No. _____

IN THE

Supreme Court of the United States

JOHN DOE,
Petitioner,
v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In denying a whistleblower award to Petitioner, the SEC interpreted key provisions of the statutory whistleblower program created by Congress in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Dodd-Frank states that no award shall be made "to any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section." 15 U.S.C. § 78u-6(c)(2)(B). According to the SEC, two violations are related if they are connected regardless of degree. In addition, the SEC interpreted the term "conviction" to include pre-judgment findings of guilt, thus assigning to it a meaning that usually attaches only when Congress expressly intends it.

The questions presented by this Petition are:

1. Does Dodd-Frank's whistleblower award program exclude whistleblowers whose criminal conduct is only tangentially connected to the enforcement action (and related actions) and who have pleaded guilty but have not been sentenced?

2. Are the SEC's heavily redacted Orders Determining Whistleblower Award Claims and sealed Whistleblower Award Proceedings entitled to *Chevron*, *Skidmore*, or some other level of deference?

PROCEEDINGS BELOW

John Doe v. Securities and Exchange Commission, Case No. No. 21-2537 (Second Circuit, December 29, 2022).

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PETITION FOR WRIT OF CERTIORARI

Petitioner John Doe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The Court of Appeals' summary order (Pet. App. 1-10) is unpublished but available at 2022 WL 16936098. The SEC's order (Pet. App. 12-20) is unpublished but available at 2021 WL 4242573.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment on November 15, 2022. A petition for panel rehearing and rehearing *en banc* was denied on December 29, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 922(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 15 U.S.C. § 78u-6(c)(2)(B), provides in relevant part:

> No award under subsection (b) shall be made . . . (B) to any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section.

Section 78u-6(b)(1) of Title 15 of the United States Code is reproduced at Pet. App. 21.

STATEMENT OF THE CASE

Beginning in November 2014, Petitioner began providing information to the Federal Bureau of Investigation ("FBI") concerning a scheme by employees of Company-1 and Individual-1, a foreign businessperson, to bribe officials in Country-1 for access to investment opportunities in that country's mining sector. Information provided by Petitioner was instrumental to an SEC enforcement action, leading to a settlement in which Company-1 agreed to pay several hundreds of millions of dollars to the Department of Justice ("DOJ") and to the SEC, for a total of over $400 million.

There is no dispute that Petitioner provided the SEC with a wealth of original information that aided the successful enforcement of an action resulting in a recovery greater than $1,000,000, the threshold requirement that entitles whistleblowers to a monetary award. What is at issue is how the SEC determines whether a whistleblower is "convicted of criminal violation…related to the judicial or administrative action " in order to deny whistleblower awards under 15 U.S.C. § 78u-6(c)(2)(B). Here, the SEC denied Petitioner's claim for a whistleblower award because he had pleaded guilty to a separate criminal scheme with Individual-1 that did not involve Company-1.

This case presents an important question implicating the practical viability of the securities whistleblower incentive program established by

Congress in Dodd-Frank; namely, whether the SEC has the authority to circumvent the statute's award provisions by employing a standardless definition of what it means to be "convicted of a criminal violation…related to the judicial or administrative action " in order to deny whistleblower awards.

This case also presents an important question relating to the level of deference with which Circuit Courts are required to give to non-precedential, non-public agency rulings.

Procedural History

Petitioner was Individual-1's attorney and business advisor, and as such, had access to a trove of information and documentation concerning Individual-1's activities.

On June 8, 2015, Petitioner, through counsel, provided an anonymous tip to the SEC concerning the Company-1/Individual-1 scheme to bribe government officials in Country-1 so that Company-1 could secure mining concessions in the country. The SEC first met directly with Petitioner on June 15, 2015, but had already received most of Petitioner's information from the parallel DOJ investigation.

Petitioner was not under investigation when he approached the FBI and was not involved in the Company-1/Individual-1 scheme, which he learned about after the fact. However, while cooperating with the SEC and the DOJ, Petitioner provided previously undisclosed information about his personal participation in a separate scheme, with Individual-1, to bribe Country-1 government officials for the

purpose of securing and maintaining Individual-1's mining concessions in Country-1. As a result, he was charged by felony information with participating in a conspiracy to violate the Foreign Corrupt Practices Act ("FCPA"), in violation of 15 U.S.C. § 78dd-3(a)(1). Petitioner was the sole source of information for the criminal charge against him, which does not allege a conspiracy between Petitioner and Company-1, and does not include conduct by Company-1, its agents, or employees. On December 15, 2015, Petitioner pleaded guilty pursuant to a cooperation agreement. Petitioner has not yet been sentenced; his cooperation with the DOJ is ongoing.

On September 29, 2016, the DOJ entered into a deferred prosecution agreement (the "DOJ Agreement") with Company-1 for the company's violation of the FCPA in which Company-1 agreed to a financial penalty in excess of $200 million. The dense statement of facts attached to the DOJ Agreement—which contains no mention of Petitioner—outlines a detailed scheme between Individual-1 and Company-1 to bribe officials in Country-1 that unfolded between December of 2007 and January 2013. The DOJ Agreement also details a corruption scheme by Company-1 in Country-2, and bribe payments in Country-3 and Country-4.

Also on September 29, 2019, the SEC issued a cease-and-desist order (the "SEC Settlement Order") ending its enforcement action against Company-1 based on the same conduct, based on a settlement agreement in which Company-1 agreed to pay approximately $200 million. The SEC Order, which details the criminal scheme between Individual-1 and Company-1 to bribe officials in Country-1, makes

no mention of Petitioner or any conduct by Petitioner.

On January 26, 2017, Petitioner filed a timely application for a whistleblower award.

On March 1, 2021, the SEC issued its preliminary denial of Petitioner's claim for a whistleblower award. While the SEC found that Petitioner had provided information that assisted SEC staff, it nonetheless found him ineligible due to his conviction for a criminal violation that was related to the SEC's enforcement action.

On April 19, 2021, the SEC provided Petitioner's counsel with the record it had considered in denying Petitioner's award. In addition to Petitioner's initial anonymous tip to the SEC, DOJ Agreement, the SEC Settlement Order, the information charging Petitioner, his cooperation agreement, the transcript of Petitioner's guilty plea, and his application for a whistleblower award, the SEC considered two declarations; one from Paul Bloch, an attorney with the Division of Enforcement of SEC, who was one of the "primary enforcement attorneys" assigned to the SEC's investigation of Company-1, and Trisha Sindler-Fuchs, an attorney with the SEC working with the Office of the Whistleblower ("OWB").

In his declaration, Mr. Bloch stated that he "believed" that the conduct to which Petitioner pleaded guilty related to the subject of the Company-1 action because they both involved "unlawful bribery payments made by Individual-1 in Country-1, along with violations of the FCPA."

Ms. Sindler-Fuchs, who reviewed Petitioner's whistleblower claim for the SEC, stated that her declaration was not based on personal knowledge, but on what she was told by James McDonald of the DOJ. Mr. McDonald confirmed for Ms. Sindler-Fuchs that "even though the [Petitioner] Information and the [Petitioner] Guilty Plea did not explicitly mention Company-1 by name, both the [Petitioner] Information and the [Petitioner] Guilty Plea were related to misconduct involving Company-1" and that "there was no separate bribery scheme in Country-1 involving Company-1 that was not already covered in the [Petitioner] Information or the [Petitioner]Guilty Plea." For this reason, McDonald concluded that the information and guilty plea "related to" the SEC's enforcement action.

On September 15, 2021, the SEC issued its Final Order denying Petitioner's claim for a whistleblower award.

While conceding that the term "related to" was not defined in the Whistleblower Program Rules or the adopting release, the SEC turned to the ordinary meaning of the term as defined by the online edition Merriam-Webster dictionary, which defines "related to" as "to be connected with (someone or something)[;] to be about (someone or something)."

Because, in pleading guilty, Petitioner had admitted to involvement with the bribery of Country-1 officials, the SEC found that his criminal conduct "relates to certain subject matters of the Covered Action and Related Action 1, including misconduct in violation of the FCPA that transpired in Country-1

and that related to the bribery of Country-1 government officials."

While acknowledging that the information charging Petitioner, and his guilty plea, did not mention Company-1, the SEC referred to the declarations of Block and Sindler-Fuchs, stating that the record included "corroborating affirmations" that confirmed that the information and plea "relate to the misconduct that the Commission and the Other Agency charged in the Covered Action and Related Action 1."

The SEC concluded:

> In sum, we see no reason for the [SEC] to depart from longstanding principles of statutory construction and the plain meaning of "related to" by, as [Petitioner] suggests, narrowly construing the term "related to" as it appears in Exchange Act Section 21F(c)(2)(b) and Exchange Act Rule 21F-8(c)(3) to apply only when a whistleblower is a co-conspirator in a criminal enterprise; has aided, abetted, facilitated, or furthered a scheme; and/or is an early participant in the misconduct from which he or she has benefitted.

The SEC further found that Petitioner's guilty plea, on which he had not yet been sentenced, met the definition of "convicted". While conceding that like "related to," "convicted" was not defined by the Exchange Act, the SEC imported the definition of

"convicted" in Section 202(a)(6) of the Investment Advisers Act of 1940, which " includes a verdict, judgment, or plea of guilty, or a finding of guilt on a plea of nolo contendere, if such verdict, judgment, plea, or finding has not been reversed, set aside, or withdrawn, whether or not sentence has been imposed."[1]

Proceedings before the Second Circuit Court of Appeals

Petitioner appealed the SEC's denial to the Second Circuit Court of Appeals, which had jurisdiction pursuant to 15 U.S.C. § 78u-6(f). Petitioner argued that the crime to which Petitioner had pleaded guilty was not "related" to the SEC's enforcement action, and that the SEC's construction of the term was standardless, rendering its decision arbitrary and capricious, and that the SEC had failed to cite substantial evidence that its enforcement action was "related to" Petitioner's criminal conduct. Petitioner further argued that he was not "convicted"

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[1] The SEC's position on the definition of the word "convicted" relied on a single unpublished decision from 2014, *In the Matter of Gregory Bartko*, Exchange Act Release No. 71666, 2014 WL 896758 (Mar. 7, 2014), in which the SEC employed the Exchange Act to sanction a bad actor who had defrauded investors through the sale of securities, using the Exchange Act, and had been found guilty by a jury but not yet sentenced, importing the IAA's definition of conviction in order to do so. These sanctions were reversed by the D.C. Circuit in *Bartko v. Sec. & Exch. Comm'n*, 845 F.3d 1217 (D.C. Cir. 2017), which concluded that the SEC's use of Dodd-Frank's collateral bar against Bartko constituted an impermissibly retroactive penalty as Bartko's misconduct had taken place prior to the enactment of Dodd-Frank.

because he had pleaded guilty but had not yet been sentenced.

In its opposition to Petitioner's filing before the Circuit, the SEC argued that the Circuit should afford *Chevron* deference to its determinations, giving controlling weight to the SEC's decision so long as it was "based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984).

In reply, Petitioner argued that *Chevron* deference was inapplicable, as the SEC's decision was a non-precedential agency ruling that was not preceded by notice and comment, did not carry the force of law, and was not, like rules or regulations, intended to clarify the rights and obligations of parties beyond the specific case under review.

After review, the Second Circuit Court of Appeals affirmed the SEC's denial of an award to Petitioner. In affirming the SEC's denial of this award, the Circuit Court failed to state whether or why it had applied *Chevron* or another level of deference to the SEC's determination that Petitioner's conviction was "related to" the enforcement action, finding that the SEC had not abused its discretion because it "adequately explained its reasoning and supported its findings with substantial evidence," Pet. App. 4, and explaining its conclusion as follows:

> The criminal information and Doe's guilty plea establish Doe's participation in a bribery scheme that involved the same central figure as the scheme

> underlying the Covered and Related Actions. A declaration from an SEC attorney that supported the SEC's denial of the award was based on information provided by a government attorney who had been involved in the Justice Department's investigation that resulted in the Related Action.

Pet. App. 8-9.

The Circuit Court did not resolve whether the term "related to" was ambiguous. Instead, the Circuit endorsed the SEC's broad definition of relatedness, citing to the "ordinary meaning" of the term announced by this Court in *Morales v. Trans World Airlines, Inc.*: "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with" 504 U.S. 374, 383, 157 (1992), *citing Black's Law Dictionary* 1158 (5th ed. 1979), as well as this Court's explanation in *Celotex Corp. v. Edward* that the term "related to" in a jurisdiction-conferring statute "suggests a grant of some breadth." 514 U.S. 300, 307-08 (1995). *Id.*

With respect to Petitioner's argument that he was not "convicted," the Circuit found that Petitioner had waived this argument by failing to make it before the SEC. However, even if it had not been waived, the Circuit held that the agency did not err in adhering to its view that it was proper to import the IAA definition of the term. *Id.* Again, the Circuit failed to state what level of deference it afforded to the SEC's decision.

Petitioner filed a petition for rehearing and rehearing *en banc* which was denied.

REASONS FOR GRANTING THE PETITION

I. The SEC's Interpretations of Relatedness and of the Term "Convicted" Are Overly Broad, Deny Whistleblowers Due Process and Frustrate the Purpose of the Whistleblower Program

The SEC's abuse of its discretion threatens to shut down a congressionally created program to root out violations of the federal securities laws. Congress made it clear that the objective of the whistleblower program was to provide strong, monetary incentives to motivate people to come forward with information and thereby risk their livelihoods. S. Rep. No. 111–176, at 111 (2010) ("Recognizing that whistleblowers often face the difficult choice between telling the truth and the risk of committing 'career suicide', the program provides for amply rewarding whistleblower(s) . . ."). The Senate Banking Committee criticized other whistleblower programs as too meager and sought to model the SEC Whistleblower Program after similar successful programs:

> The program is modeled after a successful IRS Whistleblower Program enacted into law in 2006. The reformed IRS program, which, too, has a similar minimum-maximum award levels and an appeals process, is credited to have reinvigorated the earlier, largely ineffective, IRS Whistleblower Program.

> The Committee feels the critical component of the Whistleblower Program is the minimum payout that any individual could look towards in determining whether to take the enormous risk of blowing the whistle in calling attention to fraud.

S. Rep. 111-176, 111. The Committee further stated that it intended for the "program to be used actively with ample rewards." *Id.* at 112.

In light of Congress's clearly stated priorities, the last thing that the SEC should do is use expansive readings of statutory terms to exclude huge swaths of potential whistleblowers. Any change that does unexpectedly restrict access to the whistleblower program should be made after a transparent notice-and-comment process. *See* 5 U.S.C. § 553 ("General notice of proposed rule making shall be published in the Federal Register . . . ."). And, in interpreting a statutory term exceedingly broadly, the SEC should make every effort to establish clear guidelines.

Yet the SEC failed to do this. And the Second Circuit failed to hold the SEC to this task. Instead, without explaining what level of deference it applied, the Circuit rubberstamped the SEC's expansive, unpublished, and informally promulgated definitions of "convicted" and "related to" as adequate, without considering the intent of Congress or well-established canons of statutory construction.

A. The SEC's Vague, Ad Hoc Conception of Relatedness Violates Due-process Notions of Fairness and Notice

According to the SEC, a whistleblower's criminal conviction is "related to" the conduct that led to the SEC's recovery of monetary penalties if it is "connected with" something no matter how tangential the connection is. This Court has insisted "that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The Court further noted: "Vague laws may trap the innocent by not providing fair warning." *Id.*

The SEC's position is that any connection, no matter how remote, may disqualify a whistleblower from recovering an award to which they are entitled. Obviously, some overlap is needed for two subjects to be deemed related. But the SEC does not identify which factors are dispositive or even important and how much weight to give to such factors as the degree of overlap required, which overlapping factors are essential, and which are merely persuasive. The SEC has articulated no standard for evaluating a whistleblower's post-conviction qualification for an award.

This standardless approach is arbitrary and unreasonable, robbing Dodd-Frank of its ability to notify the public exactly what violations should be brought to the SEC's attention. Whether a whistleblower can recover depends on whether the SEC is inclined to enforce its amorphous standard in a given case, creating a disincentive for potential

whistleblowers to come forward. This Court's intervention is needed to stop the SEC from awarding or denying rewards based on its own, secret considerations. Permitting the SEC's current position to stand will completely undermine the program as Congress expressly created it.

The SEC's process for reaching the decision was secret, unexplained and inconsistent with its own stated priorities. But the effect of the SEC's decision is sweeping. If the SEC plans to announce an interpretation of relatedness, or, for that matter, of the term "convicted," that carries the force of law, it should do so under the APA's notice-and-comment process. The APA's notice-and-comment requirements are meant to eliminate the possibility of unfair surprise and to give the public the opportunity to weigh in on the impact of proposed regulations.

The current decision is unreported, heavily redacted and buried on the SEC's website. It provides no notice to the public or to potential whistleblowers as to what conduct will run afoul of the rule banning convicted whistleblowers from recovering awards. Potential whistleblowers are also now deprived of any means to evaluate whether it is worth the risk of providing the SEC with information.

B. The SEC's Findings, Conclusions and the Procedures that Led to Them Were Arbitrary and Capricious

When reviewing an agency decision, the reviewing court must be satisfied that the agency has

"examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*

1. The SEC's interpretation of "related to"

With respect to the meaning of "related to," the SEC adopted an interpretation that lacked any meaningful standard: "to be connected with (someone or something)[;] to be about (someone or something)." This definition, while technically correct because it was adopted verbatim the Merriam-Webster definition, can encompass nearly anything. What matters is the degree of connectedness. On that matter, the SEC was silent.

It is clear that the SEC knows how to implement rules after a notice-and-comment process. On May 25, 2011, after notice and comment , the SEC adopted rules to create the whistleblower program, including rules related to whistleblower culpability and its impact on eligibility and recovery. In line with congressional priorities to increase the availability of whistleblower awards, these rules

explicitly permit a culpable whistleblower to recover an award, 17 C.F.R. § 240.21F-6(b)(1); *see also* Adopting Release, supra, 2011 WL 2045838, at *89; and distinguish culpable whistleblowers – who are entitled to an award – from those who had been convicted of related conduct – who are not. The basis for that distinction was the injustice of enriching people for "their own misconduct or misconduct for which they are *substantially responsible*." SEC Final Rule, release No. 34-64545, File No. S-7-33-10. Fed. Register, Vol 78, No. 113, p. 34350, June 13, 2011 (emphasis added).

These rules failed to define "related to" or "convicted," and the SEC brought no such rigor to bear in the present case. The SEC's interpretation of relatedness in this case to mean connected regardless of degree also flies in the face of its "substantial responsibility" standard. The abandonment of that principle without any explanation is, in and of itself, capricious and arbitrary. The SEC's silence on that matter evidences its failure to consider an important aspect of the relatedness issue in the context of its previously promulgated rules.

2. The SEC's interpretation of "convicted"

As to the SEC's interpretation of the term "convicted," the SEC's reasoning was similarly lacking. The SEC relied on a patently distinguishable prior agency opinion which in any event had been overturned by the courts. Further, the SEC employed none of the well-established canons of statutory interpretation, including the Surplusage Canon. That canon counsels that courts should be "hesitant to assume Congress included pointless language in its

statutory handiwork." *Elwell v. Okla. ex rel. Bd. of Regents of Univ. of Okla.*, 693 F.3d 1303, 1307 (10th Cir. 2012); *see also United States v. Butler*, 297 U.S. 1, 65 (1936) ("These words cannot be meaningless, else they would not have been used."). *See generally* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012).

"Convicted" is not defined in the Exchange Act. The Commission adopted the definition of "convicted" from the Investment Advisers Act of 1940. But the SEC's adoption of the IAA's definition in the present context would rob the IAA's particularized definition of all independent effect. Congress decided to include a definition of "convicted" in the IAA that explicitly includes verdicts or pleas of guilty – whether or not sentence has been imposed. Congress decided not to include any such definition in the Exchange Act. The Commission's decision to graft the IAA's definition onto the Exchange Act suggests either that Congress's decision to define the term in the IAA was meaningless surplusage or that its decision to omit this definition from the Exchange act was unintentional.

Neither conclusion is reasonable, given that Congress' has shown that it carefully considered the factors that would disqualify a whistleblower claimant for an award. Under the canons of statutory interpretation, courts should prefer a "meaning that leaves both provisions with some independent operation." Scalia & Garner, *supra*.

C. The SEC's Decision to Deny Petitioner a Whistleblower Award Was Unsupported by the Evidence

Finally, the SEC's decision to deny Petitioner a whistleblower award was unsupported by evidence, and its attempts at factfinding cursory. "Evidence is not substantial if it . . . constitutes mere conclusion." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1581 (10th Cir. 1994) (internal citation omitted). Here, the SEC's conclusion that Company-1's FCPA violations and Petitioner's bribery charges were related rested entirely on conclusory assertions to that effect. Specifically, a DOJ lawyer contended that "there was no separate bribery scheme in the [Country-1] involving [Company-1] that was not already covered in the [Petitioner] Information or the [Petitioner] Guilty Plea." Despite evidence to the contrary, the SEC merely accepted that proposition without probing further.

"The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 487-88 (1951). Here, the SEC failed to address facts that undermine its conclusion. Chief among them is that none of the facts contained in Petitioner's charging instruments appear in Company-1's and vice versa. This would seem to indicate that there was no relation between the two sets of violations. Yet, the SEC did not account for the lack of overlap.

II. The Second Circuit Failed to Identify the Level of Deference It Employed, Operating as a "Rubber Stamp" of the SEC's Unsupported Conclusions

Despite his substantial assistance, which aided the SEC in its successful enforcement action against Company-1, the SEC denied Petitioner a whistleblower award based on its dubious assessment that he had been "convicted of a criminal violation related to" the FCPA violations that led to the government's recovery of $400 million. The SEC did so not by careful reasoning or by diligent fact-finding. The SEC did not busy itself by consulting well-established canons of statutory interpretation or even its own rule-making releases.

Rather, the SEC's statutory interpretation renders other congressional enactments meaningless and is standardless. Likewise, the factual basis for the SEC's denial of an award was non-existent. The entire decision rested on the conclusory, second-hand statement made in an affidavit that there was only one bribery scheme. This was totally belied by the fact that the scheme to which Petitioner pleaded guilty was never alleged in the scheme to which Company-1 pleaded guilty and vice versa.

In deferring to the SEC's rulings, the Second Circuit failed to identify the level of deference it applied, operating as a "rubber stamp" of the SEC's unsupported conclusions and effectively rendering SEC Whistleblower rulings unreviewable.

A. The SEC's Unpublished, Non-Precedential Ruling on the Definitions of "Convicted" and "Related to" Are Not Entitled to Chevron Deference

"[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . ." *United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001). *Chevron* deference, which is highly deferential, requires courts to defer to an agency's interpretation of an ambiguous statute unless the interpretation is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844 (1984). But "*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved," *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006), and the degree of deference owed "var[ies] with circumstances." *Mead Corp.*, 533 U.S. at 228.

This Court observed in *Mead* as follows:

> A very good indicator of delegation meriting *Chevron* treatment is express congressional authorizations to engage in the rulemaking or adjudication process that produces the regulations or rulings for which deference is claimed. Thus, the overwhelming number of cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.

Mead Corp., 533 U.S. at 219. For this reason, "interpretations contained in policy statements, agency manuals and enforcement guidelines . . . do not warrant *Chevron* style deference." *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).[2]

Here, the SEC's decision, which interpreted undefined terms in 15 U.S.C. § 78u-6(c)(2)(B), to exclude Petitioner from an award, is entitled less deference than even an interpretation contained in a policy statement, agency manual, or enforcement guideline, as those documents, while not formalized or given the force of law under the APA's notice-and-

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[2] *Compare Mead Corp.*, 533 U.S. at 231 (denying *Chevron* deference to United States Customs Service tariff classification rulings because "Customs'[] practice in making [those rulings], present a case far removed not only from notice-and-comment process, but from any other circumstances reasonably suggesting that Congress ever thought of classification rulings as deserving the deference claimed for them here"), and *Christensen.*, 529 U.S. at 587-88 (denying *Chevron* deference to a Department of Labor Opinion letter, finding "interpretations contained in policy statements, agency manuals, and enforcement guidelines" outside the reach of *Chevron*), with, *Ross v. Sec. & Exch. Comm'n*, 34 F.4th 1114 (D.C. Cir. 2022) (according *Chevron* deference to definitions that the Commission adopted as final rules to implement the whistleblower program after a notice-and-comment period), and enforcement action*,"* which the Commission arrived at after a formal rule-making process). enforcement action," which the Commission arrived at after a formal rule-making process*), and Doe v. Sec. & Exch. Comm'n,* 28 F.4th 1306, 1312 (D.C. Cir. 2022) (according *Chevron* deference to the Commission's identification of circumstances "in which whistleblower information will be deemed to have 'led to' a successful enforcement action," which the Commission arrived at after a formal rule-making process).

comment process, are publicly promulgated, giving advance notice to potential whistleblowers of how the SEC defines these terms.

The decision is not a public pronouncement of any kind and is not binding on any part other than the Petitioner and the two other claimants. Further, in the version of the Final Order the SEC released to the public, the Commission redacted its analysis as to Petitioner's eligibility for an award in its entirety.[3] The Commission did not make its interpretations of "convicted" and "related to" or its reasons for adopting them available to anyone but the participants in the award process. It is difficult to imagine that a non-public interpretation restricted to the parties can be considered precedential. Under such circumstances, the agency has communicated no intention to treat the decisions as "carry[ing] the force of law." *Mead Corp.,* 533 U.S. at 227.

Where, as here, *Chevron* deference does not apply, courts may consider whether the agency is entitled any deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). In *Skidmore*, this Court held that "an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires." *Mead Corp*., 533 U.S. at 234 (internal citation

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[3] *In the Matter of the Claims for Awards in Connection with [Redacted]*, Exchange Act Release No. 90350 (Sep. 15, 2021), https://www.sec.gov/rules/other/2021/34-92985.pdf.

omitted) (*quoting Skidmore*, 323 U.S. at 139). In the context of *Skidmore* deference, this Court has found the following factors relevant: "the thoroughness evident in [the agency's] 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." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991) (citations and quotations omitted), superseded by statute on other grounds, Civil Rights Act of 1991, Pub. L. No. 102-166 (1991).

As discussed in further detail in Point I, above, the SEC's definitions of "related to" and "convicted", which the Second Circuit failed to adequately review, have no such power. Instead, they frustrate the goals of the SEC Whistleblower Program, and are arbitrary and capricious.

B. In Presumably (But Not Explicitly) Applying Chevron Deference to an Unpublished, Heavily-Redacted Order Which Did Not Deserve It, the Second Circuit Abdicated Its Responsibility to Serve as a Check on the SEC.

Here, in its opposition to Petitioner's filing before the Second Circuit, the SEC asked the Circuit to apply Chevron deference to its findings. Petitioner argued that Chevron deference did not apply.

Without announcing what standard of deference or evaluative criteria it employed, the Circuit Court affirmed the SEC's determination that Petitioner's criminal conduct was "related to" the SEC's enforcement action, finding that the SEC had

not abused its discretion because it "adequately" explained its reasoning and supported its findings with "substantial" evidence." *See* Pet. App. 4.

This "reasonableness" standard appears to be a de facto application of *Chevron* deference. *See Mead Corp.*, 533 U.S. at 219. (A "reviewing court must accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable.")

Yet, as discussed in Point II(A), above, *Chevron* deference is not warranted here. And in failing to interrogate what, if any, deference, was owed to the SEC's interpretations, the Second Circuit abdicated its responsibility to serve as a check on the SEC. Its decision amounted to an endorsement of the SEC's expansive, standardless definition of what it means for one thing to be related to another thing.

If left uncorrected, the Second Circuit's refusal to require *any* reasoned explanation from the SEC for the categorical lines it has drawn will deprive SEC Whistleblower Program claimants the ability to seek redress for arbitrary agency action. The petition should therefore be granted in light of the exceptional importance of the issues raised and the manifest error of the Second Circuit's holding.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 29, 2023