No. 21-648

In the Supreme Court of the United States

EDWARD HEDICAN, PETITIONER

v.

WALMART STORES EAST, L.P., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals abused its discretion in denying petitioner's motion to intervene, filed after the denial of a petition for rehearing en banc, as untimely.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Wis.):

EEOC v. *Walmart Stores East LP*, No. 18-cv-804 (Jan. 16, 2020)

United States Court of Appeals (7th Cir.):

EEOC v. *Walmart Stores East, L.P.*, No. 20-1419 (June 4, 2021) (denying motion to intervene)

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OPINIONS BELOW

The order of the court of appeals denying petitioner's motion to intervene (Pet. App. 35a-36a) is not published in the Federal Reporter. A prior opinion of the court of appeals (Pet. App. 1a-10a) is reported at 992 F.3d 656. The opinion of the district court (Pet. App. 13a-34a) is unreported but is available at 2020 WL 247462.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2021. A motion for reconsideration was denied on June 8, 2021 (Pet. App. 37a-38a). By orders dated March 19, 2020, and July 19, 2021, this Court extended the time within which to file any petition for a writ of certiorari due on or after March 19, 2020, to 150 days from the date of the lower-court judgment, order deny-

ing discretionary review, or order denying a timely petition for rehearing, as long as that judgment or order was issued before July 19, 2021. The petition for a writ of certiorari was filed on October 29, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Equal Employment Opportunity Commission (EEOC or Commission) brought an enforcement action in the United States District Court for the Eastern District of Wisconsin against respondents Walmart Stores East, L.P. and Wal-Mart Stores, Inc. (collectively, Walmart). The district court granted summary judgment to Walmart. Pet. App. 13a-34a. The court of appeals affirmed the judgment and denied the EEOC's petition for rehearing en banc. *Id.* at 1a-10a, 39a. Petitioner then filed a motion to intervene, which the court denied as untimely. *Id.* at 35a-36a.

1. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253-266 (42 U.S.C. 2000e *et seq.*), generally makes it unlawful "to fail or refuse to hire * * * any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * religion." § 703(a)(1), 78 Stat. 255 (42 U.S.C. 2000e-2(a)(1)). In 1972, Congress clarified that "'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(7), 86 Stat. 103 (42 U.S.C. 2000e(j)). Together, those provisions require a covered employer to "reason-

ably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship." 29 C.F.R. 1605.2(b)(1); see *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 74 (1977).

In April 2016, Walmart offered petitioner a job as a salaried assistant manager at its store in Hayward, Wisconsin, which is open 24 hours a day, seven days a week. Pet. App. 1a-2a; see *id.* at 102a-106a. The store has eight salaried assistant managers and a rotating schedule in which each assistant manager cycles through all possible shifts. *Id.* at 2a. Petitioner, however, is a devout Seventh-day Adventist and thus cannot work on his Sabbath from sundown Friday to sundown Saturday. *Ibid.*; see *id.* at 109a-110a.

Upon learning of that constraint, Walmart rescinded the offer. Pet. App. 2a-3a; see *id.* at 113a-114a. Walmart concluded that accommodating petitioner's request to avoid Sabbath work would impose an "undue hardship" under Title VII because it would require the other seven assistant managers to work more weekends than they otherwise would be required to work, and because Walmart thought that each assistant manager should have experience working during each shift because that would ensure familiarity with all of the departments within the store and would avoid the store's being left shorthanded in the event of vacations, illnesses, and the like. See *id.* at 2a-3a. Walmart suggested that petitioner apply for an hourly management position, which paid less than the assistant-manager position, but he did not do so. See *id.* at 3a. Petitioner filed a charge with the EEOC, which filed this enforcement action against Walmart. *Ibid.*; see *General Telephone Co.* v. *EEOC*, 446 U.S. 318, 326 (1980).

2. The district court granted summary judgment to Walmart. Pet. App. 13a-34a. The court held that the proposal that petitioner apply for an hourly management position was a reasonable accommodation under Title VII, *id.* at 26a-30a, and that reworking the schedule rotation for salaried managers to avoid assigning petitioner Sabbath shifts would impose an undue hardship because it would require Walmart "to bear more than a de minimis cost," *id.* at 31a (citation omitted); see *id.* at 31a-33a. That standard has its origins in *Hardison*, *supra*, which held that "[t]o require [an employer] to bear more than a *de minimis* cost in order to give [an employee] Saturdays off [for religious reasons] is an undue hardship." 432 U.S. at 84.

3. A divided panel of the court of appeals affirmed. Pet. App. 1a-10a.

a. The court of appeals rejected the EEOC's contention that Walmart could have accommodated petitioner's request without bearing an undue hardship by "let[ting] him trade shifts with other assistant managers." Pet. App. 5a. The court stated its view that under *Hardison*, "Title VII does not require an employer to offer an 'accommodation' that comes at the expense of other workers." *Ibid.* The court also rejected the EEOC's suggestion that Walmart could have assigned petitioner "permanently to [a] 4-day-12-hour shift and ensure[d] that it never included Fridays or Saturdays." *Id.* at 6a. The court explained that "this is a proposal to require more weekend work by the other assistant managers—and without their approval, as a shift-trading system entails." *Ibid.* The court further explained that the "EEOC's approach also would make it difficult for Walmart to maintain its rotation system, designed to ensure that all of the assistant managers

can handle all of the departments. If [petitioner] became a specialist in some departments, Walmart would encounter more than a slight burden when he went on vacation or sick leave." *Ibid.*

b. Judge Rovner dissented. Pet. App. 8a-10a. She agreed with the panel majority "that accommodating [petitioner] * * * posed a challenge, given the store's 24-hour schedule, busy weekends, and the demand among staff for time off on Fridays, Saturdays, and Sundays." *Id.* at 8a. But in Judge Rovner's view, Walmart did not adequately "consult with the other [assistant] managers" in determining that accommodating petitioner would present an undue hardship. *Ibid.* Judge Rovner thus would have remanded the case for trial so a jury could determine "whether Walmart went far enough in considering whether [petitioner's] religious scheduling needs could be accommodated." *Id.* at 9a.

c. The court of appeals denied the EEOC's petition for rehearing and rehearing en banc with no noted dissents. Pet. App. 39a. The EEOC did not seek further review in this Court.

4. Two days after the denial of rehearing, petitioner filed a motion to intervene in the court of appeals for the purpose of filing a petition for a writ of certiorari to seek review of the panel's decision on the merits. Pet. App. 68a; see *id.* at 58a-85a. The court denied that motion as untimely, stating that petitioner "had opportunity to intervene before the case was argued to the panel many months ago." *Id.* at 36a. The court denied petitioner's subsequent motion for panel or en banc reconsideration of the denial of intervention. *Id.* at 37a-38a.

Petitioner filed a motion in this Court for leave to intervene to file a petition for a writ of certiorari. See No.

21M24 (filed Aug. 30, 2021). This Court denied that motion on October 12, 2021.

ARGUMENT

Petitioner contends in passing (Pet. 11, 14) that the court of appeals erred in denying his motion to intervene on timeliness grounds. The court did not abuse its discretion in denying intervention, and petitioner does not contend that the court's decision conflicts with any decision of this Court or another court of appeals. Further review is thus unwarranted.

Rather than seeking plenary review, petitioner principally contends (Pet. i, 1-2, 10-17) that the Court should defer consideration of this petition pending the Court's disposition of *Cameron* v. *EMW Women's Surgical Center, P.S.C.*, No. 20-601 (argued Oct. 12, 2021), and then grant the petition, vacate the court of appeals' order denying intervention, and remand the case (GVR) so that the lower court can reconsider its decision in light of *Cameron*. Although the dispute in *Cameron* principally involves case-specific issues, including those related to the unique sovereign interests of States, the government acknowledges the possibility that the Court's eventual decision in that case might touch on issues relevant to this case. Accordingly, the Court may wish to defer consideration of this petition pending its decision in *Cameron*. But the Court should not necessarily GVR this case once it decides *Cameron*; if the eventual decision in *Cameron* focuses—as the parties' briefs did—on state sovereign interests or other case-specific issues, the petition for a writ of certiorari in this case should be denied.

1. The court of appeals did not abuse its discretion in denying petitioner's motion to intervene as untimely. Although Federal Rule of Civil Procedure 24 applies of

its own force only in district courts, this Court has recognized that it provides a useful guide for considering motions to intervene in the courts of appeals. See *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America* v. *Scofield*, 382 U.S. 205, 217 n.10 (1965). As relevant here, Rule 24(a) provides that intervention as of right is appropriate "[o]n timely motion" if the movant "is given an unconditional right to intervene by a federal statute." Fed. R. Civ. P. 24(a)(1). Petitioner has such a right; Congress has provided that "[t]he person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission" under Title VII. 42 U.S.C. 2000e-5(f)(1); see *General Telephone Co.* v. *EEOC*, 446 U.S. 318, 326 (1980). The question in this case is whether petitioner's motion was "timely."

Timeliness under Rule 24(a) "is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review." *NAACP* v. *New York*, 413 U.S. 345, 366 (1973). "Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive." *Id.* at 365-366. Instead, "[t]imeliness is to be determined from all the circumstances." *Id.* at 366. In *NAACP* v. *New York*, this Court suggested several relevant circumstances, including whether the movant "knew or should have known of the pendency" of the suit; whether the movant "failed to protect [his] interest in a timely fashion" once "informed of the pendency of the action"; and whether "unusual circumstances" would "warrant[] intervention." *Id.* at 366-368. None of those considerations suggest the court of appeals abused its discretion here.

Petitioner was well aware of the pendency of the EEOC's suit; indeed, he was informed of it at its inception. Petitioner also was aware that the EEOC would not necessarily protect his interests. This Court has made clear that "the EEOC is not merely a proxy for the victims of discrimination" and that "[w]hen the EEOC acts," it does so "to vindicate the public interest," not just the charging party's interests. *General Telephone*, 446 U.S. at 326. Perhaps for that reason, Congress gave the charging party a right to intervene in an EEOC enforcement action under Title VII. *Ibid.*; see 42 U.S.C. 2000e-5(f)(1).

Petitioner's suggestion (Pet. 10-11) that the government ceased to represent his interests only when litigating authority transferred from the EEOC to the Department of Justice thus cannot be squared with the statutory scheme. Indeed, the EEOC's model notice to charging parties alerts them that the "EEOC's primary purpose in filing this suit is to further the public interest"; that "the agency may decide to act in a manner that you believe is against your individual interests"; and that "[i]f you have intervened in the suit, you will be able to pursue your individual interests separately if the EEOC's interests diverge from yours." Office of General Counsel, EEOC, *Regional Attorneys' Manual*, Pt. 2, § II.E App. (Apr. 2005), go.usa.gov/xtKpQ. Critically, the notice expressly warns charging parties that "[y]ou should try to make your decision regarding intervention fairly soon, because * * * the court can deny you the right to intervene if the case has progressed substantially by the time you request intervention." *Ibid.*; cf. *Adams* v. *Proctor & Gamble Manufacturing Co.*, 697 F.2d 582, 583 (4th Cir. 1983) (en banc) (per curiam),

cert. denied, 465 U.S. 1041 (1984); *Nevilles* v. *EEOC*, 511 F.2d 303, 305 (8th Cir. 1975) (per curiam).

Nor does the petition identify any unusual circumstances that the court of appeals overlooked that would require permitting intervention here. Courts have allowed post-judgment intervention by charging parties in EEOC enforcement actions in unusual circumstances, such as when the government sought to overturn a judgment that the EEOC had secured on the charging party's behalf. See *BNSF Railway Co.* v. *EEOC*, 140 S. Ct. 109, 109 (2019); see also, *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) (granting intervention based on concern that a change in Administration might cause the EEOC to "withdraw from [the] case"). But that does not mean that a court would be *required* to permit intervention in those circumstances, much less that any similar circumstance is present here.

To the contrary, in this case the government simply declined to seek further review of the court of appeals' ruling on the merits of the failure-to-accommodate claim. As this Court has recognized, Title VII "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). And the government routinely declines to seek this Court's review of adverse decisions for a variety of reasons unrelated to a change in position. Indeed, Congress and the Executive Branch have chosen to "concentrate[]" those decisions in a "single official," the Solicitor General, precisely because they require a "broader view of litigation in which the Government is involved" and turn on "a number of fac-

tors which do not lend themselves to easy categorization." *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 96 (1994).

To be clear, the government does not take the position that it would have been an abuse of discretion for the court of appeals to *grant* petitioner's motion to intervene. Cf. Gov't Br. at 5, *United States* v. *Strickland Transportation Co.*, 615 F.2d 918 (5th Cir. 1980) (Tbl.) (arguing that courts of appeals must have "sufficient flexibility to exercise their discretion" when addressing motions to intervene, and that "intervention at the appellate level" in an EEOC enforcement proceeding should be "freely permitted when justice requires, provided * * * the request is timely under the circumstances"). Our position here is only that the court of appeals did not abuse its discretion in denying that motion on timeliness grounds.

2. a. Although petitioner reproduces the motion to intervene that he filed in the court of appeals in the appendix to the petition for a writ of certiorari, see Pet. App. 58a-85a, the petition itself does not set forth in any detail why petitioner believes that the court abused its discretion in denying his motion. Nor does the petition contend that the court's order conflicts with any decision of this Court or another court of appeals. Instead, petitioner principally asks this Court to defer consideration of the petition pending resolution of *Cameron*, *supra* (No. 20-601), which—like this case—involves a motion to intervene filed in a court of appeals after the panel's decision (but—unlike this case—before the time to file a petition for rehearing had expired).

In *Cameron*, the Secretary of the Kentucky Cabinet for Health and Family Services had defended a state statute in the district court and on appeal to the Sixth

Circuit. See Pet. Br. at 10, *Cameron*, *supra* (No. 20-601). But following the decision by a Sixth Circuit panel affirming a permanent injunction against the statute's enforcement, the Secretary decided against continuing to defend the statute, and the Kentucky Attorney General thus sought to intervene for the purpose of filing a petition for rehearing and, if necessary, a petition for a writ of certiorari. See *id.* at 10-11. A divided panel of the Sixth Circuit denied intervention as untimely, see Pet. App. at 109-110, *Cameron*, *supra* (No. 20-601), emphasizing that the motion to intervene was filed "years into [the case's] progress, after both the district court's decision and—more critically—[the panel's] decision," *id.* at 110. Judge Bush dissented, observing that the "Attorney General is *the same counsel* who represented [the Secretary] in this appeal, and [the Secretary] *does not oppose* the substitution of the Attorney General to represent the Commonwealth's interests." *Id.* at 116. Judge Bush repeatedly emphasized that the case involved the defense of a state statute by the state attorney general. See *id.* at 119-126.

In his merits brief in this Court, Attorney General Cameron principally argued that "Kentucky's sovereign interests predominate the timeliness analysis." Pet. Br. at 18, *Cameron*, *supra* (No. 20-601); see *id.* at 18-32. The respondents in *Cameron* argued, among other things, that the Attorney General was jurisdictionally barred from intervening based on his participation in the case in the district court and failure to file a timely notice of appeal; that the State's sovereign interests were adequately protected by the availability of a motion under Federal Rule of Civil Procedure 60(b)(5); and that the Attorney General should be estopped from

intervention based on his litigation conduct. See Resp. Br. at 13-48, *Cameron*, *supra* (No. 20-601).

That context suggests that this Court's decision in *Cameron* is unlikely to have relevance to this petition. As the parties' arguments in that case indicate, *Cameron* principally turns on the unusual nature of the litigation there, including the importance of a State's sovereign interest in defending its statutes. Those concerns are absent in this case, which involves a garden-variety employment dispute under Title VII. Even setting aside sovereign interests, the Kentucky Attorney General has argued that moving to intervene earlier in *Cameron* would have been "unworkable" given that his office represented the Secretary in the appeal, Pet. Br. at 34, *Cameron*, *supra* (No. 20-601); but there is nothing unworkable about a Title VII charging party's intervening in an EEOC enforcement action at an early stage in the litigation (including in the district court).

b. The Kentucky Attorney General also has argued that the Sixth Circuit improperly "placed near-dispositive reliance on the fact that the Attorney General's motion came 'years into the case's progress, after both the district court's decision and—more critically—[the panel's] decision.'" Pet. Br. at 36, *Cameron*, *supra* (No. 20-601) (brackets and citation omitted). According to the Attorney General, that allegedly rigid treatment "fits uncomfortably next to this Court's admonition—in the Rule 24 context—that 'the point to which the suit has progressed is one factor in the determination of timeliness' but 'is not solely dispositive.'" *Ibid.* (citation omitted). Whatever the merits of that argument, the court of appeals in this case did not purport to apply such a rigid rule. The court said only that petitioner's motion was untimely because he "had opportunity to in-

tervene before the case was argued to the panel many months ago," Pet. App. 36a, without suggesting that intervention after a panel decision would necessarily be untimely in all circumstances.

Nevertheless, the government acknowledges that to the extent this Court's decision in *Cameron* might address the argument set forth above in a manner untethered from state sovereign interests and the other case-specific circumstances (such as jurisdiction and estoppel), such a decision could potentially provide guidance for courts of appeals in the exercise of their discretion to deny as untimely a motion for intervention filed after the court has entered its decision. Accordingly, the Court might wish to defer consideration of the petition for a writ of certiorari in this case pending its decision in *Cameron*.

c. That said, even if the Court defers consideration of this petition, it should not automatically GVR this case following its decision in *Cameron*. That course of action would be warranted only if the *Cameron* decision finds that the Sixth Circuit in that case adopted an unduly rigid rule and provides guidance for the exercise of discretion with respect to that aspect of timeliness, untethered from state sovereign interests or the other case-specific issues in *Cameron*. Otherwise, there would be no plausible basis to question or revisit the court of appeals' exercise of discretion in this case. Cf. *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam) (explaining that a GVR is "potentially appropriate" only if there is a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration"). And because petitioner does not allege that the decision below conflicts with any decision of this

Court or another court of appeals, further review of this case in its own right is unwarranted.

d. Since the filing of the petition for a writ of certiorari in this case, this Court has granted certiorari in *Arizona* v. *San Francisco*, No. 20-1775 (oral argument scheduled for Feb. 23, 2022), and *Berger* v. *North Carolina State Conference of the NAACP*, cert. granted, No. 21-248 (Nov. 24, 2021), both of which also involve issues related to intervention. But neither of those cases would provide a basis to defer consideration of the petition in this case.

Arizona involves the petitioner States' post-judgment motion to intervene in the court of appeals to defend a federal regulation after the United States decided to cease litigating its defense of the rule. The parties dispute whether the prospective intervenors satisfy the requirements of Rule 24(a) for intervention as of right or Rule 24(b) for permissive intervention, but that dispute focuses on elements other than timeliness. See Gov't Br. at 34 & n.10, *Arizona*, *supra* (No. 20-1775). *Berger* is even further afield; that case involves the denial of State legislators' motion to intervene in the district court, and likewise does not involve a timeliness question. Accordingly, neither case is likely to bear on the timeliness issue in this case.

3. Petitioner suggests in passing (Pet. 17) that, in the alternative, the Court should remand the case to the court of appeals and "equitably toll the October 29 deadline for filing a petition for certiorari" to review the court of appeals' underlying failure-to-accommodate ruling. But that deadline is jurisdictional in a civil case, see *Department of Banking* v. *Pink*, 317 U.S. 264, 268 (1942) (per curiam), and thus not amenable to equitable

tolling, see *United States* v. *Wong*, 575 U.S. 402, 408 (2015).

CONCLUSION

The petition for a writ of certiorari should be denied. Alternatively, this Court may wish to hold the petition pending this Court's decision in *Cameron* v. *EMW Women's Surgical Center, P.S.C.*, No. 20-601 (argued Oct. 6, 2021), and then dispose of the petition as appropriate in light the Court's decision in that case.

Respectfully submitted.

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