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

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF

This Court's decision in *Cameron* v. *EMW Women's Surgical Center, P.S.C.*, 142 S. Ct. 1002 (2022) disposes of this appeal. The Seventh Circuit's decision to deny intervention cannot be reconciled with the intervention standard set out by the Court in that case. The Seventh Circuit's decision should be summarily reversed, or at the very least vacated and remanded so the panel can apply *Cameron*.

The Court explained in *Cameron* that there is no established law of appellate intervention, but what Congress has said with respect to intervention can be dispositive. Here, as in *Cameron*, "[t]he importance of ensuring" that employees "have a fair opportunity to defend" their interests in federal court "has been recognized by Congress." *Cameron*, 142 S. Ct. at 1011. Notably, while *Cameron* relied on an inference from a "not directly applicable" statute, *ibid.*, here Congress has expressly authorized employees like Hedican to intervene as of right. See 42 U.S.C. 2000e-5(f)(1).

So too with timeliness. As *Cameron* explained, "the most important circumstance relating to timeliness" is whether the proposed intervenor "sought to intervene 'as soon as it became clear' that [his] interests 'would no longer be protected' by the parties in the case." *Cameron*, 142 S. Ct. at 1012 (quoting *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 394 (1977)). Here, Hedican's "need to seek intervention did not arise" until the EEOC "ceased" pursuing the case; thus "the

timeliness of his motion should be assessed in relation to that point in time." *Ibid.*[1]

Finally, as to prejudice, substituting one party for another on appeal does not "unfairly prejudice[ ]" a defendant where the new party is merely picking up the baton from a litigant who has dropped it. *Cameron*, 142 S. Ct. at 1013 (quoting *McDonald*, 432 U.S. at 394).

In its supplemental brief, Walmart says there is something strange about what it calls an "eve-of-mandate" intervention. Walmart Supp. Br. 5; cf. Fed. R. App. P. 41(b) (mandate issues seven days after denial of rehearing). But the same adjective could be applied to Cameron's intervention, which came at the very end of an appeal. In fact, the timeframes in *Cameron* and this appeal are almost identical. "The attorney general sought to intervene two days after learning that the secretary would not continue to defend HB 454." 142 S. Ct. at 1012. Hedican sought to intervene for the sole purpose of seeking certiorari exactly two days after he learned that the EEOC's petition for en banc rehearing had been denied. Indeed, he sought to intervene long *before* he learned that the EEOC would no longer

[1] Nor did the fact that the prior litigant "might abandon" an appeal require Cameron to intervene earlier. 142 S. Ct. at 1013. Rather, where the prior litigant "had continued to defend the law on appeal," the clock for timeliness purposes began to run only when the prior litigant decided not to appeal further. *Ibid.*

continue to pursue relief against Walmart.[2] Timeliness turns on when the "need to seek intervention" arises; Walmart would have it turn instead on when the lawsuit began. *Ibid.*

Echoing the *Cameron* dissent, Walmart also says lower court discretion would be a "mere canard" if the Seventh Circuit's decision were not upheld. Walmart Supp. Br. 5. But discretion applies only to permissive intervention, and this is an as-of-right intervention. See 42 U.S.C. 2000e-5 ("The person or persons aggrieved shall have the right to intervene * * * .") And even if the Seventh Circuit did have discretion in deciding the issue of timeliness, it applied nothing close to the sound discretion standard set out in *Cameron*. Instead it dismissed Hedican's two requests out of hand, each time in less than 24 hours and with minimal reasoning.

Walmart beats a tactical retreat on the issue of how many cases this Court would have before it if Hedican vindicates his right to intervene. Instead of the approximately 100 claims it described in its brief in opposition, BIO 11, Walmart now says "every time the EEOC loses a case" a cert petition will result. Walmart Supp. Br. 4. But as we explained in the reply brief, the EEOC loses a vanishingly small number of appeals, and even fewer after en banc review. Reply 8 (describing eight such cases over six years). On this point Walmart has no answer.

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[2] Earlier on the day Hedican sought to intervene, EEOC counsel told undersigned counsel in response to a specific inquiry, "We are still evaluating whether the government will file a certiorari petition in this case[.]" Email from Sydney Foster to Eric Rassbach (June 3, 2021) (on file with counsel).

Walmart does, however, double down on its position that all charging parties *must* intervene in district court in order to preserve their appeal rights in a case. Walmart Supp. Br. 4 ("that right should not be held in reserve"). But Congress imposed no such limit in the text of the statute. 42 U.S.C. 2000e-5(f)(1). And Walmart's position would have the perverse and "seriously disrupti[ve]" effect of multiplying litigation across a host of cases in the lower courts, solely to prevent a handful of additional cert petitions from being filed every year. *Cameron*, 142 S. Ct. at 1013; Reply 8-9. That pound-foolish approach wouldn't be in anyone's interest.

CONCLUSION

Should the Court conclude in light of *Cameron*, *Arizona*, or *Berger* that the Seventh Circuit's intervention decision was incorrect, it should summarily reverse and 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.

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