

No. 12-__

IN THE
Supreme Court of the United States

ROBERT DONNELL DONALDSON,
Petitioner,
v.

DEPARTMENT OF HOMELAND SECURITY,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress has long required federal agencies to give hiring preferences to veterans of our nation's Armed Forces. Section 3318(b) of Title 5 provides that federal agencies may not "pass over a preference eligible [veteran] on a certificate in order to select an individual who is not a preference eligible" without approval from the Office of Personnel Management (OPM). Often, rather than obtaining OPM approval, federal agencies simply cancel and re-advertise the job vacancy. The question presented is:

Whether or under what circumstances a federal agency may cancel a vacancy for the purpose of hiring a non-veteran over a disabled veteran who is ranked higher on a list of qualified candidates.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Donnell Donaldson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (Pet. App. 1a) is unpublished but is available at 2012 WL 4697711. The final order of the Merit Systems Protection Board (“Board”) is unpublished but is reproduced at Pet. App. 13a. The Board’s initial decision is unpublished but is reproduced at Pet. App. 23a.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 2012. Pet. App. 1a. That court denied a timely filed petition for rehearing on November 27, 2012. Pet. App. 37a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

5 U.S.C. §§ 2108, 3304(f), 3309, 3313, 3317, 3318, and 3319 are reproduced at Pet. App. 39a-47a.

STATEMENT OF THE CASE

Petitioner Robert Donnell Donaldson, a disabled Navy veteran, sought civilian employment with the United States Coast Guard after more than a quarter-century of distinguished service to his country. Based on the Coast Guard's evaluation of the applicant pool's qualifications, Donaldson was the highest-scoring candidate for the job, even without the additional points to which he was entitled as a disabled veteran. Nevertheless, hiring officials preferred to select two non-veterans who were ranked lower on the list of "best qualified" applicants.

In such circumstances, Section 3318(b) of Title 5 requires that federal agencies obtain approval from the Office of Personnel Management (OPM) whenever they "propose[] to pass over" a disabled veteran in favor of hiring a non-veteran. In this case, however, instead of seeking approval from OPM to pass over Donaldson, the Coast Guard – consistent with widespread practice among federal agencies – canceled the job vacancy and re-advertised the position, ultimately hiring someone else.

I. Factual And Legal Background

1. Robert Donaldson is a disabled veteran who served with distinction in the United States Navy for twenty-six years. C.A. App. A214.¹ He was honorably discharged in 2009, and began working as a civilian Marine Transportation Specialist for the Navy's Military Sealift Command. *Id.* A210, A214.

¹ "C.A. App." refers to the Appendix to the United States' brief in the court of appeals.

In this capacity, Donaldson received high marks for managing a substantial maritime program and drafting operational policy for multiple seafaring vessels. *Id.* A208-A210.

In May 2010, Donaldson applied for the position of Marine Transportation Specialist with the United States Coast Guard. Pet. App. 3a. The position was advertised under the “open competitive examination” process, a principal method for filling federal civil service positions.² C.A. App. A216. Under this process, an agency develops a list of qualifications for the position. Each applicant is given a score based on his qualifications and the requirements for the job. The agency then compiles a ranked list of applicants based on those scores, producing a “certificate of eligibles.” 5 C.F.R. § 332.401. The agency must select “from the highest three eligibles . . . on the certificate.” 5 U.S.C. § 3318(a).³

² The position was concurrently advertised under the “merit promotion” process, which is open only to applicants who are already career civil servants. *See infra* pp. 21-22. However, at the interview stage, the Coast Guard elected to proceed solely under the open competitive examination process. Pet. App. 48a.

³ Congress has also authorized agencies to use a “category rating” system, under which applicants are grouped into two or more tiers and selection is made from the highest tier (rather than from the highest three eligibles on a single list). 5 U.S.C. § 3319. In 2010, the President issued an executive order requiring that agencies generally use the category rating system rather than the “rule of three” provided in Section 3318(a). *See Presidential Memorandum on Improving the Federal Recruitment and Hiring Process* (May 11, 2010), available at <http://www.whitehouse.gov/the-press-office/presidential-memorandum-improving-federal-recruitment-and-hiring->

In this case, even without the ten additional points to which he was entitled as a disabled veteran, *see* 5 U.S.C. § 3309, the Coast Guard ranked Donaldson first on the certificate for the vacant position. Pet. App. 3a, 48a. Donaldson and several other applicants were then interviewed by Captain Russell Proctor and a panel of other Coast Guard employees. *Id.* 29a.⁴ Despite Donaldson's top score and experience in a parallel position with the Navy, the panel ultimately selected two lower ranking non-veterans as its preferred candidates. *Id.*

2. Because Donaldson is a disabled veteran, any decision to pass him over in favor of a non-veteran was subject to the limitations of federal veterans' preference law. Since 1865, the federal government has extended preference to veterans applying for federal jobs. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 261 n.6 (1979). These laws are "designed to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to civil service occupations." *Id.* at 265 (citation omitted).

The form of preference has evolved over the years and depends on the nature of a veteran's

process. The question presented by this petition, however, arises under the new system as well because Congress expressly provided that the pass over protections of 5 U.S.C. § 3318(b) apply to the category rating approach. *See id.* § 3319(c)(2).

⁴ A second vacancy for the same position opened up during the official recruitment period. The Coast Guard used the same certificate for both vacancies. Pet. App. 34a.

service and the hiring process used by the federal agency. As relevant here, an honorably discharged veteran who has served in an active campaign during specified war times (e.g., the Vietnam War), or who has become disabled as a result of his active duty service, is classified as a “preference eligible.” 5 U.S.C. § 2108(3). When hiring under the open competitive examination process, an agency that “proposes to pass over a preference eligible on a certificate in order to select an individual who is not a preference eligible . . . shall” obtain approval from OPM. *Id.* § 3318(b)(1).⁵ In addition, where, as here, the preference eligible is 30 percent or more disabled, the agency must notify him of the proposed pass over and provide him with a chance to respond. *Id.* § 3318(b)(2).⁶

OPM, in turn, must “determine the sufficiency or insufficiency of the reasons submitted,” and the agency “shall comply with [OPM’s] findings.” 5 U.S.C. § 3318(b)(1). OPM has provided guidance on what counts as sufficient or insufficient reasons for passing over a veteran. *See* U.S. Office of Pers. Mgmt., *Delegated Examining Operations Handbook: A Guide for Federal Agency Examining Offices* 164-65 (2007) [hereinafter DEO Handbook]; 5 C.F.R. § 332.406(f) (providing that all federal agencies “must follow” the procedures of the DEO Handbook). For example, potential conflicts of interest, prior

⁵ The full text of the provision is reproduced at Pet. App. 45a.

⁶ The full text of the provision is reproduced at Pet. App. 45a-46a.

misconduct or poor performance at another job, or inability to obtain a required security clearance are all adequate reasons. DEO Handbook, *supra*, 160-62. On the other hand, “[o]bjections based on lack of experience . . . may be sustained only when that experience is part of the minimum requirements for the position.” *Id.* at 160.

In light of these provisions, Captain Proctor sent a memorandum to the Coast Guard’s human resources department “request[ing] permission to pass over” Donaldson in favor of two non-veteran applicants ranked below him on the competitive certificate. Pet. App. 49a. Although the Coast Guard had determined that Donaldson was “among the best qualified for the position,” *id.* 29a, Captain Proctor nonetheless insisted that Donaldson lacked “specialized expertise” for the position, *id.* 49a.

After substantial deliberation, the human resources department notified Captain Proctor that his “request to Passover a 30% Disable[d] Veteran has been denied.” Pet. App. 52a. The department explained that because Donaldson was sufficiently qualified for the position, he “must be selected over [the] non-vets.” *Id.*

At that point, the Coast Guard could have used the Section 3318(b)(1) procedure to obtain approval from OPM to pass over Donaldson in favor of Captain Proctor’s preferred non-veteran applicants. But instead, without notifying Donaldson or OPM, the agency canceled the vacancy and re-advertised the

position. Pet. App. 3a.⁷ That position was ultimately filled by an applicant who was not preference eligible. *Id.*⁸

II. Procedural History

Donaldson filed a pro se appeal with the Merit Systems Protection Board (“Board”).⁹ He alleged that the Coast Guard had violated his veterans’ preference rights under 5 U.S.C. § 3318(b) by canceling and re-advertising the Marine Transportation Specialist vacancy to avoid selecting him. Pet. App. 23a-24a, 32a.¹⁰

⁷ Although the Coast Guard canceled both vacancies, only one was subsequently re-advertised. Pet. App. 34a-35a.

⁸ Donaldson applied to the re-advertised vacancy, but the agency ultimately hired a non-preference eligible candidate through the merit promotion process. See Pet. App. 3a. Donaldson subsequently challenged the hiring process for the re-advertised position, alleging that the agency retaliated against him and departed from the category rating procedures mandated by the May 2010 Presidential Memorandum. Those claims are the subject of pending appeals before the Federal Circuit, neither of which has any bearing on the question presented by this petition. See *Donaldson v. Dep’t of Homeland Sec.*, No. 12-3160 (Fed. Cir. filed July 10, 2012); *Donaldson v. Dep’t of Homeland Sec.*, No. 12-3161 (Fed. Cir. filed July 12, 2012).

⁹ Donaldson’s initial appeal was dismissed for failure to exhaust his administrative remedies with the Department of Labor. Pet. App. 24a. Once these remedies were properly exhausted, Donaldson re-filed his veterans’ preference claim, which the Board decided on the merits. Pet. App. 24a-25a.

¹⁰ Donaldson also alleged discrimination on the basis of his prior military service, in violation of the Uniformed Services

1. Before a Board Administrative Judge, Donaldson argued that the Coast Guard's cancellation and re-advertisement of the position constituted an unlawful pass over, in violation of 5 U.S.C. § 3318(b). Pet. App. 32a. In addition, Donaldson alleged that the Coast Guard violated Section 3318(b)(2) by failing to notify him of its proposal to pass him over. *Id.* The Administrative Judge, however, rejected those arguments and dismissed the appeal. *Id.*

The full Board affirmed, relying in part on its prior decision in *Scharein v. Department of the Army*, 91 M.S.P.R. 329 (2002). Pet. App. 15a. In *Scharein*, the Army had requested permission from OPM to pass over a preference eligible veteran, but "OPM denied the request." 91 M.S.P.R. at 331. "The agency then cancelled the vacancy announcement" rather than hire the veteran. *Id.* The Board held that canceling the vacancy "did not violate [Scharein's] veterans' preference rights," reasoning that the law "does not guarantee a preference eligible a position but only an opportunity to compete with the other candidates on the certificate of eligibles." *Id.* at 334.

In this case, the Board likewise concluded that because the Coast Guard gave Donaldson "an opportunity to compete," "its decision to cancel the vacancy announcement rather than offer him the position did not violate his veterans' preference rights." Pet. App. 15a.

Employment and Reemployment Rights Act (USERRA). Pet. App. 4a. That claim is not at issue here.

2. Donaldson appealed to the Federal Circuit, which has exclusive jurisdiction over final orders and decisions of the Merit Systems Protection Board. 28 U.S.C. § 1295(a)(9). The Federal Circuit affirmed, rejecting Donaldson's contention that an agency violates federal law when it "cancels a job announcement and re-advertises the job as a means of avoiding the appointment of the eligible veteran." Pet. App. 8a. That argument, the court concluded, was foreclosed by its prior decision in *Abell v. Department of the Navy*, 343 F.3d 1378 (Fed. Cir. 2003). *Id.* at 8a-9a.

In *Abell*, a disabled veteran applied for one of three open civilian engineering positions with the Navy. 343 F.3d at 1380. Although Abell was ranked "as one of the top three candidates" on the open competitive certificate, the Navy canceled the third vacancy rather than hire Abell or seek OPM approval to pass him over. *Id.* Relying on the Board's decision in *Scharein*, the Federal Circuit upheld the cancellation. The court held that "[a]n agency may cancel a vacancy announcement for any reason that is not contrary to law." *Id.* at 1384. In the court's view, the Navy had a "good faith reason" for canceling the vacancy, *id.* at 1384 – namely, its desire to hire a different candidate. And in the court's view, all the law guaranteed Abell was "the right to apply for the three vacant positions announced by the Navy," *id.* at 1383, which he was afforded. "Accordingly, we hold that Mr. Abell was not denied his opportunity to compete by virtue of the Navy's decision to cancel the vacancy announcement." *Id.* at 1384 (relying upon *Scharein*, 91 M.S.P.R. at 334).

In this case, the Federal Circuit determined that the facts were “not materially different” from the facts in *Abell*. Pet. App. 10a. The court explained that in both cases the agency “did not seek OPM approval to pass the veteran over,” and instead “cancelled the vacancy” thereby “effectively passing him over.” *Id.* 9a. Just as in *Abell*, the court continued, “there can be no question that the agency avoided hiring Donaldson on purpose by withdrawing the job vacancy.” *Id.* 10a. But because the court here found that Donaldson’s purported lack of technical experience was a “good faith reason for the blatant pass over,” it held that “the agency did not violate Donaldson’s [veterans’ preference] rights.” *Id.*

The court noted that in *Abell* the Navy simply canceled the vacancy, while in this case the Coast Guard also re-advertised the position and hired a non-preference eligible. Pet. App. 10a. But it found this distinction immaterial. *Id.* The court likewise agreed with the Board that “[b]ecause the agency here did not seek OPM approval, the agency was not obligated to notify Donaldson” of the proposed pass over. *Id.* 8a. Accordingly, the court concluded that it was “bound by precedent” to affirm the Board’s decision. *Id.* 10a.

3. On November 27, 2012, the Federal Circuit denied Donaldson’s timely petition for rehearing en banc. Pet. App. 37a.

REASONS FOR GRANTING THE WRIT

The federal government has long committed to taking “the lead in assuring those who are in the armed services that when they return special consideration will be given to them in their efforts to obtain employment.” *Mitchell v. Cohen*, 333 U.S. 411, 419 n.12 (1948) (quoting Letter from President Franklin D. Roosevelt to Rep. Robert Ramspeck (Feb. 26, 1944)). Yet that commitment has persistently met resistance from federal agencies that all too often have sought to avoid legislative limits on their hiring discretion. In the face of this recalcitrance, Congress has repeatedly amended the law to constrain agencies’ refusals to hire otherwise qualified veterans. These efforts culminated in the mandate of 5 U.S.C. § 3318(b), which requires that any decision to pass over a preference eligible veteran be approved by the Office of Personnel Management – an independent authority outside the hiring agency – and be based on proper and adequate written reasons.

Yet in the years since Section 3318(b) was enacted, agencies have routinely circumvented this mandate by canceling and re-advertising vacancies. Indeed, the Merit Systems Protection Board reports that the practice of canceling vacancies to pass over preference-eligible veterans is the subject of one of their most frequent complaints.

This evasion has now been approved by both the Board and, as illustrated here, the Federal Circuit, which is the only circuit that regularly hears veterans’ preference claims. (Virtually all complaints regarding violations of veterans’ preference rights are made through the Board, whose decisions generally

fall within the exclusive jurisdiction of the Federal Circuit). Because the Federal Circuit has repeatedly refused to reconsider its position condoning this practice, only this Court can end the widespread agency evasion of veterans' preference law. And because no circuit split is ever likely to develop, there is no reason for the Court to delay that much needed intervention.

I. The Federal Circuit's Decision Is Inconsistent With The Text, History, And Purposes Of 5 U.S.C. § 3318(b).

Section 3318(b) requires that an agency "propos[ing] to pass over a preference eligible on a certificate in order to select an individual who is not a preference eligible . . . shall file written reasons [justifying the pass over] with the Office" of Personnel Management. 5 U.S.C. § 3318(b)(1). The agency then may pass over the veteran only if OPM has determined that the agency's reasons are "sufficien[t]," "taking into account any response received from the preference eligible." *Id.*

In this case, it is undisputed that the Coast Guard never sought or received OPM's permission to pass over Donaldson and never notified him of the proposed action before it canceled and re-advertised the vacancy. The only question is whether that failure violated Section 3318(b). The history, text, and purposes of the statute indicate that it did.

A. Section 3318(b) Is The Culmination Of Decades Of Congressional Action To Restrict Agencies' Discretion To Pass Over Qualified Veterans.

The current text of Section 3318(b) is the result of repeated attempts by Congress to overcome agency resistance to veterans' preference laws.

1. Veterans' preference in federal hiring dates back to the nineteenth century. In the aftermath of the Civil War, Congress directed that qualified "persons honorably discharged from the military or naval service by reason of disability resulting from wounds or sickness incurred in the line of duty[] should be preferred for appointments to civil offices." A Resolution to Encourage the Employment of Disabled and Discharged Soldiers, Res. 27, 38th Cong., 13 Stat. 571, 571 (1865). But Congress did not specify how the preference was to be implemented, leaving federal agencies with broad discretion to deny employment to qualified veterans as they saw fit.

With the influx of wounded veterans returning home from World War II, Congress recognized that a more binding form of veterans' preference was needed if "[t]hose who are selected from among us to wear the uniform and to serve the country on the firing line" were to avoid being "forced to tramp the streets looking for jobs" or "live on charity." 90 Cong. Rec. 3502 (1944) (statement of Rep. Starnes).

Accordingly, Congress enacted the Veterans' Preference Act of 1944 (VPA), Pub. L. No. 78-359, 58 Stat. 387, which established procedures to make it more difficult for federal agencies to deny employment to qualified veterans. Specifically,

Section 8 of the VPA established the precursor to 5 U.S.C. § 3318(b), requiring agencies to notify and provide written reasons to the Civil Service Commission after passing over an eligible veteran and selecting a non-veteran for a position. VPA § 8, 58 Stat. at 389. The Commission was required to review the “sufficiency or insufficiency of such reasons,” but its findings were not binding on the agency – the agency was only required to “consider[]” them. *Id.* Representative Edward Rees explained that this provision was “one of the most important” in the Act. 90 Cong. Rec. at 3503.

2. In 1953, Congress took the next step, amending Section 8 to make “the findings of the Civil Service Commission as to sufficiency of the reasons for passing over a veteran . . . mandatory on the departments and agencies.” 99 Cong. Rec. 10,459 (1953) (statement of Sen. Carlson) (quoting statement of Civil Service Comm’r George M. Moore); *see* Act of Aug. 14, 1953, Pub. L. No. 83-271, § 2, 67 Stat. 581, 582 (providing that the Commission’s findings “shall be complied with”).

3. Despite these changes, “passing over of . . . preference eligible[s]” remained a serious problem and an area of “primary concern” for Congress. 124 Cong. Rec. 27,551-52 (1978) (statement of Sen. Cranston, Chairman of the Comm. on Veterans’ Affairs). To ensure that the veterans’ preference would not be “a mere symbol of military service, but rather a practical form of help to veterans in need,” S. Rep. No. 95-969, at 127 (1978), Congress amended Section 3318 in 1978 to further restrict agencies’ ability to pass over veterans. Civil Service Reform

Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111.

First, Congress transferred the Commission's authority to approve pass over requests to the newly created Office of Personnel Management (OPM), an "independent establishment within the executive branch." CSRA § 201(a), 92 Stat. at 1119 (codified at 5 U.S.C. § 1101). Congress further provided that, to "better protect the rights of more seriously disabled veterans," H.R. Rep. No. 95-1717, at 144 (1978) (Conf. Rep.), OPM's power to approve pass over requests regarding 30 percent or more disabled veterans "may not be delegated" to the hiring agency.¹¹

Second, whereas the statute previously allowed an agency to notify the Civil Service Commission *after* having already passed over a veteran, Congress now required OPM's *prior* approval whenever an agency proposed to pass over a veteran in favor of a non-veteran.¹²

¹¹ CSRA § 307(d), 92 Stat. at 1149 (amending 5 U.S.C. § 3318(b) to read: "(4) In the case of a preference eligible described in paragraph (2) of this subsection, the functions of the Office under this subsection may not be delegated").

¹² See *id.* at 1148 (amending 5 U.S.C. § 3318(b) to read: "(1) If an appointing authority proposes to pass over a preference eligible on a certificate *in order to* select an individual who is not a preference eligible, such authority shall file written reasons with the Office for passing over the preference eligible The Office shall determine the sufficiency or insufficiency of the reasons submitted by the appointing authority, taking into account any response received from the preference eligible When the Office has completed its review of the proposed passover, it shall send its findings to

Third, Congress added notification requirements to ensure that disabled veterans would be apprised of any pass over requests and would have a chance to respond before OPM ruled on the pass over request.¹³

B. Section 3318(b) Prohibits An Agency From Canceling A Vacancy Without OPM Approval To Avoid Having To Hire A Preference Eligible Veteran.

Read in light of its plain text and history, Section 3318(b) precludes an agency from canceling and re-advertising a vacancy in order to avoid having to seek OPM approval to pass over an otherwise qualified preference eligible veteran.

1. The statute requires OPM approval before an agency may “pass over a preference eligible on a certificate in order to select an individual who is not a preference eligible.” 5 U.S.C. § 3318(b). In this case, there can be no genuine dispute that the Coast

the appointing authority and to the preference eligible. The appointing authority shall comply with the findings of the Office” (emphasis added)).

¹³ See *id.* (amending 5 U.S.C. § 3318(b) to read: “(2) In the case of a preference eligible . . . who has a compensable service-connected disability of 30 percent or more, the appointing authority shall at the same time it notifies the Office under paragraph (1) of this subsection, notify the preference eligible of the proposed passover, of the reasons therefor, and of his right to respond to such reasons to the Office within 15 days of the date of such notification. The Office shall, before completing its review under paragraph (1) of this subsection, require a demonstration by the appointing authority that the passover notification was timely sent to the preference eligible’s last known address”).

Guard passed over petitioner in order to select a non-preference eligible without obtaining OPM approval.

Although the term “pass over” is not defined in the statute or in any implementing regulation, the Federal Circuit rightly recognized that the Coast Guard’s refusal to hire Donaldson and subsequent cancellation of the vacancy was a “blatant pass over.” Pet. App. 10a. Donaldson was ranked first on the certificate of eligibles, but the agency declined to offer him a position, preferring instead to select other applicants. If the Coast Guard had directly hired the lower-ranked non-veterans it preferred, no one would dispute that the Coast Guard had passed Donaldson over. Canceling the vacancy in order to hire another non-veteran applicant had exactly the same purpose and effect.¹⁴

Moreover, there can be no doubt that the Coast Guard took these actions “in order to select an individual who is not a preference eligible.” 5 U.S.C. § 3318(b)(1); *see* Pet. App. 29a (finding it “not in dispute” that the agency sought to pass over Donaldson “in favor of selecting two non-veteran applicants”). The Coast Guard filed a routing slip indicating that it had “requested to Passover a CPS

¹⁴ In petitioner’s view, the pass over was accomplished when the vacancy was canceled for the purpose of selecting the non-veteran applicants favored by Captain Proctor. But even if the Court construed the phrase “pass over” more narrowly – requiring that the agency also re-advertise the position or actually hire a non-preference eligible applicant – the result in this case would be the same. After canceling the vacancy, the Coast Guard re-advertised the position and hired a non-preference eligible. Pet. App. 3a.

[preference eligible] Veteran” and that the agency would “like to select two NV [non-veterans] below Mr. Donaldson” for the position. *Id.* 52a. Further, the Coast Guard e-mailed its internal human resources department to express concern that the agency’s preferred candidates might “accept[] other positions,” if the pass over was not quickly approved. *Id.* 54a.

2. The question, then, is whether Section 3318(b) provides the exclusive mechanism for passing over preference eligible veterans, or whether Congress intended to permit agencies to achieve the same results without OPM approval through the expedient of cancellation and re-advertisement. The answer to that question should be obvious. When Congress defines detailed procedures for accomplishing a particular objective, there is strong reason to believe that Congress intended those procedures to be exclusive. *See, e.g., Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 254 (2009) (explaining that when a statute “provides highly detailed and restrictive administrative and judicial remedies,” “Congress must have intended the statutory remedies to be exclusive” (citing *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 124 (2005))).

For example, in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), Congress provided that a company required to remediate a toxic waste site “may seek contribution” from other parties who are responsible for the hazard “during or following any civil action” under certain provisions of the Comprehensive Environmental Response, Compensation, and Liability Act, *id.* at 166 (emphases omitted) (quoting 42 U.S.C. § 9613(f)(1)). This Court held that by expressly authorizing a

contribution claim in such circumstances, Congress precluded a company from seeking contribution in any other way. *Id.* at 167-68.

The same analysis applies here. Congress has established a comprehensive procedure for passing over preference eligibles, including the requirement of prior OPM approval. The Federal Circuit has never explained why Congress would create these elaborate procedures yet leave open to federal agencies a completely unregulated mechanism for accomplishing the same result.

To the contrary, the history of the statute makes clear that Congress did *not* intend OPM approval to be so easily evaded. Section 3318(b) is the culmination of a series of amendments that increasingly restricted agency discretion to deny employment to qualified veterans. It takes the decision to decline to hire a qualified veteran out of the hands of the hiring agency – which Congress knew from experience was likely to subordinate Congress’s veterans’ preference policies to the agency’s own hiring priorities – and places the decision into the hands of an outside agency specially focused on compliance with federal hiring statutes. The Federal Circuit’s precedents are nothing short of a roadmap for evading that distribution of authority and restoring to agencies the unfettered hiring discretion the statute was designed to limit.¹⁵

¹⁵ Notably, OPM itself has never publicly countenanced such evasions. To the contrary, in testimony before Congress, OPM has stated that vacancy cancellations for the purpose of avoiding hiring preference eligibles are “evidence of violations of

C. The Federal Circuit Has Erroneously Reduced Veterans' Pass Over Protections To Nothing More Than An "Opportunity To Compete."

The Federal Circuit's justification for its rule is straightforward but wholly unconvincing.

Even though Congress created a detailed procedure for approving pass overs in Section 3318(b), the Federal Circuit in *Abell v. Department of the Navy*, 343 F.3d 1378 (Fed. Cir. 2003), held that federal law ultimately provides veterans nothing more than the "opportunity to compete" for vacant positions – an opportunity that is not denied when an agency cancels a vacancy to avoid hiring a veteran, *id.* at 1384.

The Federal Circuit's sole support for that conclusion is its reading of 5 U.S.C. § 3304(f). *See* 343 F.3d at 1383. That provision states that preference eligibles "may not be denied the opportunity to compete for vacant positions" when an agency is accepting applications from "outside its own workforce under merit promotion procedures." *Id.*

veterans' preference" by federal agencies. *Fulfilling the Promise? A Review of Veterans' Preference in the Federal Government: Hearing Before the Subcomm. on Oversight of Gov't Mgmt., the Fed. Workforce & D.C. of the S. Comm. on Homeland Sec. & Governmental Affairs*, 109th Cong. 15 (2006) (statement of Dan G. Blair, Deputy Director, OPM). Furthermore, while OPM's operational handbook takes great pains to outline the specific procedures federal agencies must follow when passing over preference eligible veterans, it never states (or even suggests) that cancellation and re-advertisement is a permissible alternative. *See* DEO Handbook, *supra*, 164-65.

§ 3304(f)(1). It further provides that “[t]his subsection shall not be construed to confer an entitlement to veterans’ preference that is not otherwise required by law.” *Id.* § 3304(f)(3).

In light of this language, the *Abell* court reasoned that veterans’ preference law “does not guarantee a preference eligible a position but *only* an opportunity to compete with the other candidates on the certificate of eligibles.” *Abell*, 343 F.3d at 1384 (emphasis added) (quoting *Scharein v. Dep’t of Army*, 91 M.S.P.R. 329, 334 (2002)). And because “Mr. Abell had the opportunity to compete and did compete,” the “Navy’s decision not to fill the position did not violate Mr. Abell’s rights under the VEOA.” *Id.* at 1385.

The problem with this reasoning is that the court looked to the wrong provision. Section 3304(f) establishes a limited veterans’ preference applicable only when an agency hires from within the civil service through “merit promotion procedures.” 5 U.S.C. § 3304(f)(1). The preference under that process is the right to apply for vacancies that would otherwise be closed to veterans who are not already career civil servants. *See* Veterans’ Employment Opportunities Act of 1998, Pub. L. No. 105-339, § 2, 112 Stat. 3182, 3182 (enacting Section 3304(f) to provide “Access for Veterans” to “merit promotion procedures”). Thus, when an agency seeks to fill a position solely by promoting from within the civil service, it is accurate to say that all the law affords veterans is a right to compete.

But in petitioner’s case, and in *Abell*, the agency sought to fill a vacancy not by promotion, but through

the open competitive examination process.¹⁶ That process has always been open to the general public, including veterans. Thus, merely allowing veterans to compete in the open competitive examination process provides them no preference at all. Instead, in this context, veterans' preference takes the form of, among other things, Section 3318(b)(1)'s protection against being passed over without OPM authorization. That provision manifestly provides veterans far more than a simple "right to compete." At the same time, Section 3304(f) has no application to the open competitive examination process, and plainly does nothing to limit the rights afforded by the provisions that do.

D. Requiring Agencies To Follow The Procedures Of Section 3318(b) Will Protect Veterans' Rights Without Unduly Burdening Government Agencies.

Preventing agencies from passing over veterans by canceling vacancies will not unduly burden government hiring.

To start, nothing in the statute categorically prevents an agency from passing over a veteran. It merely requires the agency to persuade OPM that it has "proper and adequate reason[s]" for doing so. 5

¹⁶ Here and in *Abell*, the vacancies were initially advertised under both the merit promotion and the open competitive processes. See C.A. App. A216; *Abell*, 343 F.3d at 1380. But in both cases the agency ultimately elected to proceed under the open competitive examination process with respect to the hiring decisions at issue. See Pet. App. 48a; *Abell*, 343 F.3d at 1381.

U.S.C. § 3318; *see also* DEO Handbook, *supra*, at 164. There is no reason to suppose that OPM will exercise its authority unreasonably. In addition, the pass over requirement is implicated only when an agency desires to pass over a veteran who meets the qualifications the agency itself has established for the position.

Finally, an agency remains free to cancel vacancies for any number of legitimate reasons, such as when its needs shift, funding is lost, or the required duties and qualifications of the position change. But an agency must obtain OPM approval where, as here, its only reason for passing over a qualified veteran is that it prefers to hire a non-preference eligible.

II. The Court Should Grant The Petition In This Case To Resolve This Important And Frequently Recurring Question.

This case presents an excellent vehicle for the Court to correct a widespread, unlawful practice that has profound consequences for veterans, their families, and the nation.

A. Federal Agencies' Routine Cancellation of Job Vacancies In Order To Avoid Hiring Otherwise Qualified Veterans Is A Matter Of Utmost Importance.

1. Federal agencies regularly cancel vacancies to avoid hiring disabled veterans. At a September 2007 congressional hearing on veterans' preference, then-Chairman of the Merit Systems Protection Board Neil A.G. McPhie testified that of the approximately 1,600 veterans' preference cases the Board had heard between 1998 and 2007, claims that federal agencies

had “improperly cancelled a vacancy announcement” were among the four most frequent complaints.¹⁷ At that same hearing, a senior staff attorney for the National Veterans Legal Services Program testified that agency cancellation of vacancies to avoid hiring qualified veterans was a “systemic problem” that “intentionally foil[s] veterans’ preference laws.”¹⁸

Since then, the practice has continued unabated, giving rise to a flood of wrongful pass over claims. *See, e.g., Gingery v. Dep’t of Treasury*, No. 12-3057, 2012 WL 3264421, at *3 (Fed. Cir. Aug. 13, 2012); *Morales v. Dep’t of Homeland Sec.*, 475 Fed. Appx. 749, 751 (Fed. Cir. 2012); *Graves v. Dep’t of Navy*, 451 Fed. Appx. 931, 934 (Fed. Cir. 2011); *Joseph v. FTC*, 505 F.3d 1380, 1384 (Fed. Cir. 2007); *Willingham v. Dep’t of Navy*, 118 M.S.P.R. 21, 30 (2012); *Graves v. Dep’t of Veterans Affairs*, 114 M.S.P.R. 245, 256 (2010); *Jones v. Dep’t of Veterans Affairs*, 113 M.S.P.R. 385, 390-91 (2010); *Dean v. Consumer Prod. Safety Comm’n*, 108 M.S.P.R. 137, 142 (2008).

These decisions almost certainly understate the prevalence of this practice because, since *Abell v. Department of the Navy*, 343 F.3d 1378 (Fed. Cir. 2003), was decided almost a decade ago, the Federal Circuit and the Merit Systems Protection Board have made clear that such claims are doomed to fail.

2. The proper interpretation of Section 3318(b) is also important because it implicates the nation’s

¹⁷ *Veterans’ Preference: Hearing Before the Subcomm. on Econ. Opportunity of the H. Comm. on Veterans’ Affairs*, 110th Cong. 25 (2007).

¹⁸ *Id.* at 49 (statement of Meg Bartley).

solemn commitment to its veterans and the welfare of thousands of former servicemembers and their families.

a. Faithful implementation of veterans' preference law is essential to fulfilling this country's moral obligation to those who have served in our Armed Forces. As President Ronald Reagan once proclaimed, "Veterans' preference is but a partial recognition of the great debt of gratitude that the country owes to those who have served in the Armed Forces." Proclamation No. 5217, 49 Fed. Reg. 27,919 (July 5, 1984). The federal government thus has a "moral obligation to ensure that veterans, especially disabled veterans and returning wounded, have appropriate and proper access to Federal jobs in government when they separate from military service." Kay Coles James, Dir., Office of Pers. Mgmt., Address at Walter Reed Army Medical Center: A Promise Given – A Promise Kept (Apr. 22, 2004).¹⁹

b. When the promises of veterans' preference laws are not kept, there are profound practical consequences for veterans and their families.

There are over 21 million veterans currently living in the United States.²⁰ Of these, 5.5 million are

¹⁹ Available at <http://www.opm.gov/speeches/2004/KCJ-Apr04.asp>.

²⁰ Bureau of Labor Statistics, *Economic News Release: Table A-5* (Dec. 7, 2012), <http://www.bls.gov/news.release/empst.t05.htm>.

disabled – and this number is only rising.²¹ Improvements in medical care for those injured on the battlefield have resulted not only in higher survival rates, but also higher rates of disability.²² In fact, nearly half of Iraq and Afghanistan veterans have returned home with a service-connected disability.²³ As more disabled veterans come home each month, the need to provide them with meaningful employment opportunities within the federal government is more pressing than ever.

These men and women continue to face an uphill battle in obtaining employment. *See, e.g.,* David Zucchino, *Unemployment Is a Special Challenge for Veterans*, L.A. Times, Apr. 25, 2012.²⁴ The Bureau of Labor Statistics estimates, for instance, that the unemployment rate among veterans returning from Iraq and Afghanistan is over 38 percent higher than

²¹ U.S. Census Bureau, *Veteran Status: 2011 American Community Survey 1-Year Estimates*, http://factfinder2.census.gov/faces/tables/services/jsf/pages/productview.xhtml?pid=ACS_11_1YR_S2101&prodType=table (last visited Feb. 22, 2012).

²² *See, e.g.,* Aaron Smith, *A Cost of War: Soaring Disability Benefits for Veterans*, CNNMoney (Apr. 27, 2012), <http://money.cnn.com/2012/04/27/news/economy/veterans-disability/index.htm> (reporting that 46% of the 1.6 million veterans returning from Iraq and Afghanistan have filed disability claims).

²³ Marilyn Marchione, *Almost Half of New Vets Seek Disability*, Associated Press (May 28, 2012), <http://bigstory.ap.org/content/ap-impact-almost-half-new-vets-look-for-disability>.

²⁴ Available at <http://articles.latimes.com/2012/apr/25/nation/la-na-vets-unemployed-20120426>.

the national average for non-veterans.²⁵ Surveys by veterans groups suggest that the number may be even higher.²⁶ The consequences of unemployment are felt by the veteran's entire family, and can have permanent effects on children.²⁷

Such a high unemployment rate among returning disabled veterans affects not only their financial status²⁸ but also their mental and physical health.²⁹

²⁵ Bureau of Labor Statistics, *supra* note 20 (indicating a 10 percent unemployment rate for "Gulf War-era II veterans" as compared to 7.2 percent for non-veterans).

²⁶ See Michelle McCarthy, *New Veterans Face 17% Unemployment Rate, Significantly Higher Than Official Government Report*, Iraq & Afghanistan Veterans of America (Mar. 26, 2012), <http://iava.org/blog/new-veterans-face-17-unemployment-rate-significantly-higher-official-government-report>.

²⁷ See, e.g., Deborah Belle & Heather E. Bullock, *SPSSI Policy Statement: The Psychological Consequences of Unemployment*, Soc'y for the Psychol. Study of Soc. Issues, <http://www.spssi.org/index.cfm?fuseaction=page.viewpage&pageid=1457> (last visited Feb. 22, 2012) (noting that unemployment affects the well-being of spouses and children as well as family relationships); Philip Oreopoulos et al., *The Intergenerational Effects of Worker Displacement*, 26 J. Lab. Econ. 455 (2008) (finding that fathers' unemployment correlates with lower annual earnings for their children).

²⁸ See, e.g., Binyamin Applebaum, *The Enduring Consequences of Unemployment*, N.Y. Times, Economix Blog (Mar. 28, 2012, 10:30 AM), <http://economix.blogs.nytimes.com/2012/03/28/the-enduring-consequences-of-unemployment/> (noting that the unemployed suffer lasting damage to their future earnings potential and job prospects).

²⁹ See, e.g., Deborah Belle & Heather E. Bullock, *supra*, (observing that unemployment can cause anxiety, depression, poorer physical health, and reduced life expectancy).

Perhaps most tragically, unemployment may contribute to the alarmingly high suicide rate within the veteran population.³⁰

c. Finally, the promise of veterans' preference and other assistance in obtaining post-service employment has long been an important tool for military recruiting. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 265 (1979) (noting that a primary purpose of veterans' preference is to "encourage patriotic service"). Accordingly, failure to abide by veterans' preference laws can undermine efforts to recruit and retain highly qualified servicemembers.

B. The Court Should Not Wait To Review This Important Issue.

1. Whether an agency may avoid the procedural requirements of Section 3318(b) by canceling a vacancy is ripe for this Court's review. The Federal Circuit has repeatedly upheld the lawfulness of this practice and denied petitions for rehearing asking the court to reconsider its precedent, including in this case. *See, e.g.,* Pet. App. 37a; *Dow v. Gen. Servs. Admin.*, 590 F.3d 1338, 1344 (Fed. Cir. 2010); *Joseph v. FTC*, 505 F.3d 1380, 1384-85 (Fed. Cir. 2007); *Millner v. Dep't of Veterans Affairs*, 93 Fed. Appx. 223, 225 (Fed. Cir. 2004), *reh'g denied*, May 11, 2004 (unpublished). Accordingly, there is no prospect that

³⁰ *See, e.g.,* Timothy Williams, *Suicides Outpacing War Deaths for Troops*, N.Y. Times, June 9, 2012, at A10 (noting the relationship between lack of employment and the recent spike in veteran suicides).

the Federal Circuit will reverse its position absent intervention from this Court.

Nor is further percolation likely to occur in any other circuit. The Federal Circuit has exclusive jurisdiction over final decisions of the Merit Systems Protection Board, *see* 28 U.S.C. § 1295(a)(9), the forum in which almost every veterans' preference claim is adjudicated. While there are a few statutory exceptions to the Federal Circuit's exclusive jurisdiction, these rarely materialize into actual cases in other circuits.³¹ Indeed, in the ten years since *Abell*, petitioner's research has revealed only one court of appeals decision outside of the Federal Circuit that adjudicated an unlawful pass over claim. And in that case, the court simply deferred to the Federal Circuit's well-established precedent. *See Bowers v. Peake*, 366 Fed. Appx. 562, 563 (5th Cir. 2010) (summarily disposing of plaintiff's veterans' preference claim by citing to *Abell*).

This lack of precedent outside the Federal Circuit does not reflect a paucity of pass over claims or litigation. To the contrary, as noted above, vacancy cancellations to avoid veterans' preferences are a recurring subject of administrative challenge and litigation. Instead, the distribution of cases

³¹ A Merit Systems Protection Board case may be appealed to a federal district court if the Board does not issue a decision within 120 days. *See* 5 U.S.C. § 3330b(b)(1). In addition, "mixed cases" – *i.e.*, cases that involve both an action appealable to the Board and certain discrimination claims – may be filed in a federal district court and appealed to a regional circuit. *See* 5 U.S.C. § 7703(b)(2); *Kloeckner v. Solis*, 133 S. Ct. 596, 600-02 (2012).

simply reflects the reality that nearly all veterans' preference claims are brought before the MSPB and appealed to the Federal Circuit. Accordingly, the lack of a circuit conflict on the question presented is no reason to deny review.

2. This case is an ideal vehicle for correcting the Federal Circuit's misinterpretation of the veterans' preference statute. The question was squarely presented and decided below on the basis of an undisputed factual record that puts the legal question in stark relief. The Federal Circuit recognized that "there can be no question that the agency avoided hiring Donaldson on purpose by withdrawing the job vacancy." Pet. App. 10a. The sole and dispositive question was whether that conduct was lawful under Section 3318(b)(1).

Moreover, while passing over a veteran by canceling a vacancy is a common practice, the Court is unlikely to have many other opportunities to address its lawfulness. The Federal Circuit and the Merit Systems Protection Board have made clear that future challenges to this practice are bound to fail. Accordingly, few attorneys are likely to litigate such a challenge on a contingency basis, and few veterans can afford to hire counsel to appeal such claims through the Federal Circuit and eventually to this Court. Moreover, veterans who proceed *pro se* may fail to properly raise or preserve their legal claims, or may lack the skill or resources to file an effective petition for certiorari in this Court. Accordingly, denial of review in this case could well preclude the Court from ever correcting this pervasive evasion of veterans' rights.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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