No. 00-1072

In the Supreme Court of the United States

LEONARD EDELMAN, PETITIONER

v.

LYNCHBURG COLLEGE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

THEODORE B. OLSON
Solicitor General
Counsel of Record

RALPH F. BOYD, JR.
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

PAUL R.Q. WOLFSON
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530-0001
(202) 514–2217

NICHOLAS M. INZEO
Acting Deputy General Counsel

PHILIP B. SKLOVER
Associate General Counsel

VINCENT J. BLACKWOOD
Assistant General Counsel

BARBARA L. SLOAN
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964 provides that a charge of employment discrimination filed with the Equal Employment Opportunity Commission (Commission or EEOC) must be verified by the complainant under oath or affirmation, 42 U.S.C. 2000e-5(b), and must be filed within certain limitation periods, 42 U.S.C. 2000e-5(e)(1). An EEOC regulation, 29 C.F.R. 1601.12(b), provides that a discrimination charge that has been filed with the Commission within the statutory limitation period may be amended to cure "technical defects or omissions, including failure to verify the charge," and that an amendment to verify the charge "will relate back to the date the charge was first received" by EEOC, even if the verification of the charge is made after the statutory limitation period for filing a charge of discrimination. The question presented is whether 29 C.F.R. 1601.12(b) is valid.

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INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Equal Employment Opportunity Commission (Commission or EEOC) has primary responsibility for administering and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12111 *et seq.* The Attorney General also has enforcement responsibilities under Title VII and the ADA with respect to public employment. Enforcement of both statutes depends on the timely filing of a charge of discrimination, and both statutes require that a charge of discrimination be in writing and under oath or affirmation. See 42 U.S.C. 2000e-5(b) (verification requirement under Title VII); 42 U.S.C. 2000e-5(e)

(time limits for filing charges under Title VII); 42 U.S.C. 12117 (ADA incorporates Title VII's procedural provisions).

In 1966, pursuant to its statutory authority to issue "suitable procedural regulations to carry out the provisions of [Title VII]," 42 U.S.C. 2000e-12(a), EEOC promulgated a regulation providing that "technical defects or omissions, including failure to verify," in an otherwise sufficient, timely-filed charge may be cured by amendment outside the statutory limitation period, and that "[s]uch amendments * * * will relate back to the date the charge was first received." 29 C.F.R. 1601.12(b). The court of appeals in this case invalidated that EEOC regulation and held, to the contrary, that a charge of discrimination must be dismissed unless it has been both filed and verified within the limitation period.

The Commission has an obvious interest in the validity of its regulation. In addition, under Title VII and Title I of the ADA, the Commission and the Attorney General cannot take enforcement action on a discrimination charge unless it has been timely filed, and so the court of appeals' decision directly affects their ability to enforce those statutes. The United States and EEOC filed an *amicus curiae* brief in this case at the petition stage in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. On June 6, 1997, respondent, a private college, denied tenure to petitioner, a biology professor, despite favorable recommendations from the chair of his department and a faculty committee. Pet. App. 2a. On November 14, 1997 (160 days later), petitioner sent a detailed letter to EEOC, alleging that respondent denied him tenure because of his sex, and that respondent's dean was systematically purging white men from the faculty. Pet. 2; Br. in Opp. 2. Petitioner

ended the letter by stating: "I hereby file a charge of employment discrimination against [respondent] * * * and I call upon the EEOC to investigate this case in an attempt to rectify this unjust and unfair situation before any more people are subjected to this illegal discrimination." C.A. App. 85-86. The letter was signed by petitioner, but was not executed under oath or affirmation. *Id.* at 86; Pet. App. 4a.

On November 26, 1997, petitioner's attorney wrote to EEOC, stating that petitioner "would like to have a personal interview with an EEOC investigator prior to the final charging documents being served on the college." Pet. App. 2a. That letter added that "[i]t is my understanding that delay occasioned by the interview will not compromise the filing date, which will remain as November 14, 1997. Please advise if my understanding in this regard is not correct." *Ibid.*

On December 3, 1997, an EEOC employee sent petitioner a form letter, without acknowledging his attorney's correspondence. The form letter stated that petitioner should telephone EEOC to arrange an interview. Petitioner's interview was eventually scheduled for March 3, 1998. After the interview, an EEOC employee drafted an EEOC Form 5 Charge of Discrimination and mailed it to petitioner on March 18, 1998, for petitioner's review and verified signature. The EEOC received the verified charge back from petitioner on April 15, 1998, 313 days after the last alleged discriminatory employment practice. On March 26, 1999, after completing its investigation, EEOC issued petitioner a notice of right to sue. Pet. App. 2a-3a.

2. Petitioner initially filed suit against respondent in Virginia state court and alleged various state-law claims. He later added a count alleging sex discrimination in violation of Title VII, 42 U.S.C. 2000e-2(a)(1). Respondent removed the action to federal district court and then moved to dismiss the Title VII claim on the ground that petitioner had failed to

file a valid charge of discrimination with EEOC within the applicable statutory limitation period. Pet. App. 3a. Respondent argued that a "charge" was not filed until EEOC received the verified Form 5 Charge on April 15, 1998, after the expiration of the applicable 300-day limitation period for filing a Title VII charge. See 42 U.S.C. 2000e-5(e)(1).[1] Petitioner contended that his initial letter of November 14, 1997, complaining of discrimination was a timely charge of discrimination and that, under an EEOC regulation, 29 C.F.R. 1601.12(b), his subsequent verification (on the Form 5 charge) related back to that date. Although respondent acknowledged that regulation, it argued, *inter alia*, that the regulation conflicted with the underlying statute. See Br. in Opp. 5 n.1.

Without questioning the validity of the EEOC regulation, the district court agreed with respondent that petitioner had

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[1] The basic limitation period for filing a Title VII discrimination charge with EEOC is 180 days after the unlawful employment practice. 42 U.S.C. 2000e-5(e)(1). If the charging party has filed a discrimination charge with a qualified state or local agency, then the statutory limitation period for filing a charge with EEOC is 300 days. 42 U.S.C. 2000e-5(e)(1). (Such state and local agencies are commonly referred to as "deferral" agencies. See *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 112 (1988); *Tinsley* v. *First Union Nat'l Bank*, 155 F.3d 435, 439-442 (4th Cir. 1998).) In addition, if a complainant submits a charge of discrimination to EEOC based on employment practices that occurred in a State or locality that has a "deferral" agency, the 300-day limitations period applies and the EEOC refers the discrimination charge to the appropriate state or local agency for processing, even if the complainant has not filed a discrimination complaint directly with that state or local agency. See 29 C.F.R. 1601.13(a)(3)-(4) and (c); *Tinsley*, 155 F.3d at 439. Virginia has such a deferral agency, the Virginia Council on Human Rights (VCHR). See 29 C.F.R. 1601.74(a); *Tinsley*, 155 F.3d at 440. A worksharing agreement between EEOC and VCHR provides that EEOC's receipt of charges on VCHR's behalf is deemed to "automatically initiate the proceedings of both EEOC and [VCHR]" for purposes of fulfilling Title VII's deferral requirements. C.A. App. 118.

failed to file a timely charge, dismissed petitioner's Title VII claim, and remanded the remainder of the case to state court. Pet. App. 16a-17a. Although the district court noted that petitioner initially wrote to the Commission to complain about employment discrimination by respondent on November 14, 1997, and that his attorney wrote to the Commission on November 26, 1997—both dates well within the 300-day limitation period—it concluded that "neither [petitioner] nor the EEOC proceeded as if the November 1997 letter[s] did, or were intended to, commence proceedings." *Id.* at 22a-23a.

3. The court of appeals affirmed, but the panel was divided in its reasoning. Pet. App. 1a-13a (majority); *id.* at 14a-15a (concurrence).

a. The majority did not take issue with petitioner's submission that, under the Commission's regulations, EEOC would have treated his initial, non-verified letter as a charge of discrimination. It concluded, however, that EEOC's regulation permitting the verification to relate back to the filing of the initial complaint is contrary to the statute and therefore invalid. Pet. App. 1a-2a.

The majority applied the framework for review of agency regulations established in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). Pet. App. 5a. Identifying "[t]he precise question at issue in this case" as "whether verification must occur within the statutory limitations period," the court ruled that "Congress has unambiguously spoken" on that question. *Id.* at 6a. The court noted that Section 706(b) of Title VII, 42 U.S.C. 2000e-5(b), specifies that "[c]harges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." The "plain meaning of this language," stated the court, "compels the conclusion that if a discrimination claim is not in writing, under oath or affirmation, containing the information and in the

form required by the Commission, it is not a charge." Pet. App. 6a.

In addition, the court stated that Section 706(e)(1) of Title VII, 42 U.S.C. 2000e-5(e)(1), "affirmatively and plainly establishes the time period within which a charge must be filed." Pet. App. 6a. Thus, the court concluded, "[b]ecause a charge requires verification [and] because a charge must be filed within the limitations period, it follows that a charge must be verified within the limitations period." *Ibid.* (citations omitted). Because it found that the statutory language resolved the matter at hand, the court rejected petitioner's argument that EEOC's regulation is entitled to deference. *Ibid.*

b. Judge Luttig concurred only in the judgment. Pet. App. 14a-15a. He would have affirmed the dismissal of petitioner's claim on a narrower ground similar to that relied on by the district court—namely, that petitioner did not intend his initial letter to the Commission to be treated as a charge of discrimination. *Id.* at 14a.[2]

Judge Luttig stated that he was "sufficiently uncomfortable" with the broader ground relied on by the majority —that "verification may never relate back" after expiration of the limitation period—that he was unable to concur in that ruling. Pet. App. 14a. He noted that "we are not confronted with a single statute stating either by terms or in effect that 'a verified charge must be filed within [300] days of a discriminatory action.'" *Ibid.* Rather, he observed, "we are presented with two statutes, the first providing that a charge shall be filed within [300] days of the unlawful employment practice, and the second providing that charges

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[2] If the case is remanded, as we suggest below, respondent would be free to pursue its alternative argument that petitioner did not intend his initial letter to the Commission to be a "charge." See p. 5, *supra*; but see pp. 2-3, *supra*.

shall be in writing and include an oath or affirmation." *Ibid.* He further noted that "there is not *necessarily* the nexus required" between those two statutes to sustain the majority's reading. *Ibid.* "[I]f the two statutes are so read as temporally independent of each other, or at least not temporally coterminous, then there is no statutory requirement that the charge be verified within the [300] days, and relation back would be available by regulation." *Ibid.*

Finally, Judge Luttig observed, "there is no statutory definition of 'charge'" in Title VII. Pet. App. 14a-15a. Therefore, he continued, "the 'charge' that must be filed within [300] days need not—at least need not by definition—be an allegation that is verified * * * . Insofar as the statute informs us, the 'charge' that must be filed within [300] days can be merely an allegation of discrimination; it need not be verified." *Id.* at 15a. Accordingly, because he did not find EEOC's regulation to be contrary to anything in the statute, he would have upheld that regulation. *Ibid.*

SUMMARY OF ARGUMENT

The EEOC regulation at issue in this case validly permits the Commission to take action on a verified charge of discrimination under Title VII as long as the charge is submitted to the Commission within the limitation period for filing charges, even if the verification occurs after that period has expired. Although Title VII requires allegations in a charge of discrimination to be made "under oath or affirmation," 42 U.S.C. 2000e-5(b), and also imposes time limits for the filing of charges with EEOC, see 42 U.S.C. 2000e-5(e)(1), it does not expressly require verification within the limitation period for filing charges, nor does it provide express time limits for verification. The two provisions address distinct aspects of the charge-filing process and do not incorporate each other by reference. Accord-

ingly, the court of appeals erred in concluding that the statute unambiguously requires verification to occur within the time limits for filing a charge.

The regulation reflects well-established background legal principles. Federal and state courts have consistently ruled that, even when a complaint must be verified, as long as the complaint is timely filed, it may be verified after the expiration of the limitation period for the complaint. Nothing in Title VII suggests that Congress intended to depart from that principle, which was firmly established by the time of the statute's enactment in 1964.

The Commission's regulation is reasonable and entitled to deference. The regulation is not only consistent with the common law rules governing verified complaints, it also reasonably accommodates the purposes of the charge, verification, and limitation provisions of Title VII. Because the Commission may not enforce Title VII against an employer without a verification, the regulation accommodates the employer's interest in avoiding frivolous complaints. Because the complaint must be filed with EEOC within the limitation period, it accommodates the employer's interest in avoiding stale charges. At the same time, the regulation recognizes that most individuals who complain to the Commission are laypersons who will not know of the verification requirement. The regulation thus ensures that EEOC can enforce Title VII and that individuals do not inadvertently lose their rights but also protects employers against meritless and stale claims.

ARGUMENT

THE EEOC'S REGULATION PROVIDING THAT AN OTHERWISE SUFFICIENT, TIMELY-FILED CHARGE OF DISCRIMINATION MAY BE VERIFIED AFTER THE CHARGE-FILING PERIOD IS VALID AND REASONABLE

A. The Text Of Title VII Does Not Require A Charge Of Discrimination To Be Verified Within The Limitation Period For Filing A Charge With EEOC

The issue in this case is whether an otherwise valid charge of discrimination must be verified by the complainant within the limitation period for filing a complaint. As always, the first question is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). The court of appeals concluded that Congress had expressly provided that a charge must be verified within the limitation period for filing charges with the Commission. That conclusion is erroneous.

Section 706(b) of Title VII provides that "[c]harges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." 42 U.S.C. 2000e-5(b). The court of appeals read Section 706(b) to provide that only a charge made under oath or affirmation can be a valid "charge." According to the court of appeals, Section 706(b) effectively defines the word "charge" in Title VII to mean only a document executed under oath or affirmation. As the court of appeals put the matter, the "plain meaning" of Section 706(b) "compels the conclusion that if a discrimination claim is not in writing, under oath or affirmation, containing the information and in the form required by the Commission, it is not a charge." Pet. App. 6a. Under the court of appeals' reading, therefore,

a written complaint of discrimination that was filed with EEOC within the time limits and that otherwise complies with EEOC regulations is not a "charge" if it was not verified within those time limits.

The statute, however, does not define the term "charge" to mean only a complaint made under oath or affirmation. Indeed, as Judge Luttig pointed out (Pet. App. 14a-15a), Title VII does not contain a definition of "charge" at all—even though, in a separate definitional section, 42 U.S.C. 2000e, it expressly defines several other terms—and a "charge" can mean simply "an allegation of discrimination." Although Section 706(b) provides that "[c]harges shall be in writing under oath or affirmation," that requirement is not framed as a definition; it does not state that the word charge "means" or "is" a document in writing under oath or affirmation. Rather, it directs that something that *is* a charge be sworn to or affirmed.

The panel majority inferred a close nexus between Section 706(b), which contains the verification requirement for charges, and Section 706(e), 42 U.S.C. 2000e-5(e), which sets forth the limitation periods for filing charges. Section 706(e) provides that, in deferral states such as Virginia (see note 1, *supra*), a charge "shall be filed [with EEOC] * * * within three hundred days after the alleged unlawful employment practice occurred." 42 U.S.C. 2000e-5(e).

The two provisions, however, address separate requirements in the charge-filing process, and neither incorporates the other by reference. Section 706(b), which contains the verification requirement, does not refer to the time limits in Section 706(e), and Section 706(e) is silent as to whether the "charge" that must be filed within 300 days of the alleged discriminatory act must also be verified *at the time of filing.* While there is a statute of limitations for filing a charge, there is simply no statute of limitations for verification. As Judge Luttig observed (Pet. App. 14a), the statute does not

state either in express terms or in effect that "a verified charge must be filed within [300] days of a discriminatory action."

This court rejected a similar effort to superimpose Section 706(e)'s time limits on a separate provision of Title VII in *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393-394 (1982). In *Zipes*, this Court refused to read Section 706(c)'s timely-filing requirement as a jurisdictional prerequisite for purpose of Title VII's jurisdictional provision, Section 706(f). As the Court explained, the latter provision, "contains no reference to the timely-filing requirement. The provision specifying the time for filing charges with the EEOC appears as an entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Ibid.*

The court of appeals' approach to Sections 706(b) and (e) likewise resembles the method of statutory interpretation that this Court rejected last Term in *Becker* v. *Montgomery*, 121 S. Ct. 1801 (2001). In *Becker*, the Sixth Circuit concluded that a timely notice of appeal was ineffective because it was not signed by the party or his attorney, as required by Federal Rule of Civil Procedure 11(a), within the jurisdictional time period for filing a notice of appeal. The court of appeals held that the omission of the signature could not be corrected after that time period had expired. *Id.* at 1804-1805. This Court rejected the argument that, because Civil Rule 11(a) requires all papers filed in district court (including notices of appeal) to be signed, an unsigned notice of appeal was ineffective to meet the jurisdictional requirements governing notices of appeal in Federal Rules of Appellate Procedure 3 and 4. This Court declined to "dislodge the signature requirement from its Civil Rule 11(a) moorings and make of it an Appellate Rule 3 jurisdictional specification." *Id.* at 1807. Rather, the Court concluded that, although both Civil Rule 11(a) and the Appellate Rules set forth mandatory

requirements for notices of appeal, those Rules do not, either singly or in combination, provide "that the signature requirement cannot be met after the appeal period expires." *Id.* at 1805. To the contrary, the Court held, "if the notice [of appeal] is timely filed and adequate in other respects, jurisdiction will vest in the court of appeals, where the case may proceed so long as the appellant promptly supplies the signature once the omission is called to his attention." *Id.* at 1804.

Just as the Civil Rules do not provide a time limit for signatures, Title VII does not specify a time limit for verification. The EEOC's regulation fills that gap. That regulation first sets forth requirements for a charge of discrimination, including that the charge contain information identifying the complainant and the respondent, a statement of the pertinent facts, and other information. See 29 C.F.R. 1601.12(a). The regulation then specifies the minimum information that a charge must contain to vest jurisdiction in the Commission—namely, that a charge will be sufficient "when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." 29 C.F.R. 1601.12(b). The regulation further provides that "[a] charge may be amended to cure technical defects or omissions, including failure to verify the charge," and that "[s]uch amendments * * * will relate back to the date the charge was first received." *Ibid.* Thus, as with the Rules this Court examined in *Becker*, the EEOC regulation sets forth minimum requirements for a "charge" sufficient to vest the Commission with authority over the case, and then provides that other requirements for a charge may be supplied after the limitation period has expired.

B. Background Legal Principles Make Clear That A Timely-Filed Complaint Ordinarily May Be Verified After The Limitation Period For The Complaint Has Expired

The court of appeals' conclusion that a charge of discrimination must be verified within the limitation period for filing charges is not only unsupported by the text of Title VII and contrary to EEOC's gap-filling regulation, but it is also contrary to well-settled background legal principles articulated in dozens of state and federal decisions both before and after Congress enacted Title VII. Those decisions establish that, even when a complaint or other court filing must be verified, verification may occur after the limitation period for the complaint has expired, as long as the unverified complaint was filed in time. Congress, a "lawyers' body" (*Callanan* v. *United States*, 364 U.S. 587, 594 (1961)), is presumed to have been aware of that well-settled law when it enacted Title VII. Cf. *Morissette* v. *United States*, 342 U.S. 246, 262-263 (1952). Accordingly, Title VII is most naturally read to incorporate this judicial rule into the administrative context of EEOC proceedings. At a minimum, EEOC's regulation, incorporating the common law rule, is entitled to deference. See pp. 18-26, *infra*.

In modern practice under the Federal Rules of Civil Procedure and most corresponding state rules, pleadings generally need not be verified or accompanied by an affidavit, except when "specifically provided by rule or statute." Fed. R. Civ. P. 11(a). However, verification requirements were common in state proceedings through the first half of the twentieth century, especially in States that followed the Field Code's requirement of verified complaints. See Charles E. Clark, *Handbook of the Law of Code Pleading* 216-218 (2d ed. 1947). In those state proceedings and in the few instances in federal practice where verification has been

required, courts consistently held that the absence of verification was a technical defect that could be cured outside the limitation period and did not deprive the court of jurisdiction to act.[3]

The traditional function of verification is to assure the truthfulness of the factual allegations contained in a pleading. See, *e.g.*, *Drury Displays, Inc.* v. *Board of Adjustment*, 760 S.W.2d 112, 114 (Mo. 1988) (en banc) (citation omitted). As the courts have explained, however, the verification is not itself an allegation or a part of the pleading.[4] Thus, even when a court's jurisdiction depends on certain facts or allegations, verification of those facts or allegations is not necessary to vest jurisdiction in the court.[5] Omission of or errors

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[3] As pertinent here, verification was previously required in the federal system for involuntary bankruptcy petitions (see 11 U.S.C. 41(c) (1925); Bankruptcy Act of 1898, ch. 541, § 18(c), 30 Stat. 551), in suits for money against the United States brought in district court (see 28 U.S.C. 762 (1925); Act of Mar. 3, 1887, ch. 359, § 5, 24 Stat. 506), and for petitions for recovery of damages filed in the Claims Court (see 28 U.S.C. 265 (1925); Act of Mar. 3, 1911, ch. 231, § 159, 36 Stat. 1139)). Verification is still required in the federal system in shareholder derivative actions (see Fed. R. Civ. P. 23.1), in support of an *ex parte* request for a temporary restraining order (see Fed. R. Civ. P. 65(b)), in certain *in rem* actions, including forfeiture actions (see 28 U.S.C. App., Supp. Rules C(2)(a) and C(6)(a)(i)), and for removal of actions from state courts (see 28 U.S.C. 1446 (1994 & Supp. V 1999)).

[4] See, *e.g.*, *McMath* v. *Parsons*, 2 N.W. 703, 704 (Minn. 1879); *In re Estate of Sessions*, 341 P.2d 512, 517 (Or. 1959); accord *In re Estate of Shaffer*, 454 P.2d 1, 3 (Kan. 1969); *Chisholm* v. *Vocational Sch. for Girls*, 64 P.2d 838, 842 (Mont. 1936); *In re Interest of L.D.*, 398 N.W.2d 91, 98 (Neb. 1986).

[5] See, *e.g.*, *United Farm Workers of Am.* v. *Agricultural Labor Relations Bd.*, 694 P.2d 138, 139-140 (Cal. 1985) (en banc); *People* v. *Birch Sec. Co.*, 196 P.2d 143, 146 (Cal. Dist. Ct. App. 1948), cert. denied, 336 U.S. 936 (1949); *Easter Seal Soc'y for Disabled Children* v. *Berry*, 627 A.2d 482, 489 (D.C. 1993); *Lincoln Nat'l Bank* v. *Mundinger*, 528 N.E.2d 829, 836 (Ind. Ct. App. 1988); *Workman* v. *Workman*, 46 N.E.2d 718, 724 (Ind. Ct.

in a required verification are technical defects that may be remedied at any time before final judgment, and objection to the lack of verification may be waived if not raised promptly.[6] Accordingly, verification may be supplied by

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App. 1943) (en banc); *Chandler* v. *Taylor*, 12 N.W.2d 590, 594 (Iowa 1944); *Rush* v. *Rush*, 46 Iowa 648, 650-651 (1877); *In re Estate of Shaffer*, 454 P.2d at 3; *Patterson* v. *Patterson*, 190 P.2d 887, 889 (Kan. 1948); *Stoltman* v. *Stoltman*, 429 N.W.2d 220, 222 (Mich. Ct. App. 1988); *Commercial Bank & Trust Co.* v. *Jordan*, 278 P. 832, 834 (Mont. 1929); *In re Interest of L.D.*, 398 N.W.2d at 98; *Johnson* v. *Jones*, 2 Neb. 126, 135-137 (1872); *Tehansky* v. *Wilson*, 428 P.2d 375, 375 (Nev. 1967) (per curiam); *Preparatory Temple & House of Prayer for all People, Inc.* v. *Seery*, 195 A.2d 900, 902-903 (N.J. Super. Ct. Ch. Div. 1963); *Miller* v. *Board of Assessors*, 698 N.E.2d 906, 908 (N.Y. 1997); *People ex rel. New York City Omnibus Corp.* v. *Miller*, 24 N.E.2d 722, 723 (N.Y. 1939); *Colonial Storage Mgmt.* v. *Board of Revision*, 679 N.E.2d 313, 314 (Ohio Ct. App. 1996); *In re Estate of Sessions*, 341 P.2d at 516.

[6] *Johnston Broad. Co.* v. *FCC*, 175 F.2d 351, 355 (D.C. Cir. 1949) ("Generally speaking, it seems to be held in the state courts that a statutory requirement for a verified pleading is not jurisdictional but can be waived by the opposing party or cured by amendment."); see also *Ingalls Shipbuilding Corp.* v. *Cahela*, 36 So. 2d 513, 518 (Ala. 1948); *Smith* v. *Meyers*, 253 P.2d 615, 617 (Ariz. 1953); *United Farm Workers*, 694 P.2d at 140; *Lattimer* v. *Ryan*, 20 Cal. 628, 633 (1862); *Arrington* v. *Tupper*, 10 Cal. 464, 464-465 (1858); *Board of Educ.* v. *Mulcahy*, 123 P.2d 114, 118 (Cal. Dist. Ct. App. 1942); *State* v. *Beach*, 103 A. 353, 353 (Del. Super. Ct. 1918); *Mellon Bank, N.A.* v. *Coppage*, 253 S.E.2d 202, 203 (Ga. 1979); *Decker* v. *West*, 273 Ill. App. 532, 536-538 (1934); *Workman*, 46 N.E.2d at 724; *Crist* v. *Tallman*, 179 N.W. 522, 524 (Iowa 1920); *Rush*, 46 Iowa at 651; *Pulliam* v. *Pulliam*, 183 P.2d 220, 222 (Kan. 1947); *Board of Comm'rs* v. *Walter*, 112 P. 599, 600 (Kan. 1911); *Vater* v. *Vater's Adm'rs*, 113 S.W.2d 1145, 1146-1147 (Ky. 1938); *City of Dayton* v. *Hirth*, 87 S.W. 1136, 1137 (Ky. 1905); *Drury Displays*, 760 S.W.2d at 114; *Claussen* v. *Chapin*, 221 P. 1073, 1075 (Mont. 1924); *Miller*, 24 N.E.2d at 723-724; *Kuykendall* v. *Lambert*, 173 P. 657, 658 (Okla. 1918); *Estate of Sessions*, 341 P.2d at 517; *Lewis* v. *Erie Ins. Exch.*, 421 A.2d 1214, 1217 (Pa. Super. Ct. 1980); *State ex rel. Williams* v. *Jones*, 164 S.W.2d 823, 826 (Tenn. 1942); *Industrial State Bank* v. *Engineering Serv. & Equip.*, 612 S.W.2d 661, 663 (Tex. Civ.

later amendment and will relate back to the original unverified complaint.[7]

Federal courts have likewise held that, where verification is required by statute or rule, it may be supplied by amendment and will relate back to the original, unverified pleading.[8] For example, Section 18(c) of the Bankruptcy Act of 1898, ch. 541, 30 Stat. 551, required the vertification of all averments of fact in involuntary bankruptcy petitions. The federal courts uniformly held that failure to verify the facts in the petition was a non-jurisdictional, curable defect.[9] This

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App. 1981); *Keister's Ex'rs* v. *Philips*' *Ex'x*, 98 S.E. 674, 675 (Va. 1919); *Greene* v. *Union Pac. Stages, Inc.*, 45 P.2d 611, 612-613 (Wash. 1935).

[7] See *Cahela*, 36 So.2d at 518; *United Farm Workers*, 694 P.2d at 140; *Easter Seal Society*, 627 A.2d at 489; *Graves* v. *Needham*, 39 N.E.2d 321, 322 (Ill. 1942); *Maliszewski* v. *Human Rights Comm'n*, 646 N.E.2d 625, 626-628 (Ill. App. Ct. 1995); *Mundinger*, 528 N.E.2d at 836; *Workman*, 46 N.E.2d at 724; *Pulliam*, 183 P.2d at 222; *Hirth*, 87 S.W. at 1137; *Southside Civic Ass'n* v. *Warrington*, 635 So.2d 721, 723-724 (La. Ct. App.), petition for writ denied, 639 So. 2d 1168 (La. 1994); *Drury Displays, Inc.*, 760 S.W.2d at 114; *Chisholm*, 64 P.2d at 842; *In re Estate of Sessions*, 341 P.2d at 517; *State ex rel. Williams*, 164 S.W.2d at 826; *Greene*, 45 P.2d at 612; see also *Decker* v. *Board of Educ.*, 380 A.2d 285, 286-287 (N.J. Super. Ct. App. Div. 1977) (relying on agency regulations providing for relation back of verified complaints under New Jersey employment discrimination law), certification denied, 384 A.2d 842 (1978).

[8] See, *e.g.*, *United States* v. *United States Currency in the Amount of $103.387.27*, 863 F.2d 555, 561-562, 563 n.13 (7th Cir. 1988); *United States* v. *1982 Yukon Delta Houseboat*, 774 F.2d 1432, 1436 (9th Cir. 1985); *Johnston Broad. Co.*, 175 F.2d at 355-356; *Lewis* v. *Connett*, 291 F. Supp. 583, 584 (W.D. Ark. 1968); *Tracy* v. *Robbins*, 40 F.R.D. 108, 111, 114 (D.S.C. 1966), appeal dismissed, 373 F.2d 13 (4th Cir. 1967); *Yuri Yajima* v. *United States*, 6 F.R.D. 260, 262 (E.D.N.Y. 1946); *Franzen* v. *E.I. du Pont de Nemours & Co.*, 36 F. Supp. 375, 378 (D.N.J. 1941); *Duran* v. *United States*, 31 Ct. Cl. 353, 358 (1896); *Griffin* v. *United States*, 13 Ct. Cl. 257, 258-259 (1877).

[9] *In re Royal Circle of Friends Bldg. Corp.*, 159 F.2d 539, 541 (7th Cir. 1947); *Harris* v. *Mills Novelty Co.*, 106 F.2d 976, 978 (10th Cir. 1939);

Court sustained that practice in *Armstrong* v. *Fernandez*, 208 U.S. 324, 327 (1908), where it noted that the bankruptcy court had allowed verification of the petition *nunc pro tunc* and found no error in the district court's action.

This widespread practice demonstrates that, contrary to the court of appeals' reading of Title VII, a statutory requirement that a charge must be verified does not mean that verification must occur within the statute of limitations period for filing a complaint, or that an unverified complaint is not a valid "charge" within the meaning of the statute. Of course, Congress could have departed from the common-law rule by imposing a specific time limit on verifications. But in the absence of such an express provision, there is no reason to think that Congress intended to depart from that widely recognized rule.[10]

Adhering to the EEOC rule permitting verification after the filing date has passed is particularly appropriate in the context of Title VII. This Court has emphasized that Title

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Leidigh Carriage Co. v. *Stengel*, 95 F. 637, 641 (6th Cir. 1899); *In re Robbins*, 292 F. 653, 654 (S.D. Fla. 1923); *In re Farthing*, 202 F. 557, 566-567 (E.D.N.C. 1913); *In re Bellah*, 116 F. 69, 77 (D. Del. 1902); *Green River Deposit Bank*, 110 F. at 138.

[10] There is only very limited authority in the state courts to the contrary. In *Griffith* v. *Adams*, 52 A. 66, 68 (1902), the Maryland Court of Appeals stated that unverified complaints are "nullities, to which no legal effect could be given." The court did not directly address the question whether amendment would be permissible, however, and the rule in question explicitly authorized courts to grant extensions of time to file the required verification "for good cause shown." *Ibid.* Other cases similarly held only that unverified complaints *may* be disregarded, not that they must be. See 49 C.J. § 825 & n.53 (1930) (citing cases). In the special context of election contests, some courts have held that the verification requirement is jurisdictional, such that failure to file a verified petition within the relevant time period is an absolute bar. See *Dinwiddie* v. *Board of County Comm'rs*, 708 P.2d 1043, 1046 (N.M. 1985), cert. denied, 476 U.S. 1117 (1986).

VII's charge-filing requirements should be interpreted in light of the remedial purposes of the statute and the fact that its administrative processes are frequently invoked by laypersons without legal training or assistance. See *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 818 (1980) (Title VII "was enacted to implement the congressional policy against discriminatory employment practices," and "that basic policy must inform construction of this remedial legislation"); *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982) (cautioning against "technical reading" of charge-filing provisions because "laymen, unassisted by trained lawyers, initiate the process"); *Love* v. *Pullman Co.*, 404 U.S. 522, 527 (1972) (a highly technical reading of the charge-filing requirements is "particularly inappropriate in a statutory scheme [like Title VII] in which laymen, unassisted by trained lawyers, initiate the process"); see also *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 123-124 (1988); cf. *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 761 (1979) (making similar observations with respect to Age Discrimination in Employment Act of 1967).

C. The Commission's Regulation Is Reasonable And Entitled To Deference

1. The background principle of law in this area so clearly establishes that a verification may relate back to the initial complaint that the court of appeals' contrary reading of Title VII should be rejected in light of the absence of any suggestion that Congress intended to depart from the traditional rule. At a minimum, however, the court of appeals clearly erred in concluding that Title VII's plain language compelled rejection of that well-established rule. Accordingly, to the extent the statutory language does not resolve the "precise question" at issue in this case, the Court should defer to the Commission's regulation. See *Chevron*, 467 U.S.

at 842-843; see also *Commercial Office Prods.*, 486 U.S. at 115; *Oscar Mayer & Co.*, 441 U.S. at 761.

Deference to the Commission's implementation of Title VII is particularly appropriate in this case for several reasons. First, Congress expressly delegated to EEOC the authority to "issue * * * suitable procedural regulations to carry out the provisions of" Title VII. 42 U.S.C. 2000e-12(a). Congress has thus "explicitly left a gap for the agency to fill, [and] there is an express delegation of authority to the agency." *Chevron*, 467 U.S. at 843-844. Moreover, the Commission formally published the regulation in the Code of Federal Regulations and the Federal Register, rather than informally articulating it in a policy statement or enforcement guideline. See 31 Fed. Reg. 10,269 (1966); 37 Fed. Reg. 9215 (1972); 42 Fed. Reg. 55,388 (1977). Accordingly, the Commission's procedural regulation is binding "unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States* v. *Mead Corp.*, 121 S. Ct. 2164, 2171 (2001); see also *Commercial Office Prods.*, 486 U.S. at 125 (O'Connor, J., concurring) (deference to EEOC is "particularly appropriate" where regulation involves a "technical issue of agency procedure").[11]

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[11] Because this case involves an express delegation of authority to the Commission to issue regulations, there should be no dispute that *Chevron* deference is applicable. See *Mead*, 121 S. Ct. at 2172 (a "very good indicator of delegation meriting *Chevron* treatment" is "express congressional authorizations to engage in the process of rulemaking"). That is true even though the regulation at issue was not the product of notice-and-comment rulemaking. The Administrative Procedure Act does not require a notice of proposed rulemaking for "rules of agency organization, procedure, or practice." 5 U.S.C. 553(b)(A). And unlike more informal interpretive rules and guidelines that have received only "some deference" (see *Mead*, 121 S. Ct. at 2175; *Reno* v. *Koray*, 515 U.S. 50, 61 (1995)), this case involves a formal published regulation that is binding on the Commission. See also *Mead*, 121 S. Ct. at 2173 (making clear that want of notice and comment does not preclude *Chevron* deference).

Second, the regulation reflects the Commission's long-standing and consistently-held interpretation of Title VII. Cf. *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981) (EEOC's "contemporaneous construction" of Title VII procedural issue "deserves special deference when it has remained consistent over a long period of time"). The charge and relation-back provisions now found at 29 C.F.R. 1601.12(b) were initially promulgated in 1966, just two years after Title VII became law. See 29 C.F.R. 1601.11 (1966); 31 Fed. Reg. 10,269 (1966). The substance of the regulation has remained essentially unchanged, with only minor changes in citation and wording. Moreover, although Congress has enacted several sets of amendments to Title VII, including amendments to Section 706(b) in 1972, it has never disapproved the regulation by adding a limitation requirement in Section 706(b) or a verification requirement in Section 706(e). Cf. *Associated Dry Goods*, 449 U.S. at 600 n.17 (Congress's failure to disapprove EEOC regulation "suggests its consent to the Commission's practice").[12]

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[12] Moreover, before the 1972 amendments, courts of appeals had uniformly held, consistent with EEOC's 1966 regulation, that charges could be verified outside the charge-filing period. See *Blue Bell Boots, Inc.* v. *EEOC*, 418 F.2d 355, 357 (6th Cir. 1969); *Weeks* v. *Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 230-231 (5th Cir. 1969); *Choate* v. *Caterpillar Tractor Co.*, 402 F.2d 357, 360 (7th Cir. 1968). By 1990, when Congress incorporated Title VII's procedural requirements into the ADA (see p. 2, *supra*), all of the circuits that had addressed the issue had upheld EEOC's regulation permitting a verification made outside the limitation period to relate back to a timely-filed but unverified charge. See *Peterson* v. *City of Wichita*, 888 F.2d 1307, 1309 (10th Cir. 1989), cert. denied, 495 U.S. 932 (1990); *Casavantes* v. *California State Univ.*, 732 F.2d 1441, 1443 (9th Cir. 1984); *Weeks*, *supra*. The first court of appeals decision to the contrary was *Schlueter* v. *Anheuser-Busch, Inc.*, 132 F.3d 455, 458 (8th Cir. 1998); see also *Hodges* v. *Northwest Airlines, Inc.*, 990 F.2d 1030 (8th Cir. 1993) (concluding that unverified charge was not timely filed with state agency).

2. The Commission's regulation reflects a reasonable interpretation of Title VII. The regulation is not contrary to anything in the text of the statute and is consistent with well-established background legal principles. It is also fully consistent with the interests served by Title VII's charge, verification, and limitation requirements. The main purpose of a charge is to put EEOC on notice that the respondent may have engaged in conduct that violates federal anti-discrimination law. Under Title VII and Title I of the ADA, EEOC (unlike other federal agencies with enforcement

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Some courts recently have questioned whether, in the 1972 amendments to Section 706(b), Congress intended to convert the verification provision from a technical and directory measure to one that is substantive and mandatory. See *Vason* v. *City of Montgomery*, 240 F.3d 905, 907 n.2 (11th Cir. 2001) (per curiam). Those courts, however, have misunderstood the thrust of the 1972 amendments. Congress rewrote Section 706(b) in 1972 to permit charges to be filed "on behalf of" aggrieved persons as well as "by" aggrieved persons, and extended the verification requirement to all charges, including Commissioner's charges and the new "on-behalf-of" charges. The new, more complex provisions for filing charges required reorganization of the statutory language. Compare 42 U.S.C. 2000e-5(a) (1970) ("Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission[,] * * * the Commission shall furnish [the respondent] * * * with a copy of such charge[.]") with 42 U.S.C. 2000e-5(b) (1994) ("Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission * * * , the Commission shall serve a notice of the charge * * * on [the respondent]. Charges shall be in writing under oath or affirmation[.]"). The scant legislative history of that amendment indicates that Congress understood the principal change to be that verification would be required in Commissioner's charges and "on-behalf-of" charges; it does not suggest that Congress understood that, before the amendment, verification was not required in charges filed by individuals claiming discrimination. See 118 Cong. Rec. 7167 (1972) (section-by-section analysis prepared by Sens. Williams and Javits). Moreover, nothing in the legislative history suggests that verification must occur within the charge-filing period.

powers) may investigate only matters that are tied to charges of discrimination that have been filed with the Commission. See *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 64, 68 (1984). That purpose is fulfilled if the charge is "sufficiently precise to identify the parties, and to describe generally the action or practices complained of," with the minimum level of specificity required by 29 C.F.R. 1601.12(b). A charge need not also be verified to alert EEOC to potential discrimination that may warrant investigation.

The verification requirement serves to impress on complainants the gravity of filing a charge and to ensure that employers are not harassed by frivolous charges. *Blue Bell Boots, Inc.*, 418 F.2d at 357; cf. *Shell Oil*, 466 U.S. at 76 n.32 (explaining that, in Section 706(b), the "function of an oath is to impress upon its taker an awareness of his duty to tell the truth"). The employer's interests are fully protected where, as here, the charge is verified before the employer is required to cooperate in the investigation. See *Peterson* v. *City of Wichita*, 888 F.2d 1307, 1309 (10th Cir. 1989), cert. denied, 495 U.S. 932 (1990); cf. *Shell Oil*, 466 U.S. at 64 (charge that meets the requirements set forth in Section 706(b) is prerequisite to judicial enforcement of an EEOC subpoena); see also 42 U.S.C. 2000e-5(b) (requiring service of notice of charge on employer within 10 days).

Title VII's limitation periods, "while guaranteeing the protection of the civil rights laws to those who promptly assert their rights," are designed to "protect employers from the burden of defending claims arising from employment decisions that are long past." *Delaware State Coll.* v. *Ricks*, 449 U.S. 250, 256-257 (1980). The charge itself, even if unverified, represents an assertion of the victim's rights. A complainant who, in compliance with EEOC's regulations, submits a detailed letter to the Commission within the applicable time period and explains the factual basis for his claim of discrimination cannot be said to have slept on his rights.

Furthermore, the deadlines imposed by the statute ensure that, even when the charge is formally verified after the limitation period has expired, employers will not need to defend decisions that are long past. In sum, the regulation "honor[s] the remedial purpose of the legislation as a whole without rejecting the particular purpose of the filing requirement, to give prompt notice to the employer." *Zipes*, 455 U.S. at 398.

3. The regulation also reflects the Commission's practical experience with processing charges of discrimination. First, as this Court has recognized (pp. 17-18, *supra*), most individuals who contact the EEOC to complain about alleged employment discrimination are laypersons acting without legal training or assistance. Those complainants are not likely to know, at least when they initially contact the Commission, that a complaint of discrimination must be verified by oath or affirmation to be treated as a formal charge of discrimination.

Second, the limitation periods for filing an administrative charge of discrimination with EEOC are relatively short: 180 days after the alleged unlawful employment practice, or 300 days in States and localities with qualified employment-discrimination agencies (see note 1, *supra*). As there are only 50 EEOC district, area, and local offices in the United States, most complainants necessarily make initial contact with the Commission by letter or telephone.[13] Complainants often send letters to the EEOC near the end of the limitation period, intending thereby to file charges of discrimination, without being aware that the charge must be verified. The regulation protects those persons if they have asserted their

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[13] For example, the Seattle District Office handles charges from Alaska, Idaho, and Oregon as well as Washington; the Denver District Office covers not only Colorado but also Montana, Wyoming, Nebraska, North Dakota, and South Dakota.

rights in a timely fashion. It also preserves the Commission's jurisdiction to investigate allegations of discrimination, which it could not do if the charge were deemed to be untimely. See *Shell Oil*, 466 U.S. at 64.[14]

Third, because most complainants to EEOC are lay-persons, EEOC has long found it useful to have Commission staff prepare a short formal charge of discrimination (the Form 5) for the complainant to review and to execute under oath or affirmation, once the staff has distilled the essence of the allegations from contacts with the complainant. This practice simplifies EEOC's enforcement of Title VII by focusing the complainant's allegation as well as the inquiry that EEOC then makes of the employer. The process of transferring the individual's allegations to a Form 5 Charge of Discrimination ready for execution and verification often involves correspondence by mail between the Commission and the complainant. That process may take several weeks.

Thus, practical considerations strongly support the Commission's relation-back regulation. Even when a complainant sends the Commission a detailed written letter setting forth the basis for his allegation of discrimination well within the statutory limitation period, the complainant is unlikely to know of the verification requirement, and it will often be

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[14] When an individual initially contacts EEOC by telephone, a member of the Commission staff may discuss the matter with the caller to make sure that the person's complaint is not more appropriately directed to another agency (such as the Department of Labor or the National Labor Relations Board), and then typically sends that person an intake sheet or questionnaire to fill out in his own words and to return to the Commission. Once that intake sheet or questionnaire is returned to EEOC, a Commission staff person will then examine the case further, may schedule an interview with the complainant (in person or by telephone), and may eventually prepare a Form 5 Charge of Discrimination for the complainant to verify and execute. Under the EEOC regulation at issue here, a complainant's telephone call may not be treated as a charge of discrimination; a charge must be in writing. See 29 C.F.R. 1601.12(b).

impossible for the Commission to prepare, and the complainant to verify, a Form 5 Charge of Discrimination before the short limitation period expires. If such an initial written (but unverified) submission to the Commission did not toll the statute of limitations for filing a charge, EEOC would likely lose the opportunity to investigate allegations of discrimination in many cases, and individuals would lose the opportunity to obtain relief as well.

The Commission's regulation also accommodates the fact that other federal, state, and local agencies also have jurisdiction over employment-discrimination complaints. As noted above (note 1, *supra*), in deferral jurisdictions, the Commission must defer to the qualified state or local agency for 60 days before processing a charge unless the state or local proceedings conclude earlier. 42 U.S.C. 2000e-5(c). If a Title VII charge is filed initially with EEOC, the Commission may refer the charge to such a state or local agency for processing. See *Commercial Office Prods.*, 486 U.S. at 110-112. Some States, including Virginia where this case originated, do not have a verification requirement for employment-discrimination complaints. See 22 Va. Admin. Code § 25-10-20 (1990) (defining "complaint" to mean "a written statement by a person * * * alleging an act of discrimination" prohibited by state law), § 25-10-50 (listing required contents of complaint but not including verification). The EEOC's regulation permits it to refer unverified charges to state and local agencies. See 29 C.F.R. 1601.13(a)(4)(i). Those State and local agencies can then determine whether they may take action on an unverified charge under state or local law. The court of appeals' decision, however, might prevent EEOC from referring unverified charges to state and local agencies, under the reasoning an unverified charge was not a "charge" at all within the meaning of Title VII, even if those state and local agencies do not require verification for their own purposes.

In addition, federal agencies, such as the Department of Labor, that administer other anti-discrimination provisions and other federal labor laws often receive charges that should be handled by EEOC. Those agencies typically forward such charges to the Commission. Many of the referred charges are unverified, in part because the anti-discrimination provisions that those other federal agencies enforce do not require verification. See, *e.g.*, 41 C.F.R. 60-1.23 (Department of Labor regulation governing complaints under anti-discrimination provisions of Executive Order No. 11,246 does not require verification). Under the EEOC regulation, charges that are timely filed with another agency and are then referred to the Commission may be considered timely filed under Title VII, even if the transfer process is time-consuming and verification occurs outside the limitation period for filing charges with EEOC. That approach ensures that persons who seek relief for alleged employment discrimination do not mistakenly forfeit their rights.

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In short, although Title VII provides a statute of limitations for filing charges and separately requires that a charge be verified, Title VII does not include a statute of limitations for verification. Nothing in the text or legislative history of the statute suggests that verification must occur within the limitation period for filing charges, and the background legal principle establishes the opposite presumption—that verification may occur outside the limitation period for filing a complaint and will relate back to a timely filed complaint. EEOC's regulation is consistent with that background rule and furthers the purposes of the charge-filing, limitation, and verification provisions of Title VII. Accordingly, that regulation should be upheld.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

RALPH F. BOYD, JR.
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

PAUL R.Q. WOLFSON
Assistant to the Solicitor General

NICHOLAS M. INZEO
Acting Deputy General Counsel

PHILIP B. SKLOVER
Associate General Counsel

VINCENT J. BLACKWOOD
Assistant General Counsel

BARBARA L. SLOAN
Attorney
Equal Employment Opportunity Commission

AUGUST 2001