

No. 23-868

In the Supreme Court of the United States

CHARLES FLYNN, PETITIONER,

v.

DEPARTMENT OF STATE

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Three pending cases each present the same important and recurring question about whether differential pay is, as the governing statute provides, available to civilian federal employees when they are called to active duty under “any * * * provision of law during a war or during a national emergency declared by the President or Congress.” 10 U.S.C. § 101(a)(13)(B); see also *Feliciano v. Dep’t of Transp.*, No. 23-861; *Nordby v. SSA*, No. 23-866. The Court should grant review in whichever of the cases the court concludes is the best vehicle and hold the others pending its disposition.

In this case, the government’s supposed vehicle issue (at 8) is no issue at all. The United States argues that petitioner’s “military pay was higher than his civilian pay” and therefore petitioner will not be entitled to differential pay even if he prevails on the question presented. Opp. 8. That is factually incorrect. But it is also irrelevant. This Court “routinely grants certiorari to resolve important questions that controlled the lower court’s decision notwithstanding a respondent’s assertion that, on remand it may prevail for a different reason.” Cert. Reply Br. at 2, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (No. 18-15).

While the government here is trying to portray a potential alternative basis for affirmance as a vehicle problem, the Solicitor General has time and again won review under indistinguishable circumstances by noting that uncertainty as to “the ultimate outcome” of a case “does not deny * * * a vehicle for the Court to consider important questions concerning [statutory] interpretation,” and that “[t]he possibility that [respondent] might ultimately” win on alternative grounds “would not prevent the Court from addressing the questions presented in the petition.” U.S. Cert. Reply Br. at 10, *Match-E-Be-Nash-She-Wish Band v. Patchak*, 132 S. Ct. 2199 (2012) (Nos. 11-246, 11-247); *accord* Cert. Reply Br. at 11, *Astrue v. Capato*, 132 S. Ct. 2021 (2012) (No. 11-159).

That is the case here. A disputed factual question that was expressly reserved by the court below is no obstacle to this Court’s review. It was likewise disputed in the MSPB proceedings whether petitioner’s civilian pay was, in fact, higher than his military pay. *Compare* C.A. App. 174 *with* C.A. App. 306. The MSPB, however, “[did] not address whether [petitioner] would be entitled to pay differential as a matter of fact based on a difference in pay between his civilian and military service,” because it “[found] that [petitioner was] not entitled to relief as a matter of law.” Pet. App. 8a. This question, therefore, is no barrier to review and can be assessed on remand if the Court determines that petitioner is eligible for differential pay as a matter of law.¹

¹ That the government spent years vigorously fighting petitioner’s request for differential pay before the MSPB and Federal Circuit on the basis that he is categorically ineligible for it under 10 U.S.C. § 101(a)(13)(B) is a telling indication that it has no confidence in the argument that there was no difference in his pay.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of the petition for a writ of certiorari in *Feliciano*, and then disposed of as appropriate.

Respectfully submitted.

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