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No. 12-928

In the Supreme Court of the United States

INTERCOLLEGIATE BROADCASTING SYSTEM, INC.,
PETITIONER

v.

COPYRIGHT ROYALTY BOARD, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The Copyright Royalty Board is an administrative tribunal within the Library of Congress that has been charged by Congress with setting the rates and terms for statutory copyright licenses. The Board comprises three Copyright Royalty Judges (CRJs) who are appointed by the Librarian of Congress. The questions presented are as follows:

1. Whether the CRJs are "inferior Officers" for purposes of the Appointments Clause if they are made subject to removal at will by the Librarian.

2. Whether the Library of Congress is a "Department" under the Appointments Clause, allowing Congress to vest the Librarian with the power to appoint inferior officers.

3. Whether the court of appeals possessed the authority to remedy a constitutional violation by severing the for-cause restrictions on the removal of CRJs in 17 U.S.C. 802(i).

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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. 13,026.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2012. A petition for rehearing was denied on August 28, 2012 (Pet. App. 1a-4a). On November 16, 2012, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 26, 2012. On December 17, 2012, the Chief Justice further extended the time to January 25, 2013, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Appointments Clause of the Constitution (Art. II, § 2, Cl. 2) provides as follows:

> and [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

STATEMENT

1. This case involves an appeal of a final ratemaking determination by the Copyright Royalty Board, an administrative tribunal established within the Library of Congress in 2004, which sets and adjusts the rates and terms for statutory copyright licenses and provides for the distribution of royalties collected under certain statutory copyright licenses.[1] See Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341 (17 U.S.C. 801 *et seq.*). Ratemaking proceedings before the Board take the form of multi-

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[1] Under the Copyright Act, 17 U.S.C. 101 *et seq.*, a "statutory license" grants access to a copyrighted work to any person who satisfies conditions set by law, including payment of a defined royalty. Statutory licenses apply only to specific uses of copyrighted works, such as the retransmission of over-the-air television content by cable operators (17 U.S.C. 111), the use of musical, pictorial, graphic, and sculptural works by public broadcasting entities (17 U.S.C. 118), and, as relevant here, the making of ephemeral recordings (17 U.S.C. 112) and the public performance of sound recordings by means of a digital audio transmission (17 U.S.C. 114). See Pet. App. 24a-25a.

party administrative hearings, during which participating parties introduce evidence to support competing rate proposals. See 17 U.S.C. 803(b); 37 C.F.R. Pt. 351. As relevant here, the Board is required to repeat those proceedings every five years. See 17 U.S.C. 804(b).

The Board comprises three Copyright Royalty Judges (CRJs), who are appointed to staggered six-year terms by the Librarian of Congress, who is himself appointed by the President with the advice and consent of the Senate. 17 U.S.C. 801(a), 802(c) and (d); 2 U.S.C. 136. The statute provides that the Librarian may, after notice and a hearing, "sanction or remove a [CRJ] for violation of the standards of conduct adopted [by the Librarian]," or for "misconduct, neglect of duty, or any disqualifying physical or mental disability." 17 U.S.C. 802(i). After the end of a six-year term, the Librarian may decline to reappoint a CRJ for any reason.

The statute requires the CRJs, *inter alia*, to "act in accordance with regulations issued by * * * the Librarian of Congress." 17 U.S.C. 803(a)(1). Before the Board may issue any procedural regulations, including rules governing royalty ratemaking proceedings, the regulations must be approved by the Librarian. 17 U.S.C. 803(b)(6). The Librarian is empowered to prescribe standards of conduct for the CRJs. 17 U.S.C. 802(h). The CRJs rely on the Librarian for administrative resources and physical space. 17 U.S.C. 801(d) and (e). If the CRJs find themselves idle between ratemaking proceedings, they may be assigned other duties by the Register of Copyrights. 17 U.S.C. 801(b)(8). The Register is appointed by the Librarian and acts "under the Librarian's general direction and supervision." 17 U.S.C. 701(a).

When making determinations concerning adjustments and determinations of copyright royalty rates and terms, the CRJs are accorded "full independence," 17 U.S.C. 802(f)(1)(A)(i), but Congress expressly limited that independence by subjecting the CRJs to the supervision and control of the Register of Copyrights with respect to substantive issues of copyright law, including the statutory provisions governing the CRJs' ratemaking determinations. 17 U.S.C. 802(f)(1)(A)(ii), (B), and (D). Whenever a "novel material question" of substantive law arises during the course of a proceeding, the CRJs are required to "request a decision of the Register of Copyrights * * * to resolve [the] novel question" and then to "apply the legal determinations embodied in the [Register's] decision." 17 U.S.C. 802(f)(1)(B).[2]

Once the CRJs make a final determination regarding royalty rates and terms or any other matter committed to them, the Register is authorized to "review for legal error" material questions of substantive copyright law involved in the final determination. 17 U.S.C. 802(f)(1)(D). If the Register finds any material legal error, she issues a written decision "correcting [the] legal error." *Ibid.* The Register's decision, which is published in the *Federal Register*, becomes part of the record of the proceeding and is also "binding as precedent" on the CRJs in subsequent proceedings. *Ibid.*; see *SoundExchange, Inc.* v. *Librarian of Cong.*, 571 F.3d 1220, 1225-1226 (D.C. Cir. 2009) (remanding to the

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[2] If a material question of substantive copyright law is not novel, the CRJs may request an interpretation of the law from the Register, which is likewise binding on them. 17 U.S.C. 802(f)(1)(A)(ii). The Register's authority to resolve questions of substantive law does not extend to deciding "ultimate adjustments and determinations of copyright royalty rates and terms." *Ibid.*

Board in light of the Register's determination that the CRJs erred in failing to set a particular rate).

2. The Board decision challenged here established rates and terms for the statutory license for webcasting (*i.e.*, for the noninteractive transmission of copyrighted sound recordings over the internet). Pet. App. 24a; see 17 U.S.C. 112(e)(4), 114(d)(2), and (f)(2). As relevant here, the Board adopted a rate requiring noncommercial educational webcasters like those represented by petitioner to pay an annual flat fee of $500 per channel for a license authorizing the webcasting of unlimited amounts of music, so long as their listenership remained below a certain cap.[3] Pet. App. 83a-90a.

3. Petitioner appealed the Board's determination to the court of appeals, Pet. App. 9a, contending, as relevant here, that the Board's structure violates the Appointments Clause (U.S. Const. Art. II, § 2, Cl. 2) for two reasons: first, because the CRJs' "exercise of significant ratemaking authority, without any effective means of control by a superior * * * , qualifies them as 'principal' officers who must be appointed by the President with Senate confirmation"; and second, because, "even if the [CRJs] are 'inferior' officers, the Librarian of Congress is not a 'Head of Department' in whom Congress may vest appointment power." Pet. App. 11a.[4] The court of appeals vacated and remanded the Board's determination. *Id.* at 5a-23a.

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[3] The cap was set at 159,140 aggregate tuning hours per month. Pet. App. 87a-88a. The phrase "aggregate tuning hours" refers to the total hours of programming transmitted to all listeners during the relevant time period for which a statutory license royalty is required. 37 C.F.R. 380.2.

[4] Petitioner also raised challenges to the merits of the rates set by the Board and contended that the statute impermissibly gave the

a. The court of appeals held that the statutory structure of the Board "violates the Appointments Clause" because the extent of the authority conferred on the CRJs, combined with the limitations on the Librarian's power to supervise their exercise of that authority, meant that they were "principal officers who must be appointed by the President and confirmed by the Senate." Pet. App. 19a.

The court of appeals explained that the CRJs exercise significant authority, including the authority to make rate determinations involving billions of dollars of royalties. Pet. App. 13a-14a. The court then considered whether they are "inferior" officers under *Edmond* v. *United States*, 520 U.S. 651 (1997), which identified the relevant inquiry as whether an officer's "work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." Pet. App. 14a-15a (quoting *Edmond*, 520 U.S. at 663). In applying that standard, the court of appeals considered three factors "emphasized" in *Edmond*. *Id.* at 15a.

First, the court of appeals concluded that "the CRJs are supervised in some respects by the Librarian and by the Register of Copyrights, but in ways that leave broad discretion." Pet. App. 15a. While the court found that the Register's role in interpreting the copyright laws is "a non-trivial limit on the CRJs' discretion," it also found that "the Register's control over the most significant aspect of the CRJs' determinations—the rates themselves—is likely to be quite faint," because the

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court of appeals the power to enter its own ratemaking determination, but the court found it unnecessary to address those arguments, Pet. App. 6a, 10a, 23a, and they are beyond the scope of the questions presented in this Court.

statutory standards governing ratemaking formulas are "open-ended" and "do[] not provide much constraint." *Id.* at 16a, 17a, 18a.

Second, the court of appeals considered the power to remove the CRJs and found that, because the CRJs can be "removed by the Librarian only for misconduct or neglect of duty," that "supports a finding that the CRJs are principal officers." Pet. App. 18a.

Third, the court of appeals considered whether the CRJs' determinations are "reversible or correctable by any other officer or entity within the executive branch." Pet. App. 18a. The court concluded that, although the CRJs' "procedural rules are reviewed by the Librarian, and their legal determinations by the Register," the statute still affords them "'full independence in making [rate] determinations.'" *Id.* at 18a-19a (quoting 17 U.S.C. 802(f)(1)(A)(i)). It thus found that, "unlike the judges in *Edmond*, the CRJs issue decisions that are final for the executive branch, subject to reversal or change only when challenged in an Article III court." *Id.* at 19a (citation omitted).

b. Having found that the statutory method for appointing CRJs is inconsistent with the Appointments Clause, the court of appeals next considered "the appropriate remedy to correct the violation." Pet. App. 20a. In that regard, the court "follow[ed] th[is] Court's approach in *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010), by invalidating and severing the restrictions on the Librarian of Congress's ability to remove the CRJs." Pet. App. 6a. As the court of appeals explained, in *Free Enterprise Fund*, this Court held that the structure of the Public Company Accounting Oversight Board (PCAOB) violated Article I's Take Care Clause, but, "[r]ather than

finding all authority exercised by the PCAOB to be unconstitutional," this Court "held that invalidating and severing the problematic for-cause [removal] restriction was the solution best matching the problem and preserving the remainder intact." *Id.* at 20a (citing 130 S. Ct. at 3151-3154, 3161). The court of appeals found that a similar remedy here—eliminating the for-cause restrictions on the Librarian's power to remove CRJs—would suffice to "eliminate[] the Appointments Clause violation and minimize[] any collateral damage." *Ibid.*; see *id.* at 11a ("[W]e * * * provide a remedy that cures the constitutional defect with as little disruption as possible."). The court therefore found "unconstitutional all of the language in 17 U.S.C. § 802(i) following 'The Librarian of Congress may sanction or remove a Copyright Royalty Judge[.]'" *Id.* at 20a.

The court of appeals explained that severing the for-cause restrictions on the removal power was sufficient to render the CRJs inferior officers for Appointments Clause purposes because "unfettered removal power" would give the Librarian "the direct ability to 'direct,' 'supervise,' and exert some 'control' over the [CRJs'] decisions." Pet. App. 20a-21a (citing *Edmond*, 520 U.S. at 662-664). The court further concluded that "free removability constrains [the CRJs'] power enough to outweigh the extent to which the scope of their duties exceeds that of the special counsel in *Morrison* [v. *Olson*, 487 U.S. 654 (1988)]." Pet. App. 21a.

c. Having concluded that the CRJs "become validly appointed inferior officers" in light of its remedy, the court of appeals next considered whether the Librarian is a "'Head of Department' within the meaning of the Appointments Clause," and could therefore be vested with the power to appoint inferior officers. Pet. App.

21a-22a. Relying on this Court's decisions in *Free Enterprise Fund* and *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), the court of appeals concluded that the Librarian is a Head of Department. Pet. App. 22a-23a. The court explained that, although the Library of Congress performs different functions, including some "that are exercised primarily for legislative purposes," it "is a freestanding entity that clearly meets the definition of 'Department.'" *Id.* at 22a. The court noted that "the Librarian is appointed by the President with advice and consent of the Senate, and is subject to unrestricted removal by the President." *Ibid.* (citations omitted). Moreover, the "powers in the Library and the Board to promulgate copyright regulations, to apply the statute to affected parties, and to set rates and terms case by case are ones generally associated in modern times with executive agencies rather than legislators." *Id.* at 22a-23a. "In this role," the court explained, "the Library is undoubtedly a 'component of the Executive Branch.'" *Id.* at 23a (citing *Free Enter. Fund*, 130 S. Ct. at 3163). It also observed that the Fourth Circuit had previously reached the same conclusion. *Ibid.* (citing *Eltra Corp.* v. *Ringer*, 579 F.2d 294, 300-301 (4th Cir. 1978)).

Having remedied the constitutional problem it had identified, the court of appeals vacated and remanded the Board's underlying rate determination in this case because "the Board's structure was unconstitutional at the time it issued [that] determination." Pet. App. 23a.

ARGUMENT

The court of appeals invalidated the for-cause limitation on the Librarian's statutory power to remove the CRJs, severed that provision from the remainder of the statute, and remanded for further proceedings pursuant to a statutory framework under which the CRJs are

subject to at-will removal by the Librarian (in addition to the other forms of control and review that the statute provides to the Librarian, including through the Register of Copyrights).[5] Petitioner contends that the CRJs remain principal officers even when subject to those forms of control and review (Pet. 18-23); that the Librarian is not a "Head[] of Department[]" for purposes of the Appointments Clause (Pet. 23-29); and that the court of appeals lacked the authority to sever the for-cause-removal restriction (Pet. 29-34). The court of appeals properly rejected each of those contentions, and its decision does not conflict with any decision of this Court or of any other circuit. Further review is unwarranted.

1. The Appointments Clause authorizes Congress to "vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. Art. II, § 2, Cl. 2. As this Court has explained: "Whether one is an 'inferior' officer depends on whether he has a superior." *Edmond* v. *United States*, 520 U.S. 651, 662 (1997); see *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3162 (2010). Petitioner contends (Pet. 19) that, even though the CRJs are subject to at-will-removal authority in light of the court of appeals' remedy, they are still principal rather than inferior officers, simply because they "may render final decisions of the United States that are not reviewable by

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[5] Consistent with 28 U.S.C. 530D, on January 11, 2013, the Attorney General notified Congress that the government would not seek review of, but rather accepted the correctness of, the court of appeals' invalidation of part of 17 U.S.C. 802(i). The Attorney General further informed Congress that the Department of Justice would defend the court's decision against any further challenge by petitioner.

any Executive Branch officer." Petitioner does not suggest that there is any conflict in the courts of appeals with respect to that analysis, but it asserts (*ibid.*) that, under this Court's decision in *Edmond*, the supposed nonreviewability of the CRJs' individual ratemaking decisions is the "one," "critical" factor that is sufficient "by itself" to determine that "Judges such as the CRJs" are principal officers. That conclusion is unfounded.

a. As an initial matter, there is no basis for petitioner's attempt to dismiss the significance of at-will removal. The relevant question is whether the CRJs' "work is directed and supervised *at some level* by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond*, 520 U.S. at 663 (emphasis added). In making such determinations, this Court has repeatedly emphasized that "'[t]he power to remove officers' at will and without cause 'is a powerful tool for control' of an inferior." *Free Enter. Fund*, 130 S. Ct. at 3162 (quoting *Edmond*, 520 U.S. at 664); see *Myers* v. *United States*, 272 U.S. 52, 117 (1926); *United States* v. *Allred*, 155 U.S. 591, 594 (1895); *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839). In *Edmond* itself, the existence of the Judge Advocate General's power to "remove a [Coast Guard] Court of Criminal Appeals judge from his judicial assignment without cause" was one of the factors that the Court discussed in holding that the judges were inferior officers. 520 U.S. at 664. The court of appeals here appropriately recognized that vesting "unfettered removal power" in the Librarian would provide him with "the direct ability to 'direct,' 'supervise,' and exert some 'control' over the [CRJs'] decisions." Pet. App. 20a-21a.

b. Petitioner's contrary argument depends (Pet. 20-21) entirely on *Edmond*'s discussion of an additional

consideration: that the Coast Guard Court of Criminal Appeals judges at issue there had "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. But *Edmond* did not expressly make that a necessary condition for inferior-officer status. Moreover, the additional layer of Executive review on which *Edmond* relied was not unlimited. The Judge Advocate General—who otherwise exercised "administrative oversight over the Court of Criminal Appeals"—was entirely barred from "attempt[ing] to influence (by threat of removal or otherwise) the outcome of individual proceedings and ha[d] no power to reverse decisions of the court." *Id.* at 664 (citation omitted). Although the Court of Appeals for the Armed Forces (another Executive entity) was able to review decisions of the Court of Criminal Appeals, that review was obligatory only in death-penalty cases and where ordered by the Judge Advocate General. *Ibid.* And even then, review of factual determinations was quite circumscribed. *Id.* at 665 ("[S]o long as there is some competent evidence in the record to establish each element of the offense beyond a reasonable doubt, the Court of Appeals for the Armed Forces will not reevaluate the facts.").

The framework governing the CRJs is consistent with *Edmond*. Given the court of appeals' conclusion that the Librarian may remove the CRJs at will, the Librarian's role is analogous to that of the Judge Advocate General. Of course, at-will removal is not the only means by which the Librarian exercises control over the CRJs. The CRJs are required to "act in accordance with regulations issued by * * * the Librarian," 17 U.S.C. 803(a)(1); the CRJs' own procedural regulations, including rules governing royalty ratemaking proceed-

ings, must be approved by the Librarian, 17 U.S.C. 803(b)(6)(A) (Supp. V 2011); and the Librarian adopts standards of conduct for the CRJs, 17 U.S.C. 802(h).

In addition, the Librarian, through the Register, possesses authority to review aspects of the CRJs' individual decisions that is analogous to the review that the Court of Appeals for the Armed Forces was able to exercise in *Edmond*. The Register is appointed by the Librarian and acts under his "general direction and supervision." 17 U.S.C. 701(a). As the court of appeals explained, the Register retains the "authority to interpret the copyright laws," including those that govern the CRJs' ratemaking decisions, and to "provide written opinions to the CRJs on 'novel material question[s] of law,'" by which the CRJs "must abide * * * in their determinations." Pet. App. 16a (quoting 17 U.S.C. 802(f)(1)(B)). The Register also "reviews and corrects any legal errors in the CRJs' determinations." *Ibid.* (citing 17 U.S.C. 802(f)(1)(D)). Those oversight powers encompass the ability to prescribe the nature and scope of the CRJs' statutory responsibilities. See, *e.g.*, 78 Fed. Reg. 22,913 (Apr. 17, 2013) (opinion of the Register correcting the CRJs' interpretation of the ratesetting standard under 17 U.S.C. 801(b)(1)); 73 Fed. Reg. 9143, 9146 (Feb. 19, 2008) (opinion of the Register rejecting the CRJs' determination that they were not required to set a separate rate for ephemeral copies made to facilitate webcasting); 71 Fed. Reg. 64,303 (Nov. 1, 2006) (opinion of the Register that the CRJs could determine royalties payable for ringtones because they are within the scope of the statutory license under 17 U.S.C. 115).

c. Even accepting petitioner's assumption that the CRJs in some sense "render final decisions on behalf of the United States," Pet. 21, that factor alone cannot

compel that they be regarded as principal officers under the Constitution. It is not anomalous for someone other than a principal officer to take action that can be described as a "final decision[] on behalf of the United States."[6] This Court's cases make clear that inferior officers may make some decisions that are not subject to further review by other executive officers. Thus, in *Free Enterprise Fund*, the Court refused to equate the "[b]road power" that the Securities and Exchange Commission (SEC) exercised over the "functions" of the PCAOB with "the power to remove [PCAOB] members." 130 S. Ct. at 3158. While the Court recognized that the PCAOB's decisions were "subject to some latent Commission control," it emphasized that the SEC did not have "effective power to start, stop, or alter individual [PCAOB] investigations" and that the PCAOB retained

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[6] Within the Social Security Administration, decisions of the Social Security Appeals Council (which is created by regulation and not composed of principal officers) are appealable to federal district courts, not to the Commissioner of Social Security. See *Sims* v. *Apfel*, 530 U.S. 103, 106-107 (2000). Similarly, under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, members of the Benefits Review Board are appointed by the Secretary of Labor, and the Board's decisions are appealable directly to Article III courts, not to the Secretary or other executive officers. See 33 U.S.C. 921(b) and (c). The authority to settle and compromise matters on behalf of the United States is sometimes exercised by employees who are not officers of the United States at all. See 28 C.F.R. Pt. 0, Subpt. Y, App. (orders redelegating settlement authority to compromise and close civil claims in certain circumstances to certain Department of Justice employees); cf. *Tucker* v. *Commissioner*, 676 F.3d 1129, 1134 (D.C. Cir.) (rejecting Appointments Clause challenge to "effective finality" of decisions of employees of the Internal Revenue Service's Office of Appeals about the amounts of tax liabilities and whether to accept settlement offers), cert. denied, 133 S. Ct. 646 (2012).

"significant independence in determining its priorities and intervening in the affairs of regulated firms." *Id.* at 3159. Nevertheless, the Court found that at-will-removal authority—not Executive Branch review of all decisions—was a critical factor necessary to make PCAOB members inferior officers. *Id.* at 3162.[7]

Similarly, in *Morrison* v. *Olson*, 487 U.S. 654 (1988), decisions of the independent counsel about matters of such significance as whether to frame indictments, file informations, initiate prosecutions, and dismiss matters were not subject to any review within the Executive Branch. *Id.* at 663-664. The Court nevertheless concluded that the independent counsel was an inferior officer, in significant part because she was "subject to removal [for cause] by a higher Executive Branch official." *Id.* at 671.

Accordingly, there is no reason for this Court to review the court of appeals' determination that, once the for-cause restriction on removal is severed from 17 U.S.C. 802(i), the CRJs are inferior officers for purposes of the Appointments Clause.

2. With respect to the second question presented, petitioner contends (Pet. 23-29) that, even if the CRJs are inferior officers, their appointment still may not be vested in the Librarian, because the Library of Congress is an entity within the Legislative Branch rather than an executive "Department[]" within the meaning of the Appointments Clause. Petitioner does not allege any conflict in the courts of appeals or with a decision of

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[7] In *Free Enterprise Fund*, the at-will-removal power was vested in Commissioners who were understood to be removable only for cause. 130 S. Ct. at 3148-3149. Here, that power is vested in the Librarian, who does not have such protections. See pp. 16-17 & n.8, *infra*.

this Court with respect to that question. Further review is unwarranted.

a. This Court has explained that, for Appointments Clause purposes, a "Department[]" is a component of the government that is "in the Executive Branch or at least ha[s] some connection with that branch," *Buckley* v. *Valeo*, 424 U.S. 1, 127 (1976) (per curiam), and is "not subordinate to or contained within any other [free-standing] component" of the Executive Branch, *Free Enter. Fund*, 130 S. Ct. at 3163. The Library of Congress satisfies that standard.

The Library is headed by the Librarian of Congress, who is "appointed by the President, by and with the advice and consent of the Senate," and is authorized to "make rules and regulations for the government of the Library." 2 U.S.C. 136. No statute limits the President's oversight of the Librarian. Nor has Congress reserved to itself the power to review or influence the Librarian's conduct in office. Compare *Bowsher* v. *Synar*, 478 U.S. 714, 727-728 (1986) (holding that "[t]he critical factor" making the Comptroller General a congressional agent was a statutory provision giving Congress power to remove him for cause). Petitioner does not dispute the court of appeals' conclusion that the Librarian is "subject to unrestricted removal by the President." Pet. App. 22a; see Pet. 28-29 ("It is true that it is the President who has the power to remove the Librarian from office[.]").

As petitioner recognizes (Pet. 29), Presidents Jackson and Lincoln each exercised that removal authority. See Gov't C.A. Br. 31. While petitioner notes that "incoming Presidents do not generally replace Librarians," who have served for relatively long periods, Pet. 28, that does not undermine the constitutional significance of the

removal authority. The very existence of that authority creates "here-and-now subservience." *Bowsher*, 478 U.S. at 727 n.5 (citation omitted); *ibid.* ("The Impeachment Clause of the Constitution can hardly be thought to be undermined because of nonuse."); *id.* at 730 ("[T]he removal powers over the Comptroller General's office dictate that he will be subservient to Congress.").[8]

b. The President's power to appoint and remove the Librarian reflects Congress's purposeful decision to place the Library under the President's direct control and supervision. Consistent with the Library's original, limited purpose—to purchase "such books as may be necessary for the use of Congress" and set up "a suitable apartment for containing them"—Congress initially exercised direct control over the Library's operations and regulations. Act of Apr. 24, 1800, ch. 37, § 5, 2 Stat. 55. But as early as 1802 Congress vested authority to appoint the Librarian in the President alone and author-

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[8] One of petitioner's amici contends (Duffy Amicus Br. 2-3, 5-13) that the President lacks the authority to remove the Librarian at will and that the Librarian himself has repeatedly described the Library as an arm of Congress. As directly relevant here, however, the Librarian has explained that "there can be no legal doubt that in placing the appointment power of the Librarian in the President, Congress" understood that, "because the Librarian was to exercise executive functions" in the copyright context, that "method of appointment was constitutionally mandated" and it meant that "the power of removal resided in the President." *Copyright Reform Act of 1993: Hearing Before the Subcomm. on Intellectual Property and Judicial Admin. of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. 200 (1993) (*1993 Hearing*) (statement of James H. Billington). Professor Duffy sidesteps the actions of Presidents Lincoln and Jackson by relying (Amicus Br. 3, 12) on the fact that Congress later required the Senate to confirm the President's *appointment* of the Librarian. But Senate confirmation has never been seen as restricting the President's *removal* authority.

ized the President and Vice President to borrow books. See Act of Jan. 26, 1802, ch. 4, §§ 3-4, 2 Stat. 129; John Young Cole, *For Congress and the Nation: A Chronological History of the Library of Congress* 3-4 (1979). Congress later directed the Library to serve the Judicial Branch, as it still does today. See 2 U.S.C. 137, 137c (granting access to the law library by Supreme Court Justices and judges of the D.C. Circuit and the D.C. Court of Appeals).

In 1870, Congress vested in the Librarian principal responsibility for the administration of United States copyright laws. Act of July 8, 1870, ch. 230, § 85, 16 Stat. 212. Although that authority was initially exercised "under the supervision of the joint committee of Congress on the [L]ibrary," *ibid.*, Congress relinquished direct control over those functions in 1897. Act of Feb. 19, 1897, ch. 265, 29 Stat. 544 (creating the office of the Register of Copyrights to "perform all duties relating to copyrights" under "the direction of the Librarian of Congress," without any mention of congressional supervision); see 37 C.F.R. 203.2(a) ("The administration of the copyright law was entrusted to the Library of Congress by an act of Congress in 1870, and the Copyright Office has been a separate department of the Library since 1897."). As one proponent of the 1897 legislation explained, "the bill as amended and now submitted by the conference committee gives the Joint Committee on the Library no supervision of the regulations to be made by the Librarian." 29 Cong. Rec. 1947 (1897) (statement of Rep. Dockery). The 1897 legislation also made the Librarian subject to Presidential appointment and Senate confirmation, as the Appointments Clause requires for principal officers. Ch. 265, 29 Stat. at 544; see also 29 Cong. Rec. at 388-389 (1896) (statement of Rep. Rich-

ardson) ("with respect to an office of this kind," Congress "should not depart from the constitutional provision that the President shall nominate and by and with the advice and consent of the Senate appoint"). The significance of that change was not lost on Congress. One Senator warned: "By this bill, when enacted into law, Congress forever puts it out of their power to control the Library. It now loses its name and function of a Congressional Library, and becomes a national or Presidential Library, beyond the control of Congress, except by the President's consent." 29 Cong. Rec. at 977 (1897) (statement of Sen. Call).[9]

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[9] One of petitioner's amici contends (Duffy Amicus Br. 16) that the legislative history of the 1897 legislation indicates that Congress intended to "give Congress *more*, not less control over the Library." But the legislative history reveals that Congress was acutely aware of the executive nature of some of the Librarian's functions and of the attendant necessity of complying with the Appointments Clause. An earlier bill would have given a joint congressional committee the authority to appoint the Register of Copyrights, 28 Cong. Rec. 3086 (1896), but that proposal was rejected "on constitutional grounds." *Id.* at 5736 (statement of Sen. Teller); see, *e.g.*, *id.* at 5497 (statement of Sen. Mills) ("It has the name of Congressional Library, but * * * [i]t is * * * created by the law of the United States, and its officers must be appointed by the President" or by "the head of a Department."); *id.* at 5498 (statement of Sen. Platt) ("I insist that whether it be the Librarian or whether it be a register of copyrights, he exercises both judicial functions and executive functions with relation to the issue of copyrights, and he must under the statute.").

Later, in the House of Representatives, Representative Quigg proposed that the joint congressional committee on the Library of Congress be given power "to employ and remove" all officials within the Library except the Librarian (who would be renamed its director). 29 Cong. Rec. at 313 (1896). That proposal was defeated, *id.* at 390, after opposition was expressed in Appointments Clause terms. See *id.* at 318-319 (statement of Rep. Dockery) (while the Library is not "an executive department," it is nevertheless "a bureau of the

The 1897 amendments, still in effect today, gave the Librarian of Congress the power to appoint officers within the Library of Congress, including the Register of Copyrights. See ch. 265, 29 Stat. at 544-545; 2 U.S.C. 136; see also 29 Cong. Rec. at 1947 (1897) (statement of Rep. Dockery) ("[T]he bill as amended and now submitted by the conference committee * * * puts the Librarian in control of the Library force, charges him with the responsibility for the proper conduct of the office, and gives him sole power of appointment."). And Congress has reinforced that understanding of the Library's placement in the constitutional framework by increasing the Librarian's responsibility for the execution of the copyright laws and by creating new offices within the Library subject to his appointment. Thus, in 1993, Congress eliminated the Copyright Royalty Tribunal, a free-standing agency that had set rates and terms for statutory licenses, and replaced it with a system of ad-hoc royalty arbitration panels, whose members were appointed by the Librarian in consultation with the Register of Copyrights. See Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198, § 2(b), 107 Stat. 2304-2305. And in 1998, Congress gave the Librarian an added role in the administration of the Nation's copyright law, by requiring him periodically to conduct rulemaking, upon the recommendation of the Register,

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Government," whose employees are "not under the control of the House"; "[the Library] is an executive bureau, and as such should be presided over by some executive officer with authority to appoint and remove its employees"); *id.* at 386 (statement of Rep. Cannon) ("This Library is practically a great department, embracing not only the national Library, but covering the copyright business and the care of that great building. I believe that, as a general proposition, appointments must, under the Constitution, be made by the President, by the courts, or by the heads of Departments.").

who in turn consults with the Department of Commerce, addressing the propriety of exemptions to statutory anti-circumvention provisions. See 17 U.S.C. 1201(a).

c. The gravamen of petitioner's counter-argument focuses (Pet. 24, 25, 27-28) on Congress's decision to locate the Congressional Research Service (CRS) within the Library (see 2 U.S.C. 166), which petitioner sees as evidence that the Library as a whole is within the Legislative Branch and barred from exercising any executive functions. The court of appeals properly rejected that contention, Pet. App. 22a, and in doing so joined the only other court of appeals that has addressed that argument. See *Eltra Corp.* v. *Ringer*, 579 F.2d 294, 300-301 (4th Cir. 1978). Congress created CRS (then called the Legislative Reference Service) in 1914, well *after* the 1897 legislation had relinquished Congress's direct control over the Library's functions. Act of July 16, 1914, ch. 141, 38 Stat. 463.

Petitioner contends (Pet. 25-28) that CRS's ability to issue reports to Members of Congress (and to disagree with the Executive Branch's views about certain legal questions) is inconsistent with the Department of Justice's conclusion that Congress cannot prevent the President from reviewing communications to Congress from executive agencies.[10] But the Article II prerogatives of the President that were addressed in the Office of Legal Counsel opinions that petitioner cites (Pet. 26 & n.9) are not implicated by the reports that CRS provides in aid

[10] This Court has suggested that a Department for purposes of the Appointments Clause may not necessarily be "an 'executive Department[t]' under the Opinions Clause, Art. II, § 2, cl. 1." *Free Enter. Fund*, 130 S. Ct. at 3163 & n.11 (finding that the SEC is a Department for purposes of the Appointments Clause but "express[ing] no view" about its status under the Opinions Clause).

of Congress's legislative functions. See *Eltra Corp.*, 579 F.2d at 301; see also 2 U.S.C. 166(d)(7) (directing CRS to provide reports on "legislative measures upon which hearings by any committee of the Congress have been announced").

The role of CRS *vis-à-vis* Congress is akin to the role of the United States Marshals Service *vis-à-vis* the federal courts. By statute, the "primary role and mission" of the Marshals Service is "to provide for the security and to obey, execute, and enforce all orders" of the federal courts. 28 U.S.C. 566(a) (Supp. V 2011); see also *Ex parte Siebold*, 100 U.S. 371, 397 (1880) ("The marshal is pre-eminently the officer of the courts[.]"). Yet no one would seriously suggest that the Department of Justice is not a "Department" for purposes of the Appointments Clause simply because the Marshals Service is situated within the Department. 28 U.S.C. 561(a); cf. *Mistretta* v. *United States*, 488 U.S. 361, 382 (1989) (noting constitutionality of "statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment").

d. Petitioner also relies on other statutory features concerning the Library, including that it is governed by the title of the United States Code devoted to Congress and that it is exempt from the Administrative Procedure Act, which "do[es] not apply to 'the Congress.'" Pet. 24-25 (quoting *Washington Legal Found.* v. *United States Sentencing Comm'n*, 17 F.3d 1446, 1449 (D.C. Cir. 1994); see also Nat'l Religious Broadcasters Music License Comm. Amicus Br. 15-17. Petitioner's "code-grouping" approach, however, is "irrelevant" for Appointments Clause purposes. *Eltra Corp.*, 579 F.2d at 301. Otherwise, the Federal Election Commission (FEC) would still be unconstitutional, because the provisions amend-

ed after *Buckley* remain in Title 2. *Ibid.* Moreover, this Court has repeatedly recognized that Congress's ability to dictate where an agency is located for statutory purposes does not govern constitutional analyses. See *Free Enter. Fund*, 130 S. Ct. at 3148; *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995); *Mistretta*, 488 U.S. at 420, 422-423 (Scalia, J., dissenting).

e. Petitioner fares no better with its passing assertion (Pet. 25 & n.8) that the function performed by the CRJs, ratemaking, is a legislative rather than executive function. Ratemaking, like other forms of rulemaking, is an executive function when it is authorized by statute. See *Buckley*, 424 U.S. at 140-141 (treating "rulemaking" as one of the administrative powers of the FEC that could be exercised only by officers of the United States). Thus, even after the 1989 cases that petitioner cites (dealing with state ratemaking proceedings), this Court affirmed the exercise of "broad ratemaking authority" over natural gas by the Federal Energy Regulatory Commission. *Mobil Oil Exploration & Producing S.E., Inc.* v. *United Distribution Cos.*, 498 U.S. 211, 224 (1991).

There is accordingly no basis for petitioner's conclusion that Congress could not vest the power to appoint the CRJs in the Librarian.

3. Petitioner's final contention is that the court of appeals exceeded its remedial authority in severing the for-cause restriction on removal in 17 U.S.C. 802(i), either because it should have "left the remedy to Congress," Pet. 30, or because it should not have taken the supposedly "unprecedented step" of "demot[ing] officers created by Congress as principal officers to the status of inferior officers," Pet. 31. Neither of those suggested alternatives has merit. Nor does petitioner assert that

there is any conflict among the courts of appeals concerning them.

a. This Court has stressed that "[b]ecause the unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions, the normal rule is that partial, rather than facial, invalidation is the required course." *Free Enter. Fund*, 130 S. Ct. at 3161 (internal quotation marks and citations omitted). When faced with a constitutional defect in a statutory scheme, courts should ordinarily "sever[] any problematic portions while leaving the remainder intact." *Ibid.* (internal quotation marks and citations omitted); see *United States* v. *Booker*, 543 U.S. 220, 258-259 (2005) (explaining that, in performing severability analysis, courts should preserve constitutionally valid provisions that are "capable of functioning independently" and "consistent with Congress' basic objectives in enacting the statute") (internal quotation marks and citations omitted); *id.* at 265 (the court must "determine Congress's likely intent in light of [the Court's constitutional] holding") (emphasis omitted).

This Court employed those principles in *Free Enterprise Fund*. After finding that the existence of two layers of for-cause restrictions on removal between the President and the PCAOB was inconsistent with separation-of-powers principles, the Court did not invalidate all of the PCAOB's actions; instead, it invalidated and severed only two provisions that imposed limits on the SEC's ability to remove members of the PCAOB. 130 S. Ct. at 3161. The Court explained that the Sarbanes-Oxley Act of 2002 would "remain[] 'fully operative as a law' with these tenure restrictions excised," and it found "nothing in the statute's text or historical context mak[ing] it 'evident' that Congress, faced with the limi-

tations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will." *Id.* at 3161-3162 (quoting *New York* v. *United States*, 505 U.S. 144, 186 (1992)); cf. *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678 (1987) (applying similar criteria and severing a one-house legislative-veto provision from the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705).

Here, the court of appeals adhered closely to *Free Enterprise Fund* and correctly concluded that striking the for-cause-removal restriction applicable to CRJs would cure the Appointments Clause violation it had found while simultaneously "minimiz[ing] any collateral damage." Pet. App. 20a. Indeed, the court's remedy leaves intact virtually the entirety of the statutory framework for setting the rates and terms for statutory licenses and for distributing royalties collected under certain of those licenses.

b. Petitioner attempts (Pet. 33) to distinguish *Free Enterprise Fund* on the ground that it "did not involve an Appointments Clause violation." But that assertion is perplexing, because *Free Enterprise Fund* did address the petitioners' contention that PCAOB members were "principal officers" appointed in violation of the Appointments Clause. 130 S. Ct. at 3162. The Court rejected that contention on the merits precisely because it found that "the statutory restrictions on the Commission's power to remove [PCAOB] members [were] unconstitutional and void." *Ibid.* In any event, the decision contained no suggestion that its application of severability principles was limited to general separation-of-powers challenges and not to Appointments Clause challenges in particular. Nor do any of the Court's other severability decisions indicate that different tests are

required, depending on the nature of the constitutional violation.

For similar reasons, petitioner errs in suggesting (Pet. 30-31) that the court of appeals was obliged to follow *Buckley*'s approach, in which the Court, after finding an Appointments Clause violation, granted a stay to give Congress "an opportunity to reconstitute the [FEC] by law or to adopt other valid enforcement mechanisms." 424 U.S. at 143. *Buckley* did not purport to prevent courts from engaging in ordinary severability analysis in Appointments Clause cases. Instead, it identified a constitutional violation that could not have been cured by altering something as simple as removal restrictions, because the Commission there had been granted a range of powers, "most" of which could be exercised only by Officers of the United States, which most members of the Commission could never be, because they were appointed by congressional representatives. *Id.* at 113, 143. If anything, because *Buckley* did not attempt to re-vest the appointment authority in someone else, it casts doubt on petitioner's suggestion (Pet. 33) that the "most straightforward remedy" here was to transfer the authority to appoint CRJs from the Librarian alone to the President (with the Senate's advice and consent). Cf. *Free Enter. Fund*, 130 S. Ct. at 3162 (recognizing that the PCAOB could be rendered constitutional if removal power were given to the President rather than the SEC, but holding that "such editorial freedom * * * belongs to the Legislature, not the Judiciary").

c. Petitioner also errs in contending (Pet. 31) that the court of appeals impermissibly chose to "demote officers created by Congress as principal officers to the status of inferior officers." There was no such demotion.

In the context of the Copyright Royalty Board, there can be little doubt that Congress intended the CRJs to be inferior rather than principal officers, as it expressly deprived them of the chief constitutional hallmark required of a principal officer's position: appointment by the President with the advice and consent of the Senate. Petitioner's speculative assertion (Pet. 32-33) that Congress would have preferred the CRJs to be subject to Presidential nomination and Senate confirmation is belied by Congress's experience with the Copyright Royalty Board's predecessors and by its deliberate decision to vest appointment power in the Librarian.[11]

Accordingly, the court of appeals appropriately selected a remedy that cured the constitutional violation it had found, while preserving as much of Congress's

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[11] Beginning in 1976, the Copyright Royalty Tribunal was composed of Commissioners who were appointed to seven-year terms by the President with the advice and consent of the Senate. See Copyright Act of 1976, Pub. L. No. 94-553, § 802, 90 Stat. 2596. In 1993, Congress eliminated the Tribunal and replaced it with a system of ad-hoc royalty arbitration panels, whose members were appointed by the Librarian in consultation with the Register of Copyrights. See p. 20, *supra*. The legislative history attributed that change in part to unfavorable experiences with Presidential appointees to the Tribunal. See *1993 Hearing* 28 (statement of Rep. Moorhead) ("Presidential appointments of the Copyright Royalty Tribunal have not necessarily enhanced the prestige of that office. Appointments of Commissioners with expertise in copyright or communications law have been scarce."); *id.* at 64 (statement of Copyright Royalty Tribunal Commissioner Bruce D. Goodman) ("[T]he appointment of Commissioners has been terribly politicized. Too often Presidents of both parties have exalted political loyalty over experience and qualifications."); see 139 Cong. Rec. 31,192 (1993) (statement of Sen. DeConcini) (explaining that the legislation "returns the copyright royalty process to the Copyright Office and the Library of Congress, as was originally envisioned").

handiwork as possible. Further review of that decision is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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