No. 21M _____

In the Supreme Court of the United States

EDWARD HEDICAN,

Movant,

v.

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

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents.

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

Edward C. Hedican 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 Seventh Circuit in *EEOC* v. *Walmart Stores East, L.P.*, 992 F.3d 656 (7th Cir. 2021). Movant is contemporaneously submitting the proposed petition. The motion is unopposed: the EEOC takes no position on this motion and the Walmart respondents take no position on the motion "at this time."

INTRODUCTION

The merits of this case present the Court with a singular opportunity to resolve two large circuit splits arising under *Trans World Airlines* v. *Hardison*, 432 U.S. 63 (1977), and to reconsider *Hardison* itself. As the contemporaneously-submitted proposed petition explains, the issues are properly presented, the facts are well developed, the two circuit splits in the petition are square and intractable, and it is clearer than ever that *Hardison* itself should be reevaluated.

When he accepted an offer to work as an assistant manager at Walmart, Hedican told Walmart that, as a Seventh-day Adventist, he could not work on his Sabbath (sundown Friday to sundown Saturday). Even though he volunteered to work nights, or any other weekend hours as needed, and despite internal corporate compliance guidance encouraging accommodations, Walmart rescinded its offer, concluding that Hedican's inability to work on his Sabbath imposed a "minimal cost" on Walmart. Indeed, it did not even try to determine whether voluntary shift swaps with the eight other assistant managers at the store would allow an accommodation. In Walmart's

view—and the view of the courts below—the "minimal cost" of allowing shift swaps was enough under this Court's *Hardison* decision to deny an accommodation. As Judge Easterbrook explained while noting several Justices' criticism of *Hardison*: "Our task, however, is to apply *Hardison* unless the Justices themselves discard it." App.7a. The ball is thus squarely in the Court's court.

And whatever an "undue hardship" in Title VII might entail for smaller employers, surely it does not allow a company with over $500 billion in annual revenue to claim that allowing voluntary shift swaps to accommodate religion is an "undue hardship" on its business. That at least is what the EEOC thought. It pursued relief for Hedican in the lower courts—even filing an *en banc* petition explaining that the Seventh Circuit panel's decision "is incorrect and squarely conflicts with decisions of the Fifth, Sixth, and Ninth Circuits," "conflicts with decisions of at least four other courts of appeals," and is "in tension with other appellate decisions."

But the federal government's commitment to this case is far less certain—and its alignment with Hedican's interests no longer the same—now that the case is on this Court's doorstep. First, decision-making authority transfers by law from the EEOC to the Solicitor General for filings at the Supreme Court. The decision to seek this Court's review is no longer with an agency focused on civil rights enforcement but lies instead in the hands of the federal government—this country's largest employer. Perhaps unsurprisingly, then, the federal government has confirmed to counsel for Hedican that it has not yet determined whether it will seek review in this Court, or on what questions it might seek review if it did.

Second, now that this case is at this Court's threshold, the question whether to reconsider *Hardison* is on the table. And although the federal government opined two years ago in *Patterson* v. *Walgreen Co.*, No. 18-349, and in briefing below that *Hardison* should be overruled, it is unclear whether that remains its position.

Third, even if the federal government continues to pursue its claims in this Court, experience shows that the Solicitor General may not make the strongest arguments in favor of Hedican's right to a religious accommodation. For example, the Solicitor General has previously taken the position that there is no split of authority over the evidentiary burden on employers to prove "undue hardship" under Title VII—one of the issues on which Hedican would seek review. See U.S. Br.17, *Patterson* v. *Walgreen Co.*, No. 18-349. Accordingly, to protect his own unique interests, Edward Hedican submits this motion to intervene.

Given the unique circumstances of this litigation, intervention at this stage and for this purpose is appropriate. Hedican, as the charging party, has a statutory right to intervene under 42 U.S.C. 2000e-5. In addition, he has a direct and substantial legal interest in the outcome of this case; his motion to intervene is timely, submitted well within the time permitted to seek certiorari from the panel's decision below; his interests will be extinguished absent this Court's review; and the federal government's representation is now inadequate, both because of its fundamentally different interests, and because of the usual concerns—including interagency "equities"—that might persuade the Solicitor General not to seek review or to seek review on a more limited basis than Hedican would.

Finally, Hedican is filing this motion well in advance of the deadline for seeking certiorari, October 29, because he wishes to give the Court ample time to consider the motion to intervene before a petition for certiorari would normally be due.

STATEMENT

In May 2016, Walmart offered Edward Hedican a salaried position as assistant manager in its Hayward, Wisconsin store. Hedican would have been one of eight assistant managers at the store. When Hedican sought an accommodation to observe his Sabbath as a Seventh-day Adventist (sundown Friday to sundown Saturday), Walmart rescinded the offer. Discovery determined that Walmart had considered, but rejected, offering Hedican the option of voluntarily swapping shifts with the other assistant managers. This option was rejected because Walmart's human resources manager assumed—without any investigation or facts to support her assumption—that this accommodation wouldn't work because other assistant managers "may have plans" or may not want to swap shifts. App.23a.[1] She therefore rescinded Hedican's offer, instead suggesting he apply for a lower paying, hourly job at Walmart. Acting *pro se*, Hedican filed a charge with the EEOC, and, on September 27, 2018, the EEOC sued Walmart in the Western District of Wisconsin. App.70a.

On January 16, 2020, the district court granted summary judgment for Walmart and held, applying *Hardison*, that Walmart "could not accommodate [Hedican's] request to have every Saturday off without incurring undue hardship." App.14a. The

[1] All "App." cites are to the Petitioner's Appendix attached to the proposed Petition for Certiorari being submitted herewith.

EEOC appealed, arguing that Walmart should have considered voluntary shift swaps, that Walmart could not rely on speculative hardships, and that this Court should overrule *Hardison*. See EEOC CA7 Br.44-48, 36 n.5.

On March 31, 2021, a divided Seventh Circuit panel affirmed that decision. App.1a-10a. The majority acknowledged an ongoing debate at this Court over the validity of *Hardison*, noting "[t]hree Justices believe that *Hardison*'s definition of undue hardship as a slight burden should be changed[,]" but stated that "[o]ur task, however, is to apply *Hardison* unless the Justices themselves discard it." App.7a.

Judge Rovner dissented. She noted that "Hedican was available to work on Fridays, Saturday nights and Sundays," and explained that "if he were willing to disproportionately accept shift assignments during the 48 of 72 weekend hours outside of his observed Sabbath, then other managers might have been willing to pick up the slack on Friday nights and Saturdays." App.8a. She noted that Walmart "could not know for certain unless [it] asked" the other assistant managers, "and yet [it] did not." *Ibid.* Had Walmart done so, it "might have discovered that it was in fact feasible to accommodate both Hedican and the other managers." *Ibid.*

On May 17, 2021, the EEOC filed a petition for panel rehearing and rehearing *en banc*, raising a division of authority among the circuits on two questions regarding what constitutes an "undue hardship" under Title VII. App.40a-57a. On June 1, 2021, the Seventh Circuit denied the petition. App.39a.

Hedican obtained legal counsel on May 26, 2021 and, one week later, moved to intervene at the Seventh Circuit for the sole purpose of filing a petition for review in

this Court. See App.58a-85a. Hedican explained that the EEOC might not seek this Court's review of the panel's decision and therefore that the EEOC was no longer adequately representing his interests. App.82a. On June 4, 2021, the Seventh Circuit, in an order issued by Judge Easterbrook, denied Hedican's motion as "untimely" because "Hedican had the opportunity to intervene before the case was argued to the panel many months ago." App.36a. Hedican immediately sought reconsideration, explaining that, because he sought intervention for the sole purpose of seeking Supreme Court review, his request was timely. App.89a. The Seventh Circuit, in a second order issued by Judge Easterbrook, denied reconsideration. App.38a. Under this Court's July 19, 2021 order, the EEOC has until October 29 to seek certiorari.

REASONS FOR GRANTING THE MOTION

This Court has recognized that intervention for the purpose of filing a petition for certiorari is appropriate when the would-be intervenor has a direct interest in the proceeding but, while that interest was adequately represented below, the losing party no longer represents that interest. *E.g.*, *Commonwealth Land Title Ins. Co.* v. *Corman Constr., Inc.*, 508 U.S. 958 (1993) ("granting motion to intervene to file petition for certiorari); *Pyramid Lake Paiute Tribe of Indians* v. *Truckee-Carson Irrigation Dist.*, 464 U.S. 863 (1983) (same); *Hunter* v. *Ohio ex rel. Miller*, 396 U.S. 879 (1969) (same); *NLRB* v. *Acme Indus. Co.*, 384 U.S. 925 (1966) (same). See Stephen M. Shapiro et al., *Supreme Court Practice* 6-62 (11th ed. 2019) ("[T]he Court has allowed a nonparty below, whose rights were vitally affected by the lower court's decision, to intervene, by motion in the Supreme Court, in order to file the nonparty's own petition for certiorari where those interests, which were defended by the losing

party below, had been abandoned by the losing party's failure to apply for certiorari.").

In *Banks* v. *Chicago Grain Trimmers Association*, for example, this Court granted Banks's motion to intervene when the Department of Labor chose not to seek this Court's review of a decision setting aside a benefits award granted during an administrative action. 389 U.S. 813 (1967). Banks "had not intervened prior to this time because she assumed that it was unnecessary * * * [as her] rights were adequately represented by the [government]." See Pet. for Leave to Intervene & Pet. for Cert. at 9, No. 66-59 (U.S. Mar. 4, 1967). This Court granted Banks intervention so that she could protect her interest in the award, *Banks*, 389 U.S. at 813, and granted certiorari and reversed the decision below. *Banks*, 390 U.S. 459, 467 (1968).[2]

Hedican has a direct and substantial interest in seeking review of the decision below that accommodating his religious exercise would impose an undue hardship on Walmart. Until now, Hedican's interest had been adequately represented by the EEOC. But, now that this case has reached the Supreme Court, the federal government's interest in this case has changed—and the government has not committed in any way to seeking this Court's review of the decision below, much less committed to seeking review of specific questions presented. This change in the government's interests and position makes this a paradigmatic example of the sort of

[2] Intervention for the limited purpose of appeal is appropriate and timely when sought within normal deadlines. See *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 395 (1977) ("post-judgment intervention for the purpose of appeal" was timely when sought "within the time period" for appeal). See generally *Marino* v. *Ortiz*, 484 U.S. 301, 303-304 (1988) (per curiam) (recognizing non-party may intervene for limited purpose of taking an appeal).

"unusual circumstance[ ]" in which "the interests of justice" support granting leave to intervene for the purpose of filing a petition for certiorari. Shapiro, *supra* at 6-62.

I. Intervention in this Court is the only means by which Hedican, the party harmed by Walmart's discrimination, may vindicate his rights.

Although no statute or rule sets out requirements for intervention in this Court, the Court has indicated that Federal Rule of Civil Procedure 24 provides helpful guidance. See Sup. Ct. R. 17.2 (federal rules of civil procedure and evidence "may be taken as guides"); *Arizona* v. *California,* 460 U.S. 605, 614 (1983) (applying Rule 24 intervention standard as "guide" for intervention in original action); *Automobile Workers* v. *Scofield,* 382 U.S. 205, 217 n.10 (1965) ("policies underlying intervention may be applicable in appellate courts"). Rule 24(a) authorizes intervention as of right upon a timely motion by a party who either (1) "is given an unconditional right to intervene by a federal statute" or (2) "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a). Hedican satisfies both of those alternative standards.

Legal Interests. First, as the "aggrieved person" identified in the EEOC's complaint, Hedican has an unconditional right to intervene under 42 U.S.C. 2000e-5: "The aggrieved person may also intervene in the EEOC's enforcement action." *General Tel. Co. of the Nw., Inc.*, v. *EEOC*, 446 U.S. 318, 326 (1980) (expounding 42 U.S.C. 2000e-5). See also *EEOC* v. *Harris Chernin, Inc.*, 10 F.3d 1286, 1292 (7th Cir. 1993) ("[t]he person aggrieved may intervene as a matter of right."); *EEOC* v. *STME,*

LLC, 938 F.3d 1305, 1322 (11th Cir. 2019) (same). This right to intervene is why this Court has heard from both the EEOC and the aggrieved employee in other cases set for plenary review. See, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 180 (2012). Indeed, employees have been allowed to intervene on appeal in significant EEOC Title VII cases. See, *e.g.*, Order Granting Intervention, *EEOC* v. *R.G. & G.R. Harris Funeral Homes, Inc.*, No. 16-2424, 2017 WL 10350992 (7th Cir. Mar. 27, 2017) (granting intervention to employee Aimee Stephens).

Second, under Rule 24(a)(2), intervention is proper because Hedican has a direct and substantial legal interest in this lawsuit. *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 602 (1981) ("Congress considered the charging party a 'private attorney general,' whose role in enforcing the ban on discrimination is parallel to that of the Commission itself."). As the individual personally harmed by Walmart's discrimination, Hedican's interest is in the successful prosecution of this matter, which would include relief for Hedican's specific injuries. This is a textbook legal interest. See *Town of Chester* v. *Laroe Estates, Inc.*, 137 S. Ct. 1645, 1649 (2017).

Hedican's motion is timely. Rule 24(a)'s timeliness requirement is a flexible standard that must be applied in light of "all the circumstances." *NAACP* v. *New York*, 413 U.S. 345, 366 (1973). Where, as here, the movant seeks to intervene because an existing party no longer represents his interests, the critical question is whether he acted "promptly" once it was clear that his interests "would no longer be protected." *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 394 (1977); see *NAACP*, 413 U.S. at

367 (prospective intervenors were required to act once it was "obvious that there was a strong likelihood" that the United States would cease to represent their interests).

Here, Hedican's motion is timely. Up until the need to seek review from this Court, the EEOC adequately represented Hedican's interest in this litigation. In the Seventh Circuit, the EEOC pressed Hedican's interests, even seeking *en banc* reconsideration because, according to the EEOC, the panel's ruling "is incorrect and squarely conflicts with decisions of the Fifth, Sixth, and Ninth Circuits" and "conflicts with decisions of at least four other courts of appeals." App.42a.

Once the Seventh Circuit denied *en banc* rehearing, however, Hedican determined it was now uncertain whether the federal government would continue to represent his interests by petitioning this Court for review. He therefore immediately filed a motion in the Seventh Circuit to intervene for that sole purpose. App.58a-85a. Hedican's motion in this Court is also timely, as it is submitted well before the deadline for seeking review of the decision below. See *United Airlines*, 432 U.S. at 395 (finding intervention motion timely when filed during the time allotted for seeking appellate review if existing parties fail to seek such review); *Ross* v. *Marshall*, 426 F.3d 745, 755 (5th Cir. 2005) (finding intervention timely even though "Allstate was aware that its interests were at stake long before it sought to intervene," because "intervention prior to judgment would have been pointless as Allstate's interests were being adequately represented by counsel for [an existing party]").

More importantly, the federal government has different interests from the EEOC, and Hedican. The EEOC retains independent litigating authority through court of

appeals proceedings, but authority transfers to the Attorney General for "all litigation to which the Commission is a party in the Supreme Court pursuant to this subchapter." 42 U.S.C. 2000e-4(b)(2); see also *United States* v. *Providence Journal Co.*, 485 U.S. 693, 706 (1988) ("reserving litigation in this Court to the Attorney General and the Solicitor General"); Neal Devins, *Unitariness and Independence*, 82 Cal. Law Rev. 255, 278-279 (1994). Thus, in *Zarda* v. *Altitude Express, Inc.*, the EEOC and the Solicitor General filed separate and opposing *amicus* briefs at the Second Circuit, but adopted a single position in this Court. 883 F.3d 100, 116 n.12 (2d Cir. 2018). Similarly, in *Harris*, Aimee Stephens was permitted to intervene on appeal precisely because the federal government might change position—even though the "fears * * * ha[d] yet to crystallize" into a change of position. Order, *Harris*, 2017 WL 10350992, at *1. In fact, the Solicitor General's eventual brief in opposition expressly "disagree[d]" with the decision below, leaving only Stephens's brief to defend the decision on the merits. U.S. BIO 12, *R.G. & G.R. Harris Funeral Homes, Inc.* v. *EEOC*, No. 18-107.

Thus the EEOC's position below—which was closely aligned with Hedican's—is by definition not the same as the federal government's on appeal, and only Hedican is now able to take that position unfettered by interagency "equities."

Without intervention, Hedican cannot vindicate his rights. This lawsuit is Hedican's only opportunity to vindicate his statutory rights. See *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 291 (2002) ("If, however, the EEOC files suit on its own, the employee has no independent cause of action, although the employee may

intervene in the EEOC's suit.") Any subsequent claim would be precluded. See, *e.g.*, *EEOC* v. *United States Steel Corp.*, 921 F.2d 489, 495 (3d Cir. 1990). Thus denial of intervention will not just prejudice his rights, but eliminate them entirely.

The government no longer adequately represents Hedican's interests. The federal government and Hedican no longer share the same interest in this litigation. While it advanced arguments in support of Hedican below, the federal government "does not stand in the employee's shoes." *Waffle House*, 534 U.S. at 297. Rather, the EEOC "is guided by the overriding public interest in equal employment opportunity asserted through direct Federal enforcement." *General Tel.*, 446 U.S. at 326 (cleaned up). Should the EEOC, now represented by the Solicitor General, decide not to seek this Court's review of the decision below, the divergence of interests between Hedican and the federal government would be self-evident. Hedican's proposed petition confirms his interest in seeking this Court's review of the underlying merits. And even if the EEOC seeks this Court's review on some or all of the questions Hedican presents, the two parties' interests now diverge. *Id.* at 296 (EEOC actions "may be seeking to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief."). As the EEOC advises charging parties, the agency's "primary purpose in filing this suit is to further the public interest in preventing employment discrimination," not obtaining relief for the charging party. EEOC Compliance Manual, https://perma.cc/8RBL-JW3W.

Past experience shows that the Solicitor General may not make the strongest arguments available in favor of Hedican's right to a religious accommodation. For

example, the Solicitor General's recent brief requested by the Court in *Patterson* v. *Walgreen Co.*, 140 S. Ct. 685 (2020), shows that the interagency equities will bear on its decision-making. There, the Solicitor General expressly recommended *against* the Court addressing two of the three questions presented, saying they "d[id] not warrant the Court's review" with "no clear division in the circuits on either question," including a question on the role of speculation in the undue hardship analysis. U.S. Br.7, *Patterson v. Walgreen Co.*, No. 18-349. And on the third question—the definition of "undue hardship"—the Solicitor General recommended review but offered no definitive position on what should replace the *Hardison* standard. *Id.* at 19-22. Put simply, the federal government is not likely to embrace the strongest arguments available in light of its competing institutional pressures. Cf. *Arizona* v. *San Francisco*, No. 20M81 (June 1, 2021) (Court held in abeyance motion to intervene for purpose of filing cert petition where Solicitor General changed position).

II. This case squarely presents important questions of statutory interpretation for religious employees nationwide.

As the proposed petition describes in detail, this case presents an important and recurring question that at least three Justices on this Court have already noted their interest in addressing: when must an employer accommodate an employee's religious practices? See proposed Petition ("Pet.") at 1. In *Hardison*, this Court neutered Title VII's protections for religious employees, determining that anything more than a "*de minimis* cost" permits employers to deny employees a religious accommodation. This decision was wrong the day it was decided, and has been roundly criticized ever since. See, *e.g.*, *Small v. Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1229 (2021)

(Gorsuch, J., dissenting) ("it is past time for the Court to correct" *Hardison*); U.S. Br.19, *Patterson* v. *Walgreen* Co., No. 18-349 (*Hardison* was "incorrect"); *Kennedy* v. *Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (statement of Alito, J.) (raising prospect of revisiting *Hardison*); Pet.1-2, 26. And the two splits on interpreting *Hardison* shown in the Seventh Circuit's decision and the proposed petition—whether even voluntary shift swaps are always undue hardships, and whether speculative hardships satisfy the employer's burden—further illustrate the decision's errors.

This case also presents a straightforward and clear example of the religious discrimination countenanced by *Hardison*'s rule. See Pet.6-10. Despite its own written guidance "encourag[ing]" voluntary shift swaps among assistant managers for religious reasons, App.97a; App.99a, Walmart determined that it would constitute more-than-minimal cost to its business operations to accommodate the Sabbath observance of one of eight assistant managers at its Hayward store. App.3a. Under *Hardison,* this suffices to deny accommodation. And it is no surprise why Walmart has fought to defend this decision and protect *Hardison*'s deferential rule: treating any "minimal cost" as an "undue hardship" lets Walmart pick and choose when it will accommodate religious employees free from Title VII scrutiny. Indeed, if allowing an assistant manager to observe his Sabbath constitutes an undue hardship for a company with over $500 billion in annual operating expenses, what wouldn't qualify?

While questions of religious accommodation come up with some frequency, few present the factual and legal issues as clearly as this case. See Pet.35-37. Both courts

below relied on *Hardison*'s permissive rule when determining that a voluntary shift swap would constitute an undue hardship on Walmart, and both courts agreed that Walmart could have (1) permitted voluntary shift swaps, (2) paid other assistant managers overtime, or (3) hired a ninth assistant manager to accommodate Hedican. App.7a; App.33a. So an accommodation would have been easily accomplished—though it might have involved just slightly more than a "*de minimis* cost."

Reaching this Court after summary judgment, the factual record is also clear and well-developed—emails between Walmart and Hedican memorialize the offer, request for accommodation, and recission, App.102a-115a; deposition testimony confirms the reasons for Walmart's decision, App.116a-136a; and—as one of eight assistant managers who work in shifts—there is no question that Hedican's need for a Sabbath accommodation could have been met, App.5a-7a.

At bottom, it is hard to imagine an easier accommodation for Walmart than to allow voluntary shift swaps. Indeed, in his email acceptance, Hedican had already *volunteered* to work Fridays, Sundays, and even Saturday night after sundown. App.110a. Yet, rather than inquire into whether such an accommodation could be made, Walmart revoked Hedican's job offer. One would think that Title VII's prohibition on religious discrimination would have something to say about this, but both courts below blessed this decision, relying explicitly on *Hardison*. App.7a.

CONCLUSION

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

Respectfully submitted.

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