

No. _____

IN THE
Supreme Court of the United States

Mr. Charles M. Cerny & Mr. Cliff Buxbaum,

Co-Petitioners, Pro Se

v.

United States Securities & Exchange Commission

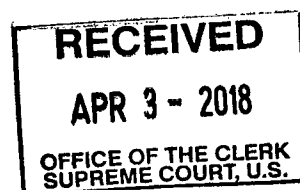
Respondent

On Petition for Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Second Circuit erred by applying the *Auer doctrine* when denying a Petition for Review of a decision by the United States Securities and Exchange Commission / Office of the Whistleblower (SEC/Commission/OWB)?
2. Whether applying the *Auer* deference renders the APA moot and may deny those who assert abuse of discretion by an Agency, constitutional due process rights, review or protection from an agency being judge, jury and executioner by their sole, unreviewable discretion; on a matter which does not require the “expertise” of the agency?
3. Whether the Commission’s vacillating interpretation of the process of the OWB Notice of a Covered Action (NoCa) is in conflict with the intent of the regulation when it was enacted, and/or is it in this instance, de-facto legislation requiring proper rulemaking procedures?
4. Whether departing from procedures and protocols in this case and inconsistently on a case by case basis, rises to the level of arbitrary, capricious and abuse of discretion?

List of Parties

- 1) Mr. Charles M. Cerny – Co-Petitioner, Pro Se
- 2) Mr. Cliff Buxbaum – Co-Petitioner, Pro Se
- 3) Securities & Exchange Commission
 - a. Solicitor General of the United States Department of Justice (for service only)
 - b. Stephen G. Yoder, Senior Litigation Counsel
 - c. Catherine Broderick, Senior Appellate Counsel

Table of Contents

QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	iv
TABLE OF AUTHORITIES	v
PETITION FOR CERTIORARI	1
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS AT ISSUE	2
STATEMENT OF THE CASE	3
A. Statutory and Regulatory Background	3
B. Facts Giving Rise to this Case	4
C. The Agency Proceedings	5
D. The Appellate Court Proceedings	5
REASONS WHY CERTIORARI SHOULD BE GRANTED	8
CONCLUSION	11
NOTARY ACKNOWLEDGEMENT (BUXBAUM)	12
APPENDIX	13-31

TABLE OF APPENDICES

APPENDIX A -	SUMMARY ORDER OF THE UNITED STATES DENYING PETITION COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED: SEPTEMBER 7, 2017.
APPENDIX B -	ORDER OF THE UNITED STATES DENYING REHEARING COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED: DECEMBER 12, 2017 (ORDER DATED 2016 IN ERROR)
APPENDIX C -	PRELIMINARY DETERMINATION OF THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION, OFFICE OF THE WHISTLEBLOWER, DATED: JUNE 5, 2015
APPENDIX D -	FINAL ORDER OF THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION, OFFICE OF THE WHISTLEBLOWER DATED: MARCH 4, 2016
APPENDIX E -	SEC RELEASE NO. 81857/ DATED: OCTOBER 12, 2017

TABLE OF AUTHORITIES

Cases

<i>Cordiano v. Metacon Gun Club) Inc.</i>	9
<i>Exelon Generation Co.) LLC v. Local 15) International Brotherhood of Electrical Workers) AFL-CIO).</i>	11
<i>Garco Construction v Secretary of the Army</i>	1
<i>In West Virginia Highlands Conservanry) Inc. v. Norton,</i>	10
<i>Wildearth Guardians v. U.S. Forest Service, 713 F. Supp.2d 1243, 5-1252 (D. Colo. 2010).</i>	10

Statutes

Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 11-203, 124 Stat. 1376 (2010).....	3
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Other Authorities

Final Brief of the Respondent, Page18	3
National Archives and Records Administration, DAA-0266-2014-0009.	5
S. Rep. No. 111-176, at 110 (2010).	3

Rules

(Rule 21 F-8 (a)	3
Release No. 34-64545 File No. S7-33-10; Implementation of the Whistleblower Provisions of 21F of the.....	3
Rule 21F-10(a), 17 C.F.R. § 240.21-10(a).....	1

PETITION FOR WRIT OF CERTIORARI

This petition presents material examples of the harm caused when a reviewing court applies *Seminole/Auer Doctrine*. It is a unique case because it demonstrates in real terms, the concerns raised in this court relating to separation of powers, purposely vague rules and regulations and effectively negating a court review of an Agency decision for arbitrary, capricious or abuse of discretion as set forth in the Administrative Procedures Act (APA).

Here, the Second Circuit took the word of the Agency that the interpretations of the Agency were consistent, and applied *Auer* without consideration of any material facts, records or argument that effectively rebukes any such consistency in petitioner's unique case. Petitioners believe this case may be a good vehicle to consider both a review of the Second Circuit's denial and whether the *Auer* deference violates Constitutional rights and be over ruled.

Absent *Auer*, the Agency could not have prevailed.

Petitioners assume this court's familiarity of current cases being reviewed for the overruling of *Auer*.

This petition may support other cases under consideration relating to the *Auer* deference, such as *Garco Construction v Secretary of the Army* in that we question if the Agency's interpretation of Rule 21F-10(a), 17 C.F.R. § 240.21-10(a)¹ has extended to the point of pure arbitrariness.

The rules at issue here pertain, *inter alia*, to OWB's Notice of a Covered Action (NoCa) process and whether the SEC has adhered to its own regulations or effectively changed the Rules without proper notice and rulemaking.

Petitioners understand that at first blush, being about two years out of time to file a claim would take a remarkable set of circumstances to be granted relief. With respect to this Honorable Court, and our Constitutional Republic which provides for redress and the checks and balances necessary to protect individual liberty, we present to the best of our abilities, a remarkable set of circumstances.

¹ Each rule provided in this petition as 21F is codified at 17 C.F.R. § 240.21F

OPINIONS BELOW

The Second Circuit Summary Order and subsequent Order Denying Rehearing are reproduced in Appendix (App) as Appendix A and Appendix B. The Preliminary Determination and Final Order of the Agency are reproduced in App as Appendix C and D respectively.

JURISDICTION

The jurisdiction of this Court to review the Judgment of the Second Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS AT ISSUE

5TH, 12TH, 14TH AMENDMENT'S TO THE UNITED STATES CONSTITUTION AS THEY RELATE TO DEPRIVATION OF PROPERTY, DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS. THE STATUTE FALLS WITHIN THE SECURITIES AND EXCHANGE ACT OF 1934, SECTION 922 WITH THE REGULATIONS BEING CODIFIED UNDER 17 C.F.R. § 240.21F

STATEMENT OF THE CASE

A. STATUTORY AND REGULATORY BACKGROUND

In *Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 11-203, 124 Stat. 1376 (2010)* (“Dodd-Frank”), the Office of the Whistleblower (OWB) was established to “motivate those with inside knowledge to come forward and assist the Government to find, identify and prosecute persons” who may have violated securities laws. S. Rep. No. 111-176, at 110 (2010). The “Motivation” to ‘report’ was a percentage amount of the monetary sanctions collected by the Commission.

The Congress authorized the OWB under Section 21F (j) to issue rules and regulations consistent with the purposes of Section 21F. The Commission adopted its Final Rules on May 25, 2011.

The rules, as adopted for Notice of a Covered Action (NoCa) are found in Rule 21F-10 (b). The Rule explains the 90 day deadline to submit a claim while noting, the Commission may in its “sole discretion waive the 90 day deadline” upon showing of “extraordinary circumstances”, specifically, “control to file timely”. (Rule 21 F-8 (a))

The OWB adopted the rule that a NoCa was to be ‘*constructive-notice*. The Commission “considered and rejected” *actual-notice*, with an explanation, of sorts: that *actual-notice* could “unfairly favor whistleblowers who have worked closely with staff, over those who have not”. (Final Brief of the Respondent, Page18)

However, during the notice and comment period to implement the OWB, the SEC had stated in no uncertain terms that they “Anticipated *Actual-notice* to those who have worked closely with the SEC”², but again, the adopted rule was narrowed to *constructive-notice* only, with the conflicting reasoning being as stated above. It seems questionable and unclear how it is possible to be a “Whistleblower” without ‘working closely with the staff’. But the important question has now become: What is the OWB’s Notice of Covered Action policy? Is it *constructive notice* or *actual notice* when it wants?

² Release No. 34-64545 File No. S7-33-10; Implementation of the Whistleblower Provisions of 21F of the Securities Exchange Act of 1934 Pg.171

B. FACTS GIVING RISE TO THIS CASE

Petitioners were investors in a company named Syntax-Brilliant Corp, (SBC) (stock-symbol BRLC) in and around 2006-2008. Petitioner, Cliff Buxbaum and others became suspect of the trading activity relating to the stock, and reported observations and analysis to FINRA, the Securities and Exchange Commission (SEC/Commission) and the Office of the United States Attorney General, who ultimately referred us back to the SEC.

On July 8, 2008 SBC filed a voluntary bankruptcy under Chapter 11 to execute a §363 Sale of Assets (Case #08-11407-Del.) Petitioners alerted the United States Trustee that the Petition for Chapter 11 Bankruptcy was a broad misrepresentation of facts.

Petitioners, relying on the Commission to act to protect investors, continually provided information, evidence and proof of fraud on the US Equity markets via this leading edge Chinese Reverse Merger fraud (SBC); insider trading and manipulation of the stock by hedgefunds, and the apparent fraud on the bankruptcy court. We all-but begged the SEC to intervene at the onset and during bankruptcy. We saw something. We said something, long before it was a bumper sticker slogan. We were whistleblowers before we knew the term, and certainly before and after whistleblowing became a business model.

While waiting for the SEC to show up and do what the SEC typically would do in a case such as SBC, petitioners did things that should reasonably be expected to be done by the government. The record is replete with the efforts taken to protect investor interests and the integrity of the bankruptcy process.

The Commission opted out of pursuing the fraud, at their discretion, for three years, until finally compelled to by petitioners' actions in the bankruptcy court.³

³ Specifically a Motion under Title 18 to Compel the Bankruptcy Court to Refer the Bankruptcy for Criminal Investigation (Case # 08-11407 Dkt#1876)

C. THE AGENCY PROCEEDINGS

The OWB protocols and procedures assume the “Whistleblower” is being incentivized to provide information and reaches out to the OWB to get into the process.

The protocols and procedures of the OWB program start with the submission of information to the OWB. Procedure requires entering the provided information in the SEC’s Tips, Complaints and Referral process (TCR). This is a critical programmatic function of the OWB process.⁴

In the case of the petitioners, information was provided directly to three or more SEC Enforcement staff both telephonically and via emails. Our information was never entered into the TCR system.

Much time passed and countless documents passed hands from the time the petitioners submitted their WB applications, starting March 2014 to the time of final denial in March 2016. In July 2015 petitioners had a meeting with the OWB. No remarks about the merits of the information provided were ever discussed in the orders, leaving another question. Why did it take so long to ultimately arrive at the basic decision that we were late?

D. THE APPELLATE COURT PROCEEDING

Petitioners filed a timely Appeal to the Second Circuit on March 25, 2016. Oral Argument was held before the Honorable Judge Chin and the Honorable Judge Carney on August 30, 2017, The Honorable Judge Winter recused himself for reasons not explained.

Petitioner Buxbaum, who lives in California and was the primary author of the briefs, sought leave of the court to appear telephonically due to health and financial issues but the court denied the request.

⁴ Commission personnel are required, pursuant to Commission-Wide Policies and Procedures for handling TCRs, to enter ANY communication received from the public, another government agency, or self-regulatory Organization (SRO) that qualifies for a TCR. While the identification of a TCR is not always obvious and may require professional judgement, if in doubt, SEC staff MUST TREAT THE MATTER AS A TCR AND ENTER IT INTO THE SYSTEM. (Emphasis added). TCRs enhance the SEC’s ability to identify potential violations of federal securities laws and to ensure appropriate and timely responses to allegation of wrong-doing”. (National Archives and Records Administration, DAA-0266-2014-0009).

The only question asked by the Honorable Judge Carney to respondent was whether the SEC “ever gives actual notice” [of a covered action]? The Respondent affirmed exactly what petitioners had argued in brief: “direct notice is provided to those who have worked closely with the Commission”.

Presumably, the panel had predetermined to apply the *Auer* deference to the Commission, as evidenced by not asking the one subsequent question necessary to establish consistency versus arbitrary, capricious or abuse of discretion: “Why didn’t you provide actual notice to the petitioners?”

Mr. Cerny was asked one question: “Were you physically able to file timely”? (But being “physically able” is not the way the SEC handled “control to file” in SEC release No. 81857 / October 12, 2017 (Appendix E)). Mr. Cerny affirmed we were physically able, but there were extenuating circumstances, not the least being, and the record is clear, we did not know we were whistleblowers and received no actual notice despite being in near-constant communication with SEC Enforcement both at the time the OWB was created as well as two years later when the NoCa was posted.

The SEC seemingly did not want to provide petitioners actual notice of their property interests. They would later stand behind the shield of accountability and transparency, the *Auer Doctrine*.

Petitioners question whether the Commission’s interpretation of the NoCa process is consistent with the regulation when it was enacted: No *actual-notice* because ‘it may cause disadvantage to others’ (*para*) as opposed to *actual-notice* as the OWB routinely provides (and Respondent affirmed) to those they have worked closely with.

Petitioners argue this represents a change of policy, but speciously imposes force of law from the original rule, without proper notice and comment. This interpretation of the OWB process for providing notice is in critical conflict with itself. The Second Circuit, by applying *Auer* allowed the Commission to interpret a rule that was in direct conflict with the rule as adopted, and the interpretations since.

Allowing deference was based solely on the Agency’s erroneous ‘claims’ of consistent interpretations of their own regulations, specifically “extraordinary circumstances” and the Commissions’ own rules as they relate to the Notice of Covered Action Process. Absent consideration to the underlying record which provides substantial evidence that refutes all such

claims of 'consistency' as erroneous or an error in judgement, denies petitioners equal protection. It's not even a matter of "He said...She said", but rather, the SEC said, "Game Over".

By applying *Auer*, the Second Circuit rendered the APA moot; shielding the Agency from any standard of review to give "affected persons" recourse to an independent judicial interpreter of the agency's legislative act as afforded in the APA.

Applying the *Auer* deference denied us, and very likely many others, who assert abuse of discretion by an Agency, any constitutional due process, review or protection from an agency being judge, jury and executioner. By their sole, unreviewable discretion; which in this case, and under the circumstances at the time, petitioners were denied the fair opportunity to request notice or receive notice of a proper and otherwise worthy contingent property claim, with a potential value of \$18 Million dollars.

REASONS TO GRANT CERTIORARI

- I. This power of "self-adjudication" contradicts the major premise of separation of powers, equal rights under law, due process and is dangerous to our liberties. Review is warranted because this case is not a one-off circumstance and demonstrates why this court should overrule, or at least reign in the Seminole Rock/Auer deference to be applied only where "the expertise" of the agency is imperative.

Petitioners are ill-equipped to add to the list of reasons and concerns that have been before this Court as to why *Auer* should be overruled. The court is aware of its own concerns at levels petitioners are incapable to fathom. Petitioners only know that by the Second Circuit allowing deference to the SEC based solely on their word; but where the incomplete and un-reviewed record below, would raise suspicion of inconsistency and reasonableness. Absent deference, the Commission would be unable to defend against petitioners' claims of being arbitrary, and capricious in the Commissions' abuse of discretion.

- II. Allowing deference conflicted with the Second Circuit's own position to determine if an agency is seeking to "defend past agency action against attack." The Second Circuit has analyzed the consistency of an agency's interpretation to help it determine whether an agency's interpretation was a post hoc rationalization. For example, in *Cordiano v. Metacon Gun Club Inc.*, the court noted "the consistency of the EPA's interpretation" of the regulation at issue, which relied on the Supreme Court's view in *Auer* that an agency's consistent interpretation demonstrates that it was not made merely to defend the agency after the onset of litigation⁵.

Petitioners provided substantial evidence in the record below that neither the Commission's interpretation of 'extraordinary circumstances', "control to file", the OWB protocols and procedures or

⁵ (allowing the Nuclear Regulatory Commission (NRC) to overrule prior policy without a reasoned explanation would "undermine democratic transparency and upset the settled expectations of regulated parties").

NoCa process, as to petitioners, was consistent with the regulation or previous interpretations; further demonstrated by the Respondent telling the panel, *in effect*, 'we give direct notice to those who worked closely with staff.....except petitioners, and we're not going to tell you why....and the court won't ask because *Auer* is easier'. Not much due process or equal protection in this scenario.

- III. The Second Circuit is in conflict with the Fourth Circuit on deference. In rejecting to give *Seminole Rock* deference to interpretations of regulation which are not based on an expertise in a given field. *In West Virginia Highlands Conservancy Inc. v. Norton*, the Fourth Circuit acknowledged that *Seminole Rock* deference normally applies to the Board's interpretation of its own regulation but it refused to apply the doctrine in this case. It held that "[w]hen the administrative interpretation is not based on expertise in the particular field ... but is based on general common law principles, great deference is not required. The court justified its use of this "exception to *Seminole Rock* deference" as being necessary to allow courts to review an agency's legal determination de novo, which it then proceeded to do with respect to the Board's decision.

It doesn't take expertise to determine common-law, common sense, equity or good faith.

- IV. Review is warranted because in another example of *Auer* clashing with the APA by applying *Auer* the Panel didn't consider established facts and substantial evidence that detract from the Agency's 'claims' of consistency in interpretations. By applying *Auer*, the Second Circuit rendered the APA moot; shielding the Agency from any standard of review to give "affected persons" ... recourse to an independent judicial interpreter of the agency's legislative act as afforded in the APA.

The Supreme Court acknowledged "the Secretary's decision is entitled to a presumption of regularity." *Id.* The Court emphasized, however, that the "presumption is not to shield [the Secretary's] action from a thorough, probing, in-depth review." *Wildearth Guardians v. U.S. Forest Service*, 713 F. Supp.2d 1243, 5-1252 (D. Colo. 2010). Allowing deference eviscerates anything that resembles any due process or review of an agency's decision, action, or inaction as directed by the

APA. Section 706(2)(A) of the Administrative Procedure Act (APA) instructs courts reviewing regulations to invalidate any agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

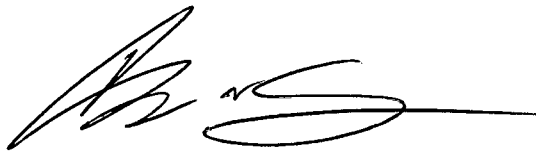
The Seventh Circuit has also identified this conflict between the APA and the *Seminole Rock* doctrine. In *Exelon Generation Co. LLC v. Local 15 International Brotherhood of Electrical Workers AFL-CIO*. The panel opined that the application of *Seminole Rock* in this case would conflict with the APA because NRC's interpretation would contradict its own prior interpretation. The court found that such a result would amount to the promulgation of a "legislative rule," which would require following the APA. In other words, NRC was required to, at a minimum, announce its change of position "in a 'reasoned analysis'" in the *Federal Register* or arguably was required to engage in "full notice-and-comment procedures." Absent such actions, the court found that it would not endorse its interpretation under cover of agency deference principles.

Conclusion

For all of these reasons, the Court should grant the petition for writ of certiorari and reverse the judgment of the United States Court of Appeals for the Second Circuit.

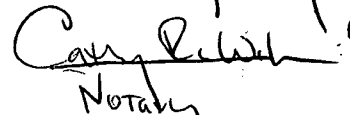
Respectfully Submitted,

**State of New York
County of Kings**



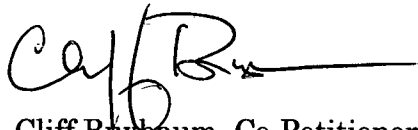
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Sworn to before me on
this 28 day of March 2018
By Charles Cerny only



Notary

CATHY R. WILDER
Notary Public, State of New York
No. 01W14992362
Qualified in Kings County
Commission Expires April 4, 2018



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March 11, 2018

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