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 OF THE NATIONAL RELIGIOUS BROADCASTERS MUSIC LICENSE COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Did Congress violate both the Appointments Clause, U.S. Const. art. II, §2, cl. 2, and the Constitution's separation of powers when it authorized the head of a Legislative Branch agency, the Librarian of Congress, to appoint officers of the United States?

2. Did the Court of Appeals exceed its authority when it purported to cure the Appointments Clause defect in this case by rewriting the relevant statute in a manner directly contrary to the design and purpose of Congress?

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INTEREST OF *AMICUS CURIAE*

The National Religious Broadcasters Music License Committee ("NRBMLC") is a standing committee of the National Religious Broadcasters. The NRBMLC represents approximately 900 full-power commercial and noncommercial AM and FM radio stations in their sound recording and music licensing dealings. This representation includes litigation before Respondent Copyright Royalty Board ("CRB") to set license fee rates and terms for the sound recording public performance right that must be licensed when its member stations "webcast" their programming over the Internet.[1] *See* 17 U.S.C. §106(5) (granting right); *id.* §114(d) (creating statutory license); *id.* §114(f) (providing for litigation before CRB to determine statutory license rates and terms). The NRBMLC participated as a party in the first webcasting proceeding held before the CRB. *See* Copyright Royalty Board, *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Final Rule and Order, 72 Fed. Reg. 24,084 (May 1, 2007) ("*Webcasting II*").[2] The NRBMLC expects to participate

1. Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amicus* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties were timely notified of *amicus*' intent to file this brief, and all parties have consented to its filing. Written consent from all parties has been lodged with the Court.

2. The NRBMLC also participated as a party in the very first webcasting proceeding, which was held before the CRB's predecessor, the Copyright Arbitration Royalty Panel. *See* Library of Congress, *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, Final Rule and Order, 67 Fed. Reg. 45,240, 45,241 (July 8, 2002) ("*Webcasting I*").

as a party in the CRB webcasting proceeding that will commence in January 2014.

Many of the stations represented by the NRBMLC webcast their programming subject to rates and terms that were negotiated with Respondent SoundExchange in light of the rates set by the CRB in the *Webcasting II* proceeding. Others would likely webcast their programming if the CRB established more reasonable rates. The rates and terms established by the CRB largely determine whether webcasting is economically viable.

As a repeat party before the CRB, the NRBMLC has a vital interest in ensuring that the CRB is properly constituted and politically accountable, and retains its statutory independence from the Librarian of Congress and the Register of Copyrights. The NRBMLC offers this brief to highlight and amplify two of the issues presented in the Petition for a Writ of Certiorari filed by Intercollegiate Broadcasting System, Inc. ("IBS").

STATEMENT OF THE CASE

This case arises out of an appeal to the United States Court of Appeals for the District of Columbia Circuit by Petitioner IBS of a decision by the CRB establishing sound recording public performance right license rates and terms for webcasting for 2011 through 2015. Copyright Royalty Board, *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 76 Fed. Reg. 13,026 (Mar. 9, 2011) ("*Webcasting III*").[3]

3. The court of appeals exercised jurisdiction pursuant to 17 U.S.C. §803(d)(1).

As prescribed by section 801(a) of the Copyright Act, 17 U.S.C. §801(a), the appointment of the CRB's Copyright Royalty Judges ("CRJs") is vested in the Librarian of Congress. Among other challenges to the CRB's decision, IBS challenged the appointment of the members of the CRB itself as violative of the Appointments Clause of the U.S. Constitution, U.S. Const., art. II, §2, cl. 2. The D.C. Circuit agreed with IBS and held that "the position of the CRJs, as currently constituted, violates the Appointments Clause." *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1334 (D.C. Cir. 2012) (hereinafter, "*IBS*"). The court therefore vacated the rates and terms established in *Webcasting III*. *Id*. at 1342.

The court of appeals determined that, as constituted at the time of the challenged decision, the Judges of the CRB were principal officers of the United States, which must be appointed by the President and confirmed by the Senate. *Id.* at 1340. The court recognized that "'billions of dollars and the fates of entire industries can ride on the [CRB's] decisions.'" *Id.* at 1337-38 (quoting *SoundExchange, Inc. v. Librarian of Cong.*, 571 F.3d 1220, 1226 (D.C. Cir. 2009) (Kavanaugh, J., concurring)). The court also relied on the facts that the CRJs' decisions were final and "not reversible or correctable by any other officer or entity," the CRJs were not subject to supervision with respect to findings of fact or the determination of rates, and the CRJs could be removed only for misconduct or neglect of duty. *Id*. at 1338-40.

Having found a constitutional defect in the appointment of the CRJs, the D.C. Circuit decided that it could remedy the defect itself by rewriting section 802(i) of the Copyright Act, 17 U.S.C. §802(i), to eliminate the strict limitations

imposed by Congress on the right of the Librarian of Congress to sanction the CRJs and remove them from office, thereby making the CRJs terminable at will. The court did not address whether the limitations on removal contained in section 802(i) were severable or whether its statutory rewrite was consistent with other provisions of the Act or with the expressed will of Congress.

The court of appeals held that, with the statute thus amended, the CRJs were inferior officers. *IBS*, 684 F.3d at 1340-41. The court then addressed and rejected IBS's argument that the Appointments Clause violation would exist even if the CRJs were inferior officers because the Library of Congress is not a Department within the Executive Branch. *Id.* at 1341-42. The court of appeals concluded that its revision of the statute rendered the CRB constitutionally constituted. It therefore remanded the *Webcasting III* decision to the CRB. *Id.* at 1342. The court of appeals denied IBS's petition for rehearing and rehearing en banc.

SUMMARY OF ARGUMENT

This case raises fundamental issues about the structure of the federal government and the Constitution's separation of powers. As is often the case where those principles are ignored, democratic choice and political accountability suffer. Here, the court of appeals allowed the Copyright Act to vest the power to appoint officers of the United States in the Librarian of Congress, who is the head of an agency located in the Legislative Branch. The court thus approved an act that violates the Appointments Clause and improperly (i) aggrandizes the power of Congress at the expense of the Executive Branch,

(ii) combines Congress' power to create offices with the power to fill them, and (iii) creates an agency empowered to make decisions that affect billions of dollars of commerce, but that lacks the requisite accountability to the President and, ultimately, to the electorate.

The status of the Library of Congress as a Legislative Branch agency is provided for by statute. This status has been broadly recognized by the courts, including this Court and at least two courts of appeals, the Second and Federal Circuits. *See infra* Part I.B.3. Before the opinion below, the D.C. Circuit, itself, had consistently recognized that the Library of Congress was located within the Legislative Branch. The opinion below ignores what should be the most important factor in separation of powers analysis – where Congress itself has indicated the officer or body lies within our constitutional structure. *See Mistretta v. United States*, 488 U.S. 361, 385 (1989) (giving substantial weight to Congress' designation of the United States Sentencing Commission as located in Judicial Branch). The decision also creates confusion in the circuits over the constitutional location and status of the Library of Congress.

Having correctly determined that, given their important duties and lack of direct supervision, the CRJs were principal officers of the United States (and therefore improperly appointed), the court of appeals should have stricken the unconstitutional grant of appointment authority, vacated the order entered by individuals without proper constitutional authority, and left correction of the constitutional defect to the democratic process. Congress may have chosen to leave the President to appoint the CRJs with the advice and consent of the Senate as specified in

the Appointments Clause, or it may have chosen to make the CRJs inferior officers with some different method of appointment, or it may have chosen to replace the CRB with a new Executive Branch agency. The point is that any such attempt to repair the statute should have been left to Congress.

Instead, the court of appeals improperly chose to rewrite a different section of the statute in order to "remedy" the appointment defect. In fact, what the court did is create its own statute – one that Congress never wrote and the President never signed; one that directly contradicts Congress' intent to insulate the CRB from political forces. The court did this by "blue penciling" the significant limitations imposed by Congress on the authority of the Librarian of Congress to sanction and remove the CRJs, vitiating the explicitly articulated will of Congress that the CRJs have "full independence in making determinations," leaving the CRJs subject to removal and sanction without hearing or performance review, undermining the statutory staggering of the CRJs' six-year terms and rendering the statute incoherent. The court of appeals took this action without undertaking any severability analysis as mandated by the constitutional decisions of this Court, and without any consideration of whether its *ex tempore* statutory rewrite was consistent with the remainder of the statutory scheme or the intent of Congress. Ironically, in attempting to vindicate Congress' improper grant of appointment power to the Legislative Branch, the court of appeals arrogated to itself Congress' power to legislate.

The issues presented in this case concerning the constitutionality of the appointment of the CRJs and the proper cure for the constitutional defect in the Copyright

Act are important and far reaching. A further circuit conflict regarding the CRB is not likely to develop because appeal of all CRB decisions is vested exclusively in the D.C. Circuit. 17 U.S.C. §803(d). Thus, it is important for this Court to address this issue now, in this case, before the CRB commences further proceedings under an unconstitutional, judicially created statutory mandate.

ARGUMENT

I. THE COPYRIGHT ACT VIOLATES THE APPOINTMENTS CLAUSE OF THE CONSTITUTION BY VESTING THE POWER TO APPOINT COPYRIGHT ROYALTY JUDGES IN THE LIBRARIAN OF CONGRESS, THE HEAD OF A LEGISLATIVE BRANCH AGENCY.

The Appointments Clause of the Constitution provides:

> [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.

U.S. Const., art. II, §2, cl. 2. Principal officers *must* be appointed by the President and confirmed by the Senate. Inferior officers may, if authorized by legislation, be appointed by the President alone, by the courts of law,

or by the "Head" of a "Department." *Id.* This Court has made clear that the term "Heads of Departments" means the head of "a free-standing, self-contained entity *in the Executive Branch*." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3162-63 (2010) (emphasis added) (quoting and adopting the reasoning of the concurring opinion in *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 915 (1991)). The relevant question is not whether the individual "Head" may exercise some executive function or is himself appointed by the President; rather, the Appointments Clause requires *the Department* to be located in the Executive Branch.

Section 801(a) of the Copyright Act, 17 U.S.C. §801(a), grants to the Librarian of Congress the power to "appoint 3 full-time Copyright Royalty Judges." If, as the court of appeals correctly held, the CRJs are principal officers, this grant of power violates the Appointments Clause for the obvious reason that the Librarian of Congress is not the President and the law does not provide for Senate confirmation.

But even if the CRJs are inferior officers, or are made into inferior officers by the improper rewrite of removal authority attempted by the court below, section 801(a) still violates the Appointments Clause. The Librarian of Congress obviously is not the President or a court of law. Nor is the Librarian the "Head" of a freestanding component of the Executive Branch for the simple reason that the Library of Congress is not in the Executive Branch – it is an agency of the Legislative Branch – and the Appointments Clause prohibits Congress from granting the appointment power to itself.

A. The Appointments Clause Is Integral to the Constitution's Separation of Powers and Was Adopted To Ensure that Congress Did Not Grant Itself the Power To Appoint Officers.

The Appointments Clause is an integral part of the constitutional structure of separated powers. It was adopted to serve two essential purposes. First, it prevents one branch from "aggrandizing its power at the expense of another branch." *Freytag*, 501 U.S. at 878; *Buckley v. Valeo*, 424 U.S. 1, 129 (1976) ("[T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches."); *accord Bowsher v. Synar*, 478 U.S. 714, 727 (1986) ("The dangers of congressional usurpation of Executive Branch functions have long been recognized.").

In particular, the Framers recognized "that combining the power to create offices with the power to appoint officers was a recipe for legislative corruption." *Freytag*, 501 U.S. at 904 (Scalia, J., concurring in part). Thus, the Clause sought to ensure that Congress did not grant the appointment power to itself (or to any part of the Legislative Branch). *Buckley*, 424 U.S. at 127 ("[N]either Congress nor its officers were included within the language 'Heads of Departments' in this part of cl. 2."); *Freytag*, 501 U.S. at 904-06 ("For these good and sufficient reasons, then, the federal appointment power was removed from Congress.") (Scalia, J., concurring in part).

Second, the Clause preserves "the Constitution's structural integrity by preventing the diffusion of the appointment power" and "ensur[ing] that those who

wielded it were accountable to political force and the will of the people." *Id.* at 878, 884. "The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint." *Id.* at 880. "Thus, the Clause bespeaks a principle of limitation . . . . Even with respect to 'inferior officers,' the Clause allows Congress only limited authority to devolve appointment power on the President, his heads of departments, and the courts of law." *Id.* at 884 (citation omitted).

The Framers recognized that "the diffusion of power carries with it a diffusion of accountability." *Free Enter. Fund*, 130 S. Ct. at 3155. The people "look to the President to guide the 'assistants or deputies . . . subject to his superintendence.' Without a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'" *Id.* (citation omitted). The grant of the appointment power to the head of a Legislative Branch agency, primarily responsible to the Congress, would undermine that clear chain of command.

B. The Library of Congress Is a Legislative Branch Agency; It Is Not a Department of the Executive Branch.

1. Congress has lodged the Library of Congress in the Legislative Branch. The Library is established pursuant to Title 2 of the United States Code, which governs "The Congress." 2 U.S.C. Ch. 5. It is funded by "appropriations for the legislative branch." *See Id.* §132a-1.

Subsequent acts of Congress have confirmed the placement of the Library of Congress in the Legislative Branch. In establishing the "program for information exchange among legislative branch agencies" in 1996, Congress directed "[a]ll of the appropriate offices and agencies of the legislative branch" to participate and specified that the Library of Congress was one of the "offices and agencies of the legislative branch." 2 U.S.C. §181. Similarly, in establishing the "Legislative information retrieval system" in 1995 to "reduce the cost of information support for the Congress," Congress charged the Library of Congress "in coordination with *other* appropriate entities of the legislative branch" to "develop and maintain . . . a single legislative information retrieval system to serve the entire Congress." 2 U.S.C. §180 (emphasis added). When Congress established the "Center for the Book" in the Library in 1977, Congress declared that "the Congress of the United States on April 24, 1800, *established for itself* a library of the Congress." 2 U.S.C. §171 (emphasis added).

When Congress created the Copyright Royalty Tribunal ("CRT"), a predecessor of the CRB, in the Copyright Act of 1976, Congress vested authority to appoint members of the CRT in the President alone due to Appointments Clause concerns. *See* United States Copyright Act, 17 U.S.C. §101 et seq., Pub. L. No. 94-553, 90 Stat. 2541 (1976). Congress rejected a proposal that would have vested appointment authority with the Register of Copyrights (the head of the Copyright Office, which is a unit of the Library of Congress). The House Report states its "constitutional concern . . . over the provision of the Senate bill that the Register of Copyrights, an employee of the *Legislative Branch*, appoint the members of the

Tribunal." H.R. Rep. No. 94-1476, at 174 (1976) (emphasis added).

Congress has also expressly limited the role of the Register of Copyrights in international meetings, making clear that the Register may only participate in international meetings as a member of a United States delegation "as authorized by the appropriate Executive branch authority." 17 U.S.C. §701(b)(3). Congress would not have used this language if the Copyright Office were, itself, in the Executive Branch.

Congress' decision to place the Library of Congress in the Legislative Branch must control for Appointments Clause purposes unless the Library's functions are incompatible with that placement. *See Mistretta*, 488 U.S. at 385 ("Congress' decision to create an independent rulemaking body to promulgate sentencing guidelines and to locate that body within the Judicial Branch is not unconstitutional unless Congress has vested in the Commission powers that are more appropriately performed by the other Branches or that undermine the integrity of the Judiciary."). As discussed in the next section, the Library of Congress' functions are overwhelming legislative. Thus, Congress' decision to place the Library of Congress in the Legislative Branch must be controlling, and the D.C. Circuit erred under this Court's precedent by ignoring that decision.

2. The functions performed by the Library of Congress are overwhelmingly legislative in nature. The Library identifies itself as part of the Legislative Branch: "An agency of the legislative branch of the U.S. government, the Library of Congress encompasses several integral

service and support units." *See* Library of Congress, *About the Library*, *available at* www.loc.gov/about/ (last visited Feb. 25, 2013). "The Library's mission is to support the Congress in fulfilling its constitutional duties and to further the progress of knowledge and creativity for the benefit of the American people." *Id.* It is "the research arm of Congress," *id.*, created to house "such books as may be necessary for the use of Congress," John Cole, *Jefferson's Legacy: A Brief History of the Library of Congress*, Part I: The Library of Congress, 1800-1992, *available at* www.loc.gov/loc/legacy/loc.html (last visited Feb. 25, 2013).

For example, the Congressional Research Service ("CRS"), established under 2 U.S.C. §166, is charged with "(A) rendering to Congress the most effective and efficient service, (B) responding most expeditiously, effectively, and efficiently to the special needs of Congress, and (C) discharging its responsibilities to Congress." *Id.* §166(b)(1); *see Bowsher*, 478 U.S. at 746 n.11 (Stevens, J., concurring) (noting that the CRS is a "congressional agent[]" that "function[s] virtually as a permanent staff for Congress"); Library of Congress, *Congressional Research Service, History and Mission*, *available at* www.loc.gov/crsinfo/about/history.html (last visited Feb. 25, 2013) (The CRS "serves the Congress throughout the legislative process by providing comprehensive and reliable legislative research and analysis that are timely, objective, authoritative, and confidential, thereby contributing to an informed national legislature.").

In addition, the Library contains:

- The Office of the Librarian, which has the mission "to set policy and to direct and support programs

and activities to accomplish the Library's mission" (*i.e.*, to support the Congress in fulfilling its constitutional duties), *see About the Library*, *supra*. The current Librarian has served continuously for twenty-five years, spanning the terms of five different Presidents;

- The Law Library, which "*Congress* established [to satisfy] *its* need for ready access to reliable legal materials," *id.* (emphasis added);

- Library Services, which works "to develop qualitatively the Library's universal collections," and the Office of Strategic Initiatives, which "direct[s] the overall digital strategic planning for the Library and the national program for long-term preservation of digital cultural assets." *Id.* Each of these missions aligns with the early recognition that, without sufficient materials properly catalogued, the Library will be "practically of no service to *Congress*," as the Librarian must be able "to get out for the instruction and information of *Congress* a bibliography upon any subject coming before us for legislation," 29 Cong. Rec. 314, 317 (1897) (statement of Quigg) (emphasis added).

The Library also houses the Copyright Office, which, as discussed above, Congress has recognized is within the Legislative Branch. In addition, section 701(b), which identifies the general functions and duties of the Register of Copyrights, provides that the Register shall "[a]dvise Congress on national and international issues relating to copyright, other matters arising under this title, and

related matters," and "[p]erform such other functions as Congress may direct." 17 U.S.C. §701(b)(1), (5).[4]

In sum, the Library of Congress performs functions that are quintessentially legislative in nature. The decision of Congress to house the Library of Congress in the Legislative Branch is structurally correct and must be given deference.

3. The Executive and Judicial Branches also have recognized that the Library of Congress is in the Legislative Branch. Petitioner discusses at length the consistent practice of the Justice Department under the Opinions in Writing Clause to treat the Library of Congress as beyond the scope of that Clause's mandate to the Executive Branch (Pet. 25-28); this brief will not add to that discussion.

Numerous courts similarly have recognized the placement of the Library of Congress in the Legislative Branch. This Court, for example, recently relied upon a case involving the Library of Congress to support the proposition that the Administrative Procedure Act does not apply to "the entire legislative branch." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 525 n.6 (2009) (citing *Ethnic Emps. of Library of Cong. v. Boorstin*,

4. Notably, the Copyright Office identifies itself as a Legislative Branch agency. In its "Circular 1a," the Office states: "[a]s a service unit of the Library of Congress, the Copyright Office is part of the legislative branch of government. The Office provides copyright policy advice to Congress." *See* Circular 1a, The United States Copyright Office, A Brief Introduction and History, *available at* www.copyright.gov/circs/circ1a.html (last visited Feb. 25, 2013).

751 F.2d 1405, 1416 n.15 (D.C. Cir. 1985)). Similarly, in *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980), this Court noted, apparently with approval, that the district court had "recognized that the FOIA did not directly provide for relief since the records were in the custody of the Library of Congress, which is not an 'agency' under the Act." *Id.* at 145. The FOIA defined "agency" to include "any executive department . . . or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. §552(f) (1980).

The Federal Circuit has held that the Library of Congress is part of the Legislative Branch. *Gardner v. Library of Congress*, 774 F.2d 1081 (Fed. Cir. 1985) (rejecting challenge to removal from employment because the Library is part of the Legislative Branch and its employees are not in the competitive service). The Second Circuit similarly has observed that the Copyright Act was drafted "by the Copyright Office of the Library of Congress, which is part of the legislative branch itself." *Harry Fox Agency, Inc. v. Mills Music, Inc.*, 720 F.2d 733, 736 (2d Cir. 1983), *rev'd on other grounds*, 469 U.S. 153 (1985).

Indeed, the D.C. Circuit itself, before its decision here, repeatedly held that the Library of Congress was part of the Legislative Branch. In 1959, that court, in an opinion by retired Justice Burton, sitting by designation, cited a long history of opinions by the Comptroller of the Treasury, Comptroller General, and Attorney General, dating back to 1897, and numerous acts of Congress, in concluding that the Library was "as its name implies" "in

or under the jurisdiction of the legislative branch of the Government." *Barger v. Mumford*, 265 F.2d 380, 382-83 & nn. 2, 3 (D.C. Cir. 1959) (Burton, J.). Thereafter, the court consistently held that the Library of Congress was located within the Legislative Branch. *See*, *e.g.*, *Judd v. Billington*, 863 F.2d 103, 104 (D.C. Cir. 1988) ("The Rehabilitation Act, as originally enacted, did not apply to Library of Congress employees. The two sections germane to federal employment were limited in scope to the executive branch. The Library of Congress, as part of the legislative branch, was not included."); *Keeffe v. Library of Cong.*, 777 F.2d 1573, 1574, 1583 (D.C. Cir. 1985) (observing that "[t]he defendant, the Library of Congress, is a congressional agency," and upholding the decision of Congress to impose "high standards of impartial and objective service upon its Congressional Research Service Analysts"); *Wash. Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446, 1449 (D.C. Cir. 1994) ("[W]e have held that the Library of Congress (part of the legislative branch but a separate entity from 'the Congress,' narrowly defined) is exempt from the APA because its provisions do not apply to 'the Congress' – that is, the legislative branch." (citing *Ethnic Emps. of Library of Cong.*, 751 F.2d at 1416 n.15)).

The decision below inexplicably deviates from this long line of precedent. It allows exactly what the Framers' were most concerned about avoiding – legislative creation and definition of the office and legislative appointment to the office.

4. The court of appeals erred in concluding that the Library of Congress "is a freestanding entity" that "meets the definition of 'Department.'" *IBS*, 684 F.3d at 1341-42. The panel's reliance on its belief that the Library of

Congress "performs a range of different functions," some of which it found "are ones generally associated in modern times with executive agencies rather than legislators," *id.*, ignores, as demonstrated above, that the functions of the Library, viewed as a whole, are overwhelming legislative. Moreover, the court of appeals answered the wrong question in finding that "in [the role of promulgating copyright regulations and rate setting] the Library is undoubtedly a 'component of the Executive Branch.'" *Id.* at 1342 (citing *Eltra Corp. v. Ringer*, 579 F.2d 294, 300-01 (4th Cir. 1978)). The Appointments Clause does not depend on particular "roles"; it depends on the structure of government and the proper determination of whether a "Department" is located within the Executive Branch. Whatever functions a Department may perform, it is not structurally in the Executive Branch in some roles and in the Legislative Branch in other roles.

The court of appeals' reliance on the fact that the Librarian of Congress is appointed by the President with the advice and consent of the Senate and, accordingly, may be removed by the President, *id.* at 1341, is similarly misplaced. That fact means only that the Librarian is an officer of the United States, in this case a principal officer. It is not dispositive of the question of whether the Library of Congress is in the Executive Branch. *See Bowsher*, 478 U.S. at 746 n.9 (Stevens, J., concurring) (comparing Presidential appointment of the Comptroller General to the Presidential appointment of the Librarian of Congress to conclude that such appointment does not mean that either is in the Executive Branch). For the reasons discussed above, the Library of Congress is in the Legislative Branch, and the court of appeals erred in holding otherwise.

II. THE COURT OF APPEALS IMPROPERLY REWROTE THE COPYRIGHT ACT IN A MANNER CONTRARY TO OTHER PROVISIONS OF THE ACT AND TO THE EXPRESSED WILL OF CONGRESS.

Having correctly concluded that the CRJs were principal officers, and that their appointment by the Librarian of Congress thus violated the Appointments Clause, the court of appeals should have struck section 801(a) – the unconstitutional grant of appointment authority to the Librarian. *See, e.g., Free Enter. Fund*, 130 S. Ct. at 3161 (concluding that the unconstitutional tenure provisions were severable and removing them). That remedy would have resulted in the requirement that the CRJs be appointed in a manner befitting principal officers – by the President with the advice and consent of the Senate, unless and until Congress decided to demote them to inferior officers and establish a different, constitutional mechanism. Instead, the court of appeals performed radical statutory surgery, rewriting *an entirely different section* of the Copyright Act in a manner that was contrary to the expressed will of Congress, and leaving the law in shambles.

Specifically, the court of appeals blue-penciled all of the substantial limitations on the Librarian's power to sanction and remove the CRJs that Congress had imposed and changed section 802(i) to an unbounded grant of authority to remove and sanction:

> (i) **Removal or Sanction.—** The Librarian of Congress may sanction or remove a Copyright Royalty Judge * * * ~~for violation~~

> ~~of the standards of conduct adopted under subsection (h), misconduct, neglect of duty, or any disqualifying physical or mental disability. Any such sanction or removal may be made only after notice and opportunity for a hearing, but the Librarian of Congress may suspend the Copyright Royalty Judge during the pendency of such hearing. The Librarian shall appoint an interim Copyright Royalty Judge during the period of any such suspension~~.

See IBS, 684 F.3d at 1340-41.

In taking this approach, the panel also removed the right of the CRJs to notice and an opportunity to be heard prior to any sanction or removal under section 802(f) and disrupted the careful staggering of six-year terms for the CRJs under section 802(c). It thus granted the Librarian broad powers that Congress had expressly withheld and undermined the "full independence" of the CRJs that Congress had expressly mandated.

The court of appeals took this step with no analysis whatsoever of whether the language it chose to strike was severable or whether its decision was consistent with the will of Congress, as required by this Court. *See*, *e.g.*, *Free Enter. Fund*, 130 S. Ct. at 3161-62; *Ayotte v. Planned Parenthood*, 546 U.S. 320, 330 (2006) ("[T]he touchstone for any decision about remedy is legislative intent, for a court cannot 'use its remedial powers to circumvent the intent of the legislature.'" (citation omitted)). In fact, the court of appeals acted contrary to the expressed will of Congress and rendered the statute incoherent.

The statutory protections against sanction and removal were part and parcel of a number of provisions that Congress enacted to ensure the independence of the CRJs when it created the CRB in the Copyright Royalty and Distribution Reform Act of 2004 (the "CRDRA"), Pub. L. No. 108-419, 118 Stat. 2341 (2004). Put simply, Congress established the CRJs as principal officers beyond the control of the Librarian of Congress.

Section 802(f), entitled "Independence of Copyright Royalty Judge," was crystal clear: subject to provisions relating to the reference of certain material questions of substantive copyright law to the Register of Copyrights, Congress provided that "the Copyright Royalty Judges *shall have full independence* in making determinations concerning adjustments and determinations of copyright royalty rates and terms, the distribution of copyright royalties, the acceptance or rejection of royalty claims, rate adjustment petitions, and petitions to participate, and in issuing other rulings under this title." 17 U.S.C. §802(f)(1)(A) (emphasis added).[5]

The CRDRA coupled this grant of full independence with a provision overriding other provisions of law and regulations of the Library of Congress in order to prohibit performance appraisals of the CRJs. *Id.* §802(f)(2)(A). This protection from review was subject only to an exception for those appraisals necessary to document a basis for sanction or removal pursuant to the Librarian's limited right to remove or sanction the CRJs *for cause*:

5. The Act also obligated the CRJs to consult with the Register regarding any determination that would require that any act be performed by the Register. 17 U.S.C. §802(f)(1)(C).

> To the extent that the Librarian of Congress adopts regulations under subsection (h) relating to the sanction or removal of a Copyright Royalty Judge and such regulations require documentation to establish the cause of such sanction or removal, the Copyright Royalty Judge may receive an appraisal related specifically to the cause of the sanction or removal.

Id. §802(f)(2)(B).

The court of appeals' statutory rewrite has rendered section 802(f)(2)(B) applicable to a null set. If the Librarian may remove or sanction the CRJs at will, there is never a requirement of documentation to establish cause, and thus performance appraisals are prohibited by section 802(f)(2)(A). Ironically, this leaves the CRJs subject to being blindsided, with no performance appraisals and no right to a hearing prior to removal or sanction. It is inconceivable that Congress, having included these protections in the CRDRA, would have countenanced this result.

Moreover, the CRB acts by majority vote and most commonly acts unanimously. For the Librarian to wield the removal power as a means of "direct[ing]" and "supervis[ing]" the CRJs' actions, *IBS*, 684 F.3d at 1341, he would need to fire at least two and, more likely, all three. The staggered six-year terms established by section 802(c) would be disrupted every time the Librarian "supervised" the CRJs.

The history of the CRDRA confirms Congress' intent to insulate the CRJs from oversight by the Librarian of

Congress. The predecessors of the CRB, the so-called "Copyright Arbitration Royalty Panels," were subject to appellate review by the Librarian of Congress based on the recommendation of the Register of Copyrights. 17 U.S.C. §802(f) (2000). The CRDRA eliminated this intermediate review in favor of direct review by the D.C. Circuit. 17 U.S.C. §803(d).

In sum, following the court of appeals' rewrite of the statute, the law now provides that the CRJs must have "full independence in making their determinations," but, in the words of the court of appeals, those "decisions will be constrained to a significant degree" by the "threat of removal." *IBS*, 684 F.3d at 1341. The law precludes performance reviews, except where required "to establish the cause of . . . sanction or removal," 17 U.S.C. §802(f)(2)(B), but under the statute as rewritten by the court below, no cause is ever required to sanction or remove the CRJs. *IBS*, 684 F.3d at 1340-41 (striking all restrictions on the Librarian's power to remove or sanction the CRJs and creating "unfettered removal power"). The law carefully provides for staggered six-year terms, but, as rewritten by the court of appeals, gives the Librarian the power to disrupt those terms every time he "supervises" the CRJs.

In deciding to utilize its blue pencil, the court of appeals made hash of a previously coherent law. The opinion below confirms the wisdom of this Court's observation that "editorial freedom" to "blue-pencil" an Act of Congress beyond striking a specific and severable unconstitutional provision "belongs to the Legislature, not the Judiciary." *Free Enter. Fund*, 130 S.Ct. at 3162; *see Buckley*, 424 U.S. at 142-43. The court of appeals violated this requirement and arrogated to itself the power of Congress.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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