No. 24-5914

IN THE

SUPREME COURT OF THE UNITED STATES

Anthony W. Perry — PETITIONER

vs.

Gina Raimondo et al., - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ANTHONY W. PERRY
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QUESTION(S) PRESENTED

This Court having decided the federal-question jurisdiction of mixed case dismissals by the MSPB for lack of jurisdiction in this case, Perry v. MSPB S. Ct. 16-399 (2017), that this case was properly before the MSPB and judicial review occurs in the district court. Footnote 10 in this Court's decision in Perry (2017) states, "If a reviewing court "agree[d] with the Board's assessment [that Perry's retirement was voluntary]," then Perry would indeed have "lost his chance to pursue his ... discrimination claim[s]," post, at 3, for those claims would have been defeated had he voluntarily submitted to the agency's action." This second appeal of the D.C. Circuit Court's jurisdictional decision in this case presents the following question:

1. Whether, without having been provided an evidentiary hearing on a nonfrivolous allegation of coercion before the MSPB, a procedure required by law, the D. C. Circuit Court of Appeals' partial decision affirming the district court's ruling sustaining that the MSPB properly dismissed Perry's mixed case for lack of jurisdiction with prejudice is reconcilable with the Supreme Court's jurisdictional decision and processing guidelines in Perry v. MSPB, 582 U.S. 420 (2017) and unlawfully causes petitioner to have "lost his chance to pursue his ... discrimination claim[s]."
2. Whether, the district court's decision to dismiss a nonfrivolous allegation of a discriminatory civil service personnel action for lack of jurisdiction instead of on the merits as this Court stated in the Perry (2017) decision is a reversible legal error and violation of appellant's due process rights that create a

structural error and structural barrier against a federal employee's right to bring a mixed case appeal to the district court for a prescribed trial de novo and de novo review.

3. Whether 5 U.S.C. 7702 and 7703 by its plain text language appropriates a deferential arbitrary and capricious standard of judicial review to a nonfrivolous allegation of an agency adverse discriminatory civil service personnel action when an evidentiary hearing required by law was denied at the MSPB and the Circuit Court fails to order such hearing in the District Court or whether under any circumstances when, as this Court has decided, the jurisdiction and the merits of a constructive personnel action are inextricably intertwined.

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Brian Digiacomo, Defendant

Barbara Fredericks, Defendant

Ronda J. Brown, Defendant

David J. Spence, Defendant

Daniel Turbitt, Defendant

Thomas Mesenbourg, Defendant

Terryne F. Murphy, Defendant

Darren Gutschow, Defendant

Tyra Dent Smith, Defendant

Ted Johnson, Defendant

Stacy Chalmers. Defendant

Dale R. Reed, Defendant

John Guenther, Defendant

United States of America, Defendant

Adam Chandler, Defendant

Deborah Miron, Defendant

Robert M. Groves, Defendant

Brien E. McGrath, Defendant

Thomas Meerholz, Defendant

Roy Castro, Defendant

John Cunningham, Defendant

Benjamin Felder, Defendant

Johnny Zuagar, Defendant

Patricia Musselman, Defendant

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to

the petition and is

[X] reported at UNKNOWN ; or,
[ ] has been designated for publication but is not yet reported; or, [ ] is unpublished.

The opinion of the United States district court appears at Appendix B to

the petition and is

[X] reported at UNKNOWN ; or,
[ ] has been designated for publication but is not yet reported; or, [ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was . May 14, ~~2024~~.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of
Appeals on the following date: ~~Aug 6, 2024, and a copy of~~ the order denying rehearing appears at Appendix C and ~~D~~ .

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including (date) on _____ (date) in Application No. —A—.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Applicable statutory provisions appear in Appendix E.

INTRODUCTION

Pro se Appellant is appealing a second D.C. Circuit Court decision in this case, this one asking this Court to vacate the D.C. Circuit Court's opinion affirming the district court's affirmation of the MSPB dismissal for lack of jurisdiction with prejudice and to vacate the Circuit Court's denial of appellant's motion for summary reversal of the district court order to brief whether the district court should sustain the MSPB dismissal for lack of jurisdiction and to vacate the Circuit Court's denial of appellant's motion for summary reversal of the district court's dismissal of this mixed case for lack of jurisdiction with prejudice because these lower court decisions are incompatible and irreconcilable with this Court's decision in Perry v. MSPB, 582 U.S. 420 (2017).

This Court decided in Perry (2017), the federal-question jurisdiction in this case that the proper court in which to litigate a federal employee's mixed case when the MSPB dismisses his complaint of a serious adverse employment action and attributes the action, in whole or in part, to bias based on race, gender, age, or disability is the district court and provided processing guidelines and questions needing adjudication to the lower court. Perry v. MSPB, S. Ct. 16-399 (2017) Pp. 9-17, Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 et. seq. At that point, the lower courts lack subject matter authority to render a contravening decision of a Supreme Court decision. That both the Circuit Court and the District Court rendered contravening decisions to this Court and did so while violating appellant's due process and constitutional rights makes those decisions summarily reversible

legal errors, and void and unenforceable orders. This Court should summarily reverse both lower courts, remedy legal errors, and remove structural errors and barriers caused by an inadequate standard of review for an alleged discriminatory and retaliatory adverse civil service personnel action. Perry v. MSPB, 582 U.S. 420 (2017).

In this Court's attempt to further clarify adjudication of mixed case appeals in this case), it decided: 1) Perry made a nonfrivolous allegation of coercion into a settlement agreement; 2) that Perry therefore brought a mixed case to the MSPB and the complaint was properly before the MSPB ; 3) that it does not matter what label the Board assigns to its decision, whether "jurisdictional," "procedural," or on the "merits", all mixed cases undergo judicial review in the district court; 4) that if the case is later dismissed by the reviewing court, it should be dismissed on the merits, not for want of jurisdiction; 5) that the jurisdiction and merits of a constructive termination are inextricable; 6) that the validity of the settlement agreement in this case is at the heart of the dispute on the merits of Perry's complaint; 7) and that "in essence, the MSPB ruled that it lacked jurisdiction because Perry's claims fail on the merits." A nonfrivolous allegation of coercion into a settlement agreement guarantees appellant an evidentiary hearing. Deines v. Dep't of Energy, 98 M.S.P.R, at 395 (2005); Garcia v. Homeland Sec., 437 F.3d 1322, 1324 (Fed. Cir.2006) (en banc).

The Circuit Court transferred the case to the district court where the district court issued its opinion stating "this court will not reach his discrimination claims

either, but instead will affirm the Merit Systems Protection Board decision dismissing his claims for lack of jurisdiction" and subsequently dismissed the entire case with prejudice. Hayes v. U.S. Gov't Printing Off., 684 F.2d 137 (D.C. Cir. 1982). The district court did not address any other issues including the validity of the settlement agreement where this Court stated that the validity of the settlement agreement was at the heart of the merits of this dispute. Nor did it dismiss any claims on the merits.

The D. C. Circuit Court affirmed the district court's dismissal of the entire case for lack of jurisdiction with prejudice. It is noted that the lack of jurisdiction and the "with prejudice" label knowingly sets up the entire discrimination case to be dismissed in the district court even though the Circuit Court was able to check the box for statutory compliance for mixed case discrimination claims, but in the manner that guarantees that the discrimination claims will never be adjudicated in a jury trial de novo. Ciralsky v. CIA, 355 F.3d 661, 669 (D.C. Cir. 2004). In Perry (2017), this Court decided that if the case, or by inference elements of the case are dismissed, it should be dismissed on the merits not for want of jurisdiction. This is irreconcilable with the decision in Perry (2017) and is a legal error. This decision also injects confusion that requires this Court's intervention.

This Court reference to this case a "paradigm mixed case", it should use this case and take the opportunity to further clarify and remove barriers to a federal employees right to bring discrimination claims in the same manner as employees in the private sector. In doing so, it must reconsider the barrier created by a

deferential arbitrary and capricious standard of review that is applied to the alleged discriminatory and retaliatory civil service component of a mixed case which permits the MSPB and the lower courts to dismiss merit claims without adjudication on the merits. That deference denies fundamental fairness, when as here the administrative record is intentionally left incomplete in the administrative process. A deferential standard of review appears nowhere in the plain text of the statutory language applicable to the mixed case appeal processing exception of an alleged discriminatory adverse civil service personnel action. 5 U.S.C. 7702 and 7703.

Federal employees are protected by anti-discrimination laws, such as Title VII of the Civil Rights Act of 1964 ("Title VII") and the Age Discrimination in Employment Act of 1967 ("ADEA"). Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin, *see* 42 U.S.C. § 2000e–16; while the ADEA prohibits discrimination on the basis of age, *see* 29 U.S.C. § 633a.

Federal employees are also protected by the CSRA, which "establishes a framework for evaluating personnel actions taken against federal employees." *Kloeckner v. Solis*, 568 U.S. 41, 44 (2012). Under the CSRA, an agency may not take a "particularly serious" adverse employment action against an employee — such as a removal, a suspension for more than 14 days, or a demotion, *id.* at 44 & n.1; *see* 5 U.S.C. § 7512 — unless doing so would "promote the efficiency of the service," 5 U.S.C. § 7513(a). The agency must demonstrate that the employee "engaged in misconduct," *King v. Frazier*, 77 F.3d 1361, 1363 (Fed. Cir. 1996), and

that the adverse action appropriately promotes the efficiency of the service after accounting for various factors. *See Douglas v. Veterans Admin.*, 5 M.S.P.R. 280, 304–06 (1981). When an agency takes a serious adverse employment action, "the affected employee has a right to appeal the agency's decision to the MSPB, an independent adjudicator of federal employment disputes." *Kloeckner*, 568 U.S. at 44; *see* 5 U.S.C. § 7513(d). The employee might argue, for example, that they did not commit any misconduct, *see King*, 77 F.3d at 1363, or that the adverse action was too harsh and thus unnecessary to promote the efficiency of the service, *see Douglas*, 5 M.S.P.R. at 304–06.

Sometimes, a federal employee alleges unlawful discrimination *and* a serious adverse employment action: The employee might allege, for example, that they were terminated based on their race. That federal employee "may proceed in a variety of ways." *Kloeckner*, 568 U.S. at 45. The employee may bring a standard claim under Title VII by exhausting administrative remedies in the agency and then filing a case in the district court. *See Al-Saffy*, 827 F.3d at 85–89. Or instead, they may bring the case before the MSPB as a "mixed case," which combines a claim under a federal anti-discrimination statute with a challenge to a serious adverse employment action under the CSRA. *Kloeckner*, 568 U.S. at 50 ("[M]ixed cases" are "those appealable to the MSPB and alleging discrimination."); 29 C.F.R. § 1614.302(a)(2) (defining a "mixed case appeal" as one in which an employee "alleges that an appealable agency action was effected, in whole or in part, because of discrimination"). In a mixed case, the employee can appeal the adverse action

directly to the MSPB, thereby "forgoing the agency's own system for evaluating discrimination charges." *Kloeckner*, 568 U.S. at 45. Alternatively, the employee may file an EEO complaint with the agency and then appeal an unfavorable outcome to the MSPB. *Id.* (citing 5 CFR § 1201.154(b); 29 CFR § 1614.302(d)(1)(i)). If the employee chooses to proceed in a mixed case before the MSPB, and the personnel action is upheld, the employee may seek review of the MSPB's ruling by a United States District Court. *Perry v. MSPB*, 582 U.S. 420, 432 (2017).

Legal and structural barriers remain to a federal employee's right to district court litigation on the merits of a mixed case, a "case of discrimination", which includes an alleged discriminatory agency adverse civil service personnel action claim, and the underlying discrimination claims under the provisions of the section 7702 and 7703. That may be due to at least two factors: 1) an MSPB dismissal for lack of jurisdiction and the denial of an evidentiary hearing on a nonfrivolous allegation coercion below, and 2) the "Federal Circuit-style" deferential standard of judicial review of a merit based nonfrivolous allegation of coercion and retaliation in this mixed case appeal.

The denial of an evidentiary hearing on a nonfrivolous allegation of coercion in this case is a legal error and creates a structural error and a structural barrier that blocks factual evidence and a decision on the merits. The barrier is then hardened by the application of a "Federal-Circuit-style" deferential arbitrary and capricious standard of review for the civil service component which is an alleged discriminatory act itself and the jurisdiction of which is "inextricable" from the

merits of the dispute. If the jurisdiction of the adverse civil service action is inextricable from the merits of the dispute, one cannot get to the merits of the complaint without an evidentiary hearing.

This Court said Perry's allegation of coercion into the settlement agreement was a nonfrivolous allegation. The Circuit Court and the district court countered with disputed facts, credibility determinations, and made inferences without an evidentiary hearing that were not theirs to make but that of a jury and decided Perry's allegation of coercion was frivolous with the same information the Supreme Court possessed when it made its determination Perry made a nonfrivolous allegation of coercion into a settlement agreement. Dvorin v. Dep't of Air Force, 70 M.S.P.R. 407, 411 (1996). This Court determined Perry's allegation of coercion was nonfrivolous and therefore he had the legal right to an evidentiary hearing on the merits of that allegation. This is a reversible legal error and a legal and structural barrier to a mixed case trial de novo in the district court. The Circuit Court and the District Court decided it didn't care whether Perry's allegations were nonfrivolous, both courts affirmed and sustained the MSPB dismissal for lack of jurisdiction with prejudice, violating this Court's decision in Perry (2017). This Court must summarily reverse both the lower courts and order the evidentiary hearing in the district court to guarantee federal employees the right to an evidentiary hearing on a nonfrivolous allegation of a discriminatory adverse civil service personnel action.

An arbitrary and capricious standard of review will not guarantee a federal employee's right to a fundamentally fair judicial process as evidenced in this case with a Supreme Court determination in hand that Perry's claim of coercion was nonfrivolous. There exists recorded testimony in the audio record of the AFGE Union President stating that he was told to tell Perry he would be terminated on the spot if he refused to sign the agreement or reported the agency action to the EEO Office. That was not even considered in the lower court's review. Neither was evidence showing Perry worked after hours that he was not paid to make up time missed during the work schedule. This entire action was an act of discriminatory retaliation for having filed those seven prior pending EEOC cases and the agency's intent to deter other discriminated against employees from bringing cases of discrimination against the U.S. Census Bureau and the Department of Commerce.

To justify its jurisdictional decision below, "the district court cites three Federal Circuit cases, Ballentine v. MSPB, 738 F.2d 1244 (Fed.Cir. 1984), and two of its progeny" abrogated by name twice in Kloeckner, 568 U.S. at 49 & n.3 and Perry, 582 U.S. at 434 n.8. Perry v. Raimondo, U.S.D.C. 1:17-cv-01932 Memorandum Opinion, Appendix B pgs. 10, 24-25.

Section 7703(b) designates the proper forum for judicial review of MSPB decisions. Section 7703(b)(2) governs"[c]ases of discrimination subject to provisions of section 7702. Kloeckner , 568 U.S. at 46. Appendix E. The district court was obligated to hear and decide this entire case de novo on the merits of plaintiff's claims, unbound by the results of the administrative process nor limited to the

administrative record. Perry v. Raimondo, et. al. Amicus Initial Brief for Appellant, D.C. Cir. 22-5319 (2024) p. 27. Susan B. Anthony List v. Driehaus, 573 U.S. 149, 167 (2014); Morris v. Rumsfeld, 420 F.3d 287, 294 (3d Cir. 2005); see Scott v. Johanns, 409 F.3d 466, 470 D.D. Cir. 2005); Hayes (D.C. Cir. 1982).

STATEMENT OF THE CASE

In 2007, Petitioner filed the first of seven EEO complaints for unlawful employment discrimination and retaliation and which he had engaged the Census Bureau in settlement discussions. All of these prior filed EEOC cases were pending adjudication or settlement at the time the Census Bureau served appellant a termination letter.

Petitioner Anthony W. Perry was hired by the U.S. Census Bureau in Suitland, Maryland in 1982, and worked for that agency for thirty years without any question or complaint of his performance or conduct. In mid-2000, appellant developed osteoarthritis in his lower back and hip with pain extending into the groin. To help manage the pain, Perry's supervisor allowed him a flexible work schedule. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983).

On June 6, 2011, Perry sent an email to the Director of the Census Bureau complaining of being subjected to ongoing discrimination in the selection process for promotion. On June 7, 2011, Perry was served a Notice of Proposed Removal by a Census employee who was not his direct supervisor. The Notice proposed to terminate Perry's employment, alleging that he had been absent during regular working hours and thus had been paid for hours he had not worked. Perry contested the charges and pointed to the informal accommodation that his supervisor had provided and his unblemished disciplinary record. Crane v. Dep't of

Air Force, 240 F.App'x 415 (Fed. Cir. 2007); Daniels v. Donahoe, No. 0120103252, 2012 WL 2068638 (E.E.O.C 2012); Davis v. Dep't of Army, 33 M.S.P.R. 389 (2005).

In August 2011, Perry and the agency entered into a settlement agreement that required him to serve a suspension for thirty calendar days, retire no later than September 4, 2012 and forfeit his discrimination claims against the agency.

In 2012 after serving a 30-day suspension and early retirement April 3, 2012, Perry filed a pro se challenge with the Board. An administrative law judge (ALJ) ordered show cause briefs as to why the challenge should not be dismissed for lack of jurisdiction. "[. . .], resignations and retirements are presumed to be voluntary, and voluntary actions are not appealable to the Board," and "the Board cannot review the same claims over which you entered into a settlement agreement with the agency." Perry responded that the settlement agreement had been coerced, and that the subsequent major adverse employment actions were thus involuntary.

After reviewing the evidence without holding an evidentiary hearing, a procedure required by law, on Perry's allegation that he was coerced into signing the nondisclosure agreement under threat of termination and duress if he failed to sign the agreement or reported the proposed termination to the agency EEO, the ALJ dismissed the case for lack of jurisdiction. Under "a long line of cases," the Board may exercise jurisdiction over an "ostensibly . . . voluntary separation from employment," if the government coerces the employee "into resigning." *Garcia v. Dep't of Homeland Sec.*, 437 F.3d 1322, 1324 (Fed. Cir. 2006) (en banc).

An employee's coerced, involuntary choice is "tantamount to forced removal." *Id.* at 1328 (internal quotation marks omitted).

An employee can prove "involuntariness in a number of different ways." *Id.* As relevant here, an employee proves coercion if his "agency threatened to take a future disciplinary action that it knew or should have known could not be substantiated." *Fassett v. U.S. Postal Serv.*, 85 M.S.P.R. 677, 679 (2000) (citing *Schultz*, 810 F.2d at 1136). The touchstone is objective reasonableness. If the agency lacks "reasonable grounds" for terminating an employee, but threatens termination anyway, then the agency coerces the employee. *Locke v. U.S. Postal Serv.*, 61 M.S.P.R. 283, 288 (1994) (quoting *Schultz*, 810 F.2d at 1136). In particular, the ALJ decided that both the 30-day suspension and retirement were voluntary because they resulted from a voluntary settlement agreement. Perry petitioned the Board for review.

The Board granted the petition and remanded the case to the ALJ for further proceedings. The Board concluded that Perry had "made a nonfrivolous allegation of involuntariness due to misrepresentation of Perry's appeal rights sufficient to warrant a jurisdictional hearing," and that the ALJ had thus erred by dismissing the case without holding an evidentiary hearing, but expressly refused to hear Perry's claim he was coerced into the settlement agreement under threat of immediate termination if he did not sign the agreement or if he reported the adverse personnel action to the EEOC.

On remand, the ALJ held a hearing on "misrepresentation" of Perry's right of appeal and concluded that Perry "failed to proved that he was coerced or detrimentally relied on misinformation when he agreed to settle his appeals." The ALJ dismissed the appeal for lack of jurisdiction. Perry petitioned again for Board review.

The Board affirmed the ALJ. It concluded that Perry "failed to establish that he detrimentally relied on misinformation regarding his potential appeal rights when entering into the settlement agreement and, therefore, that we lack jurisdiction over his appeal because [he] validly waived his appeal rights [...]". Perry also received a notice that further review rights would be at the U.S. Court of Appeals for the Federal Circuit.

Perry proceeding pro se instead file a petition for review in the U.S. Court of Appeals for the D.C. Circuit. The D.C. Circuit ordered Perry to "show cause why this petition should not be dismissed for lack of jurisdiction or transferred to the United States Court of Appeals for the Federal Circuit." After both parties filed briefs on the jurisdictional issue, the court directed parties to "address in their briefs (1) whether this court has jurisdiction to hear this case under 5 U.S.C. 7703(b)(1)(B); and (2) if not, whether this case should be transferred to the Federal Circuit or a district court pursuant to 5 U.S.C 7703(b)(1)(A) or (2)," and appointed counsel as amicus curiae "to present arguments in favor of petitioner's position." Judge Henderson dissented from the order, noting she

"would grant [the Government's] request to transfer the case to the Federal Circuit."

Upon agreement that the D.C. Circuit lacked jurisdiction, the remaining question was whether to transfer the case to a district court or the Federal Circuit. The D.C. Circuit held, that it was constrained to transfer the case to the Federal Circuit based on a pre-Kloeckner circuit precedent. (citing Powell v. Dept. of Defense, 158 F.3d 597 (D.C. Cir. 1998)).

The Federal Circuit docketed the appeal but held the briefing in abeyance until the Supreme Court resolved the jurisdictional issue presented in his petition before the high Court. See Perry v. MSPB, No. 2016-2377 (Fed. Cir. Aug. 31, 2016).

This Court granted certiorari and on June 23, 2017 and reversed the D.C. Circuit deciding the mixed case was properly before the MSPB and remanded for further processing. Perry v. MSPB (2017). "A party, [it said,] [may] establish jurisdiction at the outset of a case by means of a nonfrivolous assertion of jurisdictional elements." See Jerome B. Grubart, Inc., 513 U.S., at 537. See also Bell v. Hood, 327 U. S. 678, 682-683 (1946) (To invoke federal-question jurisdiction, allegations in a complaint must simply be more than "insubstantial or frivolous," and "[i]f the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.").

The Court went further saying, federal employees have a right to pursue claims of discrimination in violation of federal law in federal district court. See 5 U.S.C. 7703(c) (preserving "right to have the facts subject to trial de novo by the reviewing court" in any "case of discrimination" brought under 5 U.S.C 7703(b)(2)). MSPB's adverse ruling on the merits of Perry's claim that the settlement was coerced "did not retroactively divest the MSPB of jurisdiction to render that decision. "Because Perry complain[ed] of a personnel action serious enough to appeal to the MSPB" (in his case , a 30-day suspension and involuntary removal, see 5 U.S.C. 7512(1), (2)) and "allege[d] that the [personnel] action was based on discrimination," he brought a mixed case. Kloeckner, 568 U. S., at 44. "Judicial review of such a case lies in district court."

This Court went further still stating, "the distinction between jurisdictional and merits issues is not inevitably sharp, for the two inquiries may overlap. See Shoaf v. Dept. of Agriculture, 260 F.3d 1336, 1341 (CA Fed. 2001) ("recognize[ing] that the MSPB's jurisdiction and the merits of an alleged involuntary separation are inextricably intertwined. This case fits that bill." The MSPB, this Court said, determined that it lacked jurisdiction over Perry's civil-service claims on the ground that he voluntarily released those claims by entering into a valid settlement with his employing agency, the Census Bureau. See S. Ct. 16-399 (2017), App. to Pet. for Cert. 27a. footnote 9 "But the validity of the settlement is at the heart of the dispute on the merits of Perry's complaint." "In essence", the Court said, "the MSPB ruled that it lacked

jurisdiction because Perry's claims fail on the merits." See Shoaf, 260 F.3d, at 1341 (If it is established that an employee's "resignation or retirement was involuntary and thus tantamount to forced removal," then "not only [does the Board] ha[ve] jurisdiction, but also the employee wins on the merits and is entitled to reinstatement."

On remand, the district court ordered Plaintiff to file his complaint and waived the government's requirement to answer a civil complaint in according with Federal Rules of Civil Procedure Rule 12 without explanation. (Perry v. Ross (2022), 1:17-cv-01932 (TSC).

The district court issued a Mediation Standing Order December 11, 2017. After the agency declined to participate in the ordered mediation by letting the time expire instead of informing the court it had no intent to engage in settlement discussions.

The district court filed a scheduling order June 20, 2018 "that the parties shall brief the issue of whether the Merit Systems Protection Board's ("MSPB") decision dismissing Plaintiff's appeal for lack of jurisdiction should be affirmed by the district court, an issue not before it and of which the district court lacked subject matter jurisdiction in this case. At this juncture, the court will not entertain arguments on the underlying discrimination claim." (1:17-cv-01932 (2022), Dkt. No. 24, Pp. 1-3). That district court's order waived the defendant's requirement to answer plaintiff's complaint. Instead, the district court would

later answer plaintiff's complaint with its opinion and order of dismissal with prejudice approximately three years later.

On November 19, 2018, Plaintiff filed a motion for summary judgment (Dkt. No. 30-1 Pp. 1-2), an accompanying Statement of Facts in support of a Rule 56 motion for summary judgment (Perry (2022) Dkt. No. 30-2 Pp. 1-17.), a Brief in support of his Motion for Summary Judgment (Perry (2022) Dkt. No. 30-3 Pp. 1-43, and a Memorandum in Opposition to Defendant's Cross Motion for Summary Judgment (Perry (2022) Dkt. No. 41, Pp. 1-35).

On August 30, 2022 the United States District Court for the District of Columbia (1:17-cv-01932), without providing the evidentiary hearing denied by the MSPB on Plaintiff's allegation of coercion into signing a settlement agreement under threat of termination reviewed only the Board's "jurisdictional" determination based on an incomplete administrative record and "affirmed the Merit Systems Protection Board's (MSPB or "Board") decision dismissing the case for lack of jurisdiction" and subsequently dismissed this case for lack of jurisdiction with prejudice.

On appeal, the D. C. Circuit Court appointed an Amicus to argue the case in support of Appellant's position for summary reversal of the district court's dismissal for lack of jurisdiction with prejudice. On May 14, 2024, the D. C. Circuit Court of Appeals issued a two part opinion bifurcating the case by "affirm[ing] the district court's ruling that the MSPB properly dismissed Perry's mixed case because the Board lacked jurisdiction to hear claims arising from

Perry's voluntary retirement" and "reversed the district court's dismissal of Perry's discrimination claims" and remanded the discrimination claims for further proceedings.

On July 25, 2024, appellant filed a petition for panel rehearing or in the alternative a petition for rehearing en banc. Subsequently, on August 6, 2024, the D.C. Circuit Court of Appeal filed an order denying appellant's petition for panel rehearing and an order denying appellant's petition for rehearing en banc as a result of the absence of a request by any member of the court for a vote.

August 15, 2014, Appellant filed a Notice of intent to file a petition for Supreme Court Review of D.C. Circuit Court of Appeals opinion and order.

On August 16, the D.C. Circuit Court of Appeals filed a Mandate in accordance with the judgment of May 14, 2024.

Below, the Circuit Court and the district court's legal errors as well as the MSPB's legal error denying appellant an evidentiary hearing required by law in Perry's "nofrivolous allegation of coercion into a settlement agreement" leads to structural errors and barriers to a federal employee's ability to exercise his due process and constitutional rights to contest alleged workplace discrimination in the federal district court. In Perry (2017), this Court settled the federal-question of jurisdiction of the judicial review of mixed cases dismissed by the MSPB for lack of jurisdiction. The district court and the D.C. Circuit Court of appeals contravened that Supreme Court decision in the latest adjudication of this case. 1:17-cv-01932 (TSC); D.C. Cir. No. 22-5319. The amicus in this case

said the district court imposed a "Federal Circuit-style" review over Perry's mixed case extricating the jurisdiction of the alleged agency adverse discriminatory civil service personnel action from the remaining underlying discrimination claims. D.C. Cir. 22-5319, Amicus Init. Br. for Appellant.

The use of the deferential arbitrary and capricious standard of review for the discriminatory and retaliatory civil service personnel action which is at the heart of the dispute of the merits of the entire discrimination complaint when a lesser deferential standard of judicial review, de novo, is applied to the remaining underlying claims of discrimination. In this case where the MSPB denied an evidentiary hearing on a nonfrivolous allegation of coercion, a procedure required by law, a structural error and barrier is intentionally placed before a federal employee to block his path to a trial in the district court and deny due process and other constitutional rights.

Both lower courts made credibility determinations, weighed evidence, and made inferences from disputed facts that was the province of a jury. Dvorin, 70 M.S.P.R. (1996). In order to assure a federal employee's right to bring a mixed case to trial in the district court on the merits of her complaint, this Court must summarily reverse the district court affirmation of the MSPB dismissal for lack of jurisdiction as it did in Perry's first petition to this Court and remove the label "with prejudice" designed to defeat a federal employees case of discrimination before a trial de novo or de novo review of the civil service personnel action is held. Ciralsky at 661, 669 (D.C. Cir. 2004) This Court must reverse the Circuit

Court's affirmation of the district court's affirmation of the MSPB dismissal for lack of jurisdiction and correct every legal error starting with the denial of the evidentiary hearing at the MSPB. The Court on review of the statutory language in 5 U.S.C 7702 and 7703 should review the plain text of the applicable statutory language, and in the process give no deference to the fact that some Circuit Courts have applied the arbitrary and capricious standard of review to alleged discriminatory adverse agency civil service personnel actions and determine an appropriate standard of review that at the very least guarantees an evidentiary hearing on the merits of a nonfrivolous allegation of a discriminatory civil service personnel action allegation and discovery to complete the record from which the lower court will use to render it's decision.

REASONS FOR GRANTING THE PETITION

Most federal employees appear before the MSPB as pro se appellants. This Court's decision in this case will affect every federal employee who wishes to file a complaint against a federal agency for an alleged discriminatory adverse civil service personnel action.

The Supreme Court reversed and remanded this case to the D. C. Circuit Court of Appeals. 829 F. 3d 760 (2016) The Amicus curiae for Appellant in that petition to this Court stated, "this case presents this Court an opportunity to finish the job it started in Kloeckner v. Solis, 133 S. Ct. 596 (2012): to bring coherence and clarity to the statutory regime governing judicial review of decisions by the Merit Systems Protection Board (MSPB or Board)". S. Ct. 16-399 Perry v. MSPB (2017), Amicus Petition For Writ Of Certiorari for Petitioner, p. 1. Concluding in his petition for certiorari for Perry (2017) amicus stated, "insofar as the D.C. Circuit is correct that Kloeckner did not expressly answer the question of which court reviews "mixed" cases dismissed by the MSPB on jurisdictional grounds, this Court should do so now. Few things are more wasteful than litigation over the proper court in which to litigate". This Court should continue to use this case to "bring coherence and clarity to the statutory regime governing judicial review of decisions by the Merit Systems Protection Board" and the appropriate standard of judicial review that will guarantee federal employees statutory and constitutional rights to an adjudication on the merits of their allegations.

D. C. Circuit Court of Appeals has labeled its affirmation of the district court's affirmation of the MSPB dismissal of this case for lack of jurisdiction and its remand of the discrimination claims to the district court "precedential". Here, the lower courts are using the "lack of jurisdiction" label to deny statutory and constitutional rights this Court addressed in Perry (2017). That decision is irreconcilable with this Court's decision in Perry v. MSPB, 582 U.S. 420 (2017), violates appellants due process, uses legal errors to violate statutory and constitutional rights, to deny appellant's 6th amendment right to confront accusers and to deny appellant's 7th amendment right to a hearing in a civil complaint, and finally to disregard appellant's property rights to his federal employment. The district court waived the defendant's duty to respond to appellant's legal complaint, The district court's order to brief jurisdiction is in excess of the trial courts order on transfer from the Circuit Court and the opinion and order in Perry (2017).

Both the D.C. Circuit Court of Appeals and the U.S. District Court for District of Columbia acts as counsel for the government in this case reaching conclusions that do not appear on the face of the MSPB decision. Both make credibility determinations, weigh evidence, and draw inference from disputed facts, made reversible legal errors in its decisions, failed to correct the MSPB legal error. The evidence in the case is the exact same evidence the Supreme Court used to render a totally different opinion in Perry v. MSPB (2017). Dvorin, 70 M.S.P.R. (1996)

Fatal legal errors include declining to consider Perry's discrimination claims and relying on the abrogated case law of Ballentine v. MSPB, 738 F.2d 1244 (Fed. Cir. 1984) and its progeny. Perry v. Raimondo 22-5319, Amicus Init. Br. for Appellant pgs. 22-24. The district court dismissed the case with prejudice potentially preventing appellant from adjudicating his discrimination claims, some of which were coerced into forfeiture by the government in violation of Title VII of the Civil Rights Act and interference in appellant's right to bring his mixed case complaint of discrimination to the district court. The Circuit Court allowed the MSPB denial of an evidentiary hearing on coercion into a settlement agreement to stand which denied appellant due process when it could have ordered an evidentiary hearing in the district court.

The District Court erred when it upheld the Merit Systems Protection Board's determination that the Board lacked "jurisdiction" over Perry's claim under the Civil Service Reform Act. This Court said Appellant raised a nonfrivolous allegation the agency coerced him into a settlement agreement. Consequently, an evidentiary hearing was required by law. The lower courts continue to focus on appellant being out of the building instead of whether the Bureau knew, or should have known it could not fire Perry for the absence because of his supervisor provided accommodation. Motor Vehicle Mfrs. Ass'n, 463 U.S. 29 (1983). The agency, the MSPB, the district court and the Circuit Court all refused to allow Perry's supervisors to testify on this issue and this Court should rule in favor of

Perry on the merits of his complaint and reinstate his employment and he prevail on his remaining nonfrivolous claims.

This Court should review that a federal employee shall receive a trial de novo on the merits of the underlying discrimination (which includes the discriminatory civil service action) and on the alleged discriminatory adverse agency civil service personnel action itself alleged to be discriminatory, which then leads to the underlying discriminatory claims. That plain text language does not appear in the applicable sections of the CSRA (1978). Noting here that without an evidentiary hearing required by law on a nonfrivolous allegation, the arbitrary and capricious standard of judicial review would be done using an intentionally incomplete administrative record and the merits of the complaint omitted from the record.

This Court should grant the petition and issue an opinion, order, and processing guidelines without any additional argument. The Court must use this case to further clarify federal employee rights to appeal a wrongly dismissed mixed case for lack of jurisdiction when an evidentiary hearing on an appellant's nonfrivolous allegation is denied and break the "Federal Circuit-style" resolution to alleged discriminatory adverse personnel actions. The Circuit Court and District Court decisions here, the legal and resulting structural barriers, and the citation of abrogated Federal Circuit law to dismiss this complaint are intended to bar federal employee's due process and the constitutional rights to adjudicate a mixed case appeal in the district court.

The government argued that the Circuit Court should consider only "the threshold issue of whether the Board's "decision dismissing" Perry's appeal for lack of jurisdiction should be affirmed." JA83. The District Court agreed and declined "to entertain arguments on the underlying discrimination claim" and subsequently granted the government's motion for summary judgment and dismissed the entire complaint with prejudice. JA89; JA10 (5/3/2018 Minute Order); JA752. The lower courts failed to analyze the Supreme Court's decision in this case or the statutory text of 5 U.S.C. 7702-7703. Instead, the District Court held that its only task in a mixed case dismissed on jurisdictional grounds was "to decide if' the Board's "decision was arbitrary and capricious ... " and then decided the Board's jurisdictional decision was neither arbitrary nor capricious and granted summary dismissal with prejudice, never considering the freestanding discrimination claims. JA748. This decision is irreconcilable with this Court's prior decision in Perry's first appeal to this Court. Hayes (D.C. Cir. 1982).

The Circuit Court could have remanded this case to MSPB or ordered the district court to hold the evidentiary hearing to complete the administrative record and subsequently perform a de novo review of the facts and a trial de novo on the discrimination claims. Instead, it chose to "contravene" this Court's decision in Perry (2017) and its attempt to protect the right of federal workers to bring these "cases of discrimination" to the district court, preferring the expedience of a deferential "Federal-Circuit-style" disposal of them.

The Circuit Court allows the MSPB's legal errors to create a structural error and barrier that is intended to bar federal employees from bringing mixed case appeals to the district court specifically targeting the discriminatory and retaliatory civil service component for dismissal. By sustaining the district court's affirmation of the MSPB dismissal for lack of jurisdiction with prejudice, the Circuit Court ruling allows the district court to eventually dismiss the entire case and prior existing discrimination claims within the complaint without a hearing on the merits or the validity of the settlement agreement of appellant's complaint. The "with prejudice" label subjects the complaint to the fait described in the Supreme Court's footnote 10 in Perry v. MSPB (2017). Ciralsky (2004).

Footnote 10 of this Court's opinion and remand order in Perry v. MSPB, 582 U.S. 420 (2017) states "if a reviewing court "agree[d] with the Board's assessment," then Perry would indeed have "lost his chance to pursue his ... discrimination claim[s]," post, at 3 for those claims would have been defeated had he voluntarily submitted to the agency's action" and "that with-prejudice judgment may unintentionally prevent Perry from refilling his discrimination claims." See also Init. Br. for Appellant at 40, Perry v. Raimondo, D. C. Cir. No. 22-5319 (2024). Without being provided an evidentiary hearing required by law, appellant's case of discrimination is defeated without ever having the opportunity guaranteed by the law that federal employees have the right to bring claims of discrimination to the district court for a trial de novo.

CONCLUSION

The petition for a writ of certiorari should be granted and this Court should vacate the Circuit Court's partial decision affirming the district court decision affirming the MSPB dismissal for lack of jurisdiction with prejudice and summarily reverse the entire contravening district court opinion.

Respectfully submitted,

Anthony W Perry

Date: 11/1/24