

PUBLIC

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

	)	
In the Matter of	)	
	)	
Philip Serpe,	)	Docket No. 9441
	)	
Appellant.	)	
	)	

**ADMINISTRATIVE LAW JUDGE DECISION
ON APPLICATION FOR REVIEW**

PUBLIC

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF ABBREVIATIONS	iii
I. INTRODUCTION	1
II. SUMMARY OF THE CASE	4
A. The Presence Charge.	4
B. The Underlying Facts.	6
C. Serpe’s Federal Action.	9
D. The Arbitrator’s Decision.....	11
E. The Parties’ Positions on this Review.....	17
III. ISSUES ON REVIEW	19
IV. SCOPE OF REVIEW	20
V. ANALYSIS OF THE ISSUES	22
A. HIWU Proved the Presence Violation Charged.....	22
B. Serpe’s Rebuttal to HIWU’s Proof is Unpersuasive.	23
C. Serpe’s NF and NSF Arguments Also Fail.	26
D. HIWU’s Presence Violation Is Proven.....	37
E. Serpe is “Aggrieved” By the Sanctions Arising from the Arbitration....	38
F. Serpe Raised His Constitutional Objection in the Arbitration.	42
G. The Arbitrator Erred in Failing to Include a Fine for HIWU’s Proven Violation.	47
1. The Authority Interfered with HIWU’s Prosecutorial Independence	47
2. The Authority’s Direction to HIWU Did Not Disable the Arbitrator From Exercising His Authority to Award a Fine.	56
3. Serpe’s “Set Aside” Argument.	63
4. A Fine Should Be Included in the Sanctions Awarded.	64
H. The Seventh Amendment Does Not Apply to HIWU’s Enforcement Proceeding Against Serpe.....	65
1. <i>Jarkesy</i> Analysis Does Not Apply to this Case.....	66
2. <i>Jarkesy’s</i> Analytic Framework for the Seventh Amendment Issue.....	70
3. Application to HISA and the Rules.	78
a. <i>Jarkesy’s</i> Threshold Question: Seventh Amendment Coverage—or Not?.....	78

PUBLIC

b.	Anti-Doping Regulation as a Public Right.	85
1.	Historical Background.	86
2.	Failure of Disparate State-Level Oversight.	93
3.	Enactment of HISA.	95
4.	The ADMC Program: Substances and Methods of Administration Regulated.	102
5.	The ADMC Program: Proscribed Conduct.	104
6.	ADMC Program: Investigation and Enforcement.	111
7.	The Racetrack Safety Program.	114
8.	HISA’s “Self-Consciously Novel” Regulatory Scheme.	117
VI.	CONCLUSION.	121
	APPENDIX: STATUTE OF ANNE (9-ANNE-CH-14).....	122

PUBLIC

TABLE OF ABBREVIATIONS

General

ADMC – Anti-Doping and Medication Control

ADRV – Anti-Doping Rule Violation

Authority – Horseracing Integrity and Safety Authority

HISA – Horseracing Integrity and Safety Act, 15 U.S.C. §§ 3051-60

HIWU – Horseracing Integrity & Welfare Unit

Review Proceeding

AB1 – Appeal Book Part 1

AB2 – Appeal Book Part 2

AuOBr. – Authority’s Opening Brief

AuRSPCOL – Authority’s Reply to Appellant’s Proposed Conclusions of Law

Not. App. – Serpe Notice of Appeal and Application for Review (July 15, 2025)

SOBr. – Appellant Serpe’s Opening Brief

Federal Action – *Serpe v. FTC*, No. 0:24cv61939 (S.D. Fla.)

- Authority Opp. to PI Mot. – Authority’s Opposition to Plaintiff’s Motion for Preliminary Injunction, ECF 26 (Jan. 24, 2025)
- Authority Opp. to Renewed PI Mot. – Authority’s Opposition to Plaintiff’s Renewed Motion for Preliminary Injunction, ECF 55 (Aug. 15, 2025)
- Authority Response to Supp. Order – Authority’s Response to Order to Supplement the Record, ECF 44 (May 9, 2025)
- Defs’ Joint Notice and Mot. to Vacate – Defendants’ Joint Notice and Motion to Vacate Order Directing Supplemental Briefing, or in the Alternative, to

PUBLIC

Extend Supplemental Briefing Deadline, ECF 41 (Apr. 24, 2025)

- Plaintiff's Combined Response – Plaintiff's Combined Response in Opposition to Defendants' Motion to Vacate the Court's April 11, 2025, Order and Supplemental Brief in Response to that Order, ECF 42 (Apr. 24, 2025)
- PI Br. (AB1 234) – Memorandum in Support of Plaintiff's Motion for Preliminary Injunction, ECF 10-1 (Oct. 23, 2024)
- PI Mot. (AB1 231) – Plaintiff's Motion for Preliminary Injunction, ECF 10 (Oct. 23, 2024)
- Renewed PI Br. – Memorandum in Support of Plaintiff's Renewed Motion for Preliminary Injunction, ECF 50-1 (July 15, 2025)
- Renewed PI Mot. – Plaintiff's Renewed Motion for Preliminary Injunction, ECF 50 (July 15, 2025)
- Reply Renewed PI Mot. – Reply in Support of Plaintiff's Renewed Motion for Preliminary Injunction, ECF 57 (Aug. 22, 2025)

Other Cases

Perez

- *Matter of Perez*, JAMS Case No. 1501000589 (Oct. 9, 2023), *aff'd*, FTC No. 9420, at 7, 10 (ALJ Feb. 7, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/609612_d09420-administrative_law_judge_decision_on_application_for_review_-_public.pdf, *review denied*, 2024 FTC Lexis 104 (Aug. 14, 2024).

Poole

- *Matter of Poole*, JAMS Case No. 1501000576 (Aug. 8, 2023), *aff'd*, FTC No. 9417, 2023 WL 8435860 (ALJ Nov. 13, 2023)

Shell II

- Decision – *Matter of Scott Shell*, FTC No. 9439, 2025 WL 1784696 (ALJ Mar. 6, 2025)
- AuSLBr. – Authority's Supporting Legal Brief, FTC No. 9439, 2025 WL 711493 (Jan. 9, 2025)
- AuResp. to ALJ Order – Authority's Response to October 29, 2024 Order (1) Directing Briefing on the Question of Jurisdiction and (2) Staying Proceedings, FTC No. 9439, 2024 WL 5078329 (Nov. 12, 2024)

PUBLIC

- HIWU Resp. to ALJ Order – The Horseracing Integrity & Welfare Unit’s Response to the Order Directing Briefing on the Question of Jurisdiction, FTC No. 9439, 2024 WL 5078331 (Nov. 12, 2024)

PUBLIC

I. INTRODUCTION

Horseracing is among the oldest of sporting competitions. The Greeks included it in their earliest Olympics, and Homer’s *Iliad* “vividly describes the chariot race at the funeral games held in honor of the Macedonian general Patrocles.”¹ To be credible, however, races then—and now—need to have rules, lest competition “be completely ineffective.”² During colonial times and following independence, horseracing in this country was largely self-regulated, followed by the creation of state racing commissions beginning near the turn of the 19th century. In recent times, however, with public interest waning and with horse and jockey injuries plaguing the sport, the need for federal oversight became imperative. In 2020, Congress enacted the Horseracing Integrity and Safety Act (“HISA”).³ Among other things, HISA created the Horseracing Integrity and Safety Authority (the “Authority”), a private, independent, self-regulatory, nonprofit corporation, to “develop[] and implement[] a horseracing anti-doping and medication control program and a racetrack safety program” throughout the United States.⁴

The Authority promulgated, and the Federal Trade Commission approved, regulatory rules, which include the statutorily-required Anti-Doping and

¹ Joan S. Howland, *Let’s Not Spit the Bit in Defense of “The Law of The Horse”: The Historical and Legal Development of American Thoroughbred Racing*, 14 MARQ. SPORTS L. REV. 473, 476, 478 (2004).

² *NCAA. v. Board of Regents*, 468 U.S. 85, 101 (1984).

³ 15 U.S.C. §§ 3051 *et seq.*

⁴ *Id.* § 3052(a).

PUBLIC

Medication Control (“ADMC”) Program.⁵ The HISA and ADMC Program rules address, in summary: (1) the persons and thoroughbred racehorses the Program covers; (2) the substances that are banned outright or subject to threshold presence requirements, and those that are regulated as controlled medications; (3) the conduct constituting violations and corresponding sanctions; and (4) investigation and enforcement in furtherance of the statute.⁶ Under the ADMC Program, the more serious violations are Anti-Doping Rule Violations (“ADRVs”), which cover Banned Substances that “should never be in a horse’s system,” and which are set out in a Prohibited List of Banned Substances issued by the Authority.⁷

The Authority also has contracted with another private entity, the Horseracing Integrity & Welfare Unit (“HIWU”), to enforce the ADMC Program on its behalf.⁸ HIWU charges of ADRV are heard by an Internal Adjudication Panel, which may, as here, consist of a single arbitrator.⁹ The FTC has authority to review

⁵ *Id.* §§ 3053, 3055, 3057.

⁶ *See generally* Rule 3000 series; 88 Fed. Reg. 5070-5201 (Jan. 26, 2023) (FTC Notice of HISA Proposed Rule and Request for Comment); Order Approving the ADMC Rule Proposed by HISA, 2023 WL 264420 (FTC Mar. 27, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/P222100CommissionOrderAntiDopingMedication.pdf; 88 Fed. Reg. 27894 (May 3, 2023) (FTC Notice of Final Rule, effective May 22, 2023).

⁷ Rule 3010(c). *See also* Rules 1020 (definition of ADRV), 3111(a) (Prohibited Substances). Capitalized terms used, but not defined in this Decision, are those defined in HISA Rule 1020 of the General Provisions. Other abbreviations are set forth in the Table of Abbreviations.

⁸ 15 U.S.C. §§ 3054(e)(1)(B) & (E), 3055; Rules 3010(e)(1), 5720(a); HISA Announces Selection of Drug Free Sport International as Partner to Build Independent Anti-Doping and Medication Control Enforcement Agency (May 3, 2022), <https://www.hiwu.org/news/hisa-announces-selection-of-drug-free-sport-international-as-partner-to-build-independent-anti-doping-and-medication-control-enforcement-agency>.

⁹ Rules 3360, 7020.

PUBLIC

arbitrator decisions resolving HIWU-initiated enforcement proceedings.¹⁰ Further review is available under the Administrative Procedures Act.¹¹

This review proceeding arises from an ADRV that HIWU successfully prosecuted against a trainer, Philip Serpe. One of Serpe's horses, Fast Kimmie, tested positive for clenbuterol, a Banned Substance, after finishing first in a race. Clenbuterol's presence in Fast Kimmie is not disputed, although how the substance came to be in the horse was litigated before the appointed Arbitrator. In addition, Serpe contends that HIWU's prosecution of this case under HISA-authorized procedures violates his right under the Seventh Amendment of the Constitution to a jury trial. As discussed below, I hold that HIWU proved its ADRV against Serpe, and that the Arbitrator correctly awarded a two-year period of Ineligibility against Serpe. However, I also find that the Arbitrator erred in failing to include a fine against Serpe in the award of sanctions. Finally, I find that a jury trial is not constitutionally required.

I set forth the basic facts first, which include a summary of the Arbitrator's decision. After that, I discuss the issues on this review, the scope of review, and my analysis of the issues. Additional facts are presented within discussion of the individual issues.

¹⁰ 15 U.S.C. § 3058; 16 C.F.R. §§ 1.145 *et seq.*; *see* 87 Fed. Reg. 60077 (Oct. 4, 2022) (Final Rule).

¹¹ 5 U.S.C. §§ 701 *et seq.*

PUBLIC

II. SUMMARY OF THE CASE

A. The Presence Charge.

At the outset, it is useful to set out the basic Rules applicable to HIWU's charge that Fast Kimmie's positive test for clenbuterol violated an ADMC Program rule. There is no dispute that Serpe and Fast Kimmie are subject to the requirements of the ADMC Program and the Rules generally.

First, Rule 3212(a) provides in pertinent part that:

It is the personal and nondelegable duty of the Responsible Person [here, Serpe] to ensure that no Banned Substance is present in the body of his or her Covered Horse(s) [here, Fast Kimmie]. The Responsible Person is therefore *strictly liable* for any Banned Substance . . . found to be present in a Sample collected from his or her Covered Horse(s). Accordingly, it is not necessary to demonstrate *intent, Fault, negligence, or knowing Use* on the part of the Responsible Person in order to establish that the Responsible Person has committed a Rule 3212 Anti-Doping Rule Violation.

(Emphasis added). The Rule establishes what is referred to as a “presence”

violation. Serpe, a trainer, is a “Responsible Person.”¹²

Second, presence violations are typically proven through Laboratory analysis of a sample of a horse's urine, blood, or hair.¹³ The collected sample is split into the A Sample and the B Sample, and the initial analysis is performed on the A Sample.¹⁴ A second analysis may be performed on the B Sample, often when

¹² Rule 3030(a).

¹³ Rule 1020 (definition of Sample).

¹⁴ Rules 5410(g), 6304(b), 6308(b)(2).

PUBLIC

requested by a trainer, such as Serpe, after being apprised that the A Sample tested positive.¹⁵

Third, under Rule 3212(b)(2), “[s]ufficient proof” of a presence violation may be established by showing, through Laboratory analysis, that “the Covered Horse’s B Sample is analyzed and the analysis of the B Sample confirms the presence of the Banned Substance . . . found in the A Sample”¹⁶ Rule 3122(c) further provides that “Laboratories are presumed to have conducted Sample analysis and custodial procedures in accordance with the Laboratory Standards” set out in the Rules.

Fourth, HIWU has the burden of proving the ADRV “to the comfortable satisfaction of the hearing panel This standard of proof in all cases is greater than a mere balance of probability (*i.e.*, a preponderance of the evidence) but less than clear and convincing evidence or proof beyond a reasonable doubt.”¹⁷

Fifth, once HIWU satisfies this burden—which includes the presumption in favor of the Laboratory analysis—the burden shifts to Serpe “to rebut a presumption or to establish specified facts or circumstances . . . by a balance of probability (*i.e.*, a preponderance of the evidence),” subject to exceptions not applicable here.¹⁸

¹⁵ Rules 3245(a)(4)(ii), 6312; AB1 478 (EAD Notice).

¹⁶ Rule 3212(b)(2).

¹⁷ Rule 3121(a).

¹⁸ Rule 3121(b).

PUBLIC

B. The Underlying Facts.

Briefly, clenbuterol, the substance for which Fast Kimmie tested positive, is an FDA-approved β -2-agonist bronchodilator. In simpler terms, clenbuterol is typically used to improve the flow of air to the lungs in a horse. However, it also has muscle-building effects in racehorses.¹⁹ Prior to the ADMC Program taking effect in 2023, clenbuterol was “widely used by trainers.”²⁰ It reportedly was “fourth on the list of most detected drugs on horse doping laboratories worldwide.”²¹ Thus, under the Rules, clenbuterol is a Banned Substance, subject to exceptions provided for in Rule 4114(b). The exceptions are not claimed to apply here, however.²²

The central facts relating to HIWU’s presence charge are stipulated to.

On August 10, 2024, Fast Kimmie finished first in Race 4 at Saratoga Racetrack in New York, earning a purse of \$50,000.²³ After the race, urine was collected that day at the racetrack’s testing barn.²⁴ Shortly thereafter, the testing laboratory at the University of California Davis reported a positive finding of clenbuterol in the A Sample of Fast Kimmie’s urine.²⁵ HIWU notified Serpe of the A Sample analysis in early September 2024, and Serpe requested B Sample testing.²⁶

¹⁹ AB2 3010 (Cole).

²⁰ AB2 3010 (Cole).

²¹ AB2 3011 (Cole).

²² See AB1 2459-60, at ¶¶ 8, 9 (Uncontested Stipulation of Facts).

²³ AB1 776 (Equibase report); AB1 2459, at ¶ 4 (Uncontested Stipulation of Fact).

²⁴ AB1 2459, at ¶ 5 (Uncontested Stipulation of Fact).

²⁵ AB1 2459, at ¶ 6 (Uncontested Stipulation of Fact).

²⁶ AB1 2459, at ¶¶ 10, 11 (Uncontested Stipulation of Fact).

PUBLIC

In response, a testing laboratory in Ohio analyzed the B Sample, which similarly tested positive for clenbuterol.²⁷ Serpe “does not contest the analytical procedures performed or results reported by” either the University of California Davis or Ohio laboratories.²⁸ However, he denies that clenbuterol was administered to Fast Kimmie or to any of his other horses.²⁹

On October 10, 2024, HIWU issued its Charge Letter to Serpe, notifying him of an alleged presence violation under Rule 3212(a).³⁰ HIWU initiated its arbitration to resolve the alleged violation two months later.³¹ Upon charging Serpe, HIWU also imposed a Provisional Suspension on Serpe, which it lifted in November 2024 as a result of a decision by the Authority that applied to trainers generally, and not simply to Serpe.³² Except for the credit against Ineligibility arising from the Provisional Suspension, it does not factor substantively into the matters at issue in the case.³³

At the arbitration hearing, held in June 2025, HIWU offered the A and B Sample results. In response to HIWU’s prima facie case, Serpe denied that clenbuterol was administered to Fast Kimmie. Through additional evidence, Serpe sought to show that his horse tested positive through no fault of his own, or that

²⁷ AB1 2459, at ¶ 12 (Uncontested Stipulation of Fact).

²⁸ AB1 2461, at ¶ 19 (Uncontested Stipulation of Fact).

²⁹ AB1 1237 ¶¶ 6, 11-14 (Serpe witness statement).

³⁰ AB1 2460, at ¶ 13 (Uncontested Stipulation of Fact). *See also* AB1 493 (Charge Letter).

³¹ AB1 6 (HIWU letter).

³² AB1 1509 (Farrell email), 2450 (PI Decision).

³³ AB1 2784-85, at ¶ 6.1(a)b (Corrected Final Decision).

PUBLIC

there was no significant fault on his part, two defenses available under Rules 3224 and 3225 discussed further below.

Serpe maintained that the clenbuterol finding could have been transferred to Fast Kimmie from a dozen or so individuals who came in contact with his horse on race day, or during the days shortly before.³⁴ He also introduced other testing of Fast Kimmie. A blood sample collected as an Out-of-Competition doping control test in June 2024—nearly two months before the Saratoga race—detected no Banned Substances, and a post-race blood sample, collected on August 10 after Fast Kimmie’s race tested negative.³⁵ In December 2024—months after Fast Kimmie’s race—blood and hair samples further tested negative for clenbuterol.³⁶ Finally, Serpe submitted brief letters from two veterinarians he used. Both stated they did not treat, prescribe, or dispense clenbuterol to any horses Serpe trained in recent years.³⁷

At the arbitration hearing, both sides presented fact and expert testimony, along with documents, to address Serpe’s contamination argument.³⁸

³⁴ AB2 2911-15, 2940-43 (Serpe).

³⁵ AB1 2459, at ¶¶ 3, 5-6 (Uncontested Stipulation of Fact).

³⁶ AB1 2460-61, at ¶¶ 15-16 (Uncontested Stipulation of Fact).

³⁷ AB1 1268, 1270 (Hunt and Hay letters); AB2 2903 (Serpe).

³⁸ AB2 2847 *et seq.* (arbitration transcript).

PUBLIC

C. Serpe's Federal Action.³⁹

Within days of receiving HIWU's Charge Letter in October 2024, Serpe's counsel wrote HIWU stating, among other things, that "the administrative proceeding initiated . . . does not guarantee Mr. Serpe's right to a trial by jury and therefore violates the Seventh Amendment of the U.S. Constitution."⁴⁰ Days later, Serpe filed an action against the Authority and the FTC in federal district court for the Southern District of Florida (the "Federal Action"), arguing that HIWU's proceeding against him, and the Rules authorizing it, are unconstitutional.⁴¹ In summary, he alleges the following:

First, HISA's structure, which authorizes thoroughbred racing to be regulated by the Authority, a private body, violates what is sometimes referred to as the "private nondelegation" doctrine. This doctrine is derived from Article II of the United States Constitution and the separation of powers.⁴²

Second, HIWU cannot constitutionally prosecute a case against him under the Rules because, under the Seventh Amendment of the Constitution, he has a

³⁹ The parties included various filings in Serpe's federal action as evidence in the arbitration, and I directed that the record on this review include the transcript of the oral argument of Serpe's preliminary injunction motion. *See* AB1 132 (federal complaint), 231-96, 1193-94, 2438-56 (PI papers); AB2 2789 (PI transcript). The Authority has also stated it "would be glad to submit any [Federal Action] filings upon request." SOBr. at 23 n.100. In any event, I may take official notice of matters of public record, including documents in other court cases. *See, e.g.*, APA 5 U.S.C. § 556(e); FTC Rule 3.43(f); *Sands v. McCormick*, 502 F.3d 263, 268 (3d Cir. 2007) ("judicial proceedings constitute public records" subject to judicial notice) (citing authorities); *Dayco Corp. v. FTC*, 362 F.2d 180, 185-87 (6th Cir.1966) (discussing official notice).

⁴⁰ AB1 650 (Beilly letter).

⁴¹ AB1 161-62, at ¶¶ V.1-4 (federal complaint).

⁴² *See, e.g.*, AB1 132 *et seq.*, at ¶¶ 1, 10-12, 98-112 (federal complaint).

PUBLIC

right to a jury trial in federal court, where the case would be governed by the statutes and rules applicable to federal litigation. HISA and the Rules, however, call for a hearing before an arbitrator and subsequent FTC review under other (he maintains) more restricted procedures.⁴³

Shortly after beginning the Federal Action, Serpe sought a preliminary injunction barring HIWU from prosecuting its case before an arbitrator.⁴⁴ The Court limited the preliminary injunction proceedings to Serpe's Seventh Amendment claim, received the parties' briefs, and heard oral argument in April 2024. An exchange during the oral argument is worthy of mention at this point. There was discussion of Serpe's Seventh Amendment claim and its viability if HIWU's request for a monetary fine were to be dropped:

The Court: if they wrote you two weeks from today and said, "You know, for your arbitration proceeding, civil monetary penalties, fines, they're off the table. This is only going to be about, if we find you liable, disgorgement of the purse of the races that that horse ran in."

If they did that, there couldn't possibly be a Seventh Amendment violation; right? If they took it off the table.

. . . .

Mr. Beilly [counsel for Serpe]: But that's a hypothetical that doesn't exist.⁴⁵

Taking the fine "off the table" wasn't "hypothetical" for long. Less than two weeks later, HIWU informed Serpe that it "will not be seeking a fine to be imposed

⁴³ See, e.g., AB1 132 *et seq.*, at ¶¶ 1, 33, 87, 114-49 (federal complaint).

⁴⁴ AB1 162, at ¶¶ V.6 & 7 (federal complaint)

⁴⁵ AB2 2802 (transcript of argument).

PUBLIC

against [him]” in the forthcoming arbitration.⁴⁶ Then, in supplemental briefing on Serpe’s preliminary injunction motion, the Authority argued that “HIWU’s decision not to seek monetary penalties against Serpe ‘should moot’ his Seventh Amendment claim.”⁴⁷ Evidence that Serpe later obtained independent of the arbitration explained HIWU’s decision: “HIWU is not seeking a fine for Mr. Serpe *based upon direction from HISA* [*i.e.*, the Authority] that to do so would result in the continued expenditure of money litigating the issue, which would not be a prudent use of industry funds.”⁴⁸

In May 2025, the Court denied Serpe’s motion, holding in salient part that he had failed to show irreparable injury.⁴⁹ Serpe has since filed a second motion for a preliminary injunction, which the parties have briefed.⁵⁰

D. The Arbitrator’s Decision.

Having filed his Federal Action and amidst preliminary injunction proceedings, Serpe moved to stay HIWU’s case before the Arbitrator.⁵¹ The Arbitrator denied the motion, and the arbitration hearing was conducted in June

⁴⁶ AB1 1207 (HIWU letter). In withdrawing its fine request, HIWU cited Rule 3323, which applies to Controlled Medication Rule violations and seemingly has no relevance to this case. However, the withdrawal is undisputed.

⁴⁷ AB1 2447 (PI decision). *See also* Defs’ Joint Notice & Mot. to Vacate, at 1 & Ex. A, Federal Action; Authority Response to Supp. Order, at 6, Federal Action.

⁴⁸ AB1 2711 (HIWU email) (emphasis added).

⁴⁹ AB1, 2450-54 (PI decision).

⁵⁰ Renewed PI Mot. at 50, Federal Action.

⁵¹ AB1 305.

PUBLIC

2025.⁵² Later that month, the Arbitrator issued his decision, which was subsequently corrected “on the basis [of] non-merits changes.”⁵³ The Arbitrator held that, through the results of the A and B Sample tests, HIWU met its burden of proving an ADRV against Serpe, for which he was strictly liable.⁵⁴

The Arbitrator rejected Serpe’s argument that negative test results from analyses of blood and hair collected from Fast Kimmie before and after her August 2024 race refuted HIWU’s evidence.⁵⁵ He noted that the ADMC Program “is a single-matrix regime,” which, for drug testing purposes, means that presence of a Banned Substance may be established by positive test results for any single biological material collected—for example, “urine, blood, or hair” under the ADMC Program.⁵⁶ Accordingly, under Rule 6313(e), the additional test results Serpe offered failed as a matter of law:

Alternative biological matrices. Any negative Analytical Testing results obtained from hair, hoof, saliva or other biological material shall not be used to counter Adverse Analytical Findings or Atypical Findings from urine, blood (including whole blood, plasma or serum), or hair.⁵⁷

Under the Rules’ single-matrix regime, Serpe’s rebuttal proof therefore had to challenge the Laboratory analysis performed on Fast Kimmie’s urine. But on this

⁵² AB1 1196, 1209 (procedural order, corrected); AB2 (arbitration transcript).

⁵³ AB1 2748, at ¶ 2.18 (final decision), 2770 (Corrected Final Decision).

⁵⁴ AB1, 2776, at ¶¶ 3.11-13, 2778, at ¶ 5.3 (Corrected Final Decision).

⁵⁵ See AB1 2459, at ¶¶ 3, 15-16 (Uncontested Stipulation of Fact).

⁵⁶ AB1 2778, at ¶ 5.6 (Corrected Final Decision); see also *id.* at ¶ 5.11; Rule 1010 (“Sample means any biological material collected for the purposes of Doping Control or Medication Control, including urine, blood, and hair.”).

⁵⁷ AB1 2778, at ¶ 5.6 (quoting the Rule) (Corrected Final Decision).

PUBLIC

score, Serpe stipulated to the laboratory test procedures and results.⁵⁸ In all events, however, expert evidence established that negative hair results—the biological material on which Serpe principally relied—“cannot override a positive urinary [sic] finding.”⁵⁹

Expert evidence further established that these additional test results were “consistent with any one of several plausible exposure scenarios that could reflect intentional use.”⁶⁰ And insofar as Serpe sought, through this evidence, “to import an element of intent into a presence ADRV,” that effort also failed as a matter of law.⁶¹

Since HIWU had proven its *prima facie* case, the burden shifted to Serpe to show, by a balance of the probabilities, that he bore either (a) No Fault or Negligence (“NF”), or (b) No Significant Fault or Negligence (“NSF”), for the presence of clenbuterol in Fast Kimmie.⁶² By way of background, where presence of a Banned Substance is charged, if NF is shown, then Rule 3224 eliminates sanctions entirely. Under Rule 3225, if NSF is proven, sanctions may be reduced, albeit not eliminated.

NF requires that Serpe establish “that he . . . did not know or suspect, and could not reasonably have known or suspected, even with the exercise of utmost

⁵⁸ AB1 2778, at ¶ 5.6 (Corrected Final Decision). *See also* AB1 2461, at ¶¶ 18, 19 (Uncontested Stipulation of Fact).

⁵⁹ AB1 2778, at ¶ 5.7; *see also id.* at ¶¶ 5.8-9 (Corrected Final Decision).

⁶⁰ AB1 2779, at ¶ 5.13 (Corrected Final Decision).

⁶¹ AB1 2779, at ¶ 5.12; *see also id.* 2776, at ¶ 3.11, 2777-78, at ¶ 5.2 (Corrected Final Decision).

⁶² *See* AB1 2778, at ¶ 5.5, 2779-80, at ¶ 5.14 (Corrected Final Decision).

PUBLIC

caution,” that he had committed the alleged ADVR.⁶³ Thus, an NF finding “only applies in exceptional circumstances.”⁶⁴ By contrast, the elements of NSF are more relaxed. Serpe must establish that “his . . . fault or negligence, when viewed in *the totality of the circumstances* and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the [ADRV] . . . in question.”⁶⁵ NSF enables the period of Ineligibility to be adjusted downward, depending on a further analysis of the degree of fault, together with consideration of “objective” and “subjective” factors.⁶⁶

“[A]s a pre-condition” to applying either the NF or NSF Rules, however, Serpe must demonstrate how clenbuterol “entered . . . [Fast Kimmie’s] system”⁶⁷ In other words, he must prove the “source” of the clenbuterol present in Fast Kimmie. Serpe posited that the positive clenbuterol finding resulted from contamination—transfer either from a person with whom Fast Kimmie came in contact, or from the racetrack environment itself (including the test barn where Fast Kimmie’s sample was collected).

⁶³ Rule 1020 (definitions).

⁶⁴ Rule 3224(b). *See, e.g., Sangiorgi*, FEI No. 2019/BS41 (Aug. 26, 2020) (NF where the charged individual could not reasonably have known his employee, who took medication that produced the presence of a banned substance, would urinate in the horse’s stall).

⁶⁵ HISA Rule 1020 (Definitions) (emphasis added).

⁶⁶ Rule 3225(a). *See also Shell II* Decision at *41-46; *Perez*, JAMS Case No. 1501000589, at ¶¶ 7.23-.29 (Oct. 9, 2023), *aff’d*, No. 9420, at 7, 10 (ALJ Feb. 7, 2024), *review denied*, 2024 WL 3824065 (FTC Aug. 8, 2024).

⁶⁷ Rule 3224(a) (NF) & Rule 1020 (definition of NSF); AB1 2780, at ¶ 5.15 (Corrected Final Decision).

PUBLIC

The Arbitrator rejected Serpe’s effort to prove clenbuterol’s source. HIWU’s expert, Dr. Eichner, opined that “multiple exposure scenarios could explain Fast Kimmie’s doping control results.”⁶⁸ At the same time, Serpe’s own expert, Dr. Cole, “gesture[d] at the theoretical possibility of inadvertent transfer of Clenbuterol,” but failed to offer “any specific fact . . . that renders inadvertent exposure the likely explanation”⁶⁹ Because Serpe did not home in on any specific contamination scenario, he failed to satisfy his burden to prove source.⁷⁰

In any event, HIWU itself offered evidence showing that: (1) no “other horse at Saratoga was taking Clenbuterol (by one means or another) at Saratoga at any relevant time”; (2) HISA records, covering “the month and a half preceding August 10, 2024,” showed use of clenbuterol in Covered Horses located only in “California, Delaware, Iowa, Utah, and Arizona”; and (3) HIWU’s “standards and protocols” were followed at the test barn where Fast Kimmie’s urine sample was collected.⁷¹

Despite Serpe’s inability to prove the source of clenbuterol’s presence in Fast Kimmie, the Arbitrator addressed the additional elements of each defense. For NF, he held that Serpe failed to show that Fast Kimmie tested positive for clenbuterol despite Serpe having exercised the “utmost caution”; thus, the case was not one of

⁶⁸ AB1 2780, at ¶ 5.18; *see also id.* 2780-81, at ¶ 5.19 (Corrected Final Decision).

⁶⁹ AB1 2780, at ¶ 5.17 (Corrected Final Decision).

⁷⁰ AB1 2781-83, at ¶¶ 5.20-23 & 5.14-18, 5.29 (misnumbered) (Corrected Final Decision).

⁷¹ AB1 2782, at ¶¶ 5.16-17 (mis-numbered) (Corrected Final Decision). *See* AB1 1527, at ¶¶ 6-9 (Stormer wit. statement), 1532 (search results); AB2 2955-60 (Stormer).

PUBLIC

“extreme and exceptional circumstances.”⁷² For NSF, the Arbitrator similarly asserted that an “exceptional circumstances” standard applied, and that, because strictly liable under the Rules, Serpe’s attempt “to point the finger” at others was inadequate to prove “precautions taken . . . to ensure [Fast Kimmie] was not inadvertently exposed to a Banned Substance.”⁷³

Therefore, Serpe could not avail himself of either the NF or NSF defense. This left only the sanctions to be determined. Under the Rules, the arbitrator must determine whether there was an ADRV and if so, the sanctions that should be awarded. Then, the Authority is legally bound to impose the sanctions determined.⁷⁴ Here, the Arbitrator awarded the following sanctions:

- a. Disqualification of the results that Fast Kimmie obtained in Race 4 at Saratoga on August 10, 2024, including forfeiture of all purses and other compensation, prizes, trophies, points, and rankings and repayment or surrender (as applicable) to the Race Organizer (ADMC Program Rule 3221);
- b. A period of Ineligibility of two (2) years for Mr. Serpe as Covered Person, with a 25-day credit for time served under the imposition of the Provisional Suspension from October 10, 2024, to the time it was lifted on November 4, 2024 (ADMC Program Rule 3223); and
- c. Public disclosure in accordance with Rule 3620 (ADMC Program Rule 3231).⁷⁵

The Arbitrator did not award any fine, nor explain his decision. Although aware that HIWU had requested a fine in its Charge Letter, but had withdrawn it before

⁷² AB1 2783-84, at ¶ 5.21 (mis-numbered) (Corrected Final Decision).

⁷³ AB1 2784, at ¶¶ 5.23, 5.25 (mis-numbered) (Corrected Final Decision).

⁷⁴ 15 U.S.C. § 3055(c)(4)(B); Rules 3010(f)(8), 3710(a).

⁷⁵ AB1 2784-85, at ¶ 6.1(a).

PUBLIC

the arbitration hearing, the Arbitrator noted only that “HIWU could have also sought . . . the statutory fine permitted for these cases [sic] but it declined to do so.”⁷⁶

The sanctions took effect on July 14, 2025. The next day, Serpe began this proceeding to review the Arbitrator’s decision.⁷⁷

E. The Parties’ Positions on this Review.

This review proceeding arises in an uncommon framework. Serpe appeared in the arbitration and defended against HIWU’s charge on the merits, without prejudice to his position in the Federal Action where he asserts constitutional objections to HISA’s enforcement system.⁷⁸ With the Arbitrator’s decision upholding HIWU’s presence charge, but refraining from awarding any fine, Serpe maintains he is sufficiently aggrieved to seek this review. According to Serpe, a fine was “mandatory” under Rule 3223(b).⁷⁹ But, by withdrawing its fine request at the Authority’s direction shortly before the arbitration hearing, HIWU was able to have its presence charge determined in arbitration, and to subject Serpe to liability for an ADRV. On the other hand, had HIWU’s request for a fine remained in the case, HIWU, Serpe maintains, could not prosecute its charge in arbitration because the

⁷⁶ AB1 2777, at ¶ 4.2 (misnumbered); *see also* AB1 1449 (Charge letter requesting \$25,000 fine); AB2 3110-26 (closing statements) (Corrected Final Decision).

⁷⁷ Not. App. at 4 & Ex. B (Notice of Final Civil Sanctions).

⁷⁸ *See* AB2 2863-65.

⁷⁹ *See, e.g.*, SOBr. at 8-10.

PUBLIC

Seventh Amendment would entitle Serpe to have his liability, and any sanctions that might follow, determined by a jury trial in federal court.⁸⁰

In Serpe’s view, the Arbitrator’s failure to award an allegedly “mandatory” fine rendered his decision “arbitrary and capricious and not in accordance with law.”⁸¹ While he requests that I “set aside” the Arbitrator’s decision as “unlawful,” Serpe also contends that I “cannot take the further step of *modifying*” the decision “to actually impose a fine.”⁸² Instead, according to Serpe, I must “remand with directions for HIWU not to initiate an arbitration against [him]” under HISA and the Rules.⁸³

Although this is Serpe’s principal argument, he also “disputes that he is, in fact, liable” for the charged ADRV or any fine imposed.⁸⁴ He has not, however, attempted to marshal the evidence in the record to support his disputation.

For its part, the Authority maintains “[t]here are now no disputes of material fact.”⁸⁵ Liability is proven, and Serpe failed to meet his burden to show NF or NSF, with only the sanctions at issue.⁸⁶ Even there, Serpe “complains only that HIWU did not seek, and the Arbitrator did not impose, an *additional* sanction (*i.e.*, a

⁸⁰ See *generally id.* at 1 [misnumbered as 4]-3.

⁸¹ *Id.* at 1.

⁸² *Id.* at 3 (emphasis in original).

⁸³ *Id.* at 11 (citing 15 U.S.C. § 3054(e)). See also *id.* at 3.

⁸⁴ *Id.* at 1 [mis-numbered as 4]-2.

⁸⁵ AuOBr. at 8. See also *id.* at 17-18.

⁸⁶ *Id.* at 18-19.

PUBLIC

monetary fine).”⁸⁷ Urging affirmance, the Authority therefore argues that: (1) Serpe is not aggrieved by the absence of the fine as a sanction, and in any event he waived the argument by failing properly to present it to the Arbitrator; (2) neither HISA nor the Rules required a fine; and (3) the Arbitrator did not err in declining to impose one.⁸⁸

III. ISSUES ON REVIEW

Based on the proceedings before the Arbitrator and parties’ papers on this review proceeding, my decision below addresses the following issues:

1. Did HIWU prove the Presence violation charged?
2. Is Serpe sufficiently aggrieved to seek review of the Arbitrator’s decision to refrain from awarding a fine, or is this issue otherwise not reviewable in this proceeding?
3. Did the Arbitrator err in failing to include a fine in his sanctions award, or in failing to explain the reason for not doing so?
4. If the Arbitrator’s failure to award a fine was error, may I include a fine in the sanctions against Serpe, or must I direct other relief instead?

⁸⁷ *Id.* at 8 (emphasis in original).

⁸⁸ AuOBr. at 8, 19-27.

PUBLIC

5. If I may include a fine in the sanctions, is Serpe entitled under the Seventh Amendment of the Constitution to have HIWU's presence charge heard in federal court by a jury?

IV. SCOPE OF REVIEW

HISA civil sanctions, imposed for Rule violations, are reviewable by an FTC Administrative Law Judge (ALJ) upon application of the person aggrieved and thereafter by the Commission itself on a discretionary basis.⁸⁹ The ALJ reviews:

“whether—

- (i) a person has engaged in such acts or practices, or has omitted such acts or practices, as the Authority has found the person to have engaged in or omitted;
- (ii) such acts, practices, or omissions are in violation of this [chapter] or the anti-doping and medication control or racetrack safety rules approved by the Commission; or
- (iii) the final civil sanction of the Authority was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁹⁰

The ALJ's review of the Arbitrator's decision is *de novo*— “as if it had not been heard before, and as if no decision previously had been entered.”⁹¹ Thus, the

⁸⁹ 15 U.S.C. §§ 3058(b) & (c); FTC Rules 1.146 & 1.147.

⁹⁰ 15 U.S.C. § 3058(b)(2)(A); *see also* FTC Rule 1.146(b)(1)-(3).

⁹¹ *Shane v. Albertson's Inc.*, 504 F.3d 1166, 1168 (9th Cir. 2007) (review under Rule 12(b)(6) for failure to state a claim) (quoting *Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1004 (9th Cir. 2006)). *See also Harris v. Lincoln Nat'l Life Ins. Co.*, 42 F.4th 1292, 1295 (11th Cir. 2022) (“De novo means . . . a fresh, independent determination of the ‘matter’”) (quoting with approval *Doe v. United States*, 821 F.2d 694, 697-98 (D.C. Cir. 1987)); *Reyes-Colón v. United States*, 974 F.3d 56, 60 (1st Cir. 2020) (“review . . . de novo . . . is a legalistic way of saying we critique the judge's decision without giving any deference to his views”); *Amparan v. Lake Powell Car Rental Cos.*, 882 F.3d 943, 947 (10th Cir. 2018) (“[A] district court's grant of summary judgment [is reviewed] de novo,” and “[i]n so doing, we

PUBLIC

ALJ must determine the merits of the ADRV charged, and whether the sanctions the Authority imposed were “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁹² “[T]o pass muster under the arbitrary-and-capricious standard,” the ALJ must only find a “rational connection between facts and judgment.”⁹³ In doing so, “the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”⁹⁴

Judicial review under the arbitrary and capricious standard ensures that “the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision.”⁹⁵ To find an abuse of discretion, there must be “a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found.”⁹⁶ Finally, whether the sanctions are in accordance with the law is determined with reference to the substantive law embodied in HISA and the implementing Rules, summarized above.

need not defer to factual findings rendered by the district court.”) (internal quotation marks omitted); *Aquarius Marine Co. v. Pena*, 64 F.3d 82, 87 (2d Cir. 1995) (on *de novo* review, the appellate court “give[s] no deference to the lower court”).

⁹² 15 U.S.C. § 3058(b)(2)(A); FTC Rule 1.146(b)(1)-(3).

⁹³ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 56 (1983).

⁹⁴ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

⁹⁵ *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021).

⁹⁶ *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 422 F.3d 782, 798 (9th Cir. 2005) (internal quotation marks omitted).

PUBLIC

In exercising its review authority, the ALJ may “affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part” and “make any finding or conclusion that, in [their] judgment . . . is proper and based on the record.”⁹⁷

V. ANALYSIS OF THE ISSUES

A. HIWU Proved the Presence Violation Charged.

I am, admittedly, reluctant to address the merits of HIWU’s charge. Apart from a perfunctory assertion that he disputes liability, Serpe does not develop any argument on this review. However, despite stipulating to the basic facts, he still defended against HIWU’s charge on the merits during the hearing before the Arbitrator. I now have the statutory responsibility to review those proceedings *de novo*, and I will do so.

As detailed earlier, a positive A Sample test result, followed by a positive B Sample result, is “[s]ufficient proof” to establish “the presence of a Banned Substance.”⁹⁸ Here, the urine in the A Sample collected from Fast Kimmie after her race tested positive for clenbuterol, and the B Sample confirmed the drug’s presence.⁹⁹ These facts met HIWU’s burden to prove the presence violation charged.

Under Rule 3212(a), Serpe is “strictly liable” for the clenbuterol present in Fast Kimmie. This standard of liability obviates any need by HIWU “to demonstrate

⁹⁷ 15 U.S.C. § 3058(b)(3)(A); FTC Rule 1.146(d)(3).

⁹⁸ Rule 3212(b)(2).

⁹⁹ AB1 2460, at ¶¶ 10-12 (Uncontested Stipulation of Facts).

PUBLIC

intent, Fault, negligence, or knowing Use on the part of the [Covered Person] in order to establish” a presence violation.¹⁰⁰ “[T]he need for a strict liability rule in the interests of fair competition has been constantly reiterated in CAS [*i.e.*, sports law] jurisprudence.”¹⁰¹ Strict liability “is fully justified in equestrian sport by prevailing public interest, as the fight against doping tends to safeguard parity among competitors and fairness of competitions, protect the animals’ health, maintain breeding quality, combat the use of dangerous substances, preserve the integrity of the sport, and ensure that a good example is set for young people. These objectives are unanimously recognized by sports organizations and government institutions”¹⁰²

B. Serpe’s Rebuttal to HIWU’s Proof is Unpersuasive.

The additional test results for Fast Kimmie blood and hair samples, which Serpe offered, are insufficient as a matter of law to negate the positive results from two independent laboratories that analyzed the Fast Kimmie’s urine sample, collected post-race on August 10, 2024. HIWU is not obligated to verify positive sample results with further test results, nor to prioritize the results of one analytical means of testing over another.¹⁰³

¹⁰⁰ Rule 3212(a); *see also* Rule 3213(b) (covering Use violations).

¹⁰¹ *Hansen v. Fédération Equestre Internationale (FEI)*, CAS 2009/A/1768, at ¶ 15.6 (Dec. 4, 2009). *See* Rule 3070(d) (authorizing consideration, in HISA cases, of “The World Anti-Doping Code and related International Standards, procedures, documents, and practices,” as well related case law).

¹⁰² *Deutsche Reiterliche Vereinigung e.V. v. FEI*, CAS 2008/A/1700 & 1710, at ¶ 85 (Apr. 30, 2009) (citations omitted).

¹⁰³ Rule 6313(e).

PUBLIC

Serpe testified that HIWU denied his request to have Fast Kimmie’s hair tested.¹⁰⁴ But nothing prevented Serpe from arranging his own test once he was notified of the positive A Sample results in September 2024, or from comparing tests on hair samples taken at different dates after Fast Kimmie’s race.¹⁰⁵ The Rules permit—but do not require—use of hair for analysis. Acceptance of hair testing results is not universal, however:

Although hair is not yet a valid specimen for the International Olympic Committee or the World Anti-Doping Agency (WADA), it is accepted in most courts of justice in the world. A key issue is that some conflicting results are observed, all involving athletes that tested positive in urine in accredited WADA laboratories and negative in hair in certified forensic laboratories.¹⁰⁶

Expert testimony in the arbitration confirmed this assessment.

Dr. Eichner, HIWU’s expert, was himself “a fan of hair testing in certain situations.”¹⁰⁷ But a “limitation . . . [i]s that there is no reliable scientific means to negate a urinary adverse finding or blood adverse finding with a negative hair test.”¹⁰⁸ As he explained:

There is some chemical and there is some physical attributes about the hair that doesn’t always render it well for drugs to be absorbed into it. . . . [N]ot all drugs will go into hair equally across the board.

. . . .

¹⁰⁴ AB2 2936 (Serpe).

¹⁰⁵ See *Iannone v. FIM*, CAS 2020/A/6978 & 7068, at ¶ 164 (Nov. 10, 2020) (discussing delay in hair analysis, while noting that “[i]ts probative value is controversial in the context of an ADRV”).

¹⁰⁶ AB1 1608 (Kintz paper).

¹⁰⁷ AB2 3062 (Eichner).

¹⁰⁸ AB2 3062 (Eichner).

PUBLIC

So a negative hair finding doesn't offer us anything here because of limitations with hair testing. It's just as simple as that.

If you have a urinary finding that's adverse and you don't see anything in the hair, it doesn't mean it wasn't . . . exposure, because clearly there was. There was exposure, and for whatever reason, it didn't make it to the hair, and that could be due to some of the limitations with hair testing.

. . . .

There is a myriad of reasons why you have issues with seeing drugs in hair, well-established.¹⁰⁹

Significantly: “[i]t has been accepted in the forensic community that a negative hair result cannot exclude the administration of a particular drug, or one of its precursors and the negative findings should not overrule a positive urine result.”¹¹⁰ Dr. Eichner agreed: “the consensus . . . in the international community is that a negative hair test can't supersede an adverse finding in both urine or blood.”¹¹¹ For example, despite a positive test of clenbuterol in Fast Kimmie's urine two to three weeks after an oral dose, “you might not see anything in the hair”¹¹²

Dr. Cole concurred: “a negative hair analysis in and of itself should not overrule a positive urine result.”¹¹³ She also agreed that “studies on hair testing and its sensitivity in respect of small doses of Clenbuterol are limited.”¹¹⁴ Hence, “[u]ntil

¹⁰⁹ AB2 3062, 3063, 3079 (Eichner).

¹¹⁰ AB1 1611 (Kintz paper).

¹¹¹ AB2 3063 (Eichner).

¹¹² AB2 3074 (Eichner).

¹¹³ AB2 3005 (Cole). *See id.* at 3006 (Cole) (“a negative hair analysis cannot explain away a positive finding in urinalysis”).

¹¹⁴ AB2 3000 (Cole).

PUBLIC

laboratories will have sensitive enough methodologies to detect drugs following a single use, care should be taken to compare urine and hair findings.”¹¹⁵

Accordingly, no inference favorable to Serpe can be drawn from Fast Kimmie’s negative hair sample, tested months after the August 2024 race. And in all events, there was no obligation on HIWU to further investigate the positive presence finding from Fast Kimmie’s urine. All the negative test results are immaterial as a matter of law.¹¹⁶

C. Serpe’s NF and NSF Arguments Also Fail.

As noted earlier, Serpe asserted that Fast Kimmie’s positive test result was due to contamination, and that implicated his NF and NSF defenses. Each defense, however, required that he prove the “source” of the contamination. The Arbitrator held Serpe’s proof for each defense insufficient, and I agree.¹¹⁷

¹¹⁵ AB1 1611 (citation omitted) (Kintz paper).

¹¹⁶ *See generally* AB1 2459, at ¶ 6 & 2461-62, at ¶¶ 15-16 (Uncontested Stipulation of Facts).

¹¹⁷ In evaluating Serpe’s NSF defense, the Arbitrator found that Serpe failed to show “exceptional circumstances,” quoting *FIS v. Johaug*, CAS 2017/A/5015, at ¶ 167 (Aug. 21, 2017), AB1 2784, at ¶ 5.23 (Corrected Final Decision). However, the *Johaug* quotation is part of the enforcer’s submission; in ruling on NSF (¶ 207), the panel itself applied “the totality of the circumstances,” an established standard that is included in the Rules’ definition of NSF. Rule 1020. Under Rule 3224(b), NF requires “exceptional circumstances,” and imposes a higher degree of proof than does NSF. *See, e.g., Sharapova v. ITF*, CAS 2016/A/4643, at ¶ 84 (Sept. 30, 2016) (“a claim of NSF is (by definition) consistent with the existence of some degree of fault and cannot be excluded simply because the athlete left some ‘stones unturned’. . . . To find otherwise would render the NSF provision . . . meaningless.”) (emphasis in original). Insofar as the Arbitrator may have failed to apply the less rigorous NSF standard, any error would be harmless. Serpe’s proof was too speculative to satisfy either defense.

PUBLIC

Both sides' experts agreed that the test results for Fast Kimmie were "consistent with multiple potential exposure scenarios."¹¹⁸ Dr. Cole posited these possible sources for the clenbuterol: (1) an administered dose of the substance "several days before the urine sample was collected"; (2) "inadvertent transfer" from another horse or person, or from feed or barn equipment, such as a "water bucket" or "lip chain"; and (3) "contaminat[ion] in the test barn" in handling the urine collection.¹¹⁹

Dr. Eichner, however, suggested even more explanations for the test results:

- (i) at the tail end of the excretion curve for an injected dose of Clenbuterol several days before;
- (ii) approximately 1-2 hours post-administration of a single (inhaled) dose of Clenbuterol;
- (iii) approximately 20 hours to 2 days post administration of a single (inhaled) dose of Clenbuterol; and
- (iv) approximately 14-20 days post-termination of a sustained (oral) therapeutic or sub-therapeutic/microdosing regime of Clenbuterol; and
- (v) inadvertent transfer of Clenbuterol shortly before sample collection.¹²⁰

The number of possible scenarios reflects the long time period—from June to December 2024—during which samples of Fast Kimmie's urine, blood, and hair were tested.¹²¹

¹¹⁸ AB2 3013 (Cole).

¹¹⁹ AB 1245, at ¶¶ 28-30.

¹²⁰ AB1 1558, at ¶ 9(b) (Eichner report).

¹²¹ AB2 3076 ("[w]e have got a big window") (Eichner).

PUBLIC

Dr. Cole agreed that each of Dr. Eichner's scenarios was possible.¹²² Thus, she agreed Fast Kimmie's urine results were "consistent with . . . an injected dose of Clenbuterol several days before," as well as with "a single dose . . . approximately 1 to 2 hours prior to sample collection."¹²³ However, she favored inadvertent transfer.¹²⁴ But that is predictable. Each of the other scenarios assumes an individual dosed Fast Kimmie at some point, either by injection, vapor inhalation (via a mask), orally (directly into the horse's mouth), or through feed.¹²⁵

Serpe testified that numerous individuals came in contact with Fast Kimmie on race day: "anywheres [sic] from as little as 12 and as many as 15 people will have their hands on that horse within three days of a race."¹²⁶ His supposition is that somehow, there was a transfer of clenbuterol from one of these individuals to the horse.¹²⁷ However, Serpe produced no witnesses in the arbitration who, in fact, came in contact with Fast Kimmie on race day or in the period three days before. He relied solely on his own denial of administering clenbuterol to Fast Kimmie, while admitting he "use[d] it on horses that required it," at least prior to the ADMC Program taking effect in 2023.¹²⁸

¹²² AB2 3013-15 (Cole).

¹²³ AB2 3013-14 (Cole).

¹²⁴ AB2 3026 (Cole); *see also* AB1 1245, at ¶ 30 (Cole report).

¹²⁵ *See* AB2 3011, 3018 (dosing generally), 3024 (feed), 3008 & 3025-26 (inhalation) (Cole); 3067-68 (injection and inhalation), 3073-74 (dosing generally) (Eichner).

¹²⁶ AB2 2911 (Serpe); *see also* AB 2911-13 (describing the various individuals by function).

¹²⁷ AB2 2937; AB1 1238, at ¶ 16 (Serpe witness statement).

¹²⁸ AB2 2926 (Serpe); *see* AB1 1237, at ¶ 6.

PUBLIC

The likelihood of contamination as explaining clenbuterol in Fast Kimmie's urine is weak, however. In Dr. Eichner's opinion, clenbuterol has not "been shown to lend itself to cross-contamination on the backside of a race track" ¹²⁹ And the weight of the evidence points away from environment or cross-contamination (from a human or other horse) as the explanation.

- Clenbuterol is not approved by the FDA for use by humans. ¹³⁰ Therefore, it's "a low level of likelihood" there was inadvertent transfer from an individual to Fast Kimmie on race day or shortly before. ¹³¹
- A syrupy liquid, clenbuterol is less likely to contaminate a barn or stall than is a powder substance. ¹³² Therefore, as Dr. Cole admitted: "It's more of a question would you just be finding this all over the place in the environment of the barn? And I think that's highly unlikely." ¹³³
- Although it can be "quite messy" to administer clenbuterol by inhalation (essentially, via aerosol spray), there is no evidence whatsoever that clenbuterol was used or prescribed for any horse at Saratoga while Fast Kimmie was there. ¹³⁴ Indeed, Dr. Cole "thought nebulization [inhalation of

¹²⁹ AB1 1558, at ¶ 9(c); *see also* AB1 1566-67, at ¶ 37.

¹³⁰ AB2 3034 (Cole); 3071 (Eichner).

¹³¹ AB2 3072-73 (Eichner).

¹³² AB2 3022-23, 3027-28 (Cole); 3070-71 (Eichner).

¹³³ AB2 3024-25 (Cole).

¹³⁴ AB2 3025, 3031-32 (Cole); AB2 2959-60 (Stormer); AB1 1530, at ¶ 9 (Stormer witness statement).

PUBLIC

vapor] ha[d] very much fallen out of favor”¹³⁵ She further testified:

“Would it [vapor containing clenbuterol] fly around the barn and get next door? I think that’s less likely” than the mask on the horse emitting vapor “end[ing] up on the horse, on the groom, or whoever is holding the horse.”¹³⁶

- Serpe himself acknowledged that, during the summer of 2024, the blacksmith in his barn was “a body builder,” and that his exercise rider apparently used “an inhaler” of an unknown substance.¹³⁷ The exercise rider left “right around the time” Serpe learned of Fast Kimmie’s A Sample positive result, and Serpe “wanted him tested.”¹³⁸ Yet, Serpe did not speak to him.¹³⁹ Nor did Serpe call his blacksmith to testify or submit a witness statement from him.¹⁴⁰

Although he asked a “New York Gaming Commission Steward” to reach out to both individuals, apparently no contact was made.¹⁴¹

- In the days preceding Fast Kimmie’s August 10, 2024 race, and on race day itself, Serpe was “home with COVID. I was not at the barn.”¹⁴² Nevertheless, he did not call any of the roughly a dozen individuals who came in contact with Fast Kimmie—persons who seemingly could have provided details of

¹³⁵ AB2 3026 (Cole).

¹³⁶ AB2 3026 (Cole).

¹³⁷ AB1 1238, at ¶ 15 (Serpe witness statement).

¹³⁸ AB2 2940 (Serpe); AB1 1238, at ¶ 15 (Serpe witness statement).

¹³⁹ AB2 2940 (Serpe).

¹⁴⁰ AB1 2940 (Serpe).

¹⁴¹ AB1 1238, at ¶ 15 (Serpe witness statement).

¹⁴² AB2 2907 (Serpe).

PUBLIC

Fast Kimmie’s activity on race day, or during the days shortly before.¹⁴³ Nor did Serpe produce witness statements from any of them.¹⁴⁴ That failure weighs against him, particularly given his burden of proof.¹⁴⁵

- Serpe testified to his “fool-proof” record-keeping procedure, designed “to make sure there was never a medication issue. . . . So I set up these rules, and I’m very strict about these rules.”¹⁴⁶ Serpe’s practice was to keep these records “as long as we don’t have any kind of issue, whatever, then they are discarded. Usually at least 60 days.”¹⁴⁷ Consequently, in early September 2024—when HIWU notified him of Fast Kimmie’s A Sample positive results—Serpe had “the records relevant to the August 10th race at Saratoga.”¹⁴⁸ Yet, he did not retain any of the records or produce them in the arbitration.¹⁴⁹ Again, this failure weighs against him.¹⁵⁰

¹⁴³ AB2 2911-15, 2940-43 (Serpe).

¹⁴⁴ See AB1 1234-47 (Serpe witness statement).

¹⁴⁵ See, e.g., *Graves v. United States*, 150 U.S. 118, 121 (1893) (“if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.”); *Gass v. United States*, 416 F. 2d 767, 775 (D.C. Cir. 1969) (“An adverse inference is permitted from the failure of the accused to call witnesses peculiarly within [his] power to produce when their testimony would elucidate the transaction.”) (cleaned up).

¹⁴⁶ AB2 2892, 2895 (Serpe); see generally AB1 2705-06 (record-keeping forms); AB2 2891-92, 2893-98, 2906-07 (Serpe).

¹⁴⁷ AB2 2929 (Serpe).

¹⁴⁸ AB2 2930 (Serpe).

¹⁴⁹ AB2 2929-32 (Serpe).

¹⁵⁰ See, e.g., *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939) (“The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse”); *Gumbs v. Int’l Harvester, Inc.*, 718 F.2d 88, 96 (3d Cir. 1983) (“The unexplained failure or refusal of a party to judicial proceedings to produce evidence that would tend to throw light

PUBLIC

- Bearing in mind the relatively low level of clenbuterol present in Fast Kimmie, some of Dr. Eichner’s scenarios might seem implausible as a means to improve the horse’s race performance on August 10, 2024.¹⁵¹ Likewise, the race day timeline may offer little opportunity to have dosed Fast Kimmie that day before the horse ran.¹⁵² But, as discussed further below, Serpe’s burden is to prove the source—not to disprove possible alternatives. Moreover, Dr. Cole testified: there are “inconsistencies in what trainers think might make a horse faster and what the scientific studies actually prove.”¹⁵³ Or, as Dr. Eichner similarly put it: “some of the stories I have heard . . . don’t make any logical sense at all, but people believe them. . . . I could promise you individuals have their own secret sauce on what they do.”¹⁵⁴

Serpe admits his own investigation did not enable him “to find out how Clenbuterol entered Fast Kimmie’s body.”¹⁵⁵ The proof adduced at the arbitration does not answer the question either. Serpe, however, has the burden of proving the source of

on the issues authorizes, under certain circumstances, an inference or presumption unfavorable to such party.”).

¹⁵¹ See AB2 3039-40, 3044 (Cole); AB2 3077 (if there were “a recent dose”—close in time to the race—“you would have expected to have seen Clenbuterol in the blood.”), 3080 (the low level of clenbuterol detected would not likely have affected Fast Kimmie’s performance) (Cole).

¹⁵² AB2 2913-15 (Serpe); 3041-43 (Cole).

¹⁵³ AB2 3054 (Cole).

¹⁵⁴ AB2 3074, 3075 (Eichner).

¹⁵⁵ AB2 2909 (Serpe). See also AB1 1238, at ¶ 16 (“I can not specifically identify a source of the Clenbuterol.”) (Serpe witness statement).

PUBLIC

clenbuterol in Fast Kimmie by a “balance of probability,” which translates into a “preponderance of the evidence.”¹⁵⁶ Merely eliminating possibilities is not enough.

For example, in *Nabi v. Estonian Center for Integrity in Sports*,¹⁵⁷ the athlete, a wrestler, suggested that presence of a prohibited substance was due to contaminated turkey or liver eaten, or from transfer of sweat or saliva from another wrestler or from equipment. Although the athlete’s proof “ruled out” various scenarios, he failed to prove by a preponderance of the evidence that occurrence of any of the “alternative theories” was “more likely than their non-occurrence.”¹⁵⁸ Thus, the panel rejected both NF and NSF defenses.¹⁵⁹

Clenbuterol has “muscle building effects in race horses.”¹⁶⁰ Historically, it was “widely used by trainers.”¹⁶¹ It reportedly is the fourth “most [commonly] detected drugs on horse doping laboratories worldwide.”¹⁶² Despite its prohibition under the Rules, Dr. Cole acknowledged that “the likelihood that trainers are just

¹⁵⁶ Rule 3121(b).

¹⁵⁷ CAS 2021/A/8125 (Oct. 20, 2022).

¹⁵⁸ *Id.* at ¶¶ 167, 168.

¹⁵⁹ *Id.* at ¶ 189. *See also, e.g., Al Eid v. FEI*, CAS 2012/A/2807, at ¶ 10.7 (July 17, 2012) (source was not proven “by putting forward a theory of inadvertent contamination and requiring that the theory be accepted, by default, because of the absence of any other explanation or evidence”); *ADA v. UWW*, CAS 2018/A/5619, at ¶ 75 (Oct. 8, 2018) (“[A]n athlete may not merely speculate as to the possible existence of a number of conceivable explanations for the source . . . and then further speculate as to which appears the most likely of those possibilities.”); *Guerrero v. FIFA*, CAS 2018/A/5571, at ¶ 65(v) (July 30, 2018) (“If there are two competing explanations for the presence,” and one is rejected, “the hearing [panel]” may conclude “the other is not proven” either—leaving source unknown.); *IWBF v. Gibbs*, CAS 2010/A/2230, at ¶¶ 11.34, 12.2, 12.4 (Feb. 22, 2011) (evidence must demonstrate, among possibilities, which source was “a probability”).

¹⁶⁰ AB2 3010 (Cole).

¹⁶¹ AB2 3010 (Cole).

¹⁶² AB2 3011 (Cole).

PUBLIC

giving that up, I would think that there would be possibility that someone has used it”¹⁶³ Dr. Cole further admitted she could not rule out dosing of Fast Kimmie, under various scenarios.¹⁶⁴

I am mindful of the challenges that persons such as Serpe face in undertaking to prove source in this sort of case. Unlike human athletes, horses are necessarily dependent on others. They cannot talk. They cannot revisit substances they’ve ingested, received, or come in contact with. And they live in an environment that’s not of their own making, nor under their control, as well as one that is less than pristine, despite sincere, well-meaning clean-up efforts by trainers and their employees. There are risks of exposure to Banned Substances not only from intentional misconduct, but also from with others, some of whom operate independently in the same facility. Thus, the Panel’s remarks in *Al Nahyan v. FEI* are instructive:

[T]he application of the strict liability rule in equine sport can pose imputation issues which differ from typical non-equine doping violations in which the doping of the athlete’s own body is the object of the rule violation.¹⁶⁵

While remaining faithful to the language of the Rules themselves, care must, nevertheless, be taken in considering whether or not to import evidentiary features of decisions from human sport generally. Otherwise, NF and NSF as defenses can

¹⁶³ AB2 3035 (Cole).

¹⁶⁴ AB2 3008, 3011, 3013-14; AB1 1245, at ¶ 28 (“I cannot entirely rule out the possibility that a single dose of clenbuterol could have been administered several days before the urine sample was collected”) (Cole report).

¹⁶⁵ CAS 2014/A/3591, at ¶ 178 (June 8, 2015).

PUBLIC

become illusory in HISA cases. The constellation of facts in a case can create a firm conviction about the “likely” source. Then, a preponderance of the evidence may permit an appropriate inference to be drawn despite an inability to exclude one or more alternatives sources.¹⁶⁶

But this is not such a case. Serpe’s proof boils down to: (1) his own denial; (2) Dr. Cole’s opinion favoring contamination somewhere, somehow; and (3) letters from two veterinarians Serpe used. Denial, however, is the coin of the realm, available to the innocent and the guilty alike. According it too much weight would weaken the fight against doping in equine and human sport alike, and disserve the very Rules that must be enforced.¹⁶⁷

Expert evidence, on the other hand, can be highly probative. But here, Dr. Cole admittedly cannot exclude the possibility that Fast Kimmie was dosed with clenbuterol. She speculated that, despite clenbuterol’s classification as a Banned Substance, illicit, unreported use, may have occurred.¹⁶⁸ But speculation is not proof. Similarly speculative is the notion that contamination occurred in the test barn itself.¹⁶⁹ Procedures exist to minimize that risk, and there is no evidence they

¹⁶⁶ See *Syquia*, FEI No. 2017/BS28, at ¶¶ 11.15, 11.17. (Feb. 28, 2019) (“[C]umulative evidence,” the Tribunal wrote, “support[ed] the finding of human contamination that allowed the substance to enter the Horse” and proved “likely” contamination even though “[i]t was not possible to determine whether the human contamination occurred in the stable area before (or during) the Event or in the warm up area after the Event.”).

¹⁶⁷ See, e.g., *Kovshov*, FEI No. 2012/02, at ¶ 18 (Nov. 27, 2012) (“A mere denial of wrongdoing and the advancement of a speculative or innocent explanation are insufficient to meet the Athlete’s burden of showing how the Prohibited Substance entered his body.”).

¹⁶⁸ AB2 3031-32, 3036 (Cole).

¹⁶⁹ See AB2 3026, 3032 (Cole).

PUBLIC

weren't followed here, or that anyone in the test barn handled clenbuterol when Fast Kimmie was tested.¹⁷⁰

Finally, the two veterinarians' letters Serpe offered can't negate the possibility that other sources provided clenbuterol. At least historically, the substance was "widely used by trainers."¹⁷¹

So, Serpe has failed to meet his burden of proving source by a preponderance of the evidence. His inability to prove this necessary element obviates any need to consider the other requirements of either NF or NSF.¹⁷² Indeed, absent that more persuasive evidence that points more clearly to a plausible source, it is simply infeasible to assess either the extent of Serpe's caution in avoiding Fast Kimmie's exposure to clenbuterol, or the totality of the circumstances that produced the horse's positive test results. Serpe "has simply not laid the ground for an intelligible assessment of his degree of fault. The standard sanction has to be applied."¹⁷³ Accordingly, Serpe has shown no basis for eliminating or reducing sanctions.

The Arbitrator found that Serpe failed to satisfy the source requirement for either NF or NSF.¹⁷⁴ I agree, but with one minor observation. In evaluating Serpe's NSF defense, the Arbitrator found that Serpe failed to show "exceptional

¹⁷⁰ AB1 1516, at ¶¶ 7-9 (Mittlestadt witness statement); AB2 3032-34 (Cole).

¹⁷¹ AB2 3010 (Cole).

¹⁷² *See, e.g., Kovshov*, No. 2012/02, at ¶ 19.

¹⁷³ *IWBF v UKAD*, CAS 2010/A/2230, at ¶ 12.20 (Feb. 22, 2011).

¹⁷⁴ AB1 2780-84, at ¶¶ 5.15-5.25 (Corrected Final Decision).

¹⁷⁴ AB2 3013 (Cole).

PUBLIC

circumstances,” quoting *FIS v. Johaug*.¹⁷⁵ However, the *Johaug* quotation is part of the enforcer’s submission; in ruling on NSF, the panel itself applied “the totality of the circumstances,” an established standard that is included in the Rules’ definition of NSF.¹⁷⁶ Under Rule 3224(b), NF requires “exceptional circumstances,” and imposes a higher degree of proof than does NSF.¹⁷⁷ Insofar as the Arbitrator may have failed to apply the less rigorous NSF standard, any error would be harmless. Serpe’s proof was too speculative to satisfy either defense.

D. HIWU’s Presence Violation Is Proven.

HIWU proved the presence of clenbuterol in Fast Kimmie to my comfortable satisfaction. That said, I would be remiss not to mention the standard of proof by which I have analyzed the evidence.

Rule 3121 imposes on HIWU the burden of proof to the level of comfortable satisfaction, and HISA requires that I make a *de novo* review.¹⁷⁸ On the other hand, FTC Rule 1.146(c)(6)(i) provides the burden of proof on this review “is on the Authority to show, by a preponderance of the evidence,” the ADRV with which Serpe is charged—a lesser burden than that borne by HIWU in the arbitration.

¹⁷⁵ CAS 2017/A/5015, at ¶ 167; AB1 2784, at ¶ 5.23 (Corrected Final Decision).

¹⁷⁶ CAS 2017/A/5015, at ¶ 207. *See* Rule 1020.

¹⁷⁷ *See, e.g., Sharapova*, CAS 2016/A/4643, at ¶ 84 (“[A] claim of NSF is (by definition) consistent with the existence of some degree of fault and cannot be excluded simply because the athlete left some ‘stones unturned’. . . . To find otherwise would render the NSF provision . . . meaningless.”) (emphasis in original).

¹⁷⁸ 15 U.S.C. § 3058(b)(1); FTC Rules 1.146(b)(2) & (3).

PUBLIC

De novo review—the standard called for under HISA, Rule 3121, and FTC Rules 1.146(b)(2) & (3)—means I consider this case “as if it had not been heard before, and as if no decision previously had been entered.”¹⁷⁹ In short, I stand in the shoes of the Arbitrator in reviewing the evidence and its application to the law. I have, therefore, applied the comfortable satisfaction standard HIWU had to meet at the arbitration. Otherwise, the Authority would receive a benefit that can’t be squared with the *de novo* review that HISA itself requires and that could arguably exceed the FTC’s authority.¹⁸⁰ The rule of lenity—derived from criminal law, but applied in civil matters that carry penalties akin to those under criminal statutes, such as ADRVs—also supports my resolution.¹⁸¹

With Serpe’s liability proven, I address next the matter of sanctions, specifically, whether the Arbitrator erred in failing to award a fine. I first consider the Authority’s argument that Serpe is not aggrieved by the absence of a fine and, therefore, cannot complain of its omission in the sanctions award under review.

E. Serpe is “Aggrieved” By the Sanctions Arising from the Arbitration.

HISA § 3058(b)(1) provides, in relevant part, that review by an FTC ALJ may be taken “on application by . . . a person aggrieved by the civil sanction” that has

¹⁷⁹ *Shane*, 504 F.3d at 1168 (internal quotation marks omitted).

¹⁸⁰ *Cf.* BLACK’S LAW DICTIONARY (12th ed. 2024) (“procedural ultra vires” refers to “a type of narrow ultra vires in which the decision-maker fails to follow statutorily specified procedures.”).

¹⁸¹ *See Bittner v. United States*, 598 U.S. 85, 102 (2023) (plurality opinion by Gorsuch, J. joined by Jackson, J.) (civil penalties under the Bank Secrecy Act; citing authorities); *Leocal v. Ashcroft*, 543 US 1, 11 n.8 (2004) (deportation law that depended on construction of a criminal statute); *United States v. Thompson/Center Arms Co.*, 504 U. S. 505, 517-18 (1992) (civil tax case penalty).

PUBLIC

been “imposed by the Authority” The Authority maintains, however, that HISA’s review provision “does not permit a Covered Person to challenge the *absence* of a sanction. . . . A Covered Person’s interest in challenging a sanction that could have been imposed against him, but was not imposed against him, plainly does not fall within the zone of interests protected by this statutory review provision.”¹⁸² As the Authority puts it, “[t]he Arbitrator’s decision not to impose a fine only *benefitted*” Serpe.¹⁸³

But the Authority’s argument misses the forest for the trees. Serpe contends that, while HIWU initially sought a fine in charging him, after he objected that arbitration proceedings under HISA and the Rules violated his right to a jury trial under the Seventh Amendment, the Authority directed HIWU to drop its fine request with a view to mooted Serpe’s Seventh Amendment objection. Having litigated to conclusion HIWU’s presence charge against him before the Arbitrator, Serpe has been held liable for an ADRV and had sanctions imposed—actual injury resulting in a proceeding he contends violates his right to Seventh Amendment protection. Serpe’s objection is not to the absence of fine in the sanctions award. He maintains that he was entitled to have his liability for the alleged presence ADRV

¹⁸² AuOBr. at 19, 20 (footnotes and quotation marks omitted; emphasis in original) (quoting *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014)).

¹⁸³ *Id.* at 20 (emphasis in original).

PUBLIC

resolved by a jury in an action governed by discovery rules less “restrictive” than those available in a HIWU-prosecuted arbitration.¹⁸⁴

While arguing here that, since no longer subject to a fine, Serpe has no Seventh Amendment objection capable of review, at the same time the Authority contends in the Federal Action that, “[b]ecause Plaintiff’s Seventh Amendment claim depends on a fine that does not and will not exist, he cannot prevail on the merits. . . .”¹⁸⁵ So, according to the Authority, Serpe cannot have his Seventh Amendment claim heard either on this review or in his Federal Action. It’s a catch-22.

That cannot be right. HIWU itself argued in the arbitration that Serpe’s constitutional argument is properly heard in this review proceeding: “the ADMC Program and the *de novo* review process provide a forum in which Trainer Serpe can raise constitutional issues and have those issues addressed (subject to further review by a federal district court under Article III review)”¹⁸⁶ Case law supports HIWU’s position.

¹⁸⁴ *See, e.g.*, Reply Renewed PI Mot. at 3-4, Federal Action (“Serpe’s Seventh Amendment right was violated during the Arbitration because the Authority resolved his factual liability without a jury trial.”), 5 (“Simply because the Arbitrator eventually chose to withhold legal relief does not mean that a jury was not required to resolve Serpe’s underlying liability in the first place”), 14 (Allegedly “restrictive” discovery provisions in the Rules hindered “Serpe’s ability to build a case” to defend against HIWU’s charge), 17 (“if Serpe’s Seventh Amendment challenge succeeds, he would be entitled to a de-novo jury trial on HIWU’s charge letter, during which a jury would find the facts of liability before Defendants could impose any equitable sanctions.”).

¹⁸⁵ Authority Opp. to Renewed PI Mot. at 1, Federal Action. *See also id.* at 6.

¹⁸⁶ AB1 468 (HIWU Stay Opposition).

PUBLIC

In *Lemelson v. SEC*,¹⁸⁷ the plaintiff, an investment advisor who was the subject of a pending SEC in-house administrative enforcement proceeding, sued in district court to enjoin the SEC in-house proceedings, alleging a Seventh Amendment claim. The Court held that it lacked subject-matter jurisdiction over the claim because the plaintiff could “obtain meaningful review of the Commission's decision [in the on-going administrative proceeding], including any Seventh Amendment defense, in an Article III court.”¹⁸⁸ The Court further noted: “it is well-established that the harm resulting from the denial of a jury trial can be remedied on appeal, even after the case has already been tried—the reviewing court simply orders a new trial.”¹⁸⁹ Likewise, in a case seeking to enjoin an FDA administrative proceeding, the Court similarly dismissed for lack of subject-matter jurisdiction: “if the record ultimately shows that the ALJ resolved a disputed issue of material fact against Vape Central, the company can raise its Seventh Amendment argument before the court of appeals.”¹⁹⁰

Lexmark Int’l, Inc. v. Static Control Components, Inc.,¹⁹¹ and *Komjathy v. Nat’l Transp. Safety Bd.*,¹⁹² on which the Authority relies, have no application.

¹⁸⁷ 2025 WL 1503815 (D.D.C. May 27, 2025).

¹⁸⁸ *Id.* at *4.

¹⁸⁹ *Id.* at *5 (cleaned up) (citing authorities).

¹⁹⁰ *Vape Cent. Grp., LLC v. FDA*, No. 24-cv-3354, 2025 WL 637416, at *9 (D.D.C. Feb. 27, 2025). *See also, e.g., Millenia Housing Mgmt. v. HUD*, No. 24-cv-02084, 2025 WL 1222589, at *6-8 (N.D. Ohio Apr. 28, 2025), and *Blankenship v. FINRA*, No. 24-cv-3003, 2024 WL 4043442, at *2-3 (E.D. Pa. Sept. 4, 2024) (both similarly denying subject-matter jurisdiction where the Seventh Amendment claim could be heard in administrative proceedings).

¹⁹¹ 572 U.S. 118 (2014).

¹⁹² 832 F.2d 1294 (D.C. Cir. 1987).

PUBLIC

There was no allegation in either decision of conduct that disabled the party seeking review from pursuing a constitutional claim.

As I discuss below, the Authority's gloss on *de novo* review in this proceeding is too narrow, and how HIWU came to withdraw its request for a fine matters. Suffice it to say at this point that, in my view the Authority and HIWU have sought to deprive Serpe of the opportunity to have his Seventh Amendment claim heard and resolved, and they also may well have induced Arbitrator error in this case. He is, therefore, "aggrieved" for purposes of this review.

F. Serpe Raised His Constitutional Objection in the Arbitration.

The Authority further argues that Serpe waived any objection by "fail[ing] to properly present that argument to the Arbitrator."¹⁹³ It quotes FTC Rule 1.146 (a)(1), which provides that, "[e]xcept for good cause shown, no assignment of error by the aggrieved party may rely on any question of fact or law not presented to the Authority."¹⁹⁴ I am not persuaded, however.

The parties raised Serpe's Federal Action, and specifically his Seventh Amendment objection, at various points prior to the arbitration hearing itself. Months before the hearing, the Arbitrator "invited [Serpe] to file any submission he wishes on whether this proceeding should be stayed pending the federal court decision on his motion for preliminary injunction"¹⁹⁵ Serpe promptly moved to

¹⁹³ AuOBr. at 8.

¹⁹⁴ *Id.* at 22, n.95.

¹⁹⁵ AB1 302 (Procedural Order No. 1).

PUBLIC

stay the arbitration, and on the stay motion, papers in the Federal Action were submitted.¹⁹⁶ The Arbitrator denied a stay, while noting in part: “[t]he Parties are invited to keep the Arbitrator apprized [sic] of any changes in the motion for preliminary injunction hearing or any ruling on the motion, with all due haste, so that this case can proceed, or not, as required.”¹⁹⁷ After the District Court denied a preliminary injunction, Serpe provided the ruling to the Arbitrator.¹⁹⁸

Thus, by the time of the arbitrator hearing, the Arbitrator was well aware of Serpe’s claims in the Federal Action. Then, during the hearing’s closing argument, Serpe’s counsel urged the Arbitrator to admit HIWU’s May 2025 email explaining HIWU’s decision to withdraw its request for a fine, which counsel read into the record: “we are not seeking a fine from Mr. Serpe, based upon direction from HISA that to do so would result in the continued expenditure of money litigating the issue, which would not be a prudent use of industry funds.”¹⁹⁹ Serpe’s counsel put his gloss on the explanation:

So, i.e., because Mr. Serpe is exercising *his constitutional right* to file a challenge to the constitutionality of the HISA Act, and a jurisdictional challenge regarding *the seventh amendment*, if there is a monetary fine and Mr. Serpe is entitled to a jury trial to find all the facts.²⁰⁰

¹⁹⁶ AB1 305-470 (Stay moving and opposition papers).

¹⁹⁷ AB1 1210 (Corrected Procedural Order No. 2).

¹⁹⁸ AB1 2438 (Serpe notice).

¹⁹⁹ AB2 3112-13 (closing argument).

²⁰⁰ AB2 3113 (emphasis added).

PUBLIC

The Arbitrator asked Serpe's counsel what he wanted done.²⁰¹ Counsel responded:

I want you to *follow the law*, whatever the law is in connection with the arbitrator's obligations under the HISA regulations.

It is not for HIWU to determine that a mandatory fine can be withdrawn from consideration *by the arbitrator* simply by asking.

And especially when the ask is not based on any issue in the case, it's based on some direction.

So I can't fault Ms. Farrell [counsel for HIWU] from taking direction from whoever it is at HISA [the Authority] that instructed her to do this.

But it should not be used by HISA or HIWU as a means of circumventing Mr. Serpe's *constitutional rights*.²⁰²

After the arbitrator inquired whether he could rule on a matter of relief not before him, Serpe's counsel reiterated his point:

You can say that under the rules they don't have the right to take away the claim for relief, because the design of HISA is basically a four party . . . segmented proceeding.

You've got the FTC, we have got HISA, we have got HIWU, and then we have the arbitrator, and everybody has a distinctive role in the process.

HIWU, by contract with HISA, is the prosecuting entity. They are mandated to follow the rules and regulations that were approved by the FTC.

Your role . . . is to be independent of HISA, HIWU, and even the Respondent . . .—you're the check and balance on the system, to make sure that the regulations get followed.²⁰³

²⁰¹ AB2 3114.

²⁰² AB2 3114 (emphasis added).

²⁰³ AB2 3116-17 (emphasis added). *See also* AB2 3111-12 (whether there is to be a fine is "within your jurisdiction and not their jurisdiction to ask for it.").

PUBLIC

The Arbitrator responded—“All right. I understand your argument”—but was not persuaded that he could “just throw it [the matter of relief] back in for consideration because I think they have given up on me having jurisdiction.”²⁰⁴ Serpe’s counsel replied: “If HIWU is doing it as a surreptitious means of denying Mr. Serpe’s constitutional right, then *that’s something for you to consider . . .*”²⁰⁵ HIWU then argued that a fine was not mandatory under the rules, and the Arbitrator agreed.²⁰⁶

Thereafter, in issuing his decision the Arbitrator declined to award a fine, or to explain his decision not to do so, matters that I will discuss below. The Arbitrator further did not mention Serpe’s Seventh Amendment objection to having to defend against HIWU’s presence charge under the Rules, rather than before a jury in a case filed in federal district court. Accordingly, Serpe’s Seventh Amendment was raised in the arbitration, albeit both late in the hearing and perhaps inelegantly framed.

In all events, “good cause” exists for ruling on whether or not the Arbitrator erred in his sanctions award, as well as on whether Serpe is entitled to a jury trial under the Seventh Amendment. The first issue—whether the Arbitrator erred—implicates the integrity of the ADMC Program’s enforcement structure. The second—the Seventh Amendment claim—is uncommonly important, as its

²⁰⁴ AB2 3117, 3118.

²⁰⁵ AB2 3118-19 (emphasis added).

²⁰⁶ AB2 3123-24.

PUBLIC

resolution affects not only Serpe, but also enforcement of HISA and the Rules against Covered Persons generally. Furthermore, the parties have already briefed this issue in Serpe’s Federal Action, thereby providing a full opportunity for its development, as well as for informed decision-making.

Equally important, there is something unseemly about the Authority’s constitutional avoidance strategy, which would enable it to forego often minor monetary fines while continuing to expose those covered by HISA and the Rules to banishment from thoroughbred horseracing for substantial periods of Ineligibility—here, two years for Serpe’s first ADRV.²⁰⁷ As Serpe rhetorically asks in the Federal Action: “Will Defendants run this set of plays every time a Covered Person is prosecuted under HISA and seeks to vindicate his Seventh Amendment right?”²⁰⁸ The Authority and HIWU’s voluntary cessation of allegedly unconstitutional enforcement conduct “does not make the case moot.”²⁰⁹ If that avoidance strategy were permitted, the issue Serpe raises would be “capable of repetition, yet evading review”—not only in federal court, but also in HISA review proceedings.²¹⁰

²⁰⁷ Rule 3223(b). *See generally* Renewed PI Br. at 19, Federal Action (describing effects of his two-year Ineligibility).

²⁰⁸ Reply Renewed PI Mot. at 18, Federal Action.

²⁰⁹ *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

²¹⁰ *Cf. Sosna v. Iowa*, 419 U.S. 393, 400-01 (1975) (Although the named plaintiff was no longer injured by the allegedly unconstitutional voting requirement, its application continued to apply to others in the class of voters she represented); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).

PUBLIC

The ALJ's review authority includes "mak[ing] any finding or conclusion that, in the judgment of the administrative law judge, is proper and based on the record."²¹¹ I will, therefore, address the Arbitrator's failure to include a fine in his sanctions award.

G. The Arbitrator Erred in Failing to Include a Fine for HIWU's Proven Violation.

1. The Authority Interfered with HIWU's Prosecutorial Independence

In charging Serpe, HIWU sought, in pertinent part:

[I]mposition of the following proposed Consequences [*i.e.*, sanctions] for a first-time violation of ADMC Program Rule 3212:

. . . .

- A fine of USD \$25,000 or 25% of the total purse (whichever is greater) and payment of some or all of the adjudication costs and HIWU's legal costs (ADMC Program Rule 3223)²¹²

In response, Serpe commenced the Federal Action, asserting his Seventh Amendment claim and seeking a preliminary injunction against HIWU pursuing its charge under HISA and the Rules.²¹³ As described earlier, during argument of the preliminary injunction motion, the Court probed Serpe's Seventh Amendment claim:

[I]f they wrote you two weeks from today and said, 'You know, for your arbitration proceeding, civil monetary penalties, fines, they're off the table.'

²¹¹ 15 U.S.C. § 3058(b)(3)(A)(iii); FTC Rule 1.146(d)(3)(ii).

²¹² AB1 1448-49 (Charge Letter).

²¹³ AB1 132 (federal complaint), 231 (PI motion).

PUBLIC

. . . If they did that, there couldn't possibly be a Seventh Amendment violation; right?²¹⁴

The Authority bit. Within days, HIWU dropped its fine request.²¹⁵ Then, the Authority wrote the District Court that HIWU's withdrawal "moots Plaintiff's Seventh Amendment claim" ²¹⁶ In later denying Serpe's motion for lack of irreparable injury, the District Court noted HIWU's post-argument decision:

HIWU's decision does not appear to be the result of substantial deliberation; rather, it appears to be an attempt to manipulate jurisdiction. . . . Given the fact that HIWU's declaration was submitted only after this Court pressed the parties at the April 10 hearing on what action could potentially moot the claim, the circumstances surrounding the recent attestation certainly "raise a substantial possibility," that Defendants "changed course simply to deprive the court of jurisdiction."

. . . .

Defendants in this case have supplied no clear reason or process justifying their change of course, let alone a well-reasoned one.

. . . .

[T]he recent decision not to seek monetary penalties here appears to be a "one-off" specifically designed to moot Serpe's Seventh Amendment challenge."²¹⁷

The District Court's comments were well-taken. According to a HIWU email that Serpe later obtained and submitted at the arbitration hearing, "HIWU [was] not seeking a fine for Mr. Serpe based upon direction from HISA that to do so would

²¹⁴ AB2 2802, at 14 (transcript of argument).

²¹⁵ AB1 1207 (HIWU letter).

²¹⁶ Defs' Joint Notice & Mot. to Vacate at 1, Federal Action.

²¹⁷ AB1 2449, 2450 (quoting *Harrell v. Fla. Bar*, 608 F.3d 1241, 1267 (11th Cir. 2010)).

PUBLIC

result in the continued expenditure of money litigating the issue, which would not be a prudent use of industry funds.”²¹⁸ The Arbitrator received the email, subject to HIWU’s objection.²¹⁹ Insofar as it may be necessary, I overrule the objection. As discussed below, the email is probative of the reason HIWU withdrew its request for a fine, and that, in turn, is relevant to reviewing the Arbitrator’s failure to award one.

The Authority’s intervention into HIWU’s charging and prosecution of an alleged ADRV against Serpe runs counter to the independence that HISA and the Rules confer on HIWU. HISA directs that HIWU “shall—(i) serve as the independent anti-doping and medication control enforcement organization” for those regulated.²²⁰ And both the Authority and HIWU have championed HIWU’s independence, as well as that of the arbitration process generally, from the Authority.

In the Authority’s *own* words:

- HISA “requires the Authority to enter into an agreement with an anti-doping and medication control enforcement agency to serve as the *independent* anti-doping and medication control enforcement organization”²²¹

²¹⁸ AB1 2711 (Farrell email). *See also* AB2 3122-23 (Serpe’s counsel).

²¹⁹ AB2 3119, 3122 (the Court), 3120-21 (HIWU counsel).

²²⁰ 15 U.S.C. § 3054(e)(1)(E).

²²¹ *Shell II*, AuResp. to ALJ Order, FTC No. 9439, 2024 WL 5078329, at *2 (Nov. 12, 2024). (quoting 15 U.S.C. § 3054(e)(1)(E)(i)) (cleaned up; emphasis in original).

PUBLIC

- “In 2022, . . . the Authority entered into an agreement with Drug Free Sport International (‘DFSI’), to serve as the *independent* anti-doping and medication control enforcement organization for the Authority’s [ADMC] Program.”²²²
- “In 2022, DFSI established HIWU . . . to serve as the [ADMC] enforcement agency for the Authority. As the *independent* enforcement agency, HIWU is responsible for, among other things, (1) conducting and overseeing ADMC Results Management, including *independent* investigations, charging and adjudication of potential ADMC rule violations, and the enforcement of any civil sanctions for such violations; (2) performing and managing test distribution planning, the sample collection process and in-competition and out-of-competition testing; and (3) accrediting, monitoring, testing, and auditing testing laboratories. The rules comprising the Authority’s ADMC Program make clear that HIWU is responsible for carrying out these functions of the ADMC Program.”²²³
- “The Agency [HIWU] has the *sole discretion* to determine when there is sufficient evidence to determine whether a potential violation of the ADMC Program has occurred. . . . The Authority is first notified of the potential

²²² *Id.* at *2 (quoting 15 U.S.C. § 3054(e)(1)(E)(i)) (cleaned up; emphasis in original).

²²³ *Id.* at *3 (citing <https://www.hiwu.org/about> and 15 U.S.C. § 3055(c)(4)(B)-(D) and Rules 3010 (e), 3132, 3241, 5720, 6316) (cleaned up; emphasis added).

PUBLIC

violation when it receives a copy of the Notice Letter as an ‘Interested Party’ to the proceeding.”²²⁴

- “When HIWU charges the Covered Person with an Anti-Doping Rule Violation, HIWU initiates proceedings with the Arbitral Body. *See* Rule 7060. The Authority is neither made a party to the proceedings nor is it permitted to participate in the proceedings. . . . The Authority is notified of the final decision *at the same time* as the Covered Person and the Agency.”²²⁵
- “As required under [HISA], the Authority has designated HIWU to serve as the *independent* enforcement agency responsible for implementing and administering the ADMC Program. . . . HIWU functions *independently* of the Authority in executing its duties and responsibilities as the enforcement organization for the ADMC Program.”²²⁶
- “The [arbitrator’s] decision is final and binding The Authority is legally bound to impose civil sanctions determined through arbitration.”²²⁷

HIWU itself agrees:

- HIWU “is required to conduct and oversee anti-doping and medication control results management, including *independent* investigations, charging and

²²⁴ *Id.* (cleaned up; bracketed matter and emphasis added).

²²⁵ *Id.* at *4 (citing Rules 7060 and 7370) (cleaned up; emphasis added).

²²⁶ *Id.* (emphasis added).

²²⁷ *Id.* at *4-5, (citing Rule 3263; 15 U.S.C. § 3058(a); 16 C.F.R. § 1.145(a) (cleaned up)).

PUBLIC

adjudication of potential medication control rule violations, and the enforcement of any civil sanctions for such violations”²²⁸

- “[T]he Agency [HIWU] shall serve as the *independent* anti-doping and medication control enforcement organization. . . , implementing the anti-doping and medication control program on behalf of the Authority and implement anti-doping education, research, testing, compliance and adjudication programs for the ADMC Program.”²²⁹
- “HIWU *separately and independently* manages the processing of potential violations of the ADMC Program. The Authority *is not involved* in the management or decision-making with respect to this process.”²³⁰
- “The same is true for the adjudication of Equine Anti-Doping Charges before the Arbitral Body (‘AB’). . . . [P]rior to the AB’s issuance of a final decision (an “AB Final Decision”), the Authority *does not handle or oversee the litigation* (which is the purview of HIWU as the *independent* enforcement agency), or adjudication of the matter (which is the purview of the AB), in any way and has *no input* into its result. These responsibilities, as required by the Act and the Rules, *are not entrusted* to the Authority.”²³¹

²²⁸ *Shell II*, HIWU Resp.to ALJ Order, 2024 WL 5078331, at *1 (quoting 15 U.S.C. § 3055(c)(B)) (emphasis in original).

²²⁹ *Id.* (quoting 15 U.S.C. § 3054(e)(1)(E)) (emphasis in original).

²³⁰ *Id.* at *2 (citing Rules 3240, 3245, 3248, 3249, 5720(a), 6316) (emphasis added).

²³¹ *Id.* (citing Rules 7060(a), 7170, 7250) (bracketed matter added; emphasis added except for penultimate emphasis, which is in original).

PUBLIC

- “A final decision [by an Arbitral Body] issued pursuant to the Protocol that a violation of the Protocol has taken place and imposing Consequences or other sanctions for that violation shall be automatically and immediately recognized, respected, enforced and given full force and effect by the Authority. . . . Both [the Authority and HIWU] are . . . legally bound to impose the resulting sanctions and have no discretion otherwise.”²³²
- “HIWU was established in 2022 as an *independent* agency to administer the rules and enforcement mechanisms of the ADMC Program”²³³

Simply put, HIWU does not work for, nor is it subject to the direction or control of, the Authority the way an employee or even an independent contractor might be. Under HISA and the Rules, HIWU has a vital role in the national enforcement system that governs the horseracing industry, and that system’s integrity calls for, and requires, preserving HIWU’s independence from the Authority—except in the most exceptional of circumstances. Whatever the scope of those exceptions might be, intervening to direct HIWU’s charging prerogative in an individual, ongoing enforcement proceeding—as the Authority did here—is not one of them.

The Authority directed HIWU withdraw its request for a fine, supposedly, to conserve the financial wherewithal available to enforce HISA. The Authority issued

²³² *Id.* at *3 (quoting Rule 3710(a), and citing Rule 3010(e)(8)) (cleaned up; bracketed matter and emphasis added).

²³³ AB1 1299, at ¶ 28 (HIWU Responding Brief) (footnote omitted and emphasis added).

PUBLIC

its directive: (1) *months* after HIWU charged Serpe with a presence violation, and Serpe objected on the basis of the Seventh Amendment; (2) *months* after Serpe filed his Federal Action; and (3) *months* after HIWU formally began its arbitration against Serpe; but (4) within *days* of the District Court’s comments at oral argument.

The Authority’s intervention in HIWU’s prosecutorial authority concerning sanctions in Serpe’s case contrasts sharply with the Authority’s action in November 2024 adjusting provisional suspension policy. Then, the Authority “determined that further analysis and review on the issue of Provisional Suspensions [was] necessary to determine whether any modifications to the current rules [were] appropriate. While this review [took] place, the Authority lifted all provisional suspensions (including Plaintiff’s) outside a narrow category of circumstances inapplicable here.)”²³⁴

Notably, HIWU did not disclose the Authority’s directive in its letter informing Serpe no fine would be requested or in its pre-hearing brief, filed days before the arbitration hearing.²³⁵ And the Authority did not disclose it to the District Court when it argued Serpe’s Seventh Amendment objection was moot—an omission that Serpe himself commented on: “That [HIWU] letter gives no

²³⁴ Authority Opp. to PI Mot. at 5, Federal Action (quoting *HISA Announcement Regarding Provisional Suspensions* (Nov. 4, 2024), <https://hisaus.org/news/hisa-announcement-regarding-provisional-suspensions> (bracketed matter added and cleaned up). See also Order Denying PI 12 (The decision on provisional suspensions “applied to all those previously suspended across the board,” and not simply to Serpe); AB1 786 (HISA announcement of “policy change”), 2651 (Farrell email advising Serpe of “the decision of [the Authority’s] Board of Directors [on provisional suspensions] announced earlier today”).

²³⁵ AB1 1291-1316 (HIWU Responding Brief), 2711 (Farrell letter).

PUBLIC

substantive reason for HIWU’s abrupt change of plans. . . . [I]t raises questions about whether the FTC [a co-defendant] and/or the Authority encouraged or requested HIWU to make that decision”²³⁶ The Authority omitted referring to its directive in yet another paper filed in District Court and in the accompanying declaration from HIWU’s executive director.²³⁷ Serpe learned of the Authority’s directive, seemingly fortuitously, from an email HIWU wrote in another case, the admission of which HIWU objected to when offered at the arbitration hearing here.²³⁸

The conclusion is inescapable: The Authority intervened in HIWU’s case in an attempt to avoid a resolution of Serpe’s claimed constitutional violation, either by the Arbitrator or the District Court. The Authority’s interference with HIWU’s independent prosecutorial authority in this case is inconsistent with its statutory responsibility, under HISA itself, to “provide for adequate due process” to those charged with ADMC Program violations.²³⁹ In executing the Authority’s directive, HIWU became complicit in the Authority’s wrongful conduct. I need not, and do not, decide whether HIWU could *unilaterally* have exercised its own independent prosecutorial discretion to withdraw its fine request, nor whether the Authority

²³⁶ Plaintiff’s Combined Response at 1, 2, Federal Action; Defs’ Joint Notice and Mot. to Vacate, at 1, 4, Federal Action.

²³⁷ Authority Response to Supp. Order & Ex. A, Federal Action.

²³⁸ AB1 1207 (Farrell letter); AB2 3112-13, 3114-15, 3119-22 (closing argument).

²³⁹ 15 U.S.C. § 3057(c)(3). *See also* 88 Fed. Reg. 5081 (Jan. 26, 2023) (The 7000 series of the HISA Rules, covering arbitration procedures, “set out a disciplinary process . . . developed to provide for adequate due process”); 87 Fed. Reg. 60077 (Oct. 4, 2022) (FTC approval of HISA Rules is “consistent with the due process guarantees of the Administrative Procedure Act, 5 U.S.C. 556”).

PUBLIC

could appropriately have directed HIWU to drop its entire case against Serpe. That is not what happened here.

2. The Authority's Direction to HIWU Did Not Disable the Arbitrator From Exercising His Authority to Award a Fine.

The Arbitrator noted that, in seeking sanctions, HIWU “could have . . . sought . . . the statutory fine permitted for these cases but it declined to do so.”²⁴⁰ Thus, although the Arbitrator awarded a two-year period of Ineligibility, he did not include a fine as part of the sanction, nor explain its omission.²⁴¹ Serpe argues this was error: after the Arbitrator found him liable for the presence violation, “HISA Rule 3223(b) imposes a mandatory and automatic fine of some dollar amount.”²⁴²

Yes, the Arbitrator erred—but not, as Serpe asserts, because the Rules supposedly require “a mandatory and automatic fine.” That position is without merit. Rule 3223(b), the applicable provision, states that a fine amount of “up to \$25,000 or 25% of the total purse (whichever is greater)” “shall apply” for a first time ADRV. Since the purse amount for Fast Kimmie’s first place finish was \$50,000, and 25% equals \$12,500, the \$25,000 alternative “up to” applies.²⁴³

²⁴⁰ AB1 2777, at ¶ 4.2 (Corrected Final Decision).

²⁴¹ *See* AB1 2784, at ¶ 6.1(a) (Corrected Final Decision).

²⁴² SOBr. at 10; *see also id.* at 4; Not. App. at 1

²⁴³ Not. App. at 3, n.1.

PUBLIC

The expression “up to” is not ambiguous. It is “used to say that something is less than or equal to but not more than a stated value, number, or level.”²⁴⁴ So, as that phrase is used in Rule 3223(b), \$25,000 establishes the ceiling—a maximum fine amount.²⁴⁵ Contrary to Serpe’s argument, the Rule does not require any “mandatory” amount. Just as \$12,499 is “less than” both \$25,000 and \$12,500 (25% of Fast Kimmie’s purse), so too is \$0. Contrary to Serpe’s argument, no positive dollar amount is “mandatory.”²⁴⁶

For the same reason, contrary to Serpe’s argument, Rule 3223(b) does not deprive HIWU of “prosecutorial discretion over whether a fine will be sought.”²⁴⁷ Serpe cites no other Rule, nor any other authority, that limits HIWU’s prosecutorial discretion to recommend to the arbitrator whatever sanctions it deems appropriate that are within those that Rule 3223(b) authorizes. As the Supreme Court has said, “An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought.”²⁴⁸

²⁴⁴ Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/up-to>. See also Merriam-Webster Dictionary (“a function word to indicate a limit or boundary.”), <https://www.merriam-webster.com/dictionary/up%20to>.

²⁴⁵ Cf. *Duncan v. Louisiana*, 391 U.S. 145, 146 & n.1, 160 (1968) (referring to a statute that provided for imprisonment “for not more than two years” as providing “a maximum of two years’ imprisonment” and for “imprisonment for up to two years”); *People v. Scott*, No. 18, 2025 WL 835467, at *2 (N.Y. Ct. App. Mar. 18, 2025) (trial court’s statement that defendant “faced up to 45 years” imprisonment misstated the defendant’s “maximum sentencing exposure”).

²⁴⁶ See, e.g., SOBr. at 8 (“a mandatory fine for \$0 is a contradiction in terms.” (emphases deleted)).

²⁴⁷ *Id.* at 9 (emphases deleted).

²⁴⁸ *Butz v. Economou*, 438 U.S. 478, 515 (1978). See also *United States v. Kaiyo Maru No. 53*, 503 F. Supp. 1075, 1087 (D. Alaska 1980) (“That the provisions allow the government discretion to choose which sanction is appropriate in a particular case does not render the statute unconstitutionally vague. Such prosecutorial discretion has long been recognized as permissible.”) (footnote omitted).

PUBLIC

Rule 3010(j) expressly directs against constraining or limiting HIWU's enforcement authority, thus preserving traditional prosecutorial discretion.

Although HIWU withdrew its original request for a monetary fine, HIWU's exercise of prosecutorial discretion did not disable the Arbitrator from exercising his own authority under Rule 3223(b). As the Supreme Court has also said, "[w]e have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range."²⁴⁹ Accordingly, "the prosecution's role in sentencing is strictly advisory."²⁵⁰ Indeed, so too is a jury's recommendation.

In *Williams v. New York*,²⁵¹ after convicting the defendant of murder, the jury recommended life imprisonment. "[B]ut the trial judge imposed sentence of death."²⁵² The Supreme Court rejected the defendant's due process argument:

[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.²⁵³

²⁴⁹ *United States v. Booker*, 543 U.S. 220, 233 (2005). *See also Wasman v. United States*, 468 U.S. 559, 563 (1984) ("It is now well established that a judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence.")

²⁵⁰ *United States v. Garcia*, 78 F.3d 1457, 1462 (10th Cir. 1996).

²⁵¹ 337 U.S. 241 (1949).

²⁵² *Id.* at 242.

²⁵³ *Id.* at 246 (footnote omitted). *See also United States v. Garcia-Pupo*, 845 F.2d 8, 10 (1st Cir. 1988) ("judges cannot be bound by a prosecutor's sentencing recommendation"); Fed. R. Crim. P. 11(c)(1) (a plea agreement "may specify that an attorney for the government will . . . (B) recommend . . . that a particular sentence . . . is appropriate" although "such a recommendation . . . does not bind the court").

PUBLIC

Thus, even in a capital murder case, regardless of the jury's recommendation, the judge's sentencing discretion was preserved. Like a judge, the Arbitrator was not constrained by HIWU's post-charge withdrawal of any fine as a sanction. The Authority admits as much: "the Arbitrator was entitled to exercise his discretion with respect to whether to impose a fine, and if so, in what amount, based on the facts of the case."²⁵⁴ Rule 7350 itself authorizes an arbitrator to "grant any remedy or relief authorized by the Act [HISA] or the Rules issued pursuant to the Act."

Nonetheless, the Authority seeks to limit review of the Arbitrator's failure to award a fine. It argues that Congress "modeled" the FTC-Authority relationship on that of the SEC and the Financial Industry Regulatory Authority ("FINRA"). There, the SEC does not have "authority to increase a sanction imposed by a self-regulatory organization, but only to determine whether the sanction is excessive or oppressive."²⁵⁵ And, the Authority's argument continues, "[n]othing indicates that Congress intended for the FTC's review of Authority sanctions to be broader than the SEC's review of FINRA sanctions."²⁵⁶

The Authority is wrong. The SEC's review authority is narrower than that of the FTC under HISA. For the SEC, the relevant statute, in pertinent part, limits

²⁵⁴ AuRSPCOL at ¶ 20.

²⁵⁵ AuOBr. at 21 & n.87 (quoting *In the Matter of Glodek*, Exchange Act Release No. 60937, at 13 n.28 (Nov. 4, 2009)).

²⁵⁶ *Id.* at 21. *See also* Authority Opp. to Renewed PI Mot. at 6, Federal Action ("The equitable remedies imposed by the arbitrator are the only 'final civil sanction[s] imposed by the Authority' that are 'subject to de novo review' by the ALJ in Plaintiff's administrative appeal.") (quoting 15 U.S.C. § 3058(b)) & 10-14 (analogizing FTC review to that of the SEC, and arguing generally that this review proceeding does not appropriately raise Serpe's Seventh Amendment objection).

PUBLIC

review authority to the agency determining whether “a sanction imposed by a self-regulatory organization . . . imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter or is excessive or oppressive”²⁵⁷ The HISA provision is different—and broader on its face. FTC ALJ review, and that of the Commission, is explicitly “*de novo*,” and an FTC ALJ may “affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part” and “make any finding or conclusion that, in [their] judgment . . . is proper and based on the record.”²⁵⁸ “Modeling” does not trump the language of a statute. Accordingly, if an arbitrator’s sanction award in a HISA case is erroneous, HISA authorizes the ALJ to correct the error, reducing or increasing the sanction, as appropriate.

Indeed, the Authority’s position here is inconsistent with that taken in a prior proceedings before me. In *Shell II*, HIWU alleged, and separately charged, a veterinarian with possession of four Banned Substances. The arbitrator found each of the four ADRVs proven, but treated them as only one ADRV and awarded only one set of sanctions, which included two years of Ineligibility. The arbitrator further declined to direct the Ineligibility period in the case to run consecutive to that arising from another case involving the same veterinarian. On review by the veterinarian, the Authority argued that *both* arbitrator rulings were erroneously lenient. The arbitrator’s single ADRV award, the Authority maintained, was based

²⁵⁷ 15 U.S.C. § 78(e)(2).

²⁵⁸ 15 U.S.C. §§ 3058(b)(1) & (3)(A); FTC Rules 1.146(b)(2), &(3) & (d)(3).

PUBLIC

on an erroneous construction of Rule 3228(d), relating to multiple violations.²⁵⁹ The failure to provide for the Ineligibility period to run consecutively, the Authority contended, misapplied Rule 3223(c)(2), which deals with when consecutive periods of Ineligibility are warranted.²⁶⁰ Thus, on review the Authority requested that I *increase* the arbitrator's sanctions to provide for four periods of Ineligibility, running consecutively.²⁶¹

I agreed with the Authority that the arbitrator's single ADRV award erroneously construed Rule 3228(d), and, so, an award of four periods of Ineligibility could be made.²⁶² However, relying on the sports law principle of proportionality—which counsels that severity of a sanction be commensurate with the seriousness of the violation—I declined to increase the Ineligibility fourfold, and I explained the basis for my decision.²⁶³ I also held the Authority's argument for consecutive periods of Ineligibility inconsistent with prior positions taken in the case and, at bottom, untimely.²⁶⁴

The inconsistency between the Authority's position in *Shell II*—invoking the FTC ALJ's fulsome review authority—and its position here—seeking to restrict it—is part of its strategy to dodge Serpe's objection that the Seventh Amendment

²⁵⁹ *Shell II*, AuSLBr., No. 9439, 2025 WL 711493, at *1-3, 8 (Jan. 9, 2025).

²⁶⁰ *Id.* at *1, 7.

²⁶¹ *Id.* at *8-9.

²⁶² *Shell II* Decision at *30-34.

²⁶³ *Id.* at *34.

²⁶⁴ *Id.* at *51-58.

PUBLIC

entitles him to a jury trial. The Authority had it right in *Shell II*. HISA confers that fulsome review authority.

The Authority's position is also inconsistent with that taken by HIWU before the Arbitrator in this very case. Then, opposing Serpe's stay motion, HIWU argued that "[t]he ALJ's *de novo* review is conducted as though the issue had not been heard before, and no decision had previously been rendered. *De novo* review means ... a fresh independent determination of 'the matter' at stake."²⁶⁵

Regardless of the Authority's instruction that HIWU withdraw its request for a fine, the Arbitrator had the responsibility to consider, as part of his sanctions determination, whether to include one. The Arbitrator found that HIWU had proven Serpe's ADRV and that Serpe had failed to show a basis for eliminating or mitigating the sanctions to be imposed under either the NF or NSF provisions of the Rules.²⁶⁶ The Arbitrator thus appropriately awarded the required two-year Ineligibility period. And, to be sure, the Arbitrator had discretion to determine the amount of any fine awarded, which, as I noted above, could conceivably be as low as \$0.

Nonetheless, Congress intended HISA to rid thoroughbred horseracing of the scourge of doping, and there is a public interest in effective enforcement of the statute and its implementing Rules. On the facts in this case, either: (1) a fine of

²⁶⁵ AB1 467 (HIWU Stay Opposition) (internal quotation marks and footnotes citing authorities omitted).

²⁶⁶ AB1 2780-84, at ¶¶ 5.15-.25 (Corrected Final Decision).

PUBLIC

some amount greater than \$0 should have been awarded; or (2) an explanation for the decision to dispense with any fine at all was necessary. The Arbitrator, however, offered no explanation, and nothing extraordinary is suggested that could account for the omission. More is fairly required here: “justice must not only be done but must manifestly be seen to be done.”²⁶⁷ The Arbitrator’s failure to explain his decision to omit any fine “is clearly against the logic and effect of the facts found” and thus “a clear error of judgment.”²⁶⁸

Accordingly, I hold that the Arbitrator’s failure to award a fine was both an abuse of discretion and “not in accordance with law”—specifically, Rule 3223(b).²⁶⁹ I emphasize that my determination is fact-specific. I am not holding that an arbitrator in a HIWU-initiated case must always impose a fine, even though HIWU does not request one, upon a finding of liability.

3. Serpe’s “Set Aside” Argument.

Serpe, too, seeks to restrict my authority on this review. As he put it on his application for review, “[t]he ALJ may not . . . impose the fine on *de novo* review. The ALJ must instead ‘set aside’ the Decision and direct HISA, through HIWU, to enforce its charge against [him] in an Article III court pursuant to the Seventh

²⁶⁷ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 n.19 (1951) (Frankfurter, J., concurring) (quoting *Rex v. Justices of Bodmin*, (1947) 1 K.B. 321, 325). *See also United States v. Herrera*, 782 F.3d 571, 574 (10th Cir. 2015) (Gorsuch, J.) (“[O]ften enough courts will choose to err on the side of granting more process than might be strictly necessary in order to ensure not only that justice is done but that justice is seen to be done.”).

²⁶⁸ *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 422 F.3d 782, 798 (9th Cir. 2005) (internal quotation marks omitted).

²⁶⁹ 15 U.S.C. § 3058(b)(2)(A); 16 C.F.R. § 1.146(b)(1)-(3).

PUBLIC

Amendment’s jury trial guarantee.”²⁷⁰ In his review brief, however, he asserts: “[T]he FTC (through its ALJ) should set aside the Final Decision—but with one important caveat: the FTC cannot take the further step of *modifying* the Authority’s Final Decision to actually impose a fine.”²⁷¹ Because he has raised his Seventh Amendment objection to these proceedings in the Federal Action, he contends that, here, I “should set aside the Final Decision and remand with directions for HIWU not to initiate an arbitration against [him] under 15 U.S.C. § 3054(e).”²⁷²

To reiterate, under both HISA and the relevant FTC Rule, the ALJ, exercising *de novo* review, may “affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part” and “make any finding or conclusion that, in [their] judgment . . . is proper and based on the record.”²⁷³ This authority permits, but does not require, “set[ting] aside” the Arbitrator’s award. The authority to “modify” the Arbitrator’s award and to “make any finding or conclusion . . . based on the record” plainly includes reviewing and, if necessary, correcting the absence of any fine in the Arbitrator’s award. And so, I will exercise that authority.

4. A Fine Should Be Included in the Sanctions Awarded.

I affirm the sanctions that the Arbitrator did award. Rule 3223(b), which requires that Serpe serve a two-year period of Ineligibility, is appropriate, as are

²⁷⁰ Not. App. at 3.

²⁷¹ SOBr. at 3 (emphasis in original).

²⁷² *Id.* at 11.

²⁷³ 15 U.S.C. § 3058(b)(3)(A); FTC Rule 1.146(d)(3).

PUBLIC

the other sanctions. A fine, however, should be added, and as “a useful convention,” the fine should “follow”—that is, “be commensurate with”—the level of fault proven, subject to individual case adjustment.²⁷⁴ This approach, applied in HISA cases, has a counterpart in sports law generally.²⁷⁵

A Banned Substance, clenbuterol can build muscle in racehorses and historically was “widely used by trainers.”²⁷⁶ Fast Kimmie’s positive test result is serious, and Serpe has failed to show that he bears either NF or NSF for its presence, nor any other basis to reduce the ADRV’s seriousness. None of Fast Kimmie’s other test results is inconsistent with a doping, either intentionally or inadvertently, before her August 10, 2024 race at Saratoga.²⁷⁷

Therefore, I find that a fine of \$25,000, the maximum amount authorized by Rule 3223(b), is appropriate.²⁷⁸

H. The Seventh Amendment Does Not Apply to HIWU’s Enforcement Proceeding Against Serpe.

Having ruled that a monetary sanction is appropriate, I must, of necessity, also consider Serpe’s argument that, under the Seventh Amendment, he is entitled

²⁷⁴ See *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. Saldana*, JAMS Case No. 1501000587, at ¶¶ 7.29 & 7.30 (Dec. 4, 2023).

²⁷⁵ Cf. *FEI v. W.*, CAS 99/A/246, at ¶ 31 (May 11, 2000) (“a widely accepted general principle of sports law [is] that the severity of a penalty must be in proportion with the seriousness of the infringement”) (citing authorities).

²⁷⁶ AB2 3010-11 (Cole).

²⁷⁷ AB1 1245, at ¶ 28 (Cole report), 1558, at ¶ 9(b) (Eichner report); AB2 3008, 3011-13 (Cole).

²⁷⁸ See *Saldana*, JAMS Case No. 1501000587, at ¶ 7.31 (maximum fine awarded where the trainer was “unable to adduce any evidence of the source of the positive test” or “lack of reduction in his period of Ineligibility”).

PUBLIC

to a jury trial in federal court to resolve HIWU's presence charge. That, in turn, raises a preliminary question: Since both the Authority and HIWU are private entities, does the analytic framework from *SEC v. Jarkesy*,²⁷⁹ on which Serpe relies, apply at all?

1. *Jarkesy* Analysis Does Not Apply to this Case.

The Authority argues that the Seventh Amendment “does not apply to the *private* arbitration proceeding in which no governmental actor participated.”²⁸⁰ However, Serpe contends that under *Lebron v. Nat'l R.R. Passenger Corp.*,²⁸¹ and bearing in mind the FTC's review authority here, the Authority and seemingly HIWU are “state actors.” Therefore, he argues that *Jarkesy* must be applied in analyzing his Seventh Amendment claim.²⁸² But the Fifth Circuit rejected this very state actor argument for purposes of the Appointments clause in *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*.²⁸³ Discussing *Lebron* at length, the Fifth Circuit concluded: “the Authority is a private entity”²⁸⁴

²⁷⁹ 603 U.S. 109 (2024). *See* SOBr. at 3.

²⁸⁰ Authority Opp. to Renewed PI Mot. at 7, Federal Action. *See also* Authority Opp. to PI Mot. at 12, Federal Action (The Rules establish a “private enforcement arbitration proceeding”) (internal quotation marks deleted).

²⁸¹ 513 U.S. 374 (1995).

²⁸² Renewed PI Mot. at 12-13, Federal Action.

²⁸³ 107 F.4th 415, 437-40 (5th Cir. 2024), *vacated on other grounds*, No. 24-433, 2025 WL 1787684 (U.S. June 30, 2025).

²⁸⁴ *Id.* at 440.

PUBLIC

Serpe does not demonstrate that the result should be any different where the Seventh Amendment is argued. At bottom:

(1) Congress did not “create” the Authority, which “was incorporated under Delaware law shortly before HISA’s passage.”²⁸⁵

(2) The Authority was “recognized” in HISA as a “private, independent, self-regulatory, nonprofit corporation . . . for purposes of developing and implementing a horseracing anti-doping and medication control program and a racetrack safety program”²⁸⁶ It “was not created to further governmental objectives.”²⁸⁷

(3) “[T]he federal government does not control the operation of the Authority, nor has it retained for itself permanent authority to appoint a majority of the Authority’s directors. . . . To the contrary, the government has no role in appointing the Authority’s Board.”²⁸⁸

These considerations are all the more applicable for HIWU, another private entity, whom the Authority has engaged by contract. HIWU itself was formed by Drug Free Sport International (“DFSI”), also a private body with decades of experience “administering comprehensive anti-doping solutions” for sporting organizations.²⁸⁹

²⁸⁵ *Id.* at 438.

²⁸⁶ 15 U.S.C. § 3052(a).

²⁸⁷ 107 F.4th at 438 (cleaned up).

²⁸⁸ *Nat’l Horsemen’s*, 107 F.4th at 438 (cleaned up). *See* 15 U.S.C. § 3052(a)-(b).

²⁸⁹ <https://www.drugfreesport.com/about-us/>

PUBLIC

Another part of *Nat'l Horsemen's*, which Serpe also cites, dealt with the private non-delegation doctrine, an issue not raised in this proceeding.²⁹⁰ Although the Fifth Circuit held HISA violated the private non-delegation principle, that has no bearing on whether the Authority (or HIWU) are state actors for Seventh Amendment purposes: “the level of oversight required to satisfy the nondelegation doctrine is different, both quantitatively and qualitatively, from the level of permanent control required to make a nominally private corporation a state actor.”²⁹¹

FINRA's enforcement in the securities industry also provides guidance. Like the Authority and HIWU, FINRA is a private body that exercises disciplinary authority over securities industry participants, subject to review by the SEC and after that in a Court of Appeals. “[A] multitude of courts nationwide have held . . . that FINRA is a private entity wholly separate from the SEC or any other government agency.”²⁹² The *Scottsdale* Court therefore rejected the broker-dealers' Seventh Amendment claim.²⁹³

²⁹⁰ See Renewed PI Mot. 12, 15, Federal Action (citing *Nat'l Horsemen's*, 107 F.4th 415, 430-31, 432).

²⁹¹ *Kim v. FINRA*, 698 F. Supp. 3d 147, 167 (D.D.C. 2023), *appeal dismissed*, 2025 WL 313965 (D.C. Cir. Jan. 27, 2025).

²⁹² *Scottsdale Cap. Advisors Corp. v. FINRA*, 678 F.Supp.3d 88, 104 (D.D.C. 2023) (citing authorities), *rev'd in part on other grounds sub nom. Alpine Sec. Corp. v. FINRA*, 121 F.4th 1314 (D.C. Cir. 2024), *cert. denied*, 2025 WL 1549780 (U.S. June 2, 2025). See also *Kim*, 698 F. Supp. 3d at 162-65.

²⁹³ 678 F. Supp. 3d at 106. See also *Lukezic v. FINRA*, No. 25-cv-00623 (DLF), 2025 WL 2305859, at *3 (D.D.C. Aug. 10, 2025) (rejecting Seventh Amendment claim on a preliminary injunction motion seeking to enjoin a FINRA disciplinary proceeding against an investment advisor); *Ponte v. FDIC*, No. 24-cv-2379 (APM), 2024 WL 4730602, at *8 (D.D.C. Oct. 11, 2024) (same, on a motion seeking to enjoin a pending FDIC enforcement proceeding before an ALJ).

PUBLIC

FINRA enforcement is conducted within the organization itself, and thus differs from HISA enforcement where HIWU is an entity separate from, and independent of, the Authority. But that only moves the needle further away from state actor status.²⁹⁴ FINRA also has an internal review process before review by the SEC is available whereas HISA-based arbitrations are reviewed directly by the FTC ALJ.²⁹⁵ However, Serpe makes no argument that these differences are material in analyzing whether the Authority or HIWU are state actors for Seventh Amendment purposes.

Serpe seeks, however, to distinguish treatment of FINRA enforcement as based on “self-regulatory organization with a historically private pedigree,” which he suggests is inapplicable to horseracing.²⁹⁶ Not so. As I discuss below, the horserace industry has its own longstanding “pedigree”—grounded in self-regulation that later evolved into state-level oversight, which differed among the States, and which formed the basis for HISA’s enforcement provisions.²⁹⁷ The availability of FTC review of HISA’s enforcement system is comparable to that of the SEC over FINRA’s system. And like FINRA, the Authority is not federally funded.²⁹⁸

²⁹⁴ See *Kim*, 698 F. Supp. 3d at 158, and *Scottsdale Cap.*, 678 F. Supp. 3d at 96 (both describing FINRA investigation).

²⁹⁵ See *Alpine Sec.*, 121 F.4th at 1322 (describing FINRA review procedures).

²⁹⁶ Renewed PI Mot. at 13, Federal Action.

²⁹⁷ See *infra* pp. 85-101.

²⁹⁸ 15 U.S.C. § 3052(f). See *Alpine Sec.*, 121 F.4th at 1321.

PUBLIC

Serpe also argues that state actor status should be found, despite his registration as a Covered Person under HISA and thus subject to the Rules' enforcement system.²⁹⁹ Briefly, Rule 7010 provides that the Rule's arbitration provisions "shall apply to all adjudications arising out of the Rule 3000 Series," which includes HIWU's presence charge here. Requiring Serpe to submit to arbitration to resolve that charge is analogous to the dispute resolution called for by securities industry rules, which require FINRA members to participate in that organization's dispute resolution procedures.³⁰⁰

Thus, neither the Authority nor HIWU is a state actor for Seventh Amendment purposes. The case against Serpe does not trigger *Jarkesy* review. But even assuming for argument's sake that it did, Serpe would not have a Seventh Amendment right to a jury trial.

2. *Jarkesy's* Analytic Framework for the Seventh Amendment Issue.

Jarkesy arose from an SEC securities fraud action seeking civil penalties against Jarkesy and Patriot28, an investment adviser that Jarkesy managed (together, "Jarkesy"). After trial in the SEC's administrative court, Jarkesy was found liable. The SEC ordered civil penalties and disgorgement, along with cease-and-desist relief and an order barring Jarkesy from participating in the securities industry.³⁰¹ On review, Jarkesy argued that, by adjudicating the case in its

²⁹⁹ Renewed PI Mot. at 13-14, Federal Action.

³⁰⁰ See *Scottsdale Cap.*, 678 F. Supp. 3d at 95-97.

³⁰¹ *Jarkesy*, 603 U.S. at 119.

PUBLIC

administrative court, the SEC violated Jarkesy's Seventh Amendment rights to defend in an Article III court. The Supreme Court agreed.

The “threshold issue,” the court said, was “whether this action implicates the Seventh Amendment.”³⁰² The Amendment provides for a jury trial in “[s]uits at common law”³⁰³ This language “embrace[s] all suits which are not of equity and admiralty jurisdiction,” regardless of their “peculiar form” or whether or not created by statute, “if the claim is legal in nature.”³⁰⁴ And determining whether a claim is “legal in nature” turns on “the cause of action and the remedy it provides,” the latter of which is “the more important consideration.”³⁰⁵

Where, as in the SEC's case against Jarkesy, monetary relief in the form of civil penalties was sought, the remedy was “legal” because it was “designed to punish or deter the wrongdoer,” and not “solely to restore the status quo.”³⁰⁶ As the Court elaborated: civil penalties under the antifraud provisions of the securities laws seek “to punish the defendant rather than to restore the victim”³⁰⁷ Thus, the civil penalties available in an SEC prosecution were “a type of remedy at common law that could only be enforced in courts of law.”³⁰⁸

³⁰² *Id.* at 120.

³⁰³ U.S. Const. amend. VII.

³⁰⁴ *Jarkesy*, 603 U.S. at 122 (cleaned up).

³⁰⁵ *Id.* at 123 (cleaned up).

³⁰⁶ *Id.* (cleaned up).

³⁰⁷ *Id.* at 124.

³⁰⁸ *Id.* at 125 (cleaned up).

PUBLIC

The “close relationship” between securities fraud, established by statute, and common law fraud “confirm[ed]” the Court conclusion.³⁰⁹ Congress itself “incorporated” common law fraud prohibitions “into federal securities law,” and so did Supreme Court decisions under the statutes.³¹⁰ Since the federal antifraud provisions “replicate common law fraud,” the jury provision of the Seventh Amendment was triggered.³¹¹

As step 2 in the analysis, the Court considered whether to apply the “public rights” exception, which “permit[s] Congress to assign certain matters to agencies for adjudication even though such proceedings would not afford the right to a jury trial.”³¹² Public rights “historically could have been determined exclusively by the executive and legislative branches, even when they were presented in such form that the judicial power was capable of acting on them.”³¹³

That Jarquesy’s liability arose from “new statutory obligations” that “imposed civil penalties,” which Congress “committed to an administrative agency” to resolve, was not dispositive.³¹⁴ Congress, the Court wrote, “cannot conjure away the Seventh Amendment” protection of an “action [that] resembles *a traditional legal claim*”

³⁰⁹ *Id.*

³¹⁰ *Id.* at 125-26.

³¹¹ *Id.* at 120; *see also id.* at 140 (“law courts have dealt with fraud actions since before the founding . . .”).

³¹² *Id.* at 120; *see also id.* at 127.

³¹³ *Id.* at 128 (cleaned up).

³¹⁴ *Id.* at 135 (cleaned up).

PUBLIC

regardless of its “statutory origins.”³¹⁵ Nor did the Government’s position as the prosecuting party matter; “the substance of the suit, not where it is brought, who brings it, or how it is labeled” controls the analysis.³¹⁶

While providing examples of “public rights”—such as executive collection of revenue, Congressional power over immigration, and relations with “Indian tribes”—the Court emphasized that it “ha[d] not definitively explained the distinction between public and private rights, and we do not claim to do so today.”³¹⁷

Significantly, the Court did not overrule its prior decision in *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*.³¹⁸ There, the Occupational Safety and Health Act (“OSHA”) established a regulatory scheme to promote a safe workplace. OSHA authorized the Department of Labor to promulgate regulations carrying civil penalties, whose violation was adjudicated before an agency tribunal. The regulatory scheme’s distinguishing feature was that OSHA “did not borrow its cause of action from the common law. . . . The purpose of this regime was not to enable the Federal Government to bring or adjudicate claims that traced their ancestry to the common law,” but rather to enable the agency “to “develop innovative methods, techniques, and approaches for dealing with

³¹⁵ *Id.* (cleaned up; emphasis added).

³¹⁶ *Id.*; *see also id.* at 139 (“the Seventh Amendment does apply to novel statutory regimes, so long as the claims are akin to common law claims.”).

³¹⁷ *Id.* at 131 (cleaned up); *see also id.* at 128-30.

³¹⁸ 430 U.S. 442 (1977).

PUBLIC

occupational safety and health problems.”³¹⁹ Accordingly, the public rights exception applied. Seventh Amendment protections were not required.³²⁰

A recent decision applying *Jarkesy* to another regulatory system with common law roots is found in *AT&T v. FCC*.³²¹ The Fifth Circuit considered whether an FCC forfeiture order, imposed in internal administrative proceedings, violated the Seventh Amendment. Section 222 of the Telecommunications Act (“TCA”) requires carriers such as AT&T to protect the confidentiality of “customer proprietary network information [‘CPNI’].”³²² The TCA and implementing regulations further limit use and disclosure of CPNI, absent customer consent.³²³ The FCC charged AT&T with § 222 violations, arising out of its handling of customer location data, and, after finding liability, ordered a forfeiture of \$57 million. On review, AT&T argued that the FCC enforcement procedures violated the Seventh Amendment.

The forfeiture order was “not remedial” nor “meant to compensate victims[,]” but was, instead, “payable into the Treasury.”³²⁴ Therefore, The Fifth Circuit held the forfeiture was comparable to the civil penalties in *Jarkesy*.³²⁵ Moreover, the

³¹⁹ *Jarkesy*, 603 U.S. at 136-37 (cleaned up); *see also id.* at 138 (OSHA claims “were unknown to the common law”) (cleaned up) & 140 (“The novel claims in *Atlas Roofing* had never been brought in an Article III court.”).

³²⁰ *Id.* at 137-38.

³²¹ No. 24-60223, 2025 WL 2426855 (5th Cir. Apr. 17, 2025).

³²² 47 U.S.C. § 222(a).

³²³ *See AT&T*, 2025 WL 2426855, at *1.

³²⁴ *Id.* at *5 (quoting 47 U.S.C. § 504(a))

³²⁵ *Id.*

PUBLIC

FCC’s § 222 claim, which alleged AT&T had “fail[ed] to take reasonable measures to protect customers’ personal data,” was “analogous to common law negligence. . . . [S]ection 222 action targets a carrier’s negligence in handling customer data.”³²⁶ *Jarkesy’s* threshold inquiry was met.

Considering, then, the public rights exception, the FCC argued that the TCA regulated common carriers that were “affected with a public interest,” such that “Congress could assign adjudication of civil penalties against them to agencies instead of courts.”³²⁷ The Fifth Circuit rejected the FCC’s argument as too broad: “Myriad enterprises might be said to implicate the public interest.”³²⁸ Equally important, “[n]egligence claims against common carriers have been routinely adjudicated in state and federal courts.”³²⁹ Moreover, after Congress approved the Interstate Commerce Act, the very first statute enacted to regulate common carriers, the agency’s 1887 report “stated that its power must be so construed as to harmonize with the seventh amendment to the Federal Constitution, which preserves the right of trial by jury in common-law suits.”³³⁰ Thus, the FCC’s administrative procedure was “flatly inconsistent with exempting its enforcement action from Article III adjudication.”³³¹ The constitutional infirmity was not saved

³²⁶ *Id.* at *5, *6.

³²⁷ *Id.* at *7 (cleaned up).

³²⁸ *Id.* (cleaned up; footnote omitted).

³²⁹ *Id.*

³³⁰ *Id.* at *8 (cleaned up).

³³¹ *Id.*

PUBLIC

by TCA provisions entitling AT&T to defend a DOJ enforcement action in federal court after it had suffered the “reputational harm” from the FCC’s initial forfeiture order.³³²

By contrast, the Third Circuit recently considered the interplay between *Jarkesy* and *Atlas Roofing*. *Axalta Coating Sys. LLC v. FAA*³³³ arose under the Hazardous Materials Regulations (“HMRs”), which, among other things, imposed packaging requirements for shipping paint.³³⁴ The regulatory scheme further called for HMR violations to be heard by an administrative law judge, who was authorized to impose civil penalties for a proven violation. After Axalta shipped packaged paint that opened during shipment, the FAA charged the company with HMR packaging violations. The ALJ held that the FAA proved the violations and imposed a \$1900 civil penalty, which was affirmed in an agency appeal proceeding.

Axalta petitioned the Third Circuit for review of the violation finding and the penalty imposed. Relying on *Jarkesy*, Axalta argued that the Seventh Amendment prohibited adjudicating HMR violations in an administrative forum without providing for a jury trial.³³⁵ The Court of Appeals rejected Axalta’s argument, however.

³³² *Id.* at *9. *But see Verizon v. FCC*, No. 24-1733, Slip op. at 34-38 (2d Cir. Sept. 10, 2025) (Assuming Verizon had a Seventh Amendment right to a jury trial, Verizon waived the right by foregoing procedure under the TCA that would have permitted a trial de novo in the district court).

³³³ 144 F.4th 467 (3d Cir. 2025)

³³⁴ *See* 49 C.F.R. §§ 171 *et seq.*

³³⁵ *Axalta*, 144 F.4th at 473.

PUBLIC

The “threshold issue,” as *Jarkesy* held, was “whether the action implicates the Seventh Amendment.”³³⁶ The FAA conceded the point; the “civil monetary penalty” imposed on Axalta was “a prototypical common law remedy.”³³⁷ Therefore, the case turned on whether *Atlas Roofing’s* public rights exception applied.

Like the OSHA provisions in *Atlas Roofing*, the HMRs established “standards” that did not “bring common law soil with them. . . . Instead, . . . they consist[ed] of technical prescriptions for engaging in regulated activity.”³³⁸ In consequence, the Court rejected Axalta’s argument that, because the HMRs used common law terms—such as “reasonable person” and “reasonable care”—an enforcement action was, “in essence, a common law negligence action.”³³⁹ “Congress,” the Court wrote, “necessarily drew upon the common law when defining the circumstances under which a person has *knowledge* that he violated these standards.”³⁴⁰ Although the common law terminology informed whether there was a “knowing” violation, the “standards of conduct,” established in the HMRs, were themselves ones “that descend in no way from the common law.”³⁴¹ Thus, *Atlas Roofing*, not *Jarkesy*, controlled.

³³⁶ *Id.*

³³⁷ *Id.* at 475.

³³⁸ *Id.* at 476 (cleaned up).

³³⁹ *Id.* at 477.

³⁴⁰ *Id.* (emphasis in original).

³⁴¹ *Id.*

PUBLIC

3. Application to HISA and the Rules.

a. *Jarkesy's* Threshold Question: Seventh Amendment Coverage—or Not?

Here, the monetary fine to which Serpe is exposed is intended to punish and deter. As the FTC wrote in approving the proposed HISA Rules: “The range of civil sanctions (a) take into account the unique aspects of horseracing; (b) are designed to ensure fair and transparent Covered Horseraces; and (c) are intended to deter violations. The severity of the sanctions depends on the nature of the violation, and allows an opportunity for adjustment in penalty depending on the violation and facts involved.”³⁴² Since no fine is used to reimburse any alleged victim, HISA fines are not remedial. Fines have further teeth inasmuch as a Covered Person cannot be reinstated after serving a period of Ineligibility unless they have paid the fine imposed (or entered an installment plan for payment).³⁴³

These remedy features of enforcement counsel in favor of concluding that *Jarkesy's* “threshold” inquiry implicates the Seventh Amendment. However, this is only a part of the inquiry. The *Jarkesy* majority also emphasized “the close relationship between the causes of action in this case *and* common law fraud”³⁴⁴ The Supreme Court further explained:

Both target the same basic conduct: misrepresenting or concealing material facts.

³⁴² 88 Fed. Reg. 5070, 5074 (Jan. 26, 2023).

³⁴³ Rule 3232(a).

³⁴⁴ 603 U.S. at 125 (cleaned up) (emphasis added).

PUBLIC

. . . .

That is no accident. Congress deliberately used “fraud” and other common law terms of art in the Securities Act, the Securities Exchange Act, and the Investment Advisers Act. . . . In so doing, Congress incorporated prohibitions from common law fraud into federal securities law. The SEC has followed suit in rulemakings. . . .

Congress’s decision to draw upon common law fraud created an enduring link between federal securities fraud and its common law ancestor. When Congress transplants a common-law term, the old soil comes with it.³⁴⁵

The Court thus revisited its summary description of the threshold inquiry: “To determine whether a suit is legal in nature, we directed courts to consider the cause of action **and** the remedy it provides.”³⁴⁶

Serpe argues that an ADRV “bears a ‘close relationship’ with a claim for common-law fraud.” This, he contends, is so because, in establishing the ADMC Program, the Authority was required by Congress 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. . . . HISA mandated that the ADMC Program ‘be designed to ensure **fair and transparent** horseraces[.]’”³⁴⁷ As Serpe restates his argument:

³⁴⁵ *Id.* (citations omitted; cleaned up).

³⁴⁶ *Id.* at 122-23 (emphasis added); *see also id.* at 120 (“The SEC’s antifraud provisions replicate common law fraud, and it is well established that common law claims must be heard by a jury.”).

³⁴⁷ AB1 254 (quoting HISA, 15 U.S.C. §§ 3055(b)(7), 3057(d)(2)(b)) (PI Br. in Federal Action; emphasis in original).

PUBLIC

HISA established the ADMC Program to prevent, among other harms, fraud on the betting market—a principle long recognized as the cornerstone of horseracing regulations. . . .³⁴⁸

From these HISA excerpts, Serpe contends that “[i]n requiring that the ADMC Program ensure ‘full disclosure,’ ‘fair[ness],’ and ‘transparen[cy],’ Congress ‘dr[ew] upon’ ‘common law fraud principles.’”³⁴⁹

According to Serpe, just as the SEC’s enforcement action in *Jarkesy* was akin to common law fraud—historically within the province of the law courts—so too this case—brought to enforce the ADMC Program—amounts to litigating “fraud perpetrated on the betting public,” which is said to be a private right that must be litigated in a jury trial under the Seventh Amendment.³⁵⁰

But, for starters, Serpe’s effort to extend *Jarkesy* on this basis to HISA is historically inaccurate. Protecting bettors, or the “public betting market” has no long-recognized historical antecedent in the common law. The Anglo/American legal tradition has *disfavored* gambling, not simply on horse races, but generally.

Let us begin, as the Supreme Court has suggested, at the founding—indeed, even a bit before. The English Statute of Anne, enacted in 1710:

1. Prohibited enforcement of gambling debts.

³⁴⁸ AB1 254-55 (citations and footnote omitted) (PI Br. in Federal Action).

³⁴⁹ AB1 254 (citing *Jarkesy*, 603 U.S. at 125-26) (bracketed matter in original) (PI Br. in Federal Action).

³⁵⁰ AB1 256 (PI Br. in Federal Action). *See also* Renewed PI Br. at 11, Federal Action; Reply Renewed PI Br. at 1-2, Federal Action.

PUBLIC

2. Permitted the loser to recover the debt previously paid, if 10 pounds or more and the costs of suit, if the case was brought within three months.
3. If no such case was begun, permitted a third-party to sue for treble recovery, with recovery split equally with the parish poor.³⁵¹

This law, imported into the colonies and after the independence into state law, has come to be described as an “LRA”—loss recovery act. LRAs are “intended to deter illegal gambling by using its recovery provisions as a powerful enforcement mechanism.”³⁵²

LSAs are still on the books in some States. A recent Kentucky Court of Appeals decision noted:

As it is in effect today, Kentucky’s LRA retains all three tenets found in the Statute of Queen Anne: it declares all gambling contracts void (KRS 372.010); it allows the loser to recover the amount lost from the winner (KRS 372.020); and, if the loser does not file suit within a prescribed time-period, it allows a third-party to recover damages in the loser’s stead (KRS 372.040).³⁵³

³⁵¹ See Joseph Kelly, *Caught in the Intersection Between Public Policy and Practicality: A Survey of the Legal Treatment of Gambling-Related Obligations in the United States*, 5 CHAPMAN L. REV. 87, 87-88 (2002); Attached Appendix (the Statute); *An International Survey of Gambling Debt Enforcement Law*; Comm’n on the Review of the Nat’l Policy Toward Gambling, *GAMBLING IN AMERICA: FINAL REPORT* 169 (1976) (“*Gambling in America*”) (noting that in New England “a severe law against gambling” was passed “10 years after the landing of the Mayflower”).

³⁵² *Vinson v. Casino Queen, Inc.*, 123 F. 3d 655, 657 (7th Cir. 1997) (construing the exemption in Illinois law for riverboat gambling). See also *Burt v. Playtika, Ltd.*, 132 F.4th 398, 402 (6th Cir. 2025) (“Expansive gambling loss statutes, like Tennessee’s, were intended to prevent a gambler from abusing the vice and exceeding limits which bring harm to the gambler and his or her family.”) (cleaned up); *Humphrey v. Viacom, Inc.*, No. 06-2768 (DMC), 2007 WL 1797648, at *3 & 4 (D.N.J. June 20, 2007) (citing case law).

³⁵³ *Stars Interactive Holdings (IOM) Ltd. v. Commonwealth ex rel. Tilley*, No. 2016-CA-000221-MR, 2018 WL 6712631, at *6 (Ky. Ct. App. Dec. 21, 2018), *rev’d on other grounds*, 617 S.W.3d 792 (Ky. 2020), *cert. denied*, 142 S. Ct. 330 (2021). See generally Darren A. Prum, *Enforcement of Gaming Debt*, 7 GAMING L. REV. 17 (2003).

PUBLIC

The Kentucky Supreme Court upheld the State Attorney General's claim, and at trial the Commonwealth received a jury award, after trebling, of \$1.2 billion.³⁵⁴ The case settled for \$300 million.³⁵⁵

From this 18th century foundation, laws dealing with gambling evolved at the state level. "Sports gambling," specifically, "has long had strong opposition."³⁵⁶ Still, as public policy disfavoring gambling has mellowed, States have enacted and amended regulatory oversight to legalize various forms of gambling. Nevertheless, enforceability of gambling debts varies state-by-state:

All states in the Union, influenced by the historical traditions against gambling, *have started from the premise* that gambling debts are unenforceable. Nevertheless, over time states have begun a slow process of legalizing gambling, which will eventually lead to the enforcement of gambling-related debts. In general, it appears that the greater the extent of legalized gambling in a state, the more likely it is that the state has changed its laws to allow enforcement. Each state has found different ways to handle the costs and benefits of legalized gambling."³⁵⁷

An influential New York decision summarized the evolution of public policy:

The trend in New York State demonstrates an acceptance of *licensed* gambling transactions as a morally acceptable activity, not objectionable under the prevailing standards of lawful and approved social conduct in the community . . . Informed public sentiment is only against unlicensed gambling, which is unsupervised, unregulated by law and which affords no

³⁵⁴ *Commonwealth ex rel. Brown v. Stars Interactive Holdings (IOM) Ltd.*, 617 S.W.3d 792, 796 (Ky. 2020), *cert. dis'd on stipulation*, No. 21-275 (U.S. Sept. 30, 2021).

³⁵⁵ Office of the Governor, Gov. Beshear: Kentucky to Receive \$300 Million from Internet Gambling Site (Sept. 22, 2021), <https://www.kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=972>. *See also Kater v. Churchill Downs Inc.*, 886 F.3d 784 (9th Cir. 2018) (upholding claim under Washington's LRA); *Benson v. DoubleDown Interactive, LLC*, No. 18-cv-0525 RSL, 2023 WL 3761929 (W.D. Wash. June 1, 2023) (awarding attorneys fees based on \$415 million class action settlement fund).

³⁵⁶ *Murphy v. NCAA*, 584 U.S. 453, 460 (2018).

³⁵⁷ Kelly, *supra* n.351, at 122 (emphasis added).

PUBLIC

protection to customers and no assurance of fairness or honesty of the operation of the gambling devices.³⁵⁸

Policies disfavoring gambling are also reflected in a host of federal statutes. The Interstate Horseracing Act (“IHA”) was enacted to address tensions created after States that permitted pari-mutuel betting on horseraces sought to accept bets on horseraces in other States without the racetrack’s consent.³⁵⁹ Briefly, the IHA bans interstate off-track betting, but lifts the ban if consent to betting is given by the racetrack sponsoring the event and its associated “horsemen’s group,” as well as by the racing commissions in the racing State and the off-track betting State.³⁶⁰ The IHA “adopts the ‘federalism’ approach recommended by the Commission on the Review of the National Policy Toward Gambling. The approach also ensures that states do not interfere with each other’s policies prohibiting, or regulating, horseracing or wagering.”³⁶¹

Other federal laws cover various gambling activity generally. The Wire Act, for example, prohibits persons “in the business of betting or wagering” from “knowingly us[ing] a wire communication facility” to transmit “bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest,” or “which entitles the recipient to receive money or credit as a result of

³⁵⁸ *Intercontinental Hotels Corp. v. Golden*, 15 N.Y.2d 9, 15 (1964) (emphasis in original; footnotes omitted).

³⁵⁹ 15 U.S.C. § 3001 *et seq.*

³⁶⁰ 15 U.S.C. §§ 3003 (banning wagers), 3004 (consent provisions).

³⁶¹ Douglas L. McSwain, *The Legalization of Sports Betting: A Federalism Framework and the Horse Racing Model*, 11 KY J. EQUINE, AGRIC., & NAT. RESOURCES L. 63, 80 (2018); *see generally id.* at 71-82.

PUBLIC

bets or wagers,” or to “assist[] in the placing of bets or wagers”³⁶² The law, however, exempts, wire transmissions “where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.”³⁶³ Other federal laws include the Bribery in Sporting Contests Act,³⁶⁴ the Illegal Gambling Business Act,³⁶⁵ and the Interstate Transportation of Wagering Paraphernalia Act.³⁶⁶ “All of these federal laws reinforce and support states' anti-gambling laws”³⁶⁷

The salient point is that, unlike the federal antifraud securities laws at issue in *Jarkesy*, there is no “enduring link” between the anti-doping provisions, embodied in HISA and the Rules, and any “common law ancestor.” Quite the opposite. As Justice Alito put it in *Murphy v. NCAA*, “Americans have never been of one mind about gambling, and attitudes have swung back and forth.”³⁶⁸

Equally important, characterizing HISA’s provisions as designed to prevent “fraud on the betting public” proves too much. The OSHA provisions in *Atlas Roofing* could be styled as intended to prevent “fraud” on employees who justifiably relied on workplace conditions to be safe and healthy. Similarly, the Hazardous

³⁶² 18 U.S.C. § 1084(a).

³⁶³ *Id.* § 1804(b).

³⁶⁴ *Id.* § 224.

³⁶⁵ *Id.* § 1955.

³⁶⁶ *Id.* § 1953.

³⁶⁷ McSwain, *supra* n.361, at 69; *see generally id.* at 67-71.

³⁶⁸ 584 U.S. 453, 458 (2018).

PUBLIC

Materials regulations in *Axalta* could be described as preventing “fraud” on members of the shipping public who justifiably relied on goods shipped or received to be delivered intact. At a high level of generality, a host of regulatory activity can be seen as advancing the legitimate expectations of one group or another—thus preventing “fraud” or “negligence.” That, however, is a far cry from “the close relationship” between the regulatory system and “the cause of action and the remedy it provides”—the linchpin of *Jarkesy*’s first analytic step.

In sum, Serpe’s Seventh Amendment argument fails to meet *Jarkesy*’s “threshold” inquiry. Analysis of the “public rights” exception—the second step under *Jarkesy*—reinforces the disconnect between HISA’s ADMC Program and common law litigation of legal rights in the courts.

b. Anti-Doping Regulation as a Public Right.

To reiterate, the “public rights” exception recognizes that “Congress may assign the matter for decision to an agency without a jury, consistent with the Seventh Amendment.”³⁶⁹ This analytic step focuses on whether the claimed public rights “historically could have been determined exclusively by the executive and legislative branches, even when they were presented in such form that the judicial power was capable of acting on them.”³⁷⁰ Where that is so, “no involvement by an Article III court in the initial adjudication is necessary”³⁷¹ Anti-doping

³⁶⁹ *Jarkesy*, 603 U.S. at 127.

³⁷⁰ *Id.* at 128 (cleaned up).

³⁷¹ *Id.*

PUBLIC

regulation fits the public rights exception to a tee. HISA and its implementing Rules have evolved from self-regulation of horseracing, which state-level legislative and executive action later undertook to oversee, leading to Congress, in 2020, adopting national uniformity for thoroughbred horseracing.

1. Historical Background.

Even before independence, horseracing was “a popular and largely unregulated recreation throughout the colonies.”³⁷² Horseracing’s “formal debut” was “in 1665, when a New York governor sponsored racing meets at the Newmarket track on Long Island.”³⁷³ The sport’s popularity grew, particularly among the gentry, and “racing enthusiasts began advocating for standard rules to govern the length of courses, behavior during the races, and the quality of horses permitted to participate.”³⁷⁴ The first jockey club, organized in South Carolina around 1735, was formed “to avoid oversight by the Crown”³⁷⁵ Religious conservatives disfavored the sport, however, and it was banned in parts of the colonies.³⁷⁶

While objection to horse racing persisted among some after independence, the sport “was generally accepted and flourished during the first sixty years of the

³⁷² Howland, *supra* n.1, at 483.

³⁷³ *Gambling in America*, *supra* n.351, at 106; Steven A. Reiss, THE SPORT OF KINGS AND THE KINGS OF CRIME 1 (2011) (“*The Sport of Kings*”).

³⁷⁴ Howland, *supra* n.1, at 486. *See also* Reiss, *The Sport of Kings*, *supra* n.373, at 1-5.

³⁷⁵ Howland, *supra* n.1, at 486.

³⁷⁶ *Id.* at 484-85; Reiss, *The Sport of Kings*, *supra* n.373, at 3-4.

PUBLIC

nineteenth century,” preceding the Civil War.³⁷⁷ There was fierce racing competition, “fueled by political tensions . . . between North and South over who was superior in equine breeding and training. . . . [M]ost pre-Civil War matches were usually won by Northern horses.”³⁷⁸

Although interest in horseracing developed anew after the conflict, the sport was centered in northeast, as racing in the confederate States “was decimated.”³⁷⁹ There followed decades of “both turmoil and progress” in the industry.³⁸⁰ Horseracing as an industry grew significantly in the late 19th century, and so did betting on the sport:

By the late 1890s, race tracks were hotbeds of rumors about illegal wagering, doping, and fraudulent races. Many tracks were burdened by poor management, as well as dishonest trainers and jockeys. The growing distrust of the racing industry, coupled with a resurgence of conservative religious values, led to the banning of horse racing in many parts of the country. . . . Between 1897 and 1908, the number of race tracks in the United States decreased from 314 to 25.³⁸¹

³⁷⁷ Howland, *supra* n.1, at 489. *See also id.* at 486-91; Reiss, *The Sport of Kings*, *supra* n.373, at 1-2, 6-8, 11; Celso Lucas Leite, Jr., *Saving Seabiscuit: An Argument for the Establishment of a Federal Equine Sport Commission*, 28 JEFFREY S. MOORAD SPORTS L.J. 135, 138-39 (2021).

³⁷⁸ Debbie Schaefer-Jacobs, *Off to the races in 1845* (May 3, 2012), <https://americanhistory.si.edu/blog/2012/05/off-to-the-races-in-1845.html#:~:text=Here%20are%20some%20other%20details%20about%20antebellum,commissioned%20eight%20reporters%20to%20cover%20the%20race>. *See also* Reiss, *The Sport of Kings*, *supra* n.373, at 8-10.

³⁷⁹ Howland, *supra* n.1, at 492. *See also From Track to Trench: Civil War on the Turf*, at 24, 72-73, <https://www.racingmuseum.org/sites/default/files/From%20Track%20to%20Trench%20Learning%20Packet%20%281%29.pdf>.

³⁸⁰ Howland, *supra* n.1, at 495.

³⁸¹ *Id.* at 495-96 (footnotes omitted). *See also* Bradley S. Friedman, *Oats, Water, Hay, and Everything Else: The Regulation of Anabolic Steroids in Thoroughbred Horse Racing*, 16 ANIMAL L. 123, 128-30 (2009).

PUBLIC

According to one author, “[s]ince time immemorial horses have been dosed with whiskey before races, but toward the end of the nineteenth century the pace accelerated. Stimulating doping as we know it today was apparently born and bred in the New World”³⁸² After the Civil War, “powerful narcotics and stimulants . . . became widely available for medical and recreational use. . . . [I]t was just a matter of time until someone substituted these new drugs for the old, ineffective whiskey drenches in an attempt to make horses run faster.”³⁸³ Seeking to capture public interest, some owners, trainers, and jockeys were not averse—or at least were thought not to be averse—to using a secret sauce, either to improve their own horse’s performance or to impair that of a rival.³⁸⁴ At the same time, of course, they might improve their own betting odds, or those of their associates. “[N]ewspapers regularly decried the doping of horses and referred to it in no uncertain terms as an ‘evil of the turf’.”³⁸⁵ Measures used to modify racehorse performance, however, “appear[ed] cruel by any standards, and people of the time recognized such cruelty.”³⁸⁶

³⁸² Thomas Tobin, *DRUGS AND THE PERFORMANCE HORSE* 24 (1981).

³⁸³ Milton C. Toby, *UNNATURAL ABILITY* 32 (2023).

³⁸⁴ See generally John Gleaves, *Enhancing the Odds: Horse Racing, Gambling and the First Anti-Doping Movement in Sport, 1889-1911*, 32 *SPORT IN HISTORY* 26, 29-39, 41-43, 46-47 (2012).

³⁸⁵ *Id.* at 28. See also Megan Guthrie, *Get Off Your High Horse: Drugs, Breeding, and Laws of the Modern American Racehorse*, 25 *DRAKE J. AGRIC. L.* 425, 428 (2021) (“Drugging horses to gain a competitive edge has been a part of the sport since at least the nineteenth century.”) (footnote omitted).

³⁸⁶ Gleaves, *supra* n.384, at 46. See also *id.* at 30 (quoting a new report decrying “sacrificing a horse to win stakes of from \$5,000 to \$10,000” as “brutal and indefensible”).

PUBLIC

Against this backdrop, the nation’s first anti-doping provision was adopted. In 1894, the Jockey Club was formed in New York “for the purpose of organizing and regulating thoroughbred racing.”³⁸⁷ The Jockey Club “took upon itself the task of protecting the sport by setting rules and licensing participants to promote the search for order . . . for thoroughbred racing across the country.”³⁸⁸

Soon thereafter, the Jockey Club adopted Rule 162, section VI: “Any person who shall be proved to have affected the speed of a horse by the use of drugs, internally, whether administered by hypodermic or any other method, or who shall have used appliances, electrical or mechanical, other [than] the ordinary whip and spur . . . shall be ruled off.”³⁸⁹ Rule 162 was “the first significant antidoping regulation enacted by any sports governing body.”³⁹⁰ “[D]rug testing” was one of the Jockey Club’s “innovations,” leading eventually to its Reformed Racing Medication Rules.³⁹¹

The first state involvement in horseracing regulation came shortly thereafter in New York and Kentucky with enactment of racing commissions, followed by significant expansion during the 1930s, as States increasingly authorized pari-

³⁸⁷ *Gambling in America*, *supra* n.351, at 115. *See also* Toby, *Unnatural Ability*, *supra* n.383, at 56 (“The original Jockey Club ran the whole show.”) (internal quotation marks omitted); Reiss, *The Sport of Kings*, *supra* n.373, at 163-64.

³⁸⁸ Reiss, *The Sport of Kings*, *supra* n.373, at 138.

³⁸⁹ Toby, *Unnatural Ability*, *supra* n.383, at 56 (quoting Jockey Club Meeting: Important Amendments to the Racing Rules Adopted, *Brooklyn (NY) Standard Union*, Feb. 12, 1897, at 8.). *See also id.* at 39-41 (2023) (describing doping techniques and substances around the turn of the 20th century); Gleaves, *supra* n.384, at 30, n.17; Friedman, *supra* n.381, at 125.

³⁹⁰ Toby, *Unnatural Ability*, *supra* n.383, at 57.

³⁹¹ *Gambling in America*, *supra* n.351, at 116; Toby, *Unnatural Ability*, *supra* n.383, at 61.

PUBLIC

mutuel betting at racetracks and on-site wagering became legal.³⁹² But with increased horseracing came increased use of “stimulant medication.”³⁹³ As one commentator writes, “state racing commissions (or similar racing regulatory bodies) were created to protect the public from both improper conduct in and around the horse races and from improper wagering.”³⁹⁴ Reliable testing, however, was not developed until the 1930s.³⁹⁵

Initially, state commissions relied heavily on the Jockey Club to regulate horseracing, but over time they came to assume many of the Club’s responsibilities.³⁹⁶ By the 1950s, state commissions regulated not only gambling, “but also every other aspect of horseracing. Thus, the modern state-administrative model for the regulation of Thoroughbred racing was born.”³⁹⁷ State regulations

³⁹² L.1895, ch. 570 (N.Y.) and L.1906, ch.137, at 466 (Ky.) (establishing state racing commissions); Toby, *Unnatural Ability*, *supra* n.383, at 236-37; Tobin, *Drugs and the Performance Horse*, *supra* n.382, at 26; Friedman, *supra* n.381, at 130-31; Howland, *supra* n.1, at 496-98; Kyle Cassidy, *Reining In The Use Of Performance Enhancing Drugs In Horseracing: Why A Federal Regulation Is Needed*, 24 SETON HALL J. SPORTS & ENT. L. 121, 126 (2014).

³⁹³ Tobin, *Drugs and the Performance Horse*, *supra* n.382, at 26.

³⁹⁴ McSwain, *supra* n.361, at 85; *see also id.* at 87 (state racing regulators had “a dual focus . . . on integrity in racing and wagering”); Alexander M. Waldrop, Karl M. Nobert, John W. Polonis, *Horse Racing Regulatory Reform through Constructive Engagement by Industry Stakeholders with State Regulators*, 4 KY. J. EQUINE, AGRIC., & NAT. RESOURCES L. 389, 393 (2012) (state commission rules were intended “to ensure the integrity of the sport and to guarantee the fairness of the races for the purpose of protecting those wagering on the sport.”)

³⁹⁵ Toby, *Unnatural Ability*, *supra* n.383, at 111-13; Howland, *supra* n.1, at 499.

³⁹⁶ Toby, *Unnatural Ability*, *supra* n.383, at 55-57.

³⁹⁷ Friedman, *supra* n.381, at 132. *See generally Fink v. Cole*, 97 N.E.2d 873 (N.Y. Ct. App. 1951) (invalidating New York’s dual regulatory structure).

PUBLIC

included “licensing, rulemaking authority, determining civil penalties, and enforcing rules.”³⁹⁸

Besides the Jockey Club, private bodies offered state commissions detailed guidance on equine sports globally. The Association of Racing Commissioners International (“ARCI”) issued standards on “racing regulation, medication policy, drug testing laboratories, totalizator systems, racetrack operation and security, as well as off-track wagering entities.”³⁹⁹ The Racing Medication and Testing Consortium (“RMTC”), which is comprised of organizations that “represent horsemen’s groups, breed registries, racetracks, racing regulators industry associations and veterinarians,” created the National Uniform Medication Program.⁴⁰⁰ The RMTC offered detailed guidance on such subjects as drug and medication classifications and testing standards, among other matters. A majority of state commissions adopted RMTC drug standard proposals.⁴⁰¹ HISA itself instructs that work from the following organizations should be used as the

³⁹⁸ Friedman, *supra* n.381, at 132. *See also* *Gambling in America*, *supra* n.351, at 113 (“Every facet of racing, from parimutuels to security and from drug testing to public accommodations, comes within the [state racing] commissioners’ purview.”); Brian Calhoun Mundell, *The Absolute Insurer Rule: An Unconstitutional and Ineffective Means of Mitigating Illegal Equine Drugging in the “Sport of Kings”*, 12 KY. J. EQUINE, AGRIC., & NAT. RESOURCES L. 1, 12 (2020).

³⁹⁹ Mundell, *supra* n.398, at 14; *see generally id.* at 13-23.

⁴⁰⁰ *Id.* at 21 (internal quotation marks and footnotes omitted). *See also* Toby, *Unnatural Ability*, *supra* n.383, at 199 (quoting congressional hearing testimony describing the RMTC); Kimberli Gasparon, *The Dark Horse of Drug Abuse: Legal Issues of Administering Performance-Enhancing Drugs to Racehorses*, 16 JEFFREY S. MOORAD SPORTS L.J. 199, 211-12 (2009).

⁴⁰¹ Mundell, *supra* n.398, at 22-23.

PUBLIC

“baseline” for the ADMC Program rules: (a) the International Federation of Horseracing Authorities; (b) the World Anti-Doping Agency; and (c) the ARCI.⁴⁰²

Other “self-regulatory and protective organizations” included the National Association of State Racing Commissioners (ARCI’s predecessor) and the Thoroughbred Racing Association (“TRA”).⁴⁰³ In 1946, the TRA formed the Thoroughbred Racing Protective Bureau as its “investigative arm . . . to enforce compliance with TRA standards,” and it reported its “inquiries . . . to authorized TRA officials and State racing commissions for either corrective or disciplinary action.”⁴⁰⁴

Historically, then, “horseracing has a long history of being regulated by both private and public entities”⁴⁰⁵ Whether through private or public regulation, the core objectives have been “to prevent the use of illegal drugs to alter the outcome of races and to protect the integrity of the horse-racing industry and public confidence in the sport.”⁴⁰⁶ Thus, “horse racing . . . was the first modern sport to address doping.”⁴⁰⁷

⁴⁰² 15 U.S.C. § 3055(g)(2)(A).

⁴⁰³ *Gambling in America*, *supra* n.351, at 115; *See id.* at 115-16.

⁴⁰⁴ *Id.* at 116.

⁴⁰⁵ Lucy McAfee, *The Rise and Fall of the Horseracing Integrity and Safety Act: How Congress Could Save the “Sport of Kings,”* 25 VAND. J. ENT. & TECH. L. 783, 807-08 (2023).

⁴⁰⁶ Friedman, *supra* n.381, at 133 (footnote omitted).

⁴⁰⁷ Gleaves, *supra* n.384, at 29. *See also* Toby, *Unnatural Ability*, *supra* n.383, at 57-58.

PUBLIC

2. Failure of Disparate State-Level Oversight.

The risk of death or serious injury to racehorses and jockeys is unavoidable. Euthanasia of thoroughbreds on the racetrack, and career-ending injuries to jockeys (or worse), recur. So too, the cloud of doping as a contributor to racetrack injury has long hung over the horseracing industry.

One author describes how the death of Dr. Riddle after a 1903 horserace at Morris Park in New York led to widely-publicized “suppositions of betting chicanery and doping”⁴⁰⁸ The publicity “attracted the attention of the American Society for the Prevention of Cruelty to Animals . . . , which sent a badge-wielding and probably armed investigator to Morris Park with statutory authority to arrest animal abusers.”⁴⁰⁹ Much more recently, Eight Belles collapsed with two broken ankles after finishing second in the 2008 Kentucky Derby and was euthanized on the racetrack.⁴¹⁰ A few years later, a New York Times investigative report detailed the collapse of I Glance at Chicks just after finishing a 2010 race at Zia Park racetrack in New Mexico. I Glance at Chicks was euthanized; his jockey was killed by another horse’s hoof as he tried to crawl away. A post-mortem exam revealed

⁴⁰⁸ Toby, *Unnatural Ability*, *supra* n.383, at 13.

⁴⁰⁹ *Id.* at 18-19.

⁴¹⁰ Amy L. (Williams) Kluestner, *And They’re Off: Eliminating Drug Use in Thoroughbred Racing*, 3 HARV. J. SPORTS & ENT. L. 297, 298-99 (2012); *see also id.* at 301 (noting that average lifetime starts had dropped from 44 in 1950 to 13 by 2007).

PUBLIC

“the horse had been dosed with a large load of a powerful painkilling medicine called Flunixin.”⁴¹¹

Thus, by the early 21st century, the “disarray of different regulations,” scattered across 38 states, “ha[d] not been successful in protecting horses or the horseracing industry.”⁴¹² By 2007, average lifetime starts had plummeted to 13, compared to 44 some 50 years earlier.⁴¹³ Public trust and interest in horseracing was eroding: “it [was] obvious to both those inside the industry and those who enjoy thoroughbred racing as spectators that uniform regulation,” achieved either through overarching industry self-regulation or federal legislation, was “urgent[ly] need[ed].”⁴¹⁴ Industry groups considered courses of action to improve safety and medication standards; proposed federal legislation was introduced as early as 2011.⁴¹⁵

Speaking in support of a precursor to HISA, a Humane Society spokesperson stated that the proposed “Horseracing Integrity Act of 2017 followed thousands of

⁴¹¹ Walt Bogdanich, Joe Drape, Dara L. Miles & Griffin Palmer, *Mangled Horses, Maimed Jockeys*, N.Y. Times (Mar. 24, 2012).

⁴¹² McAfee, *supra* n.405, at 784.

⁴¹³ Kluestner, *supra* n.410, at 301.

⁴¹⁴ *Id.* at 316. *See also* Guthrie, *supra* n.385, at 435-36, 437 (“Having 38 states with different sets of rules is not working anymore. . . . [I]t only makes sense to have one national policy, rather than 38 different state policies for what medications a horse can take.”) (footnotes omitted); Gasparon, *supra* n.400, at 212, 216 (discussing the “increasingly urgent problem” of drug regulation in horseracing, “the best” of which would be “a national organization in charge of all drug regulation,” while industry groups “seem to agree a congressional statute . . . would be insufferable”).

⁴¹⁵ Kluestner, *supra* n.410, at 302-09, 312-20; Toby, *Unnatural Ability*, *supra* n.383, at 252-60 (discussing pre-HISA federal legislative efforts).

PUBLIC

horse deaths, a decreasing interest in horseracing, and a general crisis of confidence in the sport.”⁴¹⁶ To quote Judge Sutton:

Whether it’s the risk of pushing horses past their limits or the risks associated with unsafe tracks and doping, or other health and safety issues facing horses and jockeys, no one doubts the imperative for oversight. The question, as is so often the case, is whether the regulation should be national or local.⁴¹⁷

In 2020, a bipartisan coalition in Congress formed to enact legislation.

3. Enactment of HISA.

Congress’ objectives in enacting the Horseracing Integrity and Safety Act—are reflected in the law’s very title: “integrity”—playing by the rules—and “safety”—addressing the unavoidable risks to both jockeys and horses. Of particular concern was the connection between safety and substance abuse in horses, as industry participants relentlessly searched for ways to give their horses an edge in competition. Notably, the Humane Society, Animal Welfare Action, and Water Hay Oats Alliance—“a coalition of more than seventeen hundred owners, breeders, trainers, and industry leaders”—as well as traditional racing industry groups, supported the legislation.⁴¹⁸

Introducing the bill in the Senate in early September 2020, Senator McConnell said, “[i]n recent years, tragedies on the track, medication scandals, and

⁴¹⁶ McAfee, *supra* n.405, at 786 (internal quotation marks and footnote omitted); *see generally id.* at 787-88 (discussing HISA’s precursors in Congress).

⁴¹⁷ *Oklahoma v. United States*, 62 F.4th 221, 226 (6th Cir. 2023), *cert. denied*, 144 S.Ct. 2679 (2024).

⁴¹⁸ Toby, *Unnatural Ability*, *supra* n.383, at 261; 166 CONG. REC. H4980-82 (daily ed. Sept. 29, 2020) (remarks of Reps. Pallone, Tonko, Barr)

PUBLIC

an inconsistent patchwork of regulations have cast clouds over the future.”⁴¹⁹ A “national” board was needed to “set national standards for track safety, anti-doping, and medication practices and lab protocols” to “make thoroughbred racing as fair and as safe as possible.”⁴²⁰

Later in September, the House Committee on Energy and Commerce released Report 116-554, the “Background and Need for Legislation” section of which focused on the concern for racehorse and jockey safety:

In 2019, 441 Thoroughbred racehorses suffered fatal injuries. The fatality rate in the United States is two and a half to five times greater per race start than the fatality rates in Europe and Asia. Additionally, between 1940 and 2012, 129 jockeys died in training or racing accidents in the United States. Over half of all jockey falls result in injury, and the majority of falls are due to catastrophic injury or sudden death of the horse.⁴²¹

The Report detailed conditions of concern:

Many factors contribute to breakdowns, including training methods, racing protocols, and racing surfaces. Aggressive training schedules can deprive racehorses of the time needed to recover from intense physical activity increasing the likelihood of injury. Further, track surfaces that give support when a racehorse’s hoof lands without jolting the horse’s leg are considered safe. Wet or deep surfaces may bog down a racehorse’s hooves, applying additional pressure to their soft tissues and muscles. Firm surfaces can cause percussive injuries to the bone while lo[o]se, slick surfaces increase pressure on racehorses’ tendons and muscles.⁴²²

⁴¹⁹ 166 CONG. REC. S5514 (daily ed. Sept. 9, 2020).

⁴²⁰ *Id.*

⁴²¹ H.R. Rep. No. 116-554, at 17 (2020) (footnotes omitted). *See also* Kluestner, *supra* n.410, at 304 (discussing U.S. thoroughbred mortality rate).

⁴²² H.R. Rep. No. 116-554, at 17 (footnotes omitted).

PUBLIC

Substance abuse also exacerbated safety risks:

The use of performance enhancing drugs (PEDs) and certain therapeutic medications may also contribute to horseracing deaths. Some therapeutic medications and practices for administering those therapeutics even for legitimate purposes can also mask minor injuries, making it more difficult to detect relatively insignificant ailments that could lead to fatal injuries if not treated. . . . PEDs that stimulate endurance, deaden nerves, increase oxygen intake, and reduce inflammation can also cause significant health problems, including cardiac issues and overexertion.⁴²³

Contemporaneously, the House took up floor debate, where representatives reiterated points in the House Report. Accidents endangering “both the horses and the riders” were far too frequent, with injuries experienced at “a much higher rate than the rest of the horse-racing world”⁴²⁴ Medications were administered that, while “eas[ing] discomfort and reduc[ing] inflammation,” could “mask . . . relatively minor injuries”⁴²⁵ “[P]ushed beyond their limits, often aided by [masking] medications,” horses could experience “catastrophic breaks that ultimately lead to a horse’s death.”⁴²⁶ In the United States, lax, as well as “patchwork,” regulatory standards in 38 state jurisdictions permitted medication use that was barred or restricted in international competition.⁴²⁷ Racetrack conditions themselves

⁴²³ *Id.* at 17-18 (footnotes omitted).

⁴²⁴ CONG. REC., *supra* n.418, at H4983 (remarks of Reps. Pallone and Schakowsky).

⁴²⁵ *Id.*

⁴²⁶ *Id.* at H4980-81, 83 (remarks of Reps. Pallone, Tonko, Schakowsky).

⁴²⁷ *Id.* at H4980-82 (remarks of Reps. Pallone, Tonko, Barr).

PUBLIC

heightened the risks to horse and jockey.⁴²⁸ “Uniformity in the rules of racing, and particularly in medication rules” was long overdue.⁴²⁹

National standards for medication use, laboratory accreditation, racehorse training, veterinary guidance, racetrack conditions, and enforcement oversight—all part of HISA—are designed to promote race “authenticity,” “legitimacy,” and competition “on a level playing field.”⁴³⁰ By thus promoting racing integrity and public trust, fairness to bettors would also be enhanced.⁴³¹ But bettor interests were a secondary legislative by-product; HISA left untouched existing state and federal gambling statutes and regulations.

With bipartisan support in Congress, HISA was enacted into law in 2020: “Congress listened to its constituents’ plea for more humane practices and a decrease in the use of performance-enhancing drugs and therapeutic medications which may contribute to the sharp increase in horses’ deaths.”⁴³² Significantly, for Seventh Amendment purposes, Congress sought to provide an overarching federal structure to promote public trust and safety in an industry traditionally within the province of the states and industry bodies. HISA and the Rules approved to implement the statute represent regulatory provisions that were developed in, and evolved from, first, industry self-regulation, followed by state laws overseeing

⁴²⁸ *Id.* at H4980, 83 (remarks of Reps. Pallone, Schakowsky).

⁴²⁹ *Id.* at H4982 (remarks of Rep. Barr).

⁴³⁰ *Id.* at H4980-82 (remarks of Reps. Pallone, Tonko, Barr).

⁴³¹ *Id.*

⁴³² McAfee, *supra* n.405, at 811.

PUBLIC

horseracing. Moreover, by 2020, a body of rules governing integrity and safety in equine competition globally and sports law generally also existed, upon which to draw.

HISA and the Rules establish a detailed, technical regulatory scheme for both the substances subject to regulation, the conduct subject to disciplinary proceedings, and the enforcement procedure to investigate and adjudicate alleged violations. In developing the ADMC Program specifically, the Authority sought guidance from the existing work of private groups, which itself had informed state racing commission regulations:

The Authority considered the ARCI Model Rules of Racing when developing the Protocol and related rules. Likewise, the Authority considered rules from other racing jurisdictions such as the British Horseracing Authority's Rules of Racing.

The Authority also considered and relied heavily on international antidoping standards, including the World Anti-Doping Code (applicable to human athletes) and the International Equestrian Federation ("FEI") Equine Anti-Doping and Controlled Medication Regulations (applicable at the international level to various equestrian disciplines). Those regulations provide a robust anti-doping framework that has been tested before arbitration tribunals for many years, and that has generated a well-developed body of precedent and guidance for interpreting the provisions in those frameworks.⁴³³

Thus, Rule 3070(d) expressly provides:

The World Anti-Doping Code ["WADC"] and related International Standards, procedures, documents, and practices (WADA Code Program), the comments annotating provisions of the WADA Code Program, and any case law interpreting or applying any provisions, comments, or other aspects of the

⁴³³ 88 Fed. Reg. 5073 (Jan. 26, 2023).

PUBLIC

WADA Code Program, may be considered when adjudicating cases relating to the [ADMC] Protocol, where appropriate.

As HIWU explains in this very case:

The jurisprudence interpreting and applying the WADC is, therefore, an important tool at the disposal of the Arbitral Body. There is a longstanding and ***well-established body of anti-doping jurisprudence from specialized sporting arbitral tribunals***, including the American Arbitration Association at the national level and the Court of Arbitration for Sport (the “CAS”) at the international level, ***which informs*** the interpretation of the ADMC Program.⁴³⁴

HIWU itself was formed by Drug Free Sport International (“DFSI”), “a global leader in the anti-doping industry with more than 24 years administering comprehensive anti-doping solutions for amateur and professional athletic organizations worldwide.”⁴³⁵ The Authority has similarly described DSFI as “a worldwide leader in the sport drug testing industry and maintains enforcement partnerships with leading sports organizations”⁴³⁶

Indeed, HISA’s very feature of *de novo* review, which governs this proceeding, was imported from sports law generally, where it had long been embedded. The Court of Arbitration for Sport (“CAS”) “has full power to review the facts and the law.”⁴³⁷ That includes the authority to “issue a new decision which replaces the

⁴³⁴ AB1 1300, at ¶ 32 (HIWU Responding Brief) (emphasis added).

⁴³⁵ <https://www.drugfreesport.com/about-us/>.

⁴³⁶ Authority Response to Oct. 29, 2024 Order, *Shell II*, FTC No. 9439, 2024 WL 5078329, at *3 (ALJ Nov. 12, 2024).

⁴³⁷ *Zamalek SC v. Ferjani Sassi & Al-Duhail SC*, CAS 2022/A/8679, at ¶ 140 (Mar. 27, 2023) (internal quotations and citations omitted). *See also Knyazeva-Shirokova v. RUSADA*, CAS 2020/A/6986, at ¶ 128 (Apr. 6, 2021) (“[T]he virtue of an appeal system which allows for a full rehearing before an appellate body is that issues relating to the fairness of the hearing before the tribunal of first

PUBLIC

decision challenged or annul the decision and refer the case back to the previous instance.”⁴³⁸ In exercising this authority, “CAS does not act as an administrative court reviewing an act of an administrative authority where, usually, the scope of review is characterised by minimum standards of scrutiny In contrast, it is the duty of a CAS panel in an appeals arbitration procedure to make its independent determination of whether the Appellant’s and Respondent’s contentions are correct on the merits”⁴³⁹

Thus, the ADMC Program emerged from “a robust anti-doping framework . . . tested before arbitration tribunals”—private, self-regulatory forums whose decisions came to be reviewed under various state laws.⁴⁴⁰ HISA’s regulatory scheme differs markedly from traditional adjudication by law courts. It is, instead, one that was “determined exclusively by the executive and legislative branches,” operating in 38 States and aided by guidance from private U.S. and international organizations.⁴⁴¹

I summarize below central features of the ADMC Program. My discussion, while not comprehensive, illustrates many Program intricacies, in which departures from dispute resolution by law courts, are pervasive.

instance fade to the periphery.”) (internal quotation omitted); *USA Shooting v. UIT*, CAS 94/129, at ¶ 59 (May 23, 1995) (through a “full appeal” to CAS, any “deficiency may be cured”).

⁴³⁸ *Zamalek*, CAS 2022/A/8679, at ¶ 140 (internal quotations omitted).

⁴³⁹ *Id.*

⁴⁴⁰ 88 Fed. Reg. 5073 (Jan. 26, 2023).

⁴⁴¹ *Jarkesy*, 603 U.S. at 128 (cleaned up).

PUBLIC

4. The ADMC Program: Substances and Methods of Administration Regulated.

A core principle of the ADMC Program is that “Covered Horses should compete only when they are free from the influence of medications, other foreign substances, and treatment methods that affect their performance.”⁴⁴² The Program includes a “Prohibited List,” which distinguishes between:

- “Banned Substances,” which are “prohibited at all times”⁴⁴³ The prohibition is based on the HIWU’s “determination that medical, veterinary, or other scientific evidence or experience supports their actual or potential (i) ability to enhance the performance of Covered Horses, (ii) masking properties, or (iii) detrimental impact on horse welfare.”⁴⁴⁴; and
- “Controlled Medication Substances,” which are prohibited “during the Race Period and . . . in a Post-Race Sample or Post-Work Sample, except as otherwise specified”⁴⁴⁵

The ADMC Program similarly distinguishes: (1) “Banned Methods,” which “are prohibited at all times”⁴⁴⁶; and (2) “Controlled Medication Methods,” which “have been determined to have appropriate and therapeutic purposes, and so may be used outside the Race Period, except as otherwise provided in the Prohibited List.”⁴⁴⁷

⁴⁴² Rule 3010(d)(1).

⁴⁴³ Rule 3111(a)(1).

⁴⁴⁴ *Id.* See also Rules 1020 (definition), 4010, 4110-17.

⁴⁴⁵ Rules 1020 (definition), 4010, 4210-12.

⁴⁴⁶ Rules 3111, 4120 & 4121-22.

⁴⁴⁷ Rule 3010(c), 4220-24.

PUBLIC

Methods, in summary, are procedures that could be performed on a horse, as well as gene and cell doping.⁴⁴⁸ Banned Substance and Method violations are more serious, and thus carry more severe sanctions, than Controlled Medication and Method violations.⁴⁴⁹

As the FTC explained in approving the Rules:

The Protocol has intentionally divided the regulation of Anti-Doping Rule Violations [§§ 3210-60] and Controlled Medication Rule Violations [§§ 3310-3360] into separate chapters to reflect the Authority's view that the treatment of such violations should be separate and distinct from each other. Anti-Doping Rule Violations involve Banned Substances or Banned Methods, which are substances/methods that ***should never be in a horse's system or used on a horse as they serve no legitimate treatment purpose.*** Conversely, Controlled Medication Rule Violations involve Controlled Medication Substances or Controlled Medication Methods, which are substances/methods that ***have been determined to have appropriate and therapeutic purposes,*** and so may be used outside the Race Period, except if specified otherwise.
...

[T]his is a vital distinction, and the Protocol recognizes the distinction in the penalty structure and other provisions throughout the Protocol.⁴⁵⁰

Appendix 1 to the Rule Series 4000 lists hundreds of Banned and Controlled Medication Substances by name, with further information such as:

1. HISA classification level;
2. Penalty subclassification;
3. Detection Time; and

⁴⁴⁸ See, e.g., Rules 4121-23, 4222-24.

⁴⁴⁹ Rules 3221-23, 3228-33 (Banned Substances and Methods) & 3321-23, 3327-31 (Controlled Medications and Methods), 4310 and 4330 (Covered Horses).

⁴⁵⁰ 88 Fed. Reg. 5071, 5082 (emphasis added); see also *id.* at 5073.

PUBLIC

4. Screening limit.⁴⁵¹

Some Prohibited Substances require test thresholds, which establish the level needed to charge a violation, while others, for which there is zero-tolerance, do not.⁴⁵² Test result procedure distinguishes an “Atypical Finding,” which requires HIWU to investigate further to determine whether to charge an ADMC violation.⁴⁵³

5. The ADMC Program: Proscribed Conduct.

The HISA Rules set out various standards of conduct applicable to horseracing industry participants, such as Covered Persons, among others. Covered Persons are:

all Trainers, Owners, Breeders, Jockeys, Racetracks, Veterinarians, Persons licensed by a State Racing Commission, and the agents, assigns, and employees of such Persons; any other Persons required to be registered with the Authority; and any other horse support personnel who are engaged in the care, treatment, training, or racing of Covered Horses.”⁴⁵⁴

ADRVs are based not only on presence of a Banned Substance in a horse, but also on a Covered Person’s possession of a Banned Substance without “compelling justification.”⁴⁵⁵ While arising occasionally in sports law decisions, the “compelling

⁴⁵¹ See 88 Fed. Reg. 5124-60.

⁴⁵² Rules 1020 (“threshold” definition), 3111(c), 4010.

⁴⁵³ Rules 1020 (“Atypical Finding” definition), 3111(d), 3243, 3343 & Rule Series 3000 (Appendix 1).

⁴⁵⁴ Rule 1020 (definition).

⁴⁵⁵ Rule 3214(a).

PUBLIC

justification” defense to possession is not one familiar to common law courts.⁴⁵⁶

Other detailed ADRVs lack close common law analogs.⁴⁵⁷

Covered persons must accept prescribed “core responsibilities,” which include: (a) “cooperating promptly and completely” with the Authority and HIWU ADMC Program testing and investigations; (b) “providing complete and accurate information”; (c) making “any facility, office, stall, or equipment or other relevant location” available for inspection; (d) submitting to interviews “under oath” and providing “immediate and unfettered access” to documents and other records, and permitting their review and copying by HIWU.⁴⁵⁸

Take the presence charge for a Banned Substance as an illustration of the distinctive nature of the Rules. Horseracing industry participants are subject to stringent duties: “It is the personal and nondelegable duty of the Responsible Person,” such as Serpe, “to ensure that no Banned Substance is present in the body of his or her Covered Horse(s).”⁴⁵⁹ As noted above, Covered Persons, also subject to Rule prohibitions, cover even more individuals.⁴⁶⁰

⁴⁵⁶ *See Shell II* Decision at *11; *Perez*, FTC No. 9420, at 9 (ALJ Feb. 7, 2024) (veterinarian’s lack of wrongful intent in possessing a Banned Substance did not satisfy compelling justification).

⁴⁵⁷ *See, e.g.*, Rules 3215 (prohibiting evasion of collection of samples from the horse), 3216 (prohibiting acts or omissions relating to tampering with Doping Control or Medication Control, assisting violations by others, barring association with prescribed persons, and acting to discourage or retaliate against persons reporting violations).

⁴⁵⁸ Rule 3040(a).

⁴⁵⁹ Rule 3212(a). *See* Rule 3030(a) (defining Responsible Person).

⁴⁶⁰ Rule 1020 (definition).

PUBLIC

Earlier discussion of HIWU's presence charge against Serpe described the Rules' strict liability standard, which obviates any need by HIWU "to demonstrate intent, Fault, negligence, or knowing Use" in order to establish liability.⁴⁶¹ This approach was imported from state commission rules and sports law generally. Pre-HISA, a majority of jurisdictions to consider horseracing strict liability provisions upheld the rules against constitutional challenges, although a few outlier decisions invalidated them.⁴⁶²

The strict liability to which a Covered Person is subject is "personal and nondelegable," extending beyond that typically associated with common law. Responsibility is not excused even where the Banned Substance's presence is due to acts of another that were unknown to the Covered Person. For example, in *Syquia*,⁴⁶³ the Tribunal found that presence of a banned substance likely arose from event-site contamination, but it upheld liability: the horse-rider "has a responsibility to maintain a clean and protected environment for the Horse in the stable area, and has a responsibility to keep the Horse away from non-accredited persons at a Competition."⁴⁶⁴

⁴⁶¹ Rule 3212(a); *see also* Rule 3213(b) (covering Use violations).

⁴⁶² *See Hudson v. Texas Racing Comm'n*, 455 F.3d 597, 601 (5th Cir. 2006); *Sandstorm v. California Racing Bd.*, 189 P.2d 17 (Calif. Sup. Ct. 1948); Mundell, *supra* n.398, at 23-27; Bennett Liebman, *The Trainer Responsibility Rule in Horse Racing*, 7 VA. SPORTS & ENT. L. J. 1 (2007).

⁴⁶³ FEI No. 2017/BS28.

⁴⁶⁴ *Id.* at ¶ 11.21. *See also Johaug*, at ¶190 ("[A]thletes have a duty to cross-check assurances given by a doctor even where such a doctor is a sports specialist.") (citations omitted).

PUBLIC

Similarly, in *Al Rumaithi v. FEI*,⁴⁶⁵ the horse owner had its groom give a product “designed for Sport Horses” that a specialist veterinarian recommended.⁴⁶⁶ Although the rider himself was unaware of the recommendation and was told by the owner that the horse had received no medication, the rider was still responsible for the presence violation: “Double delegation does not decrease [the rider’s] obligations; it aggravates it.”⁴⁶⁷

As one commentator has concluded, equine competition’s strict liability principles “appl[y] far beyond the basis of traditional vicarious liability. In short, the absolute insurer rule for trainers in horseracing has *little in common* with the traditional strict liability torts and crimes.”⁴⁶⁸

While Covered Persons are subject to stringent duties of care and limited in their ability to challenge test results, at the same time, HIWU, too, is burdened. To prove a presence violation, for instance, its evidence must demonstrate the violation to “the comfortable satisfaction” of the arbitrator (or other hearing panel).⁴⁶⁹ Imported from sports law, this burden level, “is greater than a mere balance of

⁴⁶⁵ CAS 2015/A/4190 (Mar. 1, 2016).

⁴⁶⁶ *Id.* at ¶ 30(iii).

⁴⁶⁷ *Id.* at ¶ 45. *See also, e.g., Al Owais v. FEI*, CAS 2011/A/2558 (Apr. 5, 2012) (NF and NSF rejected where, to calm the horse for travel, the person charged, on a veterinarian’s advice, administered a medication that contained a banned substance, even though he disclosed doing so to event officials before competing); *Stroman v. FEI*, CAS 2013/A/3318 (Mar. 14, 2014) (NSF rejected where the Responsible Person’s employee administered an unknown substance to the horse to reduce fever, but that also may have enhanced performance weeks later); *Rashid Mohd Ali Alabbar v. FEI*, CAS 2013/A/3124 (Sept. 27, 2013) (NSF rejected where the Responsible Person provided a food supplement with a prohibited substance).

⁴⁶⁸ Liebman, *supra* n.462, at 33 (emphasis added).

⁴⁶⁹ Rule 3121(a).

PUBLIC

probability (*i.e.*, a preponderance of the evidence) but less than clear and convincing evidence or proof beyond a reasonable doubt.”⁴⁷⁰ Sports law tribunals are “well acquainted with the ‘comfortable satisfaction’ of the Panel standard of proof.”⁴⁷¹

To defend a presence charge, the Covered Person can try to rebut what is typically HIWU’s primary evidence: the laboratory test results from analyzing a sample of either the horse’s urine, blood, or hair.⁴⁷² The Covered Person’s burden on rebuttal is stringent:

Laboratories are presumed to have conducted Sample analysis and custodial procedures in accordance with the Laboratory Standards. A Covered Person who is alleged to have committed a violation may rebut this presumption by establishing that ***a departure*** from the Laboratory Standards ***occurred*** that ***could reasonably have caused*** the Adverse Analytical Finding or other factual basis for any other violation asserted.⁴⁷³

The Laboratory Standards that test labs must follow are themselves detailed in numerous Rules.⁴⁷⁴ This area, too, is one imported from sports law generally.⁴⁷⁵

⁴⁷⁰ *Id.* See generally Richard H. McLaren, *An Overview of Non-Analytical Positive & Circumstantial Evidence Cases in Sports*, 16 MARQ. SPORTS L. REV. 193 (2006).

⁴⁷¹ *McNeal v. World Athletics*, CAS 2021/A/7983 & 8059, at ¶ 200 (June 9, 2022).

⁴⁷² See, e.g., Rule 1020 (definition of Sample), 5130(e), 5320(c), 5410(f), 5420-40. Other sampling matrices, however, are not precluded. See Rule 3137(a).

⁴⁷³ Rule 3122(c) (emphasis added). See, e.g., *Matter of Wong*, FTC No. 9426, 2024 WL 2045673, at *7 (ALJ Apr. 22, 2024) (sanctions affirmed where the trainer demonstrated three Laboratory departures, but failed to show any of them could reasonably have caused” the Adverse Analytical Finding), *review denied*, 2024 WL 3824065 (FTC Aug. 28, 2024).

⁴⁷⁴ See Rule 1020 (definition), Rules 5000 and 6000 Series. Rule 3121(d) imposes the same requirements where the Covered Person seeks to challenge other Standards set out in the ADMC Program. See generally *Matter of Hewitt*, No. 9438, 2024 FTC LEXIS 191, at *23-26, 29-33 (ALJ Dec. 17, 2024) (discussing Standards and Laboratory Standards).

⁴⁷⁵ See, e.g., Adam Lewis and Jonathan Taylor, *SPORT LAW AND PRACTICE* 775-78 (sample analysis and the presumption of regularity), 777-78 (rebuttal of presumption) (4th ed. 2021).

PUBLIC

As discussed earlier, once presence is proven, the Covered Person can introduce facts that allow for either: (1) elimination of sanctions entirely, based on no fault or negligence (“NF”); or (2) reduction in the sanctions, based on no significant fault or liability (“NSF”).⁴⁷⁶ Both defenses, along with their basic analytic features, were similarly imported from sports law generally.⁴⁷⁷ HISA itself instructs that ADMC Program violations “may include—. . . an opportunity to reduce the applicable civil sanctions that is comparable to the opportunity provided by the Protocol for Olympic Movement Testing of the United States Anti-Doping Agency.”⁴⁷⁸

The narrow NF defense—requiring the “utmost caution” and applicable “only in exceptional circumstances”⁴⁷⁹—generally fails even where the Banned Substance “was administered to the Covered Horse by veterinary or other support personnel without the [Covered Person’s] knowledge”⁴⁸⁰ For example, in one equine case, the rider was responsible despite assurances of the stable veterinarian that a supplement with a “suspicious name” would not increase the horse’s testosterone level.⁴⁸¹ The panel held that the horse rider “acted with gross negligence and

⁴⁷⁶ Rules 3224 & 3225.

⁴⁷⁷ *See, e.g.*, World Anti-Doping Agency, WORLD ANTI-DOPING CODE arts. 10.5 & 10.6 (2021). The latest Code revision similarly includes the provisions. WORLD-ANTI-DOPING CODE arts. 10.5 & 10.6 (effective Jan. 1, 2027). *See also, e.g.*, *Johaug*, at ¶¶ 176, 185, 205; *Puerta v. ITF*, CAS 2006/A/1025, ¶¶ 21-25, 48-51, 53 (July 12, 2006).

⁴⁷⁸ 15 U.S.C. § 3057(d)(3)(B). *See* USADA, Protocol for Olympic Movement Testing §§ 10.5.1 (NF) and 10.5.2 (NSF) (rev. ed. Aug. 13, 2004).

⁴⁷⁹ Rules 1020 (definition) & 3224(b).

⁴⁸⁰ Rule 3224(b).

⁴⁸¹ *Aufrecht (Carriere Zwei)*, FEI No. 2007/08, at ¶ x (Aug. 10, 2007).

PUBLIC

disregard to the risks” by not “receiving written advices from renowned veterinarians.”⁴⁸²

The more relaxed elements of NSF—calling for assessment “in the totality of the circumstances and taking into account the criteria for No Fault or Negligence”—is nevertheless no walk in the park.⁴⁸³ NSF is further analyzed under three degrees of fault: “significant,” “normal,” and “light,”—and then into “objective” and “subjective” levels of fault.⁴⁸⁴

The Rules also impose obligations on Attending Veterinarians who provide “treatment or services to Covered Horses hired or otherwise authorized by the Trainer or Owner or his or her respective designee.”⁴⁸⁵ Attending Veterinarians must maintain detailed treatment records, which also must be uploaded to a website designated by the Authority, resulting in storage in an electronic database.⁴⁸⁶ These recordkeeping obligations are akin to those applicable to veterinarians licensed under state law.⁴⁸⁷

⁴⁸² *Id.* See also *Santos v. FINA*, CAS 2019/A/6482, at ¶ 66 (Feb. 14, 2020) (NF is “reserved for the truly exceptional case.”).

⁴⁸³ Rule 1020 (definition).

⁴⁸⁴ See, e.g., *Matter of Shell*, FTC No. 9435, 2024 FTC LEXIS 153, at *52-53 (ALJ Oct. 31, 2024), *aff’d*, JAMS Case No. 1501000708 (June 11, 2024). See also *Poole*, JAMS Case No. 1501000576, at ¶¶ 7.16-.20, *aff’d*, 2023 WL 8435860 at *4-5, 7; *Perez*, JAMS Case No. 1501000589, at ¶¶ 7.23-.29, *aff’d*, FTC No. 9420, at 7, 10 (ALJ Feb. 7, 2024), *review denied*, 2024 WL 3824065 (FTC. Aug. 8, 2024). See also *Cilic v. ITF*, CAS 2013/A/3327, at ¶¶ 69-71 (Apr. 11, 2014).

⁴⁸⁵ Rule 1020 (definition).

⁴⁸⁶ Rules 2251, 3040(d).

⁴⁸⁷ See, e.g., *Shell II* Decision at *17-18.

PUBLIC

Banned Substance violations for individuals also apply to Covered Horses, for which specific sanctions are provided.⁴⁸⁸ Controlled Medication violations, also applicable specifically to Covered Horses, are set forth, along with sanctions provisions.⁴⁸⁹ The Rules further detail procedures for an Owner to “retire” a Covered Horse—relieving the horse from Rule coverage—as well as to “unretire” the horse, which re-imposes the Rules.⁴⁹⁰

6. ADMC Program: Investigation and Enforcement.

Although in some respects, HIWU’s enforcement system is similar to that of criminal prosecutors and administrative officials generally, in others, the Rules confer distinct powers unique to the thoroughbred horserace industry.

For example, HIWU is charged with supervisory responsibility for the sample testing process: “Only the Agency [HIWU] (and those authorized by the Agency) may initiate and direct Testing of Covered Horses. . . . No other entity (including State Racing Commissions, Racetracks, Race Organizers, and Training Facilities) may initiate or direct any Testing on Covered Horses.”⁴⁹¹ Laboratories of course play a central role in sample testing. The Rules require laboratory accreditation, based on detailed standards that Laboratories must follow and maintain.⁴⁹² The

⁴⁸⁸ Rules 3221-22.

⁴⁸⁹ Rules 3310-16, 3321-22.

⁴⁹⁰ Rule 3050(b).

⁴⁹¹ Rule 3132(a) & (b).

⁴⁹² *See generally* Rule Series 6000 (Equine Standards for Laboratories and Accreditation).

PUBLIC

Authority “developed” these standards “using WADA International Standard for Laboratories as a baseline.”⁴⁹³

HIWU is responsible for Laboratory accreditation, which it grants on a probationary basis, pending HIWU’s further assessment whether to grant final accreditation.⁴⁹⁴ HIWU also monitors post-accreditation Laboratory compliance, which includes, in effect, testing the Laboratory itself with an externally-supplied sample.⁴⁹⁵ Depending on the results, HIWU may direct corrective action.⁴⁹⁶ HIWU further can suspend or revoke accreditation, or limit the class of analyses that a Laboratory may perform.⁴⁹⁷

The ADMC’s Atypical Finding rules, referred to earlier, charge HIWU with responsibility to determine whether an ADMC violation may appropriately be charged at all. An Atypical Finding Policy prescribes steps for HIWU to take, including: (a) initial review; (b) written notice to Responsible Persons and Interested Parties, along with relevant information, to which those notified may provide responsive information; (c) HIWU requests for additional information; and (d) criteria for deciding whether to pursue the Atypical Finding and charge an ADRV.⁴⁹⁸ After investigation, HIWU must prepare a decision and send it to the

⁴⁹³ 88 Fed. Reg. 5080 (Jan. 26, 2023). *See* Rules 6301-20 (detailing sample analysis procedures).

⁴⁹⁴ *See, e.g.*, Rules 6110, 6120-30, 6470.

⁴⁹⁵ *See, e.g.*, Rules 6140, 6210-60.

⁴⁹⁶ Rules 6130, 6140, 6410-20, 6440-42, 6460.

⁴⁹⁷ Rules 6510-40, 6560-65.

⁴⁹⁸ Rule Series 3000 Appendix 1: Atypical Finding Policy.

PUBLIC

Responsible Person.⁴⁹⁹ If HIWU moves forward and charges an ADRV, it may rely on “information submitted or obtained” during its investigation.⁵⁰⁰

Adjudicating ADRVs themselves have distinct features. Although some Rule violations are heard by arbitrators, others, for example Controlled Medication charges, may be heard by an Internal Adjudication Panel (“IAP”) under simplified procedures.⁵⁰¹ This is the Rules’ term for violation adjudication by individuals commonly known as “stewards.”⁵⁰² Traditionally, stewards were “the eyes and ears of the state’s racing regulatory body,” enforcing not only rules governing the race itself, but also those applicable outside the race, such as medication regulation.⁵⁰³ Depending on the regulatory State where a rule violation was charged, they often made the initial decision, typically with review by the state racing commission and after that by the courts.⁵⁰⁴ Under various Rules, the stewards—now referred to as

⁴⁹⁹ Appendix 1, Criteria ¶¶ 11-13.

⁵⁰⁰ *Id.* at ¶13.

⁵⁰¹ *See, e.g.*, Rules 3361-64, 7010-20, 7040, 7060-90, 7130(b), 7180, 7200, 7250, 7340.

⁵⁰² *See* 88 Fed. Reg. 5083 (Jan. 26, 2023) (“The [National Stewards Panel] is now designated as the ‘Internal Adjudication Panel,’ with individual members referred to as Internal Adjudication Panel (“IAP”) members instead of ‘stewards.’”).

⁵⁰³ McSwain, *supra* n.361, at 85-86;

⁵⁰⁴ *See generally* Richard Heard, *Legal Aspects of Medication Rule Enforcement in Tobin, Drugs and the Performance Horse*, *supra* n.382, at 424-25, 427-35 (1981); Gasparon, *supra* n.400, at 204; Liebman, *supra* n.462, at 3, 10 (describing cases in Texas and California). *See, e.g., Barry v. Barchi*, 443 U.S. 55 (1979) (reviewing a steward’s provisional suspension of a harness racing trainer’s license); *Grannan v. Westchester Racing Ass’n*, 47 N.E. 896 (N.Y. Ct. App. 1897) (upholding stewards’ decision enforcing Jockey Club rule).

PUBLIC

IAP members—resolve disciplinary matters that HIWU prosecutes and that the FTC ALJ reviews.⁵⁰⁵

7. The Racetrack Safety Program.

HISA also directs the Authority to establish a “racetrack safety program.”⁵⁰⁶ In consequence, another set of rules, covering racetrack safety, is also part of HISA’s regulatory scheme. Since Serpe is not charged with violation of any Racetrack Safety Program rule, I will not discuss the Program’s features in detail. The Program is worthy of mention nonetheless. It illustrates again that HISA’s rules were developed via guidance from private bodies, not from the decisions of law courts.

Notably, HISA instructs that, in developing the Racetrack Safety Program, the Authority “shall take into consideration existing safety standards” of the National Thoroughbred Racing Association’s (“NTRA’s”) Safety and Integrity Alliance. NTRA formed its Safety and Integrity Alliance in 2009 to develop “minimum safety and integrity standards via an established accreditation, compliance, and enforcement program.”⁵⁰⁷ The Authority “relied heavily” on the Safety and Integrity Alliance’s standards, which “incorporate[] many of the specific standards and protocols” developed by the ARCI, described above.⁵⁰⁸ HISA itself

⁵⁰⁵ See, e.g., *Matter of Martin*, No. 9431, 2024 WL 4458149 (FTC ALJ Oct. 3, 2024) (alleged violation of Racetrack Safety Rule 2280(b)(1)); Rule 3347(d) (Provisional suspension proceedings).

⁵⁰⁶ 15 U.S.C. § 3056(a)(1).

⁵⁰⁷ Waldrop, Nobert, and Polonis, *supra* n.394, at 389. See also *id.* at 390-91.

⁵⁰⁸ 87 Fed. Reg. 437 (Jan. 5, 2022).

PUBLIC

authorized the Authority to “extend provisional or interim accreditation” to racetracks that the Safety and Integrity Alliance previously had accredited.⁵⁰⁹

Other “existing safety standards” that HISA expressly referred the Authority to, and that the Authority subsequently “considered and relied on,” were: (1) the International Agreement on Breeding, Racing, and Wagering, published by the International Federation of Horseracing Authority; and (2) the Equine Health and Welfare program of the British Horseracing Authority.⁵¹⁰

By way of summary, Racetrack Safety Program “establish[es] specific safety rules and requirements designed to enhance equine and Rider safety in horseracing.”⁵¹¹ The Program includes, for example: (1) racetrack accreditation and related recordkeeping requirements; (2) designated safety personnel with prescribed duties; (3) racehorse inspections and monitoring by veterinarians; (4) racetrack surfacing monitoring and maintenance; (5) emergency preparedness; (6) safety training and continued education; and (7) jockey health.⁵¹²

The Safety Program also prohibits, or restricts, various practices, such as: (1) injury masking procedures; (2) shock wave therapy; (3) surgical and chemical neurectomy (severing) procedures that desensitize nerves; (4) pin-firing and freeze-firing (destruction of tissue), and application of substances that blister the skin, and

⁵⁰⁹ 15 U.S.C. § 3056(c)(2)(C). *See also* Rule 2111(a)(1).

⁵¹⁰ 15 U.S.C. § 3056(a)(2); 87 Fed. Reg. 437 (Jan. 5, 2022).

⁵¹¹ Rules 2101 and 2210.

⁵¹² Rules 2111-21, 2131-39, 2141-43, 2151-54, 2161-70, 2181-83, 2191-93.

PUBLIC

injections to cause inflammation or a counter-irritant effect; (5) electric shock devices, such as cattle prods; (6) use of electrical medical therapeutic devices within prescribed times.⁵¹³

Simply to illustrate the granular level of the Racetrack Safety Program, take the jockey's use of the crop while racing.⁵¹⁴ Among other things, a jockey may:

Use the crop on the hindquarters to activate and focus the Horse a maximum of 6 times during a race. The 6 permitted uses shall be in increments of 2 or fewer strikes. The rider must allow at least 2 strikes for the Horse to respond before using the crop again.⁵¹⁵

However, a jockey may not “[r]aise the crop with the rider’s wrist above the rider’s helmet when using the crop.”⁵¹⁶

Riding crops are themselves subject to detailed specifications. For example:

Riding crops shall have a shaft and smooth foam cylinder and must conform to the following dimensions and construction [among which is] . . .

The shaft, beyond the grip, must be smooth, with no protrusions or raised surface, and covered by shock absorbing material that gives a compression factor of at least one millimeter throughout its circumference.⁵¹⁷

⁵¹³ Rule 2271(a)-(f). *See also* Rules 2272-76 (additional prohibitions and restrictions).

⁵¹⁴ Rules 2280-83.

⁵¹⁵ Rule 2280(b)(1).

⁵¹⁶ Rule 2280(c)(1).

⁵¹⁷ Rule 2281(c)(4).

PUBLIC

Violations of Rule 2280 [covering number of strikes] are categorized, with exception that crop use “for the safety of Horse and rider shall not count toward the total crop uses.”⁵¹⁸

Class 3 Violation—1 to 3 strikes over the limit.

Class 2 Violation—4 to 9 strikes over the limit.

Class 1 Violation—10 or more strikes over the limit.⁵¹⁹

Sanctions imposed vary in severity by violation class.⁵²⁰

These Rules are not theoretical. HIWU charges violations, which are adjudicated before stewards and reviewed by FTC ALJs.⁵²¹ Similarly detailed Rules pervade the Racetrack Safety Program.

8. HISA’s “Self-Consciously Novel” Regulatory Scheme

In sum, in enacting HISA and authorizing implementing rules, Congress did not simply cobble together common law concepts to create regulatory rights and obligations that “resemble[] a traditional legal claim.”⁵²² Issuance and enforcement of horserace industry rules began with private bodies, the most predominate of which nationally was the New York Jockey Club, formed in 1894. These private

⁵¹⁸ Rule 2282(a).

⁵¹⁹ *Id.*

⁵²⁰ Rule 2282(b).

⁵²¹ *See Matter of Martin*, FTC No. 9431, 2024 WL 4458149, at *6 (ALJ Oct. 3, 2024) (Reversing stewards’ decision, finding that “out of the eleven strikes to Alotaluck, the seven strikes to Alotaluck’s shoulder were made for safety reasons”); *Matter of Peacock*, FTC No. 9415, 2023 WL 6284535, at *4 (ALJ Sept. 11, 2023) (Reversing stewards’ decision, finding that HIWU failed to satisfy its burden of proving the jockey “struck Sheriff Brown more than the 6 times on the hindquarters that are permitted under HISA Rule 2280(b)(1)”).

⁵²² *Jarkesy*, 603 U.S. at 135.

PUBLIC

rules came to be overseen by individual state commissions, created under state laws. State authorities absorbed enforcement responsibilities, varying their regulations as each State authorized and as each authority saw fit. At the same time, private bodies, such as ARCI, RMTC, WADA, CAS and other sports law self-regulatory groups contributed standards, guidelines, and decisions, which HISA instructs enforcers to consider. When the need to adjudicate violations by industry participants arose, controversies were resolved by racetrack stewards and state commissions via state law administrative procedures, which included judicial review—not through litigation in courts under common law.

In enacting HISA, Congress expressly authorized the Authority to propose, and the FTC to approve, implementing rules that drew from this mixture of self-regulation, state commission oversight, and national and global guidance from sports law groups. HISA's Rules thus embody “innovative methods, techniques, and approaches for dealing” with thoroughbred horseracing.⁵²³ A “self-consciously novel” system of national uniformity—designed to fight doping and to assure racetrack safety for horses and jockeys—was forged from a “disarray of different regulations” that “ha[d] not been successful in protecting horses or the horseracing industry.”⁵²⁴

⁵²³ *Jarkesy*, 603 U.S. at 137 (cleaned up). *See also id.* at 138 (OSHA claims “were unknown to the common law”) (cleaned up) & 140 (“The novel claims in *Atlas Roofing* had never been brought in an Article III court.”).

⁵²⁴ *Id.* at 137; McAfee, *supra* n.405, at 784. *See also* Toby, *Unnatural Ability*, *supra* n.383, at 236-50 (discussing the pre-HISA “Balkanization” of horseracing regulation).

PUBLIC

*Manis v. USDA*⁵²⁵ is instructive. The Horse Protection Act (“HPA”) prohibits various conduct involving “soring” of horses, a “practice of intentionally injuring or distressing a horse to achieve a certain style of trotting” that Congress determined was “cruel and inhumane.”⁵²⁶ The HPA also authorizes the Secretary of the Department of Agriculture to issue implementing rules and regulations, to adjudicate HPA violations administratively, and to impose civil penalties for proven violations.⁵²⁷ After Manis entered a sored horse at a Virginia horse show, she was found liable in an administrative proceeding for violating HPA, assessed a \$10 civil penalty, and disqualified for one year. She sued in district court, asserting a Seventh Amendment violation.

Applying *Jarkesy’s* analysis the Court rejected Manis’ attempt to analogize the HPA claim to fraud: “This is a strict liability regime primarily intended to put an end to what Congress recognized as a cruel and inhumane practice.”⁵²⁸ Manis, however, also argued that the entry of her horse in the Virginia horse show violated the show’s rules. Therefore, she maintained, the HPA violation could be compared to a breach of contract. The Court rejected the comparison: “The heart of the violation is the fact that the horse was sored; any potential breach of contract associated with that is collateral to the harm that the HPA seeks to

⁵²⁵ No.1:24-cv-175, 2025 WL 2404985 (M.D.N.C. Aug. 19, 2025),

⁵²⁶ *Id.* at *1 (quoting 15 U.S.C. § 1822(1)). *See also* 15 U.S.C. § 1821(a)(3) (describing soring), §§ 1823(b), 1824, 1824a(a), and 1825 (unlawful acts and criminal and civil enforcement); Leite, Jr., *supra* n.377, at 136, 163-66 (discussing soring and HPA enforcement).

⁵²⁷ 15 U.S.C. §§ 1825(b)(1) & (c), 1828. *See generally Manis*, 2025 WL 2404985, at *2.

⁵²⁸ 2025 WL 2404985, at *19 (internal quotation marks omitted).

PUBLIC

address.”⁵²⁹ Holding HPA enforcement within the public rights exception to the Seventh Amendment, the Court further wrote:

Notably, both common law fraud and breach of contract require some form of damage to a third party. The Horse Protection Act does not address any injury to a third party—a sore horse could have finished in last place in competition, or a purchaser could have intended to buy a sore horse—yet the penalty would still be applicable in those circumstances.

. . . .

Congress, in passing the HPA, permitted the USDA to regulate the abuse of horses, a concern foreign to the common law ethos, which saw domestic animals, such as horses, as the absolute property of man.⁵³⁰

So too here. The ADMC Program seeks to assure that Covered Horses “compete only when they are free from the influence of medications, other foreign substances, and treatment methods that affect their performance.”⁵³¹ The program’s strict liability regime reinforces this principle of competition, regardless of whether the tested horse runs first—as Fast Kimmie did at Saratoga on August 10, 2024—or last. Either way, presence of a Banned Substance, here, clenbuterol is an ADRV.

Lacking any pedigree of common law antecedents—like that of the fraud that informed *Jarkesy* or the negligence underpinning *AT&T*—HISA and its implementing Rules satisfy the public rights exception recognized in such cases as

⁵²⁹ *Id.* at *20.

⁵³⁰ *Id.* (internal quotation marks omitted). *See also Millenia Housing Mgmt. v. USHUD*, No. 1:24-cv-02084, 2025 WL 1222589, at *9 (N.D. Ohio Apr. 28, 2025) (HUD’s “unique, early enforcement [regulatory] mechanism” met the public rights exception to the Seventh Amendment).

⁵³¹ Rule 3010(d)(1).

PUBLIC

Atlas Roofing and *Axalta*. In consequence, Serpe is not entitled to jury trial under the Seventh Amendment.

VI. CONCLUSION

I affirm the sanctions that the Arbitrator awarded and that the Authority imposed. However, I modify the award to add a \$25,000 fine against Serpe. Further, I hold without merit Serpe's argument that he is entitled to a jury trial under the Seventh Amendment.

ORDERED:

Jay L. Himes
Jay L. Himes
Administrative Law Judge

Date: September 12, 2025

PUBLIC

APPENDIX: STATUTE OF ANNE (9-ANNE-CH-14)

A. D. 1710.

Anno nono ANNÆ Reginae.

C. 13, 14.

463

[Continued by 1 Geo. 1. stat. 2. cap. 2. till the first of *August* 1715, and made perpetual by 1 Geo. 1. stat. 2. cap. 12. sect. 5.]

Further Provisions concerning Hops, 6 Geo. 1.

c. 11. f. 40. 6 Geo. 1. c. 21. f. 25. 6 Geo. 2. c. 37. f. 6. (which is made perpetual by 31 Geo. 2. c. 42.) 7 Geo. 2. c. 19.

C A P. XIII.

An Act for the taking, examining, and stating the publick Accounts of the Kingdom.

‘ WHEREAS many Aids and Provisions have been raised and assigned for the necessary Defence of your Majesty and these Kingdoms, in this great and important War, and for the Support of the Government; to the End therefore, that both your Majesty and this whole Kingdom may be satisfied, and truly informed that the same have been applied to the Uses and Purposes for which they were given and granted;’ May it please your most Excellent Majesty, that it may be enacted, &c. E X P.

C A P. XIV.

An Act for the better preventing of excessive and deceitful Gaming.

‘ WHEREAS the Laws now in Force for preventing the Mischiefs which may happen by Gaming, have not been found sufficient for that Purpose;’ Therefore for the further preventing of all excessive and deceitful Gaming, be it enacted by the Queen’s most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That from and after the first Day of *May* one thousand seven hundred and eleven, all Notes, Bills, Bonds, Judgments, Mortgages or other Securities or Conveyances whatsoever, given, granted, drawn or entred into, or executed by any Person or Persons whatsoever, where the whole or any Part of the Consideration of such Conveyances or Securities, shall be for any Money, or other valuable Thing whatsoever, won by Gaming or playing at Cards, Dice, Tables, Tennis, Bowls or other Game or Games whatsoever, or by betting on the Sides or Hands of such as do game at any of the Games aforesaid, or for the reimbursing or repaying any Money knowingly lent, or advanced for such gaming or betting as aforesaid, or lent or advanced at the Time and Place of such Play, to any Person or Persons so gaming or betting as aforesaid, or that shall, during such Play, so play or bett, shall be utterly void, frustrate, and of none Effect, to all Intents and Purposes whatsoever; any Statute, Law, or Usage to the contrary thereof in any wise notwithstanding; and that where such Mortgages, Securities or other Conveyances, shall be of Lands, Tenements or Hereditaments, or shall be such as incumber or affect the same, such Mortgages, Securities or other Conveyances, shall enure and be to and for the sole Use and Benefit of, and shall devolve upon such Person or Persons as should or might have, or be intituled to such Lands, Tenements or Hereditaments in case the said Grantor or Grantors thereof, or the Person or Persons so incumbring the same, had been naturally dead, and as if such Mortgagees, Securities or other Conveyances, had been made to such Person or Persons so to be intituled after the Decease of the Person or Persons so incumbring the same; and that all Grants or Conveyances to be made for the preventing of such Lands, Tenements or Hereditaments, from coming to or devolving upon such Person or Persons hereby intended to enjoy the same as aforesaid, shall be deemed fraudulent and void, and of none Effect, to all Intents and Purposes whatsoever.

33 H. 8. c. 9. 2 & 3 P. & M. c. 9. 16 Car. 2. c. 7. After 1 May 1711. all Notes, &c. Mortgages, &c. where the Consideration is for Money won by gaming, or for Repayment of Money lent at such gaming, &c. shall be void. And where such Mortgages, &c. shall incumber any Lands, &c. they shall devolve to such Person as should have been intituled to them, in case such Grantor had been dead, &c. And all Conveyances to hinder such Lands from devolving, &c. shall be void.

II. And be it further enacted by the Authority aforesaid, That from and after the said first Day of *May* one thousand seven hundred and eleven, any Person or Persons whatsoever, who shall at any Time or Sitting, by playing at Cards, Dice, Tables or other Game or Games whatsoever, or by betting on the Sides or Hands of such as do play at any of the Games aforesaid, lose to any one or more Person or Persons so playing or betting in the whole, the Sum or Value of ten Pounds, and shall pay or deliver the same or any Part thereof, the Person or Persons, so losing and paying or delivering the same, shall be at Liberty within three Months then next, to sue for and recover the Money or Goods so lost, and paid or delivered or any Part thereof, from the respective Winner and Winners thereof, with Costs of Suit, by Action of Debt founded on this Act, to be prosecuted in any of her Majesty’s Courts of Record, in which Actions or Suits no Essoin, Protection, Wager of Law, Privilege of Parliament, or more than one Imparance shall be allowed; in which Action it shall be sufficient for the Plaintiff to alledge, that the Defendant or Defendants are indebted to the Plaintiff, or received to the Plaintiff’s Use, the Monies so lost and paid, or converted the Goods won of the Plaintiff to the Defendant’s Use, whereby the Plaintiff’s Action accrued to him, according to the Form of this Statute, without setting forth the Special Matter; and in case the Person or Persons who shall lose such Money or other Thing as aforesaid, shall not within the Time aforesaid, really and *bona fide*, and without Covin or Collusion, sue, and with Effect prosecute for the Money or other Thing, so by him or them lost, and paid or delivered as aforesaid, it shall and may be lawful to and for any Person or Persons, by any such Action or Suit as aforesaid, to sue for and recover the same, and treble the Value thereof, with Costs of Suit, against such Winner or Winners as aforesaid; the one Moiety thereof to the Use of the Person or Persons that will sue for the same, and the other Moiety to the use of the Poor of the Parish where the Offence shall be committed.

The Loser of 10l. at Cards, &c. may sue for the Money within three Months.

And if the Losers do not sue, &c. any other Person may; and recover with treble Value; one Moiety to the Informer, the other to the Poor.

III. And for the better Discovery of the Monies or other Thing so won, and to be sued for and recovered as aforesaid, it is hereby further enacted by the Authority aforesaid, That all and every the Person or Persons, who by Virtue of this present Act shall or may be liable to be sued for the same, shall be obliged

The Person sued shall answer upon Oath to discover the Money won,

The Person who shall so discover and repay, shall be indemnified from further Punishment.

Any Person winning by Fraud, &c. above 10 l. at one Sitting, and convicted thereof on Indictment, &c. shall forfeit 5 Times the Value, be deemed infamous, and suffer as in Cases of wilful Perjury.

Two Justices may cause Persons who have no visible Estate, &c. to be brought before them, and unless they make it appear that they do not maintain themselves by Gaming, shall find Sureties for their good Behaviour for 12 Months, or be committed.

Persons so finding Sureties and playing for 20 s. during the Time, shall forfeit their Recognizance.

Affaulting, &c. on Account of Money won at Play, to forfeit all his Goods, and be imprisoned two Years.

This Act shall not extend to prevent Gaming in any of the Queen's Palaces during her Residence there, &c.

Farther Provisions concerning Gaming, 2 Geo. 2. c. 28. sect. 9.

30 Geo. 2. c. 19. 10 Geo. 2. c. 28. 12 Geo. 2. c. 28. 18 Geo. 2. c. 34. 25 Geo. 2. c. 36. 30 Geo. 2. c. 24.

obliged and compellable to answer upon Oath such Bill or Bills as shall be preferred against him or them, for discovering the Sum and Sums of Money, or other Thing so won at Play as aforesaid.

IV. Provided always, and be it nevertheless enacted by the Authority aforesaid, That upon the Discovery and Repayment of the Money, or other Thing so to be discovered and repaid as aforesaid, the Person or Persons who shall so discover and repay the same as aforesaid, shall be acquitted, indemnified and discharged from any further or other Punishment, Forfeiture or Penalty, which he or they may have incurred by the playing for, or winning such Money or other Thing so discovered and repaid as aforesaid; any former or other Statute, Law or Usage, or any Thing in this present Act contained to the contrary thereof in any wise notwithstanding.

V. And be it further enacted by the Authority aforesaid, That if any Person or Persons whatsoever, at any Time or Times, after the said first Day of *May* one thousand seven hundred and eleven, do or shall, by any Fraud or Shift, Couzenage, Circumvention, Deceit or unlawful Device or ill Practice whatsoever, in playing at or with Cards, Dice, or any the Games aforesaid, or in or by bearing a Share or Part in the Stakes, Wagers or Adventures, or in or by betting on the Sides or Hands of such as do or shall play as aforesaid, win, obtain or acquire to him or themselves, or to any other or others, any Sum or Sums of Money or other valuable Thing or Things whatsoever, or shall at any one Time or Sitting, win of any one or more Person or Persons whatsoever, above the Sum or Value of ten Pounds; that then every Person or Persons so winning by such ill Practice as aforesaid, or winning at any one Time or Sitting above the said Sum or Value of ten Pounds, and being convicted of any of the said Offences, upon an Indictment or Information to be exhibited against him or them for that Purpose, shall forfeit five Times the Value of the Sum or Sums of Money, or other Thing so won as aforesaid; and in case of such ill Practice as aforesaid, shall be deemed infamous, and suffer such Corporal Punishment, as in Cases of wilful Perjury; and such Penalty to be recovered by such Person or Persons as shall sue for the same by such Action as aforesaid.

VI. And whereas divers lewd and dissolute Persons, live at great Expences, having no visible Estate, Profession or Calling to maintain themselves, but support those Expences by Gaming only; Be it therefore further enacted by the Authority aforesaid, That it shall and may be lawful for any two or more of her Majesty's Justices of the Peace, in any County, City or Liberty whatsoever, to cause to come or to be brought before them, every such Person or Persons within their respective Limits, whom they shall have just Cause to suspect to have no visible Estate, Profession or Calling to maintain themselves by, but do for the most part support themselves by Gaming; and if such Person or Persons shall not make it appear to such Justices, that the principal Part of his or their Expences is not maintained by Gaming, that then such Justices shall require of him or them sufficient Securities for his or their good Behaviour for the Space of twelve Months; and in Default of his or their finding such Securities, to commit him or them to the common Gaol, there to remain until he or they shall find such Securities as aforesaid.

VII. And be it enacted by the Authority aforesaid, That if such Person or Persons so finding Sureties as aforesaid, shall, during the Time for which he or they shall be so bound to the good Behaviour, at any one Time or Sitting, play or bett for any Sum or Sums of Money or other Thing, exceeding in the whole the Sum or Value of twenty Shillings, that then such Playing shall be deemed or taken to be a Breach of his or their Behaviour, and a Forfeiture of the Recognizance given for the same.

VIII. And for the preventing of such Quarrels as shall and may happen upon the Account of Gaming; Be it further enacted by the Authority aforesaid, That in case any Person or Persons whatsoever, shall assault and beat, or shall challenge or provoke to fight any other Person or Persons whatsoever, upon Account of any Money won by gaming, playing or betting at any of the Games aforesaid, such Person or Persons assaulting and beating, or challenging or provoking to fight such other Person or Persons upon the Account aforesaid, shall, being thereof convicted upon an Indictment or Information to be exhibited against him or them for that Purpose, forfeit to her Majesty, her Heirs and Successors, all his Goods, Chattels and Personal Estate whatsoever, and shall also suffer Imprisonment without Bail or Mainprize, in the common Gaol of the County where such Conviction shall be had during the Term of two Years.

IX. Provided always, That nothing in this Act contained shall extend to prevent or hinder any Person or Persons from gaming or playing at any of the Games aforesaid, within any of her Majesty's Palaces of *St. James* or *Whitehall*, during such Time as her Majesty, her Heirs or Successors, shall be actually resident at either of the said two Palaces, or in any other Royal Palaces, where her Majesty, her Heirs or Successors, shall be actually resident, during the Time of such actual Residence, so as such Playing be not in any House, Lodging, or other Part of any of the said Palaces, the Freehold or Inheritance whereof is or shall be out of the Crown, or is or shall be in Lease to any Person or Persons, during such Time as such Freehold and Inheritance shall be out of the Crown, or such Lease shall continue, and so as such Playing be for ready Money only.