No. 12-1044

# In the Supreme Court of the United States

ROBERT DONNELL DONALDSON, PETITIONER

*v.*

DEPARTMENT OF HOMELAND SECURITY

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

**BRIEF FOR RESPONDENT IN OPPOSITION**

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## QUESTION PRESENTED

Whether 5 U.S.C. 3318(b), which limits a federal agency's authority to "pass over" certain "preference eligible" job applicants "in order to select an individual who is not a preference eligible," prohibited the Coast Guard from declining to select anyone to fill a particular position instead of hiring petitioner, a preference eligible whom it determined to be unqualified.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is not published, but is reprinted in 495 Fed. Appx. 53. The final order of the Merit Systems Protection Board (Pet. App. 13a-22a) and its initial decision (Pet. App. 23a-36a) are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on October 4, 2012. A petition for rehearing was denied on November 27, 2012 (Pet. App. 37a-38a). The petition for a writ of certiorari was filed on February 25, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In April 2010, the United States Coast Guard posted a vacancy announcement seeking applicants for

the position of Marine Transportation Specialist. Pet. App. 3a; see C.A. App. A216-A221. Petitioner applied for the position. Pet. App. 3a; C.A. App. A204-A215. During the pendency of the selection process, a second vacancy for a Marine Transportation Specialist opened up, and the agency decided that it could fill both vacancies through the already-posted announcement. Pet. App. 34a.

Petitioner is a 30% disabled veteran who qualifies as a "preference eligible" under federal employment law. Pet. App. 3a; see 5 U.S.C. 2108(3)-(4). Preference eligibles receive certain forms of preferential treatment in federal hiring and employment. For example, under the "open competitive" procedures used in the selection process here, see Pet. 3 n.2, a preference-eligible candidate whose "earned rating" (a score that attempts to measure a candidate's fitness based on available information) was high enough to receive a passing grade was entitled to additional points, above that earned rating, in the selection process. 5 U.S.C. 3309; see 5 C.F.R. 2.1. Based on the information provided in his application, as well as the additional points he received as a preference eligible, petitioner was the top-scoring candidate among those who applied for this particular vacancy announcement. Pet. App. 29a, 48a. He was accordingly ranked, along with two non-preference-eligible applicants, as one of the top three candidates on a so-called "certificate of eligibles," and the agency was presumptively limited to those three candidates in making its selection. *Id.* at 48a; see 5 U.S.C. 3318(a).

Agencies often use interviews, which frequently include verification of a candidate's qualifications, as part of the method for selecting among the highest-

ranked candidates. After interviewing the three top-ranked candidates here, the Coast Guard "determined that [petitioner] lacked the technical expertise necessary to succeed at the position." Pet. App. 3a; see *id.* at 49a-53a; see, *e.g.*, *id.* at 52a (explaining that petitioner "was referred on the [certificate] as a qualified applicant, however, after management conducted their interviews the applicant was declared unqualified based on the panel analysis"). One of the interviewers reported, for example, that "[s]ome of [petitioner's] answers to the questions in the application [had been] exaggerated." C.A. App. A186. The interviewer also reported that petitioner was unable to address the specifics of technical questions. *Ibid.*; see *id.* at A194 (interviewer notes stating that petitioner "lacks technical foundation"), A203 (interviewer notes stating that petitioner had "no knowledge of tech. questions"). The interviewer further documented that petitioner himself had "recognized" in the interview that "he did not have the technical expertise and/or knowledge or skills for th[e] position," but claimed to be "trainable." *Id.* at A186; see *id.* at A194, A197, A200, A203 (similar comments of multiple interviewers).

Under 5 U.S.C. 3318(b)(1), a federal agency that proposes to "pass over a preference eligible on a certificate in order to select an individual who is not preference eligible" must obtain approval from the Office of Personnel Management (OPM) or its delegate. For preference eligibles who, like petitioner, have a compensable service-connected disability of 30% or more, this review must be conducted by OPM itself, and the agency must provide notice to the veteran of the pro-

posed pass over at the time the request is submitted to OPM. 5 U.S.C. 3318(b)(2) and (4).

In this case, the selecting official (himself an active duty military officer) attempted to initiate a "pass over" by sending a memorandum to the Coast Guard's human resources department, as a precursor to contacting OPM, requesting permission to "pass over" petitioner and hire the other candidates on the certificate. Pet. App. 49a-51a; see *id.* at 34a; C.A. App. A181. The memorandum explained that petitioner "d[id] not have the qualifications for the Marine Transportation specialist position and would not be able to acquire the qualifications within a reasonable period of time without sacrificing meeting both program related statutory and regulatory deadlines." Pet. App. 51a. The memorandum also stated that "it would not be in the best interest of the government to select" petitioner. *Ibid.*

The human resources department denied the request, and no pass over request was made to OPM. Pet. App. 55a; see *id.* at 32a. Rather than hire someone it considered to be unable to perform the job properly, the Coast Guard decided not to hire anyone at all under the vacancy announcement. *Id.* at 29a-30a ("The agency has argued, and [petitioner] has not disputed, that it has not selected anyone to fill the position."); see OPM, *Feds Hire Vets*, http://www.fedshirevets.gov/job/filled/ (last visited May 23, 2013) (OPM *Feds Hire Vets* Website) (explaining that an "agency is under no obligation to make a selection" following a vacancy announcement).[1]

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[1] The court of appeals stated that the agency "cancelled" the vacancy announcement. Pet. App. 3a. This Office is informed by the Coast Guard that it did not affirmatively "cancel" the vacancy

2. The agency never readvertised for the position that had first prompted the vacancy announcement. Pet. App. 35a. The agency did, however, post a new vacancy announcement for the second Marine Transportation Specialist position that had become available during the pendency of the original announcement. *Ibid.*; see Pet. 7 n.7.[2] Petitioner submitted an application for that position. Pet. App. 10a; see Pet. 7 n.8. Following a new selection process, the Coast Guard ultimately selected neither petitioner nor either of the other two people in the top three on the certificate of eligibles for the first vacancy announcement. Compare Pet. App. 10a with *id.* at 48a. Instead, the Coast Guard hired a veteran who retired at too high a rank to be a preference eligible. See Gov't Br. 5-6 & n.4, 16, *Donaldson* v. *Department of Homeland Security*, appeal pending, No. 12-3160 (Fed. Cir. docketed July 10, 2012).[3]

Petitioner has challenged his non-selection under the second vacancy announcement. See Pet. 7 n.8; see also Pet. App. 10a. Those challenges are currently pending, primarily in the Federal Circuit, and have

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announcement, but that the certificate of eligibles expired when the agency did not hire anyone within a prescribed period. See *id.* at 48a (certificate expired on August 23, 2010). This brief will use the term "cancel" to include both affirmative cancellation and the circumstances here.

[2] The administrative judge who heard this case concluded that the second position had moved to a different component of the Coast Guard. Pet. App. 35a. This Office has been informed that they were both in the same component.

[3] The court of appeals' opinion in this case erroneously states that the Coast Guard hired a non-veteran for the position. Pet. App. 3a.

not been consolidated with this case. See Pet. 7 n.8; see p. 19, *infra*.

3. While the second vacancy announcement was pending, petitioner filed appeals before the Merit Systems Protection Board (MSPB) challenging his non-selection for the original vacancy. Pet. App. 4a, 24a-25a. In the first appeal, he claimed that the Coast Guard had violated the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. 4311(a), by declining to select him because of his prior military service. Pet. App. 24a-25a. An MSPB administrative judge rejected that claim, finding that "the credible evidence showed that, rather than his military status, [petitioner's] inexperience in commercial maritime matters along with his limited experience in drafting regulations and providing technical advice on issues related to the manning and training of personnel working on commercial vessels was his downfall." *Id.* at 5a.

In another appeal (which was originally dismissed for failure to exhaust administrative remedies and later refiled), petitioner claimed that the Coast Guard had infringed on his rights under the Veterans Employment Opportunities Act of 1998 (VEOA), Pub. L. No. 105-339, 112 Stat. 3182 (5 U.S.C. 2101 *et seq.*). Pet. App. 4a-5a. The MSPB administrative judge rejected those claims as well. *Id.* at 28a-35a. The administrative judge first rejected petitioner's claim that the Coast Guard had violated petitioner's "right to compete" under 5 U.S.C. 3304(f)(1), which provides that preference eligibles and certain veterans "may not be denied the opportunity to compete" for certain types of positions, observing that petitioner had been

both rated and interviewed for the position. Pet. App. 26a, 29a-31a.

The administrative judge also concluded that the agency had not violated the notice requirements of 5 U.S.C. 3318(b), which require an agency to inform a preference eligible like petitioner when it seeks permission from OPM to "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)(1); see 5 U.S.C. 3318(b)(2); Pet. App. 33a-34a. The administrative judge observed that the selecting official's pass over request, which had initially been sent to the human-resources department, "never left the agency and never made it to OPM." Pet. App. 34a.

Finally, the administrative judge concluded that "an agency does not violate a preference-eligible veterans' [sic] rights under the VEOA * * * when it cancels a vacancy announcement rather than select him." Pet. App. 32a. The administrative judge rejected petitioner's argument that his status as a preference-eligible disabled veteran should have "guarantee[d] his selection" for the position, observing that petitioner "identified no VEOA provision, or any other statute or regulation, in support of such an argument, and I know of none." *Id.* at 31a.

4. The full MSPB issued a final order denying both appeals. Pet. App. 13a-22a. With respect to the VEOA appeal, the MSPB agreed with the administrative judge that the agency had not violated the notice requirements of 5 U.S.C. 3318(b), because it had never made a pass over request to OPM that would trigger those requirements. Pet. App. 14a. The MSPB also concluded that the Coast Guard had "ranked [petitioner] on the certificate of eligibles and gave him 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 (citing *Abell* v. *Department of the Navy*, 343 F.3d 1378, 1384 (Fed. Cir. 2003); *Scharein* v. *Department of the Army*, 91 M.S.P.R. 329, 334 (2002), aff'd, No. 02-3270, 2003 U.S. App. LEXIS 1129 (Fed. Cir. Jan. 10, 2003)).

5. The court of appeals affirmed in a nonprecedential, per curiam decision. Pet. App. 1a-12a. As relevant here, the court of appeals agreed with the MSPB that the Coast Guard's decision to leave the original vacancy unfilled, rather than select petitioner, was consistent with 5 U.S.C. 3318(b). Pet. App. 8a-10a. The court of appeals first rejected petitioner's argument that the Coast Guard had violated the notice-related requirements of 5 U.S.C. 3318(b), concluding that no notice was required because the Coast Guard did not contact OPM in order to pass over petitioner. Pet. App. 8a.

The court of appeals also rejected the argument, which it construed petitioner's pro se brief to be making, "that where an agency cancels a job announcement and re-advertises the job as a means of avoiding the appointment of [an] eligible veteran, it violates the veteran's VEOA rights." Pet. App. 8a; see *id.* at 8a-10a. The court found the argument precluded by its decision in *Abell* v. *Department of the Navy*, *supra*. Pet. App. 8a. In *Abell*, an agency had cancelled a vacancy announcement after interviewing a preference-eligible applicant and determining that the applicant lacked necessary job qualifications. 343 F.3d at 1379-1381, 1384. The court of appeals in this case adhered to *Abell*'s conclusion "that an agency is 'not

required to hire a preference eligible veteran, if, as was the case here, it does not believe that the candidate is qualified or possesses the necessary experience.'" Pet. App. 10a (quoting *Abell*, 343 F.3d at 1384). The court observed that the record in this case "amply supports" that the Coast Guard declined to hire petitioner for the "good faith" reason that "it deemed [him] to lack the experience necessary to do the job." *Ibid.* The court added that the "re-advertisement and job award to" a different candidate did "not afford [petitioner] a remedy in this case," noting that those actions had been challenged by petitioner in separate appeals that were still pending and thus were "not before" the court of appeals in this case. *Ibid.*

**ARGUMENT**

Petitioner contends (Pet. 11-30) 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. That contention lacks merit; the decision below does not conflict with any decision of this Court or any other court of appeals; and no further review is warranted.

1. a. Petitioner does not dispute that an agency generally has discretion to cancel a previously posted vacancy announcement. This Court has long recognized that the "appointment to an official position in the Government" involves an "exercise of judgment" over which "the courts have no general supervising power." *Sampson* v. *Murray*, 415 U.S. 61, 70 n.17 (1974) (quoting *Keim* v. *United States*, 177 U.S. 290, 293 (1900)). Petitioner identifies no provision of fed-

eral law that categorically forecloses an agency from canceling a vacancy announcement if, for example, the application process does not produce a candidate whom it believes it would be in the best interest of the United States to hire. To the contrary, an agency that advertises a vacancy is "under no obligation to make a selection." OPM *Feds Hire Vets* Website. The relevant regulations provide that an "agency *may* fill a vacancy in the competitive service" by any of several methods, 5 C.F.R. 330.102 (emphasis added), and they specifically contemplate that a vacancy might go unfilled, see, *e.g.*, 5 C.F.R. 319.401(d)(2) ("Records must be kept for 2 years after an appointment, or, *if no appointment is made*, for 2 years after the closing date of the vacancy announcement.") (emphasis added).[4]

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[4] One of petitioner's amici appears briefly to assert (NOVA Amicus Br. 21) that 5 U.S.C. 3318(a), which states that an agency "shall select for appointment to each vacancy from the highest three eligibles available," abrogates an agency's discretion to decline to fill a vacancy. The amicus cites no authority supporting that assertion, which conflicts with the long-held understanding that Section 3318(a) is a limitation on *who* may be hired, not an affirmative requirement that someone *be* hired. See, *e.g.*, OPM Form SF-39, *Request For Referral Of Eligibles* (Apr. 2011), http://www.opm.gov/forms/pdf_fill/sf39.pdf (anticipating that certificate of eligibles may be returned by agency unused). In any event, an argument raised only in passing by an amicus, and not addressed by the court of appeals, does not warrant certiorari. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not a first view."). Furthermore, this particular argument may have diminishing prospective importance because an Executive Order now states that federal agencies should generally use a category-rating system under 5 U.S.C. 3319, rather than the certificate-of-eligibles systems described in 5 U.S.C. 3318. See Pet. 3 n.3. Section 3319 does not contain lan-

Petitioner nevertheless contends that 5 U.S.C. 3318(b) divested the agency of discretion to cancel the vacancy announcement in this case. That contention lacks merit. Section 3318(b) provides that an agency must seek OPM approval, and notify the affected applicant, if it "proposes to 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)(1). Under the plain terms of that provision, if an agency makes an appointment under the certificate-of-eligibles procedures defined in Section 3318, it must obtain OPM's permission to decline to extend an offer to a preference eligible on the certificate "in order to select" a lower-ranked candidate on the certificate. But nothing in the text of Section 3318(b)—or any other provision of the civil-service laws—prohibits an agency from declining altogether to select any candidate at all to fill a particular vacancy.

b. Petitioner asserts (Pet. 17 n.14) that a "pass over" within the meaning of Section 3318(b) "was accomplished when the vacancy" in this case "was canceled for the purpose of selecting the non-veteran applicants favored by" the selecting official. But the cancellation could not, and did not, accomplish that purpose. Canceling the vacancy announcement did not mean that the non-preference-eligible applicants on the certificate would get the job. Rather, it meant that *nobody* would get the job. In no sense can the decision not to select *anybody* to fill a vacancy be considered an action taken "in order to select an indi-

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guage analogous to the language that the amicus highlights in Section 3318(a). See 5 U.S.C. 3319(c)(1) (describing which applicants an appointing official "may" select).

vidual who is not a preference eligible." 5 U.S.C. 3318(b)(1).

Petitioner's fall-back argument—that a violation of Section 3318(b) occurs either when an agency "re-advertise[s] [a] position" or when it "hire[s] a non-preference-eligible applicant," Pet. 17. n.14—fares no better. Contrary to petitioner's contention (Pet. 17), cancellation and readvertisement of a vacancy does not "ha[ve] exactly the same purpose and effect" as directly passing over a preference eligible and hiring a non-preference eligible. Although readvertising a vacancy allows an agency to, for example, correct any deficiencies in the initial announcement that resulted in what proved to be an inaccurate earned rating or ratings, it in no way gives an agency "unfettered hiring discretion" (Pet. 19). The federal employment laws favoring the selection of preference eligibles apply in the same way to a readvertised vacancy as they do to the original vacancy announcement. An agency that readvertises a vacancy thus has no way to know whether a non-preference-eligible applicant—let alone any specific non-preference-eligible applicant—will be selected. Resubmitting a vacancy for a fresh selection process, in which the preference statutes will again apply, is therefore neither formally nor functionally a "pass over * * * in order to select an individual who is not a preference eligible" that would be subject to 5 U.S.C. 3318(b)(1).[5]

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[5] Petitioner's attempt (*e.g.*, Pet. 17) to draw support for his position from statements in the decision below that describe the circumstances in this case as a "pass over" is misguided. Contrary to petitioner's suggestion, the court of appeals could not have meant that the Coast Guard in this case engaged in a "pass over * * * in order to select an individual who is not a preference eligible." 5

c. Petitioner's position is also inconsistent with OPM regulations. Those regulations—which have been promulgated pursuant to OPM's statutory authority to prescribe regulations for competitive-service hiring, see 5 U.S.C. 1302, and thus warrant deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)—define a "[p]ass over request" as "an objection filed against a preference eligible that results in the selection of a non-preference eligible." 5 C.F.R. 332.102 (emphasis omitted); see OPM, *Delegated Examining Operations Handbook: A Guide for Federal Agency Examining Offices* (May 2007) at 164, http://www.opm.gov/policy-data-oversight/hiring-authorities/competitive-hiring/deo_handbook.pdf. That definition, like the statute, does not permit petitioner's interpretation of "pass over" as encompassing the cancellation of a vacancy announcement.

The regulatory definition of "pass over request" necessarily presupposes that an agency can predict ahead of time that a particular course of action would be a "pass over." Otherwise, the agency would not know whether it has to seek permission to take the action (and OPM would not know whether the action requires its approval, or have any meaningful standard for judging whether it should be approved). But an agency will not know, at the time it desires to cancel a vacancy announcement, whether that cancellation will "result[] in the selection of a non-preference

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U.S.C. 3318(b)(1). Had it meant that, petitioner would have prevailed. As published circuit authority on the issue makes clear, the court of appeals recognizes that "cancel[ing] [a] vacancy" is not the same thing as "pass[ing] over a preference eligible." *Abell* v. *Department of the Navy*, 343 F.3d 1378, 1385 (Fed. Cir. 2003).

eligible," 5 C.F.R. 332.102. The agency might never readvertise the vacancy, and even if it does, the selection process for the readvertised vacancy—which would itself be subject to the preference statutes—could well result in the hiring of a preference eligible. A definition of "pass over" that can be applied only retrospectively cannot be squared with the statutory and regulatory requirement that agencies seek permission for a pass over *before* undertaking one. 5 U.S.C. 3318(b); 5 C.F.R. 332.406.[6]

d. Petitioner's reliance on legislative history (Pet. 13-16) is unavailing. Nobody disputes that the civil-service statutes embody a strong policy favoring veterans and promote the hiring of veterans in various concrete ways. Those statutory preferences presumably contribute to the far greater representation of veterans in the federal civil service than in the national labor force in general. Compare OPM, *Employ-*

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[6] Petitioner errs in suggesting (Pet. 19 n.15) that OPM disapproves of canceling a vacancy announcement in circumstances like this. In the congressional testimony cited by petitioner, an OPM official says only that OPM would view a "*pattern*" of "returning certificates unused because a veteran topped the certificate" as "evidence indicating an intent to violate veterans' preference" that might warrant further investigation under certain statutory procedures. *Fulfilling the Promise? A Review of Veterans' Preference in the Federal Government: Hearing Before the Subcomm. on Oversight of Government Management, The Federal Workforce & District of Columbia of the Senate Comm. on Homeland Security & Governmental Affairs*, 109th Cong., 2d Sess. 14-15 (2006) (statement of Dan G. Blair, Deputy Director, OPM) (emphasis added); see also, *e.g.*, 5 C.F.R. 10.1-10.3 (OPM authority to audit agency personnel practices). OPM has never taken the position that canceling a vacancy announcement, rather than hiring a preference eligible that the hiring agency determines to be unqualified, is in itself a violation of federal law.

*ment of Veterans in the Federal Executive Branch Fiscal Year 2011* (Feb. 2013) at 2, http://www.fedshirevets.gov/hire/hrp/reports/EmploymentOfVets-FY11.pdf (veterans comprised 27.3% of Executive Branch employees in FY 2011), with Bureau of Labor Statistics, *Economic News Release* (May 2013), http://www.bls.gov/news.release/empsit.t05.htm (veterans comprised 7.3% of employed civilian labor force in April 2013). But petitioner identifies nothing in the legislative history that specifically demonstrates Congress's intent, in enacting Section 3318(b), to foreclose an agency from canceling a vacancy announcement rather than hiring a preference eligible it deems unqualified for the position to which he has applied.

To the contrary, Congress has long been on notice of the practice at issue in this case and has not expressed disagreement with it. The court of appeals' decision in *Abell* v. *Department of the Navy*, 343 F.3d 1378 (Fed. Cir. 2003), which petitioner identifies as controlling on this issue (Pet. 20), has been on the books for nearly a decade.[7] See, *e.g.*, *Florida Dep't of*

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[7] Petitioner suggests (Pet. 20-22) that the reasoning of *Abell* is flawed because it rests on 5 U.S.C. 3304(f)(1) rather than an interpretation of Section 3318(b). Even if that were correct, it would not be a reason to grant certiorari, because this Court "reviews judgments, not statements in opinions," *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (citation omitted), and it would be particularly inappropriate to grant certiorari in this case to review statements in a different case. In any event, petitioner's reading of *Abell* is incorrect. *Abell* discussed the "opportunity to compete" provision of Section 3304(f)(1) because the petitioner in *Abell* relied on that provision in arguing that the agency had violated federal law. See 343 F.3d at 1383; Pet. Br. 21-22, *Abell*, *supra* (No. 03-3033). *Abell* separately rejected a Section 3318(b) argument, in the course of which it reasoned that "cancel[ing] [a] vacancy" is not

*Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute.") (quoting *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978)). Petitioner also identifies (Pet. 24) congressional testimony in 2007 discussing the issue, during which the veterans' advocate on whose testimony he relies acknowledged that "the MSPB and the court [of appeals] seem to be interpreting the law correctly." *Veterans' Preference: Hearing Before the Subcomm. on Economic Opportunity of the House Comm. on Veterans' Affairs*, 110th Cong., 1st Sess. 7 (2007). Yet despite its awareness of the issue, Congress has continued to update the veterans' preference laws without amending them to divest a federal agency of the discretion to cancel a vacancy announcement rather than hire a preference eligible whom it determines to lack the expertise for the position. See, *e.g.*, Hubbard Act, Pub. L. No. 110-317, § 8, 122 Stat. 3529 (amending definition of preference eligible); Veterans Benefits Improvement Act of 2004, Pub. L. No. 108-454, § 804,

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the same as "pass[ing] over a preference eligible." 343 F.3d at 1385. *Abell* also expressly concluded that "nothing in the statute nor OPM's regulations require[d] the agency to make a selection from the certificate and fill the vacancy"; that the agency "could and did cancel the vacancy announcement"; that "[t]he agency's actions in this regard d[id] not violate the appellant's rights under veterans' preference laws"; and that an agency "'is not required to hire a preference eligible veteran, if, as was the case here, it does not believe that the candidate is qualified or possesses the necessary experience.'" *Id.* at 1384 (quoting *Scharein* v. *Department of the Army*, 91 M.S.P.R. 329, 334 (2002)). And the MSPB decision on which *Abell* relied in discussing agency cancellation authority dealt with Section 3318, not Section 3304(f)(1). See *Scharein*, 91 M.S.P.R. at 330-335.

118 Stat. 3626 (providing judicial review for certain violations of 5 U.S.C. 3304(f)(1)).

Congress could well take the view that the disadvantages of constraining federal agency authority in that fashion would far outweigh any potential advantages. Such a conclusion would be particularly reasonable in light of the existing legal protections for veterans. As previously discussed, those protections include hiring preferences that would be applicable to any subsequent vacancy announcement that follows the cancellation of a prior one. The balance between veterans' rights and the operational priorities of federal agencies should not lightly be disturbed. Nothing in the civil-service laws enacted by Congress (or the regulations promulgated by OPM) grants petitioner the right that he asserts in this case. Petitioner's request that this Court judicially revise longstanding federal employment practices does not warrant certiorari.

2. Even assuming the issue of whether and how Section 3318(b) could apply to the cancellation of a vacancy announcement might warrant this Court's review, this case would be an unsuitable vehicle, for several reasons.

First, the question presented by the petition—"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," Pet. i—presupposes a factual condition that is absent from this case. For reasons previously explained, see pp. 11-12, *supra*, the decision to cancel the original vacancy announcement in this case cannot be considered to have been undertaken "for the purpose of hiring a

non-veteran over a disabled veteran who is ranked higher on a list of qualified candidates." The cancellation itself could not and did not result in the hiring of anyone, let alone any particular alternative candidates. And the advertisement of the second vacancy gave rise to a new selection process, as to which petitioner has identified no evidence that he was "ranked higher on a list of qualified candidates" than the non-preference-eligible veteran eventually selected through merit-promotion procedures. See Pet. 7 n.8.

Petitioner's characterization of the Coast Guard as having canceled the original vacancy announcement for the purpose of hiring a non-veteran rests on a misreading of the record. In arguing the point, petitioner incorrectly focuses exclusively on the Coast Guard's request to its human-resources department, during the pendency of the first vacancy announcement, that it be allowed to pursue the hiring of non-veteran candidates on the certificate of eligibles instead of petitioner. See Pet. 17-18. But that request was denied, Pet. App. 55a, and the agency canceled the vacancy announcement, thereby declining to hire *any* of the candidates on the certificate of eligibles. It eventually posted a new vacancy announcement, which was open to both non-veterans and to veterans, the latter of whom again received all of the preferences required by the civil-service statutes. And the person it hired was not one of the candidates who had been the subject of the original human-resources request. See pp. 4-5, *supra*.

Second, were this Court to address the issue of canceling and readvertising vacancies, it should do so in a case where the agency actually has advertised the same vacancy twice. That is not the case here. As

previously explained, see p. 5, *supra*, the second vacancy announcement in this case was actually for a different vacancy than the first. If, as petitioner suggests (Pet. 24), challenges to the cancellation of a vacancy announcement are common (even post-*Abell*), the Court will likely have the opportunity to review the issue in a case that does not present this potential complication.

Third, even if the vacancy announcements here were for precisely the same vacancy, the pending litigation arising out of the selection process for the second announcement, see Pet. 7 n.8, presents an obstacle to further review. Petitioner has appealed his non-selection for the second vacancy on a number of grounds, including the VEOA, in several separate proceedings. See *Donaldson* v. *Department of Homeland Security*, appeal pending, No. 13-3097 (Fed. Cir. docketed Apr. 8, 2013); *Donaldson* v. *MSPB*, appeal pending, No. 12-3161 (Fed. Cir. docketed July 12, 2012); *Donaldson* v. *Department of Homeland Security*, appeal pending, No. 12-3160 (Fed. Cir. docketed July 10, 2012); *Donaldson* v. *Department of Homeland Security*, No. DC-1221-12-0356-W-1 (MSPB). If his challenge is successful, petitioner may well ultimately be hired by the Coast Guard as a Marine Transportation Specialist. Consideration of petitioner's argument (Pet. 17 n.14) 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. See Pet. App. 10a (recognizing that the readvertisement and subsequent non-selection of petitioner provided no basis for "a remedy in this case" because the

challenges to that process were "not before" the court of appeals).

At the very least, the pending litigation arising out of the second vacancy underscores the difference between "pass[ing] 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)(1), and a decision to cancel and readvertise a vacancy. Where an agency follows the second course, a plaintiff who believes he should have been hired by the agency may seek relief by challenging the actual process that resulted in a different applicant being hired ahead of him. No further review of the agency's cancellation decision in this case is warranted.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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