SUPREME COURT OF THE UNITED STATES

No. 00–1072

LEONARD EDELMAN, PETITIONER *v.*
LYNCHBURG COLLEGE

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

[March 19, 2002]

JUSTICE O'CONNOR, with whom JUSTICE SCALIA joins, concurring in the judgment.

The Court today holds that there is no need in this case to defer to the Equal Employment Opportunity Commission's regulation because the agency's position is the one it "would adopt even if there were no formal rule and [the Court] were interpreting the statute from scratch." See *ante*, at 7. I do not agree that the EEOC has adopted the most natural interpretation of Title VII's provisions regarding the filing with the EEOC of charges of discrimination. See 42 U. S. C. §2000e–5 (1994 ed.). But, because the statute is at least somewhat ambiguous, I would defer to the agency's interpretation. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837, 843–844 (1984); *EEOC* v. *Commercial Office Products Co.,* 486 U. S. 107, 125 (1988) (O'CONNOR, J., concurring in judgment) ("[D]eference [to the EEOC] is particularly appropriate on this type of technical issue of agency procedure"). I think the regulation, 29 CFR §1601.12(b) (1997), should be sustained on this alternative basis.

Title VII requires "charges" of discrimination to "be in writing under oath or affirmation." 42 U. S. C. §2000e–5(b). It also requires "charge[s]" to "be filed within one hundred and eighty [or in some circumstances three hundred] days after the alleged unlawful employment practice

occurred." §2000e–5(e)(1). The most natural reading of these provisions is that the first is intended to be definitional, defining a "charge" as an allegation of discrimination made in writing under oath or affirmation. The second then specifies the time period in which such a verified charge must be filed. That Congress intended the provisions to be read together in this way is suggested by the fact that the two provisions are found in subsections of the same section of the statute. See *Davis* v. *Michigan Dept. of Treasury,* 489 U. S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"). Surprisingly, however, the Court holds that the best reading is precisely the opposite—it says it "clearly agree[s] with the EEOC" that charges do not need to be verified within the specified time period. See *ante,* at 7.

Despite the fact that I think the best reading of the statute is that a charge must be made under oath or affirmation within the specified time, this is not the only possible reading of the statute. The definition section of the statute, 42 U. S. C. §2000e, which expressly defines a number of terms, does not define the word "charge" to mean an allegation made under oath or affirmation. In fact, the definition section does not define the word "charge" at all. And the provision stating that "charges shall be in writing under oath or affirmation" is not framed as a definition—it does not say, for example, that a charge *is* an allegation made in writing under oath or affirmation. Because the statute does not explicitly define "charge" to incorporate verification but only suggests it, the requirement that charges be verified and the requirement that charges be filed within the specified time could be read as independent requirements that do not need to be satisfied simultaneously. Congress, therefore, cannot be said to have "*unambiguously* expressed [its] intent"

that the charge must be under oath or affirmation when filed. *Chevron, supra,* at 843 (emphasis added). Given this ambiguity, under our decision in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc., supra,* "the question . . . [becomes] whether the agency's [position] is based on a permissible construction of the statute," *id.,* at 843, or, in other words, whether the agency's position is "reasonable," *id.,* at 845. If so, then we must give it "controlling weight," *id.,* at 844.

I find the regulation to be reasonable for some of the same reasons that the Court finds it to be the best interpretation of the statute. As the Court notes, Title VII is "'a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process.'" See *ante,* at 8 (quoting *Commercial Office Products Co., supra,* at 124). Permitting relation back of an oath omitted from an original filing is reasonable because it helps ensure that lay complainants will not inadvertently forfeit their rights. The regulation is also consistent, as the Court explains, with the common-law practice of allowing later verifications to relate back. See *ante,* at 9–10. For these reasons, I think the regulation is reasonable and should be sustained.

The Court reserved the question of whether the EEOC's regulation is entitled to *Chevron* deference. See *ante*, at 7. I doubt that it is possible to reserve this question while simultaneously maintaining, as the Court does, see *ante*, at 7, n. 8, that the agency is free to change its interpretation. To say that the matter is ambiguous enough to permit agency choice and to suggest that the Court would countenance a different choice is to say that the Court would (because it must) defer to a reasonable agency choice. Indeed, the concurring opinion that the Court cites for the proposition that the agency could change its position was premised on the idea that the agency was entitled to deference. See *Commercial Office Products Co., supra,* at 125–126 (O'CONNOR, J., concurring in judgment).

I think the EEOC's regulation is entitled to *Chevron* deference. We have, of course, previously held that because the EEOC was not given rulemaking authority to interpret the *substantive* provisions of Title VII, its substantive regulations do not receive *Chevron* deference, but instead only receive consideration according to the standards established in *Skidmore* v. *Swift & Co.,* 323 U. S. 134, 140 (1944). See *EEOC* v. *Arabian American Oil Co.,* 499 U. S. 244, 257 (1991) ("[T]he level of deference afforded [the agency's judgment] 'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control'") (quoting *Skidmore*, *supra,* at 140); *General Elec. Co.* v. *Gilbert,* 429 U. S. 125, 141–142 (1976). The EEOC has, however, been given "authority from time to time to issue . . . suitable *procedural* regulations to carry out the provisions of" Title VII, 42 U. S. C. §2000e–12(a) (emphasis added). The regulation at issue here, which permits relation back of amendments to charges filed with the EEOC, is clearly such a procedural regulation. See, *e.g.,* Fed. Rule Civ. Proc. 15 (establishing rules for amendments to pleadings and relation back as part of the Federal Rules of Civil *Procedure*). Thus, as the Court recognizes, see *ante,* at 6–7, the EEOC was exercising authority explicitly delegated to it by Congress when it promulgated this rule.

The regulation was also promulgated pursuant to sufficiently formal procedures. Although the EEOC originally issued the regulation without undergoing formal notice-and-comment procedures, it was repromulgated pursuant to those procedures in 1977. See 42 Fed. Reg. 42022, 42023; *id.,* at 55388, 55389. We recognized in *United States* v. *Mead Corp.,* 533 U. S. 218 (2001), that although notice-and-comment procedures are not required for *Chevron* deference, notice-and-comment is "significant . . . in

pointing to *Chevron* authority," and that an "overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication." 533 U. S., at 230–231. I see no reason why a repromulgation pursuant to notice-and-comment procedures should be less entitled to deference than an original promulgation pursuant to those procedures. Cf. *Smiley* v. *Citibank (South Dakota), N. A.,* 517 U. S. 735, 741 (1996) (giving deference to "a full-dress regulation . . . adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure . . . deliberation" even though the regulation was prompted by litigation).

Moreover, the regulation is codified in the Code of Federal Regulations, 29 CFR §1601.12(b) (1977), and so is binding on all the parties coming before the EEOC, as well as on the EEOC itself. In this regard, it is distinguishable from the Customs Service ruling letters at issue in *Mead Corp., supra,* at 233, which we found not to be binding on third parties and to be changeable by the Customs Service merely upon notice, and to which we therefore denied *Chevron* deference. See also *Christensen* v. *Harris County,* 529 U. S. 576, 587 (2000) (denying *Chevron* deference to an agency opinion letter that we suggested lacked "the force of law," but stating that "the framework of deference set forth in *Chevron* does apply to an agency interpretation contained in a regulation").

Because I believe the regulation is entitled to review under *Chevron*, and because the regulation is reasonable, I concur in the judgment.