

No.

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*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Fair-market valuations turn on nuanced and record-bound factual determinations. This case involves a quintessential example: the rate paid to songwriters, composers, and publishers for public performances of their music at live concerts. Until now, the circuits have uniformly applied deferential, clear-error review to district courts' fair-market valuations. In the decision below, however, the Second Circuit parted from its sister circuits and reviewed a fair-market-value determination and the individual components of that determination under an improperly stringent *de novo* standard.

As this Court made clear in *U.S. Bank National Association ex rel. CWC Capital Asset Management LLC v. Village at Lakeridge, LLC*, 583 U.S. 387 (2018), that approach to reviewing predominantly factual questions is erroneous. Moreover, it splits with the D.C., First, Third, Fourth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits, all of which have appropriately applied deferential standards of review to comparable fair-market-value determinations in various contexts.

The question presented is:

Whether a district court's fair-market-value determination and its component parts, such as the selection of benchmark agreements, should be reviewed *de novo* or for clear error.

II

PARTIES TO THE PROCEEDING

Petitioner, Broadcast Music, Inc., is a performing rights organization and was petitioner in the district court and appellee/cross-appellant in the Second Circuit.

Respondent, North American Concert Promoters Association, is an industry association for concert promoters and was respondent in the district court and appellant/cross-appellee in the Second Circuit.

III

CORPORATE DISCLOSURE STATEMENT

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

IV

RELATED PROCEEDINGS

This case arises from these proceedings:

- *Broad. Music, Inc. v. N. Am. Concert Promoters Ass’n*, No. 18-cv-8749 (S.D.N.Y. Mar. 28, 2023) (granting petitioner’s petition to determine a reasonable royalty rate that respondent must pay for live performances of musical works)
- *Broad. Music, Inc. v. N. Am. Concert Promoters Ass’n*, Nos. 23-935, 23-1004 (2d Cir. Feb. 24, 2026) (vacating and remanding the district court’s rate determination)
- *Broad. Music, Inc. v. N. Am. Concert Promoters Ass’n*, Nos. 23-935, 23-1004 (2d Cir. Apr. 6, 2026) (denying panel rehearing and rehearing en banc)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court’s Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Broadcast Music, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is available at 168 F.4th 86 (2d Cir. 2026). Pet.App.2a-57a. The opinion of the district court is available at 664 F. Supp. 3d 470 (S.D.N.Y. 2023). Pet.App.58a-89a.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 2026, and the petition for rehearing was denied on April 6, 2026. On June 25, 2026, Justice Sotomayor extended the deadline to file a petition for a

writ of certiorari to and including August 20, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Federal Rule of Civil Procedure 52(a) provides, in relevant part:

(a) Findings and Conclusions.

(1) *In General.* In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.

* * *

(6) *Setting Aside the Findings.* Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

STATEMENT

This case presents a question of exceptional importance to the music industry, the millions of songwriters and composers whose creative genius fuels it, and litigants in all other industries involving royalty rates. For more than a century, performing rights organizations (PROs), such as petitioner Broadcast Music, Inc. (BMI), have connected songwriters and their music with all of us. PROs offer blanket licenses for the works in their repertoires to concert venues, bars, radio and television stations, streaming platforms, and other music users. Blanket licenses ensure songwriters get paid for performances of their copyrighted songs at concerts and for

other music uses, without having to individually manage and license performance of their works. Without blanket licenses, music users would have to navigate a nearly impossible task: negotiating licenses with each and every copyright holder for each and every song that could be performed, or face copyright liability. The impact on the live-concert industry would be profound; artists would be unable to adapt setlists to perform fan-requested songs or otherwise improvise—ingredients that make concerts magical.

Given the quagmire that individualized negotiations would produce, PROs are “an obvious necessity.” *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 20 (1979). Their role in the music industry has occasionally raised antitrust questions, however. The two largest PROs—BMI and American Society of Composers, Authors and Publishers (ASCAP)—therefore entered into voluntary consent decrees with the federal government. At BMI’s request, its consent decree was amended in 1994 to authorize the U.S. District Court for the Southern District of New York to resolve royalty-rate disputes between BMI and licensees by setting a reasonable rate. ASCAP’s consent decree includes a similar rate-setting mechanism.

This case arises from a dispute between BMI and respondent North American Concert Promoters Association (NACPA), which represents mega concert promoters Live Nation Entertainment and AEG Presents, among others. NACPA obtains licenses through BMI and other PROs so its member-promoters can host live performances of copyrighted songs at concerts.

Three decades ago, when concert promoters were struggling mom-and-pop businesses, BMI and NACPA agreed that BMI’s songwriters would receive royalties

calculated at 0.15% or 0.3% of gross ticket revenues, depending on venue size. Much has changed since then. Today, the live-concert industry is a multi-billion-dollar business comprising many different revenue streams, including ticketing fees, secondary-market sales, and VIP packages. As a result, the cost of attending a concert has skyrocketed. Steve Knopper, *Get Ready for Ticket Prices to Keep Rising*, Rolling Stone (Apr. 14, 2026), <https://tinyurl.com/y8hemaxv>. Fans now pay substantial premiums, fees, and surcharges on top of elevated ticket prices.

Given these radical changes in the industry, BMI sought to negotiate a higher rate to fairly compensate the individual songwriters whose music fills arenas, drives ticket sales, and makes concerts possible. After a five-week trial featuring twelve fact witnesses, competing experts, and hundreds of exhibits, the district court found that changes in the industry warranted a higher royalty rate of 0.5% and an incremental expansion of the revenue base to which that rate applies.

The Second Circuit reversed, privileging its own review of a cold record over the district court's front-row seat to the evidence and witnesses. According to the Second Circuit, the building blocks of the district court's rate determination—its selection of benchmark agreements and calculation of the appropriate revenue base to which the rate is applied—present questions of law reviewed de novo. Applying de novo review, the Second Circuit rejected aspects of the district court's benchmarking analysis and implied that the court should have set the rate based on the average or weighted average of the benchmark rates. Then, relying on an academic article on the concept of “contract surplus” that no party cited, the Second Circuit rejected the district court's expansion of the revenue base.

The likely effect of the Second Circuit’s *de novo* review will be to diminish songwriters’ hard-earned compensation when their work is performed in live concerts and to further enrich multi-billion-dollar promoters that dominate NACPA, like Live Nation and AEG. If nothing else, the Second Circuit’s decision to remand will generate delay, expense, uncertainty, and repeated litigation of inherently factual issues. BMI initiated this proceeding in 2018; eight years later, the case is now back before the district court. Moreover, the Second Circuit’s approach would make a protracted process the norm in all rate-setting proceedings, depriving BMI and music users alike of an efficient mechanism for resolving rate disputes.

The Second Circuit’s decision to apply *de novo* review to quintessential factual questions is also a complete outlier. Across myriad contexts involving rate-setting and fair-market-value determinations, nine circuits apply clear-error review to both the building blocks of those determinations—such as selection of benchmark rates—and the ultimate determinations themselves. That is as it should be. Fair-market-value determinations are inherently factual and should be made by the judge with a front-row seat to live evidence—not by a panel of appellate judges applying extra-record academic contract theories on which no expert opined.

Because the BMI and ASCAP consent decrees both submit rate disputes exclusively to the U.S. District Court for the Southern District of New York, the Second Circuit’s application of *de novo* review to this and future rate-setting disputes is critically important to the entire music industry, including the nearly 3 million songwriters, composers, and publishers whom BMI and ASCAP represent. Moreover, the decision could have devastating application across many other kinds of fair-market-value determinations made by district courts in the Second Circuit. Only

this Court can fix the Second Circuit’s egregious error and bring it back in line with its sister circuits.

At a minimum, the Court should hold this petition pending a decision in *RiseandShine Corp. v. PepsiCo, Inc.* (U.S. No. 24-1016). *RiseandShine* similarly addresses the Second Circuit’s application of de novo review to a fact-laden inquiry—there, the issue of trademark strength in a likelihood-of-confusion analysis under 15 U.S.C. § 1114. The Court’s guidance on the appropriate standard of review in *RiseandShine* may very well affect the Second Circuit’s application of de novo review to a similarly fact-bound question here.

A. Factual Background

1. Every song starts with a songwriter’s or composer’s creative idea. Before an artist records a song and before artists perform songs in concerts, a songwriter or composer must first create the musical work. This creative process involves significant effort. Accordingly, in order to “promote the ... arts,” U.S. Const. art. I, § 8, cl. 8, copyright law protects creative expressions. The Copyright Act ensures that songwriters and composers (or their assignees) have the exclusive right to publicly perform the work for profit and to license the work for others to perform. 17 U.S.C. §§ 106(4), 201(d)(2). Those rights are “not self-enforcing.” *Broad. Music*, 441 U.S. at 4. Individual copyright owners face immense obstacles to negotiating licenses with individual users. *Id.* at 20. Moreover, live music performances are often fleeting, so detecting violations is all but impossible for many individual copyright owners. *Id.* at 4-5.

Music users—that is, the businesses that build their businesses on these songs—in turn face similar difficulties in securing licenses for every song that an artist may wish to perform at a concert or that a DJ may wish to play

on air. *See id.* at 20-22. Indeed, when a musician performs a live cover of another artist’s work—like Jimi Hendrix’s rendition of “Like a Rolling Stone” by Bob Dylan at the 1967 Monterey International Pop Festival¹—the concert venue would face copyright liability if it had failed to secure a license for that surprise cover ahead of time. If a DJ plays a new single, the radio station would face copyright liability if it failed to secure a license first. Before any concert or broadcast, therefore, music users must secure the rights to play whatever songs they choose. Pet. CA2 Br. 11.

PROs solve this problem. They “provide a valuable service to both music users and PRO members” by offering blanket licenses to music users for all the copyrighted musical works in their repertoires. *Statement of the Dep’t of Justice on the Closing of the Antitrust Division’s Review of the ASCAP and BMI Consent Decrees* 10, DOJ (Aug. 4, 2016), <https://tinyurl.com/mryp9c5r> (2016 DOJ Statement). PROs’ blanket licenses ensure that songwriters get paid for public performances of their copyrighted works and allow music-intensive businesses like concert promoters to have a wide repertoire of copyrighted music at the ready. *Broad. Music*, 441 U.S. at 21-22. As the Department of Justice has recognized, the “licensing and payment benefits” from PROs are “significant,” and “the current system has well served music creators and music users for decades.” 2016 DOJ Statement 3.

Given the upsides to the songwriters and the businesses that play their music, PROs have long been a feature of the American music industry—even predating the advent of commercial radio. *Cf. History of Commercial Radio*, FCC (Oct. 17, 2023),

¹ Mitch Carter, *Wild Thing: Hendrix at Monterey*, Picturing Black History (2021), <https://tinyurl.com/ttjckw7t>.

<https://tinyurl.com/mvecva8y>. The first PRO, ASCAP, formed in 1914. *The ASCAP Story*, ASCAP, <https://tinyurl.com/c8buudw4>. Petitioner BMI followed suit in 1939, seeking to represent the jazz, country, and blues musicians who were at that time excluded from ASCAP's ranks. D. Ct. Dkt. 172-5 at 2. In the early days, BMI's affiliates ranged from Buddy Holly to Hank Williams to Miles Davis. *Id.* Other PROs include SESAC Performing Rights, LLC (formerly the Society of European Stage Authors and Composers), and Global Music Rights (GMR). Pet.App.60a.

Today, BMI represents more than 25 million musical works and 1.5 million songwriters, composers, and music publishers. *About BMI*, BMI, <https://www.bmi.com/about>. Songwriters and composers create songs, scores, and musical compositions; typically, publishers own or administer a work's copyright after it has been assigned to them. *BMI Member FAQs*, BMI, <https://tinyurl.com/2tdh5sy9>.

2. BMI has never been found to have engaged in anticompetitive behavior. However, given the role PROs play in this industry, and the “unique conditions recognized as *potentially* anti-competitive,” BMI and ASCAP are regulated by separate voluntary, court-approved consent decrees with the U.S. Department of Justice. *United States v. Broad. Music, Inc.*, 316 F.3d 189, 190 (2d Cir. 2003) (emphasis added).

BMI's first consent decree originated from a 1941 lawsuit and was replaced after the government filed a second antitrust lawsuit in 1964. D. Ct. Dkt. 172-5 at 3-4. Although the government admitted that it initiated the 1964 lawsuit “without first obtaining any hard facts,” the government settled in 1966, and BMI voluntarily entered into a new consent decree. *Id.* at 4, 15 n.8 (citation omitted). ASCAP's consent decree—created in 1941 and

modified in 1950—including a procedure for the district court to set a reasonable rate for licenses. *Id.* at 3. BMI’s 1941 and 1966 consent decrees lacked that feature.

Notwithstanding BMI’s 1966 consent decree, and the fact that BMI was and has never been found to be in violation of the decree, music users continued to bring antitrust litigation against BMI. *Id.* at 4. Although BMI successfully defeated these antitrust suits, BMI eventually had enough and petitioned the district court in 1994 to modify the consent decree, with the Department of Justice’s consent. *Id.* at 1. The court modified the consent decree to include a rate-setting procedure along the lines of ASCAP’s. D. Ct. Dkt. 124-1 ¶ 4. Under the rate-setting procedure, when BMI and a music user are unable to negotiate a license rate themselves, either can petition the district court to “determine a reasonable fee based upon all the evidence.” CA2 A.46; *see* Pet.App.58a. Both the BMI and ASCAP consent decrees confer exclusive jurisdiction for rate disputes upon the U.S. District Court for the Southern District of New York.

3. This case involves the multi-billion-dollar market for live performances of copyrighted music. Respondent NACPA is an association of Live Nation, AEG, and a few smaller concert promoters. Pet.App.61a. NACPA negotiated and litigated rates with BMI and other PROs on behalf of its members. Pet.App.60a-61a. Live Nation and AEG are the largest concert promoters in the United States; are “conglomerates” of “concert promotion, venue ownership, and ticket servicing”; and collectively bring in over \$25 billion in cash annually. *See* Pet.App.61a-62a; *Live Nation Entertainment Full Year and Fourth Quarter 2025 Results*, Live Nation Newsroom (Feb. 19, 2026), <https://tinyurl.com/3mfrv8aa>. Live Nation and AEG organize live music events and, through subsidiaries

Ticketmaster (Live Nation’s) and AXS (AEG’s), sell tickets to those events, creating a secondary revenue stream from ticketing fees. Pet.App.10a.

Live Nation and AEG’s supremacy over the live-concert industry is a recent phenomenon. In the 1990s, the industry was “composed of small independent promoters operating in regional markets on slim margins.” Pet.App.62a. Ninety percent of shows operated at a loss. Pet.App.62a. Over time, “regional promoters began consolidating until the modern landscape ... dominated by Live Nation and AEG emerged.” Pet.App.62a. The concert-promotion industry has become so consolidated that earlier this year, a federal jury declared Live Nation to have acted as an illegal monopoly. See Ben Sisario, *What’s Next Now That Live Nation Has Been Found to Act as a Monopoly*, N.Y. Times (June 3, 2026); *United States v. Live Nation Ent., Inc.*, No. 1:24-cv-3973 (S.D.N.Y.).

The license fee paid by NACPA members to BMI’s affiliates for live concerts was last negotiated more than three decades ago, in 1992. Pet.App.62a-63a. At that time, BMI proposed a 1% rate, but “NACPA protested that the concert industry was in economic distress and could not afford to pay BMI’s requested rate.” Pet.App.62a-63a. In 1998, the parties ultimately settled on “a rate of 0.3% of ‘Gross Ticket Revenues’ for concerts with under 10,000 seats and a rate of 0.15% for those with over 10,000 seats.” Pet.App.63a. Put differently, songwriters received only 15 cents for every \$100 in ticket sales at the biggest venues. The license rate was so low that expenses for catering, drapes in dressing rooms, and walkie-talkies all exceeded the license fees paid to BMI’s songwriters, composers, and publishers whose works were performed. D. Ct. Dkt. 160 at ¶¶ 26-27.

The 1998 rates remained in place until 2013, when the license was terminated. Pet.App.63a-64a. “The parties

[had] been on an interim agreement and [had] engaged in protracted negotiations for a new license without success.” Pet.App.64a. In 2018, after the parties’ negotiations stalled, BMI petitioned the district court to set a reasonable rate under the consent decree. Pet.App.58a-59a; CA2 A.22-A.35.

B. Procedural History

1. In its petition, BMI asked the court to set the rate for a retroactive period (from January 1, 2014 until June 30, 2018) and a then-current period (from July 1, 2018 to December 31, 2022). Pet.App.59a. For the retroactive period, BMI requested a tiered rate structure, with rates from 0.15% to 0.8% depending on the venue size. Pet.App.65a. BMI requested a unified rate of 0.8% for the then-current period for all venues and sought to expand the revenue base from the face value of concert tickets to include revenues from ticket fees, VIP packages and box suites, sponsorships, and certain secondary-market ticket sales. Pet.App.64a. NACPA, for its part, sought a rate between 0.21% and 0.275% for the then-current period and a rate of 0.23% for the retroactive period, with each rate applied only to the face value of a ticket. Pet.App.52a, 65a.

The district court held a five-week trial, with live testimony from twelve fact witnesses and two economic experts, along with over 300 exhibits. In 2023, after assessing the witnesses and exhaustively reviewing the record, the district court issued a 37-page opinion that rejected aspects of both BMI’s and NACPA’s proposed rate and revenue base. Pet.App.88a-89a; *see* Fed. R. Civ. P. 52(a).

Regarding the then-current rate, the court rejected BMI’s proposed rate of 0.8%. The court instead selected

a 0.5% rate by considering a range of benchmarks, including licenses between PROs (BMI, ASCAP, SESAC, and GMR) and promoters or their representatives (NACPA, Live Nation and AEG, and promoters other than NACPA members). Pet.App.79a-87a. Those benchmarks had rates ranging from 0.21% to 0.54%, with the ASCAP and older BMI agreements on the low end and the more recent SESAC and GMR agreements on the high end. Pet.App.79a-83a, 86a.

Starting with the lower-end rates in the BMI license, the district court cautioned that “[t]here have been significant market changes since the [BMI] rate was first set in 1998.” Pet.App.81a. The court had previously noted how the “small independent promoters” of the 1990s had given way to the “domina[nt]” and “consolidat[ed]” promoters of today. Pet.App.62a. Thus, the district court found that while the BMI license was a “proper benchmark[,]” it merely “set[] the floor from which to determine the reasonableness of the new license.” Pet.App.81a. Along similar lines, the district court found that the ASCAP license was a “valid benchmark” too. Pet.App.81a-82a.

The court also determined that the SESAC and GMR licenses were valid benchmarks since these licenses were “between similar parties, for similar rights, and were negotiated in similar economic circumstances.” Pet.App.83a. Accepting the opinion of BMI’s economic expert, the court noted that because they are unconstrained by consent decrees, SESAC and GMR enjoy the “freedom to terminate a negotiation, a capability which approximates the dynamics of a direct licensing negotiation between a music user and the individual music publisher.” Pet.App.84a. Further, the court noted that “a direct license with the copyright holder” is “the next best alternative to a blanket license with a PRO,” and SESAC’s and GMR’s “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.” Pet.App.84a.

As to the gross revenue base, the court included the face value of tickets, revenues for initial sales on the secondary market, ticket fees, box suites, and VIP packages. Pet.App.76a-77a. The court explained that the payment customers make to “receive the product or service in question” is a core indicator of fair market value. Pet.App.77a (citation omitted). The court credited testimony that certain NACPA members already included secondary-market sales, VIP packages, and box suites in the proceeds they report to NACPA for purposes of calculating licensing fees under the prior BMI licensing agreement. *See* Pet.App.77a. As to ticketing fees, the court highlighted testimony from a NACPA member that ticketing fees are included in the “amount that the fan is willing to pay to attend the concert.” Pet.App.78a (citation omitted). However, the court rejected BMI’s request to include sponsorship revenues in the gross revenue base based on the record before it, reasoning that these revenues “do[] not affect the ultimate price the customer has to pay to attend the show.” Pet.App.69a.

Finally, the court adopted BMI’s proposal for the retroactive period, which retained “the historical tiered rate structure and narrow revenue base.” Pet.App.88a. The historical rate structure aligned with BMI’s licenses with other concert promoters, which the court deemed valid benchmarks. Pet.App.88a.

2. NACPA appealed, and a two-judge Second Circuit panel vacated and remanded, the third judge having recused herself after oral argument. Pet.App.2a, 19a. Although Federal Rule of Civil Procedure 52(a)(6) notes that fact-findings “must not be set aside unless clearly erroneous,” Fed. R. Civ. P. 52(a)(6), the Second Circuit held

that “the selection and weighing of benchmarks and the definition of an appropriate revenue base” were all legal issues subject to de novo review, Pet.App.22a.

Reviewing de novo, the Second Circuit rejected the 0.5% rate. Pet.App.39a-40a. The Second Circuit second-guessed the district court’s assessment of benchmarking evidence, faulting the court for “fail[ing] to assign weights to the benchmarks and implicitly accord[ing] greater weight to the SESAC and GMR benchmarks than to the BMI and ASCAP benchmarks.” Pet.App.40a. In support of this idea, the Second Circuit cited observations about SESAC from another district court twelve years earlier in a case with different parties and a different record. Pet.App.43a-44a (citing *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 362 (S.D.N.Y. 2014)). The Second Circuit also rejected the district court’s reliance on benchmarks from non-NACPA concert promoters because the court of appeals disagreed with the district court’s finding that those licenses were comparable. Pet.App.44a-46a.

Ignoring the contrary testimony of BMI’s expert, the Second Circuit further found that the 0.5% rate was too high, despite falling within the range of benchmarks determined to be comparable by both the district court and the Second Circuit. *See* Pet.App.48a-49a, 51a. Instead, the Second Circuit held that the district court should have based its analysis on the “BMI/NACPA license, the ASCAP/NACPA license, the SESAC/NACPA license, and possibly the GMR/Live Nation and GMR/AEG licenses.” Pet.App.51a. Based on its view of the rate generated by an average or weighted average of the benchmark rates, the Second Circuit observed that the rate “would be significantly lower” than the district court’s rate, “but it may be higher” than the old rate. Pet.App.51a.

The Second Circuit also rejected the district court’s rate for the retroactive period because the retroactive rate also relied on benchmarks from non-NACPA promoters. Pet.App.52a.

Again applying *de novo* review, the Second Circuit disagreed with the district court’s findings as to the revenue base. Pet.App.26a-28a. The court emphasized that the revenue base “historically” included only the ticket’s face value. Pet.App.27a (cleaned up). Although the district court had credited testimony that certain NACPA members were already reporting a wider revenue base, the Second Circuit rejected that finding with a footnote recharacterizing some of the record as “unclear.” *See* Pet.App.36a-37a & n.19.

The Second Circuit also relied heavily on an article on contracting principles—which no party had cited—to conclude that parties in a hypothetical negotiation would not expand the revenue base because it would create administrative costs for NACPA without any corresponding benefits to the contractual “surplus.” Pet.App.30a-31a. Although the district court had determined that its expanded revenue base would be workable, the Second Circuit rejected the court’s finding, substituting its own opinion that the expanded revenue base would be commercially impracticable. Pet.App.28a-29a, 37a-39a.

The Second Circuit thus vacated the judgment and remanded for further proceedings. Pet.App.57a.

3. On April 6, 2026, the Second Circuit denied BMI’s petition for rehearing. Pet.App.1a.

REASONS FOR GRANTING THE PETITION

This case is a clean vehicle to resolve a lopsided circuit split and presents a question of exceptional importance to millions of songwriters, composers, and publishers, as well as other parties litigating rate disputes.

Because the Second Circuit departed from an otherwise unanimous and appropriate approach, the circuits have now split over whether fair-market-value determinations and their component parts, such as the determination whether proposed benchmark agreements are comparable to the target agreement, are reviewed deferentially or under a stringent *de novo* standard. Three circuits—the D.C., Fourth, and Ninth—hold that the benchmarks a district court uses in making a valuation determination should be reviewed deferentially. The Second Circuit, however, distorted the benchmark analysis into a legal question reviewed *de novo*. Six other circuits have held that the final valuation decision in a fair-market-value determination is inherently factual, reviewed under the deferential clear-error standard. But the Second Circuit effectively split with those courts too, transforming almost every facet of its review of the district court’s rate-setting into a legal issue subject to plenary appellate scrutiny.

The question presented impacts the livelihood of millions of musical copyright holders and could affect litigants in numerous other types of rate disputes. The Second Circuit’s erroneous standard of review now controls all future review of royalty-rate decisions for BMI and ASCAP with respect to live concerts, television, radio, streaming platforms, and more. That standard creates massive judicial inefficiencies by increasing the number of potential remands. This case is illustrative—with songwriters already waiting eight years for a resolution. The Second Circuit’s flawed reasoning also could infect the standard of review in a range of other contexts involving fair-market valuations. Additionally, because the application of *de novo* review was outcome-determinative, this case presents a clean vehicle for resolving the question presented.

The Second Circuit’s stringent standard was manifestly wrong on the merits, too. It defies this Court’s teaching that fact-intensive questions should be reviewed for clear error even if they include legal components.

For these reasons, this Court should grant the petition and decide it on the merits. At the very least, the Court should hold this petition pending resolution of *RiseandShine Corp.* There, too, the Second Circuit parted ways with every other circuit by applying de novo review to a fact-bound district-court determination. *RiseandShine* thus could affect the selection of the appropriate standard of review here.

I. The Circuits Are Divided Over the Standard of Review for Fair-Market-Value Determinations and Their Component Parts

The Second Circuit stands alone in treating fair-market-value determinations and their component parts as legal questions subject to de novo review. Nine other circuits recognize the fact-intensive nature of these decisions and accordingly defer to the district court.

1. Below, the Second Circuit held that de novo review applies to critical components of a fair-market-value determination. Although the court “analogized the determination of fair market value to an evidentiary ruling,” it “nevertheless accord[ed] plenary review to the legal issues involved in the determination.” Pet.App.21a. The court then saw a legal issue in nearly every component part despite the inherently factual nature of these issues. *See* Pet.App.22a-23a. Those components included “the selection and weighing of benchmarks and the definition of an appropriate revenue base” to which the royalty rate applied, Pet.App.22a, as well as “the decision[] ... to depart from the rates previously negotiated,” Pet.App.20a. Each of those decisions, said the Second

Circuit, “can fairly be isolated as determining an issue of law.” Pet.App.23a.

Thus, while the court said it would review the ultimate fair-market-value determination (the royalty rate) for “reasonableness,” Pet.App.19a, the court defined reasonableness review to mean *de novo* review of every component part of the rate itself, *see* Pet.App.22a-23a. The result: the Second Circuit offered its own benchmarks and revenue base, allowing its fair-market-value determination to supersede the district court’s exhaustive consideration of the evidence.

2. Nine other circuits recognize that fair-market-value determinations and their component parts are inherently factual, warranting deferential review. Three of those circuits deferentially review the choice of benchmarks that underlie fair-market-value determinations. Another six circuits review the fair-market-value determination itself for clear error.

a. Three circuits—the D.C., Fourth, and Ninth Circuits—deferentially review the choice of benchmarks or comparators underlying a fair-market-value determination in addition to deferentially reviewing the final rate.

The D.C. Circuit applies a “highly deferential” standard of review in the analogous context of copyright-royalty-rate determinations for music licensing. *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 759 (D.C. Cir. 2009). There, the Copyright Royalty Board—a creature of statute—“set[s] ‘reasonable rates and terms’ for royalty payments from digital performances.” *Id.* at 754 (quoting 17 U.S.C. § 114(f)). The D.C. Circuit recognizes that these “administratively determined rates” are “highly technical,” warranting a “particularly deferential” standard of review. *Id.* at 755 (citation omitted).

That deference “extends to” not just the rate itself, but also whether rates in other agreements “could be considered ‘comparable’ to the ratesetting the [Copyright Royalty] Judges were undertaking.” *Id.* at 759 (citation omitted). Thus, appellants “face[] an uphill battle in challenging the Board’s selection of its benchmarks,” given the Board’s discretion “to assess evidence of an agreement’s comparability and to decide whether to look to its rates and terms for guidance.” *SoundExchange, Inc. v. Copyright Royalty Bd.*, 904 F.3d 41, 50-51 (D.C. Cir. 2018) (citation omitted); *see also Music Choice v. Copyright Royalty Bd.*, 774 F.3d 1000, 1009 (D.C. Cir. 2014) (noting the Board’s “broad discretion to discount [a party’s preferred] benchmarks”).

The Fourth Circuit similarly reviews deferentially the benchmarks underlying valuation determinations. In *United States v. 269 Acres, More or Less, Located in Beaufort County*, 995 F.3d 152 (4th Cir. 2021), the court reviewed a district court’s fair-market-value determination for property in a takings case. *See id.* at 162-63. “The best evidence of property value,” the Fourth Circuit explained, “comes from comparable land sales, where the more similar the land is the more probative the sale price is.” *Id.* at 164. “Because identifying the relevant comparisons and making value adjustments often turns into a battle of experts, [the Fourth Circuit] defer[s] to the district court in weighing the varying opinions those experts offer, reversing only when the district court has made a clear error.” *Id.* at 164. Thus, the appellant’s argument that certain “land comparisons were inapplicable and should not have been credited” by the district court in setting fair market value was “intensely factual and ask[ed] [the court] to second guess ... the district court’s credibility determinations and weighing of the evidence.” *Id.* at 165. The Fourth Circuit applied clear-error review to that argument. *Id.*

As the Fourth Circuit further recognized, that deference “is vital to our judicial system.” *Id.* at 157. “[D]eference respects the superior competence of local fact finders in reviewing the evidence while also promoting judicial economy.” *Id.* When a case “turns on that deference,” the standard of review “compels [the court of appeals] to affirm,” even though it “might have decided th[e] case differently in the first instance.” *Id.*

The Ninth Circuit applies a similarly deferential standard to the choice of comparators underlying a district court’s fair-market-value determination. In *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024 (9th Cir. 2015), the Ninth Circuit reviewed a district court’s decision, following a bench trial, that set a reasonable and non-discriminatory (RAND) royalty rate for standard-essential patent licenses. *See id.* at 1033, 1042-45. Like respondents here, the appellants there challenged the district court’s choice of comparators and the “weight” assigned to them. *See id.* at 1042. The Ninth Circuit reviewed those decisions only for clear error. *See id.* at 1043. It concluded that “it was not clear error to reject the past licenses as too contextually dissimilar to be useful to the RAND rate calculation.” *Id.*; *see also Waddell v. Comm’r*, 841 F.2d 264, 268 (9th Cir. 1988) (applying clear-error review to fair-market-value determination in tax valuation context, including to comparison to other products).

In the D.C., Fourth, and Ninth Circuits, the district court’s benchmark analysis and selection of a rate from those benchmarks would have been treated as findings of fact and afforded deference. Because the Second Circuit morphed benchmarking into a legal question, however, it disregarded the district court’s analysis without identifying anything close to clear error.

b. When reviewing fair-market-value determinations themselves, six circuits—the First, Third, Sixth, Seventh, Eighth, and Tenth—apply a similarly deferential standard. Across myriad contexts, these circuits review those determinations for clear error.

The First Circuit applies clear-error review to fair-market-value determinations in the takings context. *Nat’l R.R. Passenger Corp. v. Certain Temp. Easements Above R.R. Right of Way in Providence*, 357 F.3d 36, 39 (1st Cir. 2004). Thus, after a district court determined the “fair market fee value” of property taken by eminent domain, the First Circuit deferred to the district court’s interpretation of expert testimony and other evidence supporting its valuation. *See id.* at 39-41.

The Third Circuit takes the same approach. After a district court determined a ship’s fair market value, the Third Circuit rejected arguments that the valuation “was clearly erroneous because it was based upon a contemporaneous sales market established by the sale of only one ship.” *Villaneuva Compania Naviera, S.A. v. Bethlehem Steel Corp. (In re Bankers Tr. Co.)*, 658 F.2d 103, 106 (3d Cir. 1981). “[O]ur role when reviewing a district court’s factual findings,” the Third Circuit explained, “is not to ‘substitute findings we could have made had we been the fact-finding tribunal.’” *Id.* (citation omitted). Instead, the Third Circuit views its “function” as simply “to review the record to determine whether the findings of the District Court were clearly erroneous.” *Id.* (citation omitted); *accord Hechinger Litig. Tr. v. Bankboston Retail Fin., Inc. (In re Hechinger Inv. Co. of Del.)*, 147 F. App’x 248, 252 (3d Cir. 2005) (finding no clear error in “affording great weight to [a] contemporaneous ... valuation” for fair-market-value determination).

Similarly, the Sixth Circuit applies clear-error review to valuations in the tax context. *Gross v. Comm’r*, 272

F.3d 333, 342-43 (6th Cir. 2001). Addressing a dispute over “the fair market value of certain shares of corporate stock,” *id.* at 335, the Sixth Circuit acknowledged that “the question of whether the tax court used the correct standard to determine the fair market value is a legal issue,” subject to de novo review, *id.* at 342. Yet “[t]he choice of the appropriate valuation methodology for a particular stock is, in itself, a question of fact.” *Id.* at 343. Thus, “a difference in opinion as to the methodologies used to arrive at the valuation amount” is “review[ed] ... only for clear error.” *Id.*; *see also United States v. Certain Land Situated in the City of Detroit*, 450 F.3d 205, 212 (6th Cir. 2006) (applying clear-error review to interest awarded for just compensation in takings context).

The Seventh Circuit agrees. In the takings context, for example, the court has clarified that a “[d]etermination of comparability rests within the discretion of the trier of the facts, and ordinarily will not be disturbed on review.” *United States v. 124.84 Acres of Land, More or Less, in Warrick Cnty.*, 387 F.2d 912, 915 (7th Cir. 1968); *see also Rush v. GreatBanc Tr. Co.*, 182 F.4th 619, 637-38 (7th Cir. 2026) (applying clear-error review to fair-market-value determination of damages in ERISA breach-of-fiduciary-duty cases).

The Eighth Circuit has followed suit. In takings cases, the court has applied clear-error review to a “determination of the fair market value of [a] leasehold interest.” *United States v. 1,601.14 Acres of Land, More or Less, in Stutsman Cnty.*, 491 F.2d 700, 701-02 (8th Cir. 1974). That standard, the Eighth Circuit recognized, respects “the right and duty of the trial court as the fact finder ... to determine the credibility of the witnesses, including expert witnesses, and the weight to be given to their testimony.” *See id.* at 701; *accord Mark IV Pictures*,

Inc. v. Comm’r, 969 F.2d 669, 675 (8th Cir. 1992) (applying clear-error review in tax-valuation context).

The Tenth Circuit hews to this line, too. Addressing a commercial dispute where the damages rested on a business’s “fair market value,” the Tenth Circuit rejected an attempt to frame attacks on the fair-market-value determination as legal questions. *Eateries, Inc. v. J.R. Simplot Co.*, 346 F.3d 1225, 1229-30 (10th Cir. 2003). The court recognized such attacks are “not a challenge to the methodology itself” but “a challenge to the district court’s factual findings of [the business’s] fair market value.” *Id.* at 1230. Thus, the court reviewed for clear error, *id.*, in stark contrast to the decision below.

In these circuits, the district court’s determination here would have received the deference it deserved, since the parties agreed on the rate-setting methodology. *E.g.*, Pet.App.81a (noting “both sides’ experts” used benchmarks). Parting ways with each of these circuits, the Second Circuit chose instead to flyspeck the district court’s valuation and fact-finding, setting aside key aspects of the district court’s analysis based solely on the court of appeals’ preferred view of the record.

II. The Question Presented Is Exceptionally Important, Recurring, and Squarely Presented

The adverse effects of the decision below—and its likelihood of recurring—cannot be overstated. Absent this Court’s review, the decision will adversely affect songwriters, composers, and publishers numbering in the millions. It will infect the Second Circuit’s review of royalty-rate determinations for other licenses outside of live concerts. It will undermine judicial economy. It also could disrupt the standard of review in numerous other contexts involving fair-market-value determinations and

royalty rates. This case presents a clean vehicle to review the question presented and reunify the circuits.

1. Millions of songwriters, composers, and publishers depend on royalties to receive fair compensation for performances of their copyright-protected works. Since BMI’s rate for live concert performances was last negotiated in the 1990s, the music industry has radically transformed. Some concert promoters are now mammoths operating with market power that has drawn intense antitrust scrutiny and earning billions from live music performances. *Supra* p. 10. In contrast, the creative minds whose musical works are the indispensable foundation for the live-concert industry receive just a tiny sliver of the proceeds.

The district court recognized this unfair and outdated valuation and adopted a reasonable rate to fairly compensate the songwriters whose talent and creativity make concerts possible. The Second Circuit’s application of an erroneously stringent standard of review affects the livelihood of those songwriters, ranging from Grammy winners to burgeoning talent. The Second Circuit’s decision is particularly problematic for the significant portion of BMI’s affiliates who are non-performing songwriters; their “sole source of income is the royalties for uses of their songs.” NMPA CA2 Amicus Br. 1.

The Second Circuit’s flawed methodology will directly impact more than just BMI’s 1.5 million affiliates. The Second Circuit also reviews royalty-rate decisions for ASCAP, meaning that the 1.1 million songwriters, composers, and publishers represented by that PRO are now subject to the Second Circuit’s standard too. *See* ASCAP CA2 Amicus Br. 2; *About Us*, ASCAP, <https://www.tinyurl.com/y7ecuav9>. Likewise, music users could see technical, fact-bound decisions undone at the whims of a three-judge (or in this case, a two-judge) panel.

Additionally, the impact of the Second Circuit’s decision goes beyond the live-concert context. The Second Circuit reviews all royalty-rate determinations for BMI and ASCAP, which run the gamut from television broadcasters to streaming services, and everything in between. *E.g., Broad. Music*, 316 F.3d 189 (cable and satellite television); *Pandora Media, Inc. v. Am. Soc’y of Composers, Authors & Publishers*, 785 F.3d 73 (2d Cir. 2015) (internet-radio service). The flawed standard of review in the decision below could now adversely affect those proceedings as well.

Since the Second Circuit oversees decisions under both the BMI and ASCAP consent decrees, and the Circuit declined to review the decision below en banc, nearly three million songwriters, composers, and publishers will be stuck with the consequences of the decision below absent this Court’s intervention. As this Court has recognized, when an industry is concentrated in one circuit such “that litigation in other circuits resulting in a conflict of decision would not be likely to occur,” certiorari is nevertheless warranted. *Exhibit Supply Co. v. Ace Patents Corp.*, 315 U.S. 126, 128 (1942); accord *Schriber-Schroth Co. v. Cleveland Tr. Co.*, 305 U.S. 47, 50 (1938); *Muncie Gear Works, Inc. v. Outboard, Marine & Mfg. Co.*, 315 U.S. 759, 766 (1942). Here, the grounds for certiorari are even more compelling because the Second Circuit split with nine others. *Supra* Part I.

2. Setting aside the adverse effects on songwriters, composers, and publishers, the decision below also creates massive inefficiencies, undermining “judicial economy.” *See 269 Acres*, 995 F.3d at 157. The trial here took five weeks and occurred four years ago. As the Fourth Circuit has observed elsewhere, the district court “oversaw the case from start to finish, developed the evidentiary record in the process and looked the witnesses in

their eyes while they gave their testimony.” *Walsh v. Vinoskey*, 19 F.4th 672, 680 (4th Cir. 2021). Applying de novo review to the court’s rate determination vastly increases the chance of retrial in the mine-run case, likely more than doubling the work, time, and expense for the parties and judiciary alike.

3. The decision below has far-reaching consequences outside of music licensing. Myriad contexts involve rate-setting and fair-market-value determinations, and courts typically review those determinations for clear error. In addition to the intellectual-property, tax, eminent domain, and damages contexts identified above, *supra* Part I, the decision below could infect the standard of review in multiple other contexts, including:

- The fair market value of property wrongfully seized by and forfeited to the government. *United States v. One Star Class Sloop Sailboat Built in 1930 with Hull No. 721, Named “Flash II”*, 546 F.3d 26, 35 (1st Cir. 2008);
- The “reasonable” rate for attorney’s fees. *Plyler v. Evatt*, 902 F.2d 273, 277-78 (4th Cir. 1990); *Interfaith Cmty. Org. v. Honeywell Int’l, Inc.*, 726 F.3d 403, 416 (3d Cir. 2013); *La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 324 (5th Cir. 1995);
- The interest rate in calculating damages. *Venus Lines Agency, Inc. v. CVG Int’l Am., Inc.*, 234 F.3d 1225, 1231 (11th Cir. 2000);
- The discount rate for deferred payments in bankruptcy. *Farm Cred. Servs. of Am. v. Topp (In re Topp)*, 75 F.4th 959, 963 (8th Cir. 2023);
- The fair market value of “cultural heritage resources” under section 2B1.5 of the Sentencing Guidelines. *United States v. Haggerty*, 997 F.3d 292, 303-04 (5th Cir. 2021);

- The fair market value of wildlife sold in violation of the Lacey Act, under the Sentencing Guidelines. *United States v. Dove*, 247 F.3d 152, 159 (4th Cir. 2001); *United States v. Rodebaugh*, 798 F.3d 1281, 1298-99 (10th Cir. 2015); and
- The cramdown interest rate in bankruptcy. *Wells Fargo Bank Nat'l Ass'n v. Tex. Grand Prairie Hotel Realty, LLC (In re Tex. Grand Prairie Hotel Realty, LLC)*, 710 F.3d 324, 330-31 (5th Cir. 2013).

4. This case provides an ideal vehicle for answering the question presented because the Second Circuit's application of a *de novo* standard was outcome-determinative.

a. The Second Circuit's review of the benchmarks was outcome-determinative, flawed, and inefficient. The district court examined numerous benchmarks that required parsing scores of record evidence and extensive expert testimony. Based on the record, the court found that the GMR and SESAC licenses were better benchmarks than the BMI and ASCAP licenses because they more accurately "reflect[ed] the level of competition that would be inherent in a direct licensing negotiation." Pet.App.84a. Although the BMI-NACPA license was a "proper benchmark[]," it was of lesser value to the district court because of the "significant market changes" that had occurred since the rate was negotiated in the 1990s. Pet.App.81a. The court also considered licenses with non-NACPA promoters to be valid benchmarks, because they "arose in a market that reflects the same degree of competition and economic circumstances." Pet.App.82a. Finally, while the court deemed the ASCAP-NACPA license "a valid benchmark" given the expert testimony, Pet.App.81a, the court ultimately found that the entire record justified a higher rate, Pet.App.86a-87a.

Nevertheless, the Second Circuit brushed off those fact-laden determinations because it favored its own set of facts. Pet.App.40a-44a. Instead of deferring to the district court's findings on the applicability of the SESAC and GMR benchmarks, the Second Circuit favored twelve-year-old findings of fact regarding SESAC licenses from a different district court, regarding different parties, on a different record, in reversing the district court here. Pet.App.43a-44a (citing *In re Pandora*, 6 F. Supp. 3d at 362).

The Second Circuit also set aside the district court's finding that licenses with promoters unaffiliated with NACPA constituted adequate comparators. Pet.App.44a-48a. Although the district court found that these licenses were adequately comparable, the Second Circuit rejected that finding on plenary review because it disagreed with how the district court parsed the evidence. Pet.App.45a. At every point in the benchmarking analysis, the Second Circuit second-guessed the district court's careful findings of fact, effectively conducting a second trial on a cold record and substituting its findings for those of the trial court.

b. The Second Circuit also applied de novo review to the district court's ultimate selection of the 0.5% rate. The district court selected the 0.5% rate based on its benchmarking analysis and additional testimony. The benchmark rates ranged from 0.21% to 0.54%. Pet.App.86a. The district court selected a rate on the high end of the range—in line with the SESAC and GMR licenses. Pet.App.86a. Based on testimony from BMI's head of licensing, the district court reasoned that the fair market value for licenses in other music-intensive industries, such as commercial-radio stations or virtual-live-concert streaming services, should influence the rate-setting inquiry. Pet.App.86a-87a. Those licenses had higher

rates than BMI's past live-concert license with NACPA, further supporting a rate on the higher end of the benchmark range. Pet.App.86a.

The Second Circuit reversed, finding the district court failed to "justify its departure from the prior rates negotiated by NACPA with BMI and ASCAP." Pet.App.48a. The Second Circuit inserted itself directly into the details of determining a reasonable rate, opining that the district court should have averaged the rates from the "BMI/NACPA license, the ASCAP/NACPA license, the SESAC/NACPA license, and possibly the GMR/Live Nation and GMR/AEG licenses," or taken a weighted average of these rates. Pet.App.51a. Either methodology would have produced a lower rate than the 0.5% selected by the district court. Pet.App.51a. The Second Circuit's approach overlooked the extensive evidence presented at trial on the changes to the concert industry, which caused the district court to place lesser weight on the older BMI and ASCAP agreements and to emphasize the GMR and SESAC licenses.

c. The Second Circuit's plenary review of the revenue base was also outcome determinative. The district court considered extensive testimony and numerous exhibits in deciding to expand the revenue base from a ticket's face value to include ticketing fees, secondary-market sales, box suites, and VIP packages. Pet.App.68a-70a, 76a-79a. The court heard evidence that this change was appropriate because concert promoters had artificially depressed the face value of tickets by jacking up the cost of these items. *See* Pet.App.61a-62a. As the district court recognized, fans "pay service fees on virtually all tickets." Pet.App.61a. Moreover, Live Nation and AEG executives testified that they were already reporting many of these cash flows to NACPA under the old agreement. Pet.App.77a.

The district court thus found that the measure of what fans pay to receive the product—including the ticket’s face value, secondary-ticket sales, ticketing fees, box suites, and VIP packages—appropriately indicated fair market value. Pet.App.68a (citing *Broad. Music, Inc.*, 316 F.3d at 195; *In re Application of MobiTv, Inc.*, 712 F. Supp. 2d 206, 234 (S.D.N.Y. 2010), *aff’d sub nom. MobiTV II*, 681 F.3d 76 (2d Cir. 2012)). The court declined to add sponsorship revenues to the gross revenue base because that money only “reflect[s] the value of a large, captive audience” to third parties that want to associate their brand with the show. Pet.App.69a.

The Second Circuit reversed those factual findings because, “[h]istorically,” the revenue base included only the tickets’ face value. Pet.App.26a-27a. The Second Circuit believed there was no reason to depart from the revenue base used in past agreements. Pet.App.28a. This finding overlooked the extensive record evidence presented to the district court about how the concert industry—including its ticketing practices—had transformed. *See* Pet.App.61a-62a, 76a-79a. Moreover, this finding required the Second Circuit to reject testimony credited by the district court that some NACPA members already reported an expanded revenue base. Pet.App.77a.

Rather than engage with the record, the Second Circuit instead wielded a 2003 journal article on contracting principles and the concept of “surplus.” Pet.App.30a-31a (quoting Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 Yale L.J. 541, 554 (2003)). Although the court leveraged the article’s “surplus” concept seven times in its opinion, Pet.App.30a-33a, 38a, the parties neither cited that article in their briefs nor introduced it into the record. No expert opined on the “surplus” concept. Indeed, the article’s underlying

theory is contested. *See, e.g.,* Steven J. Burton, *A Lesson on Some Limits of Economic Analysis: Schwartz and Scott on Contract Interpretation*, 88 Ind. L.J. 339, 340 n.8 (2013) (collecting sources critiquing and discussing Schwartz and Scott’s article). The Second Circuit effectively introduced its own, unsworn expert witness on a contested factual issue and used that witness to usurp the record before it. This defies basic principles of appellate review.

Based on that article, the court concluded that the goal of a contract negotiation is to increase the joint surplus created by the contract and then divide the surplus between the contracting parties. Pet.App.30a-31a (discussing Schwartz & Scott, *supra*, at 554). The Second Circuit believed that expanding the revenue base would “reduce the surplus because it is costly to administer.” Pet.App.32a-33a. Given its hypothesis about how the revenue base would affect the so-called “surplus,” the Second Circuit concluded (based on no record evidence) that “[i]n a real-world, arm’s-length negotiation, the PRO would have no incentive to insist on a definition of the revenue base that increases the administrative cost to music users without a corresponding benefit—and that thereby reduces the total surplus value of the licensing agreement.” Pet.App.33a. On that basis, the Second Circuit found the expanded revenue base unreasonable.

Because the Second Circuit’s application of de novo review infected every aspect of its analysis, the question presented is squarely presented and outcome-determinative, providing this Court with a clean vehicle for resolution.

III. The Decision Below Is Manifestly Incorrect

In *U.S. Bank National Association ex rel. CWC Capital Asset Management LLC v. Village at Lakeridge, LLC*,

583 U.S. 387 (2018), this Court established the framework for determining the appropriate standard of review for questions involving both legal and factual issues. When an issue on appeal turns on “case-specific factual issues—compelling [courts] to marshal and weigh evidence, make credibility judgments, and otherwise address ... ‘multifarious, fleeting, special, narrow facts that utterly resist generalization,’” “deference” to the district court is required. *Id.* at 396 (quoting *Pierce v. Underwood*, 487 U.S. 552, 561-62 (1988)).

U.S. Bank confirms that the Second Circuit wrongly applied an inflated standard of review to the fact-laden issues before it. The question before the Second Circuit was, given all the facts, whether the district court set a reasonable rate based on comparable benchmarks for licensing live performances of BMI affiliates’ works. “Just to describe that inquiry is to indicate where it (primarily) belongs: in the court that has presided over the presentation of evidence, that has heard all the witnesses, and that has both the closest and the deepest understanding of the record....” *Id.* at 398.

Each component of the district court’s reasonable-rate determination required finely parsing the record evidence and trial testimony. The district court’s gross-revenue-base determination turned on testimony about changes in the music industry and practices already being undertaken by NACPA’s members. *Supra* pp. 13, 29-30. The district court’s benchmarking analysis turned on dueling expert testimony and the careful examination of over a dozen licensing agreements and the context in which each was negotiated. *Supra* pp. 12-13, 27-28. The district court’s ultimate rate selection turned on its fact-bound assessment of the relevant benchmarks and testimony about licenses in other music-intensive industries. *Supra* pp. 11-12, 28-29. To turn these prototypical factual

issues into legal questions and subject them to plenary review, as the Second Circuit did here, defies the logic of *U.S. Bank*.

In defense of its novel standard of review, the Second Circuit offered that it had previously “articulated legal standards that govern the selection and weighing of benchmarks and the definition of an appropriate revenue base.” Pet.App.22a. Thus, the court concluded, de novo review had to apply. Pet.App.22a-23a. That reasoning overlooks *U.S. Bank*’s mandate that fact-laden determinations must be reviewed deferentially, even if they involve some legal components. 583 U.S. at 395-96.

IV. Alternatively, the Court Should Hold the Petition Pending *RiseandShine Corp.*

At the very least, the Court should hold this petition pending resolution of *RiseandShine Corp. v. PepsiCo, Inc.* That case asks “[w]hether trademark strength is a question of fact in a likelihood-of-confusion analysis under 15 U.S.C. § 1114.” Pet. i, *RiseandShine Corp. v. PepsiCo, Inc.*, No. 24-1016 (U.S. Mar. 19, 2025). *RiseandShine* raises similar questions about the distinction between legal and factual issues and the corresponding effect on the standard of review.

Both *RiseandShine* and this case arise out of the Second Circuit. In *RiseandShine*, the Second Circuit treated trademark strength as a question of law subject to de novo review, a position at odds with that of twelve other circuits. *Id.* at 1-2. So too here, the Second Circuit categorized fair-market-value determinations, and their component parts, as legal questions subject to de novo review. The Second Circuit made the same fundamental error in both cases—torturing archetypal factual questions into legal ones to apply de novo review.

Although the Court should grant this petition for all the reasons stated above, at a minimum it should hold the petition pending its decision in *RiseandShine*, vacate, and remand to the Second Circuit for further consideration of the appropriate standard of review after the Court issues guidance in that case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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