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**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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

IN THE MATTER OF

PHILIP SERPE,

Appellant.

MATTER NO. D09441

MOTION FOR LEAVE TO BRIEF ADDITIONAL ISSUES

Appellant Philip Serpe moves for leave to address additional constitutional issues in his brief before the Federal Trade Commission: (1) whether Serpe is entitled to an Article III court, (2) whether the enforcement and adjudication of a claim against Serpe by the Horseracing Integrity and Welfare Unit (HIWU) violates the private nondelegation doctrine, and (3) whether the adjudication violates due process.

These constitutional issues involve “decision[s] of law [and] policy”—concerning the structure and processes of adjudications under the Horseracing Integrity and Safety Act (HISA), as well as HIWU’s adjudication against Serpe here—that “warrant review by the Commission.” 16 C.F.R. § 1.147(b)(4)(ii)(B)(2). The Commission should review these issues now, notwithstanding its previous order on the questions presented, because these questions are “sufficiently important that they should be assessed on their merits.” *Lo Duca v. United States*, 93 F.3d 1100, 1104 (2d Cir. 1996). Moreover, because this adjudication violates Article III, Serpe’s suspension is unlaw-

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ful and subjects him to ongoing irreparable harm, and it should be stayed during the pendency of this appeal.¹

BACKGROUND

After a Serpe-trained horse (allegedly) tested positive for Clenbuterol, HIWU charged Serpe with violating its banned-substances rule. *In the Matter of Philip Serpe*, ALJ No. 2025-9441, slip op. at 6–7 (ALJ Sept. 12, 2025) (ALJ Decision). In response, Serpe sued in federal court to enjoin HIWU’s adjudication process on the grounds that it violated the Seventh Amendment and the private nondelegation doctrine. *Id.* at 9–10.

Meanwhile, HIWU proceeded with arbitration. ALJ Decision at 11–12. But in an attempt to moot Serpe’s Seventh Amendment claim in federal court, HIWU—at the instruction of the Horseracing Integrity and Safety Authority (Authority)—withdrew its request for a fine. *Id.* at 10–11. Ultimately, HIWU’s arbitrator concluded that Serpe violated HIWU’s banned-substance rule and, among other things, ordered a two-year suspension. *Id.* at 16.

On review, an FTC Administrative Law Judge criticized HIWU’s and the Authority’s efforts to abridge Serpe’s Seventh Amendment claim. ALJ Decision at 55–56 (citation omitted). Nevertheless, the ALJ affirmed HIWU’s sanctions and added a \$25,000 fine. *Id.* at 64–65.

This case is now before the Commission, on its own order, to address: (1) whether the ALJ was authorized to impose a civil sanction, (2) whether the fine

¹ Serpe has contemporaneously filed a motion to stay his two-year suspension sanction based on the Article III claim.

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was appropriate, and (3) whether the Seventh Amendment applies. *Philip Serpe*, Matter No. 9441 (FTC Sept. 30, 2025) (Clarification Ord.). The Commission stayed the \$25,000 fine but left in place Serpe’s two-year suspension. *Philip Serpe*, Matter No. 9441 (FTC Sept. 15, 2025) (Partial Stay Ord.).

ARGUMENT

Among the matters the Commission considers when granting review of an ALJ ruling is whether “a decision of law or policy . . . warrants review.” 16 CFR § 1.147(b)(4)(ii)(B)(2). Serpe’s case raises three additional constitutional issues that easily meet this standard: whether the adjudication of the claims against Serpe (1) requires an Article III court, (2) violates the private nondelegation doctrine, and (3) violates due process. These issues concern the structure and fundamental fairness of this adjudication process. Indeed, they are “sufficiently important” that the Commission should address them irrespective of when they were raised. *See Lo Duca*, 93 F.3d at 1104.

First, Serpe submits that the banned-substances claim cannot be adjudicated through HIWU and the Commission because the claim—legal in nature and carrying both legal and equitable remedies—is within the *mandatory* jurisdiction of Article III courts. *SEC v. Jarkesy*, 603 U.S. 109, 132 (2024). As such, the claim cannot be “withdrew[n] from judicial cognizance.” *Id.* (citation omitted). Thus, whether HIWU and the Commission are precluded from adjudicating this claim *at all* certainly “warrants review.” 16 CFR § 1.147(b)(4)(ii)(B)(2). Moreover, because the test to determine Article III jurisdiction is a necessary part of the Seventh Amendment analysis, *Jarkesy*, 603 U.S. at 120–21, Serpe’s Article III claim is inextricably linked to the Seventh

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Amendment question the Commission designated for review. The Commission must address the issue in any event.

Second, the Commission should address whether HIWU's actions violate the private nondelegation doctrine. Indeed, even before the private (HIWU) and administrative (ALJ) adjudications below, HIWU conducted an unconstitutional search of a Serpe-trained horse through blood and urine testing. These are core governmental investigative and enforcement functions, exercised here without any government oversight. *NHBPA v. Black*, 107 F.4th 415, 428–30 (5th Cir. 2024), *cert. granted, judgment vacated*, *HISA v. NHBPA*, 145 S. Ct. 2837 (2025). Notably, the private-nondelegation issue is pending before the district court, and the ALJ asked the Authority to produce transcripts from the district court's hearings. ALJ Decision at 9 n.39. The ALJ then reviewed the district court's record and referenced it in his decision. *Id.* at 9, 68. The issue is fairly presented and should be addressed.

Third, the Commission should consider whether Serpe's right to due process was violated when HIWU—at the Authority's instruction—withdrew its request for a fine to moot Serpe's Seventh Amendment argument. Again, the ALJ below noted the problem. According to the ALJ, this gamesmanship was “inconsistent” with the Authority's “responsibility” to “provide for adequate due process.” ALJ Decision at 55. The intended effect of this maneuver was to cut off Serpe's path to judicial review “while continuing to expose” him “to banishment from thoroughbred horseracing for substantial periods of Ineligibility.” *Id.* at 46. This effort by the Authority and HIWU to rig the overall outcome of the litigation in its favor rendered the arbitration funda-

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mentally unfair. *See Withrow v. Larkin*, 421 U.S. 35, 46–47 (1975). The Commission should so hold.

CONCLUSION

For the foregoing reasons, Serpe respectfully requests that the Commission grant him leave to address the aforementioned three additional issues in his opening brief.

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Respectfully submitted,

/s/ Oliver J. Dunford

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PUBLIC**CERTIFICATE OF SERVICE**

Pursuant to 16 CFR § 1.146(a) and 16 CFR § 4.4(b), I certify that on December 10, 2025, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of the filing. A courtesy copy will be sent via email to the following:

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