No. 26-238

In the Supreme Court of the United States

BROADCAST MUSIC, INC., PETITIONER

v.

NORTH AMERICAN CONCERT PROMOTERS ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE

The American Society of Composers, Authors and Publishers ("ASCAP") is an unincorporated membership association of more than 1.1 million songwriters, composers, lyricists, and music publishers, who together have created and own the copyrights to more than 20 million works.[1] Founded in 1914, ASCAP is the oldest performing rights organization (or "PRO") in the United States.

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part; no such counsel or party made a monetary contribution to fund its preparation or submission; and no person other than amicus, its members, or its counsel made such a monetary contribution. This brief is being filed more than ten days

It has numbered among its members legendary songwriters like Irving Berlin and Cole Porter, global superstars like Sir Paul McCartney and Stevie Wonder, and contemporary icons like Beyoncé and Noah Kahan. ASCAP's members depend on ASCAP to negotiate licenses with music users, track public performances, distribute royalties, and advocate on their behalf. ASCAP has granted more than 700,000 businesses blanket licenses to perform ASCAP members' copyrighted works throughout the public places and media in which music is played in America. ASCAP, *ASCAP Payment System*, https://www.ascap.com/help/royalties-and-payment/payment/whocollect (last accessed September 8, 2026).

ASCAP has a substantial interest in the outcome of this case. Like BMI, ASCAP has long operated under a consent decree, the operative version of which requires ASCAP to grant users blanket licenses upon request in exchange for a "reasonable fee." These mandatory licenses allow music users to play all of ASCAP's music even when the parties do not agree on the fee. When the parties cannot agree on a fee, a party may initiate expensive "rate court" proceedings in the U.S. District Court for the Southern District of New York, which, under a longstanding consent decree, is exclusively authorized to act as a rate court and set a "reasonable fee." 2d Am. Final J. ¶¶ VI, IX, *United States* v. *ASCAP*, No. 41-1395, 2001 WL 1589999 (S.D.N.Y. June 11, 2001).

The Second Circuit's decision with respect to the scope of appellate review of the rate court's decisions directly affects ASCAP as well as future rate-court litigants. Although the decision below addresses BMI's agreement with respondent the North American Concert Promoters Association ("NACPA"), the district court and Second

before the due date, satisfying the notice requirement under Rule 37.2.

Circuit have frequently treated the ASCAP and BMI consent decrees as equivalent. The Second Circuit's prescriptions about setting a "reasonable" fee thus will likely be cited in disputes between ASCAP and its licensees. In the decision below, the Second Circuit concluded that the district court erred by not setting a fee more closely tied to ASCAP's and BMI's historical rates and by taking account of rates negotiated by PROs that are not subject to consent decrees. Should that decision remain binding precedent in the only court of appeals to hear disputes under the ASCAP and BMI consent decrees, those flawed conclusions will infect future ASCAP rate-court proceedings and spill over into ASCAP's negotiations with licensees.

ASCAP also has a substantial interest in this case because the Second Circuit's decision will lead to longer and costlier license-fee disputes. Despite relying on economic theory about "efficient" contract terms, the Second Circuit's decision will undermine efficiency by discouraging settlement and leading to protracted rate-court appeals. ASCAP operates on a not-for-profit basis and distributes all of the royalties it collects to its members, less administrative expenses. Those added litigation burdens will therefore reduce the royalties that can be passed on to its members. ASCAP files this brief as amicus curiae to vindicate its—and its members'—strong interest in the correct determination of reasonable license rates under the consent decrees.

ARGUMENT

I. THE SECOND CIRCUIT'S DECISION IS INCORRECT.

A. The Second Circuit Erred In Substituting Its Own Judgment About How To Determine A "Reasonable" Rate.

Two years after oral argument and after a recusal, a two-judge quorum of the Second Circuit brushed aside the district court's extensive and careful fact-finding based on its own review of a cold record. The district court determined a reasonable rate for NACPA's BMI license after it conducted a bench trial that ran five weeks, admitted more than 300 exhibits into evidence, and considered the testimony of two experts and 12 fact witnesses. Pet. App. 13a, 66a-67a, 79a-89a; Pet. 12. Following further post-trial briefing, the district court issued a 37-page opinion identifying the relevant revenue base, setting reasonable retrospective and prospective rates, and explaining the findings of fact and conclusions of law supporting that decision. See Pet. App. 58a-89a.

The panel afforded no deference to the district court's conclusions because, in its view, the district court's determination of the correct revenue base, choices about which licenses were sufficiently comparable to the BMI/NACPA license, and selection of a reasonable rate "at the high end of the benchmark range" all presented questions of law reviewed de novo. Pet. App. 22a-23a.

The Second Circuit erred in substituting its own judgment for the district court's in disapproving these building blocks supporting the choice of a "reasonable" rate. "Fair market value is a factual matter," as are numerous components of the rate determination, including "the competitiveness of a market and the market power of a seller." *ASCAP* v. *Showtime/The Movie Channel, Inc.* (*Showtime II*), 912 F.2d 563, 569 (2d Cir. 1990). Here, the district court's determinations about the reasonable rate and revenue base turned on "case-specific factual issues" such as changes in the market for live-music performances and details about the current and historic relationship between various PROs and music users. *See* Pet. App. 66a-89a. The court also examined how the market has evolved since the last license negotiation in 1998—literally a bygone era in which live concerts were used as promotional tools to sell albums and CDs, rather than valuable and exclusive experiences in their own right. To make those determinations, the district court immersed itself in evidence and live-witness testimony. The Second Circuit should have recognized that primary responsibility for those determinations lay "in the court that has presided over the presentation of evidence, that has heard all the witnesses, and that has both the closest and the deepest understanding of the record," *U.S. Bank N.A. ex rel. CWCapital Asset Management LLC* v. *Village at Lakeridge, LLC*, 583 U.S. 387, 398 (2018), rather than substituting its own views of the record for the district court's considered judgment.

B. The Second Circuit Likewise Erred In Limiting The Fee And The Revenue Base.

In second-guessing the district court's well-reasoned decision, the Second Circuit went astray in several key respects. As a result, that court failed to set a "reasonable" rate approximating the fair market value of a license to perform the works in BMI's catalog.

1. To begin with, the Second Circuit erred by downplaying the significance of licensing agreements executed by PROs that best "approximate[] the rates that would be set in a competitive market." *Showtime II*, 912 F.2d at 576. ASCAP and BMI are subject to aggressive competition from two other PROs—Global Music Rights LLC

("GMR") and SESAC LLC ("SESAC")—which have market shares of 4% and 5%, respectively. Pet. App. 61a. GMR and SESAC are not subject to a consent decree and are thus not required to issue blanket licenses upon user requests. Accordingly, the licenses they voluntarily enter into provide the best evidence of the price that willing licensees and licensors would agree to in arm's-length transactions in a competitive free market. As BMI demonstrated below, these licenses, when adjusted to account for differences in contract terms, market share, and other factors, imply rates that are in some cases meaningfully higher than those ASCAP and BMI currently receive. Pet. App. 70a-75a, 82a-86a.

The district court properly concluded that SESAC and GMR licenses were appropriate benchmarks. Pet. App. 83a-86a. While the Second Circuit did *not* conclude that these benchmarks were categorically irrelevant, it nevertheless found that the district court should have placed less weight on these free-market licenses and more on the rates previously paid to the regulated PROs. Pet. App. 41a-46a. In support of that conclusion, the court of appeals explained in error that the rate court's job is to serve as a "moderating influence" on ASCAP and BMI, and speculated that GMR and SESAC might *themselves* be charging supracompetitive fees. Pet. App. 42a-44a.

That reasoning is fundamentally flawed in multiple respects. To begin with, it inverts the proper role of rate courts. The ASCAP and BMI consent decrees exist to ensure that the regulated PROs charge and obtain on behalf of their creator members reasonable rates, based on "fair market value" and approximating "what an applicant would pay in a competitive market." *United States* v. *ASCAP*, 627 F.3d 64, 76 (2d Cir. 2010). But the Second Circuit's decision, which is couched as a legal conclusion, would require future rate courts to downplay the best available evidence of the price at which willing market participants agree to enter into license agreements: GMR and SESAC rates, which reflect market values because those PROs can exercise their free-market right not to enter into agreements if the price is insufficient. Moreover, the Second Circuit's decision would require rate courts to place more emphasis on the rates previously charged by ASCAP and BMI, neither of which is a willing seller because each is sometimes compelled by its consent decree to enter into licenses at below-market rates. That incorrectly privileges as a matter of law rates set by, or negotiated in the shadow of, the rate courts over those to which willing buyers and sellers would agree.

That result is not only backwards, but risks locking in artificially depressed historical rates and creating a feedback loop in which those rates drag down future rates and prevent them from keeping pace with increased rates in the private market. And it fetters rate courts' ability to adjust rates to account for market shifts. As NACPA members Live Nation and AEG consolidate the market for live-music performances and technology disrupts how Americans access music, rate courts need the flexibility to set fees that are fair in light of changed industry dynamics.[2] The Second Circuit's undue focus on historical rates in the regulated sector as a matter of law deprives rate courts of the flexibility to consider those changed industry dynamics when appropriate.

2. The Second Circuit similarly erred in concluding (Pet. App. 28a-40a) that the district court could not decide to base royalty payments on revenue streams other than ticket sales. That conclusion—based on a theory supported by a law-review article and raised by the court *sua*

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[2] A jury recently found that Live Nation and its subsidiary Ticketmaster monopolized trade in violation of the Sherman Act. Verdict Form, *State of New York* v. *Live Nation Entertainment, Inc.*, No. 24-cv-3973 (S.D.N.Y. Apr. 15, 2026), ECF No. 1417.

sponte—defied expert testimony, not to mention common sense. As with its fee determination, the Second Circuit's revenue-base decision inordinately privileges past practice over the real-world market dynamics the district court carefully identified. At a minimum, the court's overturning of the revenue-base determination as a matter of law, too, heightens the significance of the question presented to this case and future rate-court litigation.

II. THIS CASE IS IMPORTANT AND WARRANTS THIS COURT'S REVIEW.

The Second Circuit's legal conclusion will have far-reaching consequences that heighten the need for this Court's review. Even if one set aside the circuit conflict that petitioner describes (Pet. 17-23), the Second Circuit's holding is effectively a nationwide judgment governing an important industry. Well beyond the rate determination in this case, the Second Circuit's decision will substantially affect how these determinations are made going forward.

1. The centralization of rate litigation in the Southern District of New York gives the Second Circuit essentially nationwide jurisdiction over the substance and procedure of rate determinations. This Court has not hesitated to review decisions by the Federal Circuit and D.C. Circuit where they exercise nationwide jurisdiction, because such a decision may satisfy the criteria for certiorari even without a circuit conflict. That is the case here as well. A wrongheaded decision by the Second Circuit that will apply to rate-court adjudications going forward is exactly the type of nationally important decision that this Court should review.

2. The implications of this case sweep more broadly than a contract dispute between two parties. Insofar as the Second Circuit has concluded that a "reasonable" rate is presumptively based primarily on historical rates paid

to regulated PROs by comparable licensees, calculated on a revenue base presumptively based on previous license agreements, that conclusion will loom large over future negotiations and litigations in which ASCAP and BMI seek to obtain fair compensation for their members and affiliates. This decision will shape at a fundamental level how all those determinations will be made.

Nor will this case solely affect license fees for live-music concerts. ASCAP and BMI provide public-performance licenses to all manner of businesses that publicly perform music. Whether it is a radio station broadcasting Top 40 hits, a TV station airing a show that contains music for dramatic effect, an internet service that lets users stream their favorite albums, or just a bar or hotel playing background music—each must obtain ASCAP and BMI licenses to play music in those PROs' catalogs. And the process for obtaining those licenses is much the same as when a concert presenter wants to ensure that artists have the right to perform copyrighted works: The user requests a license from the PRO, which must issue a blanket license at a reasonable rate that is either negotiated by the parties or set by the rate court under the terms of the consent decrees. While this case directly affects only the BMI/NACPA agreement, the Second Circuit's reasoning threatens to spill over into other licensees and performance categories, unfairly anchoring the fees ASCAP can obtain in the future to the rates it and BMI have charged in the past even when there clearly have been changes in industry circumstances that warrant an increase in rates. Small wonder, then, that trade associations representing the film, commercial and local radio, digital-music, trade-show, and other industries all appeared as amici in the Second Circuit to argue that the court should disregard the licenses actually set in a free market—the GMR and SESAC licenses—when determining the fair market value of the BMI/NACPA license.

Br. of Amici Curiae MPA, Inc., et al., at 8, 19-26, *BMI* v. *NACPA*, No. 23-935 (2d Cir. Oct. 11, 2023), 2023 WL 6879421.

The decision below also threatens to prolong and proliferate licensing disputes. Subjecting the building blocks of "reasonable" fee determinations to de novo review threatens to extend already-protracted and resource-intensive litigation. Take this case for example: BMI petitioned for a reasonable rate in 2018, yet the rate was not determined until after a five-week trial held in 2022. The appeal then lasted three years. Pet. App. 2a. Now, because the Second Circuit reviewed the trial court's decision de novo, Pet. App. 22a-23a, BMI and NACPA can look forward to retrial and presumably years of further litigation. Despite the Second Circuit's emphasis on efficiency and "administrative cost," *e.g.*, Pet. App. 33a-34a, 38a, that court's decision on the standard of review stands to undermine the former and increase the latter.

3. The losers in all this will be the songwriters who rely on performance royalties, often as their primary income. The Second Circuit's decision threatens to depress the rates that ASCAP and BMI can obtain from users and pass on to their rights-holding members and affiliates. Respondent's member Live Nation has contended that millions of dollars are at stake just from this one rate dispute with one PRO. Chris Williams, *BMI Wins Court Victory in Revenue Dispute with Top Concert Promoters, Says Its Writers Will Get a 138% Raise*, Variety (Mar. 28, 2023), https://variety.com/2023/music/news/bmi-wins-court-victory-concert-promoters-songwriters-raise-live-nation-aeg-1235567435/. The number presumably increases when amounts to be paid by NACPA members other than BMI members are considered.

That is not all. The Second Circuit's holding on the standard of review threatens to increase the number and cost of rate-court disputes. And every increase in

ASCAP's administrative costs reduces the amount it can pass through to its members as compensation for their creative effort.

* * * * *

In discussing the ASCAP and BMI consent decrees, former Assistant Attorney General for the Antitrust Division Makan Delrahim commented that the "ultimate goal" of the Antitrust Division "should be a market-based solution that ensures songwriters, publishers, and other artists are compensated fully for their creative efforts at market rates" and warned that the Division should ensure that creators "are not shortchanged by the non-market effects" of the consent decrees. Makan Delrahim, "And the Beat Goes On": The Future of the ASCAP/BMI Consent Decrees, Remarks as Prepared for Delivery, Virtual Event Hosted by Vanderbilt Law School (Jan. 15, 2021), https://www.justice.gov/archives/opa/speech/file/1355241/dl. Unfortunately, the Second Circuit's decision threatens to do just that. This Court's review is necessary to avoid undercompensating songwriters and thereby destroying the "incentive to create" that copyright law seeks to protect. *Andy Warhol Foundation for the Visual Arts, Inc.* v. *Goldsmith*, 598 U.S. 508, 531 (2023).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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