No. _____

IN THE

Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

CATASTROPHE MANAGEMENT SOLUTIONS,
Respondent.

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

MOTION FOR LEAVE TO INTERVENE TO FILE A PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO INTERVENE TO FILE A PETITION FOR WRIT OF CERTIORARI

Chastity C. Jones respectfully moves this Court for leave to intervene for the purpose of filing a petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018 (11th Cir. 2016), *reh'g denied*, 876 F.3d 1273 (11th Cir. 2017) (hereinafter "*CMS*").

This case raises the important question of whether Title VII of the Civil Rights Act of 1964 prohibits workplace discrimination based on stereotypes relating to the protected category of race. *See* 42 U.S.C. § 2000e-2(a)(1), (m). Specifically, the question is whether an employer can refuse to hire a qualified Black woman with well-kept natural locs, because of the stereotypical belief that locs "tend to get messy," when locs are physiologically, culturally, and historically associated with African Americans. The court below held that Title VII prohibits racial discrimination only when the discrimination is based on immutable characteristics, and therefore that Catastrophe Management Solutions (CMS) did not violate Title VII when it revoked an offer of employment to Ms. Jones based on a racial stereotype about her hairstyle. The Eleventh Circuit's ruling is irreconcilable with this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which held that Title VII reaches discrimination based on stereotypes associated with a protected class, regardless of whether the stereotypes concern mutable or immutable characteristics.

After she had her job offer revoked because of her employer's belief that locs "tend to get messy," Ms. Jones filed a charge with the Equal Employment

Opportunity Commission (EEOC). The EEOC then filed the instant suit on her behalf in the Southern District of Alabama, alleging CMS engaged in disparate-treatment discrimination. The district court dismissed the suit for failure to state a claim. The EEOC appealed the dismissal to the Eleventh Circuit, which affirmed the district court's decision. The EEOC petitioned the Eleventh Circuit for rehearing *en banc*, which the full court denied over a three-judge dissent.

Given that the EEOC has decided not to petition for certiorari,[1] Ms. Jones requests permission to intervene so that she can file her own petition. This request should be granted because Ms. Jones is the real party in interest. In bringing this action, the EEOC represented the interests of Ms. Jones and sought relief from CMS on her behalf. However, now that the EEOC has determined not to file a certiorari petition, Ms. Jones's interests are no longer being represented. Furthermore, failure to grant Ms. Jones leave to intervene would render the Eleventh Circuit's decision unreviewable, thereby leaving in place a ruling that squarely conflicts with *Price Waterhouse* and numerous decisions from other circuits with respect to one of our nation's most important civil rights laws.

As explained below, this Court has repeatedly granted intervention for leave to file certiorari petitions under circumstances similar to those here—where the would-be intervenor's interests were represented by another party below and that

[1] The EEOC's deadline for filing a petition for certiorari was March 5, 2018. It did not file a petition or an extension application by that date. Ms. Jones, on the other hand, applied for a 30-day extension to file a petition for certiorari on February 23, 2018. The Court granted the motion and extended the time for Ms. Jones to file a petition to April 4, 2018. *See* Order on Application No. 17A902.

party decided not to seek further review by this Court—and should do so again in this case, especially given the importance of the question presented.

FACTUAL BACKGROUND

Catastrophe Management Solutions is a claims processing company that provides customer service support to insurance companies. *CMS*, 852 F.2d at 1021. CMS offered Chastity Jones, a Black woman who wore her hair in well-kept "short dreadlocks," a call center customer service position that had no in-person interaction with customers or the public. *Id.* But, after offering her a position, the company told Ms. Jones that it could not hire her with her hair in locs. *Id.* When Ms. Jones asked why, CMS's representative stated that locs "tend to get messy," although she acknowledged that "I'm not saying yours are." *Id.* As a result of this false racial stereotype, CMS interpreted its grooming policy to prohibit Ms. Jones from working at the company unless she cut off her locs. *See id.* at 1022.

Ms. Jones filed a complaint with the EEOC, which then filed suit against CMS on her behalf. In the suit, the EEOC alleged that CMS engaged in race-based discrimination in violation of Title VII. *Id.* at 1020. The district court dismissed the suit for failing to state a "plausible claim for employment discrimination based on race." *EEOC v. Catastrophe Mgmt. Sols.*, 11 F. Supp. 3d 1139, 1144 (S.D. Ala. 2014). The court reasoned that dismissal was appropriate because "Title VII prohibits discrimination on the basis of *immutable* characteristics" and a "hairstyle, even one more closely associated with a particular ethnic group, is a mutable characteristic" not covered by Title VII. *Id.* at 1143 (emphasis added).

A panel of the Eleventh Circuit affirmed, holding that Title VII applies to protected classes "with respect to their immutable characteristics, but not their cultural practices." *CMS,* 852 F.3d at 1030. The EEOC petitioned for rehearing en banc, which the Eleventh Circuit denied over a three-judge dissent. *See CMS,* 876 F.3d 1273. The dissent thought rehearing en banc was warranted because the "mutable/immutable distinction" on which the panel relied was "invalidated" by this Court "more than twenty-five years ago in *Price Waterhouse* . . .." *Id.* at 1279 (Martin, J., dissenting) (citation omitted).

Because the EEOC brought the instant action on Ms. Jones's behalf, she was not a named party in the district court or Eleventh Circuit. Now that the EEOC has decided not to seek certiorari, Ms. Jones moves to intervene so that the dismissal of her discrimination claim can be reviewed by this Court.

ARGUMENT

Chastity Jones was not a party to the litigation below because the EEOC brought this employment discrimination suit on her behalf, rather than issue a right to sue letter which would have allowed her to pursue her discrimination case on her own. *See* 28 C.F.R. § 1601.28. And while her interests were adequately represented at earlier stages of this litigation by the EEOC, now that the EEOC has determined not to petition for certiorari, Ms. Jones interests will go unrepresented unless this Court allows her to intervene.

This Court has repeatedly recognized that intervention to file a certiorari petition is appropriate when the would-be intervenor has a direct interest in the

proceeding, that interest was represented by another party below, but the other party decided not to petition for certiorari. *See, e.g.*, *Com. Land Title Ins. v. Corman Construction, Inc.*, 508 U.S. 958 (1993); *Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1969); *Banks v. Chi. Grain Trimmers Ass'n*, 389 U.S. 813 (1967). That is precisely the situation here. Ms. Jones has a direct interest in the proceeding below, as a favorable ruling would require CMS to pay Ms. Jones damages for its discriminatory rescinding of its offer of employment. The EEOC represented Ms. Jones's interest below by suing on her behalf and filing an appeal in the Eleventh Circuit, but the EEOC has decided not to petition for certiorari. The Court should therefore grant Ms. Jones's intervention motion so that she may file a certiorari petition.

Banks is directly on point. In that case, a widow was awarded benefits in an administrative action by the Department of Labor (DOL). *Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 460-461 (1968). When her late husband's employer, which was obligated to pay the benefits, subsequently sued DOL to set aside the award, Mrs. Banks was not joined. *See* Pet. for Leave to Intervene & Pet. for Cert. at 9, No. 66-59 (U.S. Mar. 4, 1967). The Seventh Circuit set aside the award, and the government declined to seek this Court's review. *See id.* Mrs. Banks sought leave to intervene because otherwise, she would "be without remedy because [the government] refused to further protect [her] rights via appeal." *Id.* at 10. In her motion, Mrs. Banks explained that she previously "had not intervened prior to this time because she assumed that it was unnecessary . . . [as her] rights were adequately represented by the [government]." *Id.* This Court granted Mrs. Banks's motion to

intervene so that she could file her own petition and thereby protect her interest in the award. *See Banks*, 389 U.S. 813. The Court thereafter granted certiorari and reversed the Seventh Circuit's judgment. *See Banks*, 390 U.S. at 467.

In *Corman Construction*, this Court allowed intervention after it became clear that the petition filed by a party to the decision below would be dismissed. There, the FDIC, acting as receiver for a bank, challenged a state statute as violating federal law. *See* Mot. to Intervene & Pet. for Cert. at 3-4, No. 92-1871 (U.S. May 24, 1993). The FDIC lost in the lower courts and filed a petition with this Court, but the Solicitor General, who was required to but had not authorized the filing, sought to have it dismissed. *Id.* at 5. This Court granted a motion to intervene by the bank's insurer, which was not a party below, so that the insurer could file its own (unsuccessful) petition. *See Corman Construction*, 508 U.S. at 958.

Hunter concerned a lawsuit brought against Ohio election officials to strike the name of a judicial candidate from the ballot. *See* Pet. for Leave to Intervene & Pet. for Cert. at 6, No. 654 (U.S. Sept. 25, 1969). The candidate himself was not a named party; state officials litigated the case instead. *Id.* Following a ruling by the state court that the candidate was ineligible for office, the state officials chose not to file a petition for certiorari. *Id.* at 6, 9. The candidate therefore moved to intervene because he had a direct and "personal stake in the outcome of the controversy"—inclusion on the ballot. *Id.* at 11. As in *Banks* and *Corman Construction*, this Court allowed the

candidate to intervene to seek review here, although it ultimately denied the petition. *See Hunter*, 396 U.S. 879.[2]

Just as in *Banks*, *Corman Construction*, and *Hunter*, this Court should allow Ms. Jones to intervene here. While the EEOC represented Ms. Jones's interests below, now that it has declined to appeal the adverse Eleventh Circuit decision, intervention is the only way Ms. Jones can press her interests before this Court. There is no doubt that Ms. Jones has a direct and personal stake in the outcome of this controversy, as it concerns the propriety of dismissing a claim alleging that CMS intentionally discriminated against her because of her race; for which, as a remedy, the EEOC requested that CMS be ordered to make Ms. Jones whole by paying her backpay and damages. Compl. at 4. ECF No. 1; Amend. Compl. at 12-13, ECF No. 21. Simply, Ms. Jones's interests, including whether she is eligible for compensation for lost employment opportunities, are directly affected by this case's outcome.

Analogously, in actions brought by the EEOC on behalf of an individual, federal courts of appeal have found that the real parties in interest have standing to appeal a decision adverse to their interests. *See, e.g.*, *Binker v. Pennsylvania*, 977 F.2d 738, 745 (3d Cir. 1992) (allowing intervention to appeal district court's order approving settlement negotiated by the EEOC); *EEOC v. Pan Am. World Airways,*

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[2] This Court has also allowed a non-party to join a case at the petition stage when doing so was necessary to avoid the case becoming moot. In *Rogers v. Paul*, 382 U.S. 198 (1965) (per curiam), two students brought a class action to desegregate the public high schools in their town. By the time the students sought review by this Court of an adverse Eighth Circuit judgment, one had graduated and the other had entered the last year of school. *See id.* at 199. The Court allowed two younger students, who had not been named parties below, to join the case to preserve a live controversy. *Id.* at 198-199; *see also* Pet. for Cert. and Mot. to Add Additional Pls. at 35-37, No. 534 (U.S. Sept. 3, 1965). The Court then granted the petition and reversed the judgment below.

Inc., 897 F.2d 1499, 1506 (9th Cir. 1990) (allowing intervention to appeal of order approving EEOC settlement). Because the EEOC was asserting the claim on Ms. Jones's behalf below, Ms. Jones did not have a reason to intervene in the district court or court of appeals. *Cf. EEOC v. La. Office of Cmty. Servs.*, 47 F.3d 1438, 1442-43 (5th Cir. 1995) (denying non-party's appeal where "the EEOC adequately represented [her] below and continues to do so on appeal," and distinguishing prior case "allowing non-party appeal where EEOC had not pursued appeal in its representative capacity") (citing *EEOC v. West La. Health Servs., Inc.*, 959 F.2d 1277 (5th Cir. 1992)). It was not until the EEOC decided not to seek review of the Eleventh Circuit's decision that it became clear that Ms. Jones would have to intervene.

Finally, Ms. Jones should be allowed to intervene to not only "redress [her] own injury," but to also "vindicate[ ] the important congressional policy against discriminatory employment practices." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974); *see also N.Y. Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 64 (1980) ("Congress has cast the Title VII plaintiff in the role of a 'private attorney general,' vindicating a policy of the highest priority." (Citation and additional quotation marks omitted)). Indeed, given the important policy issues at play, Ms. Jones's situation is comparable to, if not more pressing than, the cases where the Court has permitted intervention in the past, in which the would-be intervenors reasonably relied on others to represent their interests below. And like those intervenors, Ms. Jones is acting promptly to step in now that the litigant, the EEOC, who previously pressed the cause has stepped aside.

* * *

If this Court does not grant Ms. Jones leave to intervene to file a certiorari petition, it will be unable to review the Eleventh Circuit's decision—a decision that is incompatible with this Court's decision in *Price Waterhouse* and numerous other circuits' decisions. *Cf. Rogers*, 382 U.S. at 199 (granting intervention by non-parties to preserve the question for Supreme Court review). This Court should grant Ms. Jones leave to intervene so that she can continue to press before this Court the racial discrimination claim that the EEOC originally brought on her behalf but has not presented to this Court.

CONCLUSION

For these reasons, the motion for leave to intervene should be granted.

DATED: April 4, 2018

Respectfully Submitted,

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