

IN THE SUPREME COURT OF THE UNITED STATES

No. 12-1281

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NOEL CANNING, ET AL.

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

APPLICATION OF PETITIONER
TO EXCEED THE WORD LIMITS

Pursuant to Rules 22 and 33.1(d) of the Rules of this Court, the Solicitor General, on behalf of the National Labor Relations Board, respectfully requests permission to exceed the word limits applicable to the parties' merits briefs in this case. Counsel for respondent Noel Canning has authorized us to represent that respondent does not object to this application.

1. This case involves a challenge to an order of the Board on the ground that the President did not comply with the Recess Appointments Clause when he appointed some of the Board's members in January 2012. As explained in the Board's petition for a writ of certiorari (at 6-7), the court of appeals' decision was based on

two separate grounds, neither of which had been the focus of the parties' briefing in that court. First, the court of appeals held that the President's authority under the Recess Appointments Clause is restricted to inter-session recesses of the Senate, which would mean that the President lacks the authority to make such appointments during intra-session recesses. Pet. App. 18a-35a. Second, the court further held that, even during an inter-session recess, the President may not fill a vacancy unless that vacancy first arose during that same recess. Id. at 35a-52a. The Board's petition for a writ of certiorari sought review of those two questions. See Pet. i.

Although respondent agreed that certiorari would be appropriate, it requested that the Court add an additional question that had not been decided by the court of appeals. The Court's order granting certiorari directed the parties to address "[w]hether the President's recess-appointment power may be exercised when the Senate is convening every three days in *pro forma* sessions." 133 S. Ct. 2861.

2. In opposing the addition of that question, the Board noted that, if the Court were nevertheless to add the question, "it would 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." Cert. Reply 7.

The process of preparing the Board's opening brief has now prompted this more specific request along those lines. This case requires the discussion of three separate constitutional questions of significant import for the separation of powers between the Executive and Legislative Branches. In addition, briefing the first two questions will entail not only an analysis of the Recess Appointments Clause and related provisions but also significant discussion of two independent strands of historical practice associated with the Recess Appointments Clause -- discussions that were not addressed at length in the parties' briefs before the court of appeals because respondent's challenge to the recess appointments in that court was directed to the issue encompassed in the third question presented, concerning pro-forma sessions. And the Recess Appointments Clause issues were not addressed at all before the Board, where respondent did not raise any such challenge. Furthermore, the third question presented, which is essentially independent of the first two, will require the parties to address arguments and more modern practices without the benefit of any decision by the court below (or, for that matter, by any other court) on that question.

3. For the foregoing reasons, we request leave for the parties to file merits briefs of no more than 18,000 words, and leave to file a reply brief of no more than 7,200 words.

4. As contemplated by Rule 33.1(d), this application is being submitted at least 15 days before the filing date of the first document in question, petitioner's opening brief, which is due on September 13, 2013.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

AUGUST 2013