No. 21-648

In the Supreme Court of the United States

EDWARD HEDICAN,

Petitioner,

v.

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

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents.

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

REPLY BRIEF FOR PETITIONER

ERIC C. RASSBACH
Counsel of Record
MARK L. RIENZI
NICHOLAS R. REAVES
CHRISTOPHER PAGLIARELLA
DANIEL L. CHEN
JAMES J. KIM
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1919 Penn. Ave. NW, Suite 400
Washington, D.C. 20006
(202) 955-0095
erassbach@becketlaw.org

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

REPLY BRIEF FOR PETITIONER

The certworthiness of this appeal has become only more apparent since the petition was filed. In addition to *Cameron*, the Court has granted two additional petitions concerning the standard for granting intervention on appeal: *Arizona* v. *San Francisco* and *Berger* v. *North Carolina State Conference of the NAACP*. The Court is thus set to resolve multiple aspects of appellate intervention, a topic on which the Federal Rules of Appellate Procedure are silent. And this petition fills one remaining gap in what promises to be a comprehensive review by this Court—how to treat proposed intervenors who have been given a statutory right to intervene by Congress.

Recognizing the importance of the appeal, the United States acknowledges that this Court may provide guidance in *Cameron* that will impact the intervention analysis here, if not prove dispositive. Holding this petition pending *Cameron*, *Arizona*, and *Berger* is therefore the minimally prudent course of action.

For its part, Walmart's sole objection to holding the petition relies on predicting what this Court may or may not say in *Cameron*. Such predictions are of little value, especially as they fail to engage with the key questions raised here—such as how timeliness is affected by shifting litigation positions and by newly inadequate representation on appeal. And, against the backdrop of the Court's decision to review several appeals concerning the standard governing intervention on appeal, insisting that there is nothing certworthy about that standard is just whistling past the graveyard.

Respondents also confirm there are no horribles that will parade if charging parties can intervene on appeal. Indeed, permitting intervention here will lead to at most a handful of additional petitions on this Court's certiorari docket. By contrast, Walmart's immodest proposal would require charging parties to replicate the EEOC's litigation efforts for years in the lower courts to preserve their ability to seek eventual review in this Court on the off chance that the EEOC later abandons the case. Walmart would require this futile gesture despite its plainly wasting both judicial and party resources. Unsurprisingly, then, the United States does not share Walmart's view.

Neither Respondent disputes that the underlying question presented by Hedican's lodged merits petition is certworthy: whether *Hardison*'s definition of undue hardship as de minimis cost ought to be revisited. Indeed, the federal government previously agreed *Hardison* should be revisited by this Court. Nor does any party argue that procedural obstacles would prevent reaching Hedican's merits petition if the intervention denial were reversed.

Given the importance of both the question concerning the standard governing intervention on appeal, and the underlying question of *Hardison*'s continuing validity, this petition should at a minimum be held pending the decisions in *Cameron*, *Arizona*, and *Berger*. Alternatively, the Court should summarily grant intervention, set this petition for plenary review, or order other appropriate relief allowing Hedican to seek review of the Seventh Circuit's underlying merits decision.

I. At a minimum, the petition should be held for *Cameron*, *Arizona*, and *Berger*.

1. The briefs in opposition demonstrate that this case should be held pending this Court's disposition in *Cameron*. Indeed, the Solicitor General agrees that *Cameron* "might touch on issues relevant to this case" and "the Court may wish to defer consideration of this petition pending its decision in *Cameron*." U.S. BIO 6.

But rather than draw the obvious next conclusion—that the Court *ought* to hold this petition pending *Cameron*—the United States instead offers an odd contention that this Court should not "automatically" grant, vacate, and remand this appeal after *Cameron*, in case the decision there is irrelevant. U.S. BIO 13. That argument is both tautological and beside the point. The argument is tautological because if *Cameron* isn't relevant, it won't be relevant, and of course the Court itself is in the best position to determine *Cameron*'s relevance. The argument is beside the point because a GVR in light of *Cameron*, automatic or otherwise, is hardly the only course of action available to this Court, or even the most obvious. As we explain below, the Court could grant plenary review or grant summary intervention. But the only decision for the Court right now is whether to wait, and there the United States does not disagree that waiting makes sense.

Walmart's argument concerning *Cameron* is even odder. Walmart asserts that *Cameron* is inapplicable because "[t]his case has nothing to do with state sovereignty or the question of which elected or appointed state government official speaks for a state." Walmart

BIO 12. But, as the Kentucky Attorney General explained, appellate intervention was timely even "set[ting] aside Kentucky's sovereign interests." Pet. Br. 32, *Cameron*, No. 20-601. And oral argument bore this out: Justices repeatedly raised questions about the general standard for intervention "in the post-judgment intervention context," recognized that "there isn't much law for appellate intervention," and asked about the proper standard "in the context of private parties." Tr. 5:14, 34:25-37:23, *Cameron*, No. 20-601. In other words, whatever the ultimate outcome, *Cameron* will provide significant guidance that did not previously exist. Pet. 11-16. That is particularly so because the silence of the Federal Rules of Appellate Procedure with respect to intervention on appeal means that the Court will be writing on more of a blank slate than it would be in almost any other case concerning appellate procedure.

2. The same is true of *Arizona* and *Berger*. The Court granted certiorari after the filing of the petition here, and *Arizona* and *Berger* will naturally speak to the standards for intervention on appeal. The Solicitor General and Walmart address these cases but suggest "neither case is likely to bear" on the issue in this case. U.S. BIO 14; Walmart BIO 14. Like the predictions regarding *Cameron*, these predictions are also both premature and likely wrong.

In *Arizona*, the United States has argued that the state parties' initial "inaction" and status as "latecomers" to the case was properly weighed against their intervention on appeal. Fed. Resp. Br. 33-34, *Arizona*, No. 20-1775. *Arizona* is thus an occasion for the Court

to exposit the standard applicable to assessing requests for appellate intervention.

Berger concerns two questions as to the definition of "adequate representation" and the standard of review applicable to such a finding. As we explained in the petition, Hedican did not intervene earlier because his interests were adequately represented by the EEOC all the way through the petition for rehearing en banc. His intervention was therefore timely because it came when his interests first diverged from the EEOC's. The State Respondents in *Berger* have argued that adequate representation exists whenever parties "share the same interest" notwithstanding possible "disagreement about litigation tactics." If this Court agrees for the ordinary civil case—even if the multiple-state-official facts of *Berger* present a special case—it would provide additional grounds to find Hedican's intervention timely. State BIO 19, *Berger*, No. 21-248. Indeed, holding otherwise would put proposed intervenors between a rock and a hard place: intervene early and lose on adequacy of representation or intervene later (when lack of adequacy is confirmed) and lose on timeliness. Determining the appropriate interplay between these considerations is therefore critical.

Finally, in granting these cases along with *Cameron*, this Court has already illustrated why Walmart's insistence on a circuit split is misplaced. Walmart BIO 6. This Court has already concluded that the standard for intervention on appeal needs significant attention—particularly in an era where federal and state government bodies often take conflicting positions in litigation, and fewer and fewer consistent positions

and priorities carry over from administration to administration. Granting plenary review of this petition—or summarily granting intervention—would enable the Court to provide comprehensive guidance with respect to the procedures for intervention on appeal, including for the subset of prospective intervenors who have a statutorily-mandated right to intervene.

II. Allowing intervention on appeal will conserve, not waste, judicial and party resources.

Respondents also confirm that Hedican's approach to intervention better conserves judicial and party resources. As we explained in the petition, Hedican sought to intervene immediately following the denial of rehearing en banc. That moment was the first time the government's interests diverged from Hedican's, and was therefore the first time it made sense for Hedican to litigate independently. Hedican's intervention was thus timely.

The Solicitor General agrees that Hedican's motion to intervene—denied solely on timeliness grounds—was not untimely as a matter of law. See U.S. BIO 10 ("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."). The Solicitor General claims, however, that the Seventh Circuit retained discretion to deny Hedican's motion, citing the EEOC's "model notice" form giving a charging party warning that late intervention could be found untimely by a court. But an EEOC form describ-

ing what a court might do in some circumstances cannot override the text of a statute providing an absolute right to intervene.

Moreover, although the Solicitor General claims that there are no "unusual circumstances" supporting appellate intervention here, she readily concedes "unusual circumstances" were present in *Harris Funeral Homes*, where a charging party (who presumably received the "model notice") sought and was granted belated intervention "based on concern that a change in [a]dministration might cause the EEOC to 'withdraw from [the] case.'" U.S. BIO 9. This case, of course, is exactly parallel.[1]

What remains, then, is the Solicitor General's argument, echoed by Walmart, that Hedican's position would interfere with the Solicitor General's right to take over and speak for the EEOC at the Supreme Court level, and for the federal government to otherwise manage its own case. But Hedican does not seek to alter that system at all or treat it as a "defect." Walmart BIO 14-15. Hedican seeks only a recognition that the transition of authority over the federal government's position is the moment when the government's interests change. That moment is when intervention first becomes necessary, and thus timely. As in manufacturing, a system of "just-in-time" intervention is a *more* efficient procedure for deciding intervention.

---

[1] Respondents also make no argument that intervention would prejudice the parties. Indeed, no such argument could be made, as Hedican seeks simply to pick up where the federal government left off. Pet. 10-11.

By contrast, Walmart's insistence that intervention for the purpose of seeking certiorari must be untimely as a matter of law would be profligately wasteful of judicial and party resources. In the mine run of cases, a charging party is pursuing precisely the same objective as the EEOC, which frequently settles its cases in district court and thereby obtains relief for employees. Walmart's rule would nevertheless require charging parties fully aligned with the EEOC to retain independent counsel (if they can afford it) at the outset of litigation and go through the motions of wholly duplicative litigation, possibly for years. Otherwise they will forfeit their right to intervene if and when the government decides, based on its own interests, to drop an appeal.

Perhaps that rule would make sense if there were significant judicial resource costs on the other side of the balance. But Walmart presents evidence that there are none, pointing out that "[t]he EEOC files more than 100 lawsuits each year." Walmart BIO 11. Of those approximately 100 lawsuits, how many would make their way to this Court? Most EEOC cases settle in the district court. The EEOC appeals fewer still, and the EEOC loses an even smaller number of the appeals it does take. The EEOC's database of appellate briefs shows one petition for rehearing in 2021 (this case), no petitions for rehearing in 2020 or 2019, two petitions in 2018, three in 2017, and two in 2016. See EEOC, Commission Appellate and Amicus Briefs, https://www.eeoc.gov/commission-appellate-and-amicus-briefs (reviewed January 27, 2022). Therefore, rather than "open[ing] the floodgates," Walmart BIO 11, granting Hedican's petition *might* result in a trickle of two or three additional petitions for certiorari per

year.[2] In the context of over 7,000 petitions filed each year, the resulting call on the resources of the Court would be negligible.

III. This appeal is an excellent vehicle for addressing both the question of intervention on appeal for charging parties and the underlying question of *Hardison*'s de minimis standard.

This appeal provides an excellent vehicle for the Court to address both the question of intervention on appeal and the underlying question of the continuing validity of the *Hardison* standard.

1. There are at least five paths to resolve the issues raised in the petition. First, as we noted in the petition (at 16-17)—and no party disputes—Hedican complied with the deadline to file a petition for writ of certiorari by attaching his merits petition to the intervention petition. Thus, if this Court agrees intervention was wrongly denied, this Court can immediately docket that petition and consider it on the merits. Second, the Court could grant plenary review on the intervention question. Third, the Court could remand to the Seventh Circuit to reconsider intervention. Should

---

[2] Walmart also says allowing intervention on appeal would make the Solicitor General's decision "merely preliminary." Walmart BIO 15. But there is nothing unusual about parallel decisionmaking. The EEOC's decision whether to file suit is "merely preliminary" to an employee's decision to sue, and if the EEOC declines to pursue a case, the employee can sue. Allowing a party to intervene once the government becomes likely to drop a case—as in *Harris Funeral Homes*—ensures that the government's decision not to pursue a case does not foreclose a charging party from doing so.

the Seventh Circuit then determine intervention was wrongly denied, this Court could docket Hedican's timely-lodged merits petition. Fourth, the Seventh Circuit could grant intervention and reset the deadline to petition from its merits decision, allowing Hedican to file a new petition on the *Hardison* question. Fifth, the Court could otherwise ensure that the wrongful denial of intervention does not prevent Hedican from vindicating his rights.

With respect to the fourth option described above, the Solicitor General quibbles over whether "equitable tolling" would be the correct procedural mechanism to right the wrong of denying Hedican intervention. U.S. BIO 14-15. But this Court's rules contemplate that the Seventh Circuit could reset the deadline to petition from the merits decision by, for example, permitting Hedican to file a petition for rehearing en banc, as a recently added party to the case. See Rule 13.3 ("[I]f the lower court appropriately entertains an untimely petition for rehearing or sua sponte considers rehearing," the deadline to petition for certiorari "runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment.").

The postures in both *Cameron* and *Arizona* are instructive. In *Cameron*, the Kentucky Attorney General's intervention is premised on the Sixth Circuit's permitting him to seek en banc rehearing on remand, even if the deadline for such rehearing has formally run since his prior efforts were rejected. In *Arizona*, Arizona—like Hedican—sought intervention after the rehearing deadline when the federal government's posture changed. When the lower court denied intervention, Arizona and its sister states filed a motion to

intervene directly with this Court and appended its petition for a writ of certiorari on the merits. This Court held the motion in abeyance pending the timely filing of a petition on the intervention issue. The day it granted certiorari on the intervention issue, it denied the motion for direct intervention (and its attached merits petition), confirming that a petition challenging denial of intervention is sufficient to preserve entitlement to effective relief on the merits.

2. Finally, neither Respondent disputes that the merits of the underlying *Hardison* question are worthy of this Court's review. For example, in a recent case involving an employer dwarfed by Walmart, the Solicitor General endorsed this Court's revisiting *Hardison* and called the de minimis standard "incorrect." U.S. Amicus Br. 19, *Patterson* v. *Walgreen Co.*, No. 18-349. Three Justices "agree[d]" with "the views of the Solicitor General" on this point. *Patterson* v. *Walgreen Co.*, 140 S. Ct. 685, 685-686 (2020) (Alito, J., concurring). Since then, however, the administration has changed, coinciding with the Solicitor General's decision to abandon at this Court's doorstep an appeal posing the same question.

Over the years, lower court judges, scholars, and other commentators have called on this Court to reconsider *Hardison* as it not only "rewr[o]te" Congress's effort to protect religious employees but also "most often harm[ed] religious minorities." *Small* v. *Memphis Light, Gas & Water*, 952 F.3d 821, 829 (6th Cir. 2020) (Thapar, J., concurring); Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. Chi. L. Rev. 871, 936 (2019) ("The

Court's holding in *Hardison* is dubious for a number of reasons.").

The Seventh Circuit's decision in this case would warrant correction regardless of the underlying issue. But here, correcting that error would allow this Court to consider a petition that puts the absurdity of *Hardison*—*e.g.*, permitting the nation's largest employer to claim undue hardship in accommodating one man's religious scheduling request—in full view. As the Seventh Circuit put it: "Our task, however, is to apply *Hardison* until the Justices themselves discard it." App.7a. With the charging party ready and able to present the case, there is no reason to let a wrongful denial of intervention bar him from seizing his only opportunity to vindicate his rights.

CONCLUSION

The Court should, at a minimum, hold this petition pending resolution of *Cameron*, *Arizona*, and *Berger*.

Should the Court agree in light of *Cameron*, *Arizona*, or *Berger* that the Seventh Circuit's intervention decision was incorrect, it should order the attached petition for certiorari on the merits to be filed. Alternatively, the Court could order plenary review of this petition; grant, vacate, and remand for further consideration in light of this Court's decisions; or order other appropriate relief allowing Hedican to seek review of the Seventh Circuit's underlying merits decision.

Respectfully submitted.

ERIC C. RASSBACH
Counsel of Record
MARK L. RIENZI
NICHOLAS R. REAVES
CHRISTOPHER PAGLIARELLA
DANIEL L. CHEN
JAMES J. KIM
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1919 Pennsylvania Ave. NW
Suite 400
Washington, D.C. 20006
(202) 955-0095
erassbach@becketlaw.org

Counsel for Petitioner

FEBRUARY 2022