No. 18-1139

IN THE
SUPREME COURT OF THE UNITED STATES

BNSF Railway Co.,

Petitioner,

v.

Equal Employment Opportunity Commission,

Respondent.

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

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

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Russell Holt seeks to intervene to defend a judgment that the EEOC obtained on his behalf, but that the Solicitor General now joins BNSF in attacking. In the nearly fifty years that the EEOC has been bringing enforcement suits like this one, it appears that the Solicitor General has never before asked this Court to undo a judgment that the Commission secured for an individual victim of discrimination. As Mr. Holt's motion explained, that extraordinary circumstance makes this the rare case warranting intervention in this Court. The Solicitor General does not oppose intervention. BNSF, however, urges the Court to deny the motion and leave the judgment below undefended. Opp. 5-16. Its arguments are unpersuasive.

1. As an initial matter, BNSF does not deny that Mr. Holt has a direct and substantial interest in this case. Nor could it: Although the EEOC's enforcement actions undoubtedly serve a broader public interest in stamping out discrimination, *cf.* Opp. 9, the Commission brings suit "at the behest of and for the benefit of specific individuals" like Mr. Holt. *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 326 (1980). Here, the Commission's complaint sought "to provide appropriate relief to Russell Holt," C.A. E.R. 1578, and the Commission secured a judgment awarding him nearly $100,000.

Recognizing Mr. Holt's "personal interest" in that award, BNSF posits that if this Court granted certiorari, it could "invite Holt's counsel to brief and argue the case as amicus curiae in support of the judgment below." Opp. 13. Appointing an amicus gives the Court the benefit of adversarial presentation even when no interested party is available to defend the judgment under review. But it would be highly artificial to resort to that device where, as here, the directly interested party

stands ready to defend the judgment through the time-tested procedure of a motion to intervene. And granting intervention would allow Mr. Holt to protect his interests—and provide the Court with adversarial briefing—now, while the Court decides whether the case warrants certiorari at all.

2. In resisting intervention, BNSF insists that victims of discrimination who do not exercise their right to intervene as soon as the EEOC brings suit are forever barred from seeking to become parties—no matter how the litigation unfolds. Opp. 7-11. But that has never been the law, and for good reason.

It is certainly true that individuals sometimes intervene shortly after the EEOC brings suit on their behalf. Opp. 8 & n.2. But as BNSF's own examples illustrate, they typically do so because they wish to assert claims or theories that the Commission could not or did not pursue.[1] Mr. Holt is not seeking to add anything to

[1] *See EEOC v. JCFB, Inc.*, No. 19-cv-552 (N.D. Cal.) (adding state-law claims); *EEOC v. Denton Cty.*, No. 17-cv-614 (E.D. Tex.) (adding Title VII claim to EEOC's Equal Pay Act claim); *EEOC v. Big 5 Corp.*, No. 17-cv-1098 (W.D. Wash.) (adding state-law claim); *EEOC v. Favorite Farms, Inc.*, No. 17-cv-1292 (M.D. Fla.) (same); *EEOC v. Mayflower Seafood of Goldsboro, Inc.*, No. 15-cv-636 (E.D.N.C.) (same); *EEOC v. Trans Ocean Seafoods, Inc.*, No. 15-cv-1563 (W.D. Wash.) (same); *EEOC v. Emory Healthcare, Inc.*, 15-cv-3407 (N.D. Ga.) (adding theory of ADA coverage); *EEOC v. Dolgencorp, LLC*, No. 14-cv-441 (E.D. Tenn.) (adding retaliation claim to EEOC's discrimination claims); *EEOC v. J & R Baker Farms, LLC*, No. 14-cv-136 (M.D. Ga.) (adding aggrieved individuals, state-law claims, and a claim under the Migrant and Seasonal Agricultural Worker Protection Act); *EEOC v. Parker Drilling Co.*, 13-cv-181 (D. Alaska) (adding state-law claim); *EEOC v. Vamco Sheet Metals, Inc.*, No. 13-cv-6088 (S.D.N.Y.) (adding state-law claims and a claim under the Fair Labor Standards Act); *EEOC v. BNSF Ry. Co.*, No. 12-cv-2634 (D. Kan.) (adding retaliation claim to EEOC's discrimination claim); *EEOC v. SunTrust Bank*, No. 12-cv-1325 (M.D. Fla.) (adding aggrieved individual, state-law claims, race-discrimination claim, and retaliation claim to EEOC's sex-discrimination claim); *EEOC v. Suffolk Laundry Services, Inc.*, No. 12-cv-409 (adding state-law claims); *EEOC v. Bloomberg, L.P.*, No. 07-cv-8383 (S.D.N.Y.) (same).

the Commission's claim that BNSF discriminated against him in violation of the ADA. Nor does he suggest that he is entitled to intervene because of some quibble with the Commission's "tactical decisions" about how best to advance that claim. Opp. 10 (citation omitted). Instead, he seeks to intervene only because the Solicitor General, representing the EEOC in this Court, has abandoned the Commission's claim altogether and is instead arguing against it.

In comparably unusual circumstances, courts of appeals have not hesitated to allow aggrieved individuals to become parties to EEOC suits even if the Commission's failure to represent their interests became apparent only after judgment or on appeal. *See, e.g.*, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 16-2424, 2017 WL 10350992, at *1 (6th Cir. Mar. 27, 2017); *see also EEOC v. La. Office of Cmty. Servs.,* 47 F.3d 1438, 1442 (5th Cir. 1995) (collecting examples). Those decisions are consistent with the broader principle that a post-judgment motion to intervene is timely if "the potential inadequacy of representation [by the current parties] came into existence only at the appellate stage." *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001) (citation omitted); *see, e.g.*, *Peruta v. Cty. of San Diego*, 824 F.3d 919, 940-41 (9th Cir. 2016) (granting motion to intervene to petition for rehearing); *United States v. $186,416.00 in U.S. Currency*, 722 F.3d 1173, 1175 (9th Cir. 2013) (same); *Igartua v. United States*, 636 F.3d 18 (1st Cir. 2011) (same).

Significantly, BNSF cites no decision denying an aggrieved individual's motion to intervene after a comparable change in the Commission's position. To the contrary, the decision on which it chiefly relies actually supports Mr. Holt. In *Adams v. Proctor*

& Gamble Manufacturing Co., 697 F.2d 582 (4th Cir. 1983) (en banc), the Fourth Circuit did not, as BNSF implies (Opp. 10), deny a motion to intervene as untimely. Instead, it held that aggrieved individuals who had *not* sought to intervene in an earlier EEOC enforcement suit were still bound by the resulting consent decree. *Adams*, 697 F.2d at 584. In so doing, the court explained that if the individuals were unsatisfied with the EEOC's representation of their interests, they should have intervened in the original action. *Id.* That is what Mr. Holt seeks to do here.

It is no surprise that courts have rejected BNSF's categorical, now-or-never view of intervention in EEOC litigation. To be sure, victims of discrimination who opt not to intervene at the outset forgo the chance to assert additional claims, and they are on notice that they may at some point disagree with the Commission about "the relief to which [they] are entitled" or "some other aspect of EEOC's litigation strategy." EEOC, *Notice to Charging Parties of Commission Suits*, https://www.eeoc.gov/eeoc/litigation/manual/2-2-e_notice_to_cps.cfm. But they are not warned that the Commission (or the Solicitor General) could conceivably switch sides and abandon their claims altogether. *Id.* And even if unrepresented laypeople could be deemed to be on notice of that risk, *cf.* Opp. 9-11, it would be profoundly inefficient to require *every* aggrieved individual to retain counsel, move to intervene, and then participate in years of litigation (thereby burdening the courts and the parties with duplicative filings) just to guard against such an exceedingly remote possibility. Far better to deal with that situation by allowing intervention in the tiny fraction of cases where it actually comes to pass—which is exactly what the lower courts have done.

3. There is thus little doubt that Mr. Holt would have been allowed to intervene if the EEOC had changed its position in the district court or the court of appeals. But BNSF maintains that the Solicitor General's reversal of the Commission's position is not sufficiently extraordinary to warrant intervention in this Court. Opp. 5-7, 11-16. BNSF both understates the extraordinary nature of this case and overstates the threshold for intervention reflected in this Court's practice.

a. As to this case, BNSF observes that it is not uncommon for the Solicitor General to confess error. Opp. 11. That is true enough—it happens a handful of times each Term. But the typical confession of error (say, in a criminal case) provides no occasion for anyone to intervene because it seeks to undo a judgment that benefits the Government, or perhaps the public at large. Here, in contrast, the EEOC brought suit on behalf of, and obtained a judgment payable to, Mr. Holt. The Solicitor General's attack on a judgment that the Commission secured for a specific individual is the extraordinary circumstance warranting intervention here.

And that circumstance truly is extraordinary. The EEOC has been bringing enforcement suits like this one for nearly half a century. *See Gen. Tel. Co.*, 446 U.S. at 325-26. Yet BNSF does not cite (and we have not found) any previous case in which the Solicitor General sought to undo a judgment the Commission obtained for an individual victim of discrimination. BNSF is thus quite wrong to assert that granting Mr. Holt's motion would make intervention in this Court "commonplace." Opp. 12.

The conditions justifying intervention here have apparently never arisen before, and there is no reason to expect them to recur with any frequency in the future.[2]

b. BNSF also errs in asserting that this Court has authorized intervention only "to preserve 'the existence of a justiciable case'" or "to vindicate 'particular statutory' objectives." Opp. 5-6 (citations omitted). In fact, the Court has granted motions to intervene for a wide variety of reasons. To take just a few examples: In *Turner v. Rogers*, 562 U.S. 1002 (2011) (No. 10-10), the Court granted a motion to intervene and to join a brief in opposition filed by a grandparent who had acquired an interest in the child-support payments at issue in the litigation while the case was on appeal. In *Gonzales v. Oregon*, 546 U.S. 807 (2005) (No. 04-623), the Court granted a motion to intervene filed by a group of Oregon residents interested in the State's assisted-suicide law. And in *Hunt v. Cromartie*, 525 U.S. 946 (1998) (No. 98-85), the Court granted a motion to intervene filed by a group of voters who had been allowed to intervene in the district court, but only after the order under review had been entered.[3] As those cases illustrate, the Court's intervention standard is a flexible one

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[2] BNSF cites a study finding that the Solicitor General has sometimes disagreed with the EEOC in Title VII cases. Opp. 11. But the study describes cases where the Solicitor General took a position at odds with the EEOC's previously expressed legal views—reflected, for example, in past litigation or EEOC guidelines—not cases where the Solicitor General declined to defend a judgment the Commission itself had obtained for an aggrieved individual. *See* Margaret H. Lemos, *The Solicitor General as Mediator Between Court and Agency*, 2009 Mich. St. L. Rev. 185, 198 (2009).

[3] *See also, e.g.*, *Price v. Dunn*, 139 S. Ct. 2764 (2019) (No. 18A1238) (granting motion to intervene to seek to unseal documents); *Vos v. Barg*, 555 U.S. 1211 (2009) (No. 08-603) (granting state's motion to intervene to defend the constitutionality of a state statute); *Haas v. Quest Recovery Servs., Inc.*, 549 U.S. 1163 (2007) (No. 06-263) (same for the United States).

guided by "the interests of justice." Stephen M. Shapiro et al., *Supreme Court Practice* 427 (10th ed. 2013). And in the highly unusual circumstances presented here, the interests of justice support allowing Mr. Holt to defend the judgment in his favor.

BNSF observes that this Court recently denied an aggrieved individual's motion to intervene in another EEOC enforcement action, *EEOC v. Catastrophe Management Solutions*, 138 S. Ct. 2015 (2018) (No. 17M109). Opp. 14-15. But that motion arose in a fundamentally different posture: The EEOC had *lost* in the court of appeals, and the individual sought to intervene to file a petition for a writ of certiorari that the Commission itself had declined to file. The Court did not explain why it denied the motion, but there is a substantial argument that it would have lacked jurisdiction to consider the movant's petition—an argument that the Solicitor General had advanced in another case in the same posture. There, the Solicitor General argued that the movants were "not entitled to intervene in this Court to file a petition for a writ of certiorari" because Congress specified in 28 U.S.C. § 1254(1) that "only a 'party' in the court of appeals may petition for a writ of certiorari." SG Br. at 3, *Am. Forest & Paper Ass'n v. League of Wilderness Defenders*, 540 U.S. 805 (2003) (No. 03M10) (SG *Am. Forest* Br.); *see id.* at 3-5. There is no similar obstacle here: BNSF, not Mr. Holt, has invoked this Court's jurisdiction under Section 1254(1), and the Court unquestionably has authority to allow additional parties to intervene once a case is properly before it.

This case also does not implicate the prudential considerations that may have counseled against intervention in *Catastrophe Management*. As the Solicitor General

has explained, a nonparty who wishes to "become a party for purposes of petitioning for certiorari" can do so by seeking to intervene in the court of appeals. SG *Am. Forest* Br. 9-10. The aggrieved individual in *Catastrophe Management* did not avail herself of that option—even after the court of appeals issued an adverse decision, raising the possibility that the Commission might decline to seek certiorari. Mr. Holt had no similar opportunity, because the need for intervention arose only after the case was already in this Court. Furthermore, in opposing intervention in *Catastrophe Management*, the respondent emphasized that the aggrieved individual in that case had never received a judgment, and was thus "far differently situated than a claimant who was actually awarded monetary benefits she stood to lose." Br. in Opp. at 7, *Catastrophe*, supra (No. 17M109). That perfectly describes Mr. Holt, who "st[ands] to lose" an award of nearly $100,000.

The denial of intervention in *Catastrophe Management* thus sheds no light on the proper result in these very different circumstances. And BNSF's other examples of orders denying intervention (Opp. 6 n.1) are even further afield: They involved movants who perhaps had an interest in the legal issue before the Court, but no comparable financial or other direct stake in the judgment under review.

4. Finally, BNSF briefly asserts that it would be prejudiced by intervention because it "may have litigated the case differently" had Mr. Holt been a party below. Opp. 13. But Mr. Holt does not seek to add new claims, to reopen the record, or otherwise to expand the issues in this case in any way. He seeks only to pick up where the EEOC left off in defending the judgment the Commission secured for him. BNSF

had the opportunity to take discovery from Mr. Holt, *see, e.g.*, C.A. E.R. 444-68, and it does not explain why it would have responded to the EEOC's legal arguments any differently had they been joined by Mr. Holt below—or why allowing Mr. Holt to continue to press the same arguments in this Court could prejudice BNSF in any way.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Holt leave to intervene as a respondent and to file a brief in opposition.

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