No.

In the
Supreme Court of the United States

INTERCOLLEGIATE BROADCASTING SYSTEM, INC.,
Petitioner,

v.

COPYRIGHT ROYALTY BOARD, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under 17 U.S.C. § 801(a), the Librarian of Congress appoints three Copyright Royalty Judges. The court of appeals held that, under the statute as written by Congress, the Judges are "principal officers" who must be appointed by the President under the Appointments Clause, U.S. Const., art. II, § 2, cl. 2. The court attempted to correct the violation by revising 17 U.S.C. § 802(i) to provide that the Librarian may fire the Judges without cause, which purportedly demoted the Judges to "inferior officers" who may be appointed by the Librarian.

The questions presented are:

1. Whether the court failed to cure the constitutional violation because, despite the judicial revision of the statute, the Judges are principal officers because they retain the power to render a final decision on behalf of the United States.

2. Whether, even if the court's remedy demoted the judges, it failed to cure the constitutional violation because the Librarian of Congress is not the Head of an *Executive Branch* Department and thus may not appoint officers of the United States.

3. Whether, even if the remedy chosen by the court cured the constitutional defect, the court nevertheless should have let Congress select the appropriate remedy.

PARTIES TO THE PROCEEDING

Petitioner Intercollegiate Broadcasting System, Inc. was the appellant in the court of appeals.

Respondents Copyright Royalty Board and Library of Congress were appellees in the court of appeals.

Respondents College Broadcasters, Inc. and SoundExchange, Inc. were intervenors supporting appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner Intercollegiate Broadcasting System, Inc. was incorporated as a non-stock, not-for-profit Rhode Island corporation in 1940. Intercollegiate Broadcasting System, Inc. has no parent companies or subsidiaries.

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The Intercollegiate Broadcasting System, Inc., respectfully petitions for review of the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-23a) is reported at 684 F.3d 1332. The opinion of the Copyright Royalty Board (Pet. App. 24a-184a) is reported at 76 Fed. Reg. 13026-01.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2012. Pet. App. 5a. Petitions for rehearing were denied on August 28, 2012. Pet. App. 1a-4a. On December 17, 2012, the Chief Justice extended the time to file petitions for writs of certiorari to January 25, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted at Pet. App. 185a-198a.

OVERVIEW

Under the Copyright Royalty and Distribution Reform Act of 2004, 17 U.S.C. § 801 *et seq*., the Librarian of Congress appoints three Copyright Royalty Judges ("Judges" or "CRJs"). Among their powers, the Judges set rates and terms for the use of musical works. The statute provides that the Judges "shall have full independence in making determinations concerning adjustments and determinations of copyright royalty rates and terms." 17 U.S.C. § 802(f)(1)(A)(i). The Judges' determinations regarding rates are final decisions of the United States that may not be revised by any

Executive Branch officer, but are subject to review by the D.C. Circuit. 17 U.S.C. § 803(d). Under the statute as written by Congress, the Librarian may fire the Judges only for specified reasons, such as violation of financial conflict of interest standards. 17 U.S.C. § 802(i).

The Appointments Clause provides that only the President may appoint principal officers of the United States, while inferior officers may be appointed by the President, "the Courts of Law," or "the Heads of Departments." There is no dispute that the Judges are *officers* rather than *employees*, in large part because the Judges' decisions "have considerable consequences"—"'billions of dollars and the fates of entire industries can ride on the Copyright Royalty Board's decisions.'" Pet. App. 14a, *quoting SoundExchange, Inc. v. Librarian of Congress*, 571 F.3d 1220, 1226 (D.C. Cir. 2009) (Kavanaugh, J., concurring). Applying the three factors discussed in *Edmond v. United States*, 520 U.S. 651, 665 (1997), the D.C. Circuit determined that under the statute as enacted the Judges are *principal* officers rather than *inferior* officers because they (1) have "vast discretion over the rates and terms" they set, (2) "can be removed by the Librarian only for misconduct or neglect of duty," and (3) make rate determinations that "are not reversible or correctable by any other officer or entity within the executive branch." Pet. App. 16a, 18a, 18a.

The court decided to remedy the Appointments Clause violation it identified by revising the statute to demote the Judges from principal to inferior officer status. The court did so by revising Section

802(i) to provide that the Librarian may remove the Judges without cause and without a hearing. Pet. App. 20a-21a. The court acknowledged that "individual CRJ decisions will still not be directly reversible," *id.* at 21a, but concluded that making the Judges removable without cause effectively demoted them to inferior officer status.

The court went on to determine that the Librarian is the Head of an *Executive Branch* Department and therefore may appoint inferior officers. "To be sure," the court acknowledged, the Library of Congress "performs a range of different functions, including some, such as the Congressional Research Service, that are exercised primarily for legislative purposes." Pet. App. 22a. But the court concluded that the Library of Congress nevertheless is an Executive Branch Department because (1) the President appoints the Librarian and may remove the Librarian at will and (2) some other duties of the Library are "generally associated in modern times with executive agencies rather than legislators." *Id.* at 22a-23a.

Whether the court's revision of the statute succeeded in curing the constitutional error it identified is an issue of exceptional importance warranting review by this Court. In *Edmond*, the Court held that "[w]hat is significant is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." 520 U.S. at 665. Because the Copyright Royalty Judges have the power to render a final decision on behalf of the United States even after the statutory revision by the court of appeals,

the Judges remain principal officers who must be appointed by the President. That conclusion not only follows from *Edmond* but also advances two key purposes of the Appointments Clause. First, the Appointments Clause was adopted to make the President accountable for Executive Branch decisions, and it follows that the President should appoint officials who make final decisions on behalf of the United States. Second, presidential appointment tends to result in higher quality appointees, so officers who make final decisions on behalf of the United States should be presidential appointees.

Even if the court of appeals successfully demoted the Judges to inferior officer status, it does not follow that the Librarian of *Congress* is the head of an *Executive Branch* Department and thus entitled to appoint the Judges. To the contrary, there is good reason to conclude that the Library is part of the *Legislative Branch*. Moreover, if the panel's decision stands, Congress could provide for the Librarian to appoint the members of other federal agencies. Contrary to the intention of the Framers, that would result in a shift of authority from the President to Congress and a diffusion of accountability for the actions of principal officers of the United States.

Finally, whether a court that finds an Appointments Clause violation should leave the remedy to Congress or revise the statute itself is a question of exceptional importance that warrants consideration by this Court. The court of appeals believed it was following this Court's approach in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010). But the

Court held in that case that, although one possible remedy would be to "blue-pencil a sufficient number of the Board's responsibilities so that its members would no longer be 'Officers of the United States,'" such a remedy "belongs to the Legislature, not the Judiciary." 130 S. Ct. at 3162. So too here. The Court should not have attempted to demote the Judges, but should have left it to Congress to fix the Appointments Clause violation.

That is particularly so because Congress amended the statute in 2004 so that copyright royalty decisions would be made by "permanent" panel of judges, 150 Cong. Rec. H9848-01 (daily ed. Nov. 17, 2004) (statement of Rep. Sensenbrenner), with "full independence" in making rate determinations, 17 U.S.C. § 802(f)(1)(A)(i). Because of the "demonstrable congressional interest in assuring the CRJs' independence," the constitutional defect identified by the court should be cured by requiring the President to appoint the Judges rather than by giving the Librarian power to curtail their independence through termination without cause. Recent Cases, *D.C. Circuit Holds Appointment of Copyright Royalty Judges by Librarian of Congress Violates Appointment Clause*, 126 Harv. L. Rev. 834, 839 (2013) ("*Harvard Note*").

STATEMENT

1. As the D.C. Circuit stated, decisions of the Copyright Royalty Judges "have considerable consequences"—"'billions of dollars and the fates of entire industries can ride on the Copyright Royalty Board's decisions.'" Pet. App. 14a, *quoting SoundExchange, Inc. v. Librarian of Congress*, 571

F.3d 1220, 1226 (D.C. Cir. 2009) (Kavanaugh, J., concurring). "The CRJs set the terms of exchange for musical works not only on traditional media such as CDs, cassettes and vinyl, but also on digital music downloaded through iTunes and Amazon.com, digital streaming via the web, rates paid by satellite carriers, non-commercial broadcasting, and certain cable transmissions." Pet. App. 14a. The court noted that royalty payments may constitute half of a firm's cost of doing business. *Id.*, *citing* Pet.'s C.A. Rep. Br. 6-7 (at $62.9 million annually, royalty payments represent more than half of all costs for Pandora Media, Inc., the nation's largest webcaster). In addition to establishing royalty rates and terms, the Judges make determinations concerning the distribution of royalty funds to the owners of copyrights on musical works. 17 U.S.C. § 801(b)(3)(A).

The Copyright Royalty Board is the third entity established by Congress to set royalty rates for musical works. In 1909, Congress first provided a "statutory license" authorizing the use of musical works pursuant to a rate schedule, which Congress set until 1976. Congress then established the Copyright Royalty Tribunal, an independent board whose members were appointed by the President, to set royalty rates. Copyright Act of 1976, Pub. L. No. 94-553, 17 U.S.C. § 802(a). In 1993, Congress dismantled the Tribunal and provided that royalty rates would be set by ad hoc Copyright Arbitration Review Panels, whose members were appointed by the Librarian of Congress. Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198, 17 U.S.C. § 801(2)(a).

In 2004, Congress created the current Copyright Royalty Board. Congress abandoned the ad hoc panels that had been used since 1993, providing for a Board with three Judges serving staggered, six-year terms, in order to "provide greater decisional stability, yielding the advantages of the former Copyright Royalty Tribunal." 70 Fed. Reg. 30901-01 at 30901. But unlike the members of the Tribunal, the members of the Board are not appointed by the President with the advice and consent of the Senate, but instead are appointed by the Librarian of Congress "after consultation with" the Register of Copyrights (a subordinate of the Librarian), and the Board is part of the Library. 17 U.S.C. § 801(a).

Congress also provided for limited oversight of the Judges. For example, the Librarian provides space and administrative resources for the Judges. *Id.*, § 801(d), (e). The Librarian also establishes ethical rules for the Judges and, under the statute as written by Congress, may remove the Judges only for violation of those rules and other specified actions after providing notice and the opportunity for a hearing. *Id.*, § 802(i). The Librarian has no role in reviewing or supervising the rate decisions made by the Judges and may not even provide substantive performance appraisals for the Judges. *Id.*, § 802(f)(2)(a). The Register of Copyrights, who is appointed by the Librarian, provides guidance to the Judges on "novel material questions" of copyright law. *Id.*, § 801(f)(1)(B). And after the Judges set rates, the Register may review the Judges' determinations "for legal error"—but while the Register's decisions are binding precedent in future cases, neither the Register nor the Librarian may

revise the rates established by the Judges. *Id.*, § 802(f)(1)(D).[1]

The statutory provisions governing rate determinations are, as the D.C. Circuit concluded, extremely open-ended. Pet. App. 17a. In the case of webcasting, the service at issue (which is also called "Internet radio" and consists of streaming music channels over the web), the statute provides that rates and terms should be similar to those that "would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. § 114(f)(2)(B). The statute goes on to list multiple factors on which the "Judges shall base their decision." *Id.* Those factors include whether the music service "may substitute for or may promote the sales of" records and compact discs and "otherwise may interfere with … other streams of revenue." *Id.* The Judges are also instructed to evaluate "the relative roles of the copyright owner and the transmitting entity" with respect to "relative creative contribution, technological contribution, capital investment, cost, and risk." *Id.*

The statute grants an extraordinary antitrust exemption permitting the record labels to bargain

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[1] Oddly, the statute provides that the D.C. Circuit, which has exclusive jurisdiction over appeals of decisions of the Board, "may enter its own determination with respect to the amount or distribution of royalty fees and costs." *Id.*, § 803(d)(3). The court of appeals found it unnecessary to consider Petitioner's argument that rate-making authority was "unsuitable for an Article III court" under *Federal Radio Commission v. General Electric Company*, 281 U.S. 464 (1930), because no party asked the court to set rates. Pet. App. 9a-10a.

collectively as a cartel. *Id*., § 114(e)(1). The Department of Justice warned that this exemption risked "great mischief by allowing the formation of a cartel immune from antitrust scrutiny" and would result in a "hefty premium" paid by U.S. consumers.[2]

2. This case results from a Copyright Royalty Board proceeding setting rates for webcasting for 2011 to 2015. Only one substantive issue remains. The hundreds of members of Petitioner Intercollegiate Broadcasting System ("IBS") are colleges and high schools that typically offer students an opportunity to broadcast or webcast as an extra-curricular activity, and more than 80 percent of IBS's members are public institutions. Their webcasting operations often provide music for as little as four hours a day and their audiences may number in the single digits.[3]

The statute provides that the Judges "shall distinguish among the different types" of webcasters

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[2] Letter from Kent Marcus, Acting Assistant Attorney General, U.S. Department of Justice, Office of Legislative Affairs to Senator Patrick Leahy (June 20, 1995), reprinted in 141 Cong. Rec. S11961, S11962 (1995). Other collective bargaining for copyrights has been subject to antitrust remedies rather than exemptions. *United States v. ASCAP*, 1940-43 Trade Cas. ¶56,104 (S.D.N.Y. 1941); *United States v. Broadcast Music, Inc.*, 1940-43 Trade Cas. ¶56,096 (E.D. Wis. 1941).

[3] Universities with large communications programs often require participation in larger-scale broadcasting and webcasting operations with substantial budgets, and they generally are members of respondent College Broadcasters, Inc. rather than petitioner Intercollegiate Broadcasting System.

and "shall include a minimum fee for each such type of service." 17 U.S.C. § 114(f)(2)(B). IBS argued that the Judges should set a lower minimum fee for very small webcasters such as its members. The Judges nevertheless failed to distinguish among webcasters at all with respect to the minimum fee, establishing a $500 annual administrative fee that applies to the largest commercial webcaster with a budget of more than $100 million and the smallest high-school webcaster with practically no budget all. 37 C.F.R. §§ 380.3(b)(1) ($500 fee for commercial webcasters); and 380.3(b)(2) ($500 fee for noncommercial webcasters). Because it found the statute unconstitutional under the Appointments Clause, the court of appeals did not reach the merits of petitioner's argument that the Judges should have set a lower administrative fee for very small webcasters. Pet. App. 23a.[4]

3. a. With respect to the Appointments Clause, the D.C. Circuit began its analysis by noting a lack of clarity under this Court's precedents concerning whether the exercise of "significant authority" matters only when distinguishing between employees and officers or also matters when distinguishing between principal officers and inferior officers. Pet. App. 12a-13a. "In any event," the court

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[4] Petitioner has standing to challenge the judgment. The panel's remedy requires Petitioner to return to argue before a tribunal that is arguably constitutionally defective. Under *Thomas v. Union Carbide Agricultural Products Company*, 473 U.S. 568, 580 (1985), a party has standing to challenge a "tribunal's authority to adjudicate the dispute" if it "has been or inevitably will be subjected to" the tribunal's jurisdiction.

concluded, "assuming that significance of authority has any import beyond setting the threshold for officers, it is a metric on which the CRJs score high." *Id.* at 13a-14a. It was in that connection that the court noted that "billions of dollars and the fates of entire industries can ride on the Copyright Royalty Board's decisions." *Id.* at 14a.

The court then turned to analysis of the three factors discussed by this Court in *Edmond* in the course of determining whether the Coast Guard Judges at issue in that case were principal or inferior officers. The first factor involved the level of supervision of the officers in question. With respect to the Copyright Royalty Judges, the court below noted that the Librarian of Congress has some supervisory authority over the CRJs, such as issuing ethical rules to govern their conduct, but "[n]one of these seems to afford the Librarian room to play an influential role in the CRJs' substantive decisions." Pet. App. 15a-16a. Similarly, the Register of Copyrights provides legal guidance to the Judges, but the Register's authority "leaves vast discretion over the rates and terms" to the CRJs, as do the open-ended statutory ratemaking formulas. *Id.* at 16a. "Thus, the Register's control over the most significant aspect of the CRJs' determinations—the rates themselves—is likely to be quite faint." *Id.* at 17a. And "it is the rate itself … that is of the greatest importance." *Id.* at 18a

The court then determined that "[t]he second *Edmond* factor, removability, also supports a finding that the CRJs are principal officers" because the Judges may be removed only for cause. *Id.* The court noted that the independent counsel in *Morrison v.*

Olson, 487 U.S. 654 (1988), was found to be an inferior officer even though she could be removed only for cause, but said that the Court in *Morrison* "did not hold that such a restriction on removal was generally consistent with the status of inferior officer." Pet. App. 18a.

Third, the court determined that "the CRJs' rate determinations are not reversible or correctable by any other officer or entity within the executive branch." *Id.* The court added that the statute explicitly gives the Judges "'full independence in making determinations concerning adjustments and determinations of copyright royalty rates and terms'" and various other important matters. *Id.* at 19a, *quoting* 17 U.S.C. § 802(f)(1)(A)(i).

Having analyzed these three factors, the court determined that "the CRJs as currently constituted are principal officers who must be appointed by the President and confirmed by the Senate, and that the structure of the Board therefore violates the Appointments Clause." *Id.* at 19a.

b. The court then stated that it "therefore must decide the appropriate remedy to correct the violation." *Id.* at 20a. Without much analysis, the panel simply imported the remedy from *Free Enterprise Fund v. Public Accounting Oversight Board*, 130 S. Ct. 3138 (2010). In that case, this Court concluded that the Board at issue was unconstitutional under separation-of-powers principles because the Board members had two levels of tenure protection—they could be removed only for cause by the Securities and Exchange Commission ("SEC"), whose members could be removed only for cause by the President. The Court remedied the

separation-of-powers problem by striking the provision stating that Board members could be removed only for cause. *See* Pet. App. 20a, *citing Free Enterprise Fund*, 130 S. Ct. at 3161.[5]

In this case, the court selected a remedy for the Appointments Clause violation purportedly modeled on the remedy the Court in *Free Enterprise Fund* used to cure a separation-of-powers violation. The panel said that "invalidating and severing the restrictions on the Librarian's ability to remove the CRJs eliminates the Appointments Clause violation" because "unfettered removal power" gives the Librarian the ability to "exert some 'control' over the Judges' decisions." Pet. App. 20a-21a. The court added that its remedy "minimizes any collateral damage." *Id.* at 20a. The panel recognized that "individual CRJ decisions will still not be directly reversible," but concluded "that free removability constrains their power enough to outweigh the extent to which the scope of their duties exceeds that of the special counsel in *Morrison*." *Id.* at 21a.

c. Having concluded that it had demoted the Judges, the court then turned to whether the Librarian of Congress is a "Head[] of Department[]"

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[5] The Court in *Free Enterprise Fund* went on to reject an Appointments Clause challenge, noting both its decision that separation-of-powers principles compelled the conclusion that the Commission must be permitted to remove Board members at will and "the Commission's other oversight authority." 130 S. Ct. at 3162. As the Court had explained, the Board may not issue rules or impose sanctions without SEC approval, and the SEC may alter rules or sanctions issued by the Board. *Id.* at 3148, *citing* 15 U.S.C. § 7217(b)-(c).

who may appoint inferior officers. The court recognized that this Court held in *Buckley v. Valeo*, 424 U.S. 1 (1976), that "Departments" are agencies that are "in the Executive Branch or at least have some connection with that branch." Pet. App. 22a, *quoting* 424 U.S. at 127.

"To be sure," the court acknowledged, the Library of Congress "performs a range of different functions, including some, such as the Congressional Research Service, that are exercised primarily for legislative purposes." *Id.* at 22a. And the court also acknowledged that it had referred to the Library as a "congressional agency." *Id.*, *citing Keeffe v. Library of Congress*, 777 F.2d 1573, 1574 (D.C. Cir. 1985). But the court concluded that the Library of Congress nevertheless is an Executive Branch Department because (1) the President appoints the Librarian and may remove the Librarian at will and (2) some other duties of the Library are "generally associated in modern times with executive agencies rather than legislators." *Id.* at 23a. The court noted that the Fourth Circuit had reached the same conclusion in *Eltra Corp. v. Ringer*, 579 F.2d 294, 300-01 (4th Cir. 1978). Pet. App. 23a.

d. The court of appeals denied petitions seeking rehearing by the panel and the en banc court. Pet. App. 1a-4a.

REASONS FOR GRANTING THE PETITION

Further guidance from this Court is required concerning application of the Appointments Clause. As an initial matter, the D.C. Circuit stated that it is not clear whether the degree of significance of the authority given an appointee plays a role in

distinguishing principal from inferior officers or matters only with respect to distinguishing officers from employees. Pet. App. 12a-14a. With respect to the three factors discussed by this Court in *Edmond v. United States*, 520 U.S. 651 (1997), in distinguishing principal from inferior officers, the court below read them as establishing a multifactor balancing test with no rules concerning the weight to be given to the different factors. The Court misread *Edmond*. Although the Court examined three factors in that case, it ultimately decided that "[w]hat is significant is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." 520 U.S. at 665. Thus, the Court adopted a clear rule, applicable to the many boards Congress has created in the Executive Branch: If the board in question renders "final decisions" that are legally binding unless reversed by an Article III court, its members are principal officers; if the board's decisions are reversible by a non-judicial officer, the members of the board are inferior officers. If this Court did not establish that test in *Edmond*, it should do so in this case in order to provide clear guidance to Congress and the lower courts. Under that test, the remedy selected by the court of appeals failed to cure the constitutional defect it correctly identified.

If the Court decides that the Judges are inferior officers even though they render final decisions on behalf of the United States, an additional important constitutional question that warrants this Court's review is whether the Librarian of Congress may appoint them. If the Librarian is not a "Head[] of Department[]" for purposes of the Appointments

Clause, the Librarian may not appoint officers of either rank and, for that reason, the remedy selected by the court below failed to cure the constitutional problem it identified. The Librarian is properly viewed as a Legislative Branch officer rather than as an Executive Branch officer for purposes of the Appointments Clause. Among the many reasons to so conclude is that the Library views itself as "the research arm of Congress,"[6] which is sensible since its best-known component is the Congressional Research Service. As a practical matter, Congress's decision to have the Librarian appoint the CRJs diminishes the authority of the President and gives Congress significant authority over the Judges, thus diffusing accountability for their actions. In addition, if Congress may direct the Librarian to appoint the CRJs, it may in the future provide that the Librarian may appoint other officers who issue final decisions on behalf of the United States, further increasing Congress's power relative to the President's.

Whether or not the court of appeals selected a remedy that cured the constitutional problem, this Court should grant certiorari to decide whether the court of appeals should have revised the statute itself or left it to Congress to do so. Again, the lower courts would profit from additional guidance from this Court. As a matter of precedent, *Free Enterprise Fund v. Public Accounting Oversight Board*, 130 S. Ct. 3138 (2010), is properly read to provide that a court should *not* revise a statute to cure a

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[6] Library of Congress, FAQs: What is the Library of Congress?, http://www.loc.gov/about/faqs.html#what_lc (last visited Jan. 17, 2013).

constitutional problem by *demoting* an officer. The Court considered that option in *Free Enterprise Fund* and concluded that only Congress should "blue-pencil a sufficient number of the Board's responsibilities so that its members would no longer be 'Officers of the United States,'" because such a remedy "belongs to the Legislature, not the Judiciary." 130 S. Ct. at 3162. Moreover, the remedy selected in *Free Enterprise Fund* was the most straightforward remedy for the constitutional defect: the problem was two layers of tenure protection and the Court removed one. In this case, in contrast, the fundamental problem is that Congress provided for appointment by the Librarian rather than the President, and the most straightforward remedy would be to amend the statute so that the President appoints the Judges. *Harvard Note*, 126 Harv. L. Rev. at 838 (suggesting "changing the appointment mechanism rather than eliminating the removal restriction"). *But* as in *Buckley v. Valeo*, 424 U.S. 1 (1976)—the only case in which the Court addressed the issue of how to cure an Appointments Clause violation—the choice of remedy should be left to Congress.

I. This Court Should Make Clear That An Officer Who Renders Final Decisions On Behalf Of The United States Is A Principal Officer.

Reading this Court's Appointments Clause decisions as establishing a multifactor balancing test, the court of appeals held that, "[a]lthough individual CRJ decisions will still not be directly reversible," amending the statute to permit the Librarian to fire the Judges without cause made them inferior officers. Pet. App. 21a. The court

asserted that "free removability constrains their power enough to outweigh the extent to which the scope of their duties exceeds that of the special counsel in *Morrison*." *Id.* As is common with balancing tests, the court did not attempt to explain just how it determined which factor outweighed the others. The court's decision is neither consistent with this Court's decision in *Edmond* nor with Congress's goals in establishing the Copyright Royalty Board.

a. The better reading of this Court's precedent is that, even if the statute were amended as prescribed by the court below, the Appointments Clause violation would remain. That is because, although this Court has discussed multiple factors in its decisions, it has determined that one factor is critical with respect to Judges such as the CRJs. Under *Edmond*, the CRJs differ from the Coast Guard Judges at issue in that case in what this Court described as the most significant respect: The CRJs may render final decisions of the United States that are not reviewable by any Executive Branch officer. That factor by itself makes them principal officers who must be appointed by the President without the need for any balancing.

In *Edmond*, the Court held that members of the Coast Guard Court of Criminal Appeals were inferior officers. The Court noted that the Coast Guard Judges were subject to some degree of administrative oversight by the Judge Advocate General, who "'prescribe[s] uniform rules of procedure'" for the Judges and meets with them to "'formulate policies and procedure[s].'" 520 U.S. at 664 (internal citation omitted). The Court also noted that "the Judge Advocate General may also remove a Court of

Criminal Appeals judge from his judicial assignment without cause." *Id*. After making those observations, the Court pointed out that the rulings of the Coast Guard Court of Criminal Appeals are reviewable and reversible by the Court of Appeals for the Armed Forces. *Id*. The Court relied on that factor in holding that the Coast Guard Judges are inferior officers, explaining: "What is significant is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Id*. at 665.

If the statute at issue were amended as ordered by the court below, the Copyright Royalty Judges would be in the same position as the Coast Guard Judges *except* with respect to what the Supreme Court described as the "significant" factor in *Edmond*. Both sets of judges are subject to some degree of administrative oversight and both sets of judges may be removed without cause—in the case of the CRJs, only after judicial amendment of the governing statute. But the CRJs still may "render a final decision on behalf of the United States" without review by any Executive officer. This difference is enough to make the CRJs principal officers even if the statute were amended as provided by the court below. Otherwise there would have been no point to the Supreme Court's statement in *Edmond* that "[w]hat is significant" is that the Coast Guard Judges lack the power to "render a final decision on behalf of the United States." If judges who are subject to some degree of administrative oversight and may be removed without cause are inferior officers, it would not have mattered in *Edmond* that

they lacked power to render a final decision on behalf of the United States—but it was the *deciding* factor.

b. In the case of tribunals such as the Copyright Royalty Board, it makes practical sense to emphasize whether their members render final decisions on behalf of the United States in determining whether they are principal or inferior officers. An officer who does not render final decisions is plainly inferior as a practical matter. In contrast, an officer who renders final decisions that are binding law in the absence of invalidation by a court has no superior in the Executive Branch. The President should appoint officers who render final decisions on behalf of the United States because a key purpose underlying the Appointments Clause is to make the President accountable for decisions of the Executive Branch. *See Edmond*, 520 U.S. at 660 (quoting Alexander Hamilton's statement that, under the Appointments Clause, the President would have reason to make good appointments because "[t]he blame of a bad nomination would fall upon the president singly and absolutely"). In addition, as the Court explained in *Edmond*, "vesting the President with the exclusive power to select the principal (noninferior) officers of the United States … was also designed to assure a higher quality of appointments." *Id.* at 659. It is sensible that officers who make final decisions on behalf of the United States should be of the highest quality.

It is true that providing for termination at will impinges on an officer's authority and hence makes the officer inferior to some extent. But exercising control by means of firings is a bad fit for quasi-judicial officers such as the Copyright Royalty

Judges. Such officers are meant to render expert decisions on the basis of a record compiled for that purpose. And they are meant to do so lawfully—that is, free from pressure to decide a particular case in a particular way. Here, for example, the Judges are meant to have "full independence" in making rate decisions. 17 U.S.C. § 802(f)(1)(A)(i). If their rate decisions are to be subject to review, they should be reviewed by a superior that conducts an appellate-type review. It is not sensible to have their rate decisions "reviewed" by means of occasional terminations by a Librarian who is displeased with the result but lacks authority to compile a record for review and reverse the rates at issue. It would be as if a court of appeals could not obtain briefing from the parties or overturn a district court decision, but nevertheless could fire a district court judge without providing reasons for doing so.

Moreover, under the court of appeals' ruling it would be possible for Congress to create new boards and agencies whose members have extensive powers, including the power to render final decisions on behalf of the United States, as a component of a larger agency, and have their members appointed and removable by someone other than the President. *See Free Enterprise Fund v. Public Company Accounting Oversight Board*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) ("[U]pholding the PCAOB here would green-light Congress to create a host of similar entities."). And it would be permissible for the larger agency to be closely associated with Congress, like the Library of Congress. It is possible that some Presidents might not oppose such incursions on Executive authority, since a President who did not appoint an official is

not clearly to blame for the official's decisions. *See Free Enterprise Fund*, 130 S. Ct. at 3155 ("Perhaps an individual President might find advantages in tying his own hands"). But constitutional principles do "not depend on the views of individual Presidents." *Id.*, *citing Freytag v. Commissioner*, 501 U.S. 868, 879-80 (1991).

Some officers who do not issue decisions that have the force of law nevertheless may be principal officers. For example, the Solicitor General "may well be a principal officer." *Edmond*, 520 U.S. at 668 (Souter, J., concurring). Thus, the rule of *Edmond* may not provide a clear dividing line for all officers of the United States, including officers such as the Solicitor General or the independent counsel at issue in *Morrison*, neither of whom issue decisions that have the force of law absent reversal by an Article III court. But that is not a reason not to make clear that officers who do issue final judgments are principal officers. There would be virtue to a clear rule that covers the members of the large number of entities such as the Copyright Royalty Board and the Coast Guard Court of Criminal Appeals that issue judgments, some of which are final and some of which are not final because they are subject to reversal by higher Executive Branch officers before becoming final.

II. This Court Should Determine Whether The Librarian Of Congress Is The Head Of An Executive Or Legislative Department.

If the Court concludes that the Copyright Royalty Judges are inferior officers if they may be removed from office without cause, that does not end the Appointments Clause inquiry. Rather, it raises the

question whether the Librarian is the head of an *Executive Branch* Department. That question would be raised because the Appointments Clause provides that the power to appoint inferior officers may be vested "in the President alone, in the Courts of Law, or in the Heads of Departments." The Librarian is plainly not the President or a Court of Law, and this Court held in *Buckley*, 424 U.S. at 127, that, for purposes of the Appointments Clause, a Department is an agency "in the Executive Branch or at least hav[ing] some connection with that branch." This issue warrants review by this Court because permitting the Librarian of Congress to appoint principal officers would skew the constitutional balance of power from the Executive to the Legislative Branch in a manner not intended by the Framers.

The court below acknowledged that the Congressional Research Service performs a legislative function, Pet. App. 22a-23a, but treated that function as simply one of many. Yet it is the defining characteristic of the Library, which calls itself "the research arm of Congress" and states that its "mission is to support the Congress in fulfilling its constitutional duties."[7] In addition, the Library is governed by Title II of the United States Code—"The Congress"—and funded by "appropriations for the legislative branch." 2 U.S.C. § 132a-1. Accordingly, the Library "is exempt from the APA because its provisions do not apply to 'the Congress'—that is, the

[7] *See* Library of Congress, About the Library, Welcome Message from the Librarian of Congress, www.loc.gov/about/ (last visited Jan. 17, 2013).

legislative branch." *Washington Legal Foundation v. U.S. Sentencing Comm'n*, 17 F.3d 1446, 1449 (D.C. Cir. 1994).

The court below concluded that the Librarian is the Head of an Executive Branch Department primarily because the Librarian "is appointed by the President … and is subject to unrestricted removal by the President." Pet. App. 22a. But that merely establishes that the Librarian is a principal officer. The court below also stated that some of the Library's duties are "generally associated in modern times with executive agencies." *Id.* The court described ratemaking as one of those executive duties.[8] It said that "[i]n this role the Library is undoubtedly a 'component of the Executive Branch.'" *Id*. (citation omitted). This Court should determine whether it is constitutionally permissible for an official such as the Librarian to be part of the Executive Branch one minute—if, as the court below stated, ratemaking is an executive function—and part of the Legislative Branch the next minute—as the Librarian undoubtedly is when, for example, overseeing the Congressional Research Service.

Moreover, the Department of Justice's own logic shows that the Librarian is not an Executive Branch

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[8] However, this Court has stated as recently as 1989 that "rate-making power is a legislative power." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 313 (1989). *See also New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 371 (1989) ("[t]he establishment of a rate is the making of a rule for the future, and therefore is an act legislative … in kind" (internal citation omitted)).

official. The Constitution, in the Opinions in Writing Clause, U.S. Const., art. II, § 2, cl. 1, authorizes the President alone to "require the Opinion, in writing, of the principal Officer in each of the executive Departments." The Office of Legal Counsel has long and consistently argued that separation of powers principles and the President's constitutionally guaranteed "right to control the actions and duties of his subordinates within the Executive Branch" entitle the President to review reports of executive agencies before dissemination to Congress. *See* Constitutionality of Statute Requiring Executive Agency to Report Directly to Cong., 6 Op. O.L.C. 632, 637 (1982).[9] Conversely, where a "report would be prepared principally for Congress' benefit, with the President as an incidental recipient," the Department of Justice has determined that an agency is *not* part of the Executive Branch for such purposes. Status of the Comm'n on R.R. Ret. Reform for Purposes of the Applicability of Ethics Laws, 13 Op. O.L.C. 285, 3 (1989). Accordingly, when Congress directs an Executive Branch officer to

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[9] *See also* Constitutionality Of Direct Reporting Requirement In Section 802(e)(1) Of The Implementing Recommendations Of The 9/11 Commission Act Of 2007, 32 Op. O.L.C. 1 (January 29, 2008); Status of the Comm'n on R.R. Ret. Reform for Purposes of the Applicability of Ethics Laws, 13 Op. O.L.C. 285 (1989); Inspector General Legislation, 1 Op. O.L.C. 16, 17-18 (1977) (concurrent reporting requirements in inspector general legislation offends President's Article II power to direct); and *Myers v. United States*, 272 U.S. 52, 163-64 (1926) ("Article II grants to the President the executive power of the Government, *i.e.*, the general administrative control of those executing the laws.").

report to Congress, the President and the Department of Justice construe such directions to mean that Congress has requested the officer to report, and the President generally will permit the officer to provide the report only after ensuring that it reflects the views of the Executive Branch. *See*, *e.g.*, 42 Weekly Comp. Pres. Doc. 1742, 1743 (Oct. 4, 2006) (Presidential Signing Statement construing a provision of the Department of Homeland Security Appropriations Act of 2007 consistently with the President's authority "to require the opinions of heads of departments and to supervise the unitary executive branch").

Therefore, it would be contrary to the Executive Department's view to permit the Librarian to report to Congress without review by the President. Yet that is what 2 U.S.C. § 166 requires. That provision contains a plethora of directions to the Congressional Research Service to provide written reports. For example, Section 166(d)(7) requires the Service, upon request by a congressional committee or Member of Congress, "to prepare and transmit to such committee or Member a concise memorandum with respect to one or more legislative measures upon which hearings by any committee of the Congress have been announced, which memorandum shall contain a statement of the purpose and effect of each such measure." No creative construction can interpret such measures to permit the President to review and revise such memoranda before they are sent to Congress. But if the Librarian is the Head of an Executive Branch Department, according to the Department of Justice Congress may *not* obtain the views of the Librarian or the Librarian's subordinates in the Congressional Research Service

because the President controls the views that may be provided by an Executive Branch officer. The absurdity of this conflict is especially evident where memoranda by the Congressional Research Service directly contradict written opinions of the Department of Justice. *See* Auth. of Agency Officials to Prohibit Employees from Providing Info. to Cong., 2004 WL 3554702 (U.S.A.G. May 21, 2004) (disputing a memorandum by the Congressional Research Service regarding the authority of Executive Branch officers in the Department of Health and Human Services). It would be flatly inconsistent with the role of the Congressional Research Service for the President to control its communications with Congress.

As a practical matter, allowing the Librarian to hire and fire officers such as the Copyright Royalty Judges would transfer power from the Executive Branch to the Legislative Branch and make it difficult for the public to determine who is accountable for their decisions. Through the Congressional Research Service and many of its other components, the Library of Congress works closely with Congress. For that reason, the Librarian is likely to be especially sensitive to the views of the Legislative Branch. Unlike Cabinet officers, incoming Presidents do not generally replace Librarians—in fact, since 1800 there have been only 13 Librarians of Congress, meaning that, on average, they serve longer terms than Chief Justices, and the current Librarian has served since 1987.[10] It is true

[10] *See* Library of Congress, About the Library, About the Librarian, http://www.loc.gov/about/librarianoffice/ (last visited Jan. 18, 2013.

that it is the President who has the power to remove the Librarian from office—and Presidents Jackson and Lincoln exercised that authority—but Congress would not stand for a Librarian who was not focused primarily on meeting its needs. Accordingly, the Librarian is simply far more likely to pay attention to the views of members of Congress with respect to matters such as copyright royalty rates, if rates are set by a Board within the Library whose members the Librarian appoints, than would a Cabinet Secretary if the Copyright Royalty Board were housed there. Similarly, members of a free-standing board such as the prior Copyright Royalty Tribunal would be less subject to influence by Congress than members of a Board housed in the Library of Congress. Moreover, if the Board may be housed in the Library of Congress and its members appointed by the Librarian, then so may other agencies and agencies Congress has yet to create, resulting in an impermissible shift in power from the Executive to the Legislative Branch and further diffusion of accountability for agency action.

III. This Court Should Hold That Appellate Judges Should Not Demote Officers, But Instead Should Let Congress Decide How To Fix Appointments Clause Violations.

The court of appeals deleted "all of the language in 17 U.S.C. § 802(i) following 'The Librarian of Congress may sanction or remove a Copyright Royalty Judge.'" Pet. App. 20a. Thus, the court blue-penciled the statute to eliminate the provisions that the Judges may be removed only for specified reasons and only after specified procedures have been followed. The intended effect of the deletion was to change the status of the Copyright Royalty Judges

from principal officers of the United States to inferior officers. This Court should address the circumstances under which courts should attempt to fix constitutional defects and the circumstances under which courts should let Congress amend a statute, and hold in this case that the court of appeals should not have taken the unprecedented step of attempting to demote the Judges.

In the only other case in which this Court has found an Appointments Clause violation, *Buckley v. Valeo*, the Court left the remedy to Congress. After finding that the members of the initial version of the Federal Election Commission had not been appointed in conformity with the Appointments Clause, the Court did not rewrite the statute. Instead, it decided to "stay, for a period not to exceed 30 days, the Court's judgment insofar as it affects the authority of the Commission to exercise" its duties and powers, explaining that "[t]his limited stay will afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms." 424 U.S. at 142-43. The Court invoked the *de facto* officer doctrine and precedent from apportionment and voting rights cases as the basis for its authority to grant this limited relief. *Id.* And, of course, the issuance of a stay is a traditional judicial remedy, unlike the revision of a statute.

The court of appeals should have taken the same course here. Congress reconstituted the Federal Election Commission after the Supreme Court's decision in *Buckley*, and Congress can reconstitute the Copyright Royalty Board as well. The court below did not cite *Buckley*—the only precedent

governing how to remedy an Appointments Clause violation—or explain why it was not leaving the choice of remedy to Congress. Nor did it acknowledge that it was the first Court to demote officers created by Congress as principal officers to the status of inferior officers. The panel should not have taken this unprecedented step. Moreover, after the Supreme Court's decision in *Buckley*, Congress fixed the problem with the Federal Election Commission by providing that its members are appointed by the President, and that would be the most straightforward remedy here. Congress created the Copyright Royalty Judges as principal officers, principal officers must be appointed by the President, and Congress regularly provides for presidential appointment of the members of tribunals that make important regulatory decisions.

The court below explained its choice of remedy by stating that it "minimizes any collateral damage" and is the same remedy this Court chose in *Free Enterprise Fund*. Pet. App. 20a. As an initial matter, Congress is free to make amendments in the most appropriate form, whether or not that involves adding words, deleting more words than a court is comfortable deleting, or making other changes that a court might view as "collateral damage."

More importantly, the court's remedy conflicts with Congress's goals in creating the Copyright Royalty Board. In passing the Copyright Royalty and Distribution Reform Act of 2004, one of Congress's primary goals was to remedy a flaw in the prior system—namely, that copyright royalties were set by "ad hoc" panels that produced "unpredictable and inconsistent" decisions. 150 Cong. Rec. H9848-01

(daily ed. Nov. 17, 2004) (statement of Rep. Sensenbrenner). Congress's solution was to provide for the appointment of "permanent copyright royalty judges." *Id.* ("Among other things, H.R. 1417 addresses the uniform complaint that CARP decisions are unpredictable and inconsistent. This is generally accomplished by changing the structure from one featuring ad hoc arbitration panels to one comprised of three permanent copyright royalty judges."). In rewriting the statute to permit the Librarian to fire the Judges at will, the court below ignored this principal goal of Congress.

Moreover, Congress plainly intended to create an expert body to set rates for the exchange of musical works, and an expert board is most likely to result from a presidential appointment requirement. As the Court explained in *Edmond*, "vesting the President with the exclusive power to select the principal (noninferior) officers of the United States … was also designed to assure a higher quality of appointments." 520 U.S. at 659. As the federal judiciary illustrates, Presidential appointment combined with tenure protections has proven to produce appointees of the highest quality.

In addition, Congress intentionally changed the statute, which previously gave the Librarian authority to review and revise royalty determinations, Pub. L. No. 103-198 (1993), 17 U.S.C. § 801(f), so that the CRJs have "full independence" in making rate determinations, 17 U.S.C. § 801(f)(1)(A)(i). In short, "[o]ne of Congress's objectives was to insulate the CRJs from sources of potential political pressure and allow the CRJs to make determinations on the basis of their expertise,"

Harvard Note, 126 Harv. L. Rev. at 839, and it is inconsistent with that objective to authorize the Librarian to terminate the Judges as a means of controlling their rate determinations.

The panel emphasized that this Court in *Free Enterprise Fund* did revise the statute at issue. But unlike *Buckley*, *Free Enterprise Fund* did not involve an Appointments Clause violation. Nor did the Court adopt the extraordinary remedy of demoting officers of the United States. And the remedy the Court adopted plainly was the most straightforward remedy for the separation-of-powers problem it addressed—the problem was two layers of tenure and the Court removed one. In this case, in contrast, the problem involves principal officers who were not appointed by the President and the most straightforward remedy would be to require appointment by the President. In addition, as explained above, the remedy selected by the court of appeals conflicts with Congress's goal of establishing a permanent, expert body with full independence in setting rates. *See Harvard Note*, 126 Harv. L. Rev. at 838 ("The D.C. Circuit's remedy is an extension, not an application, of the Supreme Court's decision in *Free Enterprise Fund*.")

Moreover, in *Free Enterprise Fund* the Court noted that one possible remedy would be to "blue-pencil a sufficient number of the Boards' responsibilities so that its members would no longer be 'Officers of the United States.'" 130 S. Ct. at 3162. But the Court stated that such a remedy "belongs to the Legislature, not the Judiciary." *Id.* Accordingly, in *Free Enterprise Fund* the Court explicitly rejected

use of a remedy that had the effect of demoting the officers in question.

The law would profit from consideration by this Court of the principles governing whether and when courts should revise statutes to correct constitutional defects. Such review should lead to the conclusion that, in an Appointments Clause case where Congress wanted to improve the quality of the judges setting royalty rates, the court should have left the choice of remedy to Congress rather than attempt to demote the Copyright Royalty Judges themselves.

CONCLUSION

The petition for a writ of certiorari should be granted.

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