ORAL ARGUMENT NOT YET SCHEDULED

No. 22-5319

IN THE

United States Court of Appeals for the District of Columbia Circuit

ANTHONY PERRY,

Petitioner - Appellant,

v.

GINA RAIMONDO, *et al.*,

Defendants - Appellees.

On Appeal from the United States District Court
for the District of Columbia
No. 1:17-cv-01932-TSC, Hon. Tanya S. Chutkan

REPLY BRIEF FOR COURT APPOINTED *AMICUS CURIAE* IN SUPPORT OF APPELLANT

NATHANIEL A.G. ZELINSKY
CATHERINE E. STETSON
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
nathaniel.zelinsky@hoganlovells.com

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Court-appointed Amicus Curiae *for Appellant*

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INTRODUCTION

The Government's confession of error, if only partial, is a welcome development. After convincing the District Court to ignore Anthony Perry's freestanding discrimination claims, and after doubling down in response to Perry's motion for summary reversal in this Court, the Government now agrees with us: The District Court erred when it declined to consider Perry's discrimination claims de novo.

Unfortunately, the Government reaches the correct result on this issue for the wrong reason. The Government continues to suggest that, for mixed cases decided on jurisdictional grounds, federal employees must separately exhaust discrimination claims. The Government declines to press that argument with vigor in Perry's case because the Government found extra-record evidence showing Perry happened to file a separate claim with an Equal Employment Opportunity office in 2012. Gov. Br. 19 n.1. But the Government still implies that every federal employee, Perry included, must doubly exhaust mixed cases when the Merit Systems Project Board labels its decision "jurisdictional." *Id*. at 19.

As we explained in our opening brief, that argument is wrong. *See* Amicus Br. 33-37. In correcting the error below, this Court should provide clear guidance to lower courts: There is no extra exhaustion requirement, for this or any other

mixed case. Whether Perry filed a separate claim with an Equal Employment Opportunity office, or not, it does not matter.

The Court should also provide case-specific guidance to the District Court. The waiver provision in Perry's settlement agreement is almost certainly invalid with respect to Perry's age discrimination claims. *See id.* at 38-39. Unless the Government can somehow overcome that invalidity, this case should proceed forward.

Finally, before this case goes to discovery in the District Court, it should detour to the Merits Systems Protection Board for the evidentiary hearing the Board has not yet held. The allegations before the Board were deeply concerning: Perry has crippling osteoarthritis. His superiors at the Census Bureau provided him informal accommodations: Perry could walk outside during the day to manage his severe pain, could work flexible hours, and could even work from home. *See id.* at 11-12. But the day after Perry complained to the Census Bureau's director about discrimination, management abruptly changed the rules and threatened to fire Perry for being absent from his desk, and for not signing a short-lived attendance log. *See id.* at 12-13.

Before the Board, Perry made non-frivolous allegations showing the Census Bureau "knew or should have known" it could not follow through with that pretextual termination. *Fassett v. U.S. Postal Serv.*, 85 M.S.P.R. 677, 679 (2000).

According to Perry, the Census Bureau provided no "notice" that "previously condoned activity"—Perry's flexible work schedule—was "no longer condoned." *Crane v. Dep't of Air Force*, 240 F. App'x 415, 418 (Fed. Cir. 2007). Meanwhile, the Census Bureau had improperly "treated" Perry "more harshly than" his peers, who were not required to complete the attendance log. *Parker v. Dep't of Navy*, 50 M.S.P.R. 343, 255 (1991). Under a long line of established precedent, these allegations rendered Perry's retirement-under-duress involuntary, and, if Perry could prove his allegations, would grant the Board jurisdiction over the mixed case.

But despite Perry's troubling allegations, the Board failed to hold the necessary evidentiary hearing. Our opening brief cited nearly a dozen cases outlining the governing law, explained why the Census Bureau should have known it could not have terminated Perry in these circumstances, and explained how the Merit Systems Protection Board erred as a matter of law by failing to apply the appropriate legal standard and consider relevant evidence. Amicus Br. 42-49.

The Government ignores the meat of our argument and instead nitpicks the facts, arguing that Perry's absences were not "consistent with an informal accommodation," and that Perry purportedly knew his "behavior was a serious problem." Gov. Br. 28-29. But that was *not* the basis of the Board's decision declining to hold the jurisdictional hearing. The Government cannot invent post hoc rationales to justify agency action. We explained that in our opening brief, too. *See*

Amicus Br. 49-50. Tellingly, the Government offers no response. And there's a good reason the Board did not rely on the Government's "weigh[ing]" of the "evidence." *Deines v. Dep't of Energy*, 98 M.S.P.R. 389, 395 (2005). In evaluating whether an employee pleaded jurisdiction at the outset of a case—which, remember, is all the Board was doing—the Board does not decide contested facts. Instead, based on the employee's pleadings, the Board holds an evidentiary hearing, only after which does it make final factual determinations.

This case should thus head back to the Board first. If the Board finds jurisdiction, it will decide the discrimination claims in the first instance. If the Board concludes that it lacks jurisdiction, the matter should proceed to the District Court, which should then oversee the discovery Perry deserves.

ARGUMENT

I. A District Court Must Consider Discrimination Claims De Novo.

The Government now agrees it led the District Court astray regarding the scope of district court review of discrimination claims in mixed cases. The Supreme Court established a simple rule, in this very case: Perry "need make" only "one stop" in "the district court," which "alone can resolve his entire complaint." *Perry v. MSPB*, 582 U.S. 420, 430 (2017) (*Perry I*). The relevant statutes provide clear direction about *how* the District Court should resolve the discrimination component of Perry's mixed case: by conducting a "trial de novo" on the "discrimination"

claims. 5 U.S.C. § 7703(c); *see id.* § 7702(e)(3) (confirming "right to trial de novo"). But the District Court did not consider Perry's claims "de novo." Instead, at the Government's urging, *see* JA83, the court reviewed the Board's resolution of the Civil Service Reform Act claim and declined to exercise jurisdiction over the discrimination claims, *see* JA747-748. That was pure legal error.

To aid the Court in crafting its opinion, we highlight two pitfalls in the Government's carefully hedged brief.

First, the Government reaches the right result for the wrong reasons. We all now agree Perry was entitled to de novo review on the merits of his discrimination claims. But the *why* is as important as that topline conclusion. Troublingly, the Government still appears to maintain that federal employees in mixed cases must doubly-exhaust discrimination claims whenever the Board labels its decision "jurisdictional." *See* Gov. Br. 19 & n.1. The Government no longer presses that argument with the same vigor here, because it uncovered new extra-record evidence showing Perry filed some kind of claim with an Equal Employment Opportunity office in 2012. *Id.* at 15, 19 n.1.

But whether Perry did (or didn't) file a separate claim with an Equal Employment Opportunity office in 2012 is legally irrelevant. As the Supreme Court explained, federal employees with mixed cases need not "split their claims." *Perry I*, 582 U.S. at 429. Instead, employees present an entire mixed case to the Merit

Systems Protection Board. From there, the entire mixed case heads to District Court for de novo review on the discrimination claims. *Id*. Nothing imposes a separate exhaustion requirement for discrimination claims if the Board happens to label its decision in the mixed case "jurisdictional." *See* Amicus Br. 33-37. Perry's actions before the Equal Employment Opportunity office in 2012—which are not in the record—are totally immaterial to this appeal.

There is pressing need for clear guidance on this issue from this Court. The Government has consistently argued that federal employees must separately exhaust discrimination claims. *See, e.g.*, *Squires v. MSPB*, No. 4:19-CV-5-D, 2019 WL 2884242, at *7 (E.D.N.C. July 3, 2019). In its brief before this Court, the Government stands by that argument, *see* Gov. Br. 19, and the regulations contemplating double exhaustion remain on the books, *see* 29 C.F.R. § 1614.302(b); *see generally* Amicus Br. 35. Meanwhile, federal employees typically "proceed *pro se*" and are ill-equipped to rebut the Government on these finer points of procedure. *Perry I*, 582 U.S. at 423 n.1. In correcting the judgment below, this Court should put a stop to the Government's procedural machinations and make clear there is no double exhaustion requirement for mixed cases decided on "jurisdictional" grounds.

Second, the Government repeatedly asserts that it "ultimately expects to prevail on Perry's discrimination claims," Gov. Br. 2, 21, 31, because of "the waiver provisions in the settlement agreement," *id.* at 32.

That is hard to fathom. The Older Workers Benefit Protection Act imposes strict requirements on employers, including the federal government. Failure to meet those statutory requirements invalidates a waiver of age discrimination claims. *See* Amicus Br. 38-39. Here, the settlement agreement's terms were facially deficient because they did not permit the agreement's revocation "for a period of at least 7 days following" its "execution." 29 U.S.C. § 626(f)(1)(G). Additionally, the settlement agreement is likely invalid because it appears the Census Bureau failed to provide Perry notice "in writing to consult with an attorney prior to executing the agreement." *Id.* § 626(f)(1)(E). It is difficult to imagine the Government will overcome these defects, which is perhaps why the Government ignores them.

Because Perry is proceeding *pro se*, it would be especially helpful for the Court to outline what should happen if the Government asserts the waiver: The Government will bear "the burden of proving" its strict compliance with the Older Workers Benefit Protection Act. *Id.* § 626(f)(3). If the Government fails to meet that burden, "the waiver is ineffective as a matter of law." *Thomforde v. Int'l Bus. Machs. Corp.*, 406 F.3d 500, 503 (8th Cir. 2005) ("The statutory requirements for waiver of [age discrimination] claims are strict and unqualified; if an employer fails to meet any of the statutory requirements, the waiver is ineffective as a matter of law."); *accord Kruchowski v. Weyerhaeuser Co.*, 446 F.3d 1090, 1095 (10th Cir. 2006) ("The absence of even one of the [Act's] requirements invalidates a waiver.")

(quotation marks and citation omitted). And if the waiver is ineffective, after more than a decade of litigation, Perry should finally receive discovery on his age discrimination claims.

II. The Merit Systems Protection Board Should Have Held An Evidentiary Hearing.

A. Before this case proceeds to discovery in the District Court, however, it should first head to the Merit Systems Protection Board. In assessing its jurisdiction at the outset of a case, the Board acts like a district court at the motion-to-dismiss stage. The Board looks solely to the employee's non-frivolous allegations. The Board "may not weigh evidence and resolve conflicting assertions of the parties, and the agency's evidence may not be dispositive." *Deines*, 98 M.S.P.R. at 395. In this case, Perry made non-frivolous allegations that warranted an evidentiary hearing: The agency "knew or should have known" that its threatened termination "could not be substantiated." *Fassett*, 85 M.S.P.R. at 679 (citing *Schultz v. U.S. Navy*, 810 F.2d 1133, 1136 (Fed. Cir. 1987)). When an employee such as Perry retires under the pressure of an unsustainable threat, the "facially voluntary" retirement is rendered involuntary, and the case falls within the Board's jurisdiction. *Garcia v. Dep't of Homeland Sec.*, 437 F.3d 1322, 1324, 1328 (Fed. Cir. 2006) (en banc). But the Board's decision misapplied the appropriate legal standard, ignored relevant evidence, and so failed to hold the necessary jurisdictional hearing. This Court reviews those errors de novo, and it should send this case back to the Board.

The Census Bureau's threat was unsustainable in two respects. *First*, based on Perry's allegations, the Census Bureau should have known it could not fire Perry for being away from his desk, because Perry was following the rules as they existed at the time. Perry's superiors had told him to "do what" he "needed to do" to manage his crippling disability, and authorized Perry's flexible work schedule. JA137, JA117. Relying on that authorization, Perry walked outside the building to manage his pain, and worked "during the evening in the office," "at home," and on his "day off as needed without pay." JA98; *see* JA137. Indeed, Perry calculated that he worked "more than 158 hours" outside of his official schedule, an amount greater than all the time the Bureau accused him of being absent from his desk. JA330. Separately, Perry utilized lunch breaks allowed to every other employee. JA117-118. Those breaks alone account for a fifth of the time the Bureau accused Perry of being absent. *See* Amicus Br. 44.

Copious precedent confirms a commonsense principle of basic fairness: An agency must warn a federal employee the old rules have changed *before* the agency may discipline him for violating the new rules. *See Smith v. Gen. Servs. Admin.*, 930 F.3d 1359, 1368 (Fed. Cir. 2019) ("Until the summer of 2016, Mr. Smith had never been corrected by his supervisors for failing to remove his PIV card and accordingly, he believed himself to be exempt from the PIV IT policy because of his disability."); *Crane*, 240 F. App'x at 418 ("Precedent generally requires notice to an employee

when previously condoned activity is no longer condoned, giving the employee the opportunity to conform to any new rules."); *Davis v. Dep't of Army*, 33 M.S.P.R. 223, 227 (1987) ("[A]ppellant's use of government property for which he was charged was initially authorized by his superiors. Thus, if a violation did occur, it was a technical violation of an unenforced policy."); *Tallis v. Dep't of Navy*, 20 M.S.P.R. 108, 111 (1984) ("Appellant had never been put on notice by management of any rules violations, nor had he ever been warned or counseled about his conduct."); *see also Douglas v. Veterans Admin.*, 5 M.S.P.R. 280, 305 (1981) (looking to "the clarity with which the employee was on notice of any rules that where violated in committing the offense, or had been warned about the conduct in question"). Perry received no warning that he could no longer work flexible hours, work from home, walk outside the building, or take lunch breaks. Perry thus had no "opportunity to conform to any new rules." JA118. As a result, the Census Bureau should have known it could not substantiate the threatened termination.

Second, based on Perry's allegations, the Census Bureau also should have known it could not terminate Perry for failing to sign an attendance log. *See* JA131. Perry explained that "no other GS-14 or GS-15 Supervisory IT Specialist was being required to sign-in." JA116. Only Perry. An "agency may not knowingly and intentionally treat similarly-situated employees differently." *Parker*, 50 M.S.P.R. at 354; *see Soc. Sec. Admin. v. Mills*, 73 M.S.P.R. 463, 473 (1996). But that is exactly

what the Census Bureau did. And because similarly-situated employees did not sign-in, Perry never received adequate notice that his actions would result in severe discipline. *See Tucker v. Veterans Admin.*, 11 M.S.P.R. 131, 133 (1982) (holding "the agency failed to put employees generally, and the appellant in particular, on notice that anyone apprehended stealing government property would be removed regardless of the value of the property or the employee's past record" because "disciplinary actions processed for theft during the previous year and half failed to reflect the new policy").

The Merit Systems Protection Board did not consider any of this when it denied Perry a jurisdictional hearing. The Board neither analyzed the Census Bureau's lack of notice that the rules had changed, nor the Census Bureau's disparate treatment of Perry. Nor did the Board analyze the other mitigating factors, such as Perry's spotless disciplinary record and his lack of malintent, that made it even less likely the Bureau could substantiate its threat to terminate him. *See* Amicus Br. 45.

Instead, the Board stated that Perry "admitted to his ongoing absences" and "did not begin signing in and out" immediately when instructed. JA349-350. As our opening brief explained, the Board applied the wrong legal standard and therefore ignored relevant evidence, legal errors this Court reviews de novo. *See* Amicus Br. 47; *Smith*, 930 F.3d at 1364; *Whittington v. MSPB*, 80 F.3d 471, 474 (Fed. Cir. 1996). To substantiate its termination, the Census Bureau needed to prove

two things: First, that Perry had actually been absent, or failed to sign in. Second, that Perry's conduct *warranted termination*. The Board's decision focused exclusively on the first question—*i.e.*, was Perry away from his desk, and did he fail to sign the log. The Board failed to evaluate the next question—*i.e.*, was Perry's conduct a fire-able offense under the circumstances. As a result, the Board never determined whether the Census Bureau could "substantiate[]" its threat to terminate Perry. *Fassett*, 85 M.S.P.R. at 679. The Board's error was purely legal, and requires this matter to head back to the Board for an evidentiary hearing.

B. The Government opposes remand to the Board, but its heart isn't in it. The Government agrees the relevant inquiry before the Board was whether Perry "plausibly allege[d] that the Census Bureau knew or should have known that it could not substantiate its proposal to remove him." Gov. Br. 27. The Government likewise agrees the Census Bureau could not terminate Perry "on the basis of conduct that had previously been authorized by Perry's supervisors." *Id*. Meanwhile, the Government does not dispute that the Census Bureau could not treat Perry "differently" from other "similarly-situated employees," none of whom were required to sign in. *Parker*, 50 M.S.P.R. at 354. Nor does the Government dispute that the Merit Systems Protection Board's decision failed to evaluate *any* of the foregoing.

That should be the end of the matter. Administrative agencies receive great deference. In exchange, agencies must consider the appropriate factors and the relevant evidence. When an agency doesn't, a reviewing court "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation marks and citation omitted). That's blackletter administrative law, and means this matter should head back to the Board. The Government doesn't really dispute that, either.

Because the Government cannot rebut the Board's fundamental failures, and the fact that this Court may not do the Board's homework in the first instance, the Government just ignores both issues, and apparently hopes this Court will too. Instead, the Government invites this Court to invent a new rationale for the Board's decision by weighing disputed evidence. Even if the Court entertains that invitation (to be clear, it shouldn't), the Government's arguments fail immediately out the gate.

First, the Board's precedent firmly forecloses debating the facts at this stage in the proceedings. In the decision at issue, the Board assessed its jurisdiction at the outset of a case. In that procedural posture, the Board acts like a district court considering a motion to dismiss. The Board *does not* "weigh evidence and resolve conflicting assertions of the parties." *Deines*, 98 M.S.P.R. at 395. Instead, a "non-frivolous allegation is all that is required to trigger the Board's jurisdiction at this

threshold stage." *Braun v. Dep't of Veterans Affs.*, 50 F.3d 1005, 1008 (Fed. Cir. 1995). For good reason. "It would be illogical to require" an employee "to prove in advance . . . evidence that a resignation or retirement was involuntary to secure a hearing on that very issue." *Id*.

Second, even if the Court debated the facts at this early stage, the Government's theory does not wash. The Government highlights the formal disability accommodation Perry received of "one 15 minute[] break per hour." Gov. Br. 28 (quoting JA614). The Government argues that this *formal* disability accommodation—which postdated the time period at issue—shows Perry's prior absences longer than 15 minutes were not "consistent with" Perry having previously received a more generous "*informal* accommodation." *Id*. (emphasis added).

That doesn't compute. Whatever the details of Perry's later formal accommodation, Perry's superiors could have authorized an even more flexible schedule initially. Perry alleged that his supervisor had told him to "do what" he "needed to do" to manage his pain, without limitation. JA137; *see* JA118 ("He had told me around 2007-2008 that as long as I got the work done[,] deviations in my work schedule were no problem."). Meanwhile, Perry's superiors permitted Perry to work "evenings in the office and at home, weekends, and on [his] day off." JA117. That fully explains why Perry "did not come in at all" on certain "days." Gov. Br. 28. Perry had been authorized to work from home, and at atypical times.

And note: Even as the Government debates the particulars of Perry's absences, the Government offers *no* response to Perry's allegation that employees were authorized to take lunch breaks but the charges against him failed to take those breaks into account. *See supra* p. 9. That silence is telling, and underscores that the Census Bureau abruptly changed the rules on Perry.

The Government next speculates that Perry resisted signing the attendance log because "Perry knew [his] absences of such duration and frequency were unauthorized." Gov. Br. 29. That ignores what Perry alleged: Perry was a "GS-14 Supervisory IT specialist," but "no other GS-14 or GS-15 Supervisory IT Specialist was being required to sign in." JA116. It is understandable that Perry, a senior employee with three decades of experience, demanded to know why his superiors targeted him for disfavored treatment. Nor was it "[in]consistent" with Perry's *prior* understanding of his "authorized" flexible "work schedule" for Perry to *later* conclude that management devised the short-lived attendance log as a pretext for his termination. Gov. Br. 30; *see* JA116. Indeed, Perry's allegations of retaliation are eminently plausible: Perry was a squeaky wheel who for years had accused management of improperly promoting younger, white employees through non-competitive processes. *See* JA236-237.

Regardless of who is right, this is all a matter for the Board to flesh out: An evidentiary hearing may prove Perry's allegations. Or it may prove the Government's case. But that is a factual dispute that this Court should not resolve.

Third, the Government dismisses the multiple "mitigating factors that could counsel in favor of more lenient discipline." Gov. Br. 30. But the Board *never* considered whether those factors—including Perry's spotless record, his lack of malintent, and other extenuating circumstances—meant the Census Bureau could not substantiate its threat to terminate Perry. In any event, the mitigating factors confirm the Census Bureau should have known it could not substantiate Perry's termination. Based on Perry's allegations, the core problems were that: (1) the Census Bureau failed to notify Perry that the rules had changed, prior to the threatened termination; and (2) the Census Bureau improperly singled out Perry for discipline. The Board erred when it failed to consider either issue.

Fourth, the Government highlights other evidence it says indicates "Perry entered into" the settlement "voluntarily," for instance that the agreement stated Perry's resignation was "voluntary," and that Perry had purportedly "expressed his satisfaction" "in an email" a month after signing. *Id*. at 25. The Board did not rely on that evidence in declining to hold a jurisdictional hearing. *See* JA707-708. For good reason. When an agency coerces an employee into retiring through a false threat of termination, the threat itself renders the "ostensibly" "voluntary separation"

into a "forced removal." *Garcia*, 437 F.3d at 1324, 1328 (quotation marks and citation omitted). It thus does not matter whether Perry's retirement was "facially voluntary" at the time. *Id*. at 1324. What matters is whether the Census Bureau's false threat coerced Perry into an otherwise seemingly voluntary retirement.

CONCLUSION

For the foregoing reasons, and those in the opening brief, the District Court's judgment should be vacated and the case should be remanded for further proceedings.

Respectfully submitted,

/s/ Nathaniel A.G. Zelinsky
NATHANIEL A.G. ZELINSKY
CATHERINE E. STETSON
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
nathaniel.zelinsky@hoganlovells.com

Court-Appointed Amicus Curiae *for Appellant*

November 16, 2023

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 32 and D.C. Cir. Local R. 28 because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and D.C. Cir. Local R. 32(e)(1), this document contains 3,902 words.

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/s/ Nathaniel A.G. Zelinsky
Nathaniel A.G. Zelinsky

CERTIFICATE OF SERVICE

I certify that on November 16, 2023, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Counsel for the government are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

I further certify that on November 16, 2023, I caused a true and correct copy of the foregoing to be served upon Appellant Anthony Perry by email and by mail at the following addresses:

Anthony W. Perry
5907 Croom Station Road
Upper Marlboro, MD 20772
tonywpy@aol.com

/s/ Nathaniel A.G. Zelinsky
Nathaniel A.G. Zelinsky