No. 18-1139

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

OPPOSITION TO RUSSELL HOLT'S MOTION FOR LEAVE TO INTERVENE AS A RESPONDENT AND TO FILE A BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below. Movant Russell Holt was not a party to any of the proceedings below.

Pursuant to this Court's Rule 29.6, undersigned counsel states that BNSF Railway Company's parent company is Burlington Northern Santa Fe, LLC. Burlington Northern Santa Fe, LLC's sole member is National Indemnity Company. The following publicly traded company owns 10% or more of National Indemnity Company: Berkshire Hathaway Inc.

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OPPOSITION TO RUSSELL HOLT'S MOTION FOR LEAVE TO INTERVENE AS A RESPONDENT AND TO FILE A BRIEF IN OPPOSITION

INTRODUCTION

This case involves an Americans with Disabilities Act ("ADA") action brought by the Equal Employment Opportunity Commission ("EEOC") against petitioner BNSF Railway Company ("BNSF"). The movant, Russell Holt, was not a party to the proceedings below in either the district court or the court of appeals. He has never previously moved to intervene. Now that the Solicitor General, representing the EEOC, has confessed error and acknowledged the Ninth Circuit's erroneous holding and judgment below, Holt seeks for the first time to become a party by intervening as a respondent in this Court and to oppose BNSF's petition for a writ of certiorari ("Petition"). But non-party intervention before this Court is limited to "rare occasions" involving "extraordinary factors" that make intervention imperative, conditions that are not present here. *See* Shapiro et al., *Supreme Court Practice* 427 (10th ed. 2013). Holt's disagreement with the EEOC's legal position does not amount to an extraordinary circumstance making imperative this exceedingly rare remedy. *See id.* at 428.

The fact that the Solicitor General, representing the EEOC, has acknowledged the Ninth Circuit's error in affirming summary judgment in favor of the EEOC does not qualify as an extraordinary circumstance compelling non-party intervention. Holt disagrees with the government's position that BNSF permissibly required that Holt

provide medical documentation to complete a statutorily authorized medical examination. But in ADA actions like this one—as with the multitude of other lawsuits the EEOC files each year—the EEOC does not merely represent the private interests of individual complainants. Instead, the EEOC's mandate is to protect the public interest through appropriate government enforcement and to vindicate the legal interests of the federal government. Had Holt wished to protect his own personal interests in this action, he was required to seek timely intervention in the district court. 42 U.S.C. §§ 2000e-5(f)(1), 12117(a). He chose not to do so, instead electing to allow the EEOC to control the litigation.

At this late stage of the litigation, Holt's belated request to undo his decision to stay on the sidelines is untimely, meritless, and disruptive. The record is closed, and the Solicitor General has stated the United States' position based on the record. The EEOC is bound by that position notwithstanding Holt's personal views. Granting Holt's motion would undermine the government's important gatekeeping role in ADA actions and would invite a flood of similar motions from every charging individual disappointed with the government's legal analysis and litigation strategy, particularly in appellate matters. Nothing in Holt's motion warrants treating this as an exceptional case, and the Court should deny the motion.

STATEMENT

BNSF operates one of the largest freight railroad networks in North America, with more than 32,000 miles of track in 28 states. Like many employers, BNSF requires medical examinations for all applicants seeking employment in safety-sensitive

positions, as the ADA expressly allows. *See* 42 U.S.C. § 12112(d)(3). BNSF conditions its offers of employment on the applicant's satisfactory "completion of the medical screening process." Pet. App. 18a. This case concerns "individualized" medical examinations, which are specific inquiries or follow-up testing in situations where an applicant discloses, or initial screening reveals, potential medical issues that could be relevant to the safe performance of the applicant's job duties. BNSF pays for the initial examination required of all applicants, but if follow-up medical testing is needed to ascertain whether the applicant has an impairment, the applicant must bear the expense of that individualized testing. Pet. 2.

In 2011, BNSF conditionally offered Holt the position of Senior Patrol Officer—by statute, a certified police officer position with broad crime-prevention responsibilities. *See* 49 U.S.C. § 28101; Pet. App. 5a. Like all applicants for the position, Holt underwent a post-offer medical examination conducted by an independent contractor at BNSF's expense. Pet. App. 6a. The examination revealed that Holt had a history of back issues requiring treatment, including a diagnosis of a spinal disc extrusion in 2007. *Id.* BNSF's in-house medical officer determined that he lacked sufficient information to determine whether Holt had a present back condition and requested that Holt provide a current MRI scan and updated medical records. Pet. App. 8a. Holt did not provide any of the requested information and claimed he could not afford the cost of obtaining a new MRI scan. Pet. App. 9a. Because Holt failed to complete the post-offer medical examination, BNSF designated Holt as having declined the conditional job offer. *Id.*

Holt filed a charge with the EEOC, which sued BNSF, alleging ADA violations. Pet. App. 10a. Holt did not intervene in the district court. The district court granted summary judgment for the EEOC, holding that the agency had established a claim for disability discrimination under 42 U.S.C. § 12112(a), the ADA's general anti-discrimination provision. *See* Pet. App. 47a-48a. In the district court's view, the record showed that BNSF subjected Mr. Holt to "disparate treatment" and that this treatment was "because of" a disability. Pet. App. 48a. BNSF and EEOC stipulated to damages, and the district court entered a nationwide injunction against BNSF. Pet. 7. BNSF appealed to the Ninth Circuit. Pet. App. 11a.

Holt also did not intervene before the Ninth Circuit. That court affirmed the judgment of ADA liability under 42 U.S.C. § 12112(a), but it did so on different reasoning and on grounds not urged by the EEOC. Specifically, the Ninth Circuit disagreed with "how the EEOC frames the discriminatory act," namely, BNSF's alleged "rescission of [Holt's] job offer" when he failed to complete the medical screening process. Pet. App. 18a. Instead, the Ninth Circuit held that BNSF "regarded" Holt as disabled because it conditioned its offer of employment on the results of an individualized medical examination. Pet. App. 13a-17a. The Ninth Circuit then held that BNSF discriminated against Holt in violation of the ADA by requiring him to pay for the individualized medical examination. Pet. App. 17a-24a.

BNSF petitioned this Court for a writ of certiorari, seeking review of two questions presented by the Ninth Circuit's opinion: (1) whether requiring an individualized medical examination as a condition of employment establishes in and of

itself that an employer "regards" an applicant or employee as disabled for the purposes of a discrimination claim under the ADA; and (2) whether requiring an applicant or employee to pay for a required individualized medical examination establishes that the employer has unlawfully discriminated under the ADA. Pet. i. The Solicitor General, as the authorized legal representative of the EEOC before this Court, *see* 42 U.S.C. § 2000e-4(b)(2), filed a responsive brief in which the government confessed error on the second question presented. The government stated that "the United States now agrees with petitioner that summary judgment in favor of the EEOC was inappropriate" because "if, as the record indicates, requiring Holt to pay for the follow-up MRI was . . . the application of a facially neutral policy, with no discriminatory motive, then it was lawful . . . because it did not constitute disparate treatment on the basis of disability." Br. for Resp. 20, 24. The government recommended that the Court grant the Petition, vacate the judgment of the Ninth Circuit, and remand for further proceedings ("GVR") in light of the EEOC's new position as set forth in the brief for the Respondent. *Id.* 26-27. Only then, nearly five years after this litigation commenced, did Holt file his Motion for Leave to Intervene as a Respondent ("Motion") and a proposed Brief in Opposition to BNSF's Petition.

ARGUMENT

A. Intervention In This Court Is Exceedingly Rare And Permitted Only Where Imperative.

Intervention by non-parties in the Supreme Court of the United States has been permitted only "in unusual circumstances" and is not available "in cases containing no extraordinary factors." *Supreme Court Practice*, *supra*, at 427. While intervention may,

in rare instances, be available to preserve "the existence of a justiciable case" once this Court has granted certiorari to resolve the merits of the question presented, *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 834 n.8 (1989); *Rogers v. Paul*, 382 U.S. 198, 199 (1965) (per curiam), or to vindicate "particular statutory" objectives, *Int'l Union, UAW Local 283 v. Scofield*, 382 U.S. 205, 210 (1965), absent these extraordinary circumstances, intervention is denied. Indeed, intervention by non-parties at this late stage is so rare that, as Holt acknowledges, no statute or rule establishes a standard for intervening before this Court. *See* Motion 5. Holt cites no case, and BNSF is aware of none, in which a non-party has been permitted to intervene at the certiorari stage in order to file a brief in opposition. "[T]he Court routinely denies intervention motions without comment." *Supreme Court Practice*, *supra*, at 428.[1]

Holt invokes Federal Rule of Civil Procedure 24 as the standard for "intervention as of right." Motion 5. But this is not the standard here. Although the Court has suggested that "the policies underlying" Rule 24 may be relevant, it also has emphasized that Rule 24 "appl[ies] only in the federal district courts." *Scofield*, 382 U.S. at 217 n.10. Courts of appeals have imposed a *higher* standard for intervention in light of the "unique problems caused by intervention at the appellate stage." *Amalgamated Transit Union Int'l, AFL-CIO v. Donovan*, 771 F.2d 1551, 1553 n.3 (D.C. Cir. 1985) (per curiam). Thus, where no intervention was sought before the district court, intervention at the

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[1] *See, e.g.*, *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 419 (2017); *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 571 U.S. 1235 (2014); *Nat'l Fed. of Indep. Bus. v. Sebelius*, 566 U.S. 935 (2012); *Salazar v. Buono*, 558 U.S. 810 (2009); *Metro. Life Ins. Co. v. Glenn*, 553 U.S. 1003 (2008); *Carson City v. Webb*, 540 U.S. 1141 (2004); *Med. Bd. of Cal. v. Hason*, 537 U.S. 1231 (2003).

appellate level is generally reserved for "an exceptional case for *imperative* reasons." *Id.* at 1552 (emphasis added; internal quotation marks omitted). "Where, as here, the motion for leave to intervene comes *after* the court of appeals has decided a case, it is clear that intervention should be even more disfavored." *Id.* at 1553. The bar for intervention is at its apex when it is sought for the first time in this Court.

B. No Extraordinary Circumstances Make Intervention Imperative Here.

Holt's failure to seek timely intervention is fatal to his motion, and he should not be permitted to achieve party status for the first time in the Supreme Court. Holt did not seek to intervene before the district court, where BNSF could have tested his arguments through the adversarial process at an early stage of the case. Nor did he seek to intervene in the Ninth Circuit, where the district court's judgment was subjected to appellate review. This Court is not the proper venue in which to join new parties to the case, or adjudicate new interests not presented below.

1. Holt's failure to pursue intervention at an earlier stage is fatal in light of the fact that Congress provided individuals in Holt's position with a statutory mechanism to intervene in ADA actions brought by the EEOC—provided the request to intervene is *timely*. 42 U.S.C. § 2000e-5(f)(1); *see also id.* § 12117(a) (incorporating Title VII procedure into the ADA). The statute "bars an aggrieved individual" from bringing a private action based on conduct on which the EEOC itself has brought suit. *EEOC v. Frank's Nursey & Crafts, Inc.*, 177 F.3d 448, 456 (6th Cir. 1999). But it reserves to individuals like Holt a limited "right to intervene in the EEOC's action." *Id.* EEOC notifies charging individuals of their statutory right to intervene in the EEOC action.

EEOC, *Notice to Charging Parties of Commission Suits*, Regional Attorney's Manual, *available at* https://www.eeoc.gov/eeoc/litigation/manual/2-2-e_notice_to_cps.cfm. The agency's letter urges charging individuals like Holt to make an early decision on whether to intervene, warning them that "the court can deny you the right to intervene if the case has progressed substantially by the time you request intervention." *Id.*; *see also NAACP v. New York*, 413 U.S. 345, 365 (1973) ("If [a request to intervene before the district court] is untimely, intervention must be denied."). As a result, charging individuals routinely exercise their limited right to intervene at the district court level in ADA and Title VII lawsuits brought by the EEOC (and may request attorneys' fees if they prevail, 42 U.S.C. § 2000e-5(k)), and they generally intervene early in the proceedings.[2] Holt did not comply with these standards.

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[2] *See, e.g.*, ***EEOC v. JCFB, Inc.***, No. 19-CV-00552-LHK (N.D. Cal.) (Complaint: 1/31/19; Mot. to Intervene: 4/12/19); ***EEOC v. A & E Tire, Inc.***, No. 17-cv-02362-RBJ (D. Colo.) (Complaint: 9/29/17; Mot. to Intervene: 11/10/17); ***EEOC v. Denton Cty.***, No. 4:17-cv-00614 (E.D. Tex.) (Complaint: 8/31/17; Mot. to Intervene: 10/3/17); ***EEOC v. Big 5 Corp.***, No. 2:17-cv-01098-RSM (W.D. Wash.) (Complaint: 7/20/17; Mot. to Intervene: 8/16/17); ***EEOC v. Favorite Farms, Inc.***, No. 8:17-cv-1292-T-30AAS (M.D. Fla.) (Complaint: 5/31/17; Mot. to Intervene: 10/23/17); ***EEOC v. Jackson Nat'l Life Ins. Co.***, No. 16-cv-02472-PAB-SKC (D. Colo.) (Complaint: 9/30/16; Mot. to Intervene: 12/1/16); ***EEOC v. Mayflower Seafood of Goldsboro, Inc.***, No. 5:15-cv-636-BO, 2016 WL 9782116, at *1 (E.D.N.C.) (Complaint: 12/7/15; Mot. to Intervene: 3/25/16); ***EEOC v. Trans Ocean Seafoods, Inc.***, No. 15-cv-1563-RAJ (W.D. Wash.) (Complaint: 9/30/15; Mot. to Intervene: 12/9/15); ***EEOC v. Emory Healthcare, Inc.***, No. 1:15-cv-03407-AT-AJB (N.D. Ga.) (Complaint: 9/29/15; Mot. to Intervene: 12/2/15); ***EEOC v. Dolgencorp, LLC***, No. 3:14-cv-441-TAV-HBG (E.D. Tenn.) (Complaint: 9/23/14; Mot. to Intervene: 11/24/14); ***EEOC v. J & R Baker Farms, LLC***, No. 7:14-cv-136 (HL) (M.D. Ga.) (Complaint: 8/28/14; Mot. to Intervene: 11/25/14); ***EEOC v. Parker Drilling Co.***, 3:13-cv-00181-SLG (D. Ak.) (Complaint: 9/18/13; Mot. to Intervene: 1/16/14); ***EEOC v. Vamco Sheet Metals, Inc.***, No. 13-cv-6088 (JPO) (S.D.N.Y) (Complaint: 8/29/13; Mot. to Intervene: 12/22/13); ***EEOC v. BNSF Ry. Co.***, No. 2:12-cv-02634-JWL-KGG (D. Kan.) (Complaint: 9/27/12; Mot. to Intervene: 10/4/12); ***EEOC v. SunTrust Bank***, No. 8:12-cv-1325-VMC-MAP (M.D. Fla.) (Complaint: 6/14/12; Mot. to Intervene: 8/14/12); ***EEOC v. Suffolk Laundry Servs., Inc.***,

Holt contends that his belated request for intervention is timely because the government's acknowledgement of the Ninth Circuit's legal error and request for GVR means that the EEOC has "ceased to represent his interests." Motion 6. But Holt misconstrues the government's role in an ADA action. "[T]he EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties[.]" *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977). The agency "is not merely a proxy for the victims of discrimination[.]" *Gen. Tel. Co. of Nw., Inc. v. EEOC*, 446 U.S. 318, 326 (1980). Instead, the EEOC also acts "to vindicate the public interest in preventing employment discrimination." *Id.* "The statute clearly makes the EEOC the master of its own case and confers on the agency the authority to evaluate the strength of the public interest at stake." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291 (2002). EEOC guidance makes this clear to charging individuals at the time it files suit, alerting them that "the agency's purpose in filing suit is to further the public interest in preventing employment discrimination and that it is possible the Commission's objectives and the charging [individuals'] interests will diverge during the litigation." *Notice to Charging Parties*, *supra*. It expressly notifies charging individuals that "[i]f [they] have intervened in the suit, [they] will be able [to] pursue [their] individual interests separately if the EEOC's interests diverge from [theirs] at any point." *Id.*

Indeed, it is not unusual for litigation decisions in EEOC actions to affect the rights and remedies available to a charging individual. For example, under the Age

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No. 12-cv-409 (MKB) (E.D.N.Y.) (Complaint: 1/30/12; Mot. to Intervene: 2/2/12); *EEOC v. Bloomberg L.P.*, No. 1:07-cv-08383 (LAP) (S.D.N.Y.) (Complaint: 9/27/07; Mot. to Intervene: 10/3/07).

Discrimination in Employment Act, the charging individual's right to bring a private action against an employer for unlawful conduct terminates entirely once EEOC files suit. 29 U.S.C. § 626(c)(1). Charging individuals always face some risk that litigation decisions by EEOC may "impair or impede [their] ability to protect [their] interest." *See* Motion 5–6. "[O]nce a charge is filed . . . the EEOC is in command of the process." *Waffle House*, 534 U.S. at 291. That is precisely why many charging individuals choose to intervene, and do so early on.

Holt did not act to protect his individual interests by intervening before the district court. For this reason, Holt's near-total reliance on *NAACP*, 413 U.S. at 365–66, and *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977), is completely misplaced. *See* Motion 6. Those cases addressed the Rule 24(a) standard for timely intervention at the *district court* level, and said nothing about the standard for the belated appellate-level intervention Holt attempts here. By failing to exercise his statutory right to intervene, Holt left the litigation to the EEOC without any guarantee that it would litigate the case according to his wishes. It does not matter that Holt subjectively believed that the "EEOC adequately represented [his] interest until this point[.]" *See* Motion 6. A charging individual "who wishes to participate in tactical decisions which may substantially affect the outcome of the litigation" must timely intervene. *Adams v. Proctor & Gamble Mfg. Co.*, 697 F.2d 582, 584 (4th Cir. 1984) (en banc). "If he does not intervene and leaves it to the EEOC to do whatever seems best to the EEOC for him, he should not be heard to complain of the consequences of his own indifference." *Id.* Holt's failure to timely intervene to represent his interests precludes

the extraordinary relief of eleventh-hour non-party intervention in the Supreme Court.

2. Nor does the Solicitor General's confession of error constitute unfair surprise or somehow make Holt's motion timely. There is nothing extraordinary about the government reconsidering or modifying its position before this Court. Quite the contrary, it is an essential feature of the Solicitor General's duty to "conduct and argue suits and appeals in the Supreme Court . . . in which the United States is interested." 28 U.S.C. § 518(a); *see also* 28 C.F.R. § 0.20(a). "[I]t is not uncommon for there to be conflicting views among the various offices and agencies within the executive branch," and the Solicitor General has the "power to reconcile differences among his clients, to accept the views of some and to reject others, and, in proper cases, to formulate views of his own." *Role of the Solicitor General*, 77-56 Op. Att'y Gen. 228, 230 (1977). By statute, the Solicitor General serves as the EEOC's authorized legal representative before this Court, 42 U.S.C. § 2000e-4(b)(2), and it is a matter of public record that the Solicitor General's positions may differ from the agency's below. Indeed, empirical studies have shown that in Title VII litigation—analogous to the ADA action presented in this action—the Solicitor General's position before this Court has diverged from previous EEOC positions in approximately 25% of cases. *See* Margaret H. Lemos, *The Solicitor General as Mediator Between Court & Agency*, 2009 Mich. St. L. Rev. 185, 198 (2009) (identifying divergent positions in briefs presented in 21 of 85 cases). This Court has readily managed its docket in these and other cases in which the Solicitor General has confessed error or changed position without taking the extraordinary step of inviting new parties into the litigation at the certiorari stage.

Here, the Solicitor General, as the representative of the EEOC before this Court, has recognized that "the public interest in preventing employment discrimination" is not served by defending a judgment of liability that is based on a concededly erroneous legal premise. *Gen. Tel. Co.*, 446 U.S. at 326. The EEOC is bound by this confession of error. *United States v. Jones*, 468 F.2d 454, 457 (3d Cir. 1972) (requiring the government to "maintain consistent positions" where it "has confessed error before the Supreme Court"). Nothing Holt can say about his private interests can change the binding nature of that concession because the government has a responsibility to put the public interest first. *See Young v. United States*, 315 U.S. 257, 258 (1942).

Holt's request also would reshape intervention practice in this Court. The vast majority of ADA and Title VII actions brought by EEOC against private employers originated with a charging individual with a personal stake in the outcome of the action. *See* 42 U.S.C. § 2000e-5(b). Holt asks this Court to adopt a new precedent that would permit charging individuals to remain on the sidelines throughout the litigation, benefitting when it suits them, only to emerge suddenly at late stages of the appellate proceedings whenever they conclude that their personal interests have diverged from those of the government. This would turn non-party intervention in this Court from an extraordinary occurrence to a commonplace practice in ADA and Title VII suits initiated by EEOC. Charging individuals will frequently disagree with the EEOC's decisions about whether and what issues to appeal to a court of appeals, or about whether and on what issues to seek or oppose review in this Court.

Not only would allowing intervention in these circumstances create a disruptive

precedent for this Court, but it is entirely unnecessary as a means for allowing Holt to express his personal interest. Should the Court see fit to grant plenary review on either of the questions presented in the petition, it would be within the Court's discretion to invite Holt's counsel to brief and argue the case as amicus curiae in support of the judgment below. That is the usual course in cases before this Court involving confessions of error.[3] And if the Court instead accepts the Solicitor General's suggestion to GVR, thereby sending the case back to the court of appeals for disposition, Holt's request for intervention in this Court would be moot.

3. Moreover, intervention would prejudice BNSF by adding at this late stage of proceedings—long after the record has closed—a new adverse party. BNSF litigated this case against the EEOC. Had Holt timely intervened and asserted his interests in the district court, there would have been adversarial presentation of Holt's interests in the lower courts, and BNSF and the EEOC may have litigated the case differently. Timely intervention also would have afforded the district court and court of appeals an opportunity to consider Holt's viewpoint in the first instance. Intervention at the appellate stage is rarely permitted for precisely this reason: it is inherently unfair and disruptive to the parties who have participated throughout the case. *Amalgamated Transit Union*, 771 F.2d at 1553.

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[3] *See, e.g*, *Smith v. Berryhill*, 139 S. Ct. 1765 (2019); *Culbertson v. Berryhill*, 139 S. Ct. 517 (2019); *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *Kucana v. Holder*, 558 U.S. 233 (2010).

C. Holt Cites No Authority Supporting Intervention And Granting It Here Would Justify Frequent Intervention In This Court's Certiorari Docket.

Tellingly, Holt cites *no* case in which this Court granted non-party intervention based on the Solicitor General's confession of error in this Court. Without even one precedent to stand on, Holt invokes inapposite authority to suggest that his case presents the type of unusually compelling circumstances making non-party intervention imperative. Neither *EEOC v. PJ Utah, LLC*, 822 F.3d 536, 540 (10th Cir. 2016), nor *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 16-2424, 2017 WL 10350992, at *1 (6th Cir. Mar. 27, 2017), cited at Motion 5–6, addresses non-party intervention before the Supreme Court. To the contrary, they suggest that intervention may be appropriate earlier in the action, such as before the district court or prior to briefing in the court of appeals. This Court, by contrast, has denied non-party intervention by a charging individual in an EEOC action presenting similar circumstances. *See EEOC v. Catastrophe Mgmt. Sols.*, 138 S. Ct. 2015 (2018). There, the charging individual in a Title VII action sought leave to intervene for the first time to file a petition for a writ of certiorari. Mot. for Leave to Intervene to File a Petition for Writ of Certiorari at 4, *Catastrophe Mgmt. Sols.*, No. 17M109 (Apr. 4, 2018). She contended that her intervention motion was timely because she acted promptly to intervene once EEOC declined to petition this Court for review. *Id.* at 2. Like Holt, the movant never intervened in the EEOC's action in the lower courts, but argued that her interests would not be represented before this Court unless she was permitted to intervene. *Id.* at 4. The Court denied her motion without comment. *Catastrophe Mgmt.*

Sols., 138 S. Ct. at 2015. The same considerations that led to the denial of intervention in *Catastrophe Management* apply here.

The Supreme Court cases cited by Holt are likewise inapposite. In *Scofield*, the Court addressed the circumstances under which charging parties may intervene in Court of Appeals proceedings that review or enforce National Labor Relations Board orders—not intervention for the first time before this Court. 382 U.S. at 208. The Court held that the propriety of intervention turns on "the particular statutory scheme and agency" and emphasized that its "discussion [wa]s limited to Labor Board review proceedings." *Id.* at 210. Here, the "particular statutory scheme" calls for a charging party who wishes to participate in the litigation to intervene before the district court and at an early time. *See* 42 U.S.C.§ 2000e-5(f)(1); *Notice to Charging Parties*, *supra*. Holt did not do so.

In *Mullaney v. Anderson*, 342 U.S. 415, 416–17 (1952), the Court authorized non-parties to intervene in an action challenging Alaska's collection of licensing fees from nonresident commercial fishermen to preserve the justiciability of the action. The petitioner in *Mullaney* challenged the respondents' standing for the first time once the case was already before the Court, and after granting plenary review in order to decide the question presented on the merits the Court approved intervention to avoid "requir[ing] the new plaintiffs to start over in the District Court." *Id.* at 417. Here, by contrast, there is no dispute that the United States has standing and that the petition is justiciable—Holt simply does not agree with the government's legal position on one of two legal questions in the Petition. That disagreement does not constitute

"extraordinary" circumstances and does not warrant departing from the Court's usual practice of refusing to allow non-parties to intervene for the first time before this Court. *Supreme Court Practice*, *supra*, at 427.

CONCLUSION

The Solicitor General has confessed error consistent with the government's discharge of its duty to vindicate appropriate public enforcement of the ADA. As a non-party, Holt does not control the federal government's litigating positions. This Court has never granted non-party intervention in such circumstances, and if the Court were inclined to grant plenary review on question two of the Petition, it could invite Holt or other *amicus curiae* to defend the judgment below consistent with its usual practice. Holt's invitation to recognize a right of intervention in cases where the Solicitor General confesses error would reshape intervention practice in this Court, and would depart from this Court's long-established and tested procedures for managing its certiorari docket in such circumstances. The Motion should be denied.

Respectfully submitted.

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