

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 LEONARD EDELMAN, :

4 Petitioner :

5 v. : No. 00-1072

6 LYNCHBURG COLLEGE. :

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8 Washington, D.C.

9 Tuesday, January 8, 2002

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:18 a.m.

13 APPEARANCES:

14 ERIC SCHNAPPER, ESQ., Seattle, Washington; on behalf of
15 the Petitioner.

16 LISA S. BLATT, ESQ., Assistant to the Solicitor General,
17 Department of Justice, Washington, D.C.; on behalf of
18 the United States, as amicus curiae, supporting the
19 Petitioner.

20 ALEXANDER L. BELL, ESQ., Lynchburg, Virginia; on behalf
21 of the Respondent.

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(11:18 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 00-1072, Leonard Edelman v. Lynchburg College.

Mr. Schnapper.

ORAL ARGUMENT OF ERIC SCHNAPPER

ON BEHALF OF THE PETITIONER

MR. SCHNAPPER: Mr. Chief Justice, and may it please the Court:

The relation-back rule for verification under section 1601.12(b) is a proper exercise of the authority granted to the EEOC under section 713 of title VII to promulgate procedural regulations. The regulation is consistent with the language of section 706. Title VII requires that a charge be verified, and the statute also requires that a charge be filed within 180 or 300 days of the act of discrimination.

But as Judge Luttig correctly observed below, these two statutory requirements are independent of each other. Specifically, 706(e)(1) establishes deadlines of 180 or 300 days, but it applies those deadlines only to when, quote, a charge must be filed. Section 706(e)(1) does not purport to establish a deadline for verification. Conversely, section 706(b) requires verification, but it contains no deadline for doing so. That omission is

1 particularly significant because other requirements which
2 are contained in 706(b) do have deadlines.

3 QUESTION: What -- what about the other elements
4 that -- that are required by the statute to be in the --
5 in the charge?

6 Surely the commission has to serve notice of the
7 charge, including the date and place and circumstances of
8 the alleged unlawful employment practice. Isn't that
9 statutory provision implicitly a requirement that the
10 charge contain the date, place, and circumstances of the
11 alleged unlawful practice?

12 MR. SCHNAPPER: I wouldn't go quite that far.
13 The -- the commission's interpretation of that, which is
14 embodied in section 1601.12(b), concludes that a charge is
15 sufficient if it identifies the parties and contains a
16 description of the alleged discriminatory practice.

17 QUESTION: Well, how -- how can -- how can the
18 statute be complied with? I mean, the statute,
19 2000e-5(b), clearly says that the commission on receiving
20 a charge shall serve a notice of it, paren, including the
21 date, place, and circumstances of the alleged unlawful
22 employment practice on the employer.

23 MR. SCHNAPPER: Well, it does -- it does so
24 provide. But it also provides that the -- that the charge
25 shall contain the information and be in the form required

1 by the commission. The commission does not require that
2 particular information. Ordinarily it could be inferred
3 in practice --

4 QUESTION: So, you think the charge doesn't even
5 have to -- because the commission hasn't chosen to require
6 that, a charge doesn't even have to contain the date,
7 circumstances, and place of the alleged --

8 MR. SCHNAPPER: Well, the commission has --

9 QUESTION: What does it have to contain?

10 MR. SCHNAPPER: The regulation requires --

11 QUESTION: I have been discriminated against?

12 MR. SCHNAPPER: I understand the regulation to
13 require more specificity than that. That -- that question
14 is not posed, of course, by this case. No one questions
15 the specificity of the information in this letter. It
16 did --

17 QUESTION: No. I understand that. But -- but
18 what you say about -- about the requirement or -- or
19 nonrequirement of -- of oath, of it being under oath, I
20 think you -- you're going to have to logically say about
21 other requirements or, as you think them, nonrequirements
22 of the charge. I don't see how -- how the two don't go
23 hand in hand.

24 MR. SCHNAPPER: I -- I think that you have to
25 read -- well, the commission's view is that there is an

1 irreducible minimum that has to be in a charge. You can't
2 just file a piece of paper called -- that says charge and
3 fill in the blanks later.

4 QUESTION: Why? Why does it come to that
5 position? It just made it up?

6 MR. SCHNAPPER: The statute expressly provides
7 that the commission can specify what information needs to
8 be in a charge, and that's the -- that's the answer they
9 give.

10 QUESTION: I see. Not because there's any
11 statutory compulsion, but just in its -- in its wisdom and
12 beneficence, the commission has decided that there has to
13 be a certain minimal amount of information in the charge,
14 not because the statute implies that there must be.

15 MR. SCHNAPPER: I -- I don't -- Federal Register
16 recounts any -- any explanation, but it seems to me it
17 would be logical for the commission to have looked at the
18 provision to which you refer in -- in framing the -- the
19 requirements it has.

20 QUESTION: Right, but if it looked at the
21 provision to which I refer, it would say a charge has to
22 -- we're not going to bother an employer and require him
23 to come back with a response unless you haven't just come
24 in and said, I've been discriminated against. We're not
25 going to ask the employer, has this person been

1 discriminated against? You tell us the date, the place,
2 and the circumstances. Now, that's perfectly reasonable.

3 But it seems to me also perfectly reasonable to
4 say, moreover, we're not going to go and bother the
5 employer and make the employer go through all the process
6 of -- of answering the charge unless you're serious enough
7 about it that you've -- you've sworn to it under oath, as
8 the -- as the statute requires.

9 MR. SCHNAPPER: Well, what happens as a
10 practical matter where verification occurs after the
11 filing date is that the employer is usually not required
12 to actually take any action.

13 QUESTION: But here what -- the employer wasn't
14 even -- wasn't notified until the form -- on the EEOC's
15 proper form that did everything, including the
16 verification. You seem to have treated both the same way,
17 that -- that all that the imperfect charge did was stop
18 the clock, but the EEOC didn't give notice to the employer
19 at that point. That wasn't the charge -- the form in
20 which the charge went to the employer. As I understand
21 it, the employer never got the form until it had been
22 perfected.

23 MR. SCHNAPPER: Your Honor, it's our view that
24 the -- that the court -- that the EEOC erred in not
25 providing notice at that time, and it's -- I think it's

1 clear, from a reading of the compliance manual, that its
2 own manual did require notice at that time.

3 But in any event --

4 QUESTION: And would also require notice of --
5 of a charge that was imperfect in other respects within 10
6 days of receiving the charge. So, if a -- the requirement
7 that it be in writing, for example, that's a requirement
8 that isn't -- isn't particularly in the -- in the statute
9 of limitations provision, but it's a requirement that it
10 be in writing.

11 So, the commission gets a phone complaint from
12 somebody who says, my employer is discriminating against
13 me. Now, you're saying that the commission should within
14 10 days contact the employer about that.

15 MR. SCHNAPPER: The -- it's our view that --
16 that if the commission receives a sufficient charge, it
17 must do so. The regulations do not contemplate that a
18 phone call is a sufficient charge, and they specify how it
19 -- that would have to be put in writing --

20 QUESTION: This is all just a matter of the
21 regulations. I mean, the commission can -- can just say,
22 you know, this is sufficient or isn't. This commission
23 could say that a phone call is sufficient.

24 MR. SCHNAPPER: The -- the statute requires that
25 a charge be filed, so I think it would have to be reduced

1 to writing. But I --

2 QUESTION: The word filed.

3 MR. SCHNAPPER: But I would say the commission
4 probably could alter its -- its regulation and deem a
5 memorialized phone call the filing of the charge. That's
6 -- those aren't the circumstances here.

7 And -- and to get back to the specific issue
8 before the Court, the Fifth Circuit -- excuse me -- the
9 Fourth Circuit would have reached the same result in this
10 case regardless of whether this letter -- notice of this
11 letter or the letter itself had been served on the
12 employer within 10 days of the receipt of the letter on
13 November 14th. The decision below didn't rest on that.
14 Even if there had been service and notice, the court of
15 appeals would still have held the regulation was invalid.
16 And -- and it's the validity of that specific regulation
17 -- that's the only question that the court of appeals
18 addressed.

19 QUESTION: Mr. Schnapper, if you agree that if
20 -- you started out with Judge Luttig's position. He
21 concurred and he raised four other. Did the EEOC consider
22 this a charge? We don't know whether it did. Wouldn't
23 the case have to go back so that the full court of appeals
24 could examine those questions on which Judge Luttig rested
25 so that he ended up concurring rather than dissenting?

1 MR. SCHNAPPER: Yes. Yes. It remains --

2 QUESTION: So, you agree that those four
3 questions are alive and would have to be --

4 MR. SCHNAPPER: It -- it remains open to the --
5 to the respondent to raise those issues on remand, and we
6 think that that's the appropriate procedure --

7 QUESTION: Thank you.

8 MR. SCHNAPPER: -- for addressing it.

9 The -- as I was saying, specifically 706(e)(1)
10 and 706(b) establish separate and distinct requirements.
11 In the terms of Chevron, the question is whether those
12 provisions, read together, clearly require in an
13 unambiguous manner that verification happened before the
14 charge-filing deadline. We think that -- that such
15 clarity certainly isn't present here. To the contrary,
16 our view is that the most plausible reading of the statute
17 is that verification could happen after the charge-filing
18 deadline. That's a particularly reasonable construction
19 of the statute because that is the common law rule.
20 That's the rule --

21 QUESTION: Do you think it's good practice for
22 the EEOC to wait until after the 300-day period and a
23 verification before it even notifies the employer?

24 MR. SCHNAPPER: No. No. It was -- in our view,
25 it was improper to have done that here, that the -- the

1 statute doesn't authorize them to await verification. It
2 is our understanding that is not their practice. It is
3 not authorized by the compliance manual. The compliance
4 manual does identify some circumstances in which there
5 might be delay in -- notification. Verification is not
6 one of them.

7 QUESTION: Let me -- suppose you have a
8 statutory provision which says that the complaint shall be
9 in writing, sworn to under oath, shall set forth the time,
10 place, and circumstances of the alleged grievance, comma,
11 and shall be presented to the agency within 100 days after
12 the alleged grievance. Now, would you be taking the same
13 position you take here, that that's a separate
14 requirement --

15 MR. SCHNAPPER: Yes.

16 QUESTION: -- and that --

17 MR. SCHNAPPER: Yes. We would --

18 QUESTION: Do you have any -- any -- I would
19 never read a statute that way. It would certainly seem to
20 me that -- that what they're talking about to be filed
21 within 100 days is what they have just described. And --
22 and --

23 MR. SCHNAPPER: I don't --

24 QUESTION: Do you have any cases of ours --

25 MR. SCHNAPPER: Well --

1 QUESTION: -- that -- that go that far?

2 MR. SCHNAPPER: The Federal rules require that a
3 notice of appeal shall be in writing and shall be filed
4 within a certain period of time. And yet, in Becker v.
5 Montgomery, the Court concluded that that didn't mean that
6 an unsigned -- that -- that where the only document that
7 was filed on time wasn't signed -- that there was no
8 timely notice of appeal.

9 The -- the -- and -- and indeed, the common law
10 rule was where a statute said a complaint must be verified
11 and the complaint must be filed within a certain number of
12 -- of days or years, the -- the uniform Federal and State
13 interpretation of that was that the lack of verification
14 could be corrected after the expiration of the deadline.

15 It seems to us that the commission reasonably
16 concluded that Congress would have not wanted a more
17 stringent rule about relation-back of verification to
18 apply in the administrative process, a process ordinarily
19 initiated by laymen unassisted by counsel, than would
20 apply in civil litigation which is much more formal and
21 which -- and, you know, the -- the common law rule about
22 correcting verification after the fact applied regardless
23 of whether, as would normally be the case, the -- the
24 party involved was represented by counsel. So, we -- we
25 think the common law rule is a very important part of the

1 background of the statute.

2 QUESTION: In these other situations that you
3 mentioned, does the court take action against a particular
4 individual or require a response from a particular
5 individual before the verification occurs? You see, that
6 -- that seems to me the difference here, that you're
7 saying the commission, within 10 days after receiving this
8 unverified complaint, has to submit it to the employer and
9 ask the employer to respond to it.

10 MR. SCHNAPPER: No. The -- under the procedure
11 established by title VII, the employer is not required to
12 respond just by virtue of getting notice. Notice simply
13 alerts them to the filing of the charge. It is a separate
14 step in the procedure for the agency to then require the
15 employer to do anything in response. It's not like a
16 complaint which requires an answer within so many days.

17 QUESTION: Okay. I see.

18 MR. SCHNAPPER: It's simply a heads-up.

19 QUESTION: Now, does the agency require
20 verification to occur before it will demand a response
21 from the employer?

22 MR. SCHNAPPER: I think that would be the normal
23 practice.

24 QUESTION: Isn't that what -- the form --

25 QUESTION: That makes me feel --

1 QUESTION: -- that EEOC sends out, as you've
2 described the procedure? It's called form 5, or whatever
3 it is -- that they send to the complainant says sign,
4 verify. It has everything to make the complaint perfect.
5 And that's the form that is then sent to the employer. In
6 this very case, that form was sent to the employer, but
7 the imperfect form wasn't.

8 MR. SCHNAPPER: That's -- that's what occurred
9 here. But I'm thinking -- if I didn't make it clear in
10 response to Justice Scalia's question, it's my
11 understanding that the normal practice of the agency would
12 be not to require the employer to do anything until a
13 defect in form, such as a lack of verification, had been
14 -- had been addressed. The statute simply gives the
15 employer a heads-up, but doesn't -- the notice simply
16 gives him -- doesn't require the employer to do anything.
17 It's not like a complaint.

18 QUESTION: But -- but meanwhile the -- the -- I
19 mean, this -- this could occur a very long time after the
20 event occurred --

21 MR. SCHNAPPER: I think --

22 QUESTION: -- so long as the commission waits
23 that long to get the verification. Right?

24 MR. SCHNAPPER: I think not in practice. My
25 understanding is that in practice the commission will ask

1 for a verification. In fact, frequently they will ask for
2 a form 5 regardless of whether what's in the -- the
3 correspondence that reached them. So, all problems get
4 solved.

5 If you had an employee who refused to verify
6 with reasonable promptness, I think the agency would
7 undoubtedly dismiss the -- the charge for lack of
8 cooperation, and that would be the end of it.

9 With the Court's leave, I'd like to reserve the
10 balance of my time.

11 QUESTION: Very well, Mr. Schnapper.

12 Ms. Blatt, we'll hear from you.

13 ORAL ARGUMENT OF LISA S. BLATT

14 ON BEHALF OF THE UNITED STATES,

15 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

16 MS. BLATT: Thank you, Mr. Chief Justice, and
17 may it please the Court:

18 Under the longstanding rule at common law, the
19 failure to verify a complaint, as required by statute, may
20 be cured by an amendment that relates back to a timely
21 filed complaint. The commission incorporated that rule by
22 regulation in 1966, 2 years after the passage of title
23 VII. The contrary rule embraced by the panel would
24 invalidate even the most detailed and well-pled complaint
25 that was timely filed with the commission but did not --

1 was not verified until later.

2 The common law rule ensures that substantive
3 rights are not foreclosed when the essential elements of a
4 complaint are sufficient to vest the court with
5 jurisdiction.

6 QUESTION: But -- but in this case, the -- the
7 agency doesn't treat it as a full charge until it's
8 verified for purposes of notifying the employer. The
9 agency seems to be quite inconsistent.

10 MS. BLATT: Well, that's not --

11 QUESTION: I mean, you -- you want us to accept
12 this argument as to what a charge is, but then you don't
13 want us to accept it for when the employer has to know
14 about it so the evidence doesn't go stale.

15 MS. BLATT: It's not that the -- it's not that
16 the agency is waiting for verification before it gives
17 notice, and if the only thing missing from a charge is
18 verification, the agency's procedures require notice
19 within 10 days. Thus, the -- if a November -- if a charge
20 comes in like the November 14th letter that's not
21 verified, the procedures require notice within 10 days.

22 That wasn't done here, Justice Kennedy. The
23 agency did not comply with its obligation to provide the
24 employer with notice. But that in no way affects or
25 undermines the validity of the relation-back regulation

1 which doesn't relate to notice. It relates to whether a
2 charge is timely filed even though it is not verified.
3 Had --

4 QUESTION: Well, but -- shouldn't the two be --
5 be tied together? I mean, it's reasonable to have it
6 relate back so long as there is no prejudice to the -- to
7 the employer from having it relate back. But when you say
8 we're not going to give the employer notice until it's
9 later verified, there is prejudice to the employer.
10 Evidence is getting stale and so forth.

11 MS. BLATT: But, Justice Scalia, the -- the
12 agency's procedures required this employer to have notice,
13 whether or not the November 14th letter was verified, and
14 the employer then can preserve its documents or -- or
15 respond to the charge or do whatever it wants. The --

16 QUESTION: You say that that's a separate
17 mistake, and whatever prejudice that comes from that the
18 employer is free to raise on remand. Is that it?

19 MS. BLATT: Yes. The issue of notice is what
20 drove one of the -- the key issues that drove Judge
21 Luttig's concurrence, which would have upheld the
22 regulation and the majority's interpretation. Had the
23 agency immediately hand-delivered this document to the
24 employer, we'd still be here because the Fourth Circuit
25 would invalidate the charge because it wasn't verified

1 until day 313.

2 QUESTION: But you agree with Mr. Schnapper that
3 the agency just missed, that they should have given -- for
4 the purpose of giving -- giving notice, sent that
5 unverified charge to the employer.

6 MS. BLATT: Yes, absolutely. It was filed with
7 the agency on receipt, and the -- an employer should have
8 been notified within 10 days. And that wasn't done until
9 later. And we think the -- this argument would be open on
10 remand, what the consequences of the -- of the untimely
11 notice.

12 But the untimely notice is a separate question
13 from an untimely filing of an otherwise sufficient and
14 valid charge, and this charge was filed within the 300-
15 day period because it was received by the agency on
16 November 14th. And our point is that if the essential
17 elements of the charge are sufficient to -- to vest the
18 commission with jurisdiction, the verification could be
19 supplied later.

20 And the rule at common law, which was well
21 established in both State and Federal courts by 1964,
22 applied to lawyers in a formal pleading practice and
23 judicial proceedings, and the commission certainly acted
24 reasonably in adopting the same rule where Congress
25 anticipated that the charging parties are often

1 unrepresented by counsel.

2 We don't think anything in the text of title VII
3 forecloses the commission's regulation. Section 706(b)
4 states that a charge must be verified, but it does not
5 state when verification must occur. And section 706(e)
6 states that a charge must be filed within 300 days, but it
7 doesn't state that the charge must be verified at the time
8 it is filed.

9 QUESTION: What about the argument that (b)
10 comes before (e), so -- and to define what a charge is,
11 the word charge, and then it's given a certain description
12 in (b). Then when you get down to (e), it retains that
13 same description.

14 MS. BLATT: Well, title VII didn't define the
15 word charge as a verified charge. It just said that it
16 shall be verified, and certainly those don't -- it's just
17 the kind of ambiguity that would invoke the common law
18 rule that the charge -- a later -- a later verification
19 may relate back to the time of filing. So, we don't think
20 anything in this text comes close to trumping what -- what
21 would be the common law presumption.

22 And as Judge Luttig observed, that there's not a
23 single provision either by its effect or its terms that
24 suggests that there's a limitations provision for
25 verification. There's certainly one for filing and

1 there's certainly a 10-day notice period for the employer,
2 but there's not a specific time period when the
3 verification must occur. And in the normal course of
4 business, the agency will try to obtain a standard form
5 whose signature line contains an affirmation, and so the
6 verification requirement will be supplied. And if it's
7 not, the agency will dismiss that charge and cease its
8 investigation. And there's important consequences to that
9 because the employee will not be able to pursue a claim
10 for relief if he's not complied with the statutory
11 requirement of verification.

12 QUESTION: Can you tell me what happens -- it's
13 not this case -- if there's a rule in -- in the circuits
14 -- I don't think we passed on it. What happens if there's
15 a verified complaint? The complaint is filed with the
16 EEOC in time. Then the EEOC just sits on it and notifies
17 the employer, say, 100 days late. Does the employer --
18 must he show prejudice in -- in -- before he can defend on
19 the ground of late service? Or how does that work?

20 MS. BLATT: We know of just a handful of cases
21 where the charge just got lost in the system, and the
22 consequences of that would turn on two factors. First,
23 whether the employer could show prejudice in its ability
24 to defend the suit, and we think there's a second, a
25 constitutional question of whether the employee's rights

1 could be foreclosed because the agency defaulted on its
2 own statutory obligations. This Court's decision in Logan
3 v. Zimmerman Brush would suggest that it cannot. But I
4 don't -- you wouldn't even need to get to that issue if
5 the employer didn't show prejudice.

6 This Court in Shell Oil also discussed that the
7 -- the courts of appeals had been uniform, that absent bad
8 faith by the agency or prejudice to the employer in
9 defending his ability to defend the suit, that the
10 employee's rights would not be prejudiced.

11 If there are no more questions.

12 QUESTION: Thank you, Ms. Blatt.

13 Mr. Bell, we'll hear from you.

14 ORAL ARGUMENT OF ALEXANDER W. BELL

15 ON BEHALF OF THE RESPONDENT

16 MR. BELL: In the Mohasco case, this Court
17 taught that the EEOC may not adopt regulations that are
18 inconsistent with the statutory mandate. As we have held
19 on prior occasions, its interpretations of the statute
20 cannot supersede the language chosen by Congress. And
21 that's exactly what's happened here.

22 The statute in 706(b) says that charges shall be
23 in writing and under oath. Next, it's separated by an
24 and. The statute goes on and says the statute -- the
25 charge shall include such information and be in such form

1 as the EEOC requires.

2 What the EEOC has done here in its regulation is
3 to say that a charge is sufficient so long as it's in
4 writing. That's exactly what the regulation says. The
5 text of the -- of the statute is simply inconsistent with
6 that.

7 What the argument of the respondent is, is that
8 there's no real linkage between 706(b), the use of the
9 term 706(b), where the charge shall be in writing and
10 under oath, and 706(e), which specifies that charges shall
11 be filed within a certain time period. That's simply not
12 so.

13 If you look at the text of 706(e), it says
14 charges under this section, not under this subsection. It
15 says charges under this section shall be filed within a
16 certain period of time.

17 So, we're not dealing with two independent
18 statutes here. We're dealing with two subsections of
19 exactly the same section of the same statute that are
20 joined at the hip.

21 QUESTION: Judge -- Judge Luttig said that that
22 was a very plausible argument. However, he said it was
23 not the only plausible reading of these two discrete
24 pieces of the same statute, and it was permissible for the
25 agency to take the view that it did. To prevail here, you

1 have to show that the position that the agency took was
2 impermissible rather than as Judge Luttig said it is --
3 maybe it's not the best choice, but it was a permissible
4 reading of this less than crystalline statute.

5 MR. BELL: Justice Ginsburg, we don't believe
6 that that is a permissible reading of the statute. The
7 language just doesn't work that way. The first time
8 Congress mentioned the term charge, which shall be in
9 writing and under oath, it gave definition to the term.
10 Justice Luttig -- Luttig simply didn't carry his analysis
11 far enough. I don't think he mentioned, for example, the
12 fact that 706(e) begins with charges under this section
13 shall be filed within a certain period of time. There's
14 simply no --

15 QUESTION: It seems to me that the reading that
16 you are saying is the only proper reading is somewhat
17 inconsistent with this Court's position in Becker against
18 Montgomery last term.

19 MR. BELL: Justice Ginsburg, we -- we don't
20 think so because we think what happened in Becker was a
21 harmonization of two rules of the Court, with a focus
22 particularly on rule 11, which -- in the same rule which
23 established the requirement of -- of the signing,
24 established the method to cure a failure to sign. That's
25 a very important difference here. In this statute,

1 there's absolutely no indication of a -- of a intention on
2 the part of Congress to allow curing the one thing, the
3 oath and the signing, that they set apart from the
4 delegation to the agency of authority to control, which
5 was the form and content. I mean, just looking at the
6 structure of the language, they -- they emphasized oath.
7 They applied it to commission charges, and they separated
8 it from the delegation of the authority to specify the
9 form and content. In Becker, again the very thing that
10 established the requirement for signing established the
11 method of curing it. That's not true here.

12 QUESTION: I think we heard the argument from
13 Mr. Schnapper and Ms. Blatt that as a background common
14 law principle, the idea of a curative amendment to provide
15 a signature, to provide verification that then relates
16 back is nothing new. So that what Congress wrote has to
17 be read in the light of that background understanding.
18 Yes, you must have a verification, but it can come later.

19 MR. BELL: Your Honor, I -- I believe that the
20 background principle, if you will, the background legal
21 principle of our federalism and the background legal
22 principle of due process to employers in fairness to
23 employers in giving notice was probably more a part of the
24 applicable legal background here -- here than an --

25 QUESTION: But that was conceded. The -- the

1 commission should have sent the imperfect charge. The
2 employer doesn't have to answer it till he gets the
3 perfected charge. So, the function of notice is served if
4 the EEOC had done what it was supposed to do, and now it
5 concedes that it should have sent that charge. And the
6 employer isn't bothered with having to respond until he
7 gets a perfected charge.

8 MR. BELL: Well, Your Honor, the -- the
9 regulation here eliminates the filing deadline. I mean,
10 there's no time specified when verification must occur,
11 and there are cases cited in amicus at page 18 of the
12 Equal Employment Advisory Council where charges have never
13 been verified. I mean, there's just no deadline.

14 QUESTION: But that's not what anybody is urging
15 here. They concede that there must be a verification.
16 The question -- as there was in this case.

17 MR. BELL: Well, Your Honor, the letter itself
18 was never verified. There was a form 5 that was verified.

19 QUESTION: No. The proper -- like an amended
20 complaint. You know that people file complaints in court
21 to get in under the deadline, and then they file an
22 amended pleading which relates back. That's standard.

23 MR. BELL: There's no indication that Congress
24 here adopted common law pleading rules. In fact, the
25 legislative history makes it pretty clear that Congress

1 meant to circumscribe the right that they created in title
2 VII rather narrowly.

3 QUESTION: Do you question, Mr. Bell, your
4 opponents' descriptions of the common law pleading
5 background that a complaint that was -- was required by
6 rule to be verified and filed not verified could be
7 verified later?

8 MR. BELL: There are certainly many cases that
9 hold that. There's no question about that.

10 But -- but here we're dealing with -- with
11 Congress creating a right that they struck a careful
12 balance in, and as this Court has said, Congress specified
13 certain procedures as a compromise and that the best
14 assurance of administrative fairness is to insist on the
15 procedures that Congress put out.

16 QUESTION: Mr. Bell, may I ask, going back to
17 Justice Scalia's questions earlier? The statute requires
18 that the charges shall be in writing, under oath or
19 affirmation, and shall contain such information and be in
20 such form as the commission requires. And then later they
21 prove it, the date, place, and circumstances of the
22 practice and so forth.

23 Supposing the -- a charge is filed that's kind
24 of a skeleton. It has -- maybe it doesn't really describe
25 the place adequately, and the commission says to him, you

1 have not complied with the requirement giving enough
2 information. We require an amendment. Would the charge
3 be untimely in your view or would it be -- because it did
4 not contain all the information the commission required,
5 and literally the statute requires that.

6 MR. BELL: Yes, Your Honor. I don't think the
7 commission has the power to change the statute of
8 limitations.

9 QUESTION: So that if they -- if they add a
10 requirement, more information after there's a filing, they
11 would also be deciding that the original charge was -- was
12 untimely.

13 MR. BELL: Well, and in this case, Your Honor,
14 that's exactly what they did. I mean, they -- there's no
15 question that in this case the EEOC did not regard what
16 had been filed as a charge.

17 QUESTION: And -- and --

18 MR. BELL: They kept writing letters to that
19 effect. They kept telling the petitioner, you've got to
20 file, you got to do something.

21 QUESTION: You'd also have to say, Mr. Bell,
22 that -- that since the complaint or the charge has to be
23 under the statute in such form as the commission shall
24 prescribe, you'd also have to say that if -- if the charge
25 was filed on 9 by 12 paper and the -- and the commission

1 had prescribed 8 and a half by 12, that it's ineffective.
2 Right?

3 MR. BELL: Yes, Your Honor. I think that's what
4 the statute contemplated. I think --

5 QUESTION: Any little -- any little foot fault
6 would --

7 MR. BELL: Sorry.

8 QUESTION: Any little foot fault would render it
9 ineffective. I mean, any -- any --

10 MR. BELL: I think that -- that --

11 QUESTION: -- any little technical detail that
12 -- that wasn't exactly as the commission's rules required.

13 MR. BELL: If it was required by the commission,
14 I think that's what the statute says. Of course, we're
15 not dealing with a technical detail here.

16 QUESTION: Mr. Bell, wouldn't that be --
17 wouldn't that be totally inconsistent with what Congress
18 envisioned? That is, these complaints with the EEOC were
19 not going to be filed by lawyers, lawyers who have leeway
20 to amend under the Federal rules. These are going to be
21 filed by lay people who didn't know anything, maybe not
22 even know what the word verification means, and yet you
23 think that Congress erected a structure where that initial
24 complaint had to be more meticulous than what the Federal
25 rules require a lawyer's pleading to say filed in court?

1 That would be very odd.

2 MR. BELL: The statute -- the statute seems to
3 indicate that with respect to the -- at least with respect
4 to the oath and writing requirements. I mean, there's no
5 -- if -- if the EEOC can eliminate the oath requirement,
6 they'll be here next year perhaps eliminating the writing
7 requirement.

8 QUESTION: It's -- if the question -- here the
9 question is when not whether. They're not -- they haven't
10 eliminated it. It's a question as it was in Becker. Yes,
11 you have to sign the notice of appeal, but you don't have
12 to do it within the time that the -- the statute of
13 limitations is running.

14 MR. BELL: But you do have to do it in the
15 method and in the time set out in rule 11. There is no
16 analogous provision in this statute.

17 QUESTION: What was filed in the court of
18 appeals within the time that you had to file the notice
19 lacked a signature.

20 MR. BELL: Yes.

21 QUESTION: And that's the same thing that's here
22 within the 30 -- 300 days. And then after -- here it was
23 313 days. The same thing with the notice of appeal. The
24 -- the signature was supplied some days later, but after
25 the time line. So, I frankly don't see the difference in

1 the two.

2 MR. BELL: Well, we see a fundamental difference
3 between this Court harmonizing rules over which this Court
4 has control and the Court deciding whether to apply
5 requirements set out in a statute that Congress used to
6 create a certain right.

7 When Congress knew -- when Congress wanted to
8 authorize a gap --

9 QUESTION: You're not asserting that our reading
10 of our own rules is unreasonable, are you?

11 MR. BELL: No, Your Honor.

12 QUESTION: Well, but if our reading of our rules
13 isn't unreasonable and this agency has simply read the
14 statute the way we read our rules, then I assume that this
15 agency's reading of the statute is not unreasonable. And
16 that's all that Chevron or whatever has replaced Chevron
17 requires.

18 MR. BELL: Your Honor, there are two reasons we
19 don't think Chevron is the correct -- Chevron would uphold
20 this regulation. Number one, there's -- there's no
21 delegation of authority to control the writing and -- and
22 the signing requirement here. That's clearly separated in
23 the statute. When the EEOC wanted to create a gap, it
24 knew how to do it, and it did it by saying you have the
25 right to specify the form and content of the rule. They

1 didn't do that here.

2 Secondly, this isn't a reasonable interpretation
3 of -- of the statute itself. It's inconsistent with
4 ordinary rules of statutory construction. We think it
5 really unravels the statutory scheme. It is -- it
6 eliminates the time filing requirement -- the timely
7 filing requirement. Under the -- under the regulation,
8 there's simply no deadline for filing a verified
9 complaint.

10 It -- it undercuts again not only the oath
11 requirement, but the writing requirement. There's simply
12 no intellectually honest way to separate an EEOC
13 regulation that says an oath is technical and can be fixed
14 after the filing deadline, but a writing is not technical.
15 There's no intellectually honest way to do that. The same
16 reasoning that supports the petitioner's argument with
17 respect to oath applies to -- to the writing requirement.

18 Finally, we think it undercuts the policy of
19 conciliation in the statute because, in fact, the -- the
20 technical regulation -- the -- the Solicitor General in
21 his brief says -- and this is in the brief in the --
22 urging the -- the Court to take cert, pages 16 and 17,
23 that the charges sworn to or affirmed before the employer
24 is required to take any action -- we don't think we've
25 misunderstood what the agency's practice is. It's

1 certainly been our experience that you don't get a notice
2 of any kind until you get a verified notice. That is the
3 practice in -- that -- that was what happened in this
4 case. The -- the Solicitor General, at least in its
5 earlier briefs, suggested that that was precisely the
6 practice that they followed here. So, we think that
7 ultimately the regulation also undercuts the policy in the
8 statute for prompt notice to the employer, which again
9 undercuts the policy of conciliation that's embodied in
10 the statute.

11 QUESTION: Well, the Government -- the
12 Government has asserted that that's not the case, and if
13 that -- if -- I think we have to accept that unless you
14 have solid evidence to the contrary that -- that in fact
15 they think the notice is normally given and should have
16 been given when -- here when the -- when the charge was
17 received --

18 MR. BELL: They have said that today.

19 QUESTION: -- even imperfect --

20 MR. BELL: I -- I -- and I of course saw
21 their --

22 QUESTION: Well, unless you know for sure that
23 it's not. And I agree with you that if -- if that is not
24 the policy and if -- if they're being inconsistent in
25 viewing it as a charge for one purpose but not as a charge

1 for another purpose, then -- then we have a different
2 problem. But I don't know that we can decide the case on
3 -- on the basis of simply your -- your guess that the
4 judgment -- that the Government may not be accurate in --
5 in what the policy is.

6 MR. BELL: Well, again, I -- I refer the Court
7 to the Government's brief in support of amicus of -- sorry
8 -- of granting the writ, pages 16 and 17. I would also
9 urge the Court to look at page 22 of the Government's
10 brief --

11 QUESTION: Mr. Bell, a lawyer representing the
12 Government made a representation before the Court this
13 morning that the EEOC should have immediately sent that
14 charge to the employer. I think we must take that to be
15 the Government's position.

16 MR. BELL: That does -- I mean, I'm not arguing
17 with that. I'm just pointing out that that seems
18 inconsistent with what the Solicitor General's earlier
19 briefing said in this case. That's the way we read it.
20 That's the way amicus read the Government's own brief. We
21 didn't --

22 QUESTION: Well, now it's clarified what its
23 position is.

24 MR. BELL: I -- I understand.

25 The -- if there is a -- a hardship created by

1 applying the rule, the statute of limitations, it's no
2 different from the hardship that always occurs when --
3 when someone falls outside the statute of limitations.
4 And this Court's opinion in Zipes exists for a reason, and
5 that's to give relief if someone, for good cause, making
6 out a good claim for equitable tolling, does have a basis
7 for -- for arguing that the statute shouldn't be applied
8 to him. This Court has ruled that the timely filing of
9 the charge is not jurisdictional and, as a consequence, is
10 subject to equitable tolling. And courts who have --
11 which have applied this rule as it's written -- I mean --
12 sorry -- the statute as it's written have resorted to
13 equitable tolling when the circumstances suggested that
14 that was appropriate to do.

15 QUESTION: Mr. Bell, this was a deferral case.
16 This was a 300-day case because the State agency.

17 MR. BELL: Yes, Justice Ginsburg.

18 QUESTION: Do we know whether in this case
19 anything had been done at the State agency level?

20 MR. BELL: Your Honor, the charge was not sent
21 to the State until it was put under oath just like it
22 was --

23 QUESTION: Well, that same -- the same formal --
24 whatever they called it -- form X, when it was sent to the
25 employer was also sent to the State agency.

1 MR. BELL: That's correct. After the statutory
2 deadline. That was the -- that's the only involvement the
3 State agency had in this.

4 And again, when you fall on the wrong side of a
5 statute of limitations, it's always going to seem harsh to
6 you. But if -- if a limitations is to have any meaning
7 whatsoever, you need to enforce it.

8 QUESTION: Is the apparent inconsistency between
9 what the Government says at page 16 of the brief in
10 support of granting the petition and its representation
11 here explained by the fact that at page 16 the Government
12 says the complaint must be -- the charge must be verified
13 before it requires a response --

14 MR. BELL: I --

15 QUESTION: -- but then there is another
16 requirement for simply notifying the employer that the
17 charge has been made? It seems to me --

18 MR. BELL: The -- the only requirement in the
19 handbook that we saw -- I mean, the handbook that was
20 filed -- that we received on Friday does not mention oath
21 at all. I mean, we -- we have looked at it and there's no
22 mention of oath whatsoever. So, it's -- it's very
23 difficult to know, you know, the role of the oath playing.

24 The handbook also says that the only
25 circumstance where you have to give notice of a charge

1 prior to the time that -- that the charge is -- is
2 perfected -- I think is the term that they use -- I mean,
3 they -- the -- the regulations talk about perfected
4 charges, charges. They talk about potential charges. I
5 mean, they're really all over the map. I mean, they -- in
6 terms of establishing a bright line rule, this is just the
7 opposite. They establish a fuzzy line rule in -- in their
8 regulations. But the only time, Your Honor, that the --
9 they mention giving notice of a charge is if it's within
10 15 days of the expiration of the filing deadline. That --
11 that's the only reference I was able to find.

12 And it's also quite interesting that in --

13 QUESTION: I don't understand that. I don't
14 understand what you said.

15 MR. BELL: If --

16 QUESTION: They only give notice of the charge
17 if the charge is received within 15 days of the --

18 MR. BELL: As I read this manual that was just
19 served -- served on us on Friday, that's -- that's exactly
20 what it says. That's the only circumstance I can see.
21 The --

22 QUESTION: Where they will give notice of an
23 unperfected charge.

24 MR. BELL: Yes. if it's considered a minimally
25 -- what they call a minimally sufficient charge.

1 QUESTION: They won't give notice unless the
2 charge is received --

3 MR. BELL: Right.

4 QUESTION: -- right up at the end of a deadline.

5 MR. BELL: That -- that is the way I read this
6 handbook.

7 I think it's also interesting in looking at the
8 handbook, Your Honor --

9 QUESTION: Do you have a section of the handbook
10 where that's --

11 MR. BELL: I think it's -- yes, sir. I think
12 it's on -- it's in section 2.1. It looks like on page
13 915.001, Your Honor, and it's special procedure, title VII
14 and ADA. When it is clear --

15 QUESTION: That's not a page. You got to give
16 me another page. The page is down the bottom. 2-19, 2-.

17 MR. BELL: 2-1 --

18 QUESTION: 2-1? Let me try that.

19 MR. BELL: -- is what -- what I have. And it
20 would be section 2.2(a)(1). It's what -- what happens
21 when the EEOC receives a charge by mail. And as I
22 understand, it's only when it's within 15 days of the
23 deadline that they send notice of the charge to the
24 employer.

25 Your Honor, I think it's -- or, Your Honors,

1 it's also significant looking at 2.5(a)(3) of this
2 handbook on amending charges, that the agency's own manual
3 mentions nothing about amending to add verification.
4 Nothing. They talk about amending to cure the common law
5 sort of problem, Justice Ginsburg, not the -- not the
6 oath --

7 QUESTION: What you have just said suggests that
8 this compliance manual is -- is in need of amendment, but
9 the compliance manual, unlike the regulation that we have,
10 is not something that gets Chevron deference. This has
11 not gone through any kind of notice and comment --

12 MR. BELL: I understand, and this -- of course,
13 this regulation was not passed with notice and comment
14 rulemaking either, which under the Mead decision gives it
15 less weight than it might have if -- if the regulation --

16 QUESTION: I thought the Congress authorized the
17 EEOC to make procedural rules, didn't it?

18 MR. BELL: They did.

19 QUESTION: And that's what these are. This --
20 the relation-back rule.

21 MR. BELL: Your Honor, I suppose we -- lawyers
22 could differ on whether it's a procedural or substantive
23 rule. Whether it's procedural or substantive, it changed
24 the -- it changes --

25 QUESTION: Well, what would you call rule 15(c)

1 of the Federal Rules of Civil Procedure? 15(c) of the
2 Federal Rules of Civil Procedure.

3 MR. BELL: Yes.

4 QUESTION: Is that a rule of procedure? The
5 relation-back rule?

6 MR. BELL: Yes, Your Honor, it is.

7 QUESTION: Well, I'm not sure that Mead -- does
8 -- I don't -- does Mead say that -- that even rules
9 adopted without notice and comment are entitled to Chevron
10 deference so long as they were authorized? I mean, I
11 thought all rules had to be authorized whether they do notice
12 and comment or not. What difference does it make whether
13 the statute authorizes the -- the issuance of these
14 procedural rules? You make the point that they weren't
15 adopted by notice and comment, which is what Mead says is
16 the only really safe harbor. So, they were authorized. I
17 mean, all rules have to be authorized. I mean, that's --
18 that's the starting point, isn't it?

19 MR. BELL: Well, and -- and one of the problems
20 with this rule is that there's no delegation of authority
21 to the agency to define the term charge, which is, in
22 essence, what they've done. And they've defined it as
23 something other than what -- what Congress has said, which
24 is something that's in oath -- under oath and in writing.
25 That's the problem. Again -- and I agree it doesn't make

1 any difference what procedure is used if they've -- if
2 they've overstepped the bounds and have interpreted the
3 statute in a way that's inconsistent with what the
4 statutory language requires. That's what we think they've
5 done here.

6 Again, the EEOC itself did not view what was
7 filed as a charge under their own regulations, under --
8 under the statute that it exists. I think that -- that is
9 significant.

10 The EEOC doesn't need to change the statute in
11 order to help claimants. They can follow the statute and
12 tell claimants, you need to put your complaint in -- in
13 writing and you need to put it under oath. All we're
14 talking about is a declaration. The EEOC's failure to do
15 that, which apparently they do fail to do, should not be
16 laid at the door of the respondent.

17 And again, equitable tolling is available under
18 Zipes anytime an unfair result is reached. And that --
19 that's the way these problems should be solved.

20 But just because equitable tolling is
21 appropriate in some cases does not mean this Court should
22 grant the EEOC the right to pass basically a prophylactic
23 rule that -- that says --

24 QUESTION: But how would you distinguish from
25 the point of view of the claimant who is filing the

1 original charge, sends a letter, as here, and then the
2 EEOC, if it were super-efficient, would have gotten out
3 the form in good time?

4 MR. BELL: It did in this case, Your Honor.
5 This man had the form within the 300 days. He's the one
6 who sat on it.

7 QUESTION: How many days did he have left?

8 MR. BELL: He had it for approximately a month,
9 at least 3 weeks.

10 QUESTION: Thank you, Mr. Bell.

11 Mr. Schnapper, you have 5 minutes remaining.

12 REBUTTAL ARGUMENT OF ERIC SCHNAPPER

13 ON BEHALF OF THE PETITIONER

14 MR. SCHNAPPER: Thank you, Your Honor.

15 The compliance manual in this case squarely
16 supports the representation that the Government has made
17 today with regard to its practice. The relevant provision
18 is at the bottom of page 2-1. It is section 2.2(b), and
19 it states, when the correspondence contains all the
20 information necessary to begin investigating -- which is
21 clearly true here -- constitutes a clear and timely
22 request for EEOC to act, and does not express concerns
23 about confidentiality or retaliation, acknowledge the
24 correspondence by using a form letter, and -- and serve a
25 copy of the document on the respondent.

1 Now, the absence of any reference to
2 verification is critical. It is simply not a prerequisite
3 to this command to agency officials. The manual is
4 crystal clear and entirely consistent with what the
5 Government has said.

6 In addition, there are cases in which the
7 Government with the EEOC has indeed served --

8 QUESTION: -- manual say about verification,
9 later verification?

10 MR. SCHNAPPER: I don't believe the manual
11 addresses it. It is not relevant to the commands of the
12 manual as to when service is to --

13 QUESTION: Well, one -- one might infer that
14 then that post-filing verification is not authorized.

15 MR. SCHNAPPER: It's expressly authorized by the
16 regulation in this case. I mean, I don't know that the
17 manual reiterates what's in the regulation. The
18 regulation is crystal clear. There's not a dispute here
19 as to what -- whether the regulation authorized this --
20 this particular practice.

21 There are, indeed, cases in which the EEOC has
22 served nonverified charges. You'll find examples of that
23 in the Philburn and Price cases which are mentioned in the
24 cert petition.

25 With regard to the applicability of Chevron, we

1 are in agreement with Justice Scalia that the presence or
2 absence of notice and comment rulemaking is not relevant.
3 If that were critical, then Chevron deference wouldn't
4 apply to most procedural regulations which don't require
5 notice and comment rulemaking. That would surely stand
6 everything on its head. Justice O'Connor correctly
7 pointed out in the Commercial Office Products case that
8 deference to procedural interpretations by an agency are
9 particularly appropriate.

10 In addition, it in fact happened that there was
11 notice and comment rulemaking in this case with regard to
12 these regulations in 1977. The cites to that are in the
13 amicus brief filed by the EEAC.

14 The question here, as Justice Ginsburg noted, is
15 not whether a charge has to be verified but when. The --
16 the statutory language is not clear. It could reasonably
17 have been read by the agency to require verification prior
18 to the applicable deadline. If the agency had written
19 that regulation, it would have properly have to have been
20 upheld under Chevron. But the -- the statutory language
21 was ambiguous, and this is precisely the circumstance
22 under which, under Chevron, the resolution of that matter
23 should be left to the agency.

24 Thank you.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr.

1 Schnapper.

2 The case is submitted.

3 (Whereupon, at 12:14 p.m., the case in the
4 above-entitled matter was submitted.)

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