deciding rate-setting issues that are of fundamental importance to millions of songwriters, publishers, and composers. Almost two years ago, a federal district court determined that concert promoters like Live Nation and AEG should pay a rate of 0.5% for a BMI license. In determining that 0.5% was a reasonable rate for licensing the live performance rights of BMI songwriters, publishers, and composers, the district court considered hundreds of exhibits and weeks of live testimony regarding quintessentially factual questions of fair market value and appropriate benchmarks.

The Second Circuit, however, swept the district court's determinations aside—applying *de novo* review instead of the clear error standard that other courts routinely apply in comparable circumstances, and then substituting the panel's own views for the district court's factual findings. The resulting decision conflicts with the precedents of this Court and the other circuits, and it improperly vacates the reasonable rate the district court determined for compensating creators for the use of their works. BMI therefore respectfully requests an extension on the deadline for its petition for certiorari to ensure that it has an adequate opportunity to analyze these important issues.

3. BMI is a performing rights organization representing more than 1.3 million songwriters, composers, and music publishers. *Broad. Music, Inc.* v. *N. Am. Concert Promoters Ass'n*, 664 F. Supp. 3d 470, 474 (S.D.N.Y. 2023). BMI licenses the public performance rights to music users, including the North American Concert Promoters Association (NACPA). App.7a-8a. NACPA is an industry group comprised of the largest concert promoters including Live Nation and AEG Worldwide, which rake in billions of dollars of revenue each year. *See ibid.* BMI ensures that its songwriters are paid when Live Nation and similar concert promoters profit from the performance of songwriters' works at live concerts. App.6a-7a.

4. In 1966, BMI voluntarily signed a consent decree with the U.S. government. App.6a n.1; *see Broad. Music, Inc.* v. *Columbia Broad. Sys., Inc.*, 441 U.S. 1, 20 (1979). The decree ensures that music users like Live Nation pay "reasonable" rates for the use of songwriters' works by entrusting rate determinations

to the hands of the Southern District of New York, which is designated as the rate court. App.7a (citation omitted).

5. The consent decree provides that a "reasonable" rate must be determined by the district court based on "all the evidence." App.20a (citation omitted). To be "reasonable," the rate must reflect the hypothetical fair market value of the license—the "price that a willing buyer and a willing seller would agree to in an arm's length transaction." *Am. Soc'y of Composers, Authors & Publishers* v. *Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 569 (2d Cir. 1990).

6. Until recently, NACPA paid approximately 0.21% of the face value of a concert's tickets to license the works of BMI's songwriters and publishers. App.8a-9a. That rate was negotiated back in the early 1990s when concert promoters operated at a loss and negotiated lower rates on that basis. *Broad. Music*, 664 F. Supp. 3d at 475. But times have changed. Concert promoters like Live Nation now make billions every year. This case arose because NACPA has refused to pay the new 0.8% rate proposed by BMI to more accurately reflect the value of songwriters' music to the immensely profitable live concert industry that exists today. Unable to agree, BMI petitioned the Southern District of New York to set a "reasonable rate" under the consent decree. *See* App.4a, 9a.

7. The district court conducted a thorough, five-week trial, including live testimony from twelve fact witnesses and two economic experts and more than 300 exhibits. *See* App.10a-17a. The evidence included sixteen licensing agreements that the court carefully assessed to determine appropriate benchmarks. *Broad. Music*,

664 F. Supp. 3d at 479-483, 485-488. The court additionally considered rates paid by other "music intensive industries" like commercial radio stations and witness testimony regarding recent changes in the music and live concert industries. *Id.* at 488-489. Based on all of that evidence, the court set the rate at 0.5%—falling between the 0.8% proposed by BMI and the 0.23% argued for by NACPA. *Id.* at 489.

8. The district court also considered how to determine the relevant "revenue base" to which the licensing rate would apply. After taking extensive testimony on the issue, the district court found that, in addition to the face value of a concert ticket, the revenue base should include servicing fees as well as box suite and VIP packages based on evidence that Live Nation and AEG use those charges to increase their revenue without proportionately increasing the fees paid to BMI. *Id.* at 484-485. The court declined, however, to include additional components in part because it found that, at the time, adding those components may have imposed unnecessary administrative burdens. *Id.* at 479.

9. NACPA appealed, and after one judge recused following oral argument, a panel of just two judges vacated the district court's decision. App.1a. The panel held (as relevant here) that it was appropriate to review the district court's findings regarding the fair market value of BMI's licenses "*de novo*," rejecting BMI's assertions that determinations of fair market value are quintessentially factual. App.19a; *see* App.18a-20a. Applying the *de novo* standard, the panel revisited and rejected the district court's factual and discretionary fair market value determinations. App.24a-50a. The panel then substituted its own findings based on journal articles never

introduced at trial, factual evidence presented in other cases, and speculation about contract-negotiation strategies. *E.g.*, App.28a-31a, 40a-41a, 45a, 47a.

10. The panel's erroneous and over-reaching decision warrants review. It splits with the precedents of this Court and the other circuits and distorts the rate-setting process that is of fundamental importance to the millions of songwriters, publishers, and composers who depend on BMI's and other consent decrees to protect their right to fair compensation for the use of their musical works.

11. This Court has long held that predominantly factual questions that require district courts to balance "multifarious, fleeting, special, narrow facts that utterly resist generalization" are "subject only to review for clear error." *U.S. Bank National Association ex rel. CWCapital Asset Management LLC* v. *Village at Lakeridge, LLC*, 583 U.S. 387, 396, 399 (2018) (quotation marks and citation omitted). The determination of fair market value, and the subsidiary questions regarding appropriate benchmarks and the appropriate revenue base, readily qualify as the sort of fact-intensive questions that warrant clear error review under this precedent. The clear error "standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact" based on speculation or "simply because [the court] is convinced that it would have decided the case differently." *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573 (1985). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it." *Id.* at 573-574. The panel's decision cannot be reconciled with those settled principles.

12. Moreover, in the directly analogous context of copyright royalty rates, the D.C. Circuit has repeatedly held that the "selection" and "adjustment" of rate benchmarks for determining reasonable licensing fees falls within the "'broad discretion'" of the factfinder—that is, the Copyright Royalty Board. *SoundExchange, Inc.* v. *Copyright Royalty Bd.*, 904 F.3d 41, 50-51 (D.C. Cir. 2018) (quoting *Music Choice* v. *Copyright Royalty Bd.*, 774 F.3d 1000, 1009 (D.C. Cir. 2014)). Like the rate court under the consent decree, the Copyright Royalty Board aims to "approximate rates that would have been negotiated" in the open market absent the rate-setting scheme. *Id.* at 50. To do so, the Board, like the rate court, "relies on actual, real-world agreements," determines which agreements are "sufficiently representative" of the market, and adjusts the rates in those agreements as needed "to render them useful." *Id.* at 50-51 (quotation marks and citations omitted). The D.C. Circuit applies a "particularly deferential" standard of review to each step of that analysis, approving the Board's chosen rate so long as the Board "reasonably exercise[s] its discretion." *Id.* at 50-51 (quotation marks and citation omitted).

13. The panel below did exactly the opposite, converting the fact-intensive question of fair market value into a legal exercise subject to "*de novo*" review. App.19a. Consider, for example, the panel's benchmarking analysis. Based on extensive expert testimony, the district court determined that certain licenses were better benchmarks than others because they more accurately "reflect[ed] the level of competition that would be inherent in a direct licensing negotiation." *Broad. Music*, 664 F. Supp. 3d at 487. The district court also accounted for "fair market value placed

on licenses in music intensive industries" like "commercial radio stations or virtual live concert streaming services," and determined that "significant market changes" in the industry rendered the low rates in the previous BMI-NACPA agreement less relevant. *Id.* at 486, 488-489. Without hearing a word of live testimony, the panel set aside all of those determinations because it deemed other licenses to be better comparators based on *another court's* observations, made on a different record, twelve years ago. *See* App.41a (citing *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 362 (S.D.N.Y. 2014)).

14. The panel did the same thing when reviewing the second major component of the fair-market-value analysis: the revenue base. The district court determined—again, based on extensive testimony—that the revenue base should include more than just the face value of tickets because music purchasers like Live Nation have artificially depressed ticket values by charging high service fees and selling expensive box suite and VIP packages. *Broad. Music*, 664 F. Supp. 3d at 484-485. The panel reversed that factual and discretionary finding based on a 2003 journal article regarding contracting principles that was nowhere in the record, effectively introducing a third, unsworn expert witness that was credited over the economists that testified at trial. App.28a. No other circuit has approached market-value determinations this way. This Court's intervention is needed to restore consensus to the courts of appeals.

15. Intervention is also warranted because the case presents issues of fundamental importance for the millions of songwriters, composers, and publishers

who rely on the reasonable rate-setting structure established by BMI's consent decree and an analogous decree governing BMI's principal competitor, the American Society of Composers, Authors, and Publishers (ASCAP). The consent decrees ensure that these artists receive fair compensation for the use of their works by entrusting rate-setting to a district court that can carefully weigh the evidence and testimony presented by the parties to reach a factual and discretionary determination regarding what constitutes a "reasonable" rate.

16. The panel's decision distorts the ratemaking process by usurping the district court's fact-finding role and substituting the preferences and opinions of circuit judges that have not had the benefit of the live testimony or comprehensive airing of the evidence. Moreover, this is not an isolated error that the Second Circuit may soon correct. Rather, this decision is one in a line of cases where the Second Circuit has gradually seized control of rate-making by turning quintessentially factual questions into legal ones. *See, e.g.*, *United States* v. *Broad. Music Inc.*, 426 F.3d 91, 96, 98 (2d Cir. 2005) (finding a "legal" error in the district court's "choice and adjustment of a benchmark"); *United States* v. *Am. Soc'y of Composers, Authors & Publishers*, 627 F.3d 64, 76 (2d Cir. 2010) (vacating in part, because the district court's conclusion "that particular benchmarks are comparable and particular factors are relevant are questions of law" that can be reviewed "*de novo*"). That is appellate review upside down.

17. This Court should step in to set things right. There is, after all, no need to wait for further percolation in other courts of appeals because the Second Circuit

is the only circuit that hears appeals under BMI's and ASCAP's consent decrees. This case therefore presents an ideal vehicle for the Court to weigh in on an issue that impacts millions of songwriters, composers, and publishers.

18. An extension will allow counsel to research the relevant issues and prepare a petition that fully addresses the important questions raised in the proceedings below. Additionally, counsel has upcoming oral arguments and briefing deadlines in several matters that warrant an extension on the petition for certiorari, including ongoing hearings, settlement conferences, and briefing in *V.O.S. Selections, Inc.* v. *Trump*, No. 25-66 (Ct. Int'l Trade) & No. 26-1895 (Fed. Cir.); ongoing briefing in *In re SVB Financial Group Securities Litigation*, No. 5:23-cv-1097 (N.D. Cal); a response brief due June 17, 2026, in *KalshiEX LLC* v. *Orgel*, No. 26-5235 (6th Cir.); a reply brief due June 25, 2026, in *KalshiEX LLC* v. *Schuler*, No. 26-3196 (6th Cir.); a preliminary injunction hearing on July 1, 2026, in *KalshiEX LLC* v. *Ellison*, No. 26-cv-2778 (D. Minn.); a preliminary injunction hearing on July 22, 2026, in *KalshiEX LLC* v. *Furcolo*, No. 1:26-cv-327 (D.R.I.); and an opening brief due early August in *Empire Technology Development LLC* v. *Samsung Electronics Co.*, No. 26-1822 (Fed. Cir).

19. For these reasons, BMI respectfully requests that an order be entered extending the time to file a petition for certiorari to and including August 20, 2026.

Respectfully submitted,

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