No. 12-1281

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NOEL CANNING, ET AL.

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

REPLY BRIEF FOR THE PETITIONER

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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The court of appeals held that the appointments of three members of the National Labor Relations Board by the President were inconsistent with the Recess Appointments Clause (U.S. Const. Art. II, § 2, Cl. 3) on the grounds that those appointments were made during an intra-session recess of the Senate and that they filled vacancies that had not first arisen during that same recess. Pet. App. 18a-35a, 35a-52a. All of the parties to this case—and all of the amici curiae—agree that this Court should grant certiorari to review that decision. See Noel Canning Br. in Resp. 9; Int'l Bhd. of Teamsters Br. in Resp. 1, 11; Sen. Republican Leader Mitch McConnell and 44 Other Senators Amicus Br. 2; Coalition for a Democratic Workplace Amicus Br. 6; Constitutional Accountability Ctr. Amicus Br. 4; Prof. Victor Williams Amicus Br. 2. The petition for a writ of certiorari should be granted.

A. The Court Should Review And Reverse Both Grounds Of The Court Of Appeals' Decision Invalidating The Appointments At Issue

1. As the court of appeals acknowledged (Pet. App. 30a, 41a-42a), both grounds of its decision departed from the prior decisions of other federal courts of appeals. See *Evans* v. *Stephens*, 387 F.3d 1220, 1224-1227 (11th Cir. 2004) (en banc), cert. denied, 544 U.S. 942 (2005); *United States* v. *Woodley*, 751 F.2d 1008, 1012-1013 (9th Cir. 1985) (en banc), cert. denied, 475 U.S. 1048 (1986); *United States* v. *Allocco*, 305 F.2d 704, 709-715 (2d Cir. 1962), cert. denied, 371 U.S. 964 (1963). After the petition for certiorari was filed, the Third Circuit issued a decision that, while rejecting several aspects of the D.C. Circuit's reasoning, agreed with it about the invalidity of intra-session recess appointments. See *NLRB* v. *New Vista Nursing & Rehab.*, Nos. 11-3440, 12-1027, 12-1936, 2013 WL 2099742 (May 16, 2013). That only reinforces the need for this Court's review of the decision below.

2. Respondent Noel Canning defends both of the grounds on which the court of appeals invalidated the appointments at issue in this case. Br. in Resp. 11-22, 22-29. While Noel Canning does not dispute that the court of appeals' reasoning would have invalidated hundreds of previous recess appointments, it does attempt to minimize the deep historical roots of the appointment practices that the court of appeals held to be unconstitutional. Noel Canning's efforts in that regard lack merit.

a. For instance, with respect to the question of intra-session recess appointments, Noel Canning attempts to dismiss the significance of President Andrew Johnson's 1867 appointments on the ground that Johnson was battling Republicans in Congress at the time and "never attempted to justify the[] legality" of his appointments.

Noel Canning Br. in Resp. 11 n.6. But the political battle—which was largely about whether Senate confirmation was required for *removal* from office—was immaterial to the intra-session recess appointments.[1] Nearly all of Johnson's intra-session recess appointees received the Senate's advice and consent after it resumed its session.[2] And there could have been no doubt that the validity of their interim appointments required the application of the Recess Appointments Clause to an intra-session recess. Indeed, the Court of Claims addressed that question with respect to one Johnson appointee who was ultimately not confirmed. See *Gould* v. *United States*, 19 Ct. Cl. 593, 595-596 (1884) (expressing "no doubt" that an appointment as a paymaster in the Army "could be and was legally filled by appointment of the President alone" during the Senate's four-month intra-session recess).

Noel Canning suggests (Br. in Resp. 13-14) that the general absence of intra-session recess appointments "until the 1920s (or really the 1940s)" indicates that the President was assumed not to have such a power. In fact, it simply reflects that 1867, 1868, 1921, and 1929 were the only years before the 1940s that the Senate took lengthy intra-session recesses at times other than the period around Christmas and New Year's Day. See Pet. 22; S. Pub. 112-12, *Official Congressional Directo-*

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[1] Johnson was, of course, not convicted in his impeachment trial, and this Court later sustained Johnson's view of his removal power. See *Myers* v. *United States*, 272 U.S. 52, 166-167, 175-176 (1926).

[2] Compare Henry B. Hogue, Cong. Research Serv., *Memorandum re: Intrasession Recess Appointments* 5 (Apr. 23, 2004) (listing 14 of Johnson's intra-session recess appointees), with S. Exec. J., 40th Cong., 1st Sess. 793-794, 818, 847, 856-857 (1867) (reporting advice and consent to all of those nominees except James Lutterill).

ry, 112th Congress 522-528 (2011), www.gpo.gov/fdsys/pkg/CDIR-2011-12-01/pdf/CDIR-2011-12-01.pdf. And the Presidents' refusal, in practice, to use every lengthy intra-session recess—or, for that matter, every *inter*-session recess—to fill every extant vacancy does not demonstrate an assumed lack of constitutional power. Instead, it shows that Presidents generally have good reasons to seek Senate confirmation for their appointments. See Pet. 22. It therefore belies the court of appeals' declaration that a highly restrictive interpretation is necessary to prevent the Recess Appointments Clause from "swallow[ing] the 'general' route of advice and consent." Pet. App. 26a.

Finally, it is undisputed that, in addition to Johnson's 1867 appointments, the Executive has consistently claimed the power to make intra-session recess appointments since 1921. See Pet. 17. A consistent practice of even 90 years deserves more regard than the court of appeals allowed. See, *e.g.*, *The Pocket Veto Case*, 279 U.S. 655, 689-690 (1929) (treating a "practice of at least twenty years duration" as being "a consideration of great weight in a proper interpretation of constitutional provisions").

b. With respect to the question of when a vacancy must first arise for purposes of the Recess Appointments Clause, the petition acknowledged that there was "debate" about the correct interpretation in the first three decades of practice under the Constitution. Pet. 24-25 & n.9. In addition to relying on the figures who took its side in that debate, Noel Canning contends, implausibly, that President Washington effectively made a mistake of fact when he appointed a United States Attorney to a position that had been vacant for nearly four years and when he appointed an Engraver of the

Mint. Br. in Resp. 26. But even setting those appointments aside, Noel Canning cannot dispute that the appointments in this case are consistent with Executive interpretation and practice going back at least 190 years to the administration of President James Monroe. See Pet. 24 (discussing the 1823 opinion of Attorney General William Wirt, 1 Op. Att'y Gen. 631).

3. In any event, Noel Canning's invocations of history—like those in the government's petition about historical practice and the original understanding of the constitutional text—go principally to the merits of the questions presented. They do not alter the existence of two circuit splits. See Pet. App. 30a, 41a-42a. Nor do they detract from the broad consensus that the decision below warrants this Court's review. See p. 1, *supra*.

B. The Court Should Not Address An Alternative Ground That Has Been Addressed By No Court

1. Although it does not oppose certiorari, Noel Canning contends (Br. in Resp. 9-10) that the Court should expand the scope of the questions presented to encompass whether the Senate's pro-forma sessions prevented it from being in recess on January 4, 2012, for purposes of the Recess Appointments Clause. The effect of the Senate's pro-forma sessions on the length of its recess was the principal question addressed by the parties in the court of appeals, see Pet. 6-7, and it is assuredly important. But that question was not resolved by the court of appeals, and it has not yet been resolved by any court, though it might be a ground of decision in any of several cases that are currently pending in the courts of appeals.[3]

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[3] See, *e.g.*, *NLRB* v. *Enterprise Leasing Co. S.E., LLC*, No. 12-1514 (4th Cir. argued Mar. 22, 2013); *Kreisberg* v. *HealthBridge Mgmt.*,

Under the circumstances, the government would expect the Court to decline respondent's request to expand the questions presented, consistent with "the wise and settled general practice of this Court not to consider an issue in the first instance"—especially "when the new issue is a constitutional matter." *Turner* v. *Rogers*, 131 S. Ct. 2507, 2524-2525 (2011). As the Court often observes, it is "a court of final review and not first view," and it therefore does not ordinarily "decide in the first instance issues not decided below." *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012) (citations omitted); see also, *e.g.*, *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (declining to consider a constitutional question on which the court of appeals "did not definitively rule").

Noel Canning suggests (Br. in Resp. 10) that the addition of the question would "maximize the Court's flexibility in resolving this dispute." But a decision from this Court affirming on the alternative ground involving pro-forma sessions would simply perpetuate the serious threats already posed by the D.C. Circuit's decision. As the petition explained, if the court of appeals' decision is not reversed, it will not just affect the appointments that the President made on January 4, 2012, but could also call into question many previous appointments (and possibly future appointments) to a wide range of federal agencies and offices. See Pet. 30 (noting that venue lies in the D.C. Circuit in virtually all civil actions seeking

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LLC, No. 12-4890 (2d Cir. argued May 15, 2013); *Big Ridge, Inc.* v. *NLRB*, Nos. 12-3120 and 12-3258 (7th Cir. argued May 31, 2013). As Noel Canning acknowledges (Br. in Resp. 8 n.4), the Third Circuit's decision in *New Vista Nursing & Rehabilitation*, *supra*, addressed an appointment that was made in an intra-session recess during which the Senate was not holding pro-forma sessions.

review of federal agency actions). Resolving this case on Noel Canning's proffered alternative ground would not eliminate the two circuit conflicts created by the decision below and would not remove the constitutional cloud that the court of appeals has placed over the acts of hundreds of past and present recess appointees.

2. Accordingly, the Court should grant certiorari on the two questions presented in the petition for a writ of certiorari. But it should not address the effect of pro-forma sessions of the Senate unless that question has become suitable for its review (which would presumably require at least a decision on that ground by a lower court).

If, however, the Court is inclined to use this case to decide what effect pro-forma sessions of the Senate have on the existence of a recess for purposes of the Recess Appointments Clause, it should add that question as part of any order granting certiorari. That would enable the parties and the amici curiae to be on notice that they should address it along with the two grounds that were actually resolved by the court of appeals. In that event, it would also be prudent for the Court to expand the word limits for the parties' merits briefs, to enable them to deal with all three constitutional questions.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

JUNE 2013