Supreme Court, U.S.
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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.,
Respondents.

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

BRIEF FOR RESPONDENT SOUNDEXCHANGE IN OPPOSITION

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QUESTION PRESENTED

Whether the District of Columbia Circuit Court of Appeals correctly followed this Court's precedent in *Edmond v. United States*, 520 U.S. 651 (1997), in finding that the Copyright Royalty Judges were unconstitutionally appointed principal officers and whether the court then appropriately cured the Appointments Clause violation by adopting the exact remedy this Court set forth in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010), and eliminating restrictions on the Librarian of Congress's ability to remove the Copyright Royalty Judges.

CORPORATE DISCLOSURE STATEMENT

SoundExchange is an independent, incorporated, non-profit performance rights organization, representing the owners of sound-recording copyrights and recording artists. SoundExchange collects royalties paid pursuant to statutory licenses under Section 112 and 114 of the Copyright Act, 17 U.S.C. §§ 112, 114, which allow the public performance of sound recordings via certain digital audio transmissions. SoundExchange distributes these royalties to the artists who created the sound recordings and the owners of the sound recordings. SoundExchange has not issued any shares or debt securities to the public, and SoundExchange has no parent companies. SoundExchange has no subsidiaries or affiliates that have issued any shares or debt securities to the public. No publicly-held company has a 10% or greater ownership interest in SoundExchange.

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INTRODUCTION

There is no compelling reason for this Court to grant certiorari in this case. In the decision below, the D.C. Circuit *agreed* with Petitioner that the Copyright Royalty Board (the "Board") was constituted in violation of the Appointments Clause. No party here, including Respondents United States and SoundExchange, contests that determination.

Instead, the primary thrust of the petition is that Petitioner is dissatisfied with the court of appeals' chosen remedy, *i.e.*, severing the unconstitutional restrictions on the removal of the Copyright Royalty Judges ("CRJs"). That remedial choice does not present an issue worthy of this Court's review. Not only is there no split of authority on the question, but the D.C. Circuit's remedial decision is plainly correct given that this Court recently adopted the same remedy in an analogous situation in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010).

Moreover, the D.C. Circuit's chosen remedy had the great virtue of "cur[ing] the constitutional defect with as little disruption as possible." Pet. App. 11a. The CRJs preside over hearings that set and allocate billions of dollars of copyright royalties. Pet. App. 14a. In Petitioner's view, the D.C. Circuit lacked the authority to sever the offending parts of the statute, and should have instead left the Board inoperative until such time that Congress chose to reconstitute the Board. The disruptive effect of such a choice would be hard to overstate, and it is telling that out of all the entities whose interests are affected by the

Board, no entity—small or large, royalty paying or royalty collecting—has urged review by this Court, other than Petitioner and its single amicus. The D.C. Circuit's remedial decision was not only correct as a legal matter, but profoundly sensible as well.

Accordingly, Respondent SoundExchange, on behalf of the tens of thousands of recording artists and the record labels it represents, respectfully urges this Court to deny the petition.

COUNTERSTATEMENT

A. The Copyright Royalty Board.

The Copyright Royalty Board was created in 2004 by the Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341, 17 U.S.C. § 801 et seq. The Board is part of the Library of Congress, and consists of three CRJs, who are appointed by the Librarian of Congress and serve at most six-year terms. 17 U.S.C. §§ 801(a), 802(c). Congress established the Board to "make determinations and adjustments of reasonable terms and rates of royalty payments" for statutory licenses under the Copyright Act. 17 U.S.C. § 801(b)(1). Congress also charged the Board with "authoriz[ing] the distribution" of certain royalty payments to the owners of copyrighted works, *id.* § 801(b)(3)(A), and adopting settlements submitted by participants in a rate setting proceeding as the statutory rates and terms, *id.* § 801(b)(7)(A).

The Board "set[s] 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 entities affected by Board decisions number in the tens of thousands and include record companies, cable companies, webcasters, satellite radio providers, and broadcasters, as well as every recording artist, back-up musician, and songwriter in the United States. *See* 17 U.S.C. § 115(c)(3)(C)-(D) (covering phonorecords); *id.* § 114(f)(1) & (f)(2)(A)-(B) (covering subscription and non-subscription digital transmissions and satellite radio services); *id.* § 112(e)(3)-(4) (covering ephemeral recordings); *id.* § 118(b)(4) (covering non-commercial broadcasting); *id.* § 111(d)(4) (covering secondary transmissions by cable systems).

In creating the Board, Congress set forth minimum requirements. CRJs are required to be attorneys with at least seven years of legal experience and the Chief Copyright Royalty Judge must have at least five years of experience in adjudications, arbitrations, or court trials. Of the other two CRJs, one must have significant knowledge of copyright law, and the other is required to possess significant knowledge of economics. 17 U.S.C. § 802(a).

Congress also provided for different layers of review of the Board's decisions. First, Congress established that the Register of Copyrights could review for legal error any decision involving a material question of substantive law under the

Copyright Act. 17 U.S.C. § 802(f)(1)(D). If the Register of Copyrights concludes that the Board's decision was in material error, the Register of Copyrights is required to issue a written decision correcting the legal error, which becomes a part of the record of the proceeding. *Id.* Second, Congress provided for judicial review, establishing that any determination of the Board could be appealed to the United States Court of Appeals for the District of Columbia Circuit within thirty days of its publication in the Federal Register, by any participant in the proceedings before the Board. 17 U.S.C. § 803(d)(1).

B. SoundExchange And The Proceedings Before The Copyright Royalty Board.

This case arises from the Board's decision in *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 76 Fed. Reg. 13,026 (Mar. 9, 2011), at Pet. App. 24a-184a ("Webcasting III determination"). The purpose of that proceeding (the "Webcasting III proceeding") was to set the rates and terms under Sections 112 and 114 of the Copyright Act for 2011 through 2015 for webcasters who perform sound recordings. *See* 17 U.S.C. §§ 112(e), 114. The proceeding also covered the Copyright Act's requirement that the Board set a minimum fee that webcasters must pay Respondent SoundExchange. *See* 17 U.S.C. §§ 112(e)(4), 114(f)(2)(B).

SoundExchange is an independent, incorporated, non-profit performance rights organization, representing the owners of sound-recording copyrights and recording artists. SoundExchange collects royalties paid pursuant to statutory licenses

under Sections 112 and 114 of the Copyright Act, 17 U.S.C. §§ 112, 114, which allow the public performance of sound recordings via certain digital audio transmissions. SoundExchange then distributes these royalties to the artists who created the sound recordings and the owners of the sound recordings.

In 2008 and 2009, SoundExchange successfully negotiated settlements with the vast majority of both commercial and noncommercial webcasters regarding these royalty rates. Those settlements cover webcasters that paid approximately 95% of the total webcasting royalties paid to SoundExchange in 2008 and 2009. Pet. App. 28a. Accordingly, the vast majority of webcasters did not participate in the Webcasting III proceeding.

With respect to noncommercial webcasters, two parties participated in the proceeding—Petitioner and College Broadcasters, Inc. ("CBI"), both of which are organizations that purport to represent the interests of noncommercial educational webcasters. During the proceedings, SoundExchange reached a settlement agreement with CBI for rates and terms for noncommercial educational webcasters. Pet. App. 85a.

The Copyright Act allows settling parties to submit their settlements to the Copyright Royalty Board as a basis for the Board to set statutory rates and terms. 17 U.S.C. § 801(b)(7)(A). In that circumstance, after providing the parties that would be bound by the settled rates and terms an opportunity to comment, if there is no objection it

must adopt the settlement as the basis for the statutory rates and terms. *Id.* § 801(b)(7)(A)(i). The Board may then decline to adopt the settlement only if any participant objects and the Board also concludes based on the record that the agreement does not provide a reasonable basis for setting statutory rates and terms. *Id.*

In the Webcasting III proceeding, SoundExchange and CBI submitted their agreement as the basis for statutory rates and terms for noncommercial educational webcasters. Twenty-four noncommercial educational webcasters that are subject to the agreement submitted comments supporting adoption of the agreement. Pet. App. 87a.

Petitioner was the only entity that submitted a comment that even arguably suggested dissatisfaction with the agreement, and upon questioning by the Board, Petitioner conceded that it in fact had no interest that would be implicated by the adoption of the settlement. Pet. App. 89a n.19.

Petitioner also never presented any evidence to suggest that the agreement was unreasonable. Rather, Petitioner relied on "bald assertions" that "some unidentified and unspecified numbers of its members cannot afford the fees contained in the agreement." Pet. App. 90a. Petitioner did not itself propose rates and terms for noncommercial educational webcasters (it proposed rates for noncommercial webcasters). *Id.* In the absence of any objection, much less any "proper evidence" showing why the agreement would be unreasonable, the Board adopted the agreement as the basis for

statutory rates and terms for noncommercial educational webcasters, including Petitioner. *See id.*

C. The Proceedings In The D.C. Circuit.

Petitioner appealed the Board's determination to the D.C. Circuit pursuant to 17 U.S.C. § 803(d)(1). In addition to attacking the Board's decision on the merits, Petitioner charged that the Board was unconstitutional because the CRJs were principal officers who had not been appointed by the President and confirmed by the Senate as required by the Appointments Clause. Petitioner further argued that even if the CRJs were inferior officers, they were not validly appointed because the Librarian of Congress is not the head of an Executive Branch department.

SoundExchange and CBI intervened as appellees in the D.C. Circuit to defend the outcome of the Board proceeding, with SoundExchange defending it as a whole and CBI joining it to defend the Board's adoption of its joint settlement. The United States, representing the Board and the Library of Congress, likewise defended the rates, as well as the constitutionality of the Copyright Royalty and Distribution Reform Act of 2004.

The D.C. Circuit did not reach the merits of the ratemaking proceeding because it found that the CRJs were principal officers appointed in violation of the Appointments Clause. In reaching that conclusion, the court of appeals in a unanimous opinion written by Senior Judge Williams, and joined by Judges Garland and Griffith, carefully applied each of the three factors this Court considered in

Edmond v. United States, 520 U.S. 651 (1997). The court of appeals evaluated whether "the judges were subject to the substantial supervision and oversight" of a principal officer; whether "the judges were removable . . . without cause"; and whether "another executive branch entity . . . had the power to reverse the judges' decisions." Pet. App. 15a. The court concluded that, despite the Librarian of Congress' administrative supervision of the CRJs, *see id.*, the CRJs' "nonremovability [except for cause] and the finality of their decisions" made them principal officers who had not been appointed and confirmed as required by the Appointments Clause, Pet. App. 18a.

Upon finding a violation of the Appointments Clause based on the factors set forth by this Court in *Edmond*, the court of appeals then considered the "appropriate remedy to correct the violation." Pet. App. 20a. The court examined the remedy prescribed by this Court in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010), and concluded that it would adopt exactly that remedy. Rejecting Petitioner's assertion that the Librarian of Congress was not the head of an Executive Branch agency, the court found that "invalidating and severing the restrictions on the Librarian's ability to remove the CRJs eliminates the Appointments Clause violation and minimizes any collateral damage." Pet. App. 20a.

The court of appeals then remanded the case, finding that "[b]ecause the Board's structure was unconstitutional at the time it issued its

determination, it would vacate and remand the [Board's] determination." Pet. App. 23a.

The parties thus come to this Court in a peculiar procedural posture. Despite prevailing below on its constitutional argument, Petitioner asks this Court to go further than the D.C. Circuit did in remedying the Appointments Clause violation. And despite defending the constitutionality of the Copyright Royalty Board before the court of appeals, neither the United States nor Respondent SoundExchange is challenging the court of appeals' finding of unconstitutionality or its chosen remedy.

REASONS FOR DENYING THE PETITION

I. There Is No Circuit Split On The Issues Presented Nor Any Other Compelling Reason To Grant Certiorari.

Petitioner has identified no compelling reason for this Court to grant certiorari. There is no split among the circuits on the questions presented, no confusion in the lower courts, and no novel question of federal law. Instead, Petitioner simply complains that the D.C. Circuit misapplied this Court's precedent. That is not a basis for this Court to exercise its certiorari jurisdiction. *See* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *Hubbard v. United States*, 514 U.S. 695, 721 (1995) (Rehnquist, C.J. dissenting) (describing the Court's "highly selective standard for granting review"). No party before this Court—including the United States—is seeking review of the D.C. Circuit's determination that there was a constitutional problem with the method of appointment of the CRJs under the Copyright Royalty and Distribution Reform Act of 2004. Petitioner's dissatisfaction with the way in which the D.C. Circuit corrected the problem does not warrant this Court's exercise of its certiorari jurisdiction.

A. There Is No Conflict Among The Circuits On Any Of The Questions Presented By Petitioner.

None of the three questions raised by Petitioner merits this Court's review. With respect to the first

issue, Petitioner claims that the D.C. Circuit "misread" this Court's decision in *Edmond v. United States*, 520 U.S. 651 (1997), Pet. 16, and suggests that it has the "better reading of this Court's precedent," Pet. 19. Essentially, Petitioner contends that the D.C. Circuit applied a multi-factor balancing test under *Edmond* when it should have read *Edmond* as establishing a "clear rule" requiring that any individual who issues a decision that is not reviewable by anyone in the Executive Branch must be a principal officer. *See id.* at 18-23.

Petitioner does not identify any discord among the circuits as to the meaning of this Court's decision in *Edmond*. Indeed, Petitioner does not even discuss a single lower court case applying *Edmond*. That omission is telling. In fact, the lower courts have uniformly interpreted *Edmond* just as the D.C. Circuit did to require a multi-factor analysis of whether an individual is a principal officer. *See, e.g., Masias v. Sec'y of Health & Human Servs.*, 634 F.3d 1283, 1294-95 (Fed. Cir.) (applying multi-factor balancing test under *Edmond* and concluding that special masters appointed under the Vaccine Act were inferior officers), *cert. denied*, 132 S. Ct. 815 (2011); *United States v. Hilario*, 218 F.3d 19, 25-26 (1st Cir. 2000) (applying multi-factor balancing test under *Edmond* and concluding that United States Attorneys were inferior officers because they work under the direction and supervision of the Attorney General).

Thus, not only is there no circuit split on this issue, there is no support at all in the lower courts

for Petitioner's reading of *Edmond*. Even if Petitioner were correct (and it is not) that the D.C. Circuit misapplied *Edmond*, "ordinarily a court of appeals decision interpreting one of [this Court's] precedents—even one deemed to be arguably inconsistent with it—will not be reviewed unless it conflicts with a decision of another court of appeals." *Hubbard*, 514 U.S. at 720 (Rehnquist, C.J. dissenting). There is no conflict here. At the very least, the Court should wait until some conflict arises in the lower courts before addressing this question.

As to the second issue, Petitioner finds fault with the D.C. Circuit's conclusion that the Librarian of Congress is an Executive Branch official. Petitioner claims that this Court's review is warranted 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." Pet. 24. Again, Petitioner identifies no circuit split on this issue, nor any reason why this question has importance beyond this particular case. *Cf. Watt v. Alaska*, 451 U.S. 259, 274 (1981) (Stevens, J., concurring) (opining that the Court should not have granted certiorari because "[t]he decision of the Court of Appeals did not conflict with any other judicial decision, and there is no reason to anticipate that a comparable issue will arise in another Circuit in the foreseeable future").

Finally, Petitioner claims that the D.C. Circuit should have permitted Congress to fix the Appointments Clause violation in the Copyright

Royalty and Distribution Reform Act of 2004, rather than remedying the violation itself. The D.C. Circuit severed provisions of the statute to eliminate restrictions on the Librarian of Congress's ability to remove the CRJs. In doing so, the D.C. Circuit employed the very remedy that this Court adopted in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010). Petitioner does not identify any conflict in the circuits on this issue. Nor does it suggest that the issue of how to remedy an Appointments Clause violation is a pressing question in the lower courts. Indeed, this appears to be the first case in which any court has applied the remedy set forth in *Free Enterprise Fund* to cure an Appointments Clause violation. Thus, even if this were an issue of exceptional importance, further percolation among the circuits would be necessary before review of the question would be prudent.

B. There Is No Compelling Reason For This Court's Review.

As noted above, Petitioner has not identified any conflict among the circuits on any of the questions presented for this Court's review. Nor has Petitioner identified any other compelling reason for this Court to grant the writ. There is no party before this Court—including the United States *on behalf of the Board itself*—that is defending the constitutionality of the statute or the method of appointment for CRJs that the D.C. Circuit found invalid. Instead, Petitioner and its *amici* are complaining, primarily

about the way the D.C. Circuit chose to fix the problem.

Petitioner repeatedly urges review by this Court because the "fates of entire industries" can turn on the Board's decisions. *See* Pet. 3, 6, 12. It is certainly true, as the D.C. Circuit noted, that the Board's determinations "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 [like SiriusXM], non-commercial broadcasting, and certain cable transmissions." Pet. App. 14a. But the silence from these industry participants is deafening. Out of all of the recording artists, record companies, webcasters, satellite radio broadcasters, network broadcasters, and cable television companies affected by Board determinations, *no* entity, large or small, royalty payer or royalty recipient, has urged review of the D.C. Circuit's decision save for Petitioner (an organization representing a fraction of school radio stations) and its single *amicus* (representing a fraction of other non-commercial radio stations).[1]

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[1] Petitioner purports to represent "hundreds of members" that are colleges and high schools, Pet. 10, though in the proceedings below Petitioner failed to present any evidence of "how many members it has, let alone their identities." Pet. App. 88a n.18. Petitioner is joined by *amicus* National Religious Broadcasters Music License Committee, which claims to represent 900 non-commercial radio stations. Amicus Brief of the National Religious Broadcasters Music License Committee, at 1. Other parties to the Webcasting III proceeding who did not appeal

Respondent SoundExchange respectfully submits that this indicates, that the D.C. Circuit's determination was not only in accordance with governing law, but that it was the right decision to attempt to "minimize[] any collateral damage" that might have otherwise resulted from the court's holding. Pet. App. 20a. By following this Court's precedent *in Free Enterprise Fund* and remedying the Appointments Clause violation immediately, the D.C. Circuit ensured that there would be minimal disruption to the multi-billion-dollar industries that practice before the Board. Under the court's holding, pending and future ratemaking and distribution proceedings can move forward before the Board without delay.

Conversely, had the D.C. Circuit instead done what Petitioner suggests and left it to Congress to remedy the Appointments Clause violation and reconstitute the Board, it would be immensely disruptive to SoundExchange and the other industry

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either the Copyright Royalty Board or the D.C. Circuit's decision include the Catholic Radio Association and the NCE (Non-Commercial Educational) Radio Coalition. Numerous individual college broadcasting stations also submitted comments in support of SoundExchange's position in the Webcasting III proceedings. *See* U.S. Copyright Royalty Board, Digital Performance in Sound Recordings and Ephemeral Recordings Comments and List of Parties (2009-1 CRB Webcasting III), *available at* http://www.loc.gov/crb/proceedings/2009-1/index.html (last visited Apr. 24, 2013).

participants affected by Board determinations.[2] While Petitioner points to *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) ("*Buckley*"), as an example of how Congress could reconstitute the Copyright Royalty Board just as it reconstituted the Federal Elections Commission, Pet. 30, it is instructive to look at what actually happened following this Court's decision in *Buckley*.

As Petitioner notes, after finding an Appointments Clause violation in *Buckley*, this Court held that it would "stay, for a period not to exceed 30 days, the Court's judgment" so as to "afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms." 424 U.S. at 142-43. The initial 30-day stay expired on February 29, 1976, but Congress had not acted. Thus the litigants were forced to come to this Court to ask for an extension of the stay, which was then extended to March 22. *Buckley v. Valeo*, 424 U.S. 936 (1976). But Congress still had not acted by that date, so on March 23, 1976, all of the Federal Election Commission's

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[2] Moreover, Petitioner's theory that the D.C. Circuit's decision could lead to a power grab by Congress, which may begin creating or transferring agencies to be "housed in the Library of Congress," Pet. 29, so as to exercise congressional control over them, is absurd. The only entities that appear to be concerned about the Librarian of Congress's official status are Petitioner and its *amici*. This is not the type of important federal question that requires this Court's intervention to settle.

powers were suspended.[3] The Commission remained inoperative until May 21, 1976, after Congress passed the FECA Amendments of 1976 and the President reappointed the Commissioners.[4] *See* Federal Elections Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (May 5, 1976).

While Congress did eventually reconstitute the Federal Elections Commission in a somewhat timely fashion, there is no guarantee that it would do the same for the Copyright Royalty Board. To begin with, times are now very different in Congress. In 1976, the Congress that reconstituted the Federal Elections Commission also enacted 382 other new laws.[5] But the Congress in 2012 that would have been charged with reconstituting the Board was the most inactive Congress in history—enacting just 80 bills, fewer than during any other session since year-end records began being kept in 1947.[6] Moreover, following *Buckley*, Congress was no doubt keen to

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[3] *See* Federal Elections Commission, *The Federal Election Campaign Laws: A Brief History*, *available at* http://www.fec.gov/info/ appfour.htm (last visited Apr. 24, 2013)

[4] *See id.*

[5] *See* Susan Davis, *This Congress Could Be Least Productive Since 1947*, USA Today, Aug. 14, 2012, *available at* http://usatoday30.usatoday.com/news/washington/story/2012-08-14/unproductive-congress-not-passing-bills/57060096/1.

[6] *See* Stephan Dinan, Congress Logs Most Futile Legislative Year On Record, Wash. Times, Jan. 15, 2012, *available at* http://www.washingtontimes.com/news/2012/jan/15/congress-logs-most-futile-legislative-year-on-reco/?page=all.

reconstitute the Federal Election Commission given that *Buckley* changed the landscape of congressional campaign finance and charged the Commission with implementing those changes. In contrast, Congress does not have nearly the same interests at stake in reconstituting the Board. The initial creation of the Board took more than a year-and-a-half,[7] and it is highly unlikely that Congress would move any more quickly to fix the Board than it did to create it. In the meantime, the industry would be paralyzed as ratemaking and distribution proceedings could not go forward.

In short, the D.C. Circuit "cure[d] the constitutional defect with as little disruption as possible," Pet App. 11a, and adopted a solution that both the United States and the vast majority of those affected by Board decisions are not urging should be reviewed. This Court should deny the petition for that reason alone.

II. Petitioner's Arguments On The Merits Are Erroneous.

This Court also should deny the petition because Petitioner's three claims of error in the D.C. Circuit's decision are each meritless.

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[7] *See* H.R. 1417, 108th Cong., Copyright Royalty and Distribution Reform Act of 2004 (enacted), *available at* http://www.govtrack.us/congress/bills/108/hr1417 (showing that legislation to create the Copyright Royalty Board was introduced on March 25, 2003 and enacted on November 30, 2004).

A. The Court Of Appeals Properly Applied *Edmond* And Chose A Remedy That Established The Copyright Royalty Judges As Inferior Officers.

Petitioner contends that the decision below does not remedy the constitutional violation because the CRJs remain "principal officers" under the Appointments Clause. In petitioner's telling, the CRJs' continued ability to render final decisions "that are not reviewable by any Executive Branch officer . . . *by itself* makes them principal officers who must be appointed by the President." Pet. 19 (emphasis added). That assertion is directly at odds with this Court's decision in *Edmond v. United States*, 520 U.S. 651 (1997), which, in keeping with past precedent, refused to anoint any single criterion as dispositive for "distinguishing between principal and inferior officers for Appointments Clause purposes." *Id.* at 661.

In *Edmond*, this Court considered whether the judges on the Coast Guard Court of Criminal Appeals were principal or inferior officers. In reviewing its past teachings on the subject, the Court noted "[o]ur cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers." *Edmond*, 520 U.S. at 661. Instead, the Court stated the inquiry in functional terms: an inferior officer is someone "whose work [was] directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Id.* at 663; *see*

also Free Enter. Fund, 130 S. Ct. at 3162 (reaffirming that standard).

The Court then considered a variety of factors that it found bore upon whether the judges in that case were subject to sufficient direction and supervision. It noted that the Judge Advocate General supervised and directed the judges by "exercis[ing] administrative oversight over the Court of Criminal Appeals," including by "prescribing uniform rules of procedure" for the judges. *Edmond*, 520 U.S. at 664 (internal quotation marks omitted). And it also emphasized that the Judge Advocate General could remove a judge without cause, which it emphasized is "a powerful tool for control." *Id.* (citing *Bowsher v. Synar*, 478 U.S. 714, 727 (1986); *Myers v. United States*, 272 U.S. 52 (1926)).

The Court went on to acknowledge that the Judge Advocate General's control over the judges on the Court of Criminal Appeals was "not complete," because he could neither "attempt to influence . . . the outcome of individual proceedings," nor "reverse decisions of the court." *Id.* Likewise, the Court noted that although the judges' determinations were reviewable by another executive entity—the Court of Appeals for the Armed Forces—that review was highly deferential. Nonetheless, *Edmond* found that court's review "significant" because it meant that the judges had "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.

Petitioner seizes upon the Court's use of the word "significant" to claim that the availability of review

by another Executive Branch entity was "the *deciding* factor" in deeming the judges inferior officers. Pet. 20-21. But this Court held no such thing. The Court's point was that review by the Court of Appeals for the Armed Forces could still be a "significant" factor in determining inferior officer status, even where that review was deferential. It did not hold that the absence of direct review trumped all other considerations in determining whether there was the requisite "direct[ion] and supervis[ion] at some level" within the Executive Branch. *Edmond*, 520 U.S. at 663. Had the Court intended to privilege that factor to the exclusion of others, it would have had no need to canvass all the other factors in the opinion.

This Court reaffirmed the multi-factor approach in *Free Enterprise Fund*. *See* 130 S. Ct. at 3162 (holding that the members of the Public Company Accounting Oversight Board were inferior officers under *Edmond* because the Securities Exchange Commission could remove Board members at will and exercise "other oversight authority" over the Board). And as noted above, other appellate courts have adopted the same approach. *See Masias*, 634 F.3d at 1294-95 (assessing whether special masters were inferior officers by weighing the reviewability of their decisions, and the administrative and removal authority exercised by their superior officers); *Hilario*, 218 F.3d at 25-26 (considering the Attorney General's administrative authority and removal power when evaluating whether United States Attorneys were inferior officers).

Because the court of appeals here—like the Court in *Edmond*—was considering whether certain judges were inferior or principal officers, it reasonably addressed the same three questions "emphasized" in *Edmond*: (1) whether "the judges were subject to the substantial supervision and oversight" of a principal officer; (2) whether "the judges were removable . . . without cause"; and (3) whether "another executive branch entity . . . had the power to reverse the judges' decisions." Pet. App. 15a.

Against this backdrop, Petitioner is simply incorrect to claim that the *Edmond* line of authority inflexibly requires that any officer with the power to issue final judgments is a principal officer. Such a categorical rule would make little sense. Under *Edmond*, an inferior officer is one "whose work is directed and supervised *at some level*" by a principal officer. 520 U.S. at 663 (emphasis added). Review of judgments by a principal officer is just one form of direction and supervision, and there is no reason that form should be given more weight than any other form. If anything, a principal officer's ability to remove another officer at will, or exercise administrative authority over that officer's duties, would be a more comprehensive form of direction and supervision than case-by-case review—particularly if that review is highly circumscribed, as in *Edmond*. That is why this Court has weighed multiple factors when addressing the principal/inferior question, and why this Court need not review the court of appeals' adoption of the same approach.

Indeed, this case shows the wisdom of a multi-factor analysis approach. While it is true that the decisions of CRJs are not reviewable as a whole by another Executive Branch entity, they are subject to a variety of other constraints that are more than sufficient to established that their "work is directed and supervised *at some level*" by a principal officer. 520 U.S. at 663 (emphasis added).

In the first place, under the D.C. Circuit's remedy, the CRJs are now removable at will by the Librarian, which this Court emphasized in *Edmond* is "a powerful tool for control." *Edmond*, 520 U.S. at 664 (citing *Bowsher*, 478 U.S. at 727; *Myers*, 272 U.S. 52). On top of this, the CRJs are obligated to refer "novel questions of law" to the Register, who is supervised by the Librarian. The Register's determinations are binding on the CRJs, and the Register is further entitled to review and correct the CRJs' determinations for legal error. 17 U.S.C. § 802(f)(1)(B)&(D). While these powers do not provide plenary review of CRJ determinations, the D.C. Circuit was surely correct to find that they provide a "non-trivial limit" on CRJ discretion, and that "coupled with the threat of removal," they provide the requisite significant degree of control by the Librarian. Pet. App. 16a, 21a.[8] The D.C. Circuit thus faithfully and sensibly applied the teachings of

[8] Although Respondent SoundExchange argued below that the CRJs were inferior officers based on the degree of supervision and control that the Librarian of Congress exercised over them, Respondent does not here contest the D.C. Circuit's finding that the CRJs were principal officers.

Edmond in the decision below and there is no warrant for this Court to review that determination.

B. The Court Of Appeals Correctly Determined That The Librarian Is The Head Of A "Department" Under The Appointments Clause.

Petitioner next asserts that the remedy adopted by the court of appeals failed to redress the constitutional violation because the Librarian is not the head of a "Department" under the Appointments Clause. *See* Pet. 24. Petitioner's argument is based on an understanding of the term "Department" that is irreconcilable with this Court's precedents.

The Appointments Clause gives "Heads of Departments" the authority to appoint inferior officers. U.S. Const. art. II, § 2, cl. 2. This Court has held that "the Departments referred to [by the Appointments Clause] are themselves in the Executive Branch or at least have some connection with that branch." *Buckley*, 424 U.S. at 127. Recently, this Court found that the Securities and Exchange Commission is a "Department" under the Appointments Clause, even though it is not a Cabinet agency, "[b]ecause the Commission is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component." *Free Enter. Fund*, 130 S. Ct. at 3163. Thus, the question before the court of appeals was whether the Library of Congress is a freestanding entity that is in, or at least has some connection to, the Executive Branch.

The court of appeals answered the question in the affirmative. It gave two reasons for its conclusion. First, it noted that "the Librarian is appointed by the President with advice and consent of the Senate, 2 U.S.C. § 136, and is subject to unrestricted removal by the President." Pet. App. 22a. And second, it found that "the powers in the Library and the [Copyright Royalty] 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.

The court of appeals' reasoning is sound. The President's authority to appoint and remove principal officers, such as the Librarian, ensures executive accountability and safeguards the President's ability to faithfully execute the laws without encroachment from other branches. *See Free Enter. Fund*, 130 S. Ct. at 3151-55. The President's power of appointment and removal is the primary mechanism by which he exercises "general administrative control of those executing the laws." *Id.* at 3152 (quoting *Myers*, 272 U.S. at 164). By giving the President the authority to appoint and remove the Librarian, Congress established the Librarian as the head of an entity within the Executive Branch.

Congress' delegation of traditionally executive powers to the Library of Congress also marks the Library as part of the Executive Branch. Congress cannot constitutionally grant executive powers to an entity within the Legislative Branch. *See, e.g., INS*

v. Chadha, 462 U.S. 919, 954-55 (1983) (holding that it was unconstitutional for Congress to interfere with the execution of immigration laws delegated to the Department of Justice); *Bowsher*, 478 U.S. at 722-27 (invalidating a law assigning executive powers to an official Congress could remove); *Buckley*, 424 U.S. at 124-37 (holding Congress had exceeded its constitutional power by reserving to itself the right to appoint members of a Commission that exercised executive authority). Thus, because "[t]he structure of the Constitution does not permit Congress to execute the laws," *Bowsher*, 478 U.S. at 726, and the Library of Congress executes the laws in various important respects, the Library must be within the Executive Branch, not the Legislative Branch.

Petitioner does not meaningfully dispute either of those points. Instead, Petitioner argues that the Library falls within the Legislative Branch because: (1) it assists with certain legislative functions; (2) it is designated as part of the Legislative Branch in certain statutory provisions; and (3) it has provided written reports to Congress without presidential review. *See* Pet. 24-27. None of these arguments undermines the decision below.

While Congress may not grant a legislative agency executive powers, it may permit an executive agency to engage in certain functions that assist the legislature. *See Buckley*, 424 U.S. at 133 (noting that the functions of "a typical administrative agency" may be "'predominantly quasijudicial and quasilegislative' rather than executive", (internal quotation marks omitted)). Thus, Congress may

place the Congressional Research Service—which helps gather information for legislature purposes—within the Library of Congress without transforming the Library into a part of the Legislative Branch. It is no different than Congress' placement of the Marshals Service—which exclusively serves the Judicial Branch—within the Department of Justice, an indisputable part of the Executive Branch.

Nor does it matter that the Library "is governed by Title II of the United States Code," is "funded by appropriations for the legislative branch," and "is exempt from the APA because its provisions do not apply to 'the Congress.'" Pet. 24 (internal quotation marks omitted); *see also* Amicus Brief of the National Religious Broadcasters Music License Committee, at 15-17 (making similar claims). Congress may classify governmental departments how it chooses, and may subject departments to different *statutory* requirements in accordance with those classifications. But it may not use such classifications to alter the scope of *constitutional* commands. For example, in *Free Enterprise Fund*, this Court held that the Public Company Accounting Oversight Board was "part of the Government for constitutional purposes," 130 S. Ct. at 3148 (internal quotation marks omitted), even though Congress had deemed the Board a private, "nonprofit corporation" with members who are not "officer[s] or employee[s] of . . . the Federal Government," 15 U.S.C. § 7211(a), (b). Similarly, in *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 392 (1995), this Court deemed Amtrak a "Government entity for purposes of determining the constitutional rights of citizens

affected by its actions," even though Congress had disclaimed by statute that Amtrak was a government agency. In short, it is not the Library's "congressional label," but its powers and responsibilities, that determine its position within the constitutional structure. *Id.* at 392-93.

Nor, finally, does the Congressional Research Service's duty to provide written reports to Congress establish that the Service is part of a Legislative Branch department. The Service must provide Congress with reports on certain matters upon request. *See* 2 U.S.C. § 166. Petitioner claims that requirement is incompatible with deeming the Library an Executive Branch Department because Executive Branch officials may not report to Congress without reporting to the President first. *See* Pet. 26-27. That is not so. Under the Opinions Clause of the Constitution, the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices." U.S. Const. art. II, § 2, cl. 1. The Office of Legal Counsel has interpreted the Clause to mean that "statutes purporting *to require* that executive branch officials submit reports directly to Congress, without any prior review by their superiors, would raise serious constitutional questions." Status of the Comm'n on R.R. Ret. Reform for Purposes of the Applicability of Ethics Law, 13 Op. O.L.C. 285, 1989 WL 595872, at *3 (1989) (emphasis added). 2 U.S.C. § 166 does not *require* the Congressional Research Service to bypass review by more senior Executive Branch officials before delivering a report to

Congress. Accordingly, the statute has no bearing on the Library's status as an Executive Branch Department.

Petitioner's claims of error with respect to the D.C. Circuit's conclusion that the Librarian of Congress is the Head of a Department are meritless.

C. The Court Of Appeals Reasonably Adopted This Court's Remedy In *Free Enterprise Fund*.

To resolve "the Appointments Clause violation and minimize[] any collateral damage," the court of appeals explicitly adopted this Court's reasoning and remedy in *Free Enterprise Fund*, and invalidated and severed "the restrictions on the Librarian's ability to remove the CRJs." Pet. App. 20a. The court's approach was entirely reasonable given the similarities between this case and *Free Enterprise Fund*.

In *Free Enterprise Fund*, as here, the restrictions on removing certain Executive Branch officers created a constitutional violation. *See* 130 S. Ct. at 3154. And in *Free Enterprise Fund*, as here, the consequences of disbanding the entity comprised of unconstitutionally appointed officers would have been severe. *See id.* at 3161. Accordingly, the court of appeals, like this Court before it, simply invalidated the offending removal restrictions and left the rest of the statutory scheme intact. *See id.* at 3161-62.

Petitioner's efforts to distinguish *Free Enterprise Fund* are unavailing. While *Free Enterprise Fund* "did not involve an Appointments

Clause violation," Pet. 33, but a separation-of-powers violation, the constitutional problems were similar and resulted from the same underlying statutory issue—restrictions on the removal power of Executive Branch officers. And while *Free Enterprise Fund* did not "adopt the extraordinary remedy of demoting officers of the United States," *id.*, and rejected "blue-pencil[ing] a sufficient number of the Boards' responsibilities so that its members would no longer be 'Officers of the United States,'" *id.* (quoting 130 S. Ct. at 1362), the court of appeals did not take that approach either. The court did not reduce the powers or responsibilities of the CRJs in any way; it merely *increased* the powers of the Librarian, just as *Free Enterprise Fund* increased the powers of the Securities and Exchange Commission.

Petitioner also suggests the court of appeals should have adopted this Court's remedy in *Buckley*, and left it to Congress to fix the constitutional problem. Pet. 30-31. But even beyond the practical problems this undoubtedly would have created, *see supra* pp. 15-18, *Free Enterprise Fund* is a more closely analogous case than *Buckley*. Both here and in *Free Enterprise Fund*, the constitutional problem could be remedied simply by striking a portion of a single statute. In *Buckley*, by contrast, the constitutional problem was that the members of the Federal Elections Commission were not officers of the United States, yet had "broad administrative powers" that were set forth in several different statutes. 424 U.S. at 140. Under those circumstances, it made sense to defer to Congress to

address the wide-ranging constitutional problem. But here—and in *Free Enterprise Fund*—the constitutional problem was discrete enough for a judicial remedy.

Lastly, the court of appeals' chosen remedy does not undermine the congressional scheme. While Petitioner frets that the Librarian's new removal power will create a return to the days of ad hoc panels and unpredictable results, it is pure speculation that the Librarian will actually exercise his right to remove CRJs at will. In most cases, the mere threat of removal is what will allow the Librarian to supervise and direct the CRJs. And while CRJs only serve six-year terms, the Librarian historically has served for decades at a time, Pet. 28, which means the Librarian's influence over the CRJs will actually result in increased predictability over time. In any event, if Congress is displeased with the court of appeals' remedy in this case, it may always revise the statute further. There is no reason for this Court to anticipate Congress' objections when Congress is free to voice them itself.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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