

No. 17-8372

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 REHEARING

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<i>Schroeder v. West</i> , 212 F.3d 1265, 1270 (Fed. Cir. 2000); <i>Moret v. Karn</i> , 746 F.2d 989, 992 (3d Cir. 1984) (An agency abuses its discretion if it fails to follow its own regulations and procedures	5

Petition for Rehearing

Petitioners sought review of a Summary Order from the Second Circuit with essentially the question: Why didn’t the SEC provide petitioners Actual Notice of a Covered Action (NoCa) in a manner consistent with the intent of Congress, routine procedures, protocols and interpretations of the statute?

The circuit bypassed *Chevron* and ruled according to *Auer*. In applying *Auer* there were no steps taken to determine if 1) Congress spoke directly to the Question; and 2) was the agency’s interpretation “reasonable”. *N.Y. ex rel. N.Y. State Office of Children & Family Servs. v U.S. Dep’t of Health & Human Servs. Admin. for Children & Families*, 556 F.3d 90, 97 (2d Cir. 2009) (citations and internal quotation marks omitted); see also *United States v. Connolly*, 552 F.3d 86, 89 (2d Cir. 2008) (applying the two-step inquiry as required by *Chevron*.

The underlying case unfortunately evolved into being less about a whistleblower award and more about the obvious and demonstrable failures of the SEC. It didn’t start out that way. Petitioners only wanted the cops to show

up to a billion dollar fraud, and became distraught when the realities of the Commission's blindness to the many Chinese Reverse Merger (CRM) frauds became clearer over time.

Petitioners provide herein substantial grounds not previously presented, along with a brief, broader view of the underlying drivers of the case and contested decision. Petitioners, in good faith, believe the court will be moved to grant, vacate and remand the case for a reasonable review, *de novo*.

The decision to single-out the petitioners and purposely not provide either adequate or actual notice of a property interest (Whistleblower Claim) was not reasonable. Any reasonable review of the substantial unviewed evidence is ample to demonstrate the contested-decision was intended to be and is, punitive.

Historical perspective is essential for better understanding of what brought petitioners to the highest court in the land seeking review and oversight: In the relevant time period, Chinese reverse merger frauds (CRM) and hedgefund inside trading were heavily impacting our capital markets. A great deal of the impact was massive fraud and abuse to the tune of hundreds of billions of dollars.

A documentary film entitled The China Hustle was recently released. The film documents the abuse to our capital markets using Chinese Reverse Mergers. The film also provides account of the SEC's inaction in addressing CRM's; essentially enabling the behavior and damage CRMs caused to the markets and investors. "The easiest crimes take place where there are no cops". (The China Hustle). We ask the court to take notice of The China Hustle, produced by the same folks that did Enron: the Smartest Man in the Room.

SBC, the underlying covered action, was a leading-edge CRM with all the collateral hedgefund inside trading and rot that comes along with it. In keeping true to the SEC's apparent blind-eye policy, the SBC CRM fraud was also to be ignored by the SEC.

Petitioners aggressively pursued the SEC to act. In also keeping true to how the SEC responds to embarrassment or questions illuminating potential misconduct within the agency, petitioners received similar treatment bestowed upon the highly respected and renowned SEC Whistleblower, Mr. Gary Aguirre.

According to testimony in 2006 before the United States Senate Committee on the Judiciary¹ former SEC Investigator Gary Aguirre explained: *“The potential harm that hedge funds can inflict on other market participants has no real limits.....they also do seventy percent of the trading in the US distressed debt market, US exchange-traded fund market and the convertible bond market. The same picture is emerging in the derivative markets.”*

Mr. Aguirre had been investigating an insider-trading scheme by a prominent hedgefund, similar to SBC and its secured-lender hedgefund. Mr. Aguirre goes on to testify:

Just after the SEC authorized the investigation to be presented to federal prosecutors and the FBI for possible criminal prosecution, senior SEC Enforcement officials blocked the issuance of civil subpoenas for the suspected tipper's testimony and key documents....., stopping the investigation in so doing, the SEC has given hedge funds and investment banks notice that it will not police their joint activities. The SEC could do no greater disservice to other market participants and especially the small investor. This is not mere incompetence” (emp added)

The Commission² became unhappy with Mr. Aguirre’s persistence, tenacity, integrity and character. He was sent on a two week vacation and abruptly fired a week later. The details of Mr. Aguirre’s appropriate response and victory over the tyrannical agency misconduct can be found in *Aguirre v SEC*.

Petitioners were denied Actual NoCa because the SEC was not happy being dogged for over three years to act on the securities fraud; they certainly weren’t going to provide notice to a few disrupters on a matter never intended to be pursued, despite there being ample time and recoverable funds at the time the information was provided, three years earlier. This is a sampling of very significant, ongoing problems in the administrative state that get shielded from the governed when *Auer* is put in play. This case should be remanded for review of the substantial body of evidence that conflicts with the circuit’s conclusion of the SEC’s decision-making being “reasonable”, without the availability, or review of a complete record.

Further, the court may have overlooked the criteria to establish either or both deference or abuse of discretion. Specifically, the NoCa process approved by Congress specifically rejected Actual Notice, at the SEC’s urging. However, the

¹ TESTIMONY OF GARY J. AGUIRRE, ESQ. June 28, 2006 United States Senate Committee on the Judiciary.

² The ‘Commission’ is meant to include only the higher level, heavily-conflicted decision-makers. Those conflicts drove the decision-making process and by no means refers to the staff we personally worked with in Enforcement..

SEC made clear both to Congress, and doubled-down in oral argument before the two judge circuit panel, that Actual Notice is “provided to those who have worked closely with the SEC”.

To allow the obvious question for oversight at the most basic level to fairly consider whether deference was due; and/or there was a violation of the regulation and arbitrary decision-making is too important to remain unasked and answered. It results in manifest injustice to petitioners and the investing public; those who rely on what is proving to be another flawed and unreliable agency.

Finally, the court errs by dismissing the Commission’s departure from Commission-wide mandate and protocol in processing the SEC’s interaction with the petitioners, specifically, not entering information in the Commission’s electronic Tips Complaints Referral (TCR) tracking data-base.

In keeping with the SEC’s non-enforcement of CRM’s and hedgefund inside trading, petitioner’s information necessarily had to be off the record; out of the TCR. The egregious decision to violate the exact process approved by Congress and routinely implemented in the SEC’s interaction with the public is reason enough for this court to grant, vacate and remand for response and explanation of any reasonable rationale for the turnaround in the SEC’s consistent interpretation of the process. When deciding to deny the routine Actual NoCa to petitioners, it becomes clear and obvious: we apparently worked too close for comfort with the SEC to thwart a crime they had demonstrably intended to ignore. *Schroeder v. West*, 212 F.3d 1265, 1270 (Fed. Cir. 2000); *Moret v. Karn*, 746 F.2d 989, 992 (3d Cir. 1984) (*An agency abuses its discretion if it fails to follow its own regulations and procedures*).

Our Founders made it clear that we, the people, should not trust the government. Yet *Auer* forces those regulated, and the courts, to do the opposite. According deference to the discretion of a group of people under the direction by a select few condones and encourages a soft form of tyranny. Whether it is the fallibility of human nature, and in turn, the fallible administrative state, or the lack of oversight or both, the *Auer* deference protects potential tyranny by eliminating the required checks and balances to maintain the Republic.

CONCLUSION

For all these reasons, petitioners pray that this Honorable Institution's full complement of wisdom will see petitioners were not dealt with in good faith by the SEC for reasons untenable in a nation of laws. We respectfully seek this court to grant the petition for rehearing, vacate the Summary Order and remand this case for review on the merits.

Respectfully Submitted,

June 7, 2018

Charles M. Cerny



Cliff Buxbaum

Case No. 17-8372

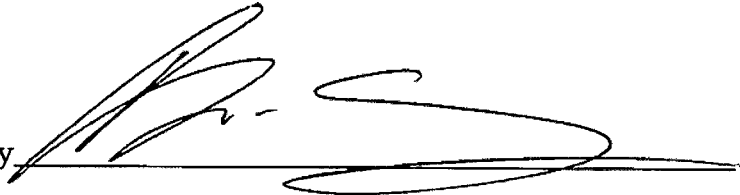
In the
Supreme Court of the United States

Certification of Co-Petitioners, Pro Se

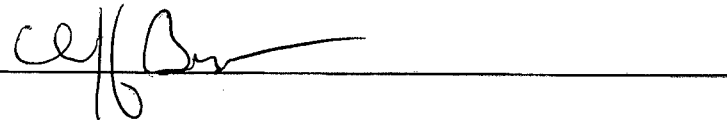
Pursuant to Rule 44 of the Supreme Court, Charles M. Cerny and Cliff Buxbaum do hereby certify this Petition for Rehearing it is presented in good faith and not for delay.

June 6, 2018

Charles M. Cerny

A handwritten signature in black ink, appearing to be 'C. M. Cerny', written over a horizontal line.

Cliff Buxbaum

A handwritten signature in black ink, appearing to be 'Cliff Buxbaum', written over a horizontal line.