

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 Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

**BRIEF OF THE NATIONAL MUSIC
PUBLISHERS' ASSOCIATION AND THE
NASHVILLE SONGWRITERS ASSOCIATION
INTERNATIONAL AS AMICI CURIAE IN
SUPPORT OF PETITIONER**

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INTEREST OF AMICI CURIAE¹

The National Music Publishers' Association ("NMPA") is the trade association representing American music publishers and their songwriting partners. Its mission is to protect, promote, and advance the interests of music's creators. The NMPA is the voice of both small and large music publishers and is the leading advocate for publishers and their songwriter partners in the nation's capital and in every area where publishers do business. NMPA's membership includes "major" music publishers affiliated with large entertainment companies as well as independently owned and operated music publishers of all sizes representing musical works of all genres. Taken together, compositions owned or controlled by NMPA's hundreds of members account for the vast majority of musical compositions licensed for commercial use in the United States.

The Nashville Songwriters Association International ("NSAI") is the world's largest not-for-profit songwriters trade association consisting of thousands of professional and developing songwriters from all genres. Established in 1967, NSAI maintains the steadfast commitment, set by its founding songwriters, to protect the rights and future of the profession of songwriting. NSAI has nearly 100

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

chapters across the United States and around the world.

Music publishers and songwriters work together to connect good songs with quality performers, with publishers partnering and advocating on behalf of songwriters as their careers grow. As part of those efforts, music publishers control the copyrights for the underlying compositions of songs on behalf of the songwriters they represent. NMPA and NSAI share the objective of protecting their members' property rights on the legislative, litigation, and regulatory fronts, including by participating in important cases like this one.

NMPA, NSAI, and their members have a strong interest in accurate and efficient copyright royalty adjudications based on a thorough review and consideration of evidence, including current market conditions. The Second Circuit's outlier standard of review advances neither accuracy nor efficiency. The district court conducted a five-week trial and reviewed hundreds of exhibits to reach factual findings grounded in market evidence. The Second Circuit, muddling the important distinction between fact and law, reversed those factual findings on de novo review, and based its conclusions on extra-record evidence drawn in part from other cases involving other parties, other records, and other time periods. Now the parties must return to the district court for yet another costly proceeding to determine royalties for a period that ended in 2022. And absent this Court's review, the district court's new factual findings will, again, be erroneously subject to de novo review on appeal.

This is no way to run a system that governs millions of dollars in royalties and underpins billions of dollars in commerce facilitated by the use of music. The question presented is crucial to an orderly and efficient process for adjudicating royalties. And that process matters not just for the publishers and songwriters whose livelihoods depend on heavily regulated royalties, but also for the music users across the economy that pay those royalties. The wrong standard drives an inefficient process toward less accurate results, harming music creators and music users across the economy.

INTRODUCTION AND SUMMARY OF ARGUMENT

Music provides the soundtrack to our lives—the first dance, the power anthem before a big meeting, the song that never fails to keep the kids entertained in the backseat. Before we can sing along, someone had to create that melody and write those catchy lyrics—in copyright parlance, the musical composition. Then someone else, often a music publisher, had to get that great song into the hands of a fabulous performer to create a sound recording or to perform it live at a concert. The music industry has transformed over the decades, but the starting point has remained the same: a songwriter creating something from nothing, often far from the spotlight.

This case is about how courts set royalty rates for use of those songwriters' composition copyrights—indeed about how courts set fair market rates across all industries, generally. It affects not just the millions of songwriters whose livelihoods depend on courts setting reasonable rates, but music users

across the economy who pay those rates, including the wedding venue that plays that first-dance song and the radio station that entertains the kids—and many, many others. That rate-setting process is already costly and complex. This Court’s review is urgently needed to keep the Second Circuit’s outlier decision from making the process inefficient and inaccurate as well.

Adjudications to determine royalty rates often involve lengthy trials with numerous witnesses to determine technical questions about current market conditions. These are factual questions with answers that change as the market develops. Because the district court is best positioned to assess those market developments, deferential review of its factual valuation determinations is critical.

The Second Circuit stands alone in subjecting such questions to *de novo* review. The consequences of its error reach far beyond one set of concert royalties—indeed, beyond the music industry as a whole. A performance license is needed virtually every time a song is played publicly, whether at a concert venue or your local grocery store. Many of these royalty rates are set by the Southern District of New York or negotiated in the shadow of its decisions. Everyone involved, on both sides of the transaction, has an interest in accurate and efficient proceedings. And accuracy and efficiency both point the same way: deferential review of district court factfinding.

Deference to the district court’s informed assessment is especially crucial for the music industry, where the commercial landscape is rapidly changing. Absent the Court’s review, court-determined rates for a multi-billion-dollar industry—

and the millions of music users across the economy as a whole—will be consigned to a process likely to generate repeated, inefficient do-overs and inaccurate rates reflecting market conditions that no longer exist. Certiorari is warranted now.

ARGUMENT

I. The question presented is exceptionally important for both songwriters and music users across the broader economy.

A. Everyday activities and commerce involve music licensing.

In the words of Carole King, “there’s no end to the music.” Carole King, *Music*, on *Music* (Ode Records 1971), <https://tinyurl.com/2ex3mfxt>. A person—let’s call her Jane—may wake to a favorite song used as a phone alarm, catch another through a rideshare speaker or morning radio broadcast, go to a gym where a dance playlist drives the pace of a class, and stop at a coffee shop where alternative music softens the room—all before arriving at work. Later that day, Jane may browse in a store where curated pop songs emphasize the store’s brand, meet a friend at a bar where they can barely hear each other over the classic rock, and find a quieter restaurant where calm instrumentals serve as a soothing background hum, before heading home to stream a television show with a catchy theme song.

Even though Jane never purchased a song, music has been woven through much of her day. This soundtrack is facilitated by a licensing system that operates behind the scenes, embedded in the everyday operations of businesses of every type.

Every time Jane heard a song, at least two copyrights were involved. The musical composition—the lyrics, melody, harmony, and structure of the song—is the work created by the songwriter or composer. Kevin J. Hickey & Dana A. Scherer, Cong. Rsch. Serv., R47642, *On the Radio: Public Performance Rights in Sound Recordings* 2–3 (2025). The sound recording (or “master” recording) is the particular recorded performance that travels through a speaker, stream, broadcast, or download. U.S. Copyright Office, *Copyright and the Music Marketplace* 18 (2015); Cong. Rsch. Serv., *On the Radio, supra*, at 2–3. For any song, there “can be only one composition, but any number of recordings.” Songtrust, *The Modern Guide to Music Publishing* 7 (2019).

This case concerns the composition side of the divide: the rights of songwriters and music publishers whose works lie beneath every recording, stream, broadcast, and concert. That role is easy to overlook. The public often associates a song with the band on stage or the artist whose voice made it famous. Most people have not heard of Ester Dean, who composed hits for Rihanna, Katy Perry, and Selena Gomez, *see* Apple Music, *Ester Dean: The Songwriters*, <https://tinyurl.com/5n8j4ed5>, or Otis Blackwell, who wrote famous songs for Elvis Presley and Jerry Lee Lewis, *see* Songwriters Hall of Fame, *Otis Blackwell*, <https://tinyurl.com/bddurtru>. But without songwriters—and licenses for their work—many great performers would have no music to perform. Those licenses are how songwriters get paid for writing the music that delights audiences, making their compensation depend heavily on statutory and court-supervised licensing regimes, like the royalty

rate determinations here. Dana A. Scherer, Cong. Rsch. Serv., R43984, *Money for Something: Music Licensing in the 21st Century* 3 (2021). And unlike the rare songwriter-artists like Taylor Swift and Dolly Parton, “‘pure’ songwriters who write works for others to perform do not have the potential to make up for lost income through touring or merchandise sales.” U.S. Copyright Office, *supra*, at 78; *see also* Pet. 24.

Two composition licenses that make up the bulk of songwriter income (over 70%) are heavily regulated. *See* NMPA, *US music publishing revenues hit \$7.3B in 2025, NMPA reveals at Annual Meeting honoring P!nk, Julian Bunetta and Harvey Mason jr.* (June 11, 2026), <https://tinyurl.com/2ej744yz> (NMPA, *Music Publishing Revenues*). First, there are public performance licenses, at issue here. The copyright owner has the exclusive right to perform the composition publicly. 17 U.S.C. § 106(4). “Perform” is deliberately broad: it can include singing or playing a song live, but it can also include playing a recording of the song through a sound system or transmitting it to an audience, even when the “audience” is in different places or receives the transmission at different times; therefore, digital streaming is a public performance. 17 U.S.C. § 101 (definitions of “perform,” “publicly,” “copies,” and “phonorecords”); Cong. Rsch. Serv., *Money for Something*, *supra*, at 1 & n.1; Songtrust, *supra*, at 21–22; 6 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 30.02[A]; Kevin J. Hickey & Dana A. Scherer, Cong. Rsch. Serv., IF11463, *Music Licensing: The ASCAP and BMI Consent Decrees* (2020). A public performance also includes the background music that

carries through a restaurant, the playlist that follows shoppers through a store, or the music that builds energy in a stadium before the game. *See Nimmer* § 30.02[A]; Pet. App. 7a.

Second, the copyright holder has the exclusive right to reproduce and distribute copies of a musical composition. *See* 17 U.S.C. § 106(1), (3); *id.* § 115. Licenses for this type of use are referred to as “mechanical” licenses, a name originating from player piano rolls. U.S. Copyright Office, *supra*, at 26; Cong. Rsch. Serv., *Money for Something*, *supra*, at 4-5. A mechanical license is needed for the “audio-only reproduction of music in physical media or digital downloads.” *Cong. Rsch. Serv., Money for Something*, *supra*, at 11. Most digital streaming requires both a public performance license *and* a mechanical license.² *Id.* at 6; U.S. Copyright Office, *supra*, at 28.

B. Royalty rates paid by all music users across the economy are often set through adjudication.

When Jane listened to a streaming service while at work, or browsed for clothes against the backdrop of a retailer’s chosen playlist, the royalty rates paid to the songwriters who created that music could very well have been set by adjudication.

For the streaming service, for example, mechanical royalties are set through adjudication every five years by the Copyright Royalty Board (“CRB”), a panel of 3 administrative judges appointed

² Other uses, like airing a television show with music synched to it, require additional types of licenses.

by the Librarian of Congress. 17 U.S.C. § 115(a)(1)(A), (c)(1)(F); *id.* § 804(b)(4); Cong. Rsch. Serv., *Money for Something*, *supra*, at 3, 29. For public performances, whether on the streaming service, the retailer’s background music, or a live concert, the royalty rates can be set through negotiations that are conducted in the shadow of judicial ratemaking or—in cases like this one—by courts where the parties fail to agree.

Whether set by the Board or by the court, rates are supposed to be “reasonable” and reflect current market conditions, meaning that they “represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.” 17 U.S.C. § 115(c)(1)(F); *United States v. Broad. Music, Inc.*, 426 F.3d 91, 95 (2d Cir. 2005).

For “efficien[cy],” ease of licensing, and to provide an alternative to song-by-song bargaining for every restaurant, radio station, and retailer, the industry relies on performing rights organizations (“PROs”) like Petitioner BMI to manage performance licenses. *Issues Related to Performing Rights Organizations*, 90 Fed. Reg. 9253, 9254 (Feb. 10, 2025). PROs act as licensing hubs: they collect non-exclusive public performance rights from songwriters and publishers and offer blanket licenses that allow users to perform works across the PRO’s repertory. *See, e.g., BMI, BMI and Performing Rights*, <https://tinyurl.com/46ey3d4>; SESAC, *Licensing FAQs*, <https://tinyurl.com/2p9d3pvh>; Cong. Rsch. Serv., *Money for Something*, *supra*, at 18; Pet. App. 7a.

The four major PROs—ASCAP, BMI, SESAC, and GMR—license nearly all public performance rights in the United States. Pet. App. 7a. A songwriter

signs up with a single PRO, which administers public performance licenses for that songwriter. Pet. App. 7a; Jeffrey Brabec & Todd Brabec, *Music Royalties 101*, 1 USC Ent. L. Spotlight 41, 45 (2017). The two largest PROs, BMI and ASCAP, collectively represent more than 90% of the market and have long been subject to consent decrees. Pet. App. 8a. The consent decrees require BMI and ASCAP to “offer any prospective music user a license to publicly perform the songs in its repertoire.” *See id.* (BMI decree). The consent decrees effectively make performance licenses compulsory. U.S. Copyright Office, *supra*, at 40. If BMI or ASCAP and a potential licensee cannot agree on terms, then the District Court for the Southern District of New York sets the “license fee.” *See* 28 U.S.C. § 137(b); Cong. Rsch. Serv., *Money for Something*, *supra*, at 19.

While the systems for mechanical and public performance licenses are different, in both cases the law limits the songwriter’s and publisher’s ordinary market leverage. NMPA, *Comments Submitted in Response to the U.S. Copyright Office’s Notice of Inquiry on Issues Related to Performing Rights Organizations*, Dkt. COLC-2025-0001, at 2-3 (Apr. 11, 2025), <https://tinyurl.com/fa4yxjbx>. Once a songwriter has written a piece of music, they have little control over who gets to use it or how much they will be paid. As a result of their “inability to negotiate free from government constraint where record companies can,” higher rates are paid for sound recordings than for musical works in regulated markets. U.S. Copyright Office, *supra*, at 136.

C. Royalty rate determinations affect billions of dollars in commerce every year.

Public performance royalties are a vital source of income for songwriters, but the financial consequences of performance license rate decisions extend well beyond songwriters and publishers. The obvious “music intensive industries” subject to licensing rate determinations—like commercial radio, music streaming, and live concerts, *see* Pet. App. 18a—are multi-billion-dollar sectors of the economy. Paul McLane, *Digital Ad Sales Are Stabilizing Overall Radio Revenue*, Radio World (Feb. 9, 2026), <https://tinyurl.com/2ud55kaj> (2025 U.S. commercial radio industry revenue was \$9.4 billion); Paula Rind, *Music Streaming Revenue in the U.S. 2006–2025*, Statista (Apr. 16, 2026), <https://tinyurl.com/shmfae48> (2025 U.S. music streaming industry revenue was \$9.5 billion); Mordor Intelligence, *United States Live Music Market Size and Share*, <https://tinyurl.com/bdctadaj> (2025 U.S. live music industry revenue was \$18.5 billion).

Public performance licensing rate decisions also affect the “hundreds of thousands of United States businesses” that play music, including bars, restaurants, hotels, and television stations. ASCAP, *Using Copyrighted Music* 11 (2011), <https://tinyurl.com/48azd2ts>; *see also* 90 Fed. Reg. at 9254-55. The \$3.8 billion paid to songwriters and publishers in public performance royalties each year, *see* NMPA, *Music Publishing Revenues*, *supra*, is a tiny portion of the revenues implicated by rate determinations.

Much of the time, music is not the product being sold but it is a crucial part of how the product is experienced. More than a century ago, Justice Oliver Wendell Holmes, Jr. explained that, while “music is not the sole object [of a patron’s visit to a restaurant], ... neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that ... give a luxurious pleasure not to be had from eating a silent meal.” *Herbert v. Shanley Co.*, 242 U.S. 591, 594-95 (1917).

Music’s behind-the-scenes commercial value is not limited to restaurants. Retailers use music because “[c]arefully curated soundscapes can encourage customers to stay longer, feel more connected to a brand, and ultimately make more purchases.” Martin Monzon, *Music Matters: How In-Store Music Shapes Shopper Behavior*, RetailNext (Feb. 17, 2025), <https://tinyurl.com/erwkkp9y>. A gym uses it to drive tempo and energy. Steve Irwin, *Music and Movement: The Role of Playlists in Energizing Group Workouts*, Austl. Inst. of Fitness (Sept. 1, 2025), <https://tinyurl.com/4a97vcwa>. Airlines and call centers use music for its calming effect. Nathan Diller, *That Chill Music When You Board a Flight? There’s a Reason for It.*, Wash. Post (Apr. 27, 2022), <https://tinyurl.com/y4mdm9y7>; Easy On Hold, *Why Call Center Hold Music Matters More Than You Think* (Nov. 19, 2025), <https://tinyurl.com/3n542hjj>.

The list goes on. Hotels, museums, spas, country clubs, casinos, and convention centers use music to set the mood and make lobbies, lounges, exhibits, and waiting time feel designed rather than silent. BMI,

Music License Agreements and Reporting Forms, <https://tinyurl.com/9k9shkt8>; Brett Smith, *The High Stakes of Casino Music: How Sound Influences Us Psychologically*, *The Fox Mag.* (Feb. 18, 2025), <https://tinyurl.com/mrx6xz8b>; Jake Hulyer, *Inside the Booming Business of Background Music*, *Guardian* (Nov. 6, 2018), <https://tinyurl.com/yc2ru4pu>; Club Mgmt. Ass’n of Am., *Music Licensing*, <https://tinyurl.com/ye6xxjt9>.

Finding the right music is so important to many businesses that bespoke playlist curation and sonic branding is now a \$2 billion industry. Hulyer, *supra*; Toshit Bhawsar, *Global Sonic Branding Solutions Market Size, Growth & Revenue 2025–2033*, HTF Mkt. Intel. (Jan. 30, 2026), <https://tinyurl.com/5yamumxu>.

For Jane, whose day has moved through music at every turn, from the gym to the coffee shop to the restaurant to the television show, music is a constant presence. That is so because thousands of businesses in every segment of the economy consider music to be valuable. Royalty rate determinations under the Second Circuit’s approach will potentially govern the prices that all these users pay for music—as well as compensation for the songwriters and publishers whose compositions make the soundtrack of Jane’s life possible.

II. The question presented is exceptionally important for ensuring accurate and efficient rate determinations.

The commerce that music licensing makes possible is not just ubiquitous, it is dynamic. Rapidly changing business models make current market

evidence essential to setting reasonable rates. By overriding the district court's factfinding without clear error, the Second Circuit makes it less likely that rates will reflect an evidence-based assessment of the evolving commercial environment. No other court of appeals applies de novo review to the factual questions that make up rate determinations. With good reason: clear-error review fosters more accurate, more efficient rate-setting that is more responsive to changing market conditions. But because of the provisions in the relevant consent decrees channeling rate adjudications to the Southern District of New York, songwriters, publishers, and music users across the economy will be stuck with the Second Circuit's inefficient, inaccurate approach unless this Court intervenes.

A. The Second Circuit stands alone in wrongly subjecting district court factfinding on fair market value to de novo review.

1. There is no dispute here that the touchstone for licensing performance rights (as well as mechanical ones) is to achieve rates that match fair market value, i.e., what a willing buyer and seller would have negotiated in an arm's-length transaction. The question presented is what process is more likely to achieve that goal.

Outside of the Second Circuit, there has been a clear choice: evidence-based factfinding regarding market conditions, subject to deferential review on appeal rather than a de novo do-over. This is true for the music industry and for a wide variety of other fair market value determinations. *See* Pet. 17-23 (describing review standards for fair market value

determinations as well as deferential review of Copyright Royalty Board). It aligns with fundamental principles of judicial review. *See* Pet. 31-33. Exceptions to clear-error review “tend to undermine the legitimacy of the district courts ..., multiply appeals ..., and needlessly reallocate judicial authority.” *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 324-25 (2015) (quoting Fed. R. Civ. P. 52(a) advisory committee’s note to 1985 amendment).

The Second Circuit stands alone in eschewing clear-error review in favor of de novo review of the factual determinations underpinning a rate decision. Among other impacts, *see* Pet. 25-27, this outlier decision will have a tremendous impact on music industry ratemaking—and on all the businesses that depend on public performance licenses—because the relevant consent decrees channel disputes into the Southern District of New York.

2. The Second Circuit is wrong. Examining the components of ratemaking decisions demonstrates their factual nature.

A critical issue in this case was the selection of benchmarks—*e.g.*, negotiated royalty agreements. A benchmark must be comparable to the license at issue to be probative of the price a willing buyer and willing seller would negotiate. *See Broad. Music*, 426 F.3d at 95. This is a fundamentally fact-based question on which other courts of appeals rightly defer. *See* Pet. 17-23; *SoundExchange, Inc. v. Copyright Royalty Bd.*, 904 F.3d 41, 50-51 (D.C. Cir. 2018) (affording “broad discretion” to the “selection” and “adjustment” of benchmarks by the Copyright Royalty Board). Drilling down into the subsidiary factors for

benchmark comparability, the fact-based nature of benchmark selection and adjustment becomes even more apparent. For example, the factors for benchmark selection applied by the Second Circuit include: whether a potential benchmark dealt with a comparable right, whether it involved similar parties in similar economic circumstances, and whether it arose in a sufficiently competitive market. *Broad. Music, Inc. v. DMX Inc.*, 683 F.3d 32, 45 (2d Cir. 2012).

The district court examined all of these factual questions and more over the course of a five-week trial. Answering them required it to “marshal and weigh evidence, [and] make credibility judgments” in order to make empirical findings about market conditions. *See U.S. Bank N.A. v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 396 (2018). These are paradigmatic factual determinations. *See id.* Yet the court of appeals overturned the district court’s assessment of the state of the market on de novo review, without finding any clear error.

To take a few examples, the district court found that the contracts of certain other PROs—those that negotiate rates on the open market and are not bound by consent decrees—were valid benchmarks because their licenses accurately reflected the “level of competition that would be inherent in a direct licensing negotiation.” Pet. App. 41a, 84a. It reached this conclusion based on expert testimony as well as testimony from industry executives. Pet. App. 84a-85a. The court of appeals disagreed with the weight the district court afforded these free market agreements—relying in part on a decade-old opinion from a different district court assessing a different

record—without even purporting to find clear error. Pet. App. 44a.

The district court also concluded based on trial evidence that licenses negotiated by concert promoters unaffiliated with Respondent NACPA “arose in a market that reflects the same degree of competition and economic circumstances, and they cover the same rights,” and so were valid benchmarks. Pet. App. 82a. Again, the court of appeals disagreed, this time based on its own conclusion that the non-NACPA promoters were “not similarly situated.” Pet. App. 45a.

The Second Circuit was equally dismissive of the district court’s factual findings regarding which revenues need to be included in the amount “customers pay to receive” concert tickets. Pet. App. 68a. Key to this determination—and thus to the calculation of the shared revenue pool—was the industry meaning of “gross revenue.” “[E]stablish[ing] a usage of trade” for a technical term is a factual question. *Teva Pharm.*, 574 U.S. at 326. The district court found, based on testimony from executives at the two largest concert promoters, that secondary sales and VIP packages were often included in their reported gross revenue. Pet. App. 77a-78a. The district court also heard and credited testimony that inclusion of those fees is the correct approach. Pet. App. 77a-78a. The court of appeals “should have accepted the District Court’s finding unless it was ‘clearly erroneous.’” *Teva Pharm.*, 574 U.S. at 336. Instead, the court of appeals made its own factual finding that “PROs and concert promoters have uniformly adopted” “the face value of concert tickets sold” as the revenue base definition, Pet. App. 31a—a

conclusion directly contrary to the district court's finding that there was no such consensus. Pet. App. 77a-79a.

Current market evidence is the key to these and other questions addressed by the district court. It is exceptionally important to the functioning of the rate-setting system that appellate courts not make findings outside the record on these technical, factual points. The district court "has a comparatively greater opportunity to gain . . . familiarity" with a case "than an appeals court judge who must read a written transcript or perhaps just those portions to which the parties have referred." *Teva Pharm.*, 574 U.S. at 327. That makes the "district court judge who has presided over, and listened to, the entirety of a proceeding" best positioned to make these determinations. *Id.*

B. The right standard of review is critical to efficiency and accuracy.

The Second Circuit's outlier approach to the standard of review creates recurring and fundamental issues for all parties involved in royalty rate determinations, no matter whose ox is gored in a particular case. Both sides of the transaction depend on rate-setting procedures to approximate fair market value in as efficient a manner as possible. De novo review of fact issues fails on both counts.

1. As for efficiency, PROs representing songwriters/publishers, potential licensees, and the district court itself all invest substantial time and resources into trials and evidentiary presentations in the district court. As here, these often involve extensive discovery, testimony from dueling experts regarding market conditions, and comparator license

agreements delivered in multi-week trials. All the while, market participants are in doubt as to what they will ultimately pay or be paid.

The proceedings in this case have taken years already and are poised to take more upon remand. Litigation began in 2018, and even the “current period” under dispute ended nearly four years ago. Pet. App. 64a. The district court reviewed over 300 exhibits and heard from 12 fact witnesses and two economic experts over the course of a five-week trial. Pet. 11.

If factual questions about competitive dynamics are all subject to de novo second-guessing at the appellate level—without any evidentiary rules or standards—this process is simply a waste of judicial resources. *Cf. Teva Pharm.*, 574 U.S. at 325 (reasoning that de novo review of factual determinations comes at a “huge cost in diversion of judicial resources” (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574-75 (1985))).

And the merry-go-round does not stop with the first trip to the court of appeals. Decisions like this one require even more costly proceedings on remand, subject again to de novo review, in a near never-ending cycle. *See, e.g., Broad. Music*, 426 F.3d at 92 (remanding, for a second time, district court decision setting licensing fee).

2. The question presented is crucial to accuracy, too. If the court of appeals sets aside factual findings without clear error based on past rate determinations, instead of relying on the district court’s assessment of current-market evidence, rates

become trapped in amber even while the industry changes.

Over the course of the five-week trial, the district court heard testimony explaining the dramatic transformation in the concert industry from the early 1990s when the benchmark rates were first negotiated, to 2006 when they were renewed, to today. That evidence showed that “[h]istorically, the concert promotion industry ha[d] been composed of small independent promoters operating in regional markets on slim margins.” Pet. App. 62a. In the initial negotiations, “NACPA protested that the concert industry was in economic distress and could not afford to pay BMI’s requested rate,” leading BMI to agree to a reduced rate. Pet. App. 62a-63a.

As the district court found, things look very different today. Most NACPA concerts are staged by enormous conglomerates such as Live Nation and AEG that own venues and ticket servicing platforms in addition to concert promotion. Pet. App. 61a-62a. These conglomerates are now earning billions of dollars of revenue. *See* Ct. of App. Supp. Appx. SA-627 (showing NACPA concert revenues topping \$20 billion); Live Nation Entertainment, Inc., Quarterly Report for the Period Ended September 30, 2023 (Form 10-Q) 22 (Nov. 2, 2023) (“Our overall revenue increased by \$2.0 billion, or 32%, to \$8.2 billion as compared to last year.”). The largest of these—Live Nation—reports that “every key operating metric is at an all-time high.” Ct. of App. Supp. Appx. SA-51; *see also id.* SA-97-98 (AEG executive’s testimony that concert revenues doubled over past five years). But these conglomerates are still paying songwriters and their publishers the same tiny percentage of ticket

revenues BMI agreed to accept from struggling mom and pop concert promoters in the early 1990s (0.15-0.3% less a 10% discount). Pet. App. 79a, 87a.

In fact, the evidence in district court showed that these big concert promoters are keeping an even bigger share of revenues than the 1990s rate suggests, by shifting their revenue models from primarily face-value ticket revenue to a host of separate fees and charges made possible by their consolidation, *e.g.*, ownership of ticket servicing companies. Pet. App. 60a. For example, the largest concert promoter, Live Nation, owns Ticketmaster and tacks on excessive Ticketmaster “convenience” and other “junk” fees, in some cases as much as 78% of the price of the ticket. *See* Bethy Squires, *Biden Is Coming for High Ticketing Fees*, Vulture (Oct. 26, 2022), <https://tinyurl.com/4k9nu2pe>; Hannah Dailey, *The Cure’s Robert Smith Demands Explanation From Ticketmaster For ‘Weird, Over Priced’ ‘Face Value’ Ticket Fees*, Billboard (Mar. 29, 2023), <https://tinyurl.com/22dtjtem>; August Brown, *Sick of fees and bots? Maggie Rogers invites fans to buy concert tickets ‘like it’s 1965’*, L.A. Times (Apr. 6, 2023), <https://tinyurl.com/mrx9u767>. Evidence before the district court showed that this “[t]icketing business generated \$1.1 billion, or 18.1%, of [Live Nation’s] total revenue during 2021,” a number that “excludes the face value of tickets sold.” Ct. of App. Supp. Appx. SA-503. In other words, revenue from ticketing fees for Live Nation alone is nearly a third of the entire amount that publishers and songwriters are paid annually for royalties for every public

performance of music across the economy. NMPA, *Music Publishing Revenues*, *supra* (\$3.8 billion).

As the district court found based on trial testimony, there is “virtually no way to opt out of paying the fees” when attending a concert, so they are properly included when determining how much a fan is willing to pay to attend a concert. Pet. App. 78a. AEG, the second-largest concert promoter, also owns a ticket servicing company that charges similar fees. Pet. App. 62a. By shifting revenues from ticket sales to fees, large concert promoters have avoided sharing the full value of the ticket with the songwriters who make these performances possible. The court of appeals turned a blind eye to these facts found by the district court, relying instead on a 2003 journal article cited by neither party. Pet. 30-31; Pet. App. 30a-31a.

Changes in how music is delivered also mean that live concerts are becoming more important among music-intensive sectors. As Live Nation’s CEO put it in an earnings release, “[i]n a world of endless screens and AI-generated everything, the one thing that can’t be copied is being there.” Live Nation Entertainment, *Live Nation Entertainment Reports Second Quarter 2026 Results*, PR Newswire (July 30, 2026), <https://tinyurl.com/j47rbpz7>. But while live concerts are an incredibly lucrative part of the music business overall, even the district court’s decision would award songwriters only pennies on the hundred-dollar bill. Pet. App. 59a, 88a (setting licensing fee for the 2018-22 period at 0.50% of gross ticket revenues less a 10% administrative discount).

After hearing weeks of evidence on the evolution of the market and current market conditions, the district court came to evidence-based conclusions

about what a willing seller and willing buyer would have negotiated. The court of appeals swept these findings away de novo, relying on old cases and old data. As a result, it forced rate-setting decisions to be made in a fictional market that no longer exists.

This is no way to run a railroad. When parties cannot reach agreement, and must rely on adjudication to set rates, that process necessarily imposes costs. But the process should not impose unnecessary, wasteful costs en route to setting rates that are not grounded in evidence-based assessments of current market conditions. The Court's review is urgently needed to avoid a de novo standard of review that creates disparity among the courts of appeals and makes rate setting more costly and less accurate for a process that affects millions of songwriters, music users across the economy, and billions of dollars.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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October 13, 2026