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 IN OPPOSITION

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QUESTION PRESENTED

Broadcast Music, Inc. (BMI) licenses the public performance of millions of copyrighted musical works on behalf of songwriters and music publishers. Under an antitrust consent decree designed to constrain BMI's market power, a federal district court in New York determines reasonable royalty rates when BMI and a prospective licensee cannot agree. The court uses comparable benchmarks to approximate the rate that a willing buyer and willing seller would negotiate in a competitive market. In a series of cases spanning more than three decades, the Second Circuit has articulated and refined the "legal standards that govern the selection and weighing of benchmarks and the definition of an appropriate revenue base." Pet. App. 22a.

In this case, the Second Circuit vacated the district court's rate determination for the live-concert license because the district court misapprehended those governing legal standards in several respects. The Second Circuit recognized that, while the factual findings underlying a fair-market-value determination are reviewed for clear error, the district court's numerous legal errors in this case were reviewable *de novo*. The Second Circuit thus corrected those errors and remanded.

The question presented is whether the Second Circuit properly applied *de novo* review, rather than clear-error review, to correct the district court's misapprehension of the governing legal standards in this case.

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INTRODUCTION

This case does not remotely warrant this Court's review. It arises from a *sui generis* rate-setting proceeding under an antitrust consent decree that has constrained petitioner Broadcast Music, Inc. (BMI) for decades. BMI is a performing rights organization (PRO) that licenses the public performance rights to nearly half of the copyrighted music performed at concerts in the United States. Because BMI wields monopoly power over access to that repertory, the BMI Consent Decree requires BMI to license any user who asks and, when the parties cannot agree on a fee, directs the Southern District of New York to set a "reasonable" one. Pet. App. 7a-8a. For more than 35 years, the Second Circuit has developed legal principles to guide that task. Chief among them: Because there is no competitive market for these licenses, "[b]enchmarks"—comparable agreements voluntarily negotiated at arm's length—"play the paramount role in rate-setting proceedings." *Id.* at 30a.

The licensees here are concert promoters represented by respondent North American Concert Promoters Association (NACPA). For decades, NACPA has paid BMI and its closest PRO comparator, the American Society of Composers, Authors and Publishers (ASCAP), effective rates ranging between approximately 0.21% and 0.275% on a revenue base consisting of the face value of tickets sold. In this rate-setting proceeding, the district court nonetheless set a rate of 0.50%—more than *double* what NACPA had historically paid BMI and nearly double what it had most recently agreed to pay

ASCAP—on an expanded revenue base divorced from every benchmark and from commercial practicalities.

The Second Circuit vacated in a thorough opinion by Judge Menashi. As the Second Circuit explained, the district court misapprehended the "legal standards that govern the selection and weighing of benchmarks and the definition of an appropriate revenue base." *Id.* at 22a-23a. Reviewing those legal errors *de novo*, the Second Circuit held that the district court misinterpreted controlling precedent, failed to consider legally relevant factors and explain key conclusions, and relied on reasoning fundamentally at odds with "the 'moderating influence' of the rate-setting framework." *Id.* at 28a-48a. The Second Circuit accordingly remanded for the district court to determine the rate, and explain its rationale, under the correct standards. *Id.* at 51a.

Nothing about that decision warrants certiorari. BMI does not ask the Court to review any of the Second Circuit's conclusions about the district court's errors. Instead, it tries to manufacture a broad question on the standard of review, mischaracterizing the decision below as holding that "fair-market-value determinations and their component parts" are "legal questions subject to de novo review." Pet. 17; *see id.* at (I). But the Second Circuit held no such thing. It reaffirmed that findings concerning fair market value are reviewed for clear error, Pet. App. 20a, whereas the district court's misunderstanding of governing legal standards is reviewed *de novo*—exactly as this Court's precedent prescribes. *See U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Village at Lakeridge, LLC*, 583 U.S. 387, 398 n.7 (2018).

That framework is nothing new. The Second Circuit has applied it in appeals under the BMI

Consent Decree for decades. And BMI itself has championed that framework when it suited its own interests—successfully urging the Second Circuit to apply *de novo* review and vacate a rate determination based on the same kinds of errors infecting the district court's decision here. *De novo* review for me but not for thee is not a sound litigating position.

BMI's remaining arguments for certiorari go nowhere. Its asserted 9-1 circuit split consists of a mishmash of eminent-domain, tax, patent, bankruptcy, and agency-review cases, none of which applied clear-error review to legal errors like those corrected here. And changing the standard of review would not change the outcome in this case: The numerous errors plaguing the district court's decision would warrant vacatur even under the deferential review BMI demands. The petition should be denied.

STATEMENT OF THE CASE

A. Legal Background

1. The Copyright Act, 17 U.S.C. § 101 *et seq.*, provides owners of musical works and other creative outputs with the exclusive rights to reproduce, distribute, and publicly perform their works. *Id.* § 106. A "musical work" refers to a song's underlying composition and lyrics created by the songwriter or composer. *See id.* §§ 101, 102(a)(2). Owners of musical works may authorize others to use their public performance rights under the Act by granting them a license. *Id.* §§ 106, 201(d)(2).

In the United States, this licensing is controlled by PROs, which affiliate with or represent individual owners of musical-work copyrights. Pet. App. 7a. Each owner gives the PRO the authority to license performances of their works on their behalf, and the

PRO then issues licenses, collects licensing fees, and distributes these royalties to affiliated copyright owners, after deducting a portion as a fee for its services. *Id.*; *see Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 4-5 (1979) (*CBS*).

PROs primarily grant permissions to licensees through "blanket license[s]." Pet. App. 7a. A "blanket license" is a time-limited license that allows "the licensee to perform any of the songs in the PRO's repertory" for a single stated fee, regardless of how much music the licensee actually uses. *Id.*; *see United States v. ASCAP (In re RealNetworks, Inc.)*, 627 F.3d 64, 68 (2d Cir. 2010), *cert. denied*, 565 U.S. 929 (2011).

Two PROs—BMI and ASCAP—dominate public performance licensing in the United States, each representing approximately 45-46% of the music performed at concerts. Pet. App. 7a. The remainder is split between two smaller PROs: Society of European Stage Authors and Composers (SESAC) (approximately 3.6%) and Global Music Rights (GMR) (approximately 4.5%). *Id.* Because each PRO controls a different bundle of rights, music users cannot substitute one PRO's license for another's, so each PRO is a monopolist seller of blanket licenses to its repertory. *See RealNetworks*, 627 F.3d at 68.

2. In 1941, the United States sued ASCAP and BMI under the antitrust laws, contending that they exercised unlawful market power by demanding supracompetitive prices for blanket licenses. *See CBS*, 441 U.S. at 10-12 & n.20.

Both settled through consent decrees, which today contain largely similar terms. *See* Pet. App. 7a-8a & n.1. Among other things, the decrees require the PROs to license any user on request and, if

negotiations fail, give either party recourse to the Southern District of New York to set a "reasonable" rate. *See id.* at 8a & nn.1-2, 23a.

For more than 35 years, the Second Circuit has articulated legal principles to implement that directive. A "reasonable" rate is one that "'an applicant would pay in a competitive market.'" *Broad. Music, Inc. v. DMX Inc.*, 683 F.3d 32, 45 (2d Cir. 2012) (citation omitted); *see* Pet. App. 23a. Given the dynamics of the "noncompetitive market of musical performance rights," ascertaining a truly "competitive price" is not economically feasible. Pet. App. 24a-26a (citation omitted). Accordingly, the court's task in practice is to exercise a "moderating influence on [the PROs]," minimizing their ability to leverage their monopoly power and extract "unacceptably inflated price levels" beyond what licensees would pay in a hypothetical reasonably competitive market. *Id.* at 26a (citation omitted); *see id.* at 42a ("[R]ate-setting courts must take seriously the fact that they exist as a result of monopolists exercising disproportionate power over the market for music rights." (quoting *United States v. Broad. Music, Inc.*, 426 F.3d 91, 96 (2d Cir. 2005) (*Music Choice IV*))).

The district court must therefore ground its rate determination in "[b]enchmarks"—i.e., analogous, voluntary "agreements reached after arm's length negotiation between other similar parties in the industry." *DMX*, 683 F.3d at 45; *see* Pet. App. 26a-27a. "In assessing whether another agreement provides a valid benchmark, the district court must consider whether [it] dealt with a comparable right, whether it involved similar parties in similar economic circumstances, and whether it arose in a

sufficiently competitive market." *DMX*, 683 F.3d at 45. The court must give greater weight to more comparable benchmarks. *See* Pet. App. 40a-41a; *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 569-70 (2d Cir. 1990).

3. BMI and ASCAP have long sought to avoid or terminate their consent decrees, but the Department of Justice has consistently reiterated that the decrees remain essential to "safeguarding a vibrant and competitive music licensing marketplace." U.S. Dep't of Justice, *Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees* 1 (Jan. 15, 2021), https://www.justice.gov/media/1115796/dl?inline.

By contrast, SESAC and GMR (the two smaller PROs) are not subject to consent decrees. Pet. App. 41a. As a result, they have repeatedly faced claims of extracting supracompetitive fees in violation of the antitrust laws. *Id.* at 42a-43a. And courts have repeatedly recognized that their smaller size does not mean they lack market power or charge competitive prices. *Id.* at 43a-44a.

B. Factual Background

1. The rates at issue in this case concern licensing fees for the performance of musical works at live music concerts. Live concerts are managed by concert promoters, who are responsible for virtually every component of the live-concert experience. *Id.* at 9a, 62a. They book talent, secure venues and service providers, facilitate operations, advertise and market the event, and advance costs, often including a guarantee payment to the performing artist. *Id.*

Although promoters do not control which songs artists perform, they are responsible for securing

performance licenses. *Id.* at 9a & n.3, 62a. Because promoters typically do not know in advance which songs will be performed or which PROs administer them, they must in practice obtain blanket licenses from all four PROs to avoid the risk of copyright infringement. *Id.* at 9a.[1]

2. NACPA is an association of major concert promoters that negotiates music performance licenses on its members' behalf. *Id.* at 9a, 60a-61a. For decades, NACPA has entered into negotiated licenses with both BMI and ASCAP. *Id.* at 10a; *see* CA2 App. 481.

Under those agreements, NACPA has historically paid ASCAP and BMI "at near parity." Pet. App. 41a (quoting Pet. App. 82a). These licenses have historically imposed a royalty calculated as a percentage rate of "Gross Ticket Revenues," defined to include revenue from ticket sales subject to certain specified deductions. *Id.* at 10a, 26a-27a. Since 1998, the BMI license has imposed a rate of 0.30% of gross ticket revenues for venues with fewer than 10,000 seats and 0.15% for venues with more than 10,000 seats. *Id.* at 10a, 63a. The overall "effective" rate paid under the original BMI license was approximately 0.21% of revenues. *Id.* at 10a. BMI and NACPA renewed those terms in 2006, adding a separate festival rate. They extended that license four times, through 2013, and then operated under an interim license with the same terms until 2022. *Id.* at 10a-11a, 63a-64a.

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[1] For example, artists often perform songs that they did not write, like covers of other artists' songs, and concerts often feature recorded music by other artists played before or after the band takes the stage.

The relationship between NACPA and ASCAP was historically similar. Most recently, the parties reached an agreement for a license for the 2018-2021 period with a single rate applicable to venues of all sizes: 0.23% of gross ticket revenues for 2018-2019, and 0.275% of gross ticket revenues for 2020-2021. *Id.* at 80a.

NACPA has also maintained a licensing agreement with SESAC since 2003. For the latest iteration, which covers the period from 2019 through 2024, the parties agreed to 0.032% of the face value of tickets. *Id.* at 82a. NACPA has never entered into a licensing agreement with GMR; GMR refused to negotiate with NACPA and instead negotiated licenses directly with six individual NACPA members, including Live Nation and AEG. *Id.* at 60a n.2, 82a-83a.

C. Proceedings Below

1. In September 2018, BMI petitioned the United States District Court for the Southern District of New York to determine a reasonable rate and terms for live concert performances for the period from January 1, 2014 through December 31, 2022. *Id.* at 5a-6a.

BMI bifurcated its proposal into two periods. For 2014-2018, BMI proposed five tiers of rates ranging from 0.15% to 0.80% (according to size of venue) on the historical revenue base. *Id.* at 11a. For 2018-2022, BMI sought 0.80%—nearly triple the effective rate of the prior BMI and ASCAP deals—on a revenue base that, for the first time in the industry's history, would include ticketing fees, VIP-package and box-suite revenues, sponsorships, and direct-to-secondary-market sales. *Id.* at 11a-12a. BMI supported that rate with foreign PRO licenses,

SESAC and GMR licenses, and licenses with non-NACPA promoters. *Id.* at 12a, 70a. NACPA, by contrast, proposed continuing the historical revenue base at a rate of 0.21% to 0.275%, consistent with its most recent voluntary agreements with BMI and ASCAP. *Id.* at 12a.

2. In March 2023, following a bench trial, the district court issued an opinion setting rates and defining the revenue base for the BMI-NACPA license. *Id.* at 58a-89a.

a. On the revenue base, the court did not look to the revenue bases used in any of the benchmarks—all of which defined the revenue base as revenue derived from ticket sales, less standard deductions, and nothing more. *See id.* at 29a. Instead, relying on *United States v. Broadcast Music, Inc.*, 316 F.3d 189, 195 (2d Cir. 2003) (*Music Choice II*), the district court devised a novel definition under which the base is measured by "[w]hat the consumer pays to attend the concert," which, in the court's view, reflected "the fair market value of the music." Pet. App. 68a. The court expanded the base beyond the industry-standard face value of tickets to include ticketing service fees, VIP-package and box-suite revenues, and direct-to-secondary-market ticket sales. *Id.* at 69a, 76a-79a.

b. On the rate, the court rejected BMI's foreign PRO benchmarks and considered the remaining domestic benchmarks, each adjusted to reflect the expanded revenue base. *Id.* at 74a-76a, 79a-86a. The court found that NACPA's prior agreement with BMI (implied rate of 0.21%) and its 2018-2021 agreement with ASCAP (0.23%) were valid benchmarks, explaining that "ASCAP is indisputably BMI's closest comparator," that the rights at issue were "essentially the same," and that "NACPA has paid ASCAP and

BMI at near parity in prior agreements." *Id.* at 79a-82a. The court also accepted BMI's and ASCAP's licenses with non-NACPA promoters (0.36% and 0.37%), SESAC's licenses with NACPA (0.34%) and with non-NACPA promoters (0.51%), and GMR's licenses with individual promoters (0.54%). *Id.* at 79a-86a. The court acknowledged that SESAC and GMR operate free of any consent decree, but reasoned that their "market sizes are more comparable to those of the large music publishers that music users would have to negotiate with directly in the absence of PROs." *Id.* at 84a.

The court then listed the implied rates reflected in those benchmarks—0.21%, 0.23%, 0.34%, 0.36%, 0.37%, 0.51%, and 0.54%—and declared that a rate of 0.50% "is therefore a reasonable one." *Id.* at 86a. Its only further explanation was that live concerts are "a music intensive industry" and "[t]hose who contribute to the musical compositions should be compensated accordingly." *Id.* at 86a-87a. The court did not assign weights to the benchmarks (each of which applied to the same industry), nor did it explain how it derived 0.50%—even though that rate is more than double the rates in NACPA's agreements with BMI and ASCAP, the two benchmarks the court itself had found most comparable.

c. Finally, the court found BMI's proposed rate for the 2014-2018 period reasonable, relying solely on the fact that it would "align" NACPA's rates with the terms of the form licenses BMI imposed on smaller non-NACPA promoters without negotiation. *Id.* at 88a. The court stated without elaboration that "[h]aving already found that the BMI-non-NACPA benchmark is valid, BMI's proposed rate for the period is reasonable." *Id.*

3. The Second Circuit vacated and remanded. *Id.* at 2a-57a. The court held that the district court "'failed to … consider[]'" and "'misapplied'" the "legal standards that govern the selection and weighing of benchmarks and the definition of an appropriate revenue base"—errors that "'can fairly be isolated as determining an issue of law'" and so receive "plenary review." *Id.* at 22a-23a (internal alteration omitted) (quoting *Showtime*, 912 F.2d at 569).

a. The Second Circuit first held that the district court's decision to "expand the definition of the revenue base" beyond the face value of tickets was "unreasonable for three reasons." *Id.* at 28a-39a.

First, the expanded definition had "no precedent among the benchmark agreements that the parties identified," all of which used "the face value of concert tickets sold with 'customary deductions.'" *Id.* at 28a-29a. Because "[b]enchmarks play the paramount role in rate-setting proceedings," the district court "acted unreasonably by departing from the industry-standard revenue base definition without a compelling reason"—particularly where its definition imposed administrative costs without any offsetting benefit. *Id.* at 29a-34a.

Second, even accepting the district court's premise that the base should reflect "'[w]hat the consumer pays to attend the concert,'" the Second Circuit explained that the district court's definition "does not conform to that principle," because it rested on a "misinterpret[ation]" of *Music Choice II* and swept in box-suite and VIP-package revenues that pay for food, drinks, backstage access, and other services beyond attending the concert. *Id.* at 34a-37a.

Third, the district court "did not merely fail to address the objection that the expanded revenue base would be commercially impracticable but even acknowledged that it was imposing inefficiencies without an economic justification." *Id.* at 39a. Promoters lack access to revenue data held by venues and other third parties, and the court never addressed how box-suite revenue sold on annual contracts could be attributed to particular concerts. *Id.* at 38a-39a.

b. The Second Circuit next held that the district court "erred in the benchmark analysis that led it to adopt a rate of 0.5 percent," again for three reasons. *Id.* at 39a-51a.

First, the district court "did not indicate the relative weights it assigned to the benchmark agreements it considered; nor did it explain how it derived the rate of 0.5 percent from those benchmarks." *Id.* at 40a. Because every BMI and ASCAP benchmark had an implied rate between 0.21% and 0.37%, the court "must have implicitly assigned greater weight to the benchmarks with higher implied rates: the SESAC and GMR benchmarks"—even though it had found that ASCAP is "'BMI's closest comparator'" and that NACPA had paid BMI and ASCAP "'at near parity.'" *Id.* at 40a-41a (quoting Pet. App. 81a-82a). Privileging SESAC's and GMR's unregulated rates, moreover, suggested that the district court believed that the consent decrees have "kept BMI's and ASCAP's rates artificially low." *Id.* at 42a. And that reasoning, the Second Circuit held, contravened the purpose of the BMI Consent Decree: "As long as the consent decrees remain in place, it is not within the discretion of the district court to decide that BMI's market power no

longer warrants the 'moderating influence' of the rate-setting framework." *Id.*

Second, the district court "erroneously considered license agreements with non-NACPA promoters." *Id.* at 40a. Licenses issued by the same PROs at around the same time carried materially lower rates for NACPA than for non-NACPA promoters, which "indicates that the non-NACPA promoters are not similarly situated to NACPA when negotiating with PROs." *Id.* at 45a-46a. The court left for remand whether GMR's licenses with NACPA members Live Nation and AEG reflect what NACPA itself would have obtained, and held that even those licenses "deserve less weight relative to the BMI and ASCAP benchmarks." *Id.* at 47a-48a.

Third, the district court "did not identify any relevant changes in economic circumstances that justify its departure from the prior rates negotiated by NACPA with BMI and ASCAP." *Id.* at 48a. The district court had itself found "no evidence in the record that the economic circumstances in 2018"—when the ASCAP-NACPA license was signed—"are significantly different from the present day." *Id.* (citation omitted). And its vague invocation of other "music intensive industries" could not bridge the gap, because those industries pay rates "far higher" than what any of the PROs are able to charge. *Id.* at 50a-51a.

The Second Circuit did not set a rate itself. It observed that a "well-supported rate for the new BMI/NACPA license would be significantly lower than the rate imposed by the district court, but it may be higher than the rate for the preexisting BMI/NACPA license," and remanded for the district court to "'determine the degree of comparability'" of

the permissible benchmarks and "'explain how it reached a particular rate.'" *Id.* at 51a-52a (quoting *Music Choice IV*, 426 F.3d at 95, 99).

c. Finally, the Second Circuit held that the district court's adoption of BMI's proposed rate for the 2014-2018 period was unreasonable because it rested on the premise that NACPA's rates should be "align[ed]" with those paid by non-NACPA promoters. *Id.* at 52a. As the court explained, "[t]he comparable benchmarks indicate that an arm's-length negotiation would not result in an alignment of NACPA rates with those negotiated by non-NACPA promoters." *Id.*

4. BMI petitioned for panel rehearing or rehearing en banc, which the Second Circuit denied without calling for a response. *Id.* at 1a.

REASONS FOR DENYING THE PETITION

This case presents no conceivable basis for certiorari. BMI seeks this Court's review on a premise the decision below does not support—that the Second Circuit "treat[s] fair-market-value determinations and their component parts as legal questions subject to de novo review." Pet. 17. The Second Circuit held no such thing. Instead, it explained that findings of fact, including findings concerning fair market value, are reviewed for clear error, and it reviewed *de novo* the district court's erroneous understanding of the legal principles that govern the analysis. The Second Circuit has applied that appellate-review framework in rate-setting appeals for more than three decades, and BMI itself has previously supported it.

That unremarkable application of settled law does not warrant this Court's review. The decision below does not conflict with any decision of this Court or of

any other court of appeals. And this case would be an exceptionally poor vehicle for review because BMI's question presented was not the question litigated or decided below, and the district court's decision could not survive even under deferential clear-error review. BMI's policy arguments and its alternative request for a hold pending *RiseandShine Corp. v. PepsiCo, Inc.*, No. 24-1016, fare no better. The petition should be denied.

I. BMI Mischaracterizes The Second Circuit's Position, Which BMI Itself Has Embraced

BMI's petition badly distorts the Second Circuit's position on the standard of review, and that distortion pervades its question presented and various arguments for certiorari.

1. For more than 35 years, the Second Circuit has consistently applied the same standards of review in rate-setting appeals under the BMI and ASCAP Consent Decrees. *See, e.g.*, Pet. App. 20a-23a; *Broad. Music, Inc. v. DMX Inc.*, 683 F.3d 32, 44-46 (2d Cir. 2012); *ASCAP v. MobiTV, Inc.*, 681 F.3d 76, 82 (2d Cir. 2012); *United States v. ASCAP (In re RealNetworks, Inc.)*, 627 F.3d 64, 76 (2d Cir. 2010), *cert. denied*, 565 U.S. 929 (2011); *United States v. Broad. Music, Inc.*, 426 F.3d 91, 96 (2d Cir. 2005) (*Music Choice IV*); *United States v. Broad. Music, Inc.*, 316 F.3d 189, 194-95 (2d Cir. 2003) (*Music Choice II*); *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 569 (2d Cir. 1990).

That precedent does not, as BMI suggests, blanketly "treat[] fair-market-value determinations and their component parts as legal questions subject to de novo review." Pet. 17. Instead, "[o]n an appeal from a rate determination," the Second Circuit

reviews the district court's "factual findings for clear error and its conclusions of law *de novo*." *MobiTV*, 681 F.3d at 82 (citing *RealNetworks*, 627 F.3d at 76). "Fair market value is a factual matter," *Showtime*, 912 F.2d at 569, and thus the district court's "findings with respect to fair market value[] are reviewed for clear error," Pet. App. 20a (quoting *RealNetworks*, 627 F.3d at 76); *see DMX*, 683 F.3d at 45. But that "does not render all aspects of [the decision] subject to review under the 'clearly erroneous' standard." Pet. App. 21a (quoting *Showtime*, 912 F.2d at 569). The Second Circuit steadfastly "'observe[s] the law/fact distinction'" and "accord[s] plenary review to the legal issues involved in the determination." *Id.* at 21a-22a (quoting *Showtime*, 912 F.2d at 569). The Second Circuit thus reviews *de novo* whether the rate court "rel[ied] on legally impermissible factors, fail[ed] to give consideration to legally relevant factors, appl[ied] incorrect legal standards, or misappl[ied] correct legal standards"—all "issue[s] of law" to which no deference is warranted. *Showtime*, 912 F.2d at 569; *see Music Choice II*, 316 F.3d at 194-95.

The Second Circuit applied that framework in this case. *See* Pet. App. 20a-23a. As the court explained, the Second Circuit has "articulated legal standards that govern the selection and weighing of benchmarks and the definition of an appropriate revenue base," and the issues on appeal concerned whether "the district court 'fail[ed] to give consideration to legally relevant factors' and 'misappl[ied] correct legal standards'" in its analysis. *Id.* at 22a-23a (quoting *Showtime*, 912 F.2d at 569). Among its numerous errors, the district court adopted a revenue-base definition with "no precedent among the benchmark agreements" based on a "misinterpret[ation]" of a

prior Second Circuit decision, *id.* at 28a-30a, 34a; failed to address the commercial impracticability of that novel definition and the fundamental differences between NACPA and the non-NACPA promoters whose licenses it treated as benchmarks, *id.* at 38a-39a, 45a-46a; and assigned greater weight to less comparable benchmarks for reasons that directly undermined "the 'moderating influence' of the rate-setting framework" itself, *id.* at 41a-42a.

Thus, far from "flyspeck[ing] the district court's valuation and fact-finding" under a "novel standard of review," Pet. 23, 33, the Second Circuit applied longstanding precedent to correct fundamental legal errors in the district court's analysis—a task properly suited to "plenary review," Pet. App. 23a (citing *Showtime*, 912 F.2d at 569).

2. BMI's mischaracterization is particularly egregious because BMI itself has successfully urged the Second Circuit to apply *de novo* review when it suited BMI's interests. In *Music Choice II*, BMI prevailed as the appellant in seeking to overturn a rate-court decision that had set a rate below BMI's request. 316 F.3d at 191, 194-97. BMI's reply brief devoted an entire section to the standard of review, and it reads like something NACPA could have written in this case. *See* BMI Reply Br. 3-5, *Music Choice II*, *supra* (No. 01-6183), 2002 WL 32331976 (*Music Choice II* BMI Reply Br.).

As relevant here, BMI argued that, although "'[f]air market value is a factual matter,'" "important elements of the district court's decision are subject to *de novo* review." *Id.* at 3-4 (quoting *Showtime*, 912 F.2d at 569). That is because, "'[i]n making a factual determination, a decision-maker might rely on legally impermissible factors, fail to give consideration to

legally relevant factors, apply incorrect legal standards, or misapply correct legal standards.'" *Id.* at 4 (quoting *Showtime*, 912 F.2d at 569). "Such errors," BMI explained, are "all subject to *de novo* review on appeal," and "[i]t is emphatically the province and duty of [the Second Circuit] to correct" them. *Id.* at 4-5. The Second Circuit agreed, applying *de novo* review to vacate the district court's erroneous definition of the revenue base—the same revenue-base question at issue here. *Music Choice II*, 316 F.3d at 194-97; *see* Pet. App. 34a-36a.

BMI also agreed with this framework in this very case. Before the Second Circuit, BMI acknowledged that the clear-error standard does not apply "where the lower court relied on impermissible factors, failed to consider legally relevant factors, applied incorrect legal standards, or misapplied the correct legal standards," and it conceded that "the determination of whether a proffered license is 'comparable,' and thus an appropriate benchmark based on the application of the facts, is 'a legal determination.'" BMI CA2 Br. 38, 40 (citations omitted); *see also* CA2 Oral Arg. 25:00-25:10 (conceding that the "standards about how the rate should be set and what's an appropriate benchmark" are "legal questions"). BMI's quarrel was with how the Second Circuit should apply that framework in this case, not with the framework itself.

Accordingly, BMI cannot credibly maintain that the Second Circuit broke new ground in this case by applying *de novo* review to "critical components of [the] fair-market-value determination." Pet. 17. The court applied the same framework for appellate review it has consistently applied in rate-setting cases under the BMI and ASCAP Consent Decrees for more

than 35 years—a framework that BMI has long embraced and that properly respects "the law/fact distinction." Pet. App. 22a (quoting *Showtime*, 912 F.2d at 569).

II. The Second Circuit's Decision Does Not Warrant This Court's Review

Once BMI's distortions are removed, it is clear that this case does not merit this Court's review. The Second Circuit applied precisely what this Court's precedent prescribes—plenary review of a lower court's understanding of the governing legal standards. And BMI's asserted 9-1 circuit split crumbles upon scrutiny, as it is assembled from a jumble of cases involving different issues arising under different legal regimes that have little connection to the decision in this case.

Moreover, this case would be a particularly unsuitable vehicle for review because BMI's categorical question presented differs from its position below, and because the answer would not change the outcome. Nothing about this case warrants this Court's intervention.

A. The Second Circuit's Application Of *De Novo* Review Comports With This Court's Cases

The Second Circuit's application of *de novo* review in this case is consistent with this Court's standard-of-review precedent. BMI's only suggestion to the contrary consists of four paragraphs asserting that the decision below is "manifestly incorrect" under *U.S. Bank National Association ex rel. CWCapital Asset Management LLC v. Village at Lakeridge, LLC*, 583 U.S. 387 (2018). Pet. 31-33. BMI did not even mention *U.S. Bank* in its Second Circuit merits

briefing. For good reason: *U.S. Bank* and its progeny only confirm that the Second Circuit correctly applied *de novo* review in this case.

1. In *U.S. Bank*, the Court explained how to identify the proper standard of appellate review for "so-called 'mixed question[s]' of law and fact." 583 U.S. at 394-96. The "reviewing court should try to break such a question into its separate factual and legal parts, reviewing each according to the appropriate legal standard." *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 24 (2021); *see U.S. Bank*, 583 U.S. at 393. Once "a mixed question can be reduced no further," the standard of review "'depends … on whether answering it entails primarily legal or factual work.'" *Google*, 593 U.S. at 24 (quoting *U.S. Bank*, 583 U.S. at 396). Mixed questions that "require courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard," are reviewed *de novo*. *U.S. Bank*, 583 U.S. at 396; *see Google*, 593 U.S. at 24 ("When applying the law involves developing auxiliary legal principles for use in other cases, appellate courts should typically review a decision *de novo*." (citation and internal alteration omitted)). On the other hand, mixed questions that are predominantly factual—questions that hinge on assessing "'narrow facts that utterly resist generalization'" after "weigh[ing] evidence" and "mak[ing] credibility judgments"—receive clear-error review. *U.S. Bank*, 583 U.S. at 396 (citation omitted).

Moreover, this Court has consistently stressed that if a "trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard." *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 18 (2024) (quoting *Inwood*

Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 855 n.15 (1982)); *see, e.g.*, *Abbott v. Perez*, 585 U.S. 579, 607 (2018) ("An appellate court has power to correct errors of law, including those that infect a finding of fact that is predicated on a misunderstanding of the governing rule of law." (citation and internal alterations omitted)); *U.S. Bank*, 583 U.S. at 398 n.7 ("[A]n appellate court must correct any legal error infecting a [lower] court's decision."). Thus, even when the question is "fact-laden," Pet. 32, if the lower court "misunderstood the nature of the [legal] query" itself, the "appellate court should apply *de novo* review." *U.S. Bank*, 583 U.S. at 398 n.7.

2. The Second Circuit's application of *de novo* review in this case comports with that precedent.

a. With respect to the revenue-base definition, the court properly applied *de novo* review for two independent reasons. To start, the Second Circuit has "articulated legal standards that govern … the definition of an appropriate revenue base," Pet. App. 22a, and the district court's analysis reflected "a mistaken impression of [those] applicable legal principles," *Alexander*, 602 U.S. at 18 (citation omitted); *see U.S. Bank*, 583 U.S. at 398 n.7. Specifically, the district court "misinterpreted [the] decision in *Music Choice II*" as requiring it to prioritize a novel principle of "'[w]hat the consumer pays to attend the concert'" over the revenue-base definition used in every benchmark agreement. Pet. App. 34a-37a. Thus, even if BMI were right that this question is predominantly factual, *see* Pet. 32, misreading controlling precedent is a prototypical "legal error" that "an appellate court must correct" by

"apply[ing] *de novo* review." *U.S. Bank*, 583 U.S. at 398 n.7.

Moreover, the Second Circuit's analysis confirms that this issue is predominantly legal, as it entailed "amplifying or elaborating on [the] legal standard[s]" governing the revenue-base definition in a way that will guide "other cases." *Id.* at 396; *see Google*, 593 U.S. at 24. Elaborating on the rule that "[b]enchmarks play the paramount role in rate-setting proceedings," the Second Circuit held that a district court cannot adopt a revenue-base definition "that has no precedent among the benchmark agreements" without "a compelling reason for doing so." Pet. App. 30a. And elaborating on the rule that a district court must "reasonably approximate the licensing agreement that would result from an arm's-length transaction between a willing seller and buyer," the Second Circuit held that a revenue-base definition is unreasonable if its implementation is not "administratively feasible and economically rational." *Id.* at 37a-39a. This is precisely the kind of "elaborating on a broad legal standard" that calls for plenary review. *U.S. Bank*, 583 U.S. at 396; *cf. id.* at 398 (concluding that the issue was predominantly factual where appellate decisions "have never tried to elaborate on" it).

b. The Second Circuit also properly applied *de novo* review to the benchmark analysis for the same two reasons. The court corrected the district court's misapplication of the "legal standards that govern the selection and weighing of benchmarks." Pet. App. 22a. To arrive at the 0.50% rate, the district court "must have implicitly assigned greater weight" to the SESAC and GMR benchmarks, and its stated reason for crediting those licenses was that those PROs,

unlike BMI and ASCAP, are "'unconstrained by a consent decree.'" *Id.* at 41a-42a (quoting Pet. App. 83a). That reasoning improperly treats the consent decrees as a problem to evade—but, as the Second Circuit held, "[a]s long as the consent decrees remain in place, it is not within the discretion of the district court to decide that BMI's market power no longer warrants the 'moderating influence' of the rate-setting framework." *Id.* at 42a. A district court that discounts the very purpose of the decree it is enforcing has "misunderstood the nature of the [legal] query," and that error was properly reviewed *de novo*. *U.S. Bank*, 583 U.S. at 398 n.7.

The Second Circuit also elaborated on the legal standards for "determin[ing] the degree of comparability" among putative benchmarks, Pet. App. 40a (quoting *Music Choice IV*, 426 F.3d at 95), holding that a district court should give greater weight to prior agreements between the same or similarly situated parties, *id.* at 41a; must account for structural differences in negotiating leverage that render certain agreements unsuitable as benchmarks, *id.* at 45a-46a; and must "identify any relevant changes in economic circumstances" to "justify [a] departure from the prior rates negotiated" by the same parties, *id.* at 48a. These "auxiliary legal principles" support *de novo* review. *Google*, 593 U.S. at 24 (quoting *U.S. Bank*, 583 U.S. at 396).

To be sure, applying those principles will entail subsidiary factual questions, including assessments of the economic characteristics and relative probative value of particular licensing agreements, which may require "parsing the record evidence and trial testimony." Pet. 32. But the Second Circuit did not suggest otherwise. It expressly recognized that

factual findings receive deferential review, Pet. App. 20a-23a, and it remanded for the district court to set a rate under the correct legal principles rather than setting a rate itself, *id.* at 51a. The presence of subsidiary factual issues, however, neither insulates the legal errors infecting the analysis nor prevents an appellate court from elaborating on the governing law. The Second Circuit's application of *de novo* review thus falls comfortably within the principles recognized by *U.S. Bank* and does not warrant this Court's review.

B. The Claimed Circuit Split Is Nonexistent

Unable to establish a conflict with this Court's cases, BMI tries to manufacture a 9-1 conflict among the courts of appeals by elevating the issue to an extreme level of generality—cases involving "fair-market-value determinations"—and then citing a hodgepodge of cases arising in "myriad contexts" far afield from this one. Pet. 17-23. This attempt to cobble together a circuit split fails.

1. BMI primarily emphasizes decisions from the D.C., Fourth, and Ninth Circuits, which, according to BMI, "deferentially review the choice of benchmarks or comparators underlying a fair-market-value determination." *Id.* at 18-20. The district court's errors in this case extended well beyond a choice of benchmarks. *See supra* at 16-17, 21-23. Regardless, these cases all arose in materially different settings and involved materially different questions.

BMI first points to the D.C. Circuit's "'highly deferential' standard of review" applicable to rate-setting decisions of the Copyright Royalty Board (CRB), an Executive Branch agency within the Library of Congress. Pet. 18-19. But as BMI itself

has argued, the D.C. Circuit's "exceptionally deferential" standard of review "applicable to decisions of a Congressionally-authorized agenc[y]" has no relevance here. *Music Choice II* BMI Reply Br. 4 & n.2. That is because the standard of review in CRB cases comes from the Copyright Act, which "expressly adopts the standard of review set forth in the Administrative Procedure Act." *Music Choice v. Copyright Royalty Bd.*, 774 F.3d 1000, 1007 (D.C. Cir. 2014); *see* 17 U.S.C. § 803(d)(3) (adopting 5 U.S.C. § 706). The APA, of course, does not govern appellate review of district court decisions. So this line of cases is inapposite.

Indeed, the APA's standards are even more deferential than the clear-error standard, and the reasons for deference are different. *See Dickinson v. Zurko*, 527 U.S. 150, 153, 160-61 (1999). As the D.C. Circuit has explained, its "especially deferential" review of CRB decisions is "distinct[ly]" rooted in the court's recognition that Congress granted the CRB substantial "'discretion in determining copyright policy'"—and in "'forecast[ing] the direction in which the future public interest lies'"—"'based on the expert knowledge of the agency.'" *Music Choice*, 774 F.3d at 1007 (citations omitted). That APA- and agency-specific deference has nothing to do with reviewing the decision of "a lower court judge," *Dickinson*, 527 U.S. at 161, and it certainly does not evidence any sort of circuit split with the Second Circuit's application of *de novo* review to the legal issues in this case.

The Fourth and Ninth Circuit cases BMI cites are also inapposite. Pet. 19-20 (citing *United States v. 269 Acres, More or Less, Located in Beaufort Cnty.*, 995 F.3d 152 (4th Cir. 2021); *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024 (9th Cir. 2015)). The *269 Acres*

case concerned the valuation of land in an eminent-domain proceeding. The appellant there identified no legal errors; the Fourth Circuit applied clear-error review to the district court's purely "factual determinations" underlying certain "land comparisons" and the credibility of expert testimony evaluating those comparisons. 995 F.3d at 165. The *Microsoft* case concerned the determination of a reasonable royalty for standard-essential patents, and the Ninth Circuit applied clear-error review to the "factual conclusions" underlying the district court's reliance on two patent-pool licenses, rather than certain historical licenses, as "relevant indicators of the RAND rate." 795 F.3d at 1042-44. "In the current context," the court held, "it was not clear error to reject the past licenses," particularly because the appellant did "not address any of [the district court's] explanations" for rejecting them. *Id.* at 1043-44.

Needless to say, eminent-domain and patent cases have little to do with rate-setting under an antitrust consent decree. *Cf. In re Application of MobiTV, Inc.*, 712 F. Supp. 2d 206, 242-43 (S.D.N.Y. 2010) (rejecting analogy to patent-law valuation standards as "inappropriate"), *aff'd sub nom. ASCAP v. MobiTV, Inc.*, 681 F.3d 76 (2d Cir. 2012). But even at BMI's preferred level of generality, there is no conflict: The Second Circuit, like the Fourth and Ninth Circuits, reviews the "factual findings … underlying a proposed benchmark agreement" for "clear error." Pet. App. 20a (quoting *RealNetworks*, 627 F.3d at 76); *see DMX*, 683 F.3d at 45; *Music Choice IV*, 426 F.3d at 96.

The Second Circuit applied *de novo* review here because it was reviewing a different category of issue. Unlike the district courts in *269 Acres* and *Microsoft*,

the district court here erred because it misapprehended the governing "legal standards." Pet. App. 22a-23a; *see supra* at 16-17. Nothing in *269 Acres* or *Microsoft* suggests that the Fourth and Ninth Circuits would defer to a district court decision that "misinterpreted" controlling precedent, Pet. App. 34a, or evaluated benchmarks in a way that contravened the "rate-setting framework" itself, *id.* at 41a-42a. As the Fourth Circuit has put it, "clear error review does not insulate findings resulting from a misapplication of the law"; such errors are instead "reviewed *de novo*." *TBL Licensing, LLC v. Vidal*, 98 F.4th 500, 510 (4th Cir. 2024).

2. BMI also points to decisions from the First, Third, Sixth, Seventh, Eighth, and Tenth Circuits stating that a lower court's "fair-market-value determinations" are reviewed for clear error. Pet. 21-23. But the same is true in the Second Circuit, which has consistently held—including in this case—that a district court's "findings with respect to fair market value[] are reviewed for clear error." Pet. App. 20a (quoting *RealNetworks*, 627 F.3d at 76); *see Showtime*, 912 F.2d at 569. There is no conflict on that point.

At the same time, these circuits also recognize, consistent with the Second Circuit's decision in this case, that a lower court's "'fail[ure] to use correct standards of valuation'" presents a "legal" question subject to *de novo* review. *Amerada Hess Corp. v. Commissioner*, 517 F.2d 75, 82 (3d Cir.) (citation omitted), *cert. denied*, 423 U.S. 1037 (1975); *see, e.g.*, *Collins v. Commissioner*, 216 F.2d 519, 522 (1st Cir. 1954) (failure to apply "the proper criterion [for determining value] is a question of law" reviewed *de novo*); *Lisle v. John Wiley & Sons, Inc. (In re*

Wilkinson), 196 F. App'x 337, 342 (6th Cir. 2006) ("Whether the bankruptcy court used proper methodology in assessing value is an issue of law reviewed *de novo*."); *Samson v. Alton Banking & Tr. Co. (In re Ebbler Furniture & Appliances, Inc.)*, 804 F.2d 87, 89 (7th Cir. 1986) ("[T]he manner in which [the lower court's] factual conclusions implicate the legal definition of value is subject to a *de novo* review."); *Swope v. Siegel-Robert, Inc.*, 243 F.3d 486, 491 (8th Cir.) ("[T]he determination of whether a given fact or circumstance is relevant to fair value … is a question of law which we review *de novo*."), *cert. denied*, 534 U.S. 887 (2001); *Estate of Holl v. Commissioner*, 967 F.2d 1437, 1439 (10th Cir. 1992) (applying *de novo* review to hold that the tax court "erred in its application of the law and in accepting an erroneous method of valuation").

Ultimately, the most striking feature of BMI's attempt to stitch together a circuit split is the final product: Even after veering into areas of the law far afield from consent-decree rate-setting, BMI does not identify a single case in which a court of appeals applied clear-error review to the kind of legal errors the Second Circuit corrected here. The absence of any actual conflict counsels strongly against review.

C. This Case Is An Exceptionally Poor Vehicle For Review

Even if the question presented otherwise warranted review, this case would be an exceptionally poor vehicle for resolving it.

1. To start, the question presented in BMI's petition differs from the question litigated in the Second Circuit. The question presented asks whether "a district court's fair-market-value determination

and its component parts" are reviewed *de novo* or for clear error. Pet. (I). But the Second Circuit did not hold that fair-market-value determinations are reviewed *de novo*. The court reaffirmed that "findings with respect to fair market value[] are reviewed for clear error," Pet. App. 20a (quoting *RealNetworks*, 627 F.3d at 76), and it applied *de novo* review here because the particular "arguments that NACPA raise[d] on appeal" concerned legal errors, *id.* at 22a.

That is also how BMI litigated the case below. As noted, BMI conceded in the Second Circuit that legal errors in the benchmark analysis are reviewed *de novo*, *see supra* at 18, and argued only that the particular issues here did not fall within that category. BMI did not even cite *U.S. Bank* until its rehearing petition, which is why the Second Circuit's opinion does not discuss it. And BMI never pressed the categorical rule it now advances—that every "component part[]" of a valuation analysis must be reviewed for clear error. This Court is "a court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and there is no reason to depart from that rule here.

2. This case is also a poor vehicle because the answer to BMI's question presented would not change the outcome. Clear-error review does not insulate findings infected by legal error, and even when it applies, it "is not a rubber stamp." *Alexander*, 602 U.S. at 18. The district court's decision could not survive even the deferential review BMI demands. *Contra* Pet. 27-31. A few examples suffice.

a. Take the 0.50% rate. The district court listed seven implied rates—0.21%, 0.23%, 0.34%, 0.36%, 0.37%, 0.51%, and 0.54%—and "therefore" declared 0.50% "a reasonable one," without assigning weights

to the benchmarks or explaining how it derived that figure. Pet. App. 86a; *see id.* at 40a. The figure is not readily derivable from the benchmarks the court itself found comparable: A simple average of the benchmark rates (which would itself vastly overstate the significance of the deals on the higher end of the spectrum, by according those with industry players one-tenth the size of BMI the same weight in the analysis) yields 0.37%, and hypothetically giving the BMI and ASCAP benchmarks double weight due to their greater comparability yields 0.33%. *See id.* at 40a-41a, 51a. The far higher 0.50% figure is unexplained. Courts applying clear-error review routinely vacate valuation decisions that merely announce a figure without "any explanation of the facts or methodology used to reach th[e] figure." *Henry v. Champlain Enters., Inc.*, 445 F.3d 610, 622 & n.4 (2d Cir. 2006) (Sotomayor, J.); *see Estate of Trompeter v. Commissioner*, 279 F.3d 767, 770-71 (9th Cir. 2002); *Akers v. Commissioner*, 798 F.2d 894, 897 (6th Cir. 1986). And they remand for the factfinder to provide an adequate explanation—exactly what the Second Circuit did here. Pet. App. 51a.[2]

b. The district court's revenue-base definition is also erroneous under any standard. As the Second Circuit explained, in addition to misinterpreting *Music Choice II*, the district court "did not address the

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[2] BMI claims the district court generally justified a "rate on the high end" based on the rates paid in other "industries," Pet. 28-29, but that does not explain how the district court arrived at 0.50%. And even on its own terms, relying on a vague reference to conditions in other industries to impose a dramatic rate increase that the parties could not achieve in negotiation would be a clearly erroneous application of the comparability analysis. *See* Pet. App. 48a-51a.

fact that none of the domestic benchmark agreements the parties identified used anything other than the face value of tickets sold," Pet. App. 29a; contradicted its own "[w]hat the consumer pays to attend the concert" principle by sweeping in box-suite and VIP-package revenues that pay for food, drinks, and backstage access, *id.* at 34a-37a; and "acknowledged that it was imposing inefficiencies without an economic justification," *id.* at 39a. Findings that ignore critical evidence or rest on internally inconsistent or economically unsound reasoning are clearly erroneous. *See, e.g.*, *Doe v. Menefee*, 391 F.3d 147, 164-65 (2d Cir. 2004) (Sotomayor, J.) (holding that "factual findings [are] clearly erroneous" where they are "internally inconsistent" and "fail[] to synthesize the evidence in a manner that accounts for conflicting evidence or the gaps in a party's evidentiary presentation"), *cert. denied*, 546 U.S. 961 (2005); *United States v. AT&T, Inc.*, 916 F.3d 1029, 1033 (D.C. Cir. 2019) ("A finding may be clearly erroneous when it … rests on internally inconsistent reasoning, or contains errors of economic logic." (citations omitted)).

BMI's complaint about the Second Circuit's citation of a law review article discussing contractual "surplus," Pet. 30, changes nothing. The Second Circuit cited the article to explain the commonsense point that rational parties would not agree to an administratively costlier revenue base that adds no value to the transaction for either side. Pet. App. 30a-31a. NACPA's expert established the same point at trial, *see id.* at 31a n.18, and it is confirmed by the uniform revenue base in all benchmark agreements, *id.* at 29a. The article simply gave a name to an intuitive proposition the record already supported.

c. Finally, the district court's finding that non-NACPA promoter licenses were comparable contradicted its own figures: Licenses issued by ASCAP and SESAC at around the same time carried rates for NACPA that differed from those for non-NACPA promoters by 0.14 and 0.17 percentage points, respectively—significant differences that "indicate[] that the non-NACPA promoters are not similarly situated to NACPA." Pet. App. 45a-46a. An "internally inconsistent" finding of that kind is clear error. *Menefee*, 391 F.3d at 164-65.

D. BMI's Policy Arguments Lack Merit

BMI and its amici also claim that the Second Circuit's decision will have a series of doomsday consequences. Pet. 23-27; ASCAP Amicus Br. 8-11; NMPA Amicus Br. 18-23; SONA Amicus Br. 8-14. These arguments do not withstand scrutiny.

First, BMI and its amici assert that the decision below will "adversely affect songwriters, composers, and publishers numbering in the millions" by diminishing their compensation. Pet. 5, 23-24; *see* ASCAP Amicus Br. 9-10; SONA Amicus Br. 10-13. This argument is divorced from the question presented. The standard of appellate review is value-neutral; it favors neither licensors nor licensees. That is why BMI itself had no trouble urging *de novo* review when it was the appellant. *See supra* at 17-18.

BMI's real complaint is its dissatisfaction with the *result* of the Second Circuit's application of *de novo* review in this case—it lost this appeal. That case-specific, result-oriented concern is not a basis for certiorari. In any event, BMI's concerns about songwriter compensation are indeed "overstated." Pet. 23. The Second Circuit did not set a rate; it

remanded for the district court to set one, recognizing that a properly supported rate "may be higher than the rate for the preexisting BMI/NACPA license." Pet. App. 51a. The only thing songwriters stand to lose is the windfall of a rate that disregarded governing law and the consent decree's core purpose.

Second, BMI and its amici warn that the Second Circuit's decision will create "massive judicial inefficiencies" and delay. Pet. 16, 25-26; *see* ASCAP Amicus Br. 10; NMPA Amicus Br. 18-19; SONA Amicus Br. 8-10. But the Second Circuit has applied the same appellate-review framework for more than three decades without the dysfunction BMI now claims—and again, BMI itself has invoked that framework to its advantage. BMI's suggestion that this framework suddenly poses a grave threat to the judicial system rings hollow.

Finally, BMI posits that the Second Circuit's decision "could have devastating application" to an untold number of legal settings, including property forfeiture, tax, eminent domain, bankruptcy cramdowns, criminal sentencing, and more. Pet. 5, 26-27. But the decision below rests on a body of precedent developed for, and tethered to, the unique consent-decree framework governing BMI and ASCAP. Pet. App. 20a-23a. BMI's catastrophizing thus requires this Court to believe that courts across the country will uncritically treat a Second Circuit opinion about royalty rates under a consent decree as a general treatise on appellate review of all valuation questions. That is a farfetched possibility, to say the least, and it certainly does not justify this Court's review.

III. There Is No Reason To Hold The Petition For *RiseandShine*

BMI's alternative request to hold the petition pending *RiseandShine Corp. v. PepsiCo, Inc.*, No. 24-1016, should be denied. Pet. 33-34. That case presents the discrete question whether trademark strength in a likelihood-of-confusion analysis under 15 U.S.C. § 1114 is a question of fact. BMI's analogy to *RiseandShine* rests on the same flawed premise addressed above: The Second Circuit did not, as BMI suggests, "categorize[] fair-market-value determinations, and their component parts, as legal questions." Pet. 33. To the contrary, the court recognized that fair-market-value determinations are factual questions reviewed for clear error, while holding that misapprehending the governing legal standards is a legal question subject to plenary review. *See supra* at 15-17. *RiseandShine* presents no question concerning the correction of such legal errors.

Nor could the decision in *RiseandShine* affect the outcome here. Factual findings that rest on mistaken legal principles are not insulated by clear-error review. *Alexander*, 602 U.S. at 18; *U.S. Bank*, 583 U.S. at 398 n.7. That settled rule is all the Second Circuit applied here. There is no reason to delay disposition of this petition pending *RiseandShine*.

CONCLUSION

The petition for a writ of certiorari should be denied.

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