PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Andrew N. Ferguson, Chairman**
Mark R. Meador

IN THE MATTER OF	
PHILIP SERPE,	**MATTER NO. D 9441**
Appellant.	**ORAL ARGUMENT REQUESTED**

APPELLANT'S OPENING BRIEF

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INTRODUCTION

Philip Serpe is a longtime, successful thoroughbred horse trainer with a clean record. But he has spent the last year and a half defending himself in a Horseracing Integrity and Welfare Unit (HIWU) arbitration and Commission adjudication against a charge that one of his horses tested positive for a banned substance. Despite the negligible amount of clenbuterol detected, HIWU's arbitrator imposed a two-year suspension, and a Commission administrative law judge (ALJ) *added* a $25,000 fine.

These proceedings should never have taken place. The Seventh Amendment guarantees the right to a jury trial for common law claims. And that jury trial must take place in an Article III court, not in an administrative agency. Here, HIWU's charge that Serpe's horse tested positive for a banned substance is subject to the Seventh Amendment. It is analogous to traditional common law claims and does not fall within any of the narrow categories of public rights that are excepted from Article III jurisdiction. Thus, Serpe should have received a jury trial in an Article III court. Instead, he was left to defend himself before the HIWU arbitrator, while HIWU and the Horseracing Integrity and Safety Authority (Authority) manipulated the process in an attempt to moot his constitutional defenses.

It is time for this unfair and unconstitutional process to end. The fine, two-year suspension, and other penalties imposed on Serpe should be vacated, and this entire adjudication dismissed because it violates the U.S. Constitution.

STATEMENT OF FACTS

Congress enacted the Horseracing Integrity and Safety Act (HISA) to establish federal regulation of thoroughbred horseracing. 15 U.S.C. §§ 3051-3060. HISA

created the Authority, a "private, independent, self-regulatory, nonprofit corporation" tasked with creating and implementing anti-doping programs for those involved in horseracing, including "covered" persons and horses. *Id.* § 3052(a).[1] The Authority's rules on "permitted and prohibited medications, substances, and methods," *id.* § 3055(c)(1)(B), form the Anti-Doping and Medical Control (ADMC) Program in HISA Rule 3000 Series, *see* 88 Fed. Reg. 5070-5201 (Jan. 26, 2023). The Authority enforces its regulations through HIWU, another private entity.

Serpe is a "Covered Person" and a "Responsible Person" under HISA.[2] On August 10, 2024, Fast Kimmie, a horse Serpe trained, finished first in a race run at Saratoga Racetrack with a total purse of $50,000.[3] After the race, "Sample Collection Personnel" from HIWU collected blood and urine samples (Samples #U100981554) from Fast Kimmie.[4] HIWU submitted the samples to the Kenneth L. Maddy Equine Analytical Chemistry Laboratory in Davis, California (UC Davis Lab), which analyzed the A Sample.[5] Nearly a month later, HIWU informed Serpe that the UC Davis Lab detected Clenbuterol in Fast Kimmie's urine.[6] The "estimated" concentration of Clenbuterol in the urine sample was 27 pg/mL.[7] The term "pg" refers to a picogram, which is equal to one-trillionth of a gram. Clenbuterol was not detected

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[1] A "Covered Horse" is any thoroughbred horse subject to HISA. 15 U.S.C. § 3051(4). A "Covered Horserace" is any horserace involving Covered Horses. *Id.* § 3051(5).
[2] Appeal Book 1 (AB1) Tab 42 (Arb. Corrected Decision), 2777. A "Responsible Person" is the owner or "Trainer of the Covered Horse." HISA Rule 3030(a).
[3] AB1 Tab 32, 2459 ¶¶ 1-4; *see also* AB1 Tab 8, 0776.
[4] AB1 Tab 15, 0477.
[5] AB1 Tab 15, 0477.
[6] AB1 Tab 15, 0477, 0487; AB1 Tab 32, 2459 ¶ 6.
[7] AB1 Tab 32, 2459 ¶ 6.

in Fast Kimmie's blood sample.[8] Clenbuterol is a "Banned Substance" under HISA Rule 3111(a)(1). HISA Rule 4114. It is therefore "prohibited at all times." *Id.* And a Covered Person is "strictly liable for any Banned Substance . . . found to be present in a Sample collected from his . . . Covered Horse(s)." HISA Rule 3212(a).

HIWU then sent Serpe an Equine Anti-Doping Notice letter.[9] HIWU advised Serpe that it was provisionally suspending Fast Kimmie, but not Serpe, for fourteen months—effective immediately.[10] In response, Serpe exercised the option to have the B urine Sample tested.[11] The Ohio Department of Agriculture Analytical Toxicology Laboratory found the presence of Clenbuterol in that urine sample.[12]

HIWU then issued Serpe a charge letter.[13] This letter charged Serpe with a first-time violation of HISA Rule 3212 (Banned Substances Claim), advised Serpe that it would seek penalties including a fine, and provisionally banned Serpe from the track—effective immediately.[14]

Because of the constitutional deficiencies in this administrative process, Serpe filed a collateral action in federal court and immediately moved for a preliminary injunction. *Serpe v. FTC, et al.*, No. 24-cv-61939 (S.D. Fla. filed Oct. 17, 2024).[15] In

[8] AB1 Tab 32, 2459 ¶ 6.
[9] AB1 Tab 15, 476-82.
[10] AB1 Tab 15, 0480.
[11] AB1 Tab 32, 2460 ¶ 11.
[12] AB1 Tab 32, 2460 ¶ 12.
[13] AB1 Tab 32, 2460 ¶ 13.
[14] AB1 Tab 15, 0493-501.
[15] AB1 Tab 6 (Complaint, Oct. 17, 2024); Tabs 7-8 (Mtn. for Preliminary Inj. & Memo. in Supp., Oct. 23, 2024).

the complaint, Serpe alleged that the Authority's proceeding violated the private non-delegation doctrine and Serpe's Seventh Amendment right to a jury trial.[16] Almost immediately after, the Authority lifted the provisional suspension against Serpe.[17]

The district court held a hearing on Serpe's motion for preliminary injunction in April 2025 and suggested that the Seventh Amendment claim would be "off the table" if HIWU decided not to seek a civil fine.[18] Once again, HIWU responded almost immediately, informing Serpe that it would not seek a fine at the arbitration.[19] And the Authority soon after submitted a supplemental brief, arguing that Serpe's preliminary-injunction motion was moot because of HIWU's decision to forgo a fine.[20] Serpe later discovered that the Authority had directed HIWU to withdraw the potential fine to avoid the cost of litigating the Seventh Amendment claim.[21]

HIWU's arbitration was conducted June 5, 2025,[22] and the Arbitrator issued his Corrected Final Decision on July 9, 2025.[23] The Arbitrator found that Serpe

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[16] AB1 Tab 6, 0149-61 (Complaint, Counts I & II).

[17] AB1 Tab 5, 1509.

[18] Appeal Book 2 (AB2) Tab 44, 2801-04 (Tr. 13:7-16:19).

[19] AB1 Tab 21, 1207 (Apr. 23, 2025 Ltr.). In its order, the District Court noted its skepticism, stating that HIWU's decision "not to seek monetary penalties here appears to be a 'one-off' specifically designed to moot Serpe's Seventh Amendment challenge." AB1 Tab 31, 2450. The ALJ agreed: "The District Court's comments were well-taken." ALJ Decision at 48.

[20] AB1 Tab 31, 2447.

[21] ALJ Decision at 48-49; AB1 Tab 37, 2711. The ALJ criticized the Authority's intervention, in light of HIWU's purportedly independent status. ALJ Decision at 49-56. "The conclusion is inescapable: The Authority intervened in HIWU's case in an attempt to avoid a resolution of Serpe's claimed constitutional violation." *Id.* at 55.

[22] AB2 Tab 45, 2846-3199 (Transcript, Arb. Hearing).

[23] AB1 Tab 42, 2769-85.

violated the Authority's ADMC Program and, because Serpe could not identify the source of the Clenbuterol, that Serpe failed to establish no fault or negligence.[24] The Arbitrator ordered a two-year suspension, disgorgement of the purse, disqualification of the results, public disclosure of liability, but no fine.[25] Serpe appealed.

On appeal, the ALJ conducted a *de novo* review of the evidence, affirmed the Arbitrator's liability finding and sanctions, and imposed a fine.[26] The ALJ relied on Rule 3223(b), which states a fine amount of "up to $25,000 or 25% of the total purse (whichever is greater)" "shall apply" for a first time Anti-Doping Rule Violation.[27] The ALJ noted that HISA was adopted to rid horseracing of the "scourge of doping" and stated that enforcement of the law was in the public interest.[28] The ALJ held that the Arbitrator's failure to impose a fine was an abuse of discretion and not in accordance with law.[29] And the ALJ ordered a fine of $25,000.[30] The ALJ rejected Serpe's argument that his Seventh Amendment right to a jury trial was violated through the private and administrative proceedings.[31]

The Commission granted *sua sponte* review of the ALJ's Decision and stayed enforcement of the fine.[32]

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[24] AB1 Tab 42, 2777, 2783-84, ¶¶ 5.2, 5.19-5.25.
[25] AB1 Tab 42, 2784-85, ¶ 6.1.
[26] ALJ Decision at 20, 121.
[27] ALJ Decision at 56.
[28] ALJ Decision at 62.
[29] ALJ Decision at 63 (citing Rule 3223(b)).
[30] ALJ Decision at 65.
[31] ALJ Decision at 65-121.
[32] Order, Docket No. 9441 (FTC Sept. 15, 2025).

SUMMARY OF THE ARGUMENT

I. While HISA allows ALJs to impose fines, the ALJ was barred from doing so here by the Seventh Amendment because the Banned Substance Claim against Serpe is common law in nature.

II. The ALJ erred by imposing a $25,000 fine because there was no proof that Serpe was at fault for the presence of the clenbuterol in Fast Kimmie's urine.

III. The Seventh Amendment guarantees Serpe a jury trial in an Article III court on the Banned Substances Claim. As a threshold matter, the Seventh Amendment applies to the Authority (because it is engaged in state action by adjudicating these claims) and the Commission (a government entity). Additionally, Serpe did not waive his Seventh Amendment claim by registering with the Authority because he had no bargaining power and could not negotiate the terms when his livelihood was at stake. On the merits, the Banned Substances Claim is common law in nature because it includes a punitive fine as a remedy and because the cause of action is analogous to a common law action in debt, fraud, breach of contract, and tortious interference. It also falls outside the narrow public rights exception to Article III jurisdiction.

IV. Irrespective of the Seventh Amendment's applicability, the Banned Substances Claim must be heard in an Article III court because the cause of action is common law in nature and includes equitable remedies. The jurisdiction of Article III courts extends to claims at both law and equity, which include the Banned Substances Claim. Again, the Banned Substances Claim does not fit within the public rights exception.

V. The enforcement actions HIWU took against Serpe, including initiating the investigation, taking samples from the horse (i.e., a search), and imposing a sanction that was not automatically stayed, violate the private non-delegation doctrine. These substantive enforcement decisions, outside of the Commission's oversight, substantially impacted Serpe.

VI. The HIWU arbitration of the Banned Substances Claim also violates the Fifth Amendment's Due Process Clause because the Authority's instruction to HIWU to drop the fine against Serpe to moot his federal district court lawsuit demonstrates that HIWU cannot plausibly fairly adjudicate the claim.

QUESTIONS PRESENTED

1. Whether the Administrative Law Judge was authorized, under 15 U.S.C. § 3058(b)(3) or any other authority, to impose a civil sanction not imposed by the arbitrator and not requested to be imposed by any party to the proceeding;

2. Whether the additional sanction imposed by the Administrative Law Judge was appropriate under the circumstances;

3. Whether the Seventh Amendment to the United States Constitution guaranteed Mr. Serpe a jury trial in federal court;

4. Whether Serpe is entitled to an Article III court;

5. Whether the enforcement and adjudication of a claim against Serpe by HIWU violates the private nondelegation doctrine; and

6. Whether the HIWU arbitration and this proceeding violate due process.[33]

STANDARD OF REVIEW

"The Commission reviews de novo the factual findings and conclusions of law made by the Administrative Law Judge." 16 C.F.R. § 1.147(c)(1).

ARGUMENT

I. The ALJ Was Unconstitutionally Authorized to Modify a Civil Sanction With a Fine in the First Instance

The FTC's ALJs possess statutory authority under HISA to impose a fine irrespective of the arbitrator-imposed sanctions or the positions of the parties. But here the ALJ's exercise of his statutory authority to impose a fine is inconsistent with the Seventh Amendment's guarantee of a jury trial.

A. HISA Authorizes FTC ALJs to Impose Fines in the First Instance

When "review[ing]" an Arbitration order, the ALJ conducts a "de novo review" to "determine whether . . . the final civil sanction of the Authority was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 15 U.S.C. § 3058(b); 16 C.F.R. § 1.146(b)(3). The ALJ "may affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the final civil sanction" and "may make any finding or conclusion that, in the judgment of the administrative law judge, is proper and based on the record." 15 U.S.C. § 3058(b)(3)(A); 16 C.F.R. § 1.146(d)(3).

These statutory provisions give FTC ALJs authority to review cases and impose civil sanctions they deem appropriate regardless of the sanctions imposed by

[33] Issues 4–6 are the subject of Serpe's December 10, 2025, Motion for Leave to Brief Additional Issues that is pending before the Commission as of this filing.

HIWU arbitrators. The ALJ here exercised his authority to "modify" the "final civil sanction." 15 U.S.C. § 3058(b)(3)(A)(ii). The phrase "final civil sanction" refers to the set of sanctions that the Arbitrator imposed. *Id.* § 3058(a). Thus, adding an additional sanction is a modification of the total mix of sanctions that HISA allows to be "modif[ied]." *Id.* § 3058(b)(3)(A)(ii).[34]

Additionally, under HISA's "de novo review" standard, there is no limitation on what the ALJ may consider in reaching his decision. 15 U.S.C. § 3058(b)(1). In fact, the ALJ may even reopen the evidentiary record. 16 C.F.R. § 1.146(c)(2). Thus, the ALJ has all the tools to make his own fully informed decision as to the appropriate sanction irrespective of the decision of the arbitrator. 15 U.S.C. § 3058.

The Commissioners have the same statutory power to impose a fine as the ALJs. 15 U.S.C. § 3058(c). In reviews of HIWU arbitrations, therefore, a fine may be imposed at each stage of the process.

B. FTC ALJs' Sanction Authority Is Not Constrained by the Positions of the Parties

The ALJ may also modify the civil sanction to impose a fine irrespective of the parties' requests. Neither HISA nor the enabling regulations prohibit an ALJ from imposing a fine when neither party requests one. 15 U.S.C. § 3058; 16 C.F.R. § 1.146. The only limitation on the ALJ's authority is that he consider the "whole record

[34] While in the rulemaking context "modify" has "a connotation of increment or limitation," *Biden v. Nebraska*, 600 U.S. 477, 494 (2023) (citation omitted), here in the adjudicative context it is better read as simply to "change," *see FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("'[W]ords of a statute must be read in their context.'"). This is particularly the case given that it is grouped with the authority to "affirm" and "reverse" the sanction. 15 U.S.C. § 3058(b)(3)(A)(ii).

relevant to the issues decided." 16 C.F.R. § 1.146(d)(2). Indeed, HISA states that the ALJ "shall determine" the legality of the "final civil sanction"—a statutory requirement to review the sanction completely, irrespective of the parties' arguments. 15 U.S.C. § 3058(b)(2)(A); *see also* 16 C.F.R. § 1.146(b)(3). Even the regulatory requirement that aggrieved parties exhaust issues before the Arbitrator allows the ALJ to determine whether there is good cause to hear an unexhausted issue. 16 C.F.R. § 1.146(a)(1).

The principle of party presentation (i.e., the prudential limitation on courts deciding issues not raised by the parties) does not restrict the ALJ's authority to modify a final civil sanction to impose a fine. *See United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020). The party-presentation principle functions as a restriction on courts "from *raising* new issues"; it "does not say that once an issue has been raised and responded to, a court must render its decision in accordance with the position of one of the parties." *United States v. Cortez-Nieto*, 43 F.4th 1034, 1051-52 (10th Cir. 2022). Under HISA, the legal validity of the entire final civil sanction is always at issue before the ALJ because the ALJ is statutorily compelled to consider it. 15 U.S.C. § 3058(b)(2)(A)(iii).

C. The Seventh Amendment Prohibits the Imposition of a Fine Against Serpe

While the ALJ has the statutory authority to impose a fine on its own, such a decision is ultimately prohibited by the Seventh Amendment. *See infra* Part III. As explained further below, the Banned Substances Claim calls for a legal remedy—civil money penalties—and "target[s] the same basic conduct" as common law fraud,

among other common law claims. *SEC v. Jarkesy*, 603 U.S. 109, 122-26 (2024). Because the Banned Substances Claim is common law in nature, it must be tried in an Article III court with a jury as guaranteed by the Seventh Amendment. *Id.* at 127-40; *see also infra* Part III.C. Thus, the ALJ was constitutionally prohibited from imposing the $25,000 fine on Serpe.

II. The ALJ Erred by Imposing a Fine of $25,000

The ALJ imposed the maximum financial sanction against Serpe despite Serpe's long history of fair play, the lack of any evidence that Serpe did anything intentionally, and the evidence of the Authority and HIWU's prosecutorial gamesmanship. The Commission should reverse.

For a first violation of Rule 3212, a "[f]ine of up to $25,000 or 25% of the total purse (whichever is greater)" may be imposed. Rule 3223(b). The ALJ correctly noted that a fine "should 'follow'—that is, 'be commensurate with'—the level of *fault proven*, subject to individual case adjustment." ALJ Decision at 65 (emphasis added) (citing *Poole*, JAMS Case No. 1501000576, at ¶¶ 7.24 & 7.25 (Aug. 8, 2023), *aff'd*, FTC No. 9417, 2023 WL 8435860, at *5 (ALJ Nov. 13, 2023); *HIWU v. Saldan*a, JAMS Case No. 1501000587, at ¶¶ 7.29 & 7.30 (Dec. 4, 2023)).

But zero fault was proven here. Instead, the ALJ states that clenbuterol "*can* build muscle in racehorses and historically *was* 'widely used by trainers.'" ALJ Decision at 65 (emphasis added) (footnote omitted). But that statement shows merely why clenbuterol is banned—it says *nothing* about whether Serpe used it.

In fact, the evidence supports Serpe. First, the amount of Clenbuterol estimated in Fast Kimmie's A sample was 27 pg/mL. AB1 Tab 32, 2459 ¶ 6. As noted

above, a "pg" or picogram is one-trillionth of a gram. And 27 pg is nowhere near enough to build muscle in racehorses or otherwise enhance a racehorse's performance. AB1 Tab 24, 1241-42 ¶¶ 14-17. Further, in December 2024, several months after Fast Kimmie's race in Saratoga, and after initially refusing Serpe's request to test Fast Kimmie's hair (AB1 Tab 32, 2460 ¶ 11), HIWU collected a hair sample (AB1 Tab 32, 2460 ¶ 15). Testing came back negative for Clenbuterol. AB1 Tab 32, 2460 ¶ 16. The negative result demonstrated that Fast Kimmie had not been on "a therapeutic regime of clenbuterol" at the time of the race given that "mane samples should have tested positive for the presence of clenbuterol for up to 360 days after that administration." AB1 Tab 24, 1245 ¶ 26. But the Arbitrator rejected Serpe's argument that HIWU should have considered this negative test result. AB1 Tab 42, 2778.

While Mr. Serpe did not show either No Fault (NF) or No Significant Fault (NSF), as defined by HISA, because he could not conclusively prove the source of the clenbuterol, the ALJ apparently treated this *lack* of NF or NSF as *positive proof* of Serpe's intent to violate the anti-doping rules. This was error and should be reversed. *See, e.g.*, *In the Matter of Jim Iree Lewis*, Docket No. 9434, 2024 WL 5078296, at *5 (FTC ALJ Oct. 17, 2024) (The "degree of fault . . . may be considered in exercising discretion to determine an appropriate fine."). At a minimum, given the negligible amount of clenbuterol in the A sample and the lack of any evidence of Serpe's intent, the Commission should exercise the discretion provided by HISA Rule 3223(b) and reduce the fine below the maximum so that it is proportional to the circumstances. *In*

the Matter of Dr. Scott Shell, Docket No. 9439, 2025 WL 1784696, at *34 (FTC ALJ Mar. 6, 2025).

III. The Seventh Amendment Guarantees Serpe a Jury Trial in an Article III Court on the Banned Substances Claim

A. Serpe's Entire Adjudication Is Subject to the Seventh Amendment

1. The HIWU Arbitration Was State Action

The Seventh Amendment applies to the HIWU Arbitration, notwithstanding that both HIWU and the Authority are private entities, because the Arbitration is state action. "[M]ost rights secured by the Constitution are protected only against infringement by governments." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982) (citation omitted). But the "actions of private entities can sometimes be regarded as governmental action for constitutional purposes." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995). An action depriving someone of a federal right is "fairly attributable" to the government where, as here, two conditions are met: (1) "the deprivation [is] caused . . . by a rule of conduct imposed by the State or by a person for whom the State is responsible," and (2) the private party carrying out the deprivation "may fairly be said to be a state actor." *Lugar*, 457 U.S. at 937. The second factor includes circumstances in which "the government acts jointly with the private entity." *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 809 (2019).

Here, HIWU is sufficiently intertwined with the Commission and Congress in enforcing Banned Substances claims that HIWU's arbitration is state action. *See Lugar*, 457 U.S. at 942. First, the rule of conduct in the Banned Substances Claim was imposed by a combination of the government (the Commission) and "a person for whom the State is responsible" (the Authority). *Id.* at 937. HISA required the

Authority to develop a list of "prohibited medications" and "substances," and associated rules, as well as to establish civil sanctions for violations. 15 U.S.C. §§ 3055(c), 3057(d). The Authority's rules then had to be approved by the Commission. *Id.* § 3053(d). Second, HIWU's arbitration (on behalf of the Authority, *see id.* § 3054(e)(1)(E)(i)) of the Banned Substances Claim is conducted "jointly" with the Commission in a multi-step process that ends with the Commission in this very proceeding. *Halleck*, 587 U.S. at 809; 15 U.S.C. § 3058.

In *Lugar*, the Supreme Court held that a private party's use of a state-created *ex parte* attachment procedure was sufficient to conclude that the private party's actions constituted state action. 457 U.S. at 940-42. Similarly, the Authority is engaged in state action in its enforcement and adjudication of the Banned Substances Claim against Serpe. *See id.* at 942.

2. The Seventh Amendment Applies to the FTC's *De Novo* Review Process

Regardless, the Seventh Amendment applies to the Commission's and its ALJ's *de novo* reviews of the HIWU arbitration decisions. 15 U.S.C. § 3058. Even if HIWU's arbitration is not state action, the Commission is indisputably part of the federal government. And *Jarkesy* confirmed that the Seventh Amendment requires that common law claims receive a jury trial in an Article III court even if "Congress assign[ed] a matter to an agency for adjudication." 603 U.S. at 139-40.

B. Serpe Did Not Waive His Seventh Amendment Jury Trial Right by Registering with the Authority

Serpe did not waive his Seventh Amendment right by registering with the Authority since any waiver must be "knowing and voluntary." *Bakrac, Inc. v. Villager*

Franchise Sys., Inc., 164 F. App'x 820, 823 (11th Cir. 2006). Whether the waiver is "knowing and voluntary" depends on the "conspicuousness of the waiver provision, the parties' relative bargaining power, the sophistication of the party challenging the waiver, and whether the terms of the contract were negotiable." *Id.* at 823-24. Because "the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver." *Aetna Ins. Co. v. Kennedy to Use of Bogash*, 301 U.S. 389, 393 (1937).

Here, the factors point towards a conclusion that any jury trial waiver—to the extent one took place—was neither knowing nor voluntary. Most importantly, registration with the Authority and agreement to its arbitration rules is compelled by Congress. 15 U.S.C. § 3054(d). Thus, Serpe had no bargaining power, nor were the terms of this agreement even negotiable given he otherwise would be forced to give up his entire Thoroughbred training career. *See Nat'l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977).

Further, to the extent the registration agreement contains a jury trial waiver, it is inconspicuous. Registration occurs through the Authority's website. https://portal.hisausapps.org/registration (last visited Dec. 23, 2025). But the website refers and links only to HISA Rule 8000 series, *id.*, which generally "establish[es] rule violations and civil sanctions, procedures for disciplinary and accreditation hearings, and provisions concerning the exercise of investigatory powers by the Authority," 87 Fed. Reg. 4023, 4024 (Jan. 26, 2022). The HISA Rule 8000 series does not mention jury trials. *See generally id.* And when waiver clauses are "set deeply and

inconspicuously in [a] contract," the presumption against waiver is not overcome. *Hendrix*, 565 F.2d at 258. That is all the more true here, where Serpe—a thoroughbred lifer with no legal training—would have had to infer from the arbitration rules that he was unlikely to receive a jury trial in an enforcement action.

Separately, HISA and the Authority's rules cannot qualify as a waiver of a registrant's jury trial rights because they do not foreclose the possibility of a jury trial. HISA allows the authority to file federal civil actions "to enforce any civil sanctions imposed" for rule violations and to obtain "all other relief to which the Authority may be entitled." 15 U.S.C. § 3054(j)(1). Once in federal court, a civil action for fines like the one the ALJ imposed against Serpe here, would require a jury trial. *Tull v. United States*, 481 U.S. 412, 420 (1987).

C. The Banned Substances Claim Is a Common Law Claim Covered by the Seventh Amendment

"[T]he Seventh Amendment guarantees that in '[s]uits at common law, . . . the right of trial by jury shall be preserved.'" *Jarkesy*, 603 U.S. at 122 (quoting U.S. Const. amend. VII). "In construing this language, [the Supreme Court] ha[s] noted that the right is not limited to the 'common-law forms of action recognized' when the Seventh Amendment was ratified." *Id.* (citation omitted). "The Amendment therefore 'embrace[s] all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume.'" *Id*. (citation omitted).

Whether a statutory claim is a suit at common law for purposes of the Seventh Amendment turns on two factors. *First*, the claim must be "legal in nature," taking into account "the cause of action and the remedy it provides." *Id.* at 122-23. *Second*,

the claim must not fall within the "'public rights' exception to Article III jurisdiction." *Id.* at 120.

1. The Banned Substances Claim Is Legal in Nature

Again, a party is entitled to a jury trial when claims (even statutory claims) (1) are similar to "18th-century actions brought in the courts of England prior to the merger of the courts of law and equity" and (2) provide a legal remedy. *Tull*, 481 U.S. at 417-18. Because "the remedy is all but dispositive" for the Seventh Amendment analysis, we discuss this factor first. *Jarkesy*, 603 U.S. at 123.

a. Fines Are Quintessential Common Law Remedies

Civil money penalties were traditionally imposed by courts of law. *Jarkesy*, 603 at 123. Here, HISA authorizes the Authority to "develop a list of civil penalties with respect to the enforcement of [its] rules." 15 U.S.C. § 3054(i). Those penalties "may include . . . monetary fines and penalties." *Id.* § 3057(d)(3). Pursuant to HISA, the Authority established that a violation of the Banned Substances rule results in, among other punishments, a fine of up to $25,000. HISA Rule 3223(b).

Additionally, as in *Jarkesy*, HISA's penalties are "designed to punish or deter the wrongdoer." 603 U.S. at 123. When establishing its civil sanctions rules, the Authority must "take into account the unique aspects of horseracing," and the rules must "be designed to ensure fair and transparent horseraces" and "deter safety, performance, and anti-doping and medication control rule violations." 15 U.S.C. § 3057(d)(2); *see also id.* § 3054(e)(1)(E)(ii) (requiring agency to "ensure that covered horses and covered persons are deterred from using or administering [banned] medications, substances, and methods").

Equally, the amount of the fine—and whether a fine is issued in the first place—is determined according to a Responsible Party's degree of culpability. HISA Rule 3224(a). Under the ADMC Program, a Responsible Party may avoid a fine only by showing that the party "did not know or suspect, and could not reasonably have known or suspected, even with the exercise of utmost caution, that he or she had . . . committed an Anti-Doping Rule Violation or Controlled Medication Rule Violation." HISA Rule 1020.

Given these statutory factors for the imposition of the fine are designed to address deterrence and culpability, rather than restoration of the status quo, they are punitive in nature and therefore legal. *Jarkesy*, 603 U.S. at 123-24.

b. The Banned Substances Claim Is Common Law in Nature

A suit at common law includes any "suit[] in which *legal* rights [a]re to be ascertained and determined." *City of Monterey v. Del Monte Dunes at Monterey, Ltd*, 526 U.S. 687, 708 (1999) (citation omitted). Establishing the legal nature of a statutory cause of action does not require "an 'abstruse historical' search" for a "precise[]" analog. *Tull*, 481 U.S. at 421 (citation omitted). The comparison, rather, is to categories of actions that were brought at common law (i.e., tort, contract, etc.). *See Monterey*, 526 U.S. at 711. Here, the Banned Substances Claim against Serpe has several common law analogs, demonstrating that the claim is legal in nature.

i. Action in Debt

First, actions "by the Government to recover civil penalties under statutory provisions [] historically have been viewed as one type of action in debt requiring trial

by jury. *Tull*, 481 U.S. at 418-19. Therefore, the Banned-Substances Claim seeking civil penalties is analogous to a common law action in debt. *See id.* at 420.

ii. Fraud

Second, a violation of the ADMC Program, such as the Banned Substances Claim, bears a "close relationship" with a claim for common-law fraud. *Jarkesy*, 603 U.S. at 125. To create the ADMC Program, HISA tasked the Authority with issuing "a list of permitted and prohibited medications, substances, and methods," 15 U.S.C. § 3055(c)(1)(B), as well as a list of "violations applicable to covered horses and covered persons," § 3057(a)(1). In establishing the ADMC Program's prohibited-substances provisions, the Authority was required to "take into consideration" that "[t]he welfare of covered horses, the integrity of the sport, and the confidence of the betting public require *full disclosure* to regulatory authorities regarding the administration of medications and treatments to covered horses." § 3055(b)(7) (emphasis added). HISA mandated that the ADMC Program "be designed to ensure *fair and transparent* horseraces[.]" § 3057(d)(2)(B) (emphasis added).

In requiring that the ADMC Program ensure "full disclosure," "fair[ness]," and "transparen[cy]," *id.* §§ 3055(b)(7), 3057(d)(2)(B), Congress drew upon common law fraud principles, *see Jarkesy*, 603 U.S. at 125. Indeed, HISA established the ADMC Program to prevent, among other harms, fraud on the betting market—a principle long recognized as a cornerstone of horseracing regulations. *See, e.g.*, *United States v. Martin*, 411 F. Supp. 2d 370, 373 (S.D.N.Y. 2006); *State ex rel. Morris v. W. Virginia Racing Comm'n*, 55 S.E.2d 263, 275 (W. Va. 1949). The ADMC Program seeks to prevent fraud on the betting markets by ensuring that the "betting public" is provided

with access to information concerning "the administration of medications and treatments to covered horses," i.e., concerning the administration of performance-enhancing drugs. 15 U.S.C. § 3055(b)(7). Additionally, the amount of a fine on a Banned Substances Claim is set according to a Responsible Party's culpability for misrepresentation.[35] HISA Rules 3224(a). A Responsible Party may avoid a fine entirely by showing that the party "bears No Fault or Negligence" for the violation. *Id.* The ADMC Program and common law fraud, therefore, "target the same basic conduct: misrepresenting or concealing material facts." *Jarkesy*, 603 U.S. at 125.

iii. Breach of Contract

The banned-substances claim is also analogous to a breach of contract claim. *See Sun Valley Orchards, LLC v. U.S. Dep't of Lab.*, 148 F.4th 121, 128-29 (3d Cir. 2025). Participation in thoroughbred racing involves an implicit contract: a manifestation of an agreement by the trainer to follow the Authority's rules in exchange for the ability to participate. HISA Rule 9000 (registration requirement); HISA Rule 7450 (rules "considered part of the agreement to arbitrate"); *see also* Restatement (Second) of Contracts § 17 (1981). And like all contracts, it incorporates "'the laws which subsist[ed] at the time and place of'" its execution. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 429-30 (1934). In fact, there is a long history of regulating horse-race fairness through contracts. T.H. Breen, HORSES AND GENTLEMEN: THE CULTURAL SIGNIFICANCE OF GAMBLING AMONG THE GENTRY OF

[35] Even the baseline strict liability for the presence of a Banned Substance, HISA Rule 3212(a), is analogous to a fraudulent conveyance claim where the fraud is established by the circumstances, not intent, *see BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 540-41 (1994).

VIRGINIA, 34 William & Mary Quarterly 239, 253-56 (1977). In colonial Virginia, for example, betting took place between the race contestants and was memorialized through an agreement, which usually "included a promise to ride a fair race." *Id.* at 253-54. The agreements were enforced in county court through jury trials. *Id.* at 255-56.

iv. Tortious Interference

Finally, the Banned Substances Claim parallels tortious interference, a tort involving improper intentional disruption of a reasonable economic expectancy. *See* Restatement (Second) of Torts § 766B (1979). Serpe is accused of conduct that could have intentionally undermined the race's integrity and disrupted competitors' reasonable economic expectations of fair competition. *See id.* § 912, cmt. f, illus. 16. This type of interference claim has deep common-law roots. *See, e.g.*, *Garret v. Taylor*, 79 Eng. Rep. 485, 485 (1621).

2. The Public Rights Exception Does Not Apply to the Banned Substances Claim

Because the Banned Substances Claim is common law in nature, it does not fall within the public rights exceptions. *See supra* Part III.C.1. The Article III judicial power "extend[s] to all Cases, in Law and Equity, arising under . . . the Laws of the United States." U.S. Const. art. III, § 2, cl. 1. As such, "[t]he Constitution prohibits Congress from 'withdraw[ing] from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law.'" *Jarkesy*, 603 U.S. at 127 (citation omitted).

Therefore, the public rights exception is truly an *exception*: it is limited to "matters [that] 'historically could have been determined exclusively by [the executive and legislative] branches.'" *Id.* at 128 (citation omitted). This exception is entirely atextual and in each case "must [] derive [] from background legal principles" and history. *Id.* at 131. For example, in *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. 272 (1855), the Court "took pains to justify" the exception "by explaining that it flowed from centuries-old rules concerning revenue collection by a sovereign." *Jarkesy*, 603 U.S. at 131.

Only six categories of public rights have been historically recognized: revenue collection, immigration, tariffs, public lands, Indian-tribal relations, and public benefits. *Jarkesy*, 603 U.S. at 128-30. And even "matters that arguably fall within the scope of the public rights doctrine" still enjoy a "presumption [] in favor of Article III courts." *Id.* at 132 (cleaned up).

Because the Banned Substances Claim is common law in nature, it falls within *none* of the established public rights exceptions. An anti-doping claim in horseracing is unrelated to the six established public rights categories. HISA Rule 3212. The only other potential public rights exception is for "new cause[s] of action" that are "unknown to the common law." *Atlas Roofing Co., Inc. v. OSHRC*, 430 U.S. 442, 461 (1977).[36] But that does not describe the Banned Substances Claim. "[T]he Seventh Amendment *does* apply to novel statutory regimes, so long as the claims are akin to common law claims." *Jarkesy*, 603 U.S. at 139 (emphasis added). And, as discussed,

[36] Serpe preserves the argument that *Atlas Roofing* should be overruled.

the Banned Substances Claim is analogous to several traditional common law claims. *See supra* Part III.C.1.

The ALJ decided that HISA was similar to the highly technical regulatory schemes that fell within the public rights exception in *Atlas Roofing* and *Axalta Coating Sys. LLC v. FAA*, 144 F.4th 467 (3d Cir. 2025). ALJ Decision at 120-21. But those cases are distinguishable. In each, Congress left it to an administrative agency to establish standards that then formed the claim against the administrative respondents. *Jarkesy*, 603 U.S. at 136-37; *Axalta*, 144 F.4th at 476.

A HISA fine for defrauding and violating the "confidence of the betting public" by secretly doping a racehorse, 15 U.S.C. § 3055(b)(7), is materially different than a regulatory penalty for violating "[t]echnical standards such as [the FAA's] [that] are" supposedly "'unknown to the common law.'" *Axalta*, 144 F.4th at 477 (citation omitted). The Banned Substances Claim against Serpe (HISA Rule 3212) comes directly from HISA—the statute directs the Authority to create "a list of permitted and prohibited medications, substances, and methods, including allowable limits of permitted medications, substances, and methods." 15 U.S.C. § 3055(c)(1)(B). This instruction was to effectuate Congress's policy that "[c]overed horses should compete only when they are free from the influence of medications, other foreign substances, and methods that affect their performance" and that "the integrity of the sport[] and the confidence of the betting public" will be maintained through transparency "regarding the administration of medications and treatments to covered horses." *Id.* § 3055(b)(1), (7). As discussed, rules for fair play in horseracing have a long common

law tradition, and this Banned Substances Claim in particular is analogous to common law fraud, breach of contract, and tortious interference. *See supra* Part III.C.1.b. Thus, the Banned Substances Claim does not fall within the public rights exception. *See Sun Valley Orchards*, 148 F.4th at 128 n.4 (distinguishing *Axalta* from a working-conditions claim based on what was functionally a contract).

IV. Serpe's Adjudication Must Take Place in an Article III Court

The Banned Substances Claim against Serpe must be adjudicated in federal court irrespective of whether the Seventh Amendment applies because it does not concern public rights. *See Sun Valley Orchards*, 148 F.4th at 127-28.

First, the Banned Substances Claim falls within Article III's mandatory jurisdiction because it is common law in nature—it is analogous to common law actions in debt, fraud, breach of contract, and tortious interference. *See supra* Part III.C.1.b. Even if the Commission removes the fine, the Banned Substances Claim retains its common law nature because the fine was still available as a remedy for the claim. HISA Rule 3223(b). Because this "suit is in the nature of an action at common law, [] the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory." *Jarkesy*, 603 U.S. at 128.

Second, because Article III's mandatory jurisdiction extends to "[c]ases[] in . . . [e]quity," U.S. Const. art. III, § 2, cl. 1, the legal-in-nature Banned Substances Claim requires Article III adjudication as it also has equitable remedies that implicate private rights. *See Jarkesy*, 603 U.S. at 132. Serpe's two-year suspension as a Covered Person is an injunction (i.e., a "means by which a court tells someone what to do or not to do." *Nken v. Holder*, 556 U.S. 418, 428 (2009)). And an injunction "is inherently

an equitable remedy."[37] *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 211 n.1 (2002). Additionally, courts have long recognized that government action excluding individuals from their chosen profession implicates significant liberty interests (i.e., a private right). *See, e.g.*, *Truax v. Raich*, 239 U.S. 33, 41 (1915). But Congress may not remove issues from the domain of the federal courts unless they exclusively involve public rights. *Jarkesy*, 603 U.S. at 128; *see also supra* Part III.C.2. Again, the claim here does not involve public rights.

V. Serpe's HIWU Arbitration Violated the Private Non-Delegation Doctrine

Additionally, HIWU's investigation, charging, and sanctioning of Serpe was unconstitutional because it violates the private non-delegation doctrine. Private entities may not be involved in government regulatory schemes unless they function "'subordinately to' the [government] and [are] subject to its 'authority and surveillance.'" *FCC v. Consumers' Rsch.*, 606 U.S. 656, 692 (2025) (citation omitted). This requires that the government "retain[] decision-making power" while the private entity may make "recommendations" in an "advisory role." *Id.* at 692-93.

HIWU did not function in a merely "advisory role" in Serpe's adjudication. *Id.* Instead, HIWU took several enforcement steps against Serpe without the involvement of the Commission. Congress authorized the Authority, through HIWU, to launch investigations, bring charges, and impose sanctions that go into effect before Commission review and are not automatically stayed. 15 U.S.C. §§ 3054(e),

[37] The same is true of disgorgement of "all purses and other compensation, prizes, trophies, points, and rankings" from the race. ALJ Decision at 16; *AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67, 82 (2021).

(h), 3055(c)(4)(B), 3057, 3058(a). These powers "are all quintessentially executive functions." *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415, 428 (5th Cir. 2024), *cert. granted, judgment vacated Texas v. Black*, 145 S. Ct. 2835 (2025).

With respect to Serpe, HIWU initiated an investigation and conducted a search by collecting blood and urine from Fast Kimmie immediately after the race in question. AB1 2459, ¶ 5 (Uncontested Stipulation of Fact). After the presence of a negligible amount of Clenbuterol found in the urine sample was confirmed, HIWU charged Serpe with violating its Banned Substances rule and imposed a provisional suspension. AB1 2459-60, ¶¶ 6, 13 (Uncontested Stipulation of Fact). HIWU brought Serpe before one of its arbitrators and argued in favor of its charges against him. ALJ Decision at 7-8. The Arbitrator found Serpe liable and imposed sanctions against him that took immediate effect. AB1 2784-85, ¶ 6.1(a); 15 U.S.C. § 3058(d). These decisions were made by HIWU, *not* the FTC on HIWU's recommendation. Accordingly, those actions were unconstitutional exercises of government enforcement power by a private entity. *See Consumers' Research*, 606 U.S. at 692-93.

VI. HISA Adjudication Violates Serpe's Due Process Rights

Finally, Serpe's HIWU Arbitration violated the Fifth Amendment Due Process Clause because it deprived Serpe of his fundamental right to "[a] fair trial in a fair tribunal[.]" *In re Murchison*, 349 U.S. 133, 136 (1955). This fairness requirement applies equally "to administrative agencies which adjudicate as well as to courts."

Withrow v. Larkin, 421 U.S. 35, 46 (1975).[38] It is also broadly construed to "prevent even the probability of unfairness." *Id.* at 47 (citation omitted). Indeed, "[e]very procedure which would offer a possible temptation to the average man as a judge not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." *Murchison*, 349 U.S. at 136 (cleaned up).

Here, through its own conduct, HIWU and the Authority have proven that the "probability of unfairness" in Serpe's HIWU Arbitration is too great to comport with the guarantee of due process. *Withrow*, 421 U.S. at 47 (citation omitted). HIWU initially sought a fine against Serpe for the alleged violation of the Banned Substances rule. AB1 Tab 15, 0493-501. But after the preliminary-injunction hearing in Serpe's parallel federal district court action, HIWU notified Serpe that it was dropping its pursuit of a fine. AB1 Tab 21, 1207. It was later revealed that the Authority instructed HIWU to drop the fine to avoid "continued expenditure of money litigating" Serpe's Seventh Amendment claim. AB1 Tab 37, 2711. This effort by these supposedly independent entities, 15 U.S.C. § 3054(e)(1)(E)(i), to manipulate Serpe's HIWU Arbitration vitiated any possibility that HIWU may be trusted as an unbiased adjudicator.

[38] Serpe expressly preserves the argument that *Withrow*'s holding, that a "combination of investigative and adjudicative functions does not, without more, constitute a due process violation," should be overruled. 421 U.S. at 58. Combined function agencies necessarily involve a "constitutionally unacceptable" "biased decisionmaker." *Id.* at 47. And they deny the respondent an independent judge and (where required) a jury.

Even the ALJ recognized that the Authority's gamesmanship was "inconsistent" with the Authority's "responsibility" to "provide for adequate due process." ALJ Decision at 55 (citation omitted). Indeed, the Authority's intention was to cut off Serpe's path to judicial review "while continuing to expose" him "to banishment from thoroughbred horseracing for substantial periods of Ineligibility." *Id.* at 46. Such an attempt to manipulate the outcome of proceedings in federal court is hopelessly biased—and thus fundamentally unfair. *See Murchison*, 349 U.S. at 136.

CONCLUSION

For the foregoing reasons, the Commission should vacate the sanctions against Serpe and dismiss this adjudication.

REQUEST FOR ORAL ARGUMENT

Oral argument is requested. This case presents constitutional issues concerning the ability of the Authority and the FTC to adjudicate Banned Substances claims. Given the significance of Serpe's constitutional claims for all parties, oral argument would help the Commission to resolve this case.

DATED: December 23, 2025

Respectfully submitted,

/s/ Oliver J. Dunford

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CERTIFICATE OF SERVICE

Pursuant to 16 C.F.R. § 4.4(b), I certify that on December 23, 2025, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of the filing. A courtesy copy will be sent via email to the following :

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Andrew N. Ferguson, Chairman**
Mark R. Meador

IN THE MATTER OF	
PHILIP SERPE,	**MATTER NO. D9441**
Appellant.	

[PROPOSED] ORDER

Upon consideration of the appeal briefs submitted in this proceeding, the arguments of counsel for the parties at oral argument, and the record in this matter, pursuant to 16 C.F.R. § 1.147,

IT IS HEREBY ORDERED THAT the Administrative Law Judge Decision dated September 12, 2025, is VACATED; and

IT IS FURTHER ORDERED THAT all sanctions imposed by the Arbitrator's Corrected Final Decision of July 9, 2025, are SET ASIDE and the case against Serpe is DISMISSED.

By the Commission.

Date: _____

_____
April Tabor
Secretary of the Commission