No. 05-1317

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SALIM B. LEWIS,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Review of an Order of the
Securities and Exchange Commission

PETITIONER'S INITIAL BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici. Petitioner Salim B. Lewis was petitioner before the Securities and Exchange Commission. The Commission is respondent here.

Ruling Under Review. The Order of the Commission denying Mr. Lewis's petition to vacate the Bar Order, *In the Matter of Salim B. Lewis*, Exchange Act Rel. No. 51817 (June 10, 2005), appears at J.A. __ (R.18).

Related Cases. The case under review was not previously before this Court. No related cases are currently pending.

Constitutional and Statutory Addendum. Relevant constitutional and statutory provisions are appended as an addendum to this brief.

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INTRODUCTION

This case arises from an order of the Securities and Exchange Commission ("Commission" or "SEC") refusing to lift a 1990 order that bars petitioner Salim B. ("Sandy") Lewis from the securities industry for life. The Commission entered that Bar Order after Mr. Lewis was convicted and civilly enjoined for actions he took to thwart unethical short-selling by other traders. Because Mr. Lewis's transgression was a solitary lapse in a career otherwise marked by the highest standards of integrity and dedication to the public good—and never should have been criminally prosecuted—on January 20, 2001, the President of the United States exercised his constitutional authority to grant Mr. Lewis a full and unconditional pardon.

In a further effort to clear his name, Mr. Lewis petitioned the Commission to vacate the 1990 Bar Order, which rested on the now-pardoned conviction. The Commission acknowledged that its prior reliance on the conviction was no longer permissible in light of the pardon. But it held that the bar survived because it was also based on the injunction entered against Mr. Lewis for the same offense. The Commission also declined to exercise its discretion to lift the bar. It nowhere suggested, however, that Mr. Lewis represented any threat to the public. Indeed, it expressly acknowledged his "distinguished career in the industry," his "otherwise unblemished disciplinary record," and the Presidential pardon.

The Commission's order cannot be sustained. It purports to conduct harmless-error review on a virtually nonexistent record. It ignores the impermissibly punitive nature of the Bar Order. And it erroneously treats allegations in its injunctive complaint

as if they were established facts. The Commission's equitable analysis was similarly flawed—the Commission refused to consider relevant evidence and applied a test that all but foreordained the outcome. This Court should grant the petition for review.

STATEMENT OF JURISDICTION

The Securities and Exchange Commission had jurisdiction over Mr. Lewis's petition pursuant to 15 U.S.C. § 78o(b)(6). This Court has jurisdiction under 15 U.S.C. § 78y(a)(1). The Commission denied the petition on June 10, 2005, and Mr. Lewis filed a petition for review on August 9, 2005.

STATEMENT OF THE ISSUES

1. Whether the Commission erroneously sustained its 1990 Bar Order even though it was based in part on a conviction for which Mr. Lewis has received a Presidential pardon.

2. Whether the Commission applied the wrong legal standard to determine whether its 1990 Bar Order constituted impermissible punishment for a pardoned offense.

3. Whether the Commission improperly treated the 1990 Bar Order as based on Mr. Lewis's underlying conduct, even though the Bar Order relied only on the allegations in its injunctive complaint.

4. Whether the Commission ignored relevant evidence and failed to explain its reasoning in refusing to vacate the 1990 Bar Order on equitable grounds.

STATEMENT OF THE CASE

On August 30, 1989, Mr. Lewis pled guilty to three counts of securities-related offenses. J.A. __ (R.7 at 42a). On August 8, 1990, the Commission obtained a consent

injunction against Mr. Lewis, based on the same conduct, that enjoined him from violating various securities laws. J.A. __ (R.7 at 208a). On August 13, 1990, Mr. Lewis consented to a Bar Order, based on the conviction and injunction, that permanently excluded him from the securities industry. J.A. __ (R.7 at 215a).

On January 21, 2001, the President of the United States granted Mr. Lewis a full and unconditional pardon. J.A. __ (R.7 at 245a). On September 9, 2004, Mr. Lewis petitioned the Commission to vacate the bar. J.A. __ (R.7). On June 10, 2005, the Commission denied his petition in relevant part. J.A. __ (R.18). Mr. Lewis now petitions for review of that June 10, 2005, Order.

STATEMENT OF FACTS

I. FACTUAL BACKGROUND

A. Mr. Lewis's 20-Year History in the Securities Industry

Mr. Lewis began his career in the securities industry in the mid-1960s and rapidly became known for his brilliance and adherence to principle. He was regarded among his peers as an "outspoken critic of the unethical practices of . . . the securities industry," particularly the use of inside information that plagued the industry in the 1980s. J.A. __, __-__ (R.7 at 169a, 197-199a). Mr. Lewis served on several SEC boards and as a personal consultant to SEC Commissioner Roderick Hills. J.A. __ (R.7 at 306a). His advice was well-regarded, and he showed himself to be "a person of exemplary moral character and integrity." *Id.* Even when his employer's financial interests rested elsewhere, Mr. Lewis pursued the interests of competition and full disclosure. J.A. __-__, __ (R.7 at 67a-68a, 267a).

B. The Fireman's Fund Offering

Ironically, it was Mr. Lewis's outrage at one manipulative practice that led to a lapse in his own judgment and his banishment from the industry. In 1986, Mr. Lewis was the managing general partner of S.B. Lewis & Co., a small investment banking and securities trading firm. On the morning of May 8, 1986, Mr. Lewis learned that traders were "shorting against the syndicate" in connection with a secondary offering of Fireman's Fund Corp. J.A. __-__ (R.7 at 81a-85a). "Shorting against the syndicate" is a manipulative practice in which traders sell stock short just before a secondary public stock offering in order to drive down the market price; underwriters in turn have to reduce the offering price; and the traders then cover their short positions with stock purchased from the underwriters at the artificially depressed price. *Id.*[2] Mr. Lewis was a vocal opponent of shorting against the syndicate, a practice he considered manipulative and unethical. *Id.* Two years later, the Commission came to the same conclusion and banned the practice. See *Short Sales in Connection with a Public Offering*, 53 Fed. Reg. 33,455 (Aug. 25, 1988).

Mr. Lewis had no financial interest in the Fireman's Fund offering. He had nothing to lose from the effort to manipulate the stock price, and would not profit financially if it failed. J.A. __-__, __ (R.7 at 88a-90a, 171a). He was, however, angered by the blatant manipulation, and expressed his frustration to Boyd Jefferies, a principal of

[2] A trader "shorts" stock or "sells short" by selling shares he does not own, hoping to buy (or "cover") the shares later at a lower price. *See* American Heritage Dictionary of the English Language (4th ed. 2000).

Jefferies & Company. In an effort to thwart the short-sellers, Mr. Lewis urged Mr. Jefferies to purchase large quantities of stock and agreed to reimburse him for any losses. Mr. Lewis hoped the purchases would discourage the short-sellers. J.A. __ (R.7 at 86a). After the offering, Mr. Lewis arranged for a third party to pay $150,000 to Jefferies & Company; Mr. Lewis then reimbursed the third party and recorded the transaction as an advisory fee. J.A. __ (R.7 at 91a).

C. The Criminal Conviction

In November 1988, Mr. Lewis was indicted in the U.S. District Court for the Southern District of New York. The government charged, among other things, that Mr. Lewis had (1) manipulated the price of Fireman's Fund stock; (2) aided and abetted margin violations by agreeing to reimburse Mr. Jefferies for his losses; and (3) aided and abetted record-keeping violations by recording the reimbursement as an advisory fee. J.A. __ (R.7 at 6a). Mr. Lewis cooperated with the investigation; admitted his actions; and, on August 30, 1989, pleaded guilty to one count of stock manipulation, one count of aiding and abetting margin violations, and one count of aiding and abetting record-keeping violations. J.A. __, __ (R.7 at 42a, 215a).

At sentencing, the trial court found that Mr. Lewis's offense was an "isolated incident." J.A. __ (R.7 at 171a). It noted that Mr. Lewis had selflessly helped a large number of people at all levels of society, an accomplishment it deemed "impressive":

> [T]he letters I have received[] covered the spectrum of our society and I would have to be very insensitive—which I hope I never am—to the message that those letters send because many of them state how you have taken an interest in the lives of those less fortunate than yourself, that you have shown that interest throughout your life and not just in reaction to the

> trouble that you are in in the hope of mitigating punishment. To me that's impressive.

Id. Accordingly, the court imposed a sentence that would ensure Mr. Lewis's skills "w[ould] not be wasted"—three years' probation, community service, and a $250,000 fine. J.A. __-__ (R.7 at 172a-174a).

D. The Civil Injunction

About a year after the guilty plea, on August 8, 1990, the Commission filed a civil complaint for injunctive relief that alleged the same misconduct that formed the basis for Mr. Lewis's guilty plea. J.A. __-__ (R.7 at 215a-216a) (*SEC v. Lewis*, 90 Civ. 5129 (S.D.N.Y. Aug. 8, 1990)). The Commission sought a so-called "obey the law" injunction—a decree enjoining Mr. Lewis from violating various provisions of the securities laws, the only direct effect of which was to authorize contempt sanctions for future violations. Mr. Lewis, "without admitting or denying any of the allegations of the complaint" except as to jurisdiction, consented to the injunction and to a monetary sanction of $475,000. J.A. __-__ (R.7 at 208a-214a).

E. The Bar Order

One week later, on August 13, 1990, Mr. Lewis consented to a Commission Bar Order permanently prohibiting him from associating with any broker, dealer, investment company, investment adviser or municipal securities dealer (the "Bar Order"). See J.A. __-__ (R.7 at 215a-216a) (*In re Salim B. Lewis*, Exchange Act Rel. No. 28333 (Aug. 13, 1990)). The bar was imposed under Section 15(b)(6)(A) of the Exchange Act, which empowers the Commission to censure an individual, limit his activities, temporarily

suspend him, or permanently bar him from the industry if it makes two findings "on the record after notice and opportunity for a hearing." 15 U.S.C. § 78o(b)(6)(A). First, the Commission must find that one of three qualifying conditions exists: (i) a violation of certain securities laws; (ii) a criminal conviction for a securities-related offense; or (iii) an injunction against violating the securities laws. *Id.* § 78o(b)(6)(A)(i)-(iii). Second, the Commission must determine that the particular sanction imposed—"censure, placing of limitations, suspension, or bar"—is in the "public interest." *Id.* § 78o(b)(6)(A).

The Bar Order found that Mr. Lewis had pled guilty to three violations of the Exchange Act. J.A. __ § III-C (R.7 at 215a). It then stated that the indictment had charged Mr. Lewis with manipulating the price of Fireman's Fund stock and aiding and abetting margin and record-keeping violations. *Id.* § III-D (R.7 at 215a). In the next paragraph, the Bar Order found that Mr. Lewis had been permanently enjoined from violating various securities laws. *Id.* § III-E (R.7 at 215a). It then cited allegations from the Commission's complaint seeking an injunction. *Id.* § III-F (R.7 at 215a-216a).

Mr. Lewis admitted the Commission's finding that it had jurisdiction, that he had pled guilty to the criminal charges (§ III-C), and that he had been civilly enjoined (§ III-E). He neither admitted nor denied the remaining findings. J.A. __ (R.7 at 215a). Based on the above facts, the Commission found it "appropriate and in the public interest" to impose a lifetime bar. J.A. __ (R.7 at 216a).

F. Mr. Lewis's Subsequent Conduct

Mr. Lewis fully complied with the Commission's orders and the judgment of the sentencing court. As a result of these events, Mr. Lewis's company—one of the most

successful small investment banking and securities trading firms in the Nation—was dissolved. J.A. __ (R.7 at 151a).

Long after his period of community service ended, Mr. Lewis continued to devote himself to the public. He provided strategic and financial support to a drug treatment center known as Daytop-NJ. J.A. __-__ (R.7 at 234a-237a). He remains committed to similar programs to this day and is actively involved in mentoring and supporting participants. *Id.* Mr. Lewis also spearheaded efforts to establish a similar drug treatment facility in New York. J.A. __ (R.7 at 4a).

In addition, Mr. Lewis has committed time and resources to aiding young people going through drug rehabilitation and counseling. One former employee of S.B. Lewis & Co. whom Mr. Lewis had counseled explained that, "[w]ithout Mr. Lewis, I could have been jobless, homeless and hopelessly addicted to drugs and alcohol." J.A. __ (R.7 at 71a). Mr. Lewis's contributions to the New Jersey public schools have been so great that one educator declared:

> [F]rom the perspective of over three decades as a superintendent of schools and as a university president, I must state that I have never seen another person give so much of himself to public education as has Mr. Lewis.

J.A. __ (R.7 at 72a). Mr. Lewis's other efforts on behalf of those less fortunate than himself are too numerous to recount. See, *e.g.*, J.A. __ (R.7 at 3a) (helping refurbish "Peopleplace," a daycare and preschool facility in Rockport, Maine); *id.* at __ (R.7 at 72a) (establishing scholarship fund for handicapped children at Phillips Exeter Academy); *id.* at __ (R.7 at 72a) (creating scholarship fund to help students at St.

Barnabas College, a racially integrated school in Johannesburg, South Africa, to study in the United States).

G. The Presidential Pardon

On March 16, 2000, Mr. Lewis filed a Petition for Pardon with the United States Department of Justice, citing among other things the isolated nature of the misconduct, the unusual nature of the prosecution, and Mr. Lewis's contributions to the securities industry and society at large. J.A. __ (R.7 at 217a). The petition was reviewed through the Justice Department's normal processes—including an eight-month investigation by the FBI—and was found meritorious. *Id.* at __ (R.7 at 243a). On January 21, 2001, the President of the United States granted Mr. Lewis a "full and unconditional pardon." *Id.* at __ (R.7 at 245a).

II. PROCEEDINGS BEFORE THE COMMISSION

A. The Motion to Vacate the Bar Order

In light of the Presidential pardon, on September 9, 2004—14 years after the bar was imposed and 18 years after the underlying conduct—Mr. Lewis filed a petition to vacate the bar. J.A. __ (R.7). The petition first addressed whether the bar remained valid in light of the pardon. It noted that, although an agency may consider a pardoned offender's underlying misconduct along with other relevant factors in assessing fitness to participate in an industry, it may not consider the conviction itself. The petition contended that the Bar Order violated that rule because it was based primarily on Mr. Lewis's conviction. J.A. __-__ (R.7 at 10-12).

The petition further argued that the Bar Order was impermissible because it punished Mr. Lewis for his underlying misconduct. Even though an agency may consider the conduct underlying a pardoned conviction for some purposes, it may not impose punishment for that conduct, even if the agency avoids relying on the conviction itself. In *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996), this Court held that an SEC suspension based solely on past misconduct constituted a "penalty" for purposes of the federal statute of limitations. The petition argued that the Bar Order here was similarly punitive because it was based entirely on Mr. Lewis's past misconduct rather than a general assessment of his fitness. J.A. __-__ (R.7 at 12-14).

Finally, Mr. Lewis urged that, even if the bar remained legally valid, the Commission should exercise its equitable discretion to lift it. He noted that his misconduct was an isolated incident motivated not by personal gain but by a desire to frustrate unethical conduct by others. J.A. __-__ (R.7 at 24-25). A very long time had passed. *Id.* at __ (R.7 at 26). Mr. Lewis had substantial experience in the industry, had an otherwise unblemished record, and had scrupulously complied with the Bar Order. *Id.* at __-__ (R.7 at 28-30). The lifetime bar was a far more severe sanction than the Commission had imposed in other cases involving worse conduct. *Id.* at __-__ (R.7 at 25-28). Two former SEC Chairmen stated that Mr. Lewis's conduct should not have been prosecuted criminally at all. *Id.* at __ (R.7 at 1). Many individuals vouched for Mr. Lewis's trustworthy and ethical character. *E.g.*, *id.* at __-__ (R.7 at 19-21). Finally, the Presidential pardon, even if it did not alone compel relief, was a significant changed

circumstance: It represented the judgment of the Nation's Chief Executive that the public interest warranted a reprieve. *Id.* at __-__ (R.7 at 28-29).

B. The Commission's Order

On June 10, 2005, the Commission issued an order denying in relevant part the petition to vacate (the "Order"). J.A. __ (R.18).

1. The Commission did not dispute that the Bar Order, as its very first ground, relied on the conviction. Nor did the Commission dispute that, because the President had granted Mr. Lewis a full and unconditional pardon, the Commission could not rely on that conviction. Nonetheless, the Commission ruled that the Bar Order survived because it also rested on the civil injunction, which the Commission declared to be "an independent ground legitimately supporting the Bar Order." J.A. __ (R.18 at 4). Although the Bar Order "did not state that the injunction itself warranted" the severe sanction of a lifetime bar, the Commission claimed there was "no suggestion [in the Bar Order] that the combined force of the conviction and injunction influenced the outcome" and declined to "impute [any] such synthesis where the injunction alone authorizes the bar." *Id.* Finally, despite the fact that the parties' consent to the Bar Order meant that the Commission had never conducted any investigation, made any findings regarding the circumstances of the misconduct, or evaluated other mitigating factors that might have affected its choice of sanction, the Commission declared that "the seriousness of Lewis's underlying conduct suggests that the Commission would have sought the bar against

Lewis based on the injunction regardless of any criminal proceedings." *Id.* at __-__ (R.18 at 4-5).[3]

2. In a footnote, the Commission rejected Mr. Lewis's argument that the Bar Order impermissibly punished him for his pardoned offense. J.A. at __-__ (R.18 at 8-9 n.26). The Commission did not dispute that the Bar Order would be punitive for statute-of-limitations purposes under *Johnson*. Nevertheless, it opined that the range of sanctions deemed "punishments" for Pardon Clause purposes was narrower than the range deemed "punishments" for statute-of-limitations purposes. Asserting that its proceedings are "designed to protect the public from individuals who have shown themselves unfit to be associated with a broker or dealer," the Commission held that the Bar Order was not punitive for purposes of the Pardon Clause. *Id.*

3. Having disclaimed any reliance on the Bar Order's conviction-related findings, the Commission held that the Bar Order's findings about the injunctive action were sufficient. Those findings, by their terms, do not actually "find" misconduct by Mr. Lewis. They merely recite that (1) Mr. Lewis was subject to an injunction (§ III-E); and (2) the Commission had *alleged* certain conduct in its injunctive complaint (§ III-F). J.A. __-__ (R.7 at 215a-216a). The injunctive order stated that Mr. Lewis was not "admitting or denying any of the allegations of the complaint" except as to jurisdiction. J.A. __ (R.7

[3] The Commission agreed that, if the civil injunction were vacated, the bar would have to be lifted. J.A. __ (R.18 at 9). It took "no position" on whether the district court should vacate the injunction. *Id.* at __ (R.18 at 9 n.31). In response, Mr. Lewis filed a Rule 60(b) motion to vacate the injunction. The Commission has now opposed that motion.

at 208a). Nevertheless, the Commission held that it could treat those allegations as established facts and give them "considerable weight" in assessing the public interest. See J.A. __-__ (R.18 at 6-7) ("We note that the Bar Order evaluates Lewis's underlying conduct."). The Commission further asserted that, because Mr. Lewis had consented to the injunction and Bar Order, he could neither challenge the Commission's allegations nor protest the absence of findings. *Id.* at __ (R.18 at 7 & nn. 23-24).

4. Finally, the Commission addressed whether there were equitable reasons to vacate the bar, even if the pardon did not require that result. It listed eight factors it considers when deciding petitions to vacate:

> [1] [T]he nature of the misconduct at issue in the underlying matter, [2] the time that has passed since issuance of the administrative bar, [3] the compliance record of, and regulatory interest in, the petitioner since issuance of the administrative bar, [4] the age and securities industry experience of the petitioner, [5] the extent to which the Commission has granted prior relief from the administrative bar, [6] whether the petitioner has identified verifiable, unanticipated consequences of the bar, [7] the position and persuasiveness of the Division of Enforcement, . . . and [8] whether there exists any other circumstances that would cause the requested relief from the administrative bar to be inconsistent with the public interest or the protection of investors.

J.A. __ (R.18 at 10). The Commission "acknowledge[d] that Lewis's distinguished career in the industry prior to his misconduct, his otherwise unblemished disciplinary record, and his charitable good works militate in favor of relief." J.A. __ (R.18 at 11). It agreed that "the pardon also weighs in Lewis's favor." *Id.* It did not dispute that Mr. Lewis's transgression was an "isolated incident." J.A. __ (R.7 at 171a). And it did not dispute that Mr. Lewis's misconduct, far from being motivated by personal gain, was

designed to thwart unethical and manipulative conduct by others. J.A. __ (R.18 at 11 n.38).

But the Commission stated that other factors pointed the other way: Mr. Lewis's misconduct was "serious"; the 14-year lapse of time was "not unduly lengthy"; Mr. Lewis had not sought prior relief or established a satisfactory subsequent compliance record; the Division of Enforcement supported the bar; and Mr. Lewis had "identifie[d] no unanticipated consequences from the bar." J.A. __ (R.18 at 11). The Commission concluded that it could not vacate the bar where "almost all" of its eight factors "counsel against granting relief." J.A. __-__ (R.18 at 11-12).[4]

SUMMARY OF ARGUMENT

The petition should be granted for four independent reasons.

I. It is undisputed that the Bar Order relied in part on Mr. Lewis's pardoned conviction, and that that reliance is now impermissible in light of the pardon. The Commission, applying what amounts to harmless-error analysis, concluded that the Bar Order survived because of its alternative reliance on the injunction. But there is at least a reasonable possibility that the conviction would have affected the Commission's "public interest" determination of which sanction to impose. The Commission's contrary rationale is fatally flawed. It disregards the Commission's statutory duty to consider the combined force of the conviction along with all other relevant factors; it purports to

[4] The Commission vacated the "collateral" portion of the Bar Order that prohibited Mr. Lewis from associating with a municipal securities dealer, investment adviser, or investment company. J.A. __ (R.18 at 13 & n.43). That relief was all but compelled by this Court's decision in *Teicher v. SEC*, 177 F.3d 1016 (D.C. Cir. 1999).

assess harmlessness when the Commission has never developed any record from which it could make that determination; and it fails to appreciate that the injunction itself was a product of the conviction.

II. Even apart from the admittedly improper reliance on the conviction, the Bar Order impermissibly punishes Mr. Lewis for his underlying offense. There can be no doubt that the Bar Order is punitive for statute-of-limitations purposes under *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996). The Commission nevertheless opined that "punishment" should be defined more narrowly when the President's constitutional prerogatives are at issue. History and precedent, however, support a broad interpretation of the pardon power. If a sanction is punitive under *Johnson*, it should also be punitive under the Pardon Clause.

III. The Commission's Order also ignored the standards governing the preclusive effects of a federal consent injunction. In its harmless-error analysis, the Commission treated the allegations in its injunctive complaint as established facts. But Mr. Lewis expressly refused to admit those allegations, and allegations underlying a consent judgment have no collateral-estoppel effects in subsequent proceedings. The Commission has no authority to modify the preclusive effects of a federal-court judgment.

IV. Finally, even if the pardon did not alone compel relief, the Commission's rationale for refusing to lift the bar on equitable grounds does not withstand scrutiny. The Commission violated its obligation to consider all relevant circumstances by refusing to give any weight at all to Mr. Lewis's motive for his offense—to thwart wrongdoing by

others. Although not a legal defense for his actions, that is plainly a mitigating factor entitled to consideration. The Commission, moreover, offered no adequate justification for applying a test that treated as only marginally relevant all the compelling factors warranting relief and gave dispositive weight to factors that were duplicative, uninformative, or applied in such a way as to be meaningless.

ARGUMENT

Throughout this proceeding, the Commission has never disputed that the one transgression that resulted in Mr. Lewis's current bar from the industry—now nearly two decades old—was an isolated departure from a decades-long record of scrupulous adherence to the highest ethical standards. Consistent with that, in 2001, the President exercised his constitutional authority under Article II, Section 2 of the Constitution to grant Mr. Lewis a full and unconditional pardon. The Commission's decision to uphold the 1990 Bar Order despite its reliance on that now-pardoned conviction infringes on the President's constitutional prerogatives. And the Commission's rationale for upholding the Bar Order cannot be reconciled with its own precedents or the ordinary requirements of administrative law.

I. THE COMMISSION IMPROPERLY UPHELD THE BAR ORDER DESPITE ITS CONCEDEDLY IMPERMISSIBLE RELIANCE ON A PARDONED CONVICTION

Whether the Bar Order survives the Presidential pardon is a question of law reviewed *de novo*. *Hirschberg v. CFTC*, 414 F.3d 679, 682 (7th Cir. 2005).

Two fundamental premises are not disputed in these proceedings. *First*, whatever other effects a Presidential pardon may have, it at least relieves the recipient of any

disabilities expressly based on the pardoned conviction. "[A]lthough the effects of the commission of the offense linger after a pardon, the effects of the conviction are all but wiped out." *Bjerkan v. United States*, 529 F.2d 125, 128 n.2 (7th Cir. 1975). That basic principle has been endorsed by the Office of Legal Counsel, see *Effects of a Presidential Pardon*, 19 Op. Off. Legal Counsel 160, 164 & n.2 (1995), by the courts, see *Bjerkan*, 529 F.2d at 128 & n.2; *In re Abrams*, 689 A.2d 6, 11 (D.C. 1997) (en banc); *United States v. Noonan*, 906 F.2d 952, 958-59 (3d Cir. 1990), and by the Commission itself, see J.A. __ (R.18 at 5 n.14). It applies to professional suspension or disqualification no less than any other disability. Although the underlying misconduct may still be considered for some purposes, "*any* deprivation of . . . the right to work in certain professions . . . on account of a [pardoned] federal *conviction*" constitutes "a restriction on the legitimate, constitutional power of the President to pardon an offense." *Bjerkan*, 529 F.2d at 128 (emphasis added).

Second, there is no dispute that the Commission in fact relied on Mr. Lewis's now-pardoned conviction in the Bar Order. Indeed, after the jurisdictional allegations, the conviction is the *first* factual finding the Bar Order makes. J.A. __ (R.7 at 215a). The Bar Order relied on the conviction in two different ways. First, it relied on the conviction and the injunction as the two statutory qualifying conditions authorizing sanctions. See J.A. __-__ (R.7 at 215a-216a); J.A. __-__ (R.18 at 3-4 & n.12). Second, the Bar Order relied on the conviction again to conclude that the draconian penalty of a lifetime bar was in the "public interest." See J.A. __ (R.7 at 216a) ("*Based upon the foregoing . . .*, the Commission deems it appropriate and in the public interest to impose the sanction

specified in Lewis' Offer." (emphasis added)). The criminal and injunctive proceedings are the *only* facts the Bar Order relies on. J.A. __-__ (R.7 at 215a-216a).

The Commission could have avoided any constitutional doubts about infringing on the Presidential pardon. It could have set the Bar Order aside and, if deemed appropriate, timely instituted another disciplinary proceeding. The Commission then could have determined, "on the record after notice and opportunity for a hearing," whether the two conditions for sanctions were still met—*i.e.*, (1) whether qualifying conditions other than the conviction existed; and (2) whether, under the totality of the circumstances excluding the conviction, the public interest still warranted the severe sanction of a lifetime bar. 15 U.S.C. § 78o(b)(6)(A). Had the Commission conducted such a proceeding, Mr. Lewis would have had a full and fair opportunity to present evidence about the circumstances of his offense and other mitigating factors counseling for a more moderate sanction.

The Commission, however, attempted to avoid that process by relying on what amounts to harmless-error analysis. It held that the Bar Order's reliance on the conviction was harmless because the civil injunction independently authorized that sanction. That analysis contradicts this Court's precedents and purports to find an error "harmless" when there is no basis in the record from which to make that determination. The Commission's order cannot be sustained.

A. Mr. Lewis Has Shown a Sufficient Possibility That the Lifetime Bar Would Not Have Been Imposed but for His Conviction

1. *The Bar Order Must Be Vacated Unless There Is No Reasonable Possibility That the Conviction Affected the Outcome*

The Commission asserted that "[a]gency action resting on several independent grounds remains valid if any of the grounds legitimately support the result, unless there is reason to believe that the combined force of these otherwise independent grounds influenced the outcome." J.A. __-__ (R.18 at 3-4). It then cited cases applying the harmless-error provision of the Administrative Procedure Act, 5 U.S.C. § 706, which states that, in judicial review of agency proceedings, "due account shall be taken of the rule of prejudicial error." See *id.* at 4 n.11 (citing *Indiana Mun. Power Agency v. FERC*, 56 F.3d 247, 256 (D.C. Cir. 1995); *Carnegie Nat. Gas Co. v. FERC*, 968 F.2d 1291, 1294-95 (D.C. Cir. 1992); and *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1183 (D.C. Cir. 2003)).

a. As an initial matter, it is far from clear that the cited harmless-error provision even applies here. Section 706 is a limitation on *judicial review* of agency proceedings. It does not purport to authorize agencies to ignore errors in their *own* proceedings. The purpose of the provision is to avoid needless remands. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality opinion). That purpose is not implicated when a case is still before an agency fully equipped to avoid the error by instituting the proper proceedings.

Liberal harmless-error analysis, moreover, is particularly inappropriate here. This case concerns not merely the severe sanction of a lifetime bar, but the President's

exclusive constitutional prerogative to issue pardons, an authority no other branch of government can curtail. See *Ex parte Garland*, 71 U.S. 333, 380 (1866). In granting that power, the Framers made a conscious decision to confer an "undivided" pardon power on "one man," so that "the benign prerogative of pardoning should be as little as possible fettered or embarrassed." The Federalist No. 74 (Hamilton). Agencies must not be permitted to subvert the President's sole judgment. Unless harmless-error analysis is reserved for cases where it is clear beyond doubt that a disability would have been imposed even absent the conviction, agencies will inevitably let stand sanctions that the President's exercise of his constitutional pardon power should eliminate.

This Court has adjusted its normal harmless-error standards in other contexts involving important constitutional values. For example, the harmless-error rule applies "gingerly, if at all," where a petitioner was denied fundamental procedural rights. See *Aero Mayflower Transit Co., Inc. v. ICC*, 711 F.2d 224, 232 n.49 (D.C. Cir. 1983); *Doe v. Hampton*, 566 F.2d 265, 278 n.29 (D.C. Cir. 1977); cf. *Sprint Corp. v. FCC*, 315 F.3d 369, 377 (D.C. Cir. 2003). Protecting the President's pardon power is just as important a constitutional imperative. For that reason, where a professional disqualification rests on both a pardoned conviction and another permissible ground, the *agency* should bear the burden of proving harmlessness, and reliance on the conviction should be overlooked only if harmless beyond a reasonable doubt. Cf. *Chapman v. California*, 386 U.S. 18, 23-24 (1967) (requiring states to evaluate federal constitutional errors under a "beyond a reasonable doubt" standard, even where state law prescribes a different standard).

b. Constitutional considerations aside, moreover, a party asserting prejudicial error in agency proceedings need not show that, but for the error, the result of the proceeding *would have been* different. Rather, the party need only show *some possibility* of a different result. This Court has made that point repeatedly: "[The] APA's 'prejudicial error' rule . . . requires only a *possibility* that the error would have resulted in *some* change . . . ." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 521 (D.C. Cir. 1983) (emphasis in original); see also *Salt River Project Agric. Imp. & Power Dist. v. United States*, 762 F.2d 1053, 1060 n.8 (D.C. Cir. 1985) (a "*significant chance* that but for the errors the agency might have reached a different result" (emphasis added)). "[T]he standard for demonstrating lack of prejudicial error is strict. 'Agency mistakes constitute harmless error [under APA § 706] only where they *clearly had no bearing* on the procedure used or the substance of [the] decision reached.' " *New York Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 334 n.13 (2d Cir. 2003) (quoting *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 444 (5th Cir. 2001)) (emphasis added). Section 706 therefore requires a lesser likelihood of prejudice than the harmless-error standard applicable to district court errors. *Unification Church v. Attorney General*, 581 F.2d 870, 873 (D.C. Cir. 1978).[5] Even under that standard, the Commission's Order cannot withstand scrutiny.

[5] See also *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1031 n. 27 (D.C. Cir. 1978) ("[I]f we *cannot be sure* that under the correct procedures the Agency would have reached the same conclusion, we cannot characterize the defect as harmless." (emphasis added)); *Consolidated Gas Supply Corp. v. FERC*, 606 F.2d 323, 329 (D.C. Cir. 1979) (error prejudicial if there is "substantial doubt" whether agency would have reached the same

2. *Mr. Lewis's Conviction Was Central to the Commission's Decision to Impose a Lifetime Bar*

The record shows far more than a reasonable possibility that Mr. Lewis's conviction affected the Commission's 1990 decision to impose the bar.

The imposition of sanctions under Section 15(b)(6)(A) is a two-step process. First, the Commission must determine whether one of the three statutory conditions authorizing sanctions (a violation, conviction, or injunction) exists. 15 U.S.C. § 78o(b)(6)(A)(i)-(iii). Second, the Commission must determine, based on the totality of the circumstances, which particular sanction—a censure, limitation, suspension, or lifetime bar—is in the "public interest." *Id.* § 78o(b)(6)(A). As this Court observed in *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099 (D.C. Cir. 1988), that " 'public interest' determination is separate from and in addition to the SEC's determination as to the existence of the disqualifying conditions necessary for the imposition of any sanctions." *Id.* at 1109.

In the Bar Order, the Commission relied on the conviction at both steps. First, the conviction authorized sanctions under subsection (ii) of Section 15(b)(6)(A) because Mr. Lewis had been "convicted of any offense specified . . . within 10 years of the commencement of the proceedings." 15 U.S.C. § 78o(b)(6)(A)(ii). Second, the conviction was a factor supporting the Commission's conclusion that the public interest warranted the most severe sanction at its disposal—a lifetime bar. While the Bar Order's

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result); *Mid-Tex Elec. Coop., Inc. v. FERC*, 773 F.2d 327, 353 (D.C. Cir. 1985) (court must agree that agency "would *necessarily* have reached the same decision" (emphasis added)).

reliance on the conviction may have been harmless at that first step (because the injunction also authorized sanctions under subsection (iii)), it was not harmless at the second. The Bar Order itself, precedent, and Commission practice provide overwhelming reason to believe that the conviction affected the Commission's public-interest determination to impose the most draconian sanction available.

On the face of the Bar Order, the criminal proceedings comprise the first two of only four non-jurisdictional findings—they thus make up *half* the relevant findings, and their placement at the beginning naturally suggests the agency deemed them most important. J.A. __-__ (R.7 at 215a-216a). Aside from the criminal and injunctive proceedings, the Bar Order contains no findings about Mr. Lewis's underlying misconduct or other circumstances that might warrant the bar. Even the injunction-related findings recite only that the agency *alleged* certain misconduct; Mr. Lewis never admitted those allegations. *See id.*; pp. 39-42, *infra*. It is thus clear from the face of the order that it relied heavily on Mr. Lewis's conviction.

In fact, this Court's precedents *require* the agency to consider the conviction. In *Blinder, Robinson*, this Court explained that "[t]he 'public interest' standard is obviously very broad, requiring that the Commission consider the full range of factors bearing on the judgment about sanctions that the expert agency ultimately must render." 837 F.2d at 1110 (emphasis omitted). In assessing the public interest, "the SEC cannot turn a deaf ear to evidence that should, in reason, bear upon the judgment that the Commission is called upon to render." *Id.* at 1111. The conviction plainly falls into that category. A criminal conviction is far more grave than a mere civil penalty, even when based on the

same underlying conduct. It shows that the offense was deemed serious enough to warrant prosecution by those charged with enforcing the Nation's criminal laws—serious enough to warrant not merely monetary sanctions but a potential loss of liberty. And it deprives the individual of many basic civil rights, including the right to vote. The branding of an individual as a convicted felon reflects utmost societal opprobrium.

The Commission itself has recognized the "combined force" of convictions and injunctions in the public-interest analysis, even when they are based on the same underlying conduct and either by itself would authorize sanctions. In *Application of Dennis Milewitz*, Exchange Act Rel. No. 40254, 1998 WL 409449 (July 23, 1998), the petitioner was subject to both a conviction and an injunction for the same conduct. He argued that the NASD could consider only one factor because they were both "based on the same conduct . . . and therefore 'should not be "counted" separately.' " *Id.* at *5. The Commission rejected that argument. "No precedent is cited for this proposition," it declared. To the contrary, because the petitioner was "subject to two distinct statutory disqualifications, . . . it is appropriate for the NASD to consider both in evaluating the application." *Id.* The Commission has relied on convictions in its public-interest analysis in countless other cases.[6]

[6] See, *e.g.*, *In the Matter of Charles Phillip Elliott*, Exchange Act Rel. No. 31202, 1992 WL 258850, at *3-4 & nn.19, 22 (Sept. 17, 1992) ("Elliott's conviction and injunction demonstrate that the public interest warrants his bar . . . ."); *In the Matter of Frederick W. Wall*, Exchange Act Rel. No. 52467, 2005 WL 2291407, at *3 (Sept. 19, 2005) ("[T]he existence of a conviction is a proper basis for imposition of remedial sanctions in the public interest."); *In the Matter of Demitrios Julius Shiva*, Exchange Act Rel. No. 38389,

This Court has refused to find agency errors harmless in comparable circumstances. In *PDK Labs. Inc. v. DEA*, 362 F.3d 786 (D.C. Cir. 2004), for example, this Court reviewed a DEA suspension order based in part on potentially invalid findings of export violations. This Court refused to deem the error harmless:

> The Deputy Administrator stated that it was "the totality of circumstances" that led him to sustain the suspension orders, and four of the "circumstances" prominently mentioned were PDK's export violations. What weight he gave to those circumstances (or any others) is impossible to discern. The decision upholding the suspension orders must therefore be set aside and the case remanded.

Id. at 799 (citation omitted). The error here is even more clearly prejudicial. Just like the suspension order in *PDK*, the Commission's public-interest finding was based on the totality of the circumstances. Just as in *PDK*, the invalid circumstances were "prominently mentioned" among the Bar Order's findings. In *PDK* it was "impossible to discern" how much weight was given to the invalid circumstances. Here, there is every reason to believe the conviction was given the *most* weight. Just as in *PDK*, therefore, the order must be set aside.

B. The Commission's Contrary Rationale Ignores Precedent and Lacks an Evidentiary Basis in the Record

The Commission nevertheless found the Bar Order's reliance on the conviction harmless. It declared:

> The Bar Order contains no suggestion that the combined force of the conviction and injunction influenced the outcome, and we impute no such synthesis where the injunction alone authorizes the bar. Lewis contends

1997 WL 112328, at *3 (Mar. 12, 1997) ("Shiva's prior conviction is relevant to the determination of what sanctions are in the public interest.").

> that the Bar Order did not state that the injunction itself warranted the bar. The Bar Order, however, contains no indication that the Commission would have reached a different result had Lewis been subject solely to an injunction. Indeed, the seriousness of Lewis's underlying conduct suggests that the Commission would have sought the bar against Lewis based on the injunction regardless of any criminal proceedings.

J.A. __-__ (R.18 at 4-5) (footnotes omitted). That analysis was flawed in multiple respects.

1. *The Commission's Rationale Ignores Its Obligation to Consider the Combined Force of All Relevant Facts*

The Commission's refusal to "impute" any "synthesis" to the conviction and injunction, J.A. __ (R.18 at 4), flies in the face of precedent. Under *Blinder, Robinson*, the Commission had a *statutory duty* to consider the combined force of all relevant circumstances when conducting its public-interest analysis. 837 F.2d at 1110-11. And the Commission itself has acknowledged that, where a petitioner is "subject to two distinct statutory disqualifications, . . . it is appropriate . . . to consider both." *Milewitz*, 1998 WL 409449, at *5; see p. 24, *supra*.

That the "injunction alone authorizes the bar" is thus irrelevant. As this Court made clear in *Blinder, Robinson*, the " 'public interest' determination is separate from and in addition to the SEC's determination as to the existence of the disqualifying conditions necessary for the imposition of any sanctions." 837 F.2d at 1109. While the injunction might justify a finding that the conviction did not affect whether sanctions were *authorized*, it cannot justify a finding that the conviction did not affect the public-interest determination of *which particular sanction to impose*. As to that second step, the Commission was *required* to consider all relevant facts in combination.

That the Bar Order "contains no suggestion" that the Commission considered the combined effect of the conviction and injunction, J.A. __ (R.18 at 4), is likewise immaterial. This Court's precedents and the Commission's own prior decisions *required* it to consider that combined effect. The error was harmless only if the Commission ignored its obligations.

2. *The Commission Lacked an Evidentiary Basis for Concluding That It Would Have Reached the Same Result Absent the Conviction*

The Commission's only other effort to establish harmlessness was its assertion that "the seriousness of Lewis's underlying conduct *suggests* that the Commission would have sought the bar against Lewis based on the injunction regardless of any criminal proceedings." J.A. __-__ (R.18 at 4-5) (emphasis added). Mere "suggestions," of course, are not enough to insulate agency error—there must be *no reasonable possibility* that the invalid consideration affected the result. See pp. 19-21, *supra*. But, whatever the standard, the Commission had no evidentiary basis in the record from which to make that assessment. The public-interest standard requires the Commission to consider all relevant circumstances. *Blinder, Robinson,* 837 F.2d at 1110. For that reason, "in meting out sanctions, the Commission cannot adequately weigh the factors that it concedes should be considered without having before it the full set of facts necessary for reasoned consideration." *Id.* at 1112.

Because the Bar Order was never litigated, the Commission can only speculate about the full set of facts and what it would have done based on those facts. The Commission never conducted any investigation, never held the otherwise statutorily-

required hearing to evaluate Mr. Lewis's background and conduct, 15 U.S.C. § 78o(b)(6)(A), and made no findings beyond the pleadings and results of prior proceedings. Those omissions were permissible at the time because both parties consented. But the consequence of that failure to develop the record is that it is now impossible for the Commission to perform harmless-error review. How can the Commission possibly know that the seriousness of the offense alone made a lifetime bar inevitable? Lesser penalties have often been imposed, even in cases involving fraud or manipulation. See, *e.g.*, *In the Matter of Richmark Capital Corp.*, Rel. No. ID-201, 2002 WL 412145, at *26-31 (Mar. 18, 2002) (ninety-day suspension for "concerted efforts" to manipulate stock price to "increase . . . compensation"), *aff'd*, Exchange Act Rel. No. 48758, 2003 WL 22570712 (Nov. 7, 2003); *In the Matter of Richardt-Alyn & Co.*, Rel. No. ID-151, 1999 WL 777449, at *15-19 (Sept. 30, 1999) (censure and monetary penalties for "deceiv[ing] and defraud[ing]" customers by "execut[ing] . . . trades with market makers at prices that were better than the prices they disclosed . . . , and retain[ing] the undisclosed trading profits"), *modified in other respects*, Exchange Act Rel. No. 43241, 2000 WL 1597385 (Sept. 1, 2000); *In the Matter of Monness, Crespi, Hardt & Co.*, Exchange Act Rel. No. 7334, 1996 WL 536524, at *2-5 (Sept. 23, 1996) (censure and monetary penalties for defrauding client of more than $2 million); see also *In the Matter of Marshall E. Melton*, Advisers Act Rel. No. 2151, 2003 WL 21729839, at *8 (July 25, 2003) (although an antifraud injunction "can, in the first instance, indicate the appropriateness in the public interest" of a bar, "[o]f course, respondents have the

opportunity to demonstrate that, notwithstanding the antifraud injunction, the public interest does not support" one).

Even on the limited record here, it is clear that Mr. Lewis is much less culpable than any of the respondents in those cases. The Commission does not deny that Mr. Lewis's conduct was an "isolated incident." J.A. __ (R.7 at 171a). Nor has it denied in these proceedings that, far from seeking personal gain, Mr. Lewis sought to defeat unethical conduct by others—conduct the Commission itself has since outlawed. Many other compelling mitigating circumstances exist. See pp. 46-50, *infra*. The Commission can only speculate what else a fully developed record might have shown. Without "the full set of facts necessary for reasoned consideration," *Blinder, Robinson*, 837 F.2d at 1112, the Commission has no basis for concluding that the offense itself rendered a lifetime bar inevitable.

The Commission misses the point when it asserts that, because Mr. Lewis consented to the Bar Order, he "may not now protest that the text of the Bar Order failed to include separate findings about his conduct." J.A. __ (R.18 at 7). Our claim is not that the Bar Order was invalid on issuance for lack of factual findings. The problem is that what the Commission did rely on—the conviction—is now conceded to be an impermissible basis. The Commission cannot *now* claim that reliance on the conviction was harmless by invoking a single factor (alleged seriousness of the offense) when it never investigated or evaluated the "full range of factors bearing on the judgment about sanctions"—including compelling facts in mitigation—that it would have been required to consider. *Blinder, Robinson*, 837 F.2d at 1110. Harmless-error analysis, like any

agency decision, must be grounded on record evidence. Having chosen not to develop the record further, the Commission cannot rely on sheer speculation instead.

3. *The Commission Failed to Consider Whether the Injunctive Proceedings Were a Product of the Conviction*

Finally, the Commission's harmless-error analysis was flawed because it gave no consideration to whether the Commission's decision to pursue an injunction against Mr. Lewis was itself a product of the conviction. The Commission's decision to file the civil complaint was plainly affected by the criminal proceedings; the Commission conducted no independent investigation and alleged the same conduct to which Mr. Lewis had pled guilty. Moreover, Mr. Lewis's *consent* to the injunction was clearly affected by the conviction as well. Because he had already pled guilty to the same conduct, he *could not have disputed* the Commission's allegations in the civil proceedings. See *SEC v. Bilzerian*, 29 F.3d 689, 693-94 (D.C. Cir. 1994). To say that the injunction was nevertheless "independent" from the criminal conviction blinks reality.

II. THE BAR ORDER INFRINGES ON THE PRESIDENT'S PARDON POWER BECAUSE IT PUNISHES MR. LEWIS FOR HIS PARDONED OFFENSE

Even aside from its impermissible reliance on the conviction, the Bar Order infringes on the President's pardon power in a second respect: It impermissibly *punishes* Mr. Lewis for his misconduct. Whether the Bar Order infringes on the President's pardon power is reviewed *de novo*. *Hirschberg*, 414 F.3d at 682.

A. The Commission May Not Impose a Lifetime Bar for a Pardoned Offense If That Bar Constitutes Punishment

For centuries, courts followed the expansive view that a pardon rendered the individual legally innocent of the underlying offense. See, *e.g.*, *Ex parte Garland*, 71 U.S. 333, 380 (1866) (pardon "blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence"). Although modern courts have departed from that understanding and allowed consideration of the conduct underlying the conviction in various circumstances, one limit remains undisputed: An agency may not impose a *punishment or penalty* for the underlying conduct, even if it avoids relying on the conviction itself. Thus, even as this Court rejected *Garland*'s dictum that a pardon "blots out guilt," it reaffirmed that a pardon bars "punishment" for the underlying offense. *In re North*, 62 F.3d 1434, 1436-37 (D.C. Cir. 1994) (explaining *Garland* on the ground that the disability there "was punishment, which the pardon barred"). If the Bar Order constitutes "punishment," it cannot survive the pardon—whether it relies on the conviction, the injunction, or the underlying misconduct.

Professional disqualification often constitutes punishment. *Garland* itself held a statutory disqualification of attorneys "punishment." 71 U.S. at 380. Modern cases have reached the same conclusion in various contexts. See, *e.g.*, *In re Ruffalo*, 390 U.S. 544, 550 (1968) ("[d]isbarment . . . is a punishment or penalty"); *Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 852-53 (1984) ("legislative bars to

participation . . . in specific employments or professions" are among the "burdens historically associated with punishment").

In *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996), this Court addressed whether a six-month SEC suspension was a "penalty" or "punishment" for purposes of the federal statute of limitations in 28 U.S.C. § 2462. The Court noted that a sanction that "restricted Johnson's ability to earn a living" "clearly resemble[s] punishment in the ordinary sense of the word." *Id.* at 488-89. Crucially, the Commission had made no inquiry into present fitness or threat to the public but had relied exclusively on past misconduct instead:

> This sanction would less resemble punishment if the SEC had focused on Johnson's current competence or the degree of risk she posed to the public. Despite the SEC's claims to the contrary, however, it is evident that the sanctions here were not based on any general finding of Johnson's unfitness as a supervisor, nor any showing of the risk she posed to the public, but rather were based on Johnson's alleged failure reasonably to supervise . . . .

Id. at 489; *see also Koch v. SEC*, 177 F.3d 784, 787 (9th Cir. 1999) (disqualification is "meant to punish . . . misconduct" even though "the point of any such proceeding is always . . . to protect the public from individuals who have shown themselves unfit").

The Bar Order clearly constitutes punishment under *Johnson*. Far more than the six-month suspension there, the lifetime bar "restrict[s] [Mr. Lewis's] ability to earn a living" and thus "clearly resemble[s] punishment in the ordinary sense of the word." 87 F.3d at 488-89. Most importantly, just as in *Johnson*, the Bar Order makes no holistic assessment of current fitness or threat to the public. Instead, the Commission issued an "indictment-like document," *id.* at 489, that simply identified past events—an isolated and aberrant episode in a lifetime of upstanding conduct—and imposed the most severe

sanction available. Indeed, the Bar Order itself states that it is imposing "sanctions." J.A. __ (R.7 at 215a).

B. The Commission Applied the Wrong Legal Standard in Determining Whether the Bar Order Was Punitive

The Commission nevertheless opined that the Bar Order was not punishment because, in general, its disciplinary sanctions are "designed to protect the public from individuals who have shown themselves unfit." J.A. __ (R.18 at 8 n.26). This Court rejected precisely that argument in *Johnson*: "The SEC argues that 'the history and common understanding of such professional sanctions has always been one associated with regulation and remedial purposes, not with punishment.' This statement is not persuasive." 87 F.3d at 488 n.6 (citation omitted).

The Commission therefore contends that *Johnson* does not apply here—that "punishment" is defined *less* broadly when the President's constitutional prerogatives are at issue than for statute-of-limitations purposes. J.A. __-__ (R.18 at 8-9 n.26). As explained below, that position is impossible to reconcile with the historically broad reach of the pardon power. Even if a pardon does not "blot out guilt," history favors a broad interpretation of the "punishments" susceptible to pardon. That category includes, at the very least, disqualifications that are punitive under *Johnson*—those based solely on past misconduct rather than a holistic assessment of current fitness or threat to the public. To hold otherwise would eviscerate the pardon power.

1. *The Pardon Power Traditionally Reached a Broad Range of Legal Disabilities*

In *Ex parte Garland*, 71 U.S. 333 (1866), the Supreme Court held that a pardon prevailed over a law disqualifying attorneys who had committed treason. The government defended the statute as relevant to attorneys' fitness to practice, but the majority held that it constituted punishment nonetheless:

> [E]xclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct.

Id. at 377, 381. The dissent protested that the majority had defined "punishment" too broadly:

> [T]he fatal vice in the reasoning of the majority is in the meaning which they attach to the word punishment . . . [I]t is in [a] loose sense that the word is used by this court, as synonymous with chastisement, correction, loss, or suffering to the party supposed to be punished, and not in the legal sense, which signifies a penalty inflicted for the commission of crime.

Id. at 392-93 (Miller, J., dissenting). It also observed that treason was relevant to fitness:

> [F]idelity to the government under which he lives, a true and loyal attachment to it, and a sincere desire for its preservation, are among the most essential qualities which should be required in a lawyer . . . .

Id. at 385.

The Commission's narrow view of punishment cannot be squared with the result in *Garland*. The disqualification in *Garland* was based on underlying conduct; no conviction was at issue. Moreover, nothing in the majority opinion suggests its holding turned on whether treason was relevant to fitness (as surely it is). Rather, *Garland* reached the result it did because it defined "punishment" broadly (much like *Johnson*) to

encompass professional disqualifications based on past misconduct rather than current fitness or threat to the public. *Garland* is consistent with a long line of English[7] and American[8] authorities defining the pardon power broadly. The Commission's argument, by contrast, is the one the *dissent* made in *Garland*. That view did not prevail then, and it cannot prevail now.

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[7] See *Cuddington v. Wilkins*, 80 Eng. Rep. 231, 231-32 (1615) (allowing slander suit by pardoned offender called a "thief"; "the whole Court were of opinion, that though he was a thief once, yet when the pardon came, it took away not only[] poenam but reatum [*i.e.*, not only punishment, but guilt]. . . . [T]he King's pardon doth not only clear the offence itself, but all the dependencies, penalties, and disabilities incident unto it . . . ."); *Celier's Case*, 83 Eng. Rep. 192, 192 (1680) (pardoned offender competent to testify; "the pardon takes away not only *poenam*, but *reatum* [*i.e.*, not only punishment, but guilt]"); 4 William Blackstone, Commentaries on the Laws of England 396 (1769) ("[T]he effect of such pardon by the king, is to make the offender a new man . . . and not so much to restore his former, as to give him a new, credit and capacity."); 2 William Hawkins, A Treatise of the Pleas of the Crown ch. 37, § 48, at 558 (T. Leach 6th ed. 1788) (pardon "makes him as it were a new man, and gives him a new capacity and credit").

[8] See *Brown v. Walker*, 161 U.S. 591, 599 (1896) (recipient "stands, with respect to such offense, as if it had never been committed"); *Knote v. United States*, 95 U.S. 149, 153 (1877) (pardon "releases the offender from all disabilities imposed by the offence"); *Osborn v. United States*, 91 U.S. 474, 477 (1875) (pardon "releases the offender from the consequences of his offence"); *Carlisle v. United States*, 83 U.S. 147, 151 (1872) (pardon "obliterates in legal contemplation the offence itself"); *Armstrong v. United States*, 80 U.S. 154, 155 (1871) (pardon "blots out the offence"); *United States v. Klein*, 80 U.S. 128, 147 (1871) (pardon "blots out the offence"); *United States v. Padelford*, 76 U.S. 531, 543 (1869) (recipient is "purged of whatever offence . . . he had committed"). The leading nineteenth-century American criminal-law treatise stated:

> It is impossible, therefore, to doubt, that, in the law, a pardon is a remission, not merely of the punishment of guilt, but of the guilt itself. . . .
>
> A full pardon absolves the party from all the legal consequences of his crime, and of his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty, or whatever else the law has provided.

1 Joel P. Bishop, Commentaries on the Criminal Law §§ 898, 916, at 541-42 n.2, 555-56 (7th ed. 1882).

2. *The Commission Takes Too Narrow a View of the Pardon Power*

Despite that historical authority, some modern commentators have advocated a much narrower view of the President's pardon power. They have suggested that professional disqualification should be deemed *per se* permissible so long as it is based on the underlying conduct rather than the conviction and the conduct has some relevance to fitness—even if the disqualification is based *entirely* on the pardoned offense, with no consideration of other relevant facts. That extreme approach first became popular after it appeared in Samuel Williston's 1915 law review article, *Does a Pardon Blot Out Guilt?*, 28 Harv. L. Rev. 647, 653 (1915).

Williston's principal point—that a pardon does not "blot out guilt"—may well be correct. Underlying misconduct and even the conviction itself may be considered for a variety of purposes. See, *e.g.*, *Carlesi v. New York*, 233 U.S. 51, 58-59 (1914) (repeat-offender sentencing); *Knote v. United States*, 95 U.S. 149, 154 (1877) (recovery of fines paid to public treasury); *Garland*, 71 U.S. at 381 (rights vested in third parties); *Richards v. United States*, 192 F.2d 602, 606 (D.C. Cir. 1951) (impeachment of credibility); *United States v. Noonan*, 906 F.2d 952, 958-60 (3d Cir. 1990) (expunction).

But the further claim that professional disqualification *never* constitutes punishment so long as it is based on conduct relevant to fitness, and not the conviction itself, has no support in text or history. The Pardon Clause gives the President authority to pardon "offences," not "convictions," U.S. Const. art. II, § 2, and crimes may be pardoned even if there has been no conviction, see *Garland*, 71 U.S. at 380; 19 Op. Off.

Legal Counsel at 164-65; 1 Bishop, *supra*, § 903, at 545. Williston's discussion on this point was not even supported by the authorities he relied on.[9]

To allow an agency to impose any sanction, however punitive, just because past conduct is relevant to fitness would seriously erode the President's pardon power. Professional disqualification would then virtually *never* constitute punishment—even though courts have recognized time and again that banishment from a profession is a "burden[] historically associated with punishment." *Selective Serv. Sys.*, 468 U.S. at 853; pp. 31-32, *supra*.

3. *This Court Should Apply Its* Johnson *Standard in the Pardon Context*

This Court should follow the *Johnson* standard. If an agency considers an offender's conduct *along with all other relevant circumstances* to determine fitness, a decision excluding him is not punitive and will survive a pardon. But an agency may not bar an individual solely on the basis of a pardoned offense.

[9] Williston pointed out two subtleties of English law: First, *Cuddington*'s rule that it was slander to call a pardoned offender a "thief" did not apply to a past-tense statement that he *was* a thief; and second, *Celier*'s rule that a pardoned felon was competent to testify did not preclude his conviction from being used to impeach him. Williston, *supra*, at 651-52. Neither of those rules, however, had anything to do with a distinction between conviction and underlying conduct. Nothing in *Cuddington* turned on whether the slander referred to the conviction or the underlying crime; there is no indication that the plaintiff was even convicted. See 80 Eng. Rep. at 231-32. The distinction was between statements of historical fact and statements improperly suggesting that those historical facts still had present legal significance. Likewise, the impeachment exception to *Celier*'s rule had nothing to do with a distinction between conviction and underlying conduct—even a pardoned *conviction* could be used to impeach a witness's credibility. See *Rookwood's Case*, 90 Eng. Rep. 1277, 1278 (1696) ("the conviction indeed might be objected to his credit"); 1 Bishop, *supra*, § 917, at 557 ("Even then the conviction may be shown as impairing the witness's credit.").

That approach is consistent with the treatment of pardons in other contexts. Historically, for example, a pardon restored a witness's competence to testify, but a jury could still consider the crime along with all other relevant circumstances in assessing credibility. *Celier's Case*, 83 Eng. Rep. 192, 192 (1680); *Rookwood's Case*, 90 Eng. Rep. 1277, 1278 (1696); *Boyd v. United States*, 142 U.S. 450, 453-54 (1892); *Richards*, 192 F.2d at 606. Likewise here, the Commission may not categorically exclude Mr. Lewis solely because of his pardoned offense, but it may consider his misconduct *along with all other relevant circumstances* in assessing fitness.

The *Johnson* standard is also consistent with the results of modern cases. See *In re Abrams*, 689 A.2d 6 (D.C. 1997) (en banc) (5-4 decision); *Hirschberg v. CFTC*, 414 F.3d 679 (7th Cir. 2005); *Grossgold v. Supreme Court of Illinois*, 557 F.2d 122 (7th Cir. 1977). Although there is language in those cases endorsing a narrower view, their results are consistent with *Johnson*. In *Abrams* and *Hirschberg*, the agency made an explicit fitness determination based on the totality of the circumstances before imposing sanctions. See *Abrams*, 689 A.2d at 21 (Schwelb, J.) (reviewing "mitigating factors"); *Hirschberg*, 414 F.3d at 684 (agency evaluated "evidence in mitigation or of rehabilitation"). In *Grossgold*, the pardon discussion was dictum because the court had already concluded that it lacked subject-matter jurisdiction. See 557 F.2d at 125; accord *Abrams*, 689 A.2d at 13 n.13 ("The discussion in *Grossgold* of the effect of a pardon must be regarded as dictum . . . ."). Moreover, none of those cases considered whether to adopt this Court's approach in *Johnson*, and thus cannot be read as rejecting it.

The Bar Order, like the suspension in *Johnson*, is based solely on past misconduct without any inquiry into whether Mr. Lewis is currently unfit or poses a threat to the public. It reflects no independent investigation or evaluation at all. The Commission could impose a disability if, after developing a full record, it timely determined that Mr. Lewis presents a threat to the industry or is otherwise so unfit as to warrant a bar. But the Commission has not undertaken that inquiry. And with good reason—nothing else in Mr. Lewis's history could even remotely warrant the penalty imposed. Mr. Lewis's compliance has been exemplary for decades: His one transgression was aberrant and isolated; the Commission has never claimed otherwise. Mr. Lewis has selflessly contributed to the industry and the community. Under *Johnson*, a bar order that ignores those factors is punitive for statute-of-limitations purposes. It would be incongruous to reach a contrary result when the President's constitutional pardon power is at issue.

III. THE COMMISSION ERRED BY TREATING THE ALLEGATIONS IN THE INJUNCTIVE COMPLAINT AS IF THEY WERE ESTABLISHED FACTS

Even accepting the Commission's flawed harmless-error analysis and its crabbed view of the pardon power, its Order still cannot be sustained. The Commission relied on a single rationale for upholding the Bar Order: that it had "evaluate[d]" Mr. Lewis's misconduct by citing the earlier allegations in its injunctive complaint. J.A. __-__ (R.18 at 6-7). Of course, that rationale is insufficient even on its own terms because the Commission never evaluated *other* circumstances it would have to consider in its public-interest analysis. See pp. 27-29, *supra*. But it fails for a more basic reason as well: The Commission violated settled law by treating the allegations in its injunctive complaint as

if they were established facts. Whether the Commission misinterpreted the preclusive effects of the injunctive proceedings is a question of law reviewed *de novo*. See *United States v. Smith-Baltiher*, 424 F.3d 913, 919 (9th Cir. 2005).

The Commission has never proved its allegations in court or held any sort of administrative hearing to determine them. And the injunctive order expressly states that Mr. Lewis was neither admitting nor denying those allegations. J.A. __ (R.7 at 208a). Allegations in *litigated* cases may have issue-preclusive effects in subsequent proceedings. See, *e.g.*, *SEC v. Bilzerian*, 29 F.3d 689, 693-94 (D.C. Cir. 1994); *Blinder, Robinson*, 837 F.2d at 1109-10. But precisely the opposite is true of allegations underlying a *consent* judgment—they ordinarily have no issue-preclusive effects and cannot be relied on as established facts in later proceedings. See *S. Pac. Commc'ns Co. v. AT&T*, 740 F.2d 1011, 1021 (D.C. Cir. 1984) (consent judgment has collateral estoppel effects "only when 'it is clear that the parties intended the stipulation of settlement and judgment entered thereon to adjudicate once and for all the issues raised in that action.' . . . The consent decree must contain 'far-reaching, preclusive language.'" (quoting *Yachts Am., Inc. v. United States*, 673 F.2d 356, 362 (Ct. Cl. 1982)); *Hughes v. Santa Fe Int'l Corp.*, 847 F.2d 239, 241 (5th Cir. 1988) ("A consent judgment ordinarily does not give rise to issue preclusion because the issues underlying the judgment are neither actually litigated nor necessary and essential to the judgment. However, consent judgments will be given preclusive effect if the parties manifest such an intention." (citations omitted)); *Balbirer v. Austin*, 790 F.2d 1524, 1528 (11th Cir. 1986); *La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.V.*, 914 F.2d 900, 906 (7th Cir. 1990).

The Commission reached the opposite result based on its decision in *In the Matter of Marshall E. Melton*, Advisers Act Rel. No. 2151, 2003 WL 21729839 (July 25, 2003). In *Melton*, the Commission stated that it would henceforth "rely on the factual allegations of the injunctive complaint in determining the appropriate remedial sanction in the public interest" in later administrative proceedings, and that it would "construe . . . 'neither admit nor deny' language [in an injunctive order] as precluding a person who has consented to an injunction in a Commission enforcement action from denying the factual allegations of the injunctive complaint in a follow-on proceeding before the agency." *Id.* at *8-9. The Commission justified that rule on the ground that it would be "illogical and a waste of resources" not to treat injunctive allegations as conclusively established in later administrative proceedings. *Id.* at *8. It "ma[de] no attempt to compare and contrast [that policy] with [its] traditional policy." *Id.* at *7.

The Commission, however, has no authority to modify the preclusive effects of a federal-court judgment. See *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507 (2001) (federal judiciary has "the last word" on the preclusive effects of its own judgments); cf. Restatement (Second) of Conflict of Laws § 95 (1971) (issue-preclusive effects of a judgment are determined by the jurisdiction that rendered it). If the Commission believes that the normal rules of collateral estoppel are "illogical and a waste of resources," *Melton*, 2003 WL 21729839, at *8, it should insist that consent injunctions include a stipulation that the allegations will be binding in later administrative proceedings. But an agency may not adopt an aberrant rule of collateral estoppel (one that uniformly favors the agency and is justified only by the agency's own convenience)

and then apply that rule even where the agency expressly agreed that the defendant was not admitting its allegations.

The Commission's assertion that Mr. Lewis cannot contest the absence of findings because he consented to both the injunction and the Bar Order, J.A. __ (R.18 at 7), misses the mark. Consent to the injunction is irrelevant because Mr. Lewis is not collaterally attacking the injunction—it exists and concededly authorizes sanctions under Section 15(b)(6)(A)(iii). Mr. Lewis disputes only the Commission's authority to treat the *allegations in its injunctive complaint* as established facts in later proceedings. That Mr. Lewis consented to the injunction does not mean he also consented to whatever collateral-estoppel effects the Commission unilaterally chooses to attach to the allegations in its injunctive complaint. To the contrary, Mr. Lewis refused to admit the allegations, and the Commission agreed to terminate proceedings without proving its allegations in court. Mr. Lewis's consent to the Bar Order is likewise irrelevant. See pp. 29-30, *supra*. A party who consents to an order does not thereby waive his right to complain even when subsequent developments render the order invalid. See, *e.g.*, *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). Nor does his consent allow the other party to ignore traditional rules of issue preclusion, or make up whatever findings are necessary, to salvage the order when such developments occur.

IV. THE COMMISSION ABUSED ITS DISCRETION IN REFUSING TO VACATE THE BAR ORDER ON EQUITABLE GROUNDS

Even if the pardon alone did not invalidate the bar, the Commission's refusal to vacate the bar on equitable grounds was arbitrary and capricious. While the

Commission's sanctions determinations are reviewed for abuse of discretion, *Svalberg v. SEC*, 876 F.2d 181, 184 (D.C. Cir. 1989), the sufficiency of the Commission's reasoning is reviewed *de novo*, *City of Kansas City v. HUD*, 923 F.2d 188, 193 (D.C. Cir. 1991). Where the draconian sanction of a lifetime bar is at issue, courts closely scrutinize the decision. "[P]ermanent exclusion from the industry is 'without justification in fact' unless the Commission specifically articulates compelling reasons for such a sanction." *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979) (footnote omitted), *aff'd on other grounds*, 450 U.S. 91 (1981).

In ruling on a petition to vacate, the Commission applies an eight-factor test it developed in *Wien* and two other cases in 2003. See *In the Matter of Stephen S. Wien*, Exchange Act Rel. No. 49000, 2003 WL 23094748 (Dec. 29, 2003); *In the Matter of Ciro Cozzolino*, Exchange Act Rel. No. 49001, 2003 WL 23094746 (Dec. 29, 2003); *In the Matter of Edward I. Frankel*, Exchange Act Rel. No. 49002, 2003 WL 23094747 (Dec. 29, 2003). Those eight factors are:

> [1] [T]he nature of the misconduct at issue in the underlying matter, [2] the time that has passed since issuance of the administrative bar, [3] the compliance record of, and regulatory interest in, the petitioner since issuance of the administrative bar, [4] the age and securities industry experience of the petitioner, [5] the extent to which the Commission has granted prior relief from the administrative bar, [6] whether the petitioner has identified verifiable, unanticipated consequences of the bar, [7] the position and persuasiveness of the Division of Enforcement, . . . and [8] whether there exists any other circumstances that would cause the requested relief from the administrative bar to be inconsistent with the public interest or the protection of investors.

J.A. __ (R.18 at 10). The Commission's application of that test here was flawed in critical respects.

A. The Commission Failed to Consider the Mitigating Significance of Mr. Lewis's Motives

The Commission violated this Court's precedents when addressing the very first *Wien* factor, the "nature of the misconduct." Its analysis of that factor was limited to the assertion that "Lewis committed serious misconduct by engaging in stock price manipulation." J.A. __ (R.18 at 11). The Commission did not address any other aspect of the misconduct's "nature." Mr. Lewis had argued that this factor favored relief because he had acted solely to thwart unethical "shorting against the syndicate" by other traders. The Commission did not dispute Mr. Lewis's motives, but it refused to give them any weight in its analysis, explaining that "[o]ur rules . . . do not permit individuals to respond to perceived wrongdoing by committing wrongdoing of their own." J.A. __ (R.18 at 11 n.38).

That was error. The Commission *must* "consider the full range of factors bearing on [its] judgment about sanctions"; it "cannot turn a deaf ear to evidence that should, in reason, bear upon the judgment that the Commission is called upon to render." *Blinder, Robinson*, 837 F.2d at 1110-11. Mr. Lewis's motive is plainly such a circumstance. Shorting against the syndicate was widely considered unethical at the time, and the Commission itself banned the practice shortly thereafter. See p. 4, *supra*. The principle that one who breaks the law to thwart wrongdoing by others deserves a lesser sanction than one who does so for personal gain is deeply embedded in our traditions. See, *e.g.*, U.S.S.G. § 5K2.11 (downward departure for defendant who "commit[s] a crime in order to avoid a perceived greater harm"); *United States v. Williams*, 432 F.3d 621, 623-24 (6th

Cir. 2005) (illegal possession of firearm to thwart threats of violence is a "mitigating factor" even though "not a defense or an excuse"); *United States v. Salemi*, 26 F.3d 1084, 1087 (11th Cir. 1994) (kidnapping to prevent abuse by third parties held mitigating factor by trial court); cf. Model Penal Code § 3.05. Mr. Lewis's motive was clearly relevant, not only to his moral blameworthiness, but to whether he posed any genuine threat to the public. Someone who commits an isolated and aberrant act in response to wrongdoing by others does not pose the same threat as someone who engages in a continuing, calculated course of conduct for personal gain.

The Commission's response that its "rules . . . do not permit individuals to respond to perceived wrongdoing by committing wrongdoing of their own," J.A. __ (R.18 at 11 n.38), is non-responsive. Mr. Lewis has never contended that his motives were a *legal excuse*—if they were, he never would have been enjoined in the first place. Under *Blinder, Robinson*, the Commission must consider *all* mitigating circumstances, not just those that completely exonerate.

The Commission's error fatally infected the result. It clearly affected the Commission's analysis of the first *Wien* factor, the "nature of the misconduct." J.A. __ (R.18 at 11 & n.38). It also affected the seventh *Wien* factor, because the seriousness of the offense was the only reason the Division ever identified for opposing relief. J.A. __-__ (R.11 at 9-10). Without those two infected factors, the Commission could not have concluded that "almost all the [*Wien*] factors . . . counsel against granting relief." J.A. __-__ (R.18 at 11-12). At worst, the factors would have been evenly balanced, since two factors already favored Mr. Lewis—he had a "distinguished career in the industry prior to

his misconduct" (the fourth *Wien* factor), and the Commission identified no "other circumstances that would cause the requested relief . . . to be inconsistent with the public interest" (the eighth *Wien* factor). J.A. at __-__ (R.18 at 10-11). Given the compelling non-*Wien* factors also favoring relief—Mr. Lewis's "otherwise unblemished disciplinary record," his "charitable good works," and the Presidential pardon, J.A. __ (R.18 at 11), the balance clearly would have tipped in Mr. Lewis's favor. At the very least, there is a reasonable possibility that the agency would have reached a different result had it taken all relevant facts into account.

B. The Commission Failed to Give a Reasoned Justification for According Dispositive Weight to the *Wien* Factors While Downplaying the Other, More Compelling Circumstances

The remainder of the Commission's equitable analysis falls equally short. Principles of reasoned decisionmaking require an agency to explain its conclusion adequately. See *Rockies Fund, Inc. v. SEC*, 428 F.3d 1088, 1099 (D.C. Cir. 2005). Although the Commission paid lip service to Mr. Lewis's Presidential pardon, his otherwise spotless disciplinary record, and his lifetime of unflagging service to the industry and the community, it gave those factors essentially no weight. Instead, it denied the petition because "almost all the [*Wien*] factors . . . counsel against granting relief." J.A. __-__ (R.18 at 11-12). The Commission failed to give any reasoned justification for according dispositive weight to the *Wien* factors while all but ignoring other, more compelling circumstances.

The Commission, moreover, was able to claim that "almost all the [*Wien*] factors . . . counsel against granting relief" only because so many of them are duplicative or

uninformative. For example, it counted as two separate factors the "seriousness" of the offense and the Division's opposition (factors 1 and 7), even though the only reason the Division ever identified for opposing the petition was the seriousness of the offense. J.A. __-__ (R.11 at 9-10). The Commission likewise counted as two separate factors the absence of prior relief from the bar and Mr. Lewis's failure to establish a subsequent industry compliance record (factors 3 and 5), even though the absence of prior relief precluded Mr. Lewis from reentering the industry.

The Commission also repeatedly counted as weighing *against* relief factors that were at worst neutral. For example, factor 3 is the "compliance record of, and regulatory interest in, the petitioner since issuance of the administrative bar." That factor would count in favor of relief if a petitioner had reentered the industry and had a good compliance record, and against relief if he had reentered and had a bad one. Mr. Lewis simply had *no* such record, because he had not reentered the industry. At worst, therefore, the factor should have been neutral. Yet the Commission treated it as weighing against relief nonetheless. J.A. __ (R.18 at 11). In at least two other instances, the Commission similarly counted the mere absence of a factor that would have *favored* relief as a factor militating *against* relief—factor 5 (absence of prior relief) and factor 6 (absence of unanticipated consequences).

Other *Wien* factors are tailored to ignore relevant evidence. For example, under factor 3, the Commission considers whether the petitioner has established a satisfactory compliance record in the industry since the bar. But it does not consider the petitioner's *previous* compliance record, or his subsequent compliance record *outside* the industry

(for example, his compliance with the bar order itself). Because of those limitations, the Commission could treat factor 3 as militating *against* relief, even though Mr. Lewis had a spotless twenty-year compliance record in the industry before the Fireman's Fund offering and a spotless record since then. Mr. Lewis's otherwise unblemished record was considered only as a non-*Wien* factor at the end. Likewise, under factor 6, the Commission considers whether the petitioner has identified any "unanticipated consequences" of the bar. The Presidential pardon, while not an unanticipated *consequence* of the bar, is certainly an unanticipated circumstance warranting relief. Yet, because factor 6 addresses only "consequences," the Commission treated it as militating *against* relief, and the pardon was considered only as a non-*Wien* factor at the end.

The Commission applied other *Wien* factors in a way that renders them almost meaningless. For example, under factor 1, the Commission held that the "seriousness" of Mr. Lewis's misconduct militated against relief because his offense involved "stock price manipulation." J.A. __ (R.18 at 11). But *any* misconduct that results in a lifetime bar will be serious by some measure. Likewise, factor 2—the length of time the bar order has been in effect—is an automatic thumb on the scale against relief. Mr. Lewis's bar order had been in effect *14 years*, and his conduct occurred nearly *two decades* ago. Yet the Commission described that period as "not unduly lengthy" and treated this factor as militating *against* relief. J.A. __ (R.18 at 11). The Commission apparently measures time on a geological scale—*Wien* itself held a period of *21 years* "not unduly lengthy." 2003 WL 23094748, at *5; see also *Frankel*, 2003 WL 23094747, at *4 (*31 years*, while

"lengthy," does not "weigh significantly in favor of relief"). For someone like Sandy Lewis, who is 67 years old, that represents a lifetime.

The Commission offered no adequate justification for applying a test that treats compelling factors warranting relief as marginal and gives dispositive weight to factors that are either duplicative, neutral, tailored to exclude relevant evidence, or applied in such a way as to be meaningless. By the Commission's own admission, Mr. Lewis had a "distinguished career in the industry" and an "otherwise unblemished disciplinary record." J.A. __ (R.18 at 11). He has selflessly committed himself to bettering the lives of others. His transgression was an "isolated" and well-intentioned act. The Commission has steadfastly refused to suggest that Mr. Lewis would represent any sort of threat, or would follow any but the highest standards of ethical conduct, if permitted to reenter the industry. Indeed, it strains credulity to think that Mr. Lewis, who lost his business and was banished from the industry for 14 years for a single misguided act, has not learned from his error.

Finally, the Presidential pardon is a compelling circumstance entitled to far more weight than the Commission purported to give it. The pardon represents the judgment of the Nation's Chief Executive that the public interest warrants a reprieve. Unlike the Commission, the President carefully evaluated Mr. Lewis's entire background and all the circumstances attending his offense. He concluded that it would no longer be in the Nation's interest for Mr. Lewis to suffer a continuing blemish on his otherwise upstanding character, and that Mr. Lewis should be restored to his civil rights. That determination is plainly entitled to great weight. Yet the Commission paid it only lip

service because it was not on the preset *Wien* list. The Commission gave no reasoned explanation for according such little significance to a circumstance so obviously important. The Nation's Chief Executive is entitled to a better explanation before his judgments are so cavalierly dismissed.

CONCLUSION

The petition for review should be granted.

Dated: February 17, 2006

Respectfully submitted,

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CONSTITUTIONAL AND STATUTORY ADDENDUM

Article II, Section 2 of the United States Constitution provides in relevant part:

> The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Section 15(b)(6)(A) of the Exchange Act, 15 U.S.C. § 78o(b)(6)(A), provides as follows:

(6)(A) With respect to any person who is associated, who is seeking to become associated, or, at the time of the alleged misconduct, who was associated or was seeking to become associated with a broker or dealer, or any person participating, or, at the time of the alleged misconduct, who was participating, in an offering of any penny stock, the Commission, by order, shall censure, place limitations on the activities or functions of such person, or suspend for a period not exceeding 12 months, or bar such person from being associated with a broker or dealer, or from participating in an offering of penny stock, if the Commission finds, on the record after notice and opportunity for a hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person—

(i) has committed or omitted any act, or is subject to an order or finding, enumerated in subparagraph (A), (D), or (E) of paragraph (4) of this subsection;

(ii) has been convicted of any offense specified in subparagraph (B) of such paragraph (4) within 10 years of the commencement of the proceedings under this paragraph; or

(iii) is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4).

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CERTIFICATE OF SERVICE

I certify that today, February 17, 2006, the original and seven copies of the foregoing Petitioner's Initial Brief were dispatched to the clerk by U.S. Overnight (Express) Mail, and that two copies were served by the same means upon the following:

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