NO. 21-648

In the Supreme Court of the United States

EDWARD HEDICAN,

Petitioner,

v.

WALMART STORES EAST, L.P., and WAL-MART STORES, INC.; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

When a "charging party" seeks leave to intervene at the end of an EEOC case—months after the court of appeals issued its decision and after the court has denied rehearing en banc—does the court of appeals have discretion to deny intervention as untimely?

CORPORATE DISCLOSURE STATEMENT

Wal-Mart Stores East, LP ("WSELP") is an indirect, wholly owned subsidiary of Walmart Inc. WSE Management, LLC is the general partner of WSELP, and WSE Investment, LLC is the limited partner of WSELP. Wal-Mart Stores East, LLC is the sole member for each of WSE Management, LLC and WSE Investment, LLC. Walmart Inc. is the sole member of Wal-Mart Stores East, LLC.

Walmart Inc. is a Delaware corporation that is publicly traded on the New York Stock Exchange, with its headquarters in Bentonville, Arkansas. Walmart Inc. has no parent corporation. Alice L. Walton, Jim C. Walton, the John T. Walton Estate Trust, S. Robson Walton, the Walton Family Holdings Trust, and Walton Enterprises, LLC, each have a greater than 10% beneficial ownership of stock issued by Walmart Inc.

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INTRODUCTION

The petition should be denied because it does not raise any issue worthy of this Court's review.

When the Equal Employment Opportunity Commission brings an employment discrimination suit, it represents the interests of the public—not the person, or "charging party," who claims to have been discriminated against. Because the EEOC is not the charging party's counsel or agent and has a broader and different mission than simply representing the charging party, Congress gave the charging party a right to intervene to protect his personal interests. 42 U.S.C. § 2000e-5(f)(1). But Congress did not require courts to allow a charging party to intervene under any and all circumstances no matter how untimely the charging party's motion may be. To the contrary, petitioner acknowledges that a charging party's motion to intervene must be timely.

The petition thus seeks this Court's review of a narrow, factbound question: Did the Seventh Circuit act within its discretion when it denied petitioner's motion to intervene—made after the litigation was completely over in the circuit court—as untimely. That question is neither difficult nor worthy of certiorari. If the timeliness requirement means anything, it must mean that the Seventh Circuit had discretion to deny petitioner's motion under the circumstances presented here, when there was nothing left for the circuit court to do but issue the mandate. After all, petitioner moved to intervene *after* the denial of the EEOC's petition for rehearing, more than two months after the Seventh Circuit's decision, more than eighteen months after the district

court's decision, more than three years after the case was filed, and only a few days before the mandate issued. While petitioner contends that his motion was "timely" because he sought to intervene to seek certiorari from this Court, no authority requires a circuit court to allow a charging party to sit on his rights for an entire case and then intervene after denial of en banc rehearing to independently seek this Court's review. Appropriately, this Court recently rejected petitioner's attempt to intervene in this Court for that very purpose. Docket No. 21M24.

Perhaps recognizing that the Seventh Circuit's exercise of its discretion to deny his belated motion does not warrant this Court's review, petitioner urges the Court to hold his petition until it decides *Cameron v. EMW Women's Surgical Center, P.S.C.*, No. 20-601. But nothing the Court says in *Cameron*, or any other pending case, is likely to call the Seventh Circuit's decision into question. This case has nothing to do with state sovereignty, the authority of a state's Attorney General to defend a state's laws, or the elections-related intervention issues raised in *Cameron*. Nor does this case implicate the circuit split that the Kentucky Attorney General identified as a basis for review in *Cameron*. Nothing the Court does in *Cameron* will eliminate the requirement that intervention be timely—a requirement that neither the Kentucky Attorney General nor petitioner here contests. And however the Court resolves the timeliness question in *Cameron*—where the issue is who is authorized under state law to speak for the state at different stages of a case—that resolution will not apply to the run-of-the-mill setting of this case. All that happened here is that a private party who could

have intervened years earlier, and who knew all along that the EEOC did not represent his personal interests, opted to sit on his rights until after the appeal was over. Petitioner provides no reason why this Court should question the Seventh Circuit's discretion in holding that his past-the-last-minute request to intervene was untimely.

The petition should be denied.

STATEMENT

In place of petitioner's "factual background," which is not relevant to his petition, Walmart would direct the Court to the undisputed facts found by the district court. App. 14a–25a. The few relevant facts are easily recited: petitioner applied to work at a Walmart store in a management position that required Friday night and Saturday shifts, though his religious practice at the time did not allow him to work from sundown Friday to sundown Saturday. App. 14a–17a. As soon as petitioner mentioned this schedule restriction, Walmart attempted to accommodate him, possibly in a different supervisory position. App. 15a–25a. Unfortunately, petitioner declined to engage with Walmart about an accommodation, App. 22a–25a, 30a–31a, and instead complained to the EEOC, which then filed suit in 2018. Petitioner did not move to intervene at any point in the district court litigation.

The district court rejected the EEOC's religious discrimination claim on summary judgment. App. 30a–33a. The court held that Walmart had tried to reasonably accommodate petitioner and that any of the EEOC's proposed alternative accommodations

would have posed undue hardship to Walmart. *Id.* The district court specifically rejected the EEOC's suggestion that voluntary shift swaps could have accommodated petitioner, a ruling supported by conclusive evidence that shift swaps were not feasible given the circumstances of Walmart's other employees. App. 32a–33a.

The EEOC appealed. At no time during the litigation of the appeal did petitioner seek to intervene. On March 31, 2021, following oral argument, the Seventh Circuit issued an opinion agreeing with the district court that Walmart had reasonably accommodated petitioner and affirming the district court's judgment. App. 1a–7a. In May 2021, the EEOC sought rehearing en banc. App. 39a. Petitioner still did not move to intervene. The Seventh Circuit denied rehearing with no dissent or call for a vote, bringing the appeal to a close. *Id.*

At that point, when all that remained was for the Seventh Circuit's formal mandate to issue, petitioner finally moved to intervene. While petitioner stated that he was moving to intervene in order to seek certiorari from this Court, App. 68a, he cited no authority holding that a charging party is entitled to sit on his rights until after an appeal is over—and after rehearing is denied—and only then move to intervene. Walmart opposed petitioner's motion as untimely. App. 73a–76a. The Seventh Circuit denied the motion as "untimely," correctly noting that petitioner "had opportunity to intervene before the case was argued to the panel many months ago." App. 36a. Petitioner moved for panel and en banc

reconsideration, which the Seventh Circuit denied. App. 38a.

Petitioner then moved to intervene before this Court in order to file a petition for certiorari seeking review of the Seventh Circuit's decision on the merits of the EEOC's case. Walmart opposed his motion as procedurally improper. *See* Response at 1–2, *Hedican v. Walmart Stores E., L.P.*, No. 21M24 (U.S. Sept. 7, 2021). The Court denied the motion. *Hedican v. Walmart Stores E., L.P.*, 142 S. Ct. 331 (2021) (mem.) ("Motion of Edward Hedican for leave to intervene to file a petition for a writ of certiorari is denied."). The Solicitor General opted not to file a petition for certiorari seeking review of the Seventh Circuit's decision.

On the day when a petition from the Solicitor General on behalf of the EEOC would have been due, petitioner filed this petition seeking this Court's review of the Seventh Circuit's denial of his motion to intervene. Petitioner asks this Court to direct the Seventh Circuit to grant him leave to intervene in the circuit court, long after the circuit court proceedings ended with the denial of rehearing. Petitioner's ultimate goal is to then file a petition for certiorari seeking review of the Seventh Circuit's merits decision—even though the Court already denied that relief when petitioner sought it in the form of intervention in this Court.

REASONS FOR DENYING THE PETITION

I. The Petition Identifies No Issue Worthy of this Court's Review.

The petition raises no issue that could warrant this Court's review. There is no relevant circuit split. Nor does the petition present an important issue of federal law. Instead, the only question presented by the Seventh Circuit's one-page order is narrow and factbound: Did the Seventh Circuit act within its discretion when it denied petitioner's motion to intervene as untimely.

Even petitioner agrees that the Seventh Circuit was required to consider whether his motion was timely. Pet. 11 ("the only issue is whether Hedican's motion to intervene at the Seventh Circuit was timely"). Timeliness is an express requirement of Federal Rule of Civil Procedure 24, which often serves as a guide for appellate courts when evaluating motions to intervene. *See* Fed. R. Civ. P. 24 (conditioning a court's obligation to permit intervention, even when intervention is available as of right, "[o]n timely motion"); *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., AFL-CIO, Loc. 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965) (noting that Rule 24's policies "may be applicable in appellate courts"). Enforcing timeliness requirements is also part of the lower courts' inherent power to manage their dockets. As this Court has recognized, "[f]ederal courts possess certain 'inherent powers,' not conferred by rule or statute, 'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Goodyear Tire & Rubber Co. v.*

Haeger, 137 S. Ct. 1178, 1186 (2017) (quoting *Link v. Wabash R.R.,* 370 U.S. 626, 630–31 (1962)).

And nothing in Title VII eliminates or modifies the timeliness requirement. Section 2000e-5(f)(1) provides that charging parties "shall have the right to intervene in a civil action brought by the Commission," but it does not address when that right must or may be exercised. The statute thus leaves the timeliness question to the ordinary background principles that govern the timeliness of intervention more broadly. *See, e.g.*, *EEOC v. Catastrophe Mgmt. Sols.*, 138 S. Ct. 2015 (2018) (mem.) (denying motion to intervene by the charging party after the EEOC declined to seek certiorari); *Adams v. Procter & Gamble Mfg. Co.*, 697 F.2d 582, 584 (4th Cir. 1983) (per curiam) (denying motion to intervene after a consent decree had been entered); *EEOC v. Westinghouse Elec. Corp*., 675 F.2d 164, 165 (8th Cir. 1982) (denying motion to intervene filed more than five years after the EEOC filed the case); *EEOC v. United Air Lines*, 515 F.2d 946, 949–50 (7th Cir. 1975) (denying motion to intervene more than five months after an amended complaint was filed and because discovery was nearly finished).

This Court has long recognized that the timeliness of an intervention motion is addressed to a court's discretion: "[t]imeliness is to be determined from all the circumstances," and "it 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). The Seventh Circuit's resolution of that inherently factbound inquiry in the specific

circumstances of this case does not raise any legal issue worthy of this Court's attention.

The Seventh Circuit acted well within its discretion when it denied petitioner's belated motion to intervene as untimely. Petitioner waited to file his motion until the last possible moment, just days before the mandate was scheduled to issue. *See* Fed. R. App. P. 41(b). If petitioner had waited any longer, the Seventh Circuit would have lacked jurisdiction even to consider his motion. *See Kusay v. United States*, 62 F.3d 192, 194 (7th Cir. 1995) ("Just as the notice of appeal transfers jurisdiction to the court of appeals, so the mandate returns it to the district court."). While petitioner acknowledges that intervention must be timely, his position drains the timeliness requirement of all meaning: a timeliness requirement that is satisfied all the way until the moment when the court loses jurisdiction is no requirement at all. In short, if the Seventh Circuit had no discretion to deny petitioner's motion as untimely, the timeliness requirement would be meaningless.

Petitioner tries to excuse his delay by suggesting that the Attorney General, which conducts the EEOC's litigation before this Court, 42 U.S.C. § 2000e-4(b)(2), may have diverging interests from his own because the federal government is the "nation's largest employer." Pet. 11. But that was true all along. Petitioner never had any guarantee that the EEOC (whether represented by the Attorney General or the EEOC's trial attorneys) would litigate the case the way he wanted. A charging party knows from the outset of a case filed by the EEOC that the EEOC's interests are distinct from the charging party's.

"When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination." *Gen. Tel. Co. of Nw., Inc. v. EEOC*, 446 U.S. 318, 326 (1980). This Court made clear decades ago that "the 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). That is precisely why Title VII provides the aggrieved individual with the right to intervene in the EEOC's action to preserve his or her personal stake in the case. 42 U.S.C. § 2000e-5(f)(1).

Indeed, the role of the EEOC is well understood. The EEOC's guidance instructs its trial attorneys to inform charging parties of their right to timely intervene as well as the possible consequences if they choose not to intervene. The Model Letter in the guidance, which the EEOC's trial attorneys are instructed to send "[w]ithin a week of filing suit," informs charging parties that the EEOC will pursue its own mission and that charging parties should intervene if they want to be sure they can pursue their interests as they believe best:

> Under section 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1), you have a right to intervene as a party in the EEOC's suit and to be represented by your own attorney.... EEOC's primary purpose in filing this suit *is to further the public interest* in preventing employment discrimination. It is possible that at some point in the EEOC's prosecution of the suit, you will disagree with the agency's decisions

> regarding the relief to which you are entitled in the case, or with some other aspect of EEOC's litigation strategy. *Because EEOC's first obligation is to the public interest, the agency may decide to act in a manner that you believe is against your individual interests.* If you *have intervened* in the suit, you will be able [to] pursue your individual interests separately if the EEOC's interests diverge from yours at any point.

E. Notice to Charging Parties of Commission Suits, https://www.eeoc.gov/e-notice-charging-parties-commission-suits (emphasis added).

The EEOC's letter also warns charging parties that they should intervene promptly if they wish to do so because intervention must be timely:

> You should try to make your decision regarding intervention fairly soon, because even though you have an unconditional right to intervene if you do so in a timely manner, the court can deny you the right to intervene if the case has progressed substantially by the time you request intervention.

Id.

Given this well-established legal framework, charging parties know from the outset that the EEOC's views about whether or how to pursue the case might diverge from their own, and they know from the outset that if they do not move to intervene before "the case has progressed substantially," *id.*, they might be unable to intervene. Courts have recognized that when a charging party does not timely

intervene, "it is not unfair … to conclude that he placed the conduct of the litigation entirely upon the EEOC and expressed a conclusive willingness to be bound by the outcome[.]" *Adams*, 697 F.2d at 583. Courts—including this Court—also often deny motions to intervene in EEOC cases as untimely when the charging party waits too long. *See Catastrophe Mgmt. Sols.*, 138 S. Ct. 2015; *Adams*, 697 F.2d at 584; *Westinghouse Elec. Corp.*, 675 F.2d at 165*;* and *United Air Lines*, 515 F.2d at 949–50.

Unsurprisingly, there is no authority to support petitioner's position, which would eliminate the consideration of timeliness altogether. The EEOC files more than 100 lawsuits each year—116 in fiscal year 2021—some involving systemic issues that affected multiple individuals. *See* EEOC, Fiscal Year 2021 Agency Financial Report 10 (2021). Petitioner's reasoning would apply to all of these EEOC cases—and likely other civil enforcement regimes like the Fair Housing Act, 42 U.S.C. § 3612—and open the floodgates to belated intervention by charging parties who sat on their rights all the way through the denial of en banc rehearing. After all, petitioner cites nothing specific about this case to justify his belated effort to intervene; on his interpretation, every charging party would have an absolute right to intervene up until the court of appeals issues its mandate. As explained above, nothing in Section 2000e-5(f)(1) remotely confers such an anomalous entitlement, and Rule 24's recognition that timeliness is required even where intervention is as of right belies petitioner's position. The Court should decline petitioner's invitation to remove the circuit courts'

discretion to decide whether to allow such belated intervention.

The timeliness question here is neither complicated nor close. The Seventh Circuit at the very least had discretion to deny petitioner's motion to intervene as untimely under the facts of this case. There is no reason for the Court to devote its resources to considering standards for appellate intervention when the denial of intervention would have to be upheld here under any standard.

II. The Issues Raised In *Cameron* Are Not Relevant Here.

Seeking a lifeline, petitioner urges the Court to hold this petition pending its decision in *Cameron v. EMW Women's Surgical Center*. But the Court's decision in *Cameron* is not at all likely to affect the outcome in this case. *Cameron* implicates the states' powers to choose who represents their interests in federal court at different stages of litigation. Petitioner's claim that the issues here are "identical" is not colorable. Pet. 1. This case has nothing to do with state sovereignty or the question of which elected or appointed state government official speaks for a state in this Court. Congress has determined who speaks for the EEOC in this Court—the Attorney General—and nothing the Court could say in *Cameron* will change that. And because *Cameron* does not involve a circuit court's discretion to deny post-*rehearing* intervention, sought months after the court's decision by someone who could have intervened years earlier, the Court's decision will not help petitioner.

A. In *Cameron*, the Kentucky Attorney General has argued that the Sixth Circuit's timeliness analysis failed to give full effect to the Commonwealth's sovereign choice to designate the Attorney General as its agent to step in under these circumstances. Petition at 21, No. 20-601 (U.S. Oct. 30, 2020). At oral argument, the Kentucky Attorney General made clear that his argument was not about the Sixth Circuit's weighing of factors to arrive at its timeliness holding but rather its failure to consider Kentucky's sovereign interests. *See* Transcript of Oral Argument at 4, *Cameron*, No. 20-601 (U.S. Oct. 12, 2021), *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-601_f2qg.pdf ("To be clear, the panel did not merely weigh factors to arrive at its timeliness holding. It affirmatively treated Kentucky's sovereign interests as irrelevant to that inquiry."). He identified a circuit split on whether state sovereign interests should be considered in the timeliness analysis. Petition at 21, *Cameron*, No. 20-601 ("The panel majority's decision created a circuit split with profound implications. Until now, the only courts addressing the unique nature of a State intervening to defend its sovereignty have recognized the compelling need to liberally allow such intervention.").

Whether the Sixth Circuit's timeliness determination in *Cameron* was an abuse of discretion, then, depends on whether the court adequately considered the state's sovereign authority to determine who should speak for it in ongoing litigation at various stages—an issue that has no conceivable counterpart in this case. To the extent that the timeliness issue in *Cameron* involves other issues,

they may be whether the Kentucky Attorney General should have earlier expected that an incoming administration would stop defending a statute that it had been defending during the previous administration and whether a stipulation signed by the Attorney General at an earlier stage of the case foreclosed the later effort to intervene. *See* Petition at 4–9, *Cameron*, No. 20-601. Those issues are obviously inapplicable here. (State sovereign interests are also core to two other cases pending before the Court, *Berger v. North Carolina State Conference of the NAACP*, No. 21-248, and *Arizona v. City and County of San Francisco, California*, No. 20-1775, which are equally irrelevant here for similar reasons.).

B. Moreover, *Cameron* concerns timeliness only as it relates to the "handoff" of litigation from one state official to another, a matter that involves state law. *See* Petition at 3, No. 20-601. The comparison petitioner draws between his motion to intervene and the Kentucky Attorney General's motion is inapt. The Kentucky Attorney General cited state law allowing him to take over as the representative of the state when another state official declines to appeal an adverse ruling invalidating a state law. *Id*. at 2. He argued that the Sixth Circuit should have considered the state's sovereign choice of who has the right to decide whether to appeal decisions affecting state law. *Id.* Here, there is also a statute that dictates who decides whether an EEOC case will be litigated in the Supreme Court, and that is the Attorney General of the United States. 42 U.S.C. § 2000e-4(b)(2).

Petitioner appears to view the transfer of litigating authority from the EEOC to the Attorney

General as a defect that post-rehearing-denial automatic-charging-party intervention can solve. *See* Pet. 11. But there is no warrant to treat Congress's determination of how EEOC cases should proceed as a bug calling for a work-around. Having one official represent the United States in this Court makes abundant sense; regardless, Congress made that choice and its judgment is entitled to respect. *See* Brief of the United States at 40–41, *Arizona*, No. 20-1775 (U.S. Jan. 12, 2022) ("[T]he decision to give the Attorney General and Solicitor General authority to determine not just *how* but *whether* to pursue appellate review 'represents a policy choice by Congress.' … Nothing in Rule 24 or broader principles of intervention warrants overruling the judgment of Congress and the Executive Branch …. " (emphasis in original) (quoting *Fed. Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 96 (1994))). Petitioner's approach of late intervention for the sole purpose of filing a petition for certiorari would upset that statutory scheme, as the Solicitor General's determination not to pursue review of an EEOC case in this Court would be merely preliminary to the charging party's decision about whether he wished to then intervene and file his own petition for certiorari.

Petitioner identified nothing about the circumstances of this particular case to justify his belated motion to intervene. And his position is that the Seventh Circuit, despite properly requiring his motion to be timely, and despite courts' customary discretion on intervention motions, had to grant his motion. Adopting his position, then, would make intervention after the denial of rehearing automatic.

That position has nothing to recommend it as a matter of law or logic. And it has no connection to *Cameron*.

CONCLUSION

For these reasons, this Court should deny the petition for certiorari.

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