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

BRIEF OF FEDERAL CIRCUIT BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Federal Circuit Bar Association ("FCBA") is a national organization for the Bar of the United States Court of Appeals for the Federal Circuit. The FCBA unites the different groups across the country that practice before that court, seeking to strengthen and serve the court. One of the FCBA's objectives is to provide the perspective of disinterested practitioners, including through *amicus curiae* briefs filed with this Court, on issues affecting practice before the Federal Circuit.

The FCBA has a particular interest in the adjudication of matters falling within the exclusive jurisdiction of the Federal Circuit, including the administration of veterans' benefits and the merit system for federal employment. Through its Veterans Appeals Committee, the FCBA facilitates pro bono representation of veterans who, like petitioner in this case, have filed *pro se* appeals with the Federal Circuit.

As particularly relevant here, the FCBA seeks to promote the sound interpretation and fair administration of laws governing veterans' federal employment

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *amicus* represent that all parties were provided notice of *amicus*'s intention to file this brief at least 10 days before its due date and that all parties have consented to the filing of this brief. Counsel for petitioner has filed a letter with the Clerk granting blanket consent to the filing of *amicus* briefs, and counsel for respondent has consented to the filing of this *amicus* brief in a letter that is being submitted contemporaneously with the filing of this brief.

preferences. This case raises the question whether an agency may, consistent with federal law, cancel and re-advertise a job vacancy for the purpose of hiring a non-veteran instead of a preference-eligible veteran. The answer to this question is significant both to veterans seeking federal employment and to federal agencies seeking to comply with their legal obligations. And it is important to the FCBA and its members who represent veterans that the laws governing veterans' preference be faithfully interpreted and applied.

Association lawyers who are government employees played no role in deciding whether to file this brief or in developing its contents.

STATEMENT

Robert Donnell Donaldson petitions for a writ of certiorari to review the Federal Circuit's ruling that the United States Coast Guard—a military branch operating under respondent Department of Homeland Security—did not violate Donaldson's rights under federal law to preference in hiring. As framed by the petition, 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.

Donaldson is a disabled veteran of the United States Navy who was honorably discharged in 2009 after 26 years of service. In 2010, Donaldson applied for a position with the Coast Guard. Using the "open competitive examination process," the Coast Guard assigned each applicant for the position a score based on relevant qualifications and job requirements, then ranked the applicants to develop a "certificate of eligibles." *See* 5 C.F.R. § 332.401. The Coast Guard

was required to select from the highest three eligibles listed on the certificate to fill the position. *See* 5 U.S.C. § 3318(a).

As a result of his score, Donaldson was ranked first on the certificate of eligibles. *See* Pet. App. 3a. (The other two top-ranked applicants were non-veterans.) In addition, as a disabled veteran applying for federal employment, Donaldson was entitled to certain preferences under federal law. Most important here, if the Coast Guard wanted to "pass over"[2] Donaldson "in order to select an individual who is a not a preference eligible," it was required to "file written reasons with the Office [of Personnel Management ("OPM")]." 5 U.S.C. § 3318(b)(1). OPM would then "determine the sufficiency or insufficiency of the reasons submitted by the [agency]" and send its findings to both the agency and Donaldson. *Id.* The agency would then be required to "comply with the findings of the Office." *Id.* In addition, because Donaldson has a service-connected disability rating of 30 percent, the Coast Guard would have to notify him of the proposed pass-over at the same time it notified OPM, thus allowing him an opportunity to respond to the proposal. *Id.* § 3318(b)(2).

Although the selecting official at the Coast Guard sought approval from the agency's internal human resources department to "pass over" Donaldson and to select one of the lower-ranked non-veterans for the position, the department denied the request and informed the selecting official that OPM approval was required in order to "pass over" Donaldson. *See* Pet. App. 49a-55a. Instead of seeking OPM approval, however, the Coast Guard canceled the job listing,

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[2] The term "pass over" is not expressly defined by statute or regulation.

relisted the position under a different hiring authority not subject to § 3318(b), and hired a non-preference eligible. *See id.* at 3a.

Donaldson appealed the Coast Guard's actions to the Merit Systems Protection Board ("MSPB" or "Board"), alleging that the agency violated § 3318(b) when it canceled the job listing to avoid hiring him.[3] The Board denied the appeal, finding that the agency "gave [Donaldson] an opportunity to compete for the position, and its decision to cancel the vacancy announcement rather than offer him the position did not violate his veterans' preference rights." *Id.* at 15a.

The Federal Circuit affirmed. The Court acknowledged that "there can be no question that the agency avoided hiring Donaldson on purpose by withdrawing the job vacancy" and that there had been a "blatant pass over of Donaldson." *Id.* at 9a-10a. But it held, relying on a 2003 case presenting similar facts, that federal law allows an agency to cancel a vacancy to avoid hiring a veteran based on the "good faith reason" that the veteran, though among the top-qualified candidates, does not possess the requisite expertise. *Id.* at 10a. Without confronting the language of § 3318(b) or applying that statute to Donaldson, the Federal Circuit deemed itself "bound by precedent" to affirm the decision of the Board. *Id.* at 9a.

The Federal Circuit denied Donaldson's petition for en banc review. In his petition to this Court,

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[3] As the petition notes, Donaldson argues in the alternative that the violation occurred when the agency relisted the position after canceling it or when it ultimately hired a non-preference-eligible applicant for the position, all without OPM notice or approval. *See* Pet. 17 n.14.

Donaldson seeks a resolution of the question whether the agency's hiring practice, endorsed by the Board and the Federal Circuit, violates the rights guaranteed by § 3318(b).

REASONS FOR GRANTING THE WRIT

Congress has carefully created a system to honor the nation's commitment to its veterans. Part of that system affords veterans who are qualified for jobs with the federal government certain preferences in the hiring process. Veterans' preference in federal employment is a critical component of the nation's obligations to its veterans in return for their service. And part of that preference is the prohibition in 5 U.S.C. § 3318(b) on "passing over" veterans without written justification and OPM approval.

The question presented by Donaldson's petition is whether § 3318(b) prohibits an agency from canceling a job listing to avoid hiring a preference-eligible veteran—a practice that is a frequent source of complaints from veterans. The Board and the Federal Circuit have upheld agencies' decisions to engage in this practice consistently for more than a decade. Yet they have done so without adequately interpreting and applying the language of § 3318(b).

From the Federal Circuit's analysis of this case, it appears that that court is unlikely to reconsider the lawfulness of the approach taken by the various agencies, including the Coast Guard here. The FCBA takes no position at this time on the merits of that question. The FCBA nevertheless agrees with petitioner that, for the benefit of the veterans to whom our nation is indebted and of the agencies obligated to comply with federal law, this Court should grant certiorari to decide whether the Federal Circuit's decision is consistent with the statute.

I. THE PETITION ADDRESSES A FREQUENTLY RECURRING QUESTION OF NATIONAL SIGNIFICANCE

A. Congress Created Veterans' Preference As an Integral Part of the Nation's Relationship with Its Veterans

"Congress has long recognized that [veterans' preference] is an earned benefit, not a gift." H.R. Rep. No. 105-40, at 9, 1997 WL 136375, at *9 (1997). "Over the years . . . , Congress has made many attempts to reinforce veterans preference laws . . . to make certain that individuals who have served their country have opportunities to continue their service in a civilian capacity." *Easing the Burdens Through Employment: Hearing Before the S. Comm. on Veterans' Affairs*, 111th Cong. 18 (2009) (comment of Sen. Akaka). An example of that continual strengthening of veterans' preference is the evolution of 5 U.S.C. § 3318(b), the "pass over" statute that provides the basis for petitioner's claim.

Section 3318(b)(1) sets out three steps that must be taken before an agency can "pass over" a preference-eligible veteran on the certificate of eligibles in favor of a non-veteran: First, "[i]f 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 [of Personnel Management] for passing over the preference eligible." *Id.* § 3318(b)(1). Second, "[t]he Office shall determine the sufficiency or insufficiency of the reasons submitted by the appointing authority." *Id.* Third, "[w]hen the Office has completed its review of the proposed passover, it shall send its findings to the appointing authority and to the preference eligible." *Id.*

Section 3318(b)(2) requires additional steps when the veteran—like Donaldson—"has a compensable service-connected disability of 30 percent or more." *Id.* § 3318(b)(2). In such cases, the veteran is entitled to notice, contemporaneous with the agency's request to OPM, 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." *Id.* OPM must, as a predicate to its consideration of the "passover," "require" the agency to prove satisfactory notice to the veteran. *Id.* And OPM must "tak[e] into account any response received from the preference eligible" when weighing the sufficiency of the agency's reasons for "passing over" the veteran. *Id.* § 3318(b)(1).

Veterans like Donaldson who are at least 30 percent disabled also benefit from a prohibition on OPM delegating its functions to any agency. *Id.* § 3318(b)(4). In general, OPM has delegated its "pass over" review to the agencies—subject to ongoing monitoring—but only OPM can approve the "pass over" of a 30 percent disabled veteran. *See* OPM, *Delegated Examining Operations Handbook: A Guide for Federal Agency Examining Offices* chs. 1(B) & (C), 6(C) & (D) (May 2007) ("DEO Handbook"), *available at* http://www.opm.gov/policy-data-oversight/hiring-authorities/competitive-hiring/deo_handbook.pdf.[4]

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[4] Even for less- or non-disabled preference-eligible veterans, OPM has limited the scope of delegated "pass over" authority through the guidance of the DEO Handbook. Chapter 6, Section D, of the handbook addresses how an agency may "Object to an Eligible" on the certificate of eligibles, including guidance on various bases for objection. OPM instructs agencies that "[o]bjections based on lack of experience (minimum qualifying experience, either general or specialized, or selective factors) may be sustained only when that experience is part of the minimum requirements for the position." DEO Handbook at 160.

Each step in the current "pass over" process is the result of repeated efforts by Congress to provide meaningful employment preference rights to veterans. OPM's predecessor, the Civil Service Commission, initially had authority only to issue a non-binding recommendation on the sufficiency of the reasons for an agency's "pass over." *See* Veterans' Preference Act of 1944, ch. 287, § 8, 58 Stat. 387, 389. Congress made the Commission's decision mandatory in 1953. *See* Act of Aug. 14, 1953, ch. 485, § 2, 67 Stat. 581, 582 (requiring that the agency "shall" comply with the Commission's decision).

Likewise, the Commission initially received notice of a "pass over" only after it had occurred, but Congress made pre-approval mandatory in conjunction with the creation of OPM in 1978. *See* Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 307(d), 92 Stat. 1111, 1148-49. At the same time, Congress also ensured that disabled veterans would receive notice of the proposed pass-over. *See id.* The decision to make OPM's review of the reasons for a proposed "pass over" non-delegable for 30 percent disabled veterans, and to guarantee such veterans notice and an opportunity to be heard, was a compromise struck between the House and Senate in conference. *See* H.R. Conf. Rep. No. 95-1717, at 144 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2860, 2877-78. "[T]he purpose of th[e] [compromise] [wa]s to better protect the rights of more seriously disabled veterans." *Id.*

B. Agencies Routinely Cancel Job Listings Rather Than Hire Preference-Eligible Veterans

Despite Congress's continual and careful attention to veterans' preference laws, issues concerning the scope of preference continue to arise. *See* H.R. Rep.

No. 105-40, at 9, 1997 WL 136375, at *9 ("[V]eterans' preference in the Federal workplace is often ignored or circumvented and . . . its continued viability is threatened on several fronts."). One of these issues is whether federal agencies may use cancellations to avoid hiring a preference-eligible veteran without following the procedural steps mandated by § 3318(b).

OPM has reported to Congress that, between 1998 and 2007, one of the five most common veterans' preference complaints is that the agency improperly canceled a job listing. *See Veterans' Preference: Hearing Before the Subcomm. on Econ. Opportunity of the H. Comm. on Veterans' Affairs*, 110th Cong. 61 (2007) (statement of Neil A.G. McPhee, Chairman, MSPB). Veterans' advocates at the same hearing characterized intentional cancellations as a typical agency tactic used to avoid hiring preference-eligible veterans. *See id.* at 3-4, 7, 18, 21, 49. In response to comments on this "loophole," the ranking member, Congressman Boozman, said that "[i]t wasn't intended to be that way when the law was written." *Id.* at 7.

Nevertheless, as OPM and veterans' advocates acknowledge, the cancellation tactic has been effectively validated through judicial review. In numerous decisions, both the Board and the Federal Circuit have approved cancellations where a preference-eligible veteran was ranked on the certificate of eligibles but the agency never sought OPM approval to "pass over" the veteran. *See*, *e.g.*, *Morales v. Department of Homeland Sec.*, 475 F. App'x 749, 751 (Fed. Cir. 2012); *Dow v. General Servs. Admin.*, 590 F.3d 1338, 1344 (Fed. Cir. 2010); *Graves v. Department of Veterans Affairs*, 114 M.S.P.R. 245, 256 (2010); *Jones v. Department 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); *Abell v. Department of the Navy*, 92 M.S.P.R. 397, 403 (2002), *aff'd*, 343 F.3d 1378 (Fed. Cir. 2003); *Villamarzo v. EPA*, 92 M.S.P.R. 159, 161-62 (2002).

The decisions of the Board and the Federal Circuit dismissing Donaldson's claim under § 3318(b) are consistent with, and in fact were based on, this line of precedent. And, according to OPM's own data, they are affecting numerous other veterans as well. The lawfulness of these decisions and the agency practice they sanction is a significant issue meriting this Court's review.

II. THE FEDERAL CIRCUIT HAS CONCLUSIVELY RULED ON THE QUESTION PRESENTED BY THE PETITION, AND THIS COURT SHOULD REVIEW ITS RULING

The FCBA does not currently take a position on the merits of the Federal Circuit's conclusion that intentional cancellations to avoid hiring a preference-eligible veteran are lawful. The FCBA nevertheless believes that the issue is worthy of review by this Court, both because of its practical importance and because the Federal Circuit's decisions on this issue lack a fully satisfactory statutory analysis. Given that the issue is now effectively settled in the Federal Circuit—and because no other court of appeals is likely to address the question—only this Court is likely to be able to ensure that veterans' rights under § 3318(b) are fully considered and appropriately vindicated.

A. The Federal Circuit Has Failed To Address Relevant Statutory Language in Its Decisions

The Federal Circuit recognized that Donaldson claimed a violation of § 3318(b) based on the Coast

Guard's cancellation of the job listing to avoid hiring him. *See* Pet. App. 8a ("We . . . understand Donaldson to argue that where an agency cancels a job announcement and re-advertises the job as a means of avoiding the appointment of the eligible veteran, it violates the veteran's [statutory] rights."). Rather than consider the meaning of the statute and its application to the facts of this case, however, the court concluded that Donaldson's § 3318(b) claim was "precluded" by its earlier ruling in *Abell v. Department of the Navy*, 343 F.3d 1378 (Fed. Cir. 2003). Pet. App. 8a; *see also id.* at 10a ("[W]e are bound by precedent to conclude that the agency did not violate Donaldson's [statutory] rights.").

The Federal Circuit characterized the facts of *Abell* as "not materially different" from Donaldson's case. *Id.* Both men were veterans, preference-eligible, and ranked in the top three of their respective certificates of eligibles. *See id.* at 9a. Similarly, the agency in both cases decided that the veterans lacked the requisite credentials for the vacant position and canceled the job listing without seeking OPM approval for a "pass over." *See id.* Further, "there can be no question that the agency avoided hiring Donaldson on purpose by withdrawing the job vacancy: the same was true in *Abell*." *Id.* at 9a-10a. Most important, the court characterized both cases as presenting a "pass over." *See id.* at 10a ("[T]he agency intentionally passed Donaldson over by refusing to hire him and by cancelling the vacancy for which he had applied."); *id.* at 9a ("[T]he agency cancelled the vacancy without selection of Abell, thus effectively passing him over.").

Noting that "Donaldson finds himself in the same predicament as Abell," *id.*, the Federal Circuit applied

its previous holding—namely, that "an agency is 'not required to hire a preference eligible veteran, if, as was the case here, it does not believe the candidate is qualified or possesses the necessary experience,'" *id.* at 10a (quoting *Abell*, 343 F.3d at 1384). Although it agreed that Donaldson (like Abell) had been "passed over," the Federal Circuit cited *Abell* for the proposition that the agency need only have a "good faith reason" for that pass-over. *Id.*

The *Abell* decision itself, however, 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.[5] The holding applied to Donaldson's "pass over" claim —that an agency "may cancel a vacancy announcement for any reason that is not contrary to law," 343 F.3d at 1384—was not based on § 3318(b) at all. Instead, *Abell* was interpreting and applying a different statute, 5 U.S.C. § 3304(f)(1), which guarantees veterans "'the opportunity to compete . . . under merit promotion procedures'"—that is, where an agency is hiring from within its own ranks and a veteran otherwise would not be able to apply for the position. *Abell*, 343 F.3d at 1383 (quoting 5 U.S.C. § 3304(f)(1)).

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[5] The Federal Circuit in *Abell* did address the notice requirement of § 3318(b)(2); the court rejected Abell's argument that the agency had to notify him of its intent to cancel the vacancy, reasoning that the statute requires such notice only if the agency actually submits a pass-over request to OPM, which the agency in Abell's case did not do. *See* 343 F.3d at 1385. Contrary to the Federal Circuit's treatment of *Abell* in this case, however, Abell did not argue that the agency's cancellation amounted to a pass-over triggering the substantive requirements of § 3318(b) —including the obligation to seek written approval from OPM— and the Federal Circuit did not decide that issue.

As a result, neither the *Abell* nor the *Donaldson* opinion explains how the statutory conditions for a "pass over" are met, or why those statutory conditions can be disregarded, despite the Federal Circuit's clear holding that both veterans were "passed over" within the meaning of § 3318(b).[6]

B. The Federal Circuit's Approval of the Cancellation Procedure Is Final and Ripe for Review

The Federal Circuit's exclusive reliance on *Abell* to resolve Donaldson's case suggests that the court has reached a firm and definite conclusion on the permissibility of agencies canceling vacancy announcements in lieu of hiring a preference-eligible veteran ranked on the certificate of eligibles. At a minimum, petitioner's claim that the court's decision is inconsistent with the statutory language is substantial enough to warrant serious consideration. Such consideration will be denied in this case and may be denied in many additional cases unless this Court grants review. The Federal Circuit's decision here was nonprecedential and *per curiam*, and the court denied Donaldson's petitions for panel and en banc rehearing. *See* Pet. App. 37a-38a. The Federal Circuit may thus be unlikely to engage in substantive review of similar claims in the future. And, as the petition explains (at 29), the Federal Circuit is the only appellate court likely to confront such claims. Veterans' preference disputes are presented to the Board, *see* 5 U.S.C. § 3330a(d)(1), and (with certain very narrow exceptions) the Federal Circuit has exclusive jurisdiction over appeals from the Board, *see* 28 U.S.C. § 1295(a)(9). Thus, it is unlikely that any other court

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[6] Because there may be other rationales supporting the practice at issue, we do not take a position on the merits.

will be called upon to interpret § 3318(b) or otherwise rule on the appropriateness of agencies' cancellation of job vacancies to avoid hiring preference-eligible veterans. The Federal Circuit's word on the issue is, for all practical purposes, final.

The "pass over" prohibition in 5 U.S.C. § 3318(b) is an important part of veterans' preference rights, which are themselves an important public policy. The statute deserves to be faithfully interpreted in keeping with congressional intent, and this Court's review is necessary to achieve that result.

CONCLUSION

Because it raises an important question of federal veterans and employment law that should be settled by this Court, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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