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

SUPPLEMENTAL BRIEF OF RESPONDENTS WALMART STORES EAST, L.P. AND WAL-MART STORES, INC.

Kelly Perigoe
KING & SPALDING LLP
633 West Fifth Street
Los Angeles, CA 90071
(213) 218-4010

Nicole Bronnimann
KING & SPALDING LLP
1100 Louisiana Street
Houston, TX 77002
(713) 751-3200

Jeremy M. Bylund
Counsel of Record
Jeffrey S. Bucholtz
Ashley C. Parrish
Gabriel Krimm
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, DC 20006
(202) 737-0500
jbylund@kslaw.com

Counsel for Walmart Stores East, L.P. and Wal-Mart Stores, Inc.

March 15, 2022

REASONS TO DENY THE PETITION

The Court's recent decision in *Cameron v. EMW Women's Surgical Center*, No. 20-601, slip op. (U.S. Mar. 3, 2022), confirms that the petition in this case is not worthy of this Court's review. In this "garden-variety" Title VII action, Gov't Br. 12, the Seventh Circuit committed no legal error that could call into doubt its decision to deny petitioner's past-the-last-minute request to intervene. Petitioner knew from the outset of litigation that the EEOC represented the public's interest, not his own personal interests. Yet, he opted not to intervene through years of litigation and changed his mind only after rehearing had been denied, just days before the mandate issued. BIO 4–5. Because the Seventh Circuit appropriately exercised its discretion in denying intervention, and because nothing in *Cameron* changes that conclusion, the petition should be denied.

1. This Court made clear in *Cameron* that it was not "attempt[ing] to set out a general rule governing the right of non-parties to appeal or to move for appellate intervention." Slip op. 7. Nor did the Court alter the standard of review. As the Court observed, no "statute or rule" governs appellate intervention and, as a result, federal appellate courts appropriately look to the "policies underlying intervention" in the district courts for guidance in exercising their discretion. *Id.* (quoting *Int'l Union, United Automobile, Aerospace & Agric. Implement Workers v. Scofield*, 382 U.S. 205, 217 n.10 (1965)). The decision in *Cameron* thus is tightly tied to the unusual circumstances of that case.

Cameron reaffirms that the timeliness of an intervention request turns on the legal "interests" that a proposed intervenor seeks to protect through intervention, *see id.,* in light of "all the circumstances." Slip op. 10 (quoting *NAACP v. New York*, 413 U.S. 345, 366 (1973)). As *Cameron* explains, "the most important circumstance" is how much time has passed since the proposed intervenor knew that his legal interests "'would no longer be protected'" by the parties, or when he "should have [been] alerted" to that fact. *Id.* at 10–11 (quoting *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977)). The federal appellate courts have applied this standard for decades. *See Stallworth v. Monsanto Co.*, 558 F.2d 257, 264 (5th Cir. 1977).

The Sixth Circuit abused its discretion in *Cameron* because it "failed to account for the strength of the Kentucky attorney general's interest" in intervening once it became clear that the state official assigned to defend Kentucky's laws would no longer fulfill that function. *See* Slip op. 9; *see also id.* at 8 (emphasizing that "a State's opportunity to defend its laws in federal court should not be lightly cut off"). As the Court carefully explained, the Kentucky Attorney General was not intervening to enforce the law but rather exercising "his role as the Commonwealth's 'chief law officer' … who has the authority to defend Kentucky's interests in federal court when no other official is willing to do so." *Id.* at 9–10 n.5 (quoting Ky. Rev. Stat. Ann. § 15.020(1)). The Attorney General's need to exercise that authority, and his role under the specific state-law scheme vis-à-vis other state officials, did not arise until Kentucky's interests were threatened when the Secretary of Health and Family

Service "ceased defending the state law." *Id.* at 11. As Justice Kagan explained, the Secretary's decision to abandon defending Kentucky's interest was a "major shift in the litigation" that created an "urgent reason" for the Attorney General to intervene to protect Kentucky's interests as provided by state law. *Id.* at 4 (Kagan, J., concurring in the judgment). In short, as the Court admonished, "[r]espect for state sovereignty must ... take into account the authority of a State to structure its executive branch in a way that empowers multiple officials to defend its sovereign interests in federal court." *Id.* at 8. The Sixth Circuit's failure to consider those state-sovereignty considerations required reversal.

2. The same considerations do not apply here. While petitioner is disappointed that the Solicitor General chose not to seek this Court's discretionary review on behalf of the EEOC, petitioner knew or should have known from the outset of litigation that his interests were never directly or fully represented or protected by the government. BIO 8–11. Decades ago, this Court explained that the government's power to bring discrimination suits "does not function ... as a vehicle for conducting litigation on behalf of private parties." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977). As a result, petitioner was never in a position to rely on the government to protect his personal interests. *See* EEOC, *Notice to Charging Parties of Commission Suits*, https://www.eeoc.gov/e-notice-charging-parties-commission-suits (instructing EEOC trial attorneys to explain intervention rights and the need to intervene early in the case to charging parties). That legal disconnect between the EEOC's role and interests and the charging party's personal

interests is why Congress granted charging parties "the right to intervene in a civil action brought by the Commission," 42 U.S.C. § 2000e-5(f)(1), and it is why that right should not be held in reserve. *See* BIO 7 (citing cases).

"[T]here 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)." Gov't Br. 12. Petitioner simply chose not to do that. Despite the government's unique and distinct objectives, petitioner did not participate in the district court litigation or in the appeal and remained on the sidelines. Certainly, by the time the panel ruled against the EEOC it was evident to petitioner that his interests were imperiled, and yet he still did not intervene even though it was not certain the government would even seek en banc rehearing (which is a long shot under any circumstances). Petitioner waited to file his motion until the last possible moment, after the litigation was over and just days before the mandate was scheduled to issue. But a petition for certiorari does not—and should not—follow as a matter of course every time the EEOC loses a case.

The Seventh Circuit was thus well within its discretion to decide that in *this* case, under *these* circumstances, the motion to intervene was untimely. Unlike in *Cameron*, there was no major shift during the litigation: the EEOC never represented or purported to represent petitioner's personal interests, and petitioner always knew that the government could make litigation decisions in its case for its own reasons. If a court of appeals has no discretion to deny

an eve-of-mandate intervention motion as untimely in these circumstances, the notion that courts have discretion to decide the timeliness of intervention motions would be a mere canard. BIO 8.

Holding that charging parties have an absolute legal right—not subject to any meaningful judicial discretion—to intervene all the way up until the issuance of the mandate would also "seriously disrupt[]" the Title VII statutory scheme. *See Cameron*, slip op. 11–12 (quoting *NAACP*, 413 U.S. at 369). If the Seventh Circuit erred in denying petitioner's motion, then any and every charging party will have a right to intervene to file a petition for certiorari. *See* BIO 11. Congress gave the United States Attorney General the authority (which is then delegated to the Solicitor General) to decide whether to petition for certiorari for good reason, BIO 14–15, and nothing in *Cameron* remotely suggests that the Court intended its decision in that unusual state-sovereignty case to disrupt Congress's design of Title VII. To the contrary, such a dramatic extension of *Cameron* would belie the Court's assurance that it was "not attempt[ing] to set out a general rule governing the right of non-parties to appeal or to move for appellate intervention." Slip op. 7.

CONCLUSION

For these reasons and those set forth in the brief in opposition, the Court should deny the petition for certiorari.

Respectfully submitted,

Kelly Perigoe
KING & SPALDING LLP
633 West Fifth Street
Los Angeles, CA 90071
(213) 218-4010

Nicole Bronnimann
KING & SPALDING LLP
1100 Louisiana Street
Houston, TX 77002
(713) 751-3200

Jeremy M. Bylund
Counsel of Record
Jeffrey S. Bucholtz
Ashley C. Parrish
Gabriel Krimm
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, DC 20006
(202) 737-0500
jbylund@kslaw.com

Counsel for Walmart Stores East, L.P. and Wal-Mart Stores, Inc.

March 15, 2022