No. 19-1476

In the Supreme Court of the United States

VANTAGE ENERGY SERVICES, INC., ET AL., PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an intake questionnaire filed with the Equal Employment Opportunity Commission (EEOC) that alleged that petitioners discriminated against an employee on the basis of disability and stated that the employee wanted to file a charge of discrimination, but that was not verified by the employee when it was filed with the EEOC, constitutes a "charge" under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*

2. Whether the facial plausibility pleading standard articulated in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), applies to allegations in an ADA complaint concerning the timeliness of an administrative charge of discrimination filed with the EEOC or notice of that charge under 42 U.S.C. 2000e-5.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 954 F.3d 749. The judgment of the district court (Pet. App. 16a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 2020. The petition for a writ of certiorari was filed on July 2, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the timeliness of a "charge" of disability discrimination filed with the Equal Employment Opportunity Commission (EEOC or Commission) under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq*. More specifically, the case primarily concerns whether the intake questionnaire in this case, which was filed before the charge-filing dead-

line, presented such a "charge," even though the allegations in the questionnaire were not verified under penalty of perjury by the complaining party until after the charge-filing deadline.

a. Title I of the ADA, 42 U.S.C. 12111-12117, prohibits employment discrimination against certain individuals on the basis of disability. 42 U.S.C. 12112. To enforce that prohibition, "Congress has directed the EEOC to exercise the same enforcement powers, remedies, and procedures that are set forth in Title VII of the Civil Rights Act of 1964[, 42 U.S.C. 2000e *et seq.*]" *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 285 (2002) (citing 42 U.S.C. 12117(a)). The ADA accordingly provides that "[t]he powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of [Title 42 of the United States Code] shall be the powers, remedies, and procedures [that Title I of the ADA] provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of [the ADA]." 42 U.S.C. 12117(a).

As relevant here, Title VII requires that "[a] charge under [Section 2000e-5] shall be filed within" 180 or 300 days "after the alleged unlawful employment practice occurred." 42 U.S.C. 2000e-5(e)(1). Section 2000e-5(e)'s "charge-filing requirement"—like its associated "time limit for filing a charge with the EEOC"—is a "nonjurisdictional" "claim-processing rule" which, if not satisfied, can provide the defendant with a "dispositive defense" to liability. *Fort Bend County* v. *Davis*, 139 S. Ct. 1843, 1850-1852 (2019); see *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 392-398 (1982). In this case, all agree that Section 2000e-5(e) required that the relevant disability-discrimination "charge" be filed within

300 days of petitioners' alleged discrimination. Pet. 5; cf. *Fort Bend County*, 139 S. Ct. at 1846. "[W]ithin ten days" after such "a charge is filed by or on behalf of a person claiming to be aggrieved," the EEOC shall "serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on [the] employer." 42 U.S.C. 2000e-5(b).

Neither Section 2000e-5 nor any other Title VII provision "defines 'charge.'" *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 112 (2002). Section 2000e-5(b) instead 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 Commission has promulgated procedural regulations governing both Title VII and ADA claims. 29 C.F.R. 1601.1; cf. 42 U.S.C. 2000e-12(a), 12116 (rulemaking authority). Like Section 2000e-5(b), the regulations provide that a "charge shall be in writing and signed" and, in addition, "shall be verified," 29 C.F.R. 1601.9, either by being "sworn to or affirmed" or by being "supported by an unsworn declaration in writing under penalty of perjury," 29 C.F.R. 1601.3(a) (defining "*verified*"). The regulations further provide that a "charge should contain" certain types of information, 29 C.F.R. 1601.12(a), but that "a charge is 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). Under the Commission's regulations, a "charge may be amended to cure technical defects or omissions, including failure to verify the charge," and such amendments

"will relate back to the date the charge was first received." *Ibid.*

In the Title VII context, this Court has held that the statutory term "charge" does not in itself "require an oath," and that the "EEOC regulation permitting an otherwise timely filer to verify a charge after the time for filing has expired" reflects "the position [this Court] would adopt even if * * * [the Court] were interpreting the statute from scratch." *Edelman*, 535 U.S. at 109, 113-114. Section 2000e-5(b)'s "verification requirement," the Court determined, requires "an oath only by the time the employer is obliged to respond to the charge, not at the time an employee files it with the EEOC." *Id.* at 113. That requirement reflects that the statutory function of verification is to "protect[] employers from the disruption and expense of responding to a claim unless a complainant is serious enough and sure enough to support it by oath subject to liability for perjury." *Ibid.*

b. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, contains distinct enforcement provisions that, like Title VII, do not include a statutory definition for "charge" but are triggered by "a charge alleging unlawful discrimination," 29 U.S.C. 626(d)(1). See *Federal Express Corp.* v. *Holowecki*, 552 U.S. 389, 393 (2008). In February 2008, the Court in *Holowecki* concluded that in order for a filing "to be deemed a charge" under the ADEA, it must not only include "an allegation [of discrimination] and the name of the charged party" as required by EEOC regulations but must also be "reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee." *Id.* at 402. *Holowecki*

determined that an individual's filing of the EEOC's Form 283, which was labeled as "an 'Intake Questionnaire'" (*id.* at 394), constituted a "charge" because the form was supplemented by an affidavit that was reasonably read to include a "request for the agency to act." *Id.* at 404-405. In order to "reduce the risk" of future "misunderstandings by those who seek [the EEOC's] assistance," the Court suggested that "the agency should determine, in the first instance, what additional revisions in its forms and processes are necessary or appropriate." *Id.* at 407.

c. "Following *Holowecki*, the EEOC revised its Intake Questionnaire to require claimants to check a box to request that the EEOC take remedial action." *Hildebrand* v. *Allegheny County*, 757 F.3d 99, 113 (3d Cir. 2014), cert. denied, 135 S. Ct. 1398 (2015). The EEOC's Intake Questionnaire form at issue in this case (Pet. App. 33a-43a), which the EEOC updated in September 2008, *id.* at 42a, warns the individual completing the form that "you will lose your rights" if "you do not file a charge of discrimination" within the relevant 180- or 300-day deadline, *id.* at 41a (emphases omitted), and states that, "[c]onsistent with 29 CFR 1601.12(b)," "this questionnaire may serve as a charge if it meets the elements of a charge," C.A. R.E. 32. See Pet. App. 43a (reprinting text but with typographical error). The form accordingly asks the individual to "check one of [two] boxes" to "tell [the EEOC] what you would like [it] to do with the information" provided on the form. *Id.* at 41a (emphases omitted). The form states that "you may wish to check Box 1" "[i]f you would like more information before filing a charge," but that "[i]f you want to file a charge, you should check Box 2." *Id.* at 41a-42a (emphases omitted). "Box 1" provides that "I want to

talk to an EEOC employee before deciding whether to file a charge" and that "I understand that by checking this box, I have not filed a charge with the EEOC." *Id.* at 42a. "Box 2," in turn, provides that "I want to file a charge of discrimination, and I authorize the EEOC to look into the discrimination I described above" in the form. *Ibid.*

2. a. In 2014, petitioners employed David Poston on a deep-water drillship off the coast of Equatorial Guinea, where Poston suffered a heart attack while on the job. Pet. App. 2a, 39a. Petitioners initially placed Poston on short-term disability leave. *Id.* at 2a. But on October 2, 2014, the day Poston was to return to work, petitioners fired him. *Id.* at 2a-3a.

b. On February 20, 2015, 141 days after Poston's termination, Poston's attorneys submitted to the EEOC a letter (Pet. App. 30a-32a; C.A. R.E. 26) on behalf of Poston and eight other of petitioners' former employees, alleging that petitioners had "engaged in a systematic pattern of discriminatory practices and behavior." *Id.* at 3a, 31a-32a. The letter stated that the attached EEOC intake questionnaires explained how "each individual was discharged in contravention of federal employment laws including" the ADA. *Id.* at 32a. The letter added that each of the former employees had provided counsel with power-of-attorney "to submit these claims" to the EEOC and asked that the EEOC "accept this letter as a complaint of employment discrimination brought against [petitioners]." *Id.* at 31a-32a.

The signed intake questionnaire for Poston (Pet. App. 33a-43a) accompanying his counsel's letter alleges that, as relevant here, petitioners discriminated against Poston by terminating him because of his disability. *Id.* at 34a, 36a-37a, 39a. In response to instructions to

check one of the form's two boxes "to tell us what you would like us to do with the information you are providing," and to "check Box 2" "[i]f you want to file a charge," the form bears an "X" selecting Box 2. *Id.* at 41a-42a (emphases omitted).

Five days later (February 25), consistent with its obligation to serve notice of a charge within ten days, 42 U.S.C. 2000e-5(b), the EEOC sent petitioners a form entitled Notice of Charge of Discrimination, explaining that a "charge of employment discrimination ha[d] been filed against [petitioners]" under the ADA based on an employee's "[d]ischarge" that occurred on October 2, 2014. Pet. App. 44a, 46a (emphasis omitted). The form identified the EEOC charge number assigned to that charge, stated that "[a] perfected charge (EEOC Form 5) will be mailed to you once it has been received from the Charging Party," and added that "[n]o action is required by you at this time." *Ibid.* (emphasis omitted); see *id.* at 4a.

On the same day, the EEOC also sent Poston letters bearing the same EEOC "Charge N[umber]" that "acknowledg[ed] receipt of [his] above-numbered charge of employment discrimination against [petitioners]," C.A. R.E. 34, and asked that Poston supplement his questionnaire with his address and phone number on an EEOC form entitled "Third Party Certification of Charge," *id.* at 37. See Pet. App. 4a.

c. "[T]he EEOC looks out for the employer's interest by refusing to call for any response to an otherwise sufficient complaint until the verification [of that charge] has been supplied." *Edelman*, 535 U.S. at 115. The EEOC utilizes EEOC Form 5, entitled "Charge of Discrimination," to allow a charging party "to review"

his charge and then "verify [it] by oath or affirmation." *Id.* at 109-110.

On May 21, 2015, after the relevant file was transferred to the appropriate EEOC office, the EEOC informed Poston's counsel by letter that the agency required a verified charge from Poston before it would begin its investigation. Pet. App. 4a, 47a-48a.

Several months later, on September 22, 2015, the EEOC notified Poston's attorneys by letter (Pet. App. 47a-49a) that it had yet to receive Poston's verified charge and requested that Poston sign and return the EEOC Form 5 enclosed with the letter. *Id.* at 4a, 48a. The EEOC informed Poston's counsel that the EEOC had notified petitioners that "the Charging Parties ha[d] initiated the charge filing process," but that the EEOC was "authorized to dismiss the charges" and issue a right-to-sue letter that would allow "the Charging Parties to pursue the matter in federal court" if the agency did not receive "the signed charges"—*i.e.*, "the signed Charges of Discrimination (EEOC Form 5)"—"within 30 days." *Id.* at 48a-49a. The letter added that, "[f]or purposes of meeting the deadline for filing a charge, the date of your original signed document will be retained as the original fil[]ing." *Id.* at 48a.

On October 13, 2015, less than 30 days after the EEOC's September 2015 letter but more than 300 days after Poston's termination, the EEOC received Poston's verified charge on an EEOC Form 5 (C.A. R.E. 21-24), which Poston signed under penalty of perjury. Pet. App. 4a, 5a n.2.

The EEOC then sent petitioners a second form entitled Notice of Charge of Discrimination (Pet. App. 27a-29a), this time asking petitioners to provide "a statement of [petitioners'] position on the issues covered by

this charge" and enclosing a copy of Poston's verified charge on the EEOC Form 5. *Id.* at 28a; see D. Ct. Doc. 4-1, at 3-6 (Feb. 26, 2018). The EEOC subsequently investigated the charge, found reasonable cause to believe that petitioners violated the ADA, and was unsuccessful in its conciliation efforts. Pet. App. 4a-5a.

3. The EEOC then filed this enforcement action alleging that petitioners had discriminated against Poston in violation of the ADA. Pet. App. 2a, 5a. Among other things, the EEOC's complaint alleged that "[a]ll conditions precedent to the institution of this lawsuit have been fulfilled." Compl. ¶ 15; see Pet. App. 5a.

Petitioners moved to dismiss the complaint for "failure to exhaust administrative remedies." D. Ct. Doc. 4, at 2 (Feb. 26, 2018). Petitioners argued that the EEOC had failed to allege that Poston had timely filed his charge, and that the EEOC could not do so, because Poston's verified EEOC Form 5 was not filed with the EEOC until October 2015, after Section 2000e-5(e)'s 300-day charge-filing deadline, which petitioners stated "operate[s] as a statute of limitations" (*id.* at 5). *Id.* at 2-5; see Pet. App. 5a. The district court entered a one-sentence judgment stating, "[b]ecause the intake questionnaire is not a verified charge, this case is dismissed with prejudice." Pet. App. 16a.

4. The court of appeals reversed and remanded. Pet. App. 1a-15a. The court determined that Poston's intake questionnaire conveyed a "charge" that was filed with the EEOC within Section 2000e-5(e)'s 300-day charge-filing deadline and that the charge was permissibly verified a little more than two months outside that 300-day period. *Id.* at 6a-15a.

a. The court of appeals reasoned that it, like "every circuit" to have considered the issue, had determined

that *Holowecki's* understanding of a "charge" in the ADEA context "extends to Title VII and the ADA," and that, in this case, Poston's intake questionnaire qualified as a charge under *Holowecki*. Pet. App. 7a-8a. The court determined that the questionnaire sufficiently identified the parties and described the alleged discrimination as required by EEOC regulations, *id.* at 9a, and "also satisifi[ed] *Holowecki's* additional request-to-act condition" because "Poston checked 'Box 2' on the questionnaire," "clear[ly] manifest[ing] [his] intent for the EEOC to take remedial action." *Id.* at 9a-10a. In so ruling, the court determined that petitioners' reliance on *Carlson* v. *Christian Brothers Services*, 840 F.3d 466 (7th Cir. 2016), was misplaced because *Carlson* concerned a form used by a state agency that did not embody a request for relief and that was different from the EEOC's intake questionnaire at issue here. Pet. App. 14a n.9.

The court of appeals also rejected petitioners' contention that the intake questionnaire "was fatally defective" because it "was [initially] unverified" and because that "defect was not cured" until after "the 300-day filing deadline," Pet. App. 11a. See *id.* at 11a-13a. The court explained that, under *Edelman*, the "verification of a charge (and, by extension, an intake questionnaire that qualifies as a charge) can occur outside the filing period," and that amendments curing such "'technical' defects" will "'relate back' to the original date of filing" under the EEOC regulations that *Edelman* upheld. *Id.* at 12a (citation omitted). The court declined petitioners' suggestion that it should limit *Edelman's* holding to charges that are "verified shortly after the 300-day filing period," noting that "verification took place [in this case] just about two months outside the 300-day filing

window" and that petitioners had failed to "establish[] any prejudice stemming from this delay." *Id.* at 12a n.8.

b. The court of appeals in a footnote rejected petitioners' additional contention that the EEOC's complaint should be dismissed "because the EEOC failed to plead with specificity that Poston timely filed his charge or that the EEOC provided [petitioners] notice of the charge." Pet. App. 6a n.4. Under its decision in *EEOC* v. *Standard Forge & Axle Co.*, 496 F.2d 1392 (5th Cir. 1974), cert. denied, 419 U.S. 1106 (1975), the court explained, those matters could be "generally pled" as a "conditions precedent to suit" under Federal Rule of Civil Procedure 9(c). Pet. App. 6a n.4.

ARGUMENT

Petitioners contend (Pet. 12-25) that the unverified intake questionnaire in this case did not constitute a timely "charge," and that Poston's verification of his charge a little more than two months after Section 2000e-5(e)'s 300-day period did not relate back to the date of Poston's earlier filing. Petitioners further contend (Pet. 26-31) that the court of appeals' conclusion that the EEOC was not required to allege with specificity in its complaint that Poston's administrative charge was timely or that petitioners were provided notice of that charge conflicts with "the facial plausibility standard of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)," Pet. i. The judgment of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. The court of appeals correctly determined that the intake questionnaire in this ADA case, which was filed with the EEOC within Section 2000e-5(e)'s 300-day charge-filing period, constituted a "charge," and that Poston permissibly verified his charge after the 300-day

period where, as here, petitioners have shown no prejudice resulting from any delay.

a. Petitioners incorrectly contend (Pet. 3, 12) that the court of appeals' judgment in this ADA case "conflict[s] with *Federal Express Corp. v. Holowecki*, 552 U.S. 389 (2008)." As a threshold matter, *Holowecki* interpreted the meaning of "charge" under the ADEA's statutory provisions, 552 U.S. at 395-404, and specifically "caution[ed]" that "the EEOC enforcement mechanisms and statutory waiting periods for ADEA claims differ in some respects" from those under Title VII and the ADA, *id.* at 393. So even if the court of appeals here had construed the ADA differently from *Holowecki's* interpretation of the ADEA, that difference would not necessarily be a conflict.

More fundamentally, the court of appeals' decision is consistent with *Holowecki*. The government agrees with the courts of appeals that have uniformly determined (Pet. App. 7a-8a) that *Holowecki's* understanding of "charge" also reflects the proper understanding of that term as used in Title VII and the ADA. In particular, the government agrees that in order for a filing alleging employment discrimination under the ADA to present a "charge" to the EEOC, it must be "reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee." *Holowecki*, 552 U.S. at 402. The court of appeals here properly stated that standard, Pet. App. 7a, and correctly applied it to the facts of this case, *id.* at 9a-15a.

The EEOC intake questionnaire at issue in this case was specifically revised in 2008 in light of *Holowecki's* suggestion that the EEOC consider "what additional revisions in its forms and processes are necessary or

appropriate" to "reduce the risk" of "misunderstandings by those who seek [the EEOC's] assistance." 552 U.S. at 407. The revised intake questionnaire warns those completing it that "you will lose your rights" if "you do not file a charge of discrimination" within the relevant period; states that "this questionnaire may serve as a charge if it meets the elements of a charge"; and instructs the individual to "check one of [two] boxes" to "tell [the EEOC] what you would like to do with the information" on the form. Pet. App. 41a, 43a (emphases omitted). The form specifically instructs to check Box 1 "to talk to an EEOC employee before deciding whether to file a charge" and that, "by checking this box," the individual completing the form "ha[s] not filed a charge with the EEOC." *Id.* at 41a-42a. The form then further instructs to "check Box 2" "[i]f you want to file a charge" and that checking Box 2 demonstrates that "[you] want to file a charge of discrimination" with the EEOC and authorize the agency to investigate "the discrimination [you have] described" on the form. *Id.* at 42a (emphases omitted). The revised intake questionnaire here, on which Box 2 is selected, accordingly "constitutes a clear manifestation of Poston's intent for the EEOC to take remedial action." Pet. App. 10a; see *Hildebrand* v. *Allegheny County*, 757 F.3d 99, 113 (3d Cir. 2014) (concluding that "an employee who completes the [revised] Intake Questionnaire and checks Box 2 unquestionably files a charge of discrimination"), cert. denied, 135 S. Ct. 1398 (2015).

That conclusion is further reinforced by the cover letter submitted by Poston's counsel with the intake questionnaire. See *Holowecki*, 552 U.S. at 405 (concluding that the EEOC's pre-2008 intake questionnaire, which previously suggested that it was not a charge of

discrimination, nevertheless constituted a charge when read with the affidavit accompanying it). After alleging that petitioners had "engaged in a systematic pattern of discriminatory practices and behavior"—as demonstrated in nine intake questionnaires showing how "each individual was discharged in contravention of federal employment laws"—the letter specifically requested that the EEOC "accept this letter as a complaint of employment discrimination brought against [petitioners]." Pet. App. 31a-32a.

b. Petitioners' contrary contentions (Pet. 14-19) lack merit. Petitioners' description (Pet. 14) of the intake questionnaire form ignores both the accompanying letter from Poston's counsel and, more importantly, the relevant language on the form that the EEOC revised after *Holowecki*. The form expressly states that it "may serve as a charge" and includes contrasting options in Box 1 and Box 2, which together demonstrate that checking Box 2 signals an intent that the completed form constitute a charge of discrimination requesting action by the EEOC. See Pet. App. 41a-43a; pp. 5-6, 13, *supra*.

Petitioners suggest (Pet. 16-18 & n.6) that the fact that Poston's counsel completed the intake questionnaire on Poston's behalf suggests that the form is merely "preliminary," reasoning that, under the EEOC's internal procedures, the agency would not initially disclose Poston's name to petitioners and that this means he "d[id] not want [his] identity disclosed." That is incorrect. Although an affirmative indication (if not withdrawn) that a complaining party does not want the EEOC to disclose his identity could reflect that he does not seek actual remedial action from the agency, no such indication exists here. Box 2 instead makes clear

that Poston understood that the EEOC would in fact give petitioners "information about the charge, including [his] name." Pet. App. 42a (emphasis omitted). The clear import of Poston's completed questionnaire transmitted by letter by his attorney was not undermined by the fact that the EEOC's procedures allowed it to wait to disclose Poston's name until it collected further information, including his properly verified charge under penalty of perjury—those procedures merely ensure that an employer need not respond to a charge until all technical requirements for the charge have been satisfied. And once the charge had been verified, as petitioners appear to recognize (Pet. 17 n.5), that amendment related back to the date of Poston's original, unverified charge under 29 C.F.R. 1601.12(b), a regulation that this Court upheld as "an unassailable interpretation of [Section 2000e-5]." *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 118 (2002); see *id.* at 109-110 & n.2.

Petitioners err in their related contention (Pet. 14-15) that the court of appeals' decision conflicts with *Carlson* v. *Christian Brothers Services*, 840 F.3d 466 (7th Cir. 2016). In *Carlson*, the EEOC filed an amicus brief taking the position that a state agency's Complaint Information Sheet (CIS) was sufficiently analogous to the EEOC's revised intake questionnaire that the completed state form should be deemed a "charge" under the ADA. See Pet. 14-15.[1] But the Seventh Circuit in *Carlson* disagreed. The court instead held that the state agency's CIS form did not constitute a charge, because the state form not only clearly warned in capitalized

[1] The EEOC exercises independent litigating authority, without the authorization of the Solicitor General, when participating as a party or amicus curiae in certain cases in district courts and the courts of appeals. 42 U.S.C. 2000e-4(b)(2); cf. 28 C.F.R. 0.20(c).

letters that "THIS IS NOT A CHARGE," but also stated that the state agency would "send you a charge form for signature" only "if [it] accepts your claim." *Carlson*, 840 F.3d at 468. Nothing in the EEOC's revised intake questionnaire includes anything similar to that text disclaiming that a form may be used to file a charge. To the contrary, the EEOC's post-*Holowecki* form makes clear that "this questionnaire may serve as a charge" and instructs to check Box 2, as Poston did, "[i]f you want to file a charge." Pet. App. 42a-43a (emphasis omitted).

c. Petitioners separately contend (Pet. 20-25) that the Court should grant review to decide whether Poston's verification of his charge, which he effectuated by submitting an EEOC Form 5 a little more than two months after Section 2000e-5(e)'s 300-day charge-filing period expired, should relate back to his earlier unverified charge. The court of appeals rejected petitioners' contention that Poston's charge was "fatally defective" and correctly concluded that any defect was cured by Poston's subsequent verification. Pet. App. 11a-13a. Even petitioners do not contend that the court of appeals' decision in this regard implicates a division of authority that might warrant review. See Pet. 23-25.

In any event, the court appeals correctly determined that *Edelman* "made clear * * * that verification of a charge (and, by extension, an intake questionnaire that qualifies as a charge) can occur outside the [charge-] filing period." Pet. App. 12a. *Edelman* interpreted Section 2000e-5(e) and Section 2000e-5(b) as distinct provisions serving distinct functions. See 535 U.S. at 108-109, 112. First, Section 2000e-5(e) embodies a charge-filing requirement, requiring that a "charge under this section shall be filed" within 180 or 300 days "after

the alleged unlawful employment practice occurred." 42 U.S.C. 2000e-5(e)(1). But that requirement simply requires that a charge—verified or unverified—be filed within the relevant 180- or 300-day period. Second, Section 2000e-5(b), separately provides that, as relevant here, "[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). Thus, as this Court held in *Edelman*, Section 2000e-5(b) "merely requires the verification of a charge, *without saying when* it must be verified." *Edelman*, 535 U.S. at 112 (emphasis added).

Edelman further determined that the "verification requirement" in Section 2000e-5(b) serves a statutory function distinct from Section 2000-5(e)'s "time limitation." 535 U.S. at 112-113. The verification requirement requires "an oath only by the time the employer is obliged to respond to the charge, not at the time an employee files it with the EEOC," reflecting its statutory function to "protect[] employers from the disruption and expense of responding to a claim unless a complainant is serious enough and sure enough to support it by oath subject to liability for perjury." *Id.* at 113. And as the EEOC did in this case, "the EEOC looks out for the employer's interest by refusing to call for any response to an otherwise sufficient complaint until the verification [of that charge] has been supplied." *Id.* at 115. The EEOC also ensures that such verification does not impermissibly delay its action by warning the charging party that it may dismiss his charge unless it receives a verified charge by a specific date. Pet. App. 49a; see Pet. 23-24 (discussing cases in which the EEOC dismissed such charges). That warning in this case promptly produced Poston's verified charge within 30

days, see pp. 8-9, *supra*, such that the EEOC received the requisite verification a little more than two months after the period for filing an (unverified) charge had expired. Pet. App. 13a n.8.

Given that *Edelman* itself upheld the EEOC's acceptance of the verification of an earlier charge 13 days after the charge-filing-period had expired, see 535 U.S. at 110, and given that petitioners failed to show "any prejudice stemming from [the] delay" of "just about two months" in this case, the court of appeals correctly determined that this case would not implicate any "outer limit" that may exist under *Edelman* on the time for verification and relation back. Pet. App. 13a n.8. In fact, this case parallels the circumstances in *Edelman*, where the Court concluded that it had no occasion to address the possibility that an "employer w[ould] be prejudiced by these procedures" because (as here) that was "not [the] case" before it. *Edelman*, 535 U.S. at 115 n.9. *Edelman* further noted that the "EEOC's standard practice," which the EEOC followed here, "is to caution complainants that if they fail to follow up on their initial unverified charge, the EEOC will not proceed further." *Ibid.* Petitioners' failure to allege any circuit conflict on the verification issue, see Pet. 23-25, underscores that no further review is warranted.

d. Finally, this Court's review of petitioners' contentions concerning the use of the EEOC's Intake Questionnaire is unwarranted for the additional reason that the issues presented are of diminishing practical significance. After the events relevant to this case, the EEOC discontinued its distribution of its general Intake Questionnaire form, which the EEOC no longer makes available on its website. Cf. EEOC, *Selected EEOC Forms*, https://go.usa.gov/x73zT. It its place,

since November 2017, the EEOC has operated an online Public Portal to "allow[] individuals to submit online initial inquiries and requests for intake interviews with the agency." EEOC, *EEOC Launches Online Services for Inquiries, Appointments and Discrimination Charges* (Nov. 1, 2017), https://go.usa.gov/x73UA. "The new system does not permit individuals to file charges of discrimination online" if the individuals have themselves prepared the charges. *Ibid.* Instead, only charges "prepared by the EEOC" may be submitted through the online system, *ibid.*, "after [an individual] submit[s] an online inquiry and [EEOC personnel] interview [the individual]," EEOC, *How to File a Charge of Employment Discrimination*, https://go.usa.gov/x73U6. Although some discrimination cases may continue to involve EEOC Intake Questionnaires that the EEOC previously made publicly available, the question is of diminishing prospective importance and thus does not merit this Court's review for that reason as well.

2. Petitioners separately contend (Pet. 26-31) that the court of appeals erred in concluding that the EEOC did not need "to plead with specificity [in its complaint] that Poston timely filed his charge" with the EEOC or that the "EEOC provided [petitioners] notice of the charge" under Section 2000e-5, Pet. App. 6a n.4. Petitioners argue that the court failed to apply the facial plausibility pleading standard articulated in *Iqbal*, *supra*, and thus allowed the EEOC as "plaintiff to evade the [pleading] requirements of Rule 8" of the Federal Rules of Civil Procedure, Pet. 26. That contention lacks merit. The EEOC had no obligation to plead the timeliness of Poston's administrative charge or notice of that charge under any standard, because those issues con-

cern potential *defenses* that petitioners must raise. Petitioners identify no division of authority that might warrant review on that question. And in any event, this case would be a poor vehicle to address the issue. The timeliness of Poston's charge has already been upheld on its merits, the EEOC gave petitioners proper notice of that charge, there is no dispute over the relevant facts, and, even if the EEOC's pleading had been insufficiently specific, no sound basis exists for denying the EEOC leave to amend its complaint on remand to specify the (undisputed) facts.

a. Rule 8(a) requires that a complaint or other pleading that "states a claim for relief" must contain "a short and plain statement of the grounds for the court's jurisdiction" and "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(1) and (2). In *Iqbal*, this Court determined that the statement of a plaintiff's "claim" required by Rule 8(a)(2) must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 677-678 (citation omitted). Under that "facial plausibility" standard, the Court stated, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678-679.

Iqbal further determined that Rule 9, which addresses the pleading of special matters, does not allow "discriminatory intent" to be pleaded with "a conclusory allegation." 556 U.S. at 686-687. Although Rule 9(b) provides that "intent" and other mental states "may be alleged generally," unlike "fraud or mistake," which must be pleaded with "particularity," Fed. R. Civ. P. 9(b), the Court determined that the word "'generally'" in that provision "is a relative term" that merely

excuses the plaintiff from pleading "intent under an elevated pleading standard." *Iqbal*, 556 U.S. at 686. The Court concluded that Rule 8 is "still operative" and that, under Rule 8(a)(2), a plaintiff cannot "plead the bare elements of his cause of action" and "expect his complaint to survive a motion to dismiss." *Id.* at 687.

Iqbal's teachings have no application here, because Section 2000e-5's relevant provisions do not concern matters that, under Rule 8(a), the EEOC was required to plead in its complaint at all. Section 2000e-5 provides that a complainant must file a "charge" with the EEOC "alleging that an employer * * * has engaged in an unlawful employment practice." 42 U.S.C. 2000e-5(b). That administrative "charge" must be filed within 180 or 300 days "after the alleged unlawful employment practice occurred." 42 U.S.C. 2000e-5(e)(1). The EEOC must then provide the employer with notice of that charge. 42 U.S.C. 2000e-5(b) and (e)(1). Those procedural provisions do not reflect elements of a substantive discrimination claim that an ADA plaintiff must allege; they reflect claim-processing rules which, if not satisfied, provide the defendant with potential defenses, if the defendant properly raises them. See Fed. R. Civ. P. 8(c) (providing that a defendant's responsive pleading, not a plaintiff's complaint, must affirmatively state any affirmative defense, including a statute-of-limitations defense).

This Court's decisions interpreting Section 2000e-5's charge-filing requirements demonstrate that those requirements, if not fulfilled, merely provide a defense to liability. In *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), the Court rejected an employer's contention that Section 2000e-5's "statutory time limit for filing charges" with the EEOC is "a jurisdictional

prerequisite" rather than "an affirmative defense analogous to a statute of limitations." *Id.* at 387, 389. *Zipes* concluded that "Congress intended the filing period to operate as a statute of limitations" and accordingly "h[e]ld that filing a timely charge of discrimination with the EEOC" is a nonjurisdictional "requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Id.* at 393-394. More recently, the Court in *Fort Bend County* v. *Davis*, 139 S. Ct. 1843 (2019), made clear that Section 2000e-5's charge-filing requirement is itself nonjurisdictional and imposes only "procedural obligations." *Id.* at 1850-1851 (citation omitted). The Court determined that the statutory obligation to file an administrative charge before filing suit is simply a "claim-processing rule" which, when not followed, can provide the defendant a "dispositive defense" that is itself "subject to forfeiture" if the defendant fails to raise it timely. *Id.* at 1851-1852. It follows that Section 2000e-5's claim-processing requirements will support a "defense" that the defendant may raise for which a plaintiff has no "pleading requirement." *Hardaway* v. *Hartford Pub. Works Dep't*, 879 F.3d 486, 491 (2d Cir. 2018); see *id.* at 490-491.[2]

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[2] The Tenth Circuit previously "held that [the] exhaustion of administrative remedies [under Section 2000e-5] is a 'jurisdictional prerequisite to suit.'" *Lincoln* v. *BNSF Ry. Co.*, 900 F.3d 1166, 1181, 1183 (10th Cir. 2018) (discussing rulings that had applied for nearly 40 years). Under that approach, a Title VII or ADA plaintiff could have had an obligation under Rule 8 to plead the timely filing of an administrative charge under Section 2000e-5 as part of its obligation to plead "the grounds for the [district] court's jurisdiction," Fed. R. Civ. P. 8(a)(1). In late 2018, however, the Tenth Circuit, in an opinion reflecting the views of the "full court," overrode its prior precedents. *Lincoln*, 900 F.3d at 1183-1185. The Tenth Circuit now concludes that the "failure to file an EEOC charge" provides the

The same holds true with respect to timely notice of a charge under Section 2000e-5. If the failure to file such a charge is itself a defense, a failure to provide timely notice of a charge actually filed with the EEOC at best provides a related defense. That potential defense to an EEOC action would rest on whether the employer can "pro[ve]" either "bad faith on the part of the Commission or prejudice to the employer" from any delay in notice. *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 66 n.16 (1984); see *EEOC* v. *Burlington N., Inc.*, 644 F.2d 717, 720-721 (8th Cir. 1981); *EEOC* v. *Airguide Corp.*, 539 F.2d 1038, 1042 & n.7 (5th Cir. 1976).[3] Petitioners have not disputed in this Court the court of appeals' conclusion that they would need to "demonstrate that [they] w[ere] prejudiced by [any such] delay," Pet. App. 14a. And the requirement that a *defendant* prove such prejudice itself demonstrates that timely notice of an administrative charge is not an element of an ADA claim that the plaintiff must allege in its complaint.

Petitioners argue (Pet. 26-27) that Section 2000e-5's requirements reflect conditions precedent to suit and that Rule 9(c)'s provisions providing that "conditions precedent" may be "allege[d] generally," Fed. R. Civ. P. 9(c), are similar to the provisions of Rule 9(b) addressed

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employer "an affirmative defense" and that the "failure to file a timely EEOC charge [likewise] permits a defendant only an affirmative defense." *Id.* at 1183, 1185.

[3] The Court has "assumed [*arguendo*] that noncompliance with [Section 2000e-5's] notice requirement is a legitimate defense to [an EEOC] subpoena enforcement action" but has noted that there is "substantial reason to doubt" whether such a defense would be valid. *Shell Oil Co.*, 466 U.S. at 66; see *id.* at 93-94 (O'Connor, J., concurring in part and dissenting in part) (concluding that EEOC's authority to investigate a charge and issue subpoenas does not depend on whether it has provided notice under Section 2000e-5).

in *Iqbal* that concern the pleading of intent. Petitioners further contend (Pet. 26) that, as in *Iqbal*, Rule 9(c) "does not permit a plaintiff to evade the requirements of Rule 8." Those contentions are misplaced. As discussed above, Rule 8's relevant pleading requirements apply only to a complaint's allegations showing "the [district] court's jurisdiction" or supporting the plaintiff's "claim," Fed. R. Civ. P. 8(a)(1) and (2), and the timely filing of an administrative charge and notice of that charge under Section 2000e-5 address neither. Indeed, despite acknowledging below that Section 2000e-5(e)'s timely-charge requirement "operate[s] as a statute of limitations," D. Ct. Doc. 4, at 5, petitioners ignore that such defenses must be raised by a defendant under Rule 8(c), not preemptively negated by a plaintiff under Rules 8(a) and 9(c).[4]

b. Petitioners do not allege any conflict among the courts of appeals on the pleading question that they present. Petitioners invoke (Pet. 27) a single court of appeals decision, but it is consistent with the decision below. Like the Fifth Circuit in this case, the Third Circuit in *Hildebrand*, *supra*, held that a plaintiff's general allegation that he complied with "[a]ll conditions precedent" by filing a discrimination claim with the EEOC was sufficient (without addressing whether that general allegation was even necessary). *Hildebrand*, 757 F.3d at 111-112. Petitioners also invoke (Pet. 28-29) district court decisions, which highlights the absence of any

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[4] Rule 9(c) itself imposes on a plaintiff no obligation to plead "conditions precedent" independent of Rule 8(a). Rule 9(c)'s relevant text addresses *how* conditions precedent *may* be pled, not *when* they *must* be pled. See Fed. R. Civ. P. 9(c) ("In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed.").

relevant circuit conflict that might warrant this Court's review. See Sup. Ct. R. 10(a); cf. *Camreta* v. *Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.") (citation omitted).

c. In any event, this case would be a poor vehicle to address whether an ADA plaintiff must allege with specificity the timely filing of an administrative charge of discrimination or notice thereof. The court of appeals has already (correctly) determined based on undisputed facts, not on mere pleading, that Poston's charge was timely. See Pet. App. 6a-15a; pp. 11-18, *supra*. If this Court were to grant review on that timeliness question, it would resolve that question on the same undisputed facts. If, on the other hand, the Court were to deny review on that first question presented, the court of appeals' determination that Poston's charge was timely would control. Either way, this case has moved beyond mere questions of pleading. The EEOC's prompt notice of Poston's original charge, which the EEOC supplemented when Poston later verified his charge, see pp. 7-9, *supra*, was likewise sufficient. And as the court of appeals concluded (and petitioners do not dispute), it was petitioners that had to establish prejudice from any delayed notice. Pet. App. 14a.

Moreover, even if this Court were to conclude that an ADA complaint must plead with specificity the timeliness of an administrative charge or notice thereof, no sound basis would exist for denying the EEOC an opportunity to amend its complaint on remand in order to state the (undisputed) facts supporting its position. Rule 15 provides that a district court "should freely give

leave [to amend a pleading] when justice so requires." Fed. R. Civ. P. 15(a)(2). And in this case, the EEOC's complaint complied fully with the pleading requirements of the governing court. The Fifth Circuit in *EEOC* v. *Standard Forge & Axle Co.*, 496 F.2d 1392 (1974), cert. denied, 419 U.S. 1106 (1975), "decline[d] to reach the merits" of the "question of whether any or all of the procedures set out in [Section 2000e-5] are conditions precedent" that might implicate a pleading obligation, *id.* at 1394, but it determined that, even if they were, the EEOC in that case had "fully complied with the requirements of Rule 9(c)," *id.* at 1395, by alleging generally that "[a]ll conditions precedent to the institution of [its] lawsuit have been fulfilled," *id.* at 1393. The court of appeals in this case thus concluded that the EEOC's complaint was sufficient based on its governing precedent. Pet. App. 6a n.4.

Even petitioners did not contend in their motion to dismiss that the EEOC should be denied leave to amend to add specific allegations showing compliance with Section 2000e-5. Petitioners argued that the district court should dismiss the complaint with prejudice only because "an amendment would be futile" based on petitioner's contention that, if granted leave to amend, the EEOC would be unable to make the relevant allegations. D. Ct. Doc. 4, at 1-2. The district court thus declined to address petitioner's pleading argument and dismissed the EEOC's complaint on the ground that Poston's charge was in fact untimely. Pet. App. 16a. And because the court of appeals has now correctly determined that Poston's charge was timely, pp. 11-18, *supra*, the EEOC is fully capable on remand of pleading with specificity the (undisputed) facts demonstrating compliance with Section 2000e-5's relevant provisions.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2020