No. 17-370

IN THE

Supreme Court of the United States

JAMEKA K. EVANS,

Petitioner,

v.

GEORGIA REGIONAL HOSPITAL, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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The petition for a writ of certiorari and accompanying amicus briefs demonstrate that this case has all of the earmarks of one this Court should hear: It involves an intractable conflict over an issue of federal statutory law, with profound implications for individual dignity and employment practices from coast to coast. In response to this showing, respondents "take no position on whether this Court should grant the petition." Resp. Br. 4. They also say that if the Court grants certiorari, they "do not intend to participate" at the merits stage. *Id.* at 5-6.

Petitioner offers this short reply to make clear that these assertions should not dissuade this Court from granting certiorari.

1. A respondent's refusal to participate in this Court, or otherwise to defend a decision of a federal court of appeals, does not affect the certiorari calculus. To the contrary, this Court regularly grants certiorari and decides cases in which defendants that prevailed below decline to defend those victories. This often occurs where respondents are the United States or its agents. *See, e.g.*, *McLane Co. v. EEOC*, 137 S. Ct. 1159, 1166 (2017); *Beckles v. United States*, 137 S. Ct. 886, 892 (2017); *Green v. Brennan*, 136 S. Ct. 1769, 1775 (2016). It also happens where, as here, respondents are other types of governmental or private parties. *See, e.g.*, *Burnside v. Walters*, 133 S. Ct. 2337 (2013); *Becker v. Montgomery*, 532 U.S. 757, 762 n.1 (2001); *Toibb v. Radloff*, 501 U.S. 157, 160 n.4 (1991); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829 n.3 (1988); *Brown v. Hartlage*, 456 U.S. 45, 47 n.1 (1982).

The reason for this practice is simple: A respondent cannot create its own vehicle problem by refusing to participate in proceedings in this Court. To conclude otherwise would license respondents to insulate their wins from this Court's scrutiny. Accordingly, when a respondent in a certworthy case advises this Court that it does not intend to appear or otherwise to defend a judgment below, the Court typically grants certiorari and appoints an amicus to file a merits brief and to present oral argument in support of the judgment. Those customary procedures would be fully appropriate here.[1]

Respondents express concern that if they appear in this Court, they may "risk[] waiving certain defenses otherwise available" to them in further proceedings. Resp. Br. 5. For the reasons petitioner has already explained, those purported fears are baseless. *See* Petr. Letter to Clerk dated Oct. 10, 2017. Besides, respondents have pointed to no specific defense that would be waived.

But the most important point for present purposes is that respondents' reasons for refusing to participate are simply immaterial. A pro se plaintiff whose complaint is dismissed under 28 U.S.C. § 1915(e)(2)(B)(ii) for failure to state a claim upon which relief can be granted is entitled—just like any other plaintiff—to challenge that holding on appeal. *See Neitzke v. Williams*, 490 U.S. 319, 329-30 (1989).

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[1] Indeed, this Court may not even need to appoint an amicus to ensure comprehensive argumentation on both sides. As the Petition notes, the Department of Justice recently filed a brief in the Second Circuit that maintains—in accordance with the Eleventh Circuit's judgment below—that Title VII does not cover sexual orientation discrimination. *See* Pet. 14.

This must especially be so where, as here, the validity of the claim is so debatable as to be the subject of a circuit split. Accordingly, this Court should consider the Petition here just as it would any petition in which the defendant was appearing in support of the judgment below.

2. Despite refusing to participate or to take a position on whether certiorari should be granted, respondent Georgia Regional Hospital suggests that its identity as a named defendant "could pose [an] impediment[] to deciding the question presented." Resp. Br. 6. The Hospital is mistaken. No court has yet considered whether Georgia Regional Hospital, which employed petitioner during the relevant period here, is a proper defendant. Accordingly, any argument the Hospital may wish to make in that regard—or with respect to any other defense unrelated to the question presented—can be left for remand. *See, e.g.*, *Skinner v. Switzer*, 562 U.S. 521, 537 (2011). The issue poses no barrier to certiorari.

Even on remand, the issue of the Hospital's identity as a defendant will pose no problem. There is reason to believe that Georgia Regional Hospital *is* a proper defendant. Although the Hospital suggests it is not capable of being sued, it has appeared and defended against other claims—including a case in the same procedural posture as this one. *See* Defs.' Br. in Support of Pre-Answer Motion to Dismiss, *Pringle v. Ga. Reg'l Hosp.*, No. 1:09-CV-0147-TCB (N.D. Ga. July 31, 2009), ECF No. 26 (arguing that pro se plaintiff's complaint should be dismissed for failure to state a claim); *see also, e.g.*, *Gary v. Ga. Dept. of Human Res.*, 323 F. Supp. 2d 1368, 1373 (M.D. Ga. 2004) (allowing claim to proceed against Northwest Georgia Regional

Hospital). In any event, it is well established that plaintiffs whose claims are restored on appeal may amend their complaints on remand where necessary to name proper parties as defendants. *See, e.g.*, *Ximines v. George Wingate High Sch.*, 516 F.3d 156, 159-60 (2d Cir. 2008); *Johnson v. Johnson*, 466 F.3d 1213, 1215-16 (10th Cir. 2006); *Donald v. Cook Cty. Sheriff's Dept.*, 95 F.3d 548, 559-60, 562 (7th Cir. 1996); *cf.* Fed. R. Civ. P. 15(a)(2) (courts should "freely give leave [to amend] when justice so requires"). Therefore, even should it turn out that the Hospital's parent agency, the Georgia Department of Behavioral Health and Developmental Disabilities, is technically a more appropriate defendant here, a ministerial amendment can address that, with no difference for the litigation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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