No. 13-1103

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GESTAMP SOUTH CAROLINA, LLC

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

REPLY BRIEF FOR THE PETITIONER

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The court of appeals held that the National Labor Relations Board lacked authority to enter its decision in this case because "the President's recess appointment of a board member to the NLRB is constitutionally valid under the Recess Appointments Clause of the United States Constitution only if the appointment is made during an intersession, as opposed to an intra-session, recess of the Senate." Pet. App. 3a-4a. Respondent "agrees with the Board that the question presented" in the petition in this case "is identical to the first question" pending before the Court in *NLRB* v. *Noel Canning*, No. 12-1281 (argued Jan. 13, 2014). Br. in Opp. 1. Respondent nevertheless contends that there is no reason to hold this case pending the disposition of *Noel Canning*, because, regardless of the outcome of that case, respondent believes certiorari should be denied here. *Id.* at 1-2, 4. That conclusion would not be consistent with this Court's general

practices or with the fact that the Court is apparently holding for *Noel Canning* the Board's petition in *NLRB* v. *Enterprise Leasing Co. S.E., LLC*, 722 F.3d 609 (4th Cir. 2013), petition for cert. pending, No. 13-671 (filed Dec. 4, 2013)—the very case on which the decision below relied. See Pet. App. 3a, 4a n.*.

As respondent notes (Br. in Opp. 1, 4), if the Court concludes in *Noel Canning* that the Recess Appointments Clause does not authorize intra-session recess appointments, then it would be appropriate to deny certiorari in this case. But respondent errs in contending (*id.* at 1-2, 4) that the same result should follow if *Noel Canning* decides that intra-session recess appointments are constitutional. Such a decision would mean that the court of appeals in this case erred in its resolution of the only question that it addressed.

Respondent contends that "the unique, fact-specific nature of this case[] makes it unsuitable for this Court's discretionary review," because, in respondent's view, the administrative law judge and the Board both erred, as a matter of substantive labor law, in their finding of animus in concluding that respondent had violated 29 U.S.C. 158(a)(3) in discharging an employee. Br. in Opp. 1, 2. The court of appeals did not address that question.

If this Court were to grant plenary review, respondent's view of the merits on that issue could, in theory, provide an alternative ground for affirming the judgment of the court of appeals. Cf. *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435-436 (1924). But this Court would ordinarily "decline to entertain" such an alternative ground "[i]n the absence of * * * an indication that the issue[] [is]

of sufficient general importance to justify the grant of certiorari." *United States* v. *Nobles*, 422 U.S. 225, 242 n.16 (1975). Neither party here contends that respondent's fact-specific labor-law question would warrant this Court's plenary review, especially since the issue was not decided by the court of appeals.

When the Court concludes that a court of appeals' judgment is predicated on an erroneous ground and an alternative argument on the merits has not been addressed by the court of appeals in the first instance, the Court's usual practice is not to decide the alternative ground, but to reverse the judgment and remand for further proceedings. See, *e.g.*, *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012) ("[W]hen we reverse on a threshold question, we typically remand for resolution of any claims the lower courts' error prevented them from addressing."); *Pacific Bell Tel. Co.* v. *linkLine Commc'ns, Inc.*, 555 U.S. 438, 456-457 (2009); *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7, 726 (2005); *United States* v. *Rutherford*, 442 U.S. 544, 559 n.18 (1979). Consistent with that practice, if the Court determines in *Noel Canning* that the Recess Appointments Clause permits the President to make intra-session recess appointments, then it should not deny certiorari in this case, but should instead reverse the judgment of the court of appeals (which would then be predicated solely upon a demonstrably erroneous ground) and remand for further proceedings.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be held pending this Court's disposition of *Noel Canning*,

No. 12-1281, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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