

No. 21M24

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.

REPLY IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE TO FILE
A PETITION FOR WRIT OF CERTIORARI

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

Counsel for Movant
Edward Hedican

REPLY

In response to Edward Hedicán's motion to intervene, the federal government makes no opposition, and (after hesitating) Walmart offers only a wisp of opposition that invokes purely procedural objections. Perhaps that is no surprise, since the relief sought in the motion is straightforward: as both the charging party in this litigation and the individual directly harmed by Walmart's actions, Hedicán seeks to intervene for the sole purpose of filing a petition for certiorari.

In the motion we explained why Hedicán has an incontestable legal interest in the case, why the government does not and cannot adequately represent his interests, and why intervention is timely. Mot. 8-13. Indeed, it would be unusual for the Court to allow a meritorious case filed by the EEOC and pressed through the *en banc* stage to evaporate when the time comes to seek this Court's review.¹ And there is no doubt that this Court has granted similar motions in the past. See Stephen M. Shapiro et al., *Supreme Court Practice* 6-62 (11th ed. 2019); Mot. at 6 (listing several examples). That is especially so in the unique circumstance where Congress has given Hedicán an absolute right to intervene. See 42 U.S.C. 2000e-5; Mot. 8-9.

In response, neither the federal government nor Walmart voices any disagreement with the merits of the motion, thereby conceding them. For that reason alone, the

¹ A review of the EEOC's database of appellate briefs reveals just how unique Hedicán's request is. According to the database, the EEOC filed no petitions for rehearing in 2020 or 2019, two in 2018, three in 2017, and two in 2016. See Equal Employment Opportunity Commission, *Commission Appellate and Amicus Briefs*, <https://www.eeoc.gov/commission-appellate-and-amicus-briefs> (reviewed Sept. 15, 2021). Granting Hedicán's motion (or even granting *all* others in a similar procedural posture) therefore would not add appreciably to the cert pool.

Court should permit Hedican to intervene and order Hedican's proposed petition for a writ of certiorari to be filed.

Although it is silent on the merits, Walmart does offer a quarter-hearted defense based on procedural objections to the motion's timing and form. Resp. 1-2. Walmart's main argument is that Hedican should have filed a petition seeking this Court's review of the denial of intervention below instead of seeking to intervene directly in this Court. Resp. 1. But as Hedican explained in his motion, this Court's caselaw confirms that moving to intervene in this Court is the right approach, even if intervention could also have been granted below. Mot. 6-7.

Walmart also fails to address the intervention examples cited by Hedican, Mot. 6-7, ignoring four of the five examples altogether. The one example Walmart does discuss, *Banks v. Chicago Grain Trimmers Association, Inc.*, 389 U.S. 813 (1967), is a case in which intervention is "unexplained"—all we know is that it was granted. Resp. 2. This makes Walmart's attempts to pick out supposed factual differences (like the fact that Hedican sought to intervene both in this Court and the Seventh Circuit) pure speculation. Indeed, Walmart cites no precedent to support this supposed distinction.²

² Hedican does not disagree with Walmart that he could *also* file a petition for review of the Seventh Circuit's denial of intervention, see *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 30 (1993) (per curiam) ("One who has been denied the right to intervene in a case in a court of appeals *may* petition for certiorari to review that ruling" (emphasis added)), but this Court's precedent confirms that this is not the only means by which intervention may be sought.

Walmart also notes that the government has not yet confirmed its decision not to seek this Court's review, arguing that this also makes *Banks* "inapt." Resp. 2. But neither Walmart nor the EEOC contests Hedican's argument that his legal interests are distinct from those of the federal government. See Mot. 12-13. Thus, even if the government were to seek this Court's review, Hedican's interests cannot be adequately represented by the federal government; neither the federal government nor Walmart contends otherwise. Intervention should therefore be granted so that Hedican can represent his own unique interests in this Court.

Notwithstanding the procedural posture, this is a straightforward motion. No one contests that Hedican has a legal interest in the outcome of this case, that this is his only avenue to vindicate his rights, that the government no longer adequately represents his interests, or that this case squarely presents statutory interpretation questions of nationwide importance. It is simple enough for the Court to allow the petition to be filed and resolve it in the normal course.

* * *

Walmart's paper-thin opposition aside, this motion comes to the Court uncontested. Hedican's interest in this litigation is undisputed, worth protecting, and distinct from the government's. Absent intervention, that interest will be extinguished—whether or not the government petitions for review. At bottom, permitting intervention for the limited purpose of seeking certiorari simply ensures that this case will be considered in the same way this Court reviews any of the thousands of other petitions this Court receives every year. And, as Hedican has

explained, this case is worth considering on the merits. Walmart, the nation's largest private employer, could not be bothered to allow even *voluntary* shift swaps among shift workers in one of its stores. This should have been an easy solution—let Hedican ask his co-workers to swap shifts. But even an essentially costless accommodation has been denied, and now Walmart continues to defend that denial in this Court—all because of *Hardison*. See Mot. 13-15. If this Court is looking for the right vehicle to reconsider *Hardison*, it need look no further.

CONCLUSION

The Court should grant Hedican's motion to intervene for the purpose of filing his proposed petition for writ of certiorari already lodged with the Court.

Respectfully submitted.

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

Counsel for Movant
Edward Hedican

SEPTEMBER 2021