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

REPLY BRIEF FOR PETITIONER

WILLIAM MALONE
9117 Vendome Drive
West Bethesda, MD. 20817

CHRISTOPHER J. WRIGHT
COUNSEL OF RECORD
TIMOTHY J. SIMEONE
MARK D. DAVIS
RACHEL W. PETTY
WILTSHIRE & GRANNIS LLP
1200 18th St., N.W., Ste. 1200
Washington, D.C. 20036
(202) 730-1300
cwright@wiltshiregrannis.com

May 6, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the
Supreme Court of the United States

No. 12-928

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

REPLY BRIEF FOR PETITIONER

In this Appointments Clause case, the court below invalidated the statute as written because the Copyright Royalty Judges ("CRJs") are principal officers of the United States who must be appointed by the President but were appointed by the Librarian of Congress. The government now concedes that the statute was unconstitutional as enacted. But the government contends that the court below fixed the problem by revising the statute to provide that the Librarian may fire the Judges without cause.

The fact that Congress passed a statute the government now refuses to defend underscores the

existing uncertainty regarding the requirements of the Appointments Clause, and demonstrates the need for review by this Court. So does the fact that the Civil Division of the Department of Justice defended the statute below but its superiors within the Department have now concluded that the statute was unconstitutional as enacted.

In addition, Respondents have not adequately responded to Petitioner's arguments showing the need for review by the Court.

1. The Court should clarify the standard for distinguishing principal from inferior officers. The Petition showed that the decision below is contrary to this Court's decision in *Edmond v. United States*, 520 U.S. 651 (1997), which held that the members of the Coast Guard Court of Criminal Appeals are inferior officers. In *Edmond* the Court noted that the Judge Advocate General could remove a Coast Guard Judge "from his judicial assignment without cause." *Id.* at 664. But that was not the end of the Court's inquiry. The Court emphasized that the decisions of the Coast Guard Judges were subject to review by the Court of Appeals for the Armed Forces, and held that "[w]hat is significant is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Id.* at 665.

The government accuses Petitioner of "dismiss[ing] the significance of at-will removal" with respect to determining whether officers are principal or inferior officers. SG Opp. 11. That is not so. Rather, the government over-emphasizes the importance of that factor, while failing to heed this

Court's holding in *Edmond* that what is "significant" is that the Coast Guard Judges had "no power to render a final decision on behalf of the United States" without review by another Executive Branch official. This Court's decision in *Edmond* simply cannot be read as holding that judges who may be removed without cause are inferior officers whether or not they may render final decisions on behalf of the United States. *After* noting that the Coast Guard Judges were removable without cause, the *Edmond* Court went on to say that what is significant is that they render final decisions of the United States without further Executive Branch review.

As a result, *Edmond* could plausibly be read to mean that before concluding that officials are inferior rather than principal it is necessary to conclude both that they may be removed without cause *and* cannot render final decisions on behalf of the United States. Or *Edmond* could mean that officials are inferior if they cannot render final decisions on behalf of the United States even if they can be removed only for cause. But *Edmond* cannot reasonably be read to mean that it does not matter whether officials have the power to render final decisions on behalf of the United States. If that were so, there would have been no reason for the Court to address the issue, much less emphasize the significance of Coast Guard judges' *lack* of power to render final decisions.

The government argues that a decision that officers who make final decisions on behalf of the United States are principal officers would call into question the constitutionality of the Social Security Appeals Council and the Benefits Review Board. SG

Opp. 14 n.6. But the fact that the Court's decision would have significance beyond the case at bar is a reason to grant the Petition rather than to deny it. And if the government's argument is that it is unreasonable to require the President to appoint officers who make final decisions regarding matters such as social security and longshore benefits on the theory that those matters are not sufficiently important, it bears note that the court below began its analysis by stating that it is unclear under this Court's decisions whether "significance of authority" affects the determination whether an officer is a principal or inferior officer, but that in any event "significance of authority … is a metric on which the CRJs score high." Pet. App. 13a-14a. The court's acknowledged uncertainty concerning whether "significance of authority" is a factor in distinguishing principal from inferior officers is both a reason for reviewing the decision and a possible basis for distinguishing the Copyright Royalty Judges from other officers.

The government also suggests that the members of the Public Company Accounting Oversight Board ("PCAOB") at issue in *Free Enterprise Fund v. PCAOB*, 130 S. Ct. 3138 (2010), would be principal officers under Petitioner's reading of *Edmond*. Not so. Although the PCAOB may conduct investigations without oversight by the Securities and Exchange Commission, the PCAOB is subject to the SEC's oversight "with respect to the issuance of rules or the imposition of sanctions (both of which are subject to Commission approval and alteration)." *Id.* at 3148. The difference between conducting investigations and adopting rules and sanctions is a difference in kind. Of course, a decision to investigate may be very

important to the target of the investigation. But only when an investigation results in a sanction or a rule can it be said to be a final decision—and the PCAOB lacks authority to adopt rules or issue sanctions without SEC approval. The many industries subject to rate determinations of the Copyright Royalty Judges, in contrast, must pay those rates unless a party can persuade the court of appeals to reverse its decisions.

Similarly, contrary to the government's suggestion, SG Opp. 15, Petitioner's reading of *Edmond* does not call into question this Court's decision in *Morrison v. Olson*, 487 U.S. 654 (1988). Although the independent counsel at issue in that case could "initiate prosecutions" and take similar steps, the initiation of a prosecution is an initial rather than a final step.

SoundExchange argues that review of this issue is not warranted because most of the other entities that have business before the Board have not filed in support of the Petition. SX Opp. 14. But of course, whether the Board is constitutional and whether the issue is of sufficient importance to warrant further review does not depend on the views of other parties, particularly parties who may think they have good reason not to antagonize an entity whose rate decisions can put them out of business. And as SoundExchange well knows, it insisted that parties promise not to "participate as a party, intervenor, amicus curiae or otherwise" in litigation challenging the order of the Board at issue in this case, Notification, 74 Fed. Reg. 34,796, 34,801 (June 19, 2009), as part of the price of settling.

The Court should grant the first question presented to provide needed guidance on the standard for distinguishing principal from inferior officers, an issue that affects many boards that Congress has created and may create in the future.

2. The Court should determine whether the Librarian is the Head of an Executive Branch Department. The government completely fails to reconcile its position that the Librarian is the Head of an Executive Branch Department with the Librarian's important duties to serve Congress. That failure is most clear with respect to the conflict between the government's position in this case and the Office of Legal Counsel's longstanding interpretation of the Opinions in Writing Clause, U.S. Const., art. II, §2, cl. 1.

As demonstrated in the Petition, without dispute from the government, the Department of Justice interprets the Opinions Clause to mean that the President has the right to review and edit documents produced by Executive Departments before they are provided to Congress. But one of the key statutory provisions governing the Library's functions, 2 U.S.C. §166, requires the Congressional Research Service ("CRS") to produce reports of all kinds to Congress. No one understands that requirement to permit the Service to submit reports to Congress only after review by the President. And the Service regularly disagrees with positions of the President in its reports. Of course, there is nothing wrong with Congress obtaining independent expert views—but the very fact that the Librarian provides expert views that are independent of and may differ from those of the Executive Branch shows that the

Librarian is not the Head of an Executive Branch Department.

The government's opposition contains an inscrutable two-sentence paragraph that first acknowledges that the CRS has "the ability to issue reports to Members of Congress (and to disagree with the Executive Branch's views about certain legal questions)," and goes on to say, without further explanation, that "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 of Congress's legislative functions." SG Opp. 21-22. The petition for a writ of certiorari should be granted so that the government has the opportunity to explain, in a brief on the merits, *why* the President's prerogatives are "not implicated" when an officer whom the government contends heads an Executive Branch Department disagrees with the President's views in a formal submission to Congress.

The government suggests in a footnote that the Library may be a "Department" for purposes of the Appointments Clause, U.S. Const., article II, §2, cl. 2, but not for purposes of the Opinions Clause. SG Opp. 21 n.10. Thus, the government essentially concedes that the Department's longstanding views on the Opinions Clause cannot be reconciled with its position in this case involving the Appointments Clause.

The government also contends that "[t]he role of CRS *vis-à-vis* Congress is akin to the role of the United States Marshals Service *vis-à-vis* the federal courts," yet the Department of Justice is clearly an

Executive Branch agency even though it includes the Marshals Service. SG Opp. 22. But protecting members of the Judiciary is far different than providing legal advice. The Marshals Service would be akin to the Congressional Research Service if it selected and supervised the law clerks used by federal judges.

In that connection, the government quotes a statement in *Mistretta v. United States*, 488 U.S. 361, 382 (1989), noting the constitutionality of "'statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment." SG Opp. 22. However, that quotation illuminates the difference between placing the Marshals Service in the Department of Justice and placing the Copyright Royalty Board in the Library of Congress. The government does not dispute the argument in the Petition that, as a practical matter, putting the Board in the Library makes the CRJs far more susceptible to influence by Congress than if it were housed in an Executive Branch Department such as the Department of Commerce. Pet. 28-29. For that reason, putting the Board in the Library both aggrandizes the role of the Legislative Branch and encroaches on the role of the Executive Branch.

The Court should grant the second question presented to prevent further aggrandizement by Congress and encroachment on the prerogatives of the President.

3. The Court should provide guidance on how to remedy Appointment Clause violations. The government argues that upon finding the statute unconstitutional as written, the court below properly

revised it to make the Copyright Royalty Judges at will employees. The government appears to condone this judicial encroachment on the legislative function because the court deleted words from only one provision of the statute, leaving the rest of the statute untouched by the editor's blue pencil. SG Opp. 25. But this analysis ignores the *effect* of this excision on the other provisions of the statute and Congress's goals in enacting it.

This Court has twice described the inquiry concerning how to remedy a violation of the Appointment Clause as "elusive." *Free Enterprise Fund*, 130 S. Ct. at 3161, *quoting INS v. Chadha*, 462 U.S. 919, 932 (1983). But surely a proper remedy cannot undermine the achievement of the permissible goals of the statue. Yet that is what the remedy in this case does. As the Petition explained, Congress intended to create a permanent, expert body that was insulated from political pressure and had full independence in setting rates. Pet. 31-33; *see also* Recent Cases, 126 Harv. L. Rev. 834, 839 (2013) ("One of Congress's objectives was to insulate the CRJs from sources of potential political pressure and allow the CRJs to make determinations on the basis of their expertise."). The remedy selected here, however, undermines the Board's independence by making it impermanent unless the Judges make decisions pleasing to the Librarian. Indeed, the Librarian may find it necessary to fire all three Judges if they issue a decision the Librarian deems objectionable.

Moreover, the statute prohibits the Librarian from revising the Board's decisions and even from conducting performance appraisals of the Judges. 17

U.S.C. §802(f)(2)(a). Under this regime, the Librarian will have no opportunity to attempt to shape the Judges' ratemaking to improve it, but will be able to affect the rates by firing the Judges. That is flatly inconsistent with Congress' declaration that the Judges are to have "full independence" in setting rates. *Id*. at §802(f)(1)(A)(i). And prior to 2004 the Librarian had the power to review and revise royalty rates, but in amending the statute Congress took that power away from the Librarian. *See* Pet. 32. Thus, although words were deleted from only one provision of the Act, it is clear that many other provisions were affected and undermined by the deletion ordered by the court below.

In short, the D.C. Circuit's amendment to the statute permitting the Librarian to terminate the Judges without cause does make the Judges subordinate to the Librarian in some respects, but it is a remedy that is at war with many other provisions of the statute and Congress's goals in enacting it. It turns the Board from a permanent, expert body free from political pressure and with full independence into an entity whose members may be fired without warning unless they can divine the views of the Librarian, who necessarily views himself as Congress's assistant.

The court's remedy also interferes with the creation of an expert Board since distinguished professionals are much more likely to be attracted to serve on a Board with full independence than be subject to termination without notice. And, in contrast to appointment and termination by the Librarian, appointment by the President is also likely to attract especially distinguished Board

members. In a footnote, the government advances the bold argument that appointment by the President leads to *less* qualified appointees. SG Opp. 27 n.11. But that is not this Court's view. *Edmond*, 520 U.S. at 659 ("vesting the President with the exclusive power to select the principal (noninferior) officers of the United States … was also designed to assure a higher quality of appointments").

Of course, no remedy for a constitutional violation can leave a statute fully intact. But it is not sensible to strike words that undermine Congress's goals in enacting the statute. That is especially so when the most straightforward remedy, which would be to invalidate appointment of the Judges by the Librarian, would undermine no permissible goal that Congress might have had. That is, if Congress's goal was to give the powers of principal officers of the United States to persons appointed by someone other than the President, such a goal is simply not legitimate. Although the remedial inquiry is necessarily elusive to some extent, a sensible approach to determining the appropriate remedy for a constitutional violation should concern itself more with ensuring that Congress's permissible goals in enacting the statute are not undermined than with revising the minimum number of provisions.

In the only case in which this Court has found an Appointments Clause violation, *Buckley v. Valeo*, 424 U.S. 1 (1976), it left the remedy to Congress. The government attempts to distinguish *Buckley* on the ground that the Appointments Clause violation there "could not have been cured by altering something as simple as removal restrictions." SG Opp. 26. But as discussed above, this sort of mechanical approach

makes no sense when deleting words from one provision purportedly cures the constitutional violation but conflicts with Congress's legitimate goals in enacting other provisions. SoundExchange advances the creative argument that *Buckley* ought not be followed because, while Congress was able to pass many laws relatively quickly in 1976, the current Congress is "the most inactive Congress in history." SX Opp. 17. True or not, Congress's inability to do its job does not empower the judiciary to rewrite statutes in ways that undermine key provisions of the statutes.

In response to the argument in the Petition that it would be inappropriate for a court to choose to demote the Judges from principal to inferior status, the government argues that the Judges were *not* demoted because "Congress intended the CRJs to be inferior rather than principal officers." SG Opp. 27. The government's reasoning is circular—it argues that Congress wanted the CRJs to be inferior officers because it wanted the Librarian rather than the President to appoint them. But as the court below held—and the government now concedes—Congress gave the powers of principal officers to the Judges. Giving meaning to everything Congress did, it wanted to create principal officers who were appointed by the Librarian. Congress lacks that power on account of the Appointments Clause.

The Court should grant the third question presented because further guidance is needed on the important but elusive issue of how to remedy constitutional violations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM MALONE
9117 Vendome Drive
West Bethesda, MD.
20817

CHRISTOPHER J. WRIGHT
COUNSEL OF RECORD
TIMOTHY J. SIMEONE
MARK D. DAVIS
RACHEL W. PETTY
WILTSHIRE & GRANNIS LLP
1200 18th St., N.W., Ste. 1200
Washington, D.C. 20036
(202) 730-1300
cwright@wiltshiregrannis.com

MAY 6, 2013