No. 12-1044

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

REPLY BRIEF FOR THE PETITIONER

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Kevin K. Russell
Counsel of Record
GOLDSTEIN &
RUSSELL, P.C.
5225 Wisconsin Ave., NW,
Suite 404
Washington, DC 20015
(202) 362-0636
kr@goldsteinrussell.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

REPLY BRIEF FOR THE PETITIONER

After decades of dissatisfaction with agencies' implementation of veterans' preference requirements, Congress took the decision to pass over qualified disabled veterans out of agencies' hands. In 5 U.S.C. § 3318(b), Congress required that before a disabled preference eligible veteran may be passed over in favor of a non-preference eligible candidate, the agency must justify its decision to, and receive approval from, the Office of Personnel Management (OPM), an outside body focused on implementing federal employment law. The Solicitor General confirms that the Executive Branch believes it has found a workaround to avoid that restriction, one that leaves the decision to deny employment to otherwise qualified veterans in the hands of relatively low-level agency officials who will predictably place greater weight on their own hiring preferences than the nation's veterans' policies.

Respect for Congress demands that before the Executive Branch is allowed to bypass Congress's reticulate pass over regime, *some* court carefully evaluate the legal justification for it. But the Solicitor General all but acknowledges that the only court of appeals positioned to provide that review has failed in that duty. The Government does not defend the only reason the Federal Circuit has ever given for its approval of the cancellation stratagem – *i.e.*, that the law only provides veterans a right to compete – and instead offers new justifications that no appellate court has passed on, much less accepted. Because the Federal Circuit has refused to reconsider its position, only this Court can give the question presented by this petition the serious consideration it deserves.

The Government offers no convincing reason why the question does not otherwise warrant review. The Solicitor General does not dispute the Federal Circuit Bar Association's representation that cancellation to avoid OPM scrutiny is a common agency tactic, FCBA Br. § I(B), or amici's demonstration of the question's practical importance to veterans, *see id*. § I(A); NOVA Br. 2-4. Nor does the Government contest that the question arises almost exclusively in the Federal Circuit, making the absence of a circuit conflict immaterial. *See* Pet. 28-29; FBCA Br. 13-14. Instead, the Government's opposition rests on two claims: (1) the Federal Circuit *could have* upheld the cancellation practice for more convincing reasons; and (2) this case is a poor vehicle for deciding the Question Presented. Because neither assertion is persuasive, the petition should be granted.

1. The Government begins its opposition by mischaracterizing both the record and petitioner's argument. It says that petitioner contends "that, notwithstanding the Coast Guard's determination that he lacked the expertise necessary to succeed at the job, the agency violated his rights under 5 U.S.C. § 3318(b) when it declined to hire anyone for the original vacancy announcement rather than hire him." BIO 9.

But the Government surely knows better. The "Coast Guard" did not deem petitioner unqualified. To the contrary, the Coast Guard's civil service process ranked petitioner the most qualified candidate, even without his veterans' preference points. The entire purpose of the elaborate civil service process is to require an agency to establish the qualifications for a position in advance, and to

have specialist human resource professionals evaluate candidates' experience and background against those criteria. In the process used in this case, the role of the interviewing officials is not to second guess those determinations, *contra* BIO 2, but to choose among the top three candidates emerging from that elaborate process, 5 U.S.C. § 3318(a). If an official objects that a person on the list is unqualified, there is a mechanism for seeking his removal from the list, but again the ultimate decision is made by human resources experts, not the interviewing official. *See* 5 C.F.R. § 332.406. In this case, when Captain Proctor, the particular Coast Guard officer who oversaw the candidate interviews, tried to bypass petitioner on the grounds he was not qualified, other Coast Guard officials in the agency's human resources department overruled him and deemed petitioner sufficiently qualified for the job. Pet. App. 52a.[1] Accordingly, the final word from the Coast Guard was that petitioner was not only qualified, but highly so.

Thus, this case is not about *whether* the Government may decline to hire a veteran it deems unqualified; it is about *who* within the Government is empowered to make that determination. Contrary to the Solicitor General's assertion (BIO 9), petitioner does not claim that the Coast Guard violated Section 3318(b) by declining to hire him. Rather, he claims that it violated the statute by unilaterally making

---

[1] The Government has been required to correct inaccuracies in Captain Proctor's testimony. *See* BIO 5 n.2; Pet. App. 34a-35a.

the decision to pass him over, without first justifying that decision to OPM.

2. The Government's zealous defense of an agency's attempt to avoid congressional restrictions on its hiring discretion is neither surprising nor a reason to deny certiorari. As the petition demonstrated, and the Solicitor General simply ignores, the present structure of veterans' preference laws is a response to repeated attempts by the Executive Branch to resist any meaningful constraint on agencies' authority to deny employment to qualified veterans when the agency would prefer to hire someone else. Pet. 13-16.

The Solicitor General's continuation of that tradition of resistance warrants review, even if the Court is not yet convinced that the Government's interpretation of the statute is wrong. The question at this stage is not whether the Government's cancellation practice is lawful; it is whether the lawfulness of the practice should be finally determined by this Court or, instead, left to the Federal Circuit.

Here, the case for review by this Court is unusually strong. As the Federal Circuit Bar Association explains, the Federal Circuit has given the question shallow and unconvincing treatment, yet refuses to revisit the question anew. *See* FCBA Br. § II. In this case, as in similar cases, the Federal Circuit simply concluded that petitioner's challenge was "precluded by the decision of this court in *Abell v. Dep't of the Navy*, 343 F.3d 1378 (Fed. Cir. 2003)." Pet. App. 8a. And as the petition explained, the court in *Abell* upheld the cancellation practice because, in its view, the only thing veterans' preference law

guarantees veterans is the right to compete for a position, citing the inapplicable 5 U.S.C. § 3304(f). *Abell*, 343 F.3d at 1384. The *Abell* decision thus "fails to address § 3318(b) and its requirement that a preference eligible veteran be 'passed over' only with OPM approval at the culmination of a multi-step process." FCBA Br. 12.

The United States does not even attempt to defend the Federal Circuit's reliance on Section 3304(f). Instead, it claims (in a footnote) that the Federal Circuit actually *did* consider the relevant statutory language in *Abell*. BIO 15-16 n.7. But the Government's citations do not support its assertion. Because the portion of the *Abell* opinion deciding the cancellation claim says nothing about Section 3318(b)(1), the Government is forced to rely on a separately numbered section of the opinion addressing the distinct claim that Abell was entitled to notification of the proposed cancellation. BIO 15-16 n.7. That portion of the opinion analyzes the language of Section 3318(b)(*2*) addressing notification rights, not the language of subsection (b)(*1*) that governs this case. 343 F.3d at 1385. Likewise, the Government's collection of statements generically approving the cancellation practice, BIO 15-16 n.7, do nothing to show that the Federal Circuit reached those conclusions based on a meaningful consideration of the relevant statutory language, its history, or the other considerations now presented to this Court by the parties.

3. The Solicitor General nonetheless insists that certiorari is unwarranted because the Federal Circuit could have reached the same conclusion for better

reasons. But the Government's alternative rationale is unconvincing as well.

a. The Government acknowledges that when an agency passes over a preference eligible and simultaneously selects a non-preference eligible, it is required to justify that decision to OPM. BIO 11. It nonetheless argues that Congress intended that an agency may accomplish substantially the same objective – passing over a preference eligible whom it does not want to hire, and hiring a non-preference eligible substitute – without *any* outside oversight, so long as it proceeds in two steps: first passing over the veteran by canceling the vacancy, and then hiring a non-preference eligible substitute in a subsequent hiring process.

Why would Congress have intended such radically different levels of outside scrutiny for two means of accomplishing substantially similar objectives, both of which have the same deleterious effect on Congress's veterans' preference policies? The Government cannot say. The best it offers is that "Congress could well take the view that the disadvantages of constraining federal authority" in the fashion petitioner advances "would far outweigh any potential advantages." BIO 17. But the only disadvantage the Government identifies to petitioner's interpretation is that it places a restraint on agency hiring discretion – if the agency does not want to hire a qualified veteran at the top of the list, it must justify that desire to OPM. If Congress shared the Solicitor General's distaste for subjecting agency decision making to OPM review, it would not have enacted Section 3318(b) in the first place.

It is no answer to say that cancellation is different because "existing legal protections for veterans" would "be applicable to any subsequent vacancy announcement." BIO 17. Under the Government's rule, those protections are empty promises. Any veteran denied employment through cancellation will know that applying for the re-advertised position is likely an exercise in futility – the cancellation demonstrates the agency's unwillingness to hire the veteran and the Federal Circuit's approval of the cancellation maneuver enables the agency to repeat it as many times as necessary to avoid hiring the veteran.

b. The Government nonetheless insists that even if its view of the statute makes no sense, the language of Section 3318(b) compels it. Not so.

The United States does not seriously contest that the undefined phrase "pass over" can be understood to encompass an agency's decision to not offer a position to a veteran whom it would otherwise be compelled to hire. *See* BIO 12 n.5 (acknowledging that the court of appeals referred to refusal to hire petitioner as a "blatant pass over," Pet. App. 10a). Instead, the Government insists that because cancellation does not immediately result in the selection of a non-preference eligible, cancellation will never be undertaken for the purpose of "select[ing] an individual who is not preference eligible," and therefore never triggers the requirement of OPM review. BIO 11-12 (quoting 5 U.S.C. § 3318(b)(1)).

But the Government places more weight on the quoted language than it can bear. The United States reads the phrase as showing that Congress is

indifferent to the denial of employment to an otherwise qualified veteran, so long as a non-preference eligible is not immediately given the position. But that gets the manifest purpose of the statute exactly backwards. The point is not to deny employment to non-veterans, but rather to limit agencies' ability to deny employment to preference eligibles who are otherwise qualified for the position. *See* Pet. 13-16. The phrase the Government cites is simply a way of making clear that the statute is not violated when one veteran is passed over, but the job is given to another preference eligible veteran. To be sure, if Congress had foreseen the Government's most recent attempts at evasion, it might have worded the phrase differently. But that lack of omniscience should not lead this Court to disregard the obvious and important purposes of the statute.

In any case, the Government's argument fails on its own terms. The Solicitor General assumes that because the results of a subsequent hiring process cannot be known with certainty at the time of the cancellation, the selection of a non-preference eligible can never be the purpose of the cancellation. But that is not so, as the evidence in the case illustrates. The record reflects that the vacancy was canceled because Captain Proctor wished to hire certain non-preference eligible candidates instead of petitioner. *See* Pet. 6-7.[2] The fact that the cancellation and re-advertisement did not ultimately produce the exact

---

[2] To the extent this factual question was not resolved below (*see* BIO 18), it is because the purpose of the cancellation is irrelevant under *Abell*.

result desired does not change the purpose for which it was undertaken. Things do not always turn out as planned. One can take the day off work "in order to" go see a movie with a friend, yet end up having to see the movie alone or with someone else.

Thus, the language of the statute does not require that the cancellation "accomplish [the] purpose" of hiring a non-preference eligible. BIO 11. Even under a narrow construction of the provision, it should be enough that hiring a non-preference eligible was the goal of the cancellation at the time the vacancy was left unfilled. And even if this Court were to conclude that the statute could only be violated if an agency eventually hires a non-preference eligible, the Government acknowledges that this impermissible result is what happened in this case. BIO 5.[3]

---

[3] The Government's reliance on indirect inferences drawn from the definition of "pass over request" in the OPM regulations, BIO 13-14, is to no avail. The definition was promulgated six years after *Abell* had firmly established that Section 3318(b) permits pass overs by cancellation. *See* 74 Fed. Reg. 30459 (June 26, 2009); *Ledbetter v. Goodyear*, 550 U.S. 618, 642 n.11 (2007) ("Agencies have no special claim to deference in their interpretation of [judicial] decisions."). Moreover, indirect inferences aside, when addressing the specific question of cancellation pass overs, OPM officials have not embraced the Government's position in this case. *See* Pet. 19 n.15; BIO 14 n.6 (stating only that "OPM has never taken the position" that cancellations can violate the statute, while acknowledging that OPM has told Congress that a "pattern" of such cancellations might).

3. The Government's alleged vehicle problems also provide no basis to delay review in the hopes of a better case coming along in the future.

First, the Government's assertion that the Question Presented is based on a false premise is not a vehicle objection, but a repetition of its merits argument. On the Government's view, *no* case will ever pose the question presented because, in the Government's view, no cancellation is ever undertaken for the purpose of selecting a non-preference eligible. BIO 11-12. This case is a perfectly good vehicle for resolving whether the Government's argument is correct.

Second, the Government's claim that "the second vacancy announcement in this case was actually for a different vacancy than the first," BIO 19, is disingenuous. The statement implies that the re-advertised position was not one of the two initial vacancies for which petitioner was interviewed, but that is simply untrue. S*ee, e.g.*, Pet. App. 3a, 25a. Instead, the Government bases its misleading statement on the fact that the initial vacancy announcement was issued for one position (call it "Position A") before a second identical position ("Position B") opened up. Although the Coast Guard "decided that it could fill both vacancies through the already-posted announcement," BIO 2, the Government's point seems to be that the re-advertised job was Position B, which was not the subject of the initial job announcement *when the announcement was issued*. Why that would make a difference, the Government makes no effort to explain.

Third, the fact that petitioner is challenging the denial of his selection for the re-advertised position does not make this an inappropriate vehicle for resolving the distinct question of whether the Government lawfully denied him employment the first time he applied. *Contra* BIO 19-20. The Government does not argue that the pending appeals address or affect the legal claim raised here (they do not),[4] or would resolve any factual disputes relevant to this case (they will not). Instead, the Government posits only that if his other "challenge is successful, petitioner may well ultimately be hired." BIO 19. But even if that happened it would not moot this case, as the pending appeals would not address petitioner's entitlement to backpay prior to the completion of the second hiring process. *See* 5 U.S.C. § 3330c(a).

Nor should the fact that petitioner had the tenacity to re-apply for the re-advertised position provide any reason to deny review. Unless the Government is suggesting that this Court wait for a case in which a veteran threw in the towel after the first rejection, the circumstance of multiple pending challenges is unlikely to be avoided given the sixty-day limit for challenging agency hiring decisions. *See* 5 U.S.C. § 3330a(a)(2)(A). The pending appeals thus necessarily challenge only the subsequent hiring process and do not provide petitioner a vehicle for

---

[4] Because the Coast Guard ultimately hired someone for the re-advertised position, petitioner obviously is not making a "pass over by cancellation" claim in the pending appeals.

raising the cancellation claim presented in this petition.[5]

If anything, the fact that this case involves both cancellation and re-advertisement makes this case an ideal vehicle for resolving the Question Presented, as it allows the Court to consider multiple possible interpretations of Section 3318 in a single case.

Finally, the Government's vehicle objections would be more convincing if there were any real prospect that some other, potentially more attractive vehicle might be forthcoming. But as the petition explained, and the Government does not contest, if this Court denies certiorari in this case, it is unlikely to see another serious petition on the same question again. Pet. 30.

---

[5] The Government also asserts that petitioner's argument "that a pass over occurred when the agency hired a non-preference eligible for the second vacancy would be premature while the results of that hiring process are still under review." BIO 19. But that misconstrues petitioner's backup argument. At the latest, the statute was violated when the Coast Guard "*select[ed]* an individual who is not preference eligible," 5 U.S.C. § 3318(b)(1) (emphasis added), not when the legal challenges to that selection became final.

CONCLUSION

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

Respectfully submitted,

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Kevin K. Russell
Counsel of Record
GOLDSTEIN &
RUSSELL, P.C.
5225 Wisconsin Ave.,
NW, Suite 404
Washington, DC 20015
(202) 362-0636
kr@goldsteinrussell.com

June 3, 2013