

No. 26-238

IN THE
Supreme Court of the United States

BROADCAST MUSIC, INC.,

Petitioner,

v.

NORTH AMERICAN CONCERT
PROMOTERS ASSOCIATION,

Respondent.

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

**BRIEF OF SONGWRITERS OF
NORTH AMERICA AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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TABLE OF CONTENTS

	<i>Page</i>
INTERESTS OF AMICUS CURIAE.....	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. THE DISTRICT COURT IS THE ONLY FORUM IN WHICH THE VALUE OF A SONGWRITER'S WORK IS EVER WEIGHED ON EVIDENCE.....	5
II. TREATING THE COMPONENTS OF FAIR MARKET VALUE AS LAW MAKES DELAY STRUCTURAL, AND THE DELAY FALLS ON SONGWRITERS.....	8
III. NO OTHER COURT OF APPEALS WILL EVER ADDRESS THE QUESTION PRESENTED.	14
CONCLUSION.....	14

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Anderson v. City of Bessemer City</i> , 470 U.S. 564 (1985).....	9
<i>ASCAP v. Showtime/The Movie Channel, Inc.</i> , 912 F.2d 563 (2d Cir. 1990)	7
<i>Besser Mfg. Co. v. United States</i> , 343 U.S. 444 (1952).....	7
<i>Broadcast Music, Inc. v.</i> <i>Columbia Broadcasting System, Inc.</i> , 441 U.S. 1 (1979)	5
<i>Broadcast Music, Inc. v. Pandora Media, Inc.</i> , No. 13 Civ. 4037 (LLS), 2013 WL 6697788 (S.D.N.Y. Dec. 18, 2013)	6
<i>Exhibit Supply Co. v. Ace Patents Corp.</i> , 315 U.S. 126 (1942).....	14
<i>Pandora Media, Inc. v. ASCAP</i> , 785 F.3d 73 (2d Cir. 2015)	6
<i>U.S. Bank National Ass’n v.</i> <i>Village at Lakeridge, LLC</i> , 583 U.S. 387 (2018).....	2, 7, 9

Statutes and Other Authorities

17 U.S.C. § 106(4)	5
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Pub. L. No. 94-553, § 106(4), 90 Stat. 2541, 2546	5
BMI Consent Decree	6, 10, 13, 15
BMI, <i>Royalty Policy Manual</i> , https://tinyurl.com/232dsrs6 (last visited Oct. 7, 2026)	12
NMPA, <i>U.S. Music Publishing Revenue Grew 19% to \$5.6B Last Year</i> (June 14, 2023), https://tinyurl.com/2bkuogfn	11
NMPA, <i>US Music Publishing Revenues Hit \$7.3B in 2025, NMPA Reveals at Annual Meeting</i> (June 11, 2026), https://ti- nyurl.com/2bz6g5b8	11
Donald S. Passman, <i>All You Need to Know About the Music Business</i> 227 (10th ed. 2019)	12
S. Ct. Rule 37.2	1
U.S. Copyright Office, <i>How Songwriters, Com- posers, and Performers Get Paid</i> 6 (rev. July 2022), https://tinyurl.com/22c4ub4c	12
U.S. Dep’t of Justice, Antitrust Div., <i>Statement of the Department of Justice on the Closing of the Antitrust Division’s Review of the ASCAP and BMI Consent Decrees</i> (Aug. 4, 2016)	6

INTERESTS OF AMICUS CURIAE¹

Songwriters of North America (“SONA”) is a membership-based advocacy organization which was formed in 2015 by and for professional songwriters. SONA advocates on behalf of songwriters’ interests before legislative bodies, administrative agencies, and the courts. SONA is a diverse community that unites enthusiastic music creators and thoughtful business leaders to create a unified voice to protect artistic expression, compensation, and the rights of songwriters in North America. Most of SONA’s members are affiliated with BMI or ASCAP, and their public performance royalties are therefore paid under the consent decrees at issue here. SONA’s members depend on public performance royalties, collected and distributed through performance rights organizations, for a substantial share of their income, and SONA therefore has a direct interest in a rate-setting system that produces final rates within a reasonable time.

¹ Counsel of record for all parties received timely advance notice of intent to file. S. Ct. Rule 37.2. No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus curiae, its members, or its counsel made a monetary contribution intended to fund the brief’s preparation or submission.

SUMMARY OF ARGUMENT

BMI's petition asks whether the components of a fair-market-value determination, such as the choice and weighting of benchmark agreements and the definition of the revenue base, are reviewed on appeal *de novo* or for clear error. In this case, the District Court—based on the evidence presented—determined that a growing share of what fans pay to attend a concert now arrives outside the ticket's face value, through fees, dynamic pricing, premium tiers, and resale. On appeal, the Second Circuit paid no deference to these factual findings and, in doing so, departed from the traditional role of appellate review.

As aptly argued by Petitioner, the Second Circuit's answer below conflicts with *U.S. Bank National Ass'n v. Village at Lakeridge, LLC*, 583 U.S. 387 (2018), and with the approach of nine other circuits. Pet. 17–23. SONA writes, not to retread that analysis, but, rather, to explain why the Second Circuit's failure to accord due deference to the factual findings of the District Court matters to the individual creators whose works are valued in the district court proceedings.

In most cases, a songwriter cannot set the price for the public performance of her work. She does not negotiate directly with licensees for this right. Rather, her chosen performance rights organization is tasked with administering the public performance right in her works. If that chosen organization happens to be

BMI or ASCAP, consent decrees send any impasse on rates to a single district court. The district court trial is the only forum where evidence is heard and weighed as to what the performance of a song is worth in various settings and media. The district court judge must then decide between warring narratives about this value based on the factual evidence adduced. In this case, the District Court proceeding took five weeks, twelve fact witnesses, two economists, and more than three hundred exhibits to determine the reasonable value of a BMI blanket license to NACPA. But by recasting benchmark selection, benchmark weight, and the revenue base as questions of law, the Second Circuit has reserved to itself the ability to redo that selection and weighing on a cold record. For songwriters, that means the only hearing they get does not actually settle anything.

What SONA and its members fear is that *de novo* review of fact-bound judgments will inevitably invite appeal and make remand the expected outcome. This will cause untenable delays in proper compensation reaching songwriters for the performance of their works. This proceeding illustrates the delay that will become the norm in future proceedings if *de novo* review is the standard applied to the district court's factual findings. The relevant NACPA rate period began January 1, 2014. BMI petitioned the District Court in 2018. Trial ended in 2022, judgment came in 2023, and the appeal took nearly three years more. As it stands, the case now returns to the district court for a

new weighing, and—once again—any result will be reviewable *de novo* by the Second Circuit. Throughout, licensees have paid interim rates carried over *from 1998*. Promoters with national operations can absorb that delay; individual songwriters, waiting on royalties for performances that have already happened, cannot.

For the working songwriters who make up SONA's membership, the uncertainty is itself the harm. For many, public performance is the largest and most direct income stream, and it is paid to the writer by her PRO rather than through her publisher. Under the standard adopted below, a writer cannot know when a rate period will close, how much the retroactive adjustment will be, or how many of the license categories that feed her royalty statement will be adjudicated at any given time. That uncertainty shapes decisions about whether she can afford to keep writing, and it reaches every songwriter, because every negotiated rate is struck in the shadow of the rates set by the Southern District of New York.

The Court should grant the petition.

* * * *

ARGUMENT**I. THE DISTRICT COURT IS THE ONLY FORUM
IN WHICH THE VALUE OF A SONG-
WRITER'S WORK IS EVER WEIGHED ON
EVIDENCE.**

Since 1897, the Copyright Act has afforded a songwriter the exclusive right to perform her work publicly. Act of Jan. 6, 1897, ch. 4, 29 Stat. 481; Act of Mar. 4, 1909, ch. 320, § 1(e), 35 Stat. 1075, 1075; Copyright Act of 1976, Pub. L. No. 94-553, § 106(4), 90 Stat. 2541, 2546 (codified at 17 U.S.C. § 106(4)). That right has historically been exercised almost entirely through blanket licenses administered by performance rights organizations. This Court has explained why: individual composers cannot practically negotiate with, monitor, and police the thousands of users who might perform their works, and users cannot practically clear every song an artist might play. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 4-5, 20 (1979). The blanket license solves that problem for both sides. But it also means the individual writer has traded away any practical ability to set her own price.

The consent decree governing BMI (and the separate decree governing ASCAP) formalizes that trade. A songwriter who elects to affiliate with BMI cannot selectively restrict the rights she grants to BMI, and

BMI must license any user who asks. *See Pandora Media, Inc. v. ASCAP*, 785 F.3d 73, 77–78 (2d Cir. 2015) (because the decree requires the PRO “to license its entire repertory to all eligible users,” members “may not license works to [it] for licensing to some eligible users but not others”); *Broadcast Music, Inc. v. Pandora Media, Inc.*, No. 13 Civ. 4037 (LLS), 2013 WL 6697788 (S.D.N.Y. Dec. 18, 2013); *see also* U.S. Dep’t of Justice, Antitrust Div., *Statement of the Department of Justice on the Closing of the Antitrust Division’s Review of the ASCAP and BMI Consent Decrees* 12, 16 (Aug. 4, 2016). If the parties cannot agree, either may petition the Southern District of New York to set a reasonable fee, and in the meantime the user may perform the entire repertory. *See* BMI Consent Decree § XIV(A)-(B). A songwriter cannot realistically negotiate a separate price with the licensee. Her compensation is whatever the district court process eventually produces, then calculated through BMI’s distribution formula.

The concert economy makes that dependence especially stark. Performing artists negotiate guarantees and share in ticketing, merchandise, and sponsorship. Promoters set ticket prices and fees. The writer of the song the crowd came to hear has none of those luxuries. According to trial evidence BMI cited below, headlining artists typically receive 80% to 90% of the ticket price after show costs, while the historical BMI concert rate was about 0.21%, and that license fee is itself charged back to artists as a show cost. BMI C.A.

Br. 33 n.9 (*citing* A132:11-21; SA208:19-22, SA277-289).

Because the songwriter has no other channel, the trial in the district court is where the value of her work is actually decided. That decision is, by the Second Circuit's own account, a judgment call with no single right answer. The panel acknowledged that a "competitive price will never emerge" in the blanket-license market and that "a district court cannot identify a unique 'market value' for a BMI blanket license." Pet. App. 24a-25a.

When there is no unique answer, choosing among the reasonable ones is the core of the fact-finder's job. Which past agreements were negotiated by comparable parties in comparable conditions; how much each deserves to count; whether the way fans pay for concerts has changed enough to matter: each of those questions turns on testimony about how particular deals were struck and how a particular industry works. *See U.S. Bank*, 583 U.S. at 396. The Second Circuit has itself long described fair market value as "a factual matter, albeit a hypothetical one." *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 569 (2d Cir. 1990). The panel below recited that very rule, Pet. App. 25a, yet treated the comparability questions, and the revenue base, as ones of law. Pet. App. 20a, 22a–23a. *Contra Besser Mfg. Co. v. United States*, 343 U.S. 444, 448 (1952) ("We do not pass on [the sufficiency of the evidentiary material considered

in arriving at a royalty rate] in the absence of glaring error not shown here.”).

The District Court heard executives describe how their companies sell tickets and how their other licenses were negotiated, weighed competing economists, and explained its choices in a 32-page opinion. Pet. App. 58a-89a. On appeal, a panel reweighed those same choices on the written record, relying heavily on a law-review article that neither party had cited and no witness had addressed. Pet. App. 30a-31a; Pet. 30-31. On that approach, the one proceeding in which evidence was actually heard produced merely a first draft revised by a court that heard none of it.

II. TREATING THE COMPONENTS OF FAIR MARKET VALUE AS LAW MAKES DELAY STRUCTURAL, AND THE DELAY FALLS ON SONGWRITERS.

Plenary review of fact-bound rate components does more than shift decisionmaking authority from the trial court to the court of appeals; it also creates structural delays that will inevitably change how long rate proceedings last and who bears the cost of the wait.

The history of this proceeding shows how. The rate period began January 1, 2014; BMI petitioned in 2018; trial ended in 2022; judgment came in 2023; the Second Circuit decided the appeal in February 2026; and

the case now returns to the district court for a new weighing. Nothing about that history makes this case an outlier or unlikely to recur. When an appellate court may substitute its own weighing of factual benchmarks, a party dissatisfied with the trial result has every reason to appeal, and the appellate court has every opportunity to remand. A remand produces a new rate, which is again reviewable on the same terms. And the cycle can continue unabated until the district court conforms to the appellate court's own findings. Deferential review is what ordinarily brings fact-bound litigation to an end. This Court has explained that making parties persuade a second set of judges of the facts adds little accuracy at a large cost in time and judicial resources. *Anderson v. City of Bessemer City*, 470 U.S. 564, 574-575 (1985); *see also U.S. Bank*, 583 U.S. at 396-398. Without it, the rate-setting mechanism has no natural stopping point. That cuts both ways and benefits no one involved.

For the parties to the license, delay is a cost of doing business. In this proceeding, Live Nation and AEG operate national promotion, venue, and ticketing businesses that together take in more than \$25 billion annually. Pet. 9. BMI is an institution that can fund a decade of litigation. Meanwhile, individual writers are paid at an interim rate fixed in 1998, and they bear that cost despite having no role in the dispute. Moreover, any increase reaches writers only after a final

rate is fixed, applied retroactively, collected, and distributed. The distribution of that increased rate can be many years after the performances that earned it.

Nor is that cost confined to the concert license at issue here. BMI licenses its repertory to radio and television broadcasters, digital and streaming services, and tens of thousands of general licensees, and every one of those licenses is subject to the same rate-setting mechanism and the same appellate review. BMI Consent Decree § XIV. This proceeding is simply the first in which this Court has been asked to review that rule. For a working songwriter, whose performance income arrives through BMI from dozens of license categories, that is not a dispute over one line of a royalty statement. It is structural instability in the system by which her work is paid at all.

Delay also shapes rates outside the courtroom. Because a district court proceeding takes years and costs millions of dollars, ASCAP and BMI invoke it sparingly; ASCAP told the Second Circuit that the district court issued only three final fee decisions in the preceding decade, and that the PROs are often left to settle for less. ASCAP C.A. Br. 8-9. A standard of review that lengthens that alternative threatens to lower what creators can obtain even in the deals that never reach the courtroom.

Regardless of the merits in the current dispute between the parties, its effect on songwriters is plain.

For the people whose work is being valued, a standard of review that leaves every rate provisional is not a procedural detail. It is the difference between being paid on a predictable schedule and waiting indefinitely on a ruling in a dispute over which they have no control. Not knowing when or whether a rate will become final is itself a harm worth mitigating.

SONA's members are working songwriters and composers. Many are not performing artists. They do not share in ticket guarantees, merchandise, or sponsorships, and many do not tour at all. For them, the public performance royalty paid through a PRO is not a supplement to income earned on the road; it is often the largest and most reliable component of what they earn from their catalogs.

The numbers bear that out. Public performance is the single largest source of music publishing revenue in the United States. Of the \$7.3 billion in U.S. publishing revenue reported for 2025, performance royalties accounted for 52%, more than mechanical royalties (19%) and synchronization fees (24%) combined. NMPA, *US Music Publishing Revenues Hit \$7.3B in 2025, NMPA Reveals at Annual Meeting* (June 11, 2026), <https://tinyurl.com/2bz6g5b8>. Performance has supplied roughly half of U.S. publishing revenue for more than a decade. See NMPA, *U.S. Music Publishing Revenue Grew 19% to \$5.6B Last Year* (June 14, 2023), <https://tinyurl.com/2bkuogfn> (48% in 2022). And unlike mechanical and synchronization income,

which reach the writer through her publisher, the writer’s share of performance royalties is paid to her directly by her PRO. U.S. Copyright Office, *How Songwriters, Composers, and Performers Get Paid* 6 (rev. July 2022), <https://tinyurl.com/22c4ub4c>. When a district court sets the price of a BMI license, then, it is setting the price of the largest and most direct income stream a songwriter has. Moreover, the “writer’s share” of PRO payments is not typically subject to recoupment of prior advances paid by the publisher. See Donald S. Passman, *All You Need to Know About the Music Business* 227 (10th ed. 2019). As a result, performance royalties provide an incredibly reliable income stream for songwriters, which, in turn, can support everyday living expenses or even serve as collateral for a loan.

BMI distributes performance royalties to its affiliates on a quarterly schedule, and each distribution reflects the license fees BMI collected for the period across every category of licensee. BMI, *Royalty Policy Manual*, <https://tinyurl.com/232dsrs6> (last visited Oct. 7, 2026). When any one of those categories is in dispute before the district court, the portion of the distribution attributable to it is paid at the interim rate, and the difference arrives only when the rate becomes final and the retroactive adjustment is collected and distributed. A writer cannot know when that will happen or how much it will be. She cannot borrow against it or budget around it. In this proceeding, writers whose songs were performed in 2014 are still waiting,

and any retroactive payment for those performances will now arrive more than a decade after the fact, without interest. Pet. App. 53a–56a.

That uncertainty compounds under a standard of review that invites appeal in every proceeding. A writer whose works are performed on the radio, in a streaming playlist, in a restaurant, and at a concert could face open rate periods in several categories at once, each with its own interim rate, its own remand, and its own indefinite horizon. The effect is not simply a smaller check. It is the inability to know what the check means. For a songwriter deciding whether she can afford to keep writing full time, whether to take other work, or whether to sell her catalog to a buyer who can afford to wait out the litigation, that uncertainty has real and sometimes irreversible consequences.

That is why the standard of review matters to SONA and its members. The consent decree’s promise to creators is a “reasonable” fee “based upon all the evidence.” Pet. App. 56a (quoting BMI Consent Decree § XIV(A)). That promise means little if the evidence can be weighed in only one forum and that forum’s weighing does not count. It means less still to a working songwriter if the fee it produces arrives, if at all, years after her work was performed.

III. NO OTHER COURT OF APPEALS WILL EVER ADDRESS THE QUESTION PRESENTED.

Because every BMI and ASCAP rate dispute is heard in the Southern District of New York and reviewed by the Second Circuit, no other court of appeals will ever take up the question presented. The usual reason to let a question mature in several circuits before granting review does not exist here and, given the Second Circuit's exclusive jurisdiction, never will. This Court has granted review in exactly that posture, where the affected industry was concentrated in a single circuit "so that litigation in other circuits resulting in a conflict of decision would not be likely to occur." *Exhibit Supply Co. v. Ace Patents Corp.*, 315 U.S. 126, 128 (1942). The same is true of these rate proceedings: their location gives the Second Circuit effectively nationwide authority over the standard of review for every rate set under the consent decrees. If the decision below is to be corrected, it can be corrected only here.

CONCLUSION

A rate-setting system on which songwriters necessarily depend must be able to reach reliable outcomes without subjecting creators to repeated cycles of uncertainty over the same rate period. Because the standard adopted below will govern every rate pro-

ceeding under the BMI Consent Decree, that uncertainty will not stop at concerts. The real-world effect on the people at the end of the royalty chain should be part of the Court's understanding of the stakes.

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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