PUBLIC

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. 9441**

THE HORSERACING INTEGRITY AND SAFETY AUTHORITY'S ANSWERING BRIEF

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INTRODUCTION

A neutral Arbitrator found that Appellant Philip Serpe violated Rule 3212 of the Anti-Doping and Medication Control ("ADMC") Program, under which he is "strictly liable for any Banned Substance or its Metabolites or Markers found to be present in a Sample collected from his or her Covered Horse(s)." On appeal from that decision to an Administrative Law Judge ("ALJ"), Appellant did not contest that substantial evidence backs the three sanctions the Arbitrator imposed—Disqualification of the relevant race results, a period of Ineligibility, and Public Disclosure. Instead, in an attempt to create a Seventh Amendment question, Appellant complained that the Horseracing Integrity & Welfare Unit ("HIWU") did not seek, and the Arbitrator did not impose, an *additional* sanction (*i.e.*, a monetary fine).

That complaint should have been rejected. The Horseracing Integrity and Safety Act of 2020 ("HISA" or the "Act") does not permit Appellant to challenge the *absence* of a particular sanction or the ALJ to add an entirely new one. Even if it did, Appellant waived ALJ review of his new contention that a fine was mandatory because he failed to properly present it to the Arbitrator. In any event, neither the Act nor the Rules (setting only a maximum limit) required a fine, and the Arbitrator did not act unreasonably in declining to impose one.

But the ALJ ignored both the Act's text and Appellant's waiver, and concluded—on a ground never urged by Appellant in the arbitration or on appeal—that the Arbitrator erred. And instead of simply vacating or remanding the Arbitrator's decision, the ALJ imposed a $25,000 fine that no party had sought. Appellant now raises a host of Seventh Amendment arguments premised on that fine.

Because the Act makes clear that the ALJ lacked authority to add a fine in the first instance, that sanction should be set aside and the Commission should not reach Appellant's (waived and meritless) constitutional claims.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Appellant is the Trainer of Fast Kimmie, a Covered Horse under the Act.[1] On August 10, 2024, Fast Kimmie competed at Saratoga Racetrack.[2] Following the race, Sample Collection Personnel collected blood and urine Samples from the horse.[3] Analysis of these Samples revealed Clenbuterol, a Banned Substance under Rule 4114(b), in Fast Kimmie's urine.[4] On October 10, 2024, HIWU, acting "on behalf" of the Horseracing Integrity and Safety Authority ("Authority") under the Act and Rules,[5] issued a Charge Letter to Appellant notifying him that HIWU was charging him with a violation of Rule 3212.[6]

On October 17, 2024, Appellant filed suit in the United States District Court for the Southern District of Florida against the Commission and the Authority (the "Federal Court Action"), alleging that the enforcement action against him was unconstitutional under the Seventh Amendment and the private-nondelegation doctrine.[7] Appellant thereafter filed a motion for a preliminary injunction, seeking to enjoin the Authority and the Commission from taking any

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[1] Proposed Findings of Fact ("PFF") 1; Uncontested Stipulation of Fact ("Stipulation") 9, **AB1** Tab 32, 2459.

[2] PFF 3; Stipulation, **AB1** Tab 32, 2459.

[3] PFF 4; Stipulation, **AB1** Tab 32, 2459.

[4] PFF 5; Stipulation, **AB1** Tab 32, 2459; *see also* Exhibit A to Stipulation, **AB1** Tab 32, 2509.

[5] Rule 3010(e).

[6] PFF 9 and 10; Stipulation, **AB1** Tab 32, 2460; *see also* Exhibit D to Stipulation, **AB1** Tab 32, 2589-2592.

[7] **AB1** Tab 6, 0132, 0161-0162.

enforcement action against him.[8] The district court limited the preliminary-injunction motion to Appellant's Seventh Amendment claim, and (consistent with Appellant's arguments) suggested at a hearing on the motion that "there couldn't possibly be a Seventh Amendment violation" if HIWU told Plaintiff that "for [his] arbitration proceeding, civil monetary penalties, fines, they're off the table."[9] On April 23, 2025, before briefing or hearing in the arbitration proceeding, HIWU notified Appellant that it was not seeking a fine in the underlying arbitration.[10]

On May 17, 2025, Appellant filed his pre-hearing brief in the arbitration.[11] Appellant mentioned a fine in only two places, arguing that any "fines for the alleged violation should be capped or eliminated" or "greatly reduced."[12]

On May 28, 2025, the federal court denied Appellant's preliminary-injunction motion.[13] The arbitration hearing occurred about one week later, on June 5, 2025.[14] On July 9, 2025, the Arbitrator issued his Final Decision, finding Appellant liable for the charged Anti-Doping Rule Violation ("ADRV") and imposing three sanctions: (1) Disqualification of the results that Fast Kimmie obtained in Race 4 at Saratoga Racetrack on August 10, 2024; (2) a two-year period of Ineligibility for Appellant, with a 25-day credit for time served; and (3) Public Disclosure in accordance with the Authority's Rules.[15] The Arbitrator explained that "HIWU could have sought its legal fees and the fees of the Arbitrator and the arbitration institution as well as the statutory

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[8] **AB1** Tab 7, 0239.
[9] PI Hr'g Tr. 14:3-12.
[10] **AB1** Tab 21, 1207.
[11] **AB1** Tab 26, 1272.
[12] *Id.* at 1277, 1289.
[13] **AB1** Tab 31, 2456.
[14] PFF 13; Final Decision, **AB1** Tab 42, 2770.
[15] PFF 16 and 17; Final Decision, **AB1** Tab 42, 2784-2785.

fine permitted for these cases but it declined to do so."[16] The Arbitrator also made clear that, despite Appellant's liability under the Act's strict-liability regime, "no one should read this decision as determining that [Appellant] is a cheater."[17]

Under the Act and Rules, the sanctions imposed by the Arbitrator are the "final *** civil sanction[s] of the Authority."[18] HIWU served a Notice of Final Civil Sanctions on Appellant on July 14, 2025.[19]

B. On July 15, 2025, Appellant renewed his motion for a preliminary injunction in the Federal Court Action, alleging again that the enforcement action violated the Seventh Amendment.[20] On the same day, Appellant sought *de novo* ALJ review of the Arbitrator's Decision "because the HISA Rules required the Arbitrator to impose a mandatory minimum fine against Appellant."[21] Appellant argued that "[t]he ALJ may not, however, impose the fine on *de novo* review" and "must instead 'set aside' the Decision[.]"[22] Both parties agreed that "the ALJ has no authority to *** modify the Final Decision to impose" a fine no party had requested.[23]

On September 12, 2025, the ALJ affirmed the sanctions imposed by the Arbitrator, but also "modif[ied] the award to add a $25,000 fine" against Appellant.[24] Specifically, the ALJ confirmed

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[16] PFF 16; Final Decision ¶ 4.2, **AB1** Tab 42, 2777.

[17] PFF 16; Final Decision ¶ 5.26, **AB1** Tab 42, 2784.

[18] 15 U.S.C. § 3055(c)(4)(B); Rules 3010(f)(8), 3710(a).

[19] Exhibit B to Notice of Appeal and Application for Review.

[20] Pl.'s Renewed Mot. for Prelim. Inj., *Serpe v. FTC*, No. 24-cv-61939-DSL (July 15, 2025), ECF No. 50.

[21] Notice of Appeal and Application for Review (July 15, 2025).

[22] *Id.*

[23] Appellant's Reply 7; Authority's Reply to Appellant's Proposed Findings of Fact, Conclusions of Law, and Legal Brief 17.

[24] ALJ Decision 121.

that HIWU proved the charged ADRV and that Appellant's defenses were unpersuasive.[25] The ALJ then held that Appellant could challenge the Arbitrator's decision *not* to impose a fine because the resultant loss of an opportunity to raise a constitutional objection predicated on that fine rendered Appellant a "person aggrieved by the civil sanction" within the meaning of section 3058(b)(1).[26] Although the ALJ disagreed with Appellant that a fine was mandatory,[27] it found that the Arbitrator erred in failing to explain why he declined to impose one here.[28] The ALJ then held both that it had the power to impose a fine and that the maximum-allowed $25,000 fine was appropriate.[29]

Although no party raised or briefed a Seventh Amendment claim in the administrative proceedings, the ALJ proceeded to analyze the constitutional argument for over 50 pages. The ALJ concluded that Appellant was not entitled to a jury trial because, among other reasons, the Banned Substance violation falls within the public rights exception.[30]

C. On September 15, 2025, the Commission *sua sponte* granted review of the ALJ's decision and stayed the ALJ's fine pending further review.

Shortly thereafter, Appellant moved for clarification of the issues to address on appeal, explaining that he had not "identified any error for appeal."[31] On September 30, 2025, the Commission granted the motion and ordered the parties to address: (1) whether the ALJ was authorized, under 15 U.S.C. § 3058(b)(3) or any other authority, to impose a civil sanction not

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[25] *Id.* at 22-38.
[26] *Id.* at 38-42.
[27] *Id.* at 56.
[28] *Id.* at 63-64.
[29] *Id.* at 65.
[30] *Id.* at 85, 120-21.
[31] Motion for Clarification and Extension of Time.

imposed by the Arbitrator and not requested to be imposed by any party to the proceeding; (2) whether the additional sanction imposed by the ALJ was appropriate under the circumstances; and (3) whether the Seventh Amendment to the United States Constitution guaranteed Appellant a jury trial in federal court.

More than two months later—and more than one month after the Southern District of Florida issued a decision denying Appellant's renewed motion for a preliminary injunction[32]—Appellant moved for the Commission to stay his suspension.[33] He also requested leave to brief three additional issues: (1) whether he is entitled to immediate adjudication in an Article III court; (2) whether HIWU enforcement violates the private-nondelegation doctrine; and (3) whether the adjudication violated due process.[34] The Authority opposed both motions.

On January 2, 2026, the Commission denied as moot Appellant's motion for leave to brief the issues he had already included in his opening brief. The Commission noted, however, that it had made no "determination that such issues were preserved by [Appellant] or are otherwise appropriately addressed in this proceeding."

SUMMARY OF ARGUMENT

I. Nothing in the Act authorizes a "person aggrieved by the civil sanction" imposed in the arbitration to appeal the *absence* of a particular sanction or the ALJ to add a distinct sanction in the first instance. Instead, every relevant provision of the Act—from the circumstances triggering the ALJ's authority to the ultimate scope of the ALJ's review—is tied to the final civil

[32] Order, *Serpe v. FTC*, No. 24-cv-61939-DSL (Oct. 30, 2025), ECF No. 65.
[33] Motion for Stay of Sanction Pending Review (Dec. 10, 2025).
[34] Motion for Leave to Brief Additional Issues (Dec. 10, 2025).

sanctions the Arbitrator imposed. The ALJ's authority to "modify" those sanctions does not permit the *addition* of an entirely new one.

II. Even if the ALJ generally had the authority to impose a fine in the first instance, it was not appropriate here. Appellant did not properly present to the Arbitrator that a fine was required under the Rules—and never showed cause to excuse his forfeiture of that basis for his subsequent challenge to the Arbitrator's Decision. The ALJ nevertheless took up the issue, assigned error on a ground never urged by any party at any stage of these proceedings, and imposed a remedy no party sought. But the Arbitrator's choice not to impose a fine was more than reasonable, and his explanation was more than adequate.

III. If the Commission agrees that the ALJ could not or should not have injected new legal relief, it need not reach Appellant's Seventh Amendment arguments (which everyone agrees are predicated on the imposition of a fine). In any event, those arguments fail on their own terms. Appellant acknowledges that he agreed to arbitrate any charged ADRV—precluding him from claiming entitlement to a jury trial. Regardless, the Seventh Amendment does not reach a Banned Substance claim. The Act and Rules create a novel, hyper-technical regime without any common-law analogue, as reflected by the long history of administrative adjudication of these types of health-and-safety claims that also brings them within the "public rights" exception.

IV. None of the other constitutional issues Appellant raises is properly before the Commission. Appellant failed (repeatedly) to present those issues to the Arbitrator or the ALJ. Appellant's new claims also fail on the merits.

QUESTIONS PRESENTED

I. Whether the ALJ was authorized, under 15 U.S.C. § 3058(b)(3) or any other authority, to impose a civil sanction not imposed by the Arbitrator and not requested to be imposed by any party to the proceeding.

II. Whether the additional sanction imposed by the ALJ was appropriate under the circumstances.

III. Whether the Seventh Amendment to the United States Constitution guaranteed Appellant a jury trial in federal court.

IV. Whether Appellant's additional constitutional issues, not presented to the arbitrator or ALJ, are forfeited and meritless.

STANDARD OF REVIEW

"The Commission reviews de novo the factual findings and conclusions of law made by the [ALJ]."[35]

ARGUMENT

I. THE ALJ WAS NOT AUTHORIZED TO ADD A NEW CIVIL SANCTION

A. The ALJ lacked authority to impose a civil sanction not imposed by the Arbitrator and not requested by any party to the proceeding. The Act assigns frontline responsibility for "imposing civil sanctions against covered persons" to HIWU and the Authority (acting consistent with Commission-approved rules providing for arbitration),[36] while the provision governing agency review proceedings initiated by a "person aggrieved by the civil sanction" (*i.e.*, a Covered

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[35] 16 C.F.R. § 1.147(c)(1).

[36] 15 U.S.C. § 3057(d)(1); *see also id.* § 3055 (any sanction by HIWU deemed "civil sanction of the Authority").

Person like Appellant) limits the agency's role to "review" of that sanction.[37] Accordingly, such review is triggered only "[i]f the Authority *imposes a final civil sanction*" in the first place and provides "notice of *the civil sanction*."[38] Consistent with those conditions, the proceedings are carried out "*[w]ith respect to* the final sanction imposed by the Authority"; only that "*civil sanction* shall be subject to de novo review by the [ALJ]"; and the ALJ determines whether that "*final civil sanction of the Authority* was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[39]

That plain text forecloses Appellant's claim that an ALJ has freewheeling power to impose any additional "civil sanctions they deem appropriate regardless of the sanctions imposed by HIWU arbitrators."[40] Appellant locates such authority in Congress's instruction that the ALJ may "modify *** the final civil sanction of the Authority" (in addition to affirming, reversing, remanding, or setting it aside).[41] Tellingly, however, no party here requested the ALJ to impose a fine. Indeed, Appellant urged the exact opposite position below: "If the ALJ concludes that a fine is mandatory, the ALJ *has no authority* to *** modify the Final Decision to impose one."[42]

Appellant was right before. Consistent with the Act's express limitation on the scope of ALJ review to "*the* civil sanction" "imposed by the Authority,"[43] the statutory authority to "modify" does not authorize the ALJ to *add* an entirely new sanction. As Appellant acknowledges

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[37] *Id.* § 3058(b)(1).
[38] *Id.* § 3058(a) (emphases added).
[39] *Id.* § 3058(b)(1), (2)(A) (emphases added).
[40] Appellant's Br. 8-9.
[41] 15 U.S.C. § 3058(b)(B)(3)(A)(ii).
[42] Appellant's Reply 7 (emphasis added); *see also* Application for Review 4 ("The ALJ may not, however, impose the fine on de novo review.").
[43] 15 U.S.C. § 3058(b)(1) (emphasis added).

(but buries in a footnote), the Supreme Court has reiterated that the term "'modify' has 'a connotation of increment or limitation.'"[44] Under that commonsense understanding, the ALJ's authority to "modify *** the final civil sanction" imposed by the Arbitrator does not allow the ALJ to "create[] a novel and fundamentally different" sanction in the first instance.[45]

Appellant tries to relegate that on-point precedent to "the rulemaking context."[46] But the Supreme Court simply espoused the ordinary meaning supplied by "[v]irtually every dictionary,"[47] and courts have applied that understanding in the agency-adjudication context.[48] Eliminating any doubt, another provision of the Act, which similarly confers oversight authority on the FTC, confirms that Congress understood the power to "modify" to be different than the power to "add to."[49] "Identical words used in different parts of the same statute carry the same meaning."[50]

That sensible construction of the statute finds further support in the parallel relationship between the Securities Exchange Commission ("SEC") and the self-regulatory organizations ("SROs") it oversees. The SEC has long recognized that even where it "might have reached a different conclusion as to the appropriate sanction for [a securities broker-dealer's] fraudulent

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[44] Appellant's Br. 9 n.34 (quoting *Biden v. Nebraska*, 600 U.S. 477, 494-495 (2023)); *see also MCI Telecomms. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994) (same).

[45] *Biden*, 600 U.S. at 495-496.

[46] Appellant's Br. 9 n.34.

[47] *MCI*, 512 U.S. at 225.

[48] *See, e.g.*, *Reyna v. Lynch*, 631 F. App'x 366, 369-370 (6th Cir. 2015) (relying, in context of immigration judge adjudication, on fact that "'modify' *** has a connotation of increment or limitation") (quoting *MCI*, 512 U.S. at 225).

[49] *Compare* 15 U.S.C. § 3053(e) (allowing FTC to "abrogate, add to, and modify the rules of the Authority"), *with id.* § 3058(b)(3)(A)(ii) (authorizing ALJ to "affirm, reverse, modify, set aside, or remand"); *see also Walmsley v. FTC*, 117 F.4th 1032, 1040 (8th Cir. 2024) (noting that § 3053(e)'s pairing of "add to" with "modify" grants FTC greater power to supervise the Authority than would "modify" standing alone), *vacated on other grounds*, 145 S. Ct. 2870 (2025) (Mem.).

[50] *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 85 (2017) (internal quotation marks and citation omitted).

conduct, [it] do[es] not have authority to increase a sanction imposed by a self-regulatory organization[.]"[51] All agree that "Congress modeled the Act" here on that SEC-SRO scheme.[52]

B. In addition to specifying the ALJ's role, Congress reinforced its intent through its framing of the Authority's and the Covered Person's respective positions. The Authority cannot be the appealing party in the ALJ proceeding.[53] Restricting the ALJ's power to impose new sanctions, beyond those the Arbitrator already levied, is thus consistent with the "unwritten but longstanding rule [that] an appellate court may not alter a judgment to benefit a nonappealing party."[54] Moreover, unlike an application for review by the Commission itself, a Covered Person may request ALJ review only if "aggrieved by the civil sanction" imposed.[55] So allowing a Covered Person to challenge the *nonexistence* of a sanction would not "fall within the zone of interests protected by" this statutory-review provision.[56]

Appellant does not even try to demonstrate how he was "aggrieved" within the meaning of the Act by the Arbitrator's decision *not* to impose a fine. The ALJ, for its part, concluded that Appellant was "aggrieved" because the "absence of any fine in the Arbitrator's award" would

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[51] *In the Matter of Kevin Glodek*, Exchange Act Release No. 60937, at 13 n.28 (Nov. 4, 2009).

[52] *Walmsley*, 117 F.4th at 1039. Any minor distinctions in the text of the two statutes does not indicate that Congress intended the FTC to exercise broader authority than the SEC, which is also limited to "review[ing] a final disciplinary sanction imposed." 15 U.S.C. § 78s(e). The ALJ was wrong to suggest that the SEC does not conduct *de novo* review of SRO sanctions. ALJ Decision 59-60; *see Oklahoma v. United States*, --- F.4th ----, 2025 WL 3653642, at *7 (6th Cir. Dec. 17, 2025) ("[T]he SEC applies fresh review to the SRO's decisions and actions.").

[53] 15 U.S.C. § 3058(b)(1) (allowing for ALJ review of Authority sanction only "on application by the Commission or a person aggrieved by the civil sanction"); *see* Order at 5, *In re Shell*, *DVM*, No. 9439 (FTC ALJ Dec. 6, 2024) ("[N]either HIWU nor the Authority may seek ALJ review[.]").

[54] *Greenlaw v. United States*, 554 U.S. 237, 244 (2008).

[55] 15 U.S.C. § 3058(b)(1).

[56] *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014).

"deprive [Appellant] of the opportunity to have his Seventh Amendment claim heard."[57] That is wrong on multiple levels. The Act requires Appellant to be "aggrieved *by the civil sanction*" imposed in the arbitration, not the *lack* of a sanction. And Appellant continues to pursue his Seventh Amendment claim in the Federal Court Action. The fact that claim will fail absent a fine simply means there is no constitutional violation; seeking agency review to create a constitutional violation cannot be what Congress intended.

Were there any doubt, the canon of constitutional avoidance would eliminate it. For all the reasons explained, section 3058(b) is best read as restricting the ALJ's authority to add a sanction that the Arbitrator never imposed in the first instance. But because that construction is at least "plausible," it "should prevail" over the expansive reading Appellant advances with the sole purpose of creating a constitutional problem.[58]

II. THE ALJ'S IMPOSITION OF A FINE WAS INAPPROPRIATE

Even if the ALJ had authority to add a sanction that no party requested, it was inappropriate for the ALJ to impose a fine here for at least two reasons. First, in the arbitration, Appellant waived any argument that a fine was required. Second, the Arbitrator hardly abused his discretion in declining to impose a fine under the circumstances.

A. Appellant Waived In the Arbitration The Argument That A Fine Should Have Been Imposed.

Before the ALJ, Appellant identified only a single ground for review. In his words, the appeal "present[ed] an exceedingly narrow and straight forward question of regulatory

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[57] ALJ Decision 42, 64.

[58] *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005); *see* Appellant's Br. 10 ("While the ALJ has the statutory authority to impose a fine on its own, such a decision is ultimately prohibited by the Seventh Amendment.").

interpretation[:] Namely, does HISA Rule 3223(b) require an Arbitrator to impose a fine *** for a Covered Person's first-time violation of HISA Rule 3212[.]"[59]

But Appellant never presented that question to the Arbitrator. Instead, the only mention of "fine" in Appellant's pre-hearing arbitration briefs—filed weeks after HIWU informed him that it was not pursuing a fine—was Appellant's assertion that any "fines for the alleged violation should be capped or eliminated" or "greatly reduced."[60] To the extent Appellant questioned whether HIWU's decision not to pursue a fine comported with the Rules, he did so only vaguely "at the end of closing" arguments during the hearing—when, in the Arbitrator's words, it was "a little bit late to be bringing" up an issue Appellant "would have had notice" of well before.[61] The only Rules he even mentioned in the arbitration hearing were "Rule 7340" and "the 7000 series" (neither of which addresses a fine).[62]

The ALJ did not find otherwise. The ALJ concluded only that "[Appellant's] *Seventh Amendment [claim]* was raised in the arbitration, albeit both late in the hearing and perhaps inelegantly framed."[63] But whether "the Arbitrator was well aware of [Appellant's constitutional] claim in the Federal Action"[64] is distinct from whether "the Arbitrator was required to impose a monetary fine" under Rule 3223(b).[65] Appellant has never contended that the Seventh Amendment somehow precluded the *non*-imposition of a fine.

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[59] Appellant's ALJ Br. 1.
[60] **AB1** Tab 26, 1277, 1289.
[61] Tr. 273:12-15 (Arbitrator), **AB2** Tab 45, 3119.
[62] Tr. 261:20, 271:8 (Beilly), **AB2** Tab 45, 3107, 3117.
[63] ALJ Decision 45 (emphasis added).
[64] *Id.* at 43.
[65] Appellant's ALJ Br. 1, 3, 10.

Because Appellant failed at the arbitration stage to argue that the Rules (or Act) required imposition of a fine, he was required to show "good cause" before the ALJ could properly consider his waived contention.[66] In his submissions to the ALJ, however, Appellant never even mentioned "good cause."[67] Yet the ALJ found that "'good cause' exists" because "whether the Arbitrator erred *** implicates the integrity of the ADMC Program's enforcement structure."[68] But if the Commission were to accept that reasoning, the exception would swallow the rule; ALJ proceedings always involve an "assignment of error."[69]

The ALJ also found good cause because resolution of Appellant's "Seventh Amendment claim *** affects not only [Appellant], but also enforcement of HISA and the Rules against Covered Persons generally," and the ALJ did not like what he perceived to be the Authority's "avoidance strategy."[70] But administrative agencies, no less than courts, are meant to "avoid[] serious constitutional questions" where possible, not go searching for them.[71] Besides, the ALJ's reasoning is confusing: No one has ever claimed that imposition of a "period[] of Ineligibility" without an accompanying fine is "allegedly unconstitutional" under the Seventh Amendment; Appellant never challenged that suspension; and Appellant's Seventh Amendment claim has hardly "evad[ed] review" in federal court, where he continues to press it on summary judgment.[72]

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[66] 16 C.F.R. § 1.146(a)(1).

[67] At most, Appellant included a passing statement in a footnote that he "only raised the issue in closing because HIWU earlier stated [during the arbitration hearing] that it would 'address the reason for [withholding a fine] in [its] closing submission.'" Appellant's Reply at 4 n.8 (quoting Tr. 16:22-23 (Farrell), **AB2** Tab 45, 2862). That cannot explain Appellant's failure to object to HIWU's decision not to seek a fine in his pre-hearing briefing, filed weeks after receiving notice.

[68] ALJ Decision 45.

[69] 16 C.F.R. § 1.146(a)(1).

[70] ALJ Decision 45-46.

[71] *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1249-1251 (10th Cir. 2008).

[72] ALJ Decision 46.

As this same ALJ has recognized elsewhere (when ruling against the Authority), the Commission's waiver rule protects "[f]undamental fairness" for the opposing party and for "the arbitration process itself."[73] There was no reason to displace that principle here. Allowing Appellant to inject a new issue into the ALJ proceeding, absent good cause for his failure to raise it in the arbitration, was inappropriate.

B. The Arbitrator's Decision Not To Impose A Fine Was Not An Abuse Of Discretion.

Making matters worse, the ALJ did not even rely on Appellant's belated (and sole) argument to find that the Arbitrator had erred. In fact, the ALJ rejected as "without merit" the contention that "the Rules supposedly require 'a mandatory and automatic fine.'"[74] That should have been the end of the inquiry.[75]

Instead, the ALJ went on to find error on a ground never urged by any party: that "[t]he Arbitrator's failure to explain his decision to omit any fine 'is clearly against the logic and effect of the facts found.'"[76] Notably, not even Appellant defends that reasoning here, perhaps because its lack of foundation is apparent. HIWU did not seek a fine, and Appellant made clear that he was "not asking [the Arbitrator] to impose" one.[77] The ALJ is wrong, moreover, that the Arbitrator "offered no explanation" for declining to impose a fine.[78] As the ALJ acknowledges elsewhere in

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[73] Decision at 57, *In re Shell*, No. 9439 (FTC ALJ Mar. 6, 2025).

[74] ALJ Decision 56.

[75] *See* 16 C.F.R. § 1.146(a)(1) (limiting ALJ review to issues "plainly and concisely stated" in Covered Person's application); *cf. Greenlaw*, 554 U.S. at 243 (explaining "principle of party presentation," which applies "in the first instance and on appeal" "[i]n our adversary system").

[76] ALJ Decision 63 (quoting *National Wildlife Fed'n v. National Marine Fisheries Serv.*, 422 F.3d 782, 798 (9th Cir. 2005)).

[77] Tr., 262:5-6 (Beilly), **AB2** Tab 45, 3108; *see also id.* at 271:14-18 (Arbitrator, Beilly), **AB2** Tab 45, 3117.

[78] ALJ Decision 63.

his decision, "the Arbitrator agreed" with HIWU "that a fine was not mandatory under the rules."[79] The Arbitrator further explained that although "HIWU could have *** sought its legal fees and the fees of the Arbitrator and the arbitration institution as well as the statutory fine permitted for these cases[,] *** it declined to do so."[80] The Arbitrator added that, while Appellant was "unable to meet his burden and standard of proof under the applicable rules," "no one should read []his decision as determining that [Appellant] is a cheater."[81] Indeed, even Appellant argues that a fine should "be commensurate with the level of fault proven," and "zero fault was proven here."[82]

Because the Arbitrator's "path may reasonably be discerned," even if his explanation was "of less than ideal clarity" for the ALJ's liking, no further detail was required.[83] But to the extent the ALJ had concerns about the Arbitrator's explanation, "the usual remedy" in the administrative-law context would be to remand "for additional investigation or explanation."[84] After concluding (contrary to Appellant's position) that "the Arbitrator had discretion" to "dispense with any fine" "[o]n the facts in this case,"[85] it was inappropriate for the ALJ to strip the Arbitrator of that discretion and impose a maximum fine himself, rather than simply affirm or (at most) "remand for further proceedings" so the Arbitrator could supply the explanation in the first instance.[86]

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[79] *Id.* at 45 (citing **AB2** 3123-24).

[80] PFF 16; Final Decision ¶ 4.2, **AB1** Tab 42, 2777.

[81] PFF 16; Final Decision ¶ 5.26, **AB1** Tab 42, 2784; *see also, e.g., In the Matter of Jim Iree Lewis*, No. 9434, 2024 WL 5078296, at *5 (FTC ALJ Oct. 17, 2024) ("The degree of fault *** may be considered in exercising discretion to determine an appropriate fine.").

[82] Appellant's Br. 11 (citations omitted and cleaned up).

[83] *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974).

[84] *Schacht v. Lieberman*, 103 F.4th 794, 797 (D.C. Cir. 2024) (citation omitted).

[85] ALJ Decision 62.

[86] 15 U.S.C. § 3058(b)(3)(A)(ii).

III. THE SEVENTH AMENDMENT IS NOT IMPLICATED

Appellant acknowledges that "a party is entitled to a jury trial" only when the claim at issue "provide[s] a legal remedy."[87] Because a fine is the only legal remedy Appellant has ever identified as triggering the Seventh Amendment,[88] if the Commission agrees that the ALJ's imposition of a fine here was improper for any of the reasons discussed above, the Commission need not (and should not) consider Appellant's Seventh Amendment challenge. The Commission should simply "set aside" the ALJ's decision "in part,"[89] leaving only the affirmation of the (unchallenged) sanctions imposed by the Arbitrator—all of which are indisputably equitable in nature and thus do not "implicate" the Seventh Amendment.[90]

Regardless, even if the Seventh Amendment were implicated here, Appellant's claim would fail for several reasons.

A. Appellant Waived Any Seventh Amendment Right.

"[T]he loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate."[91] Accordingly, Appellant's agreement to arbitrate alleged violations of the ADMC Program Rules forecloses his claim that he is entitled to jury adjudication in Article III court.[92] That places him in a position similar to the countless securities industry participants who

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[87] Appellant's Br. 17.

[88] *Id.* at 17-18.

[89] 15 U.S.C. § 3058(c)(3)(A)(i).

[90] *See SEC v. Jarkesy*, 603 U.S. 109, 121-123 (2024); *see also, e.g.*, *Hard Candy, LLC v. Anastasia Beverly Hills, Inc.*, 921 F.3d 1343, 1359 (11th Cir. 2019) (action seeking only "equitable" relief, including "injunction," "accounting," and "disgorgement" of profits, "does not carry with it a right to a jury trial").

[91] *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1371 (11th Cir. 2005) (quoting *Sydnor v. Conseco Fin. Serv. Corp.*, 252 F.3d 302, 307 (4th Cir. 2001)).

[92] *See* Order at 3, 7, 27-28, *Serpe v. FTC*, No. 24-cv-61939-DSL (Oct. 30, 2025), ECF No. 65 (detailing Covered Person's agreement upon registration, including that "Arbitration is intended

have "waived this right" by agreeing to similar "mandatory securities industry arbitration under federally-compelled and SEC-approved procedures."[93]

Appellant concedes that he registered with the Authority and thus agreed to abide by its rules and procedures, including "agreement to its arbitration rules."[94] And he does not argue that his agreement was unlawfully compelled in any way, under the Constitution or otherwise. Instead, he argues only that the Commission should overlook that agreement because it was not "knowing and voluntary," a standard Appellant draws from an unpublished Eleventh Circuit decision.[95] But the Eleventh Circuit itself has made clear—in a published decision that the district court cited in the Federal Court Action but that Appellant ignores here—that Appellant's "heightened 'knowing and voluntary' standard" does not apply to an "agreement to arbitrate."[96]

Rather, "general contract principles govern the enforceability of arbitration agreements."[97] So Appellant must be held to his agreement unless he can point to "fraud, duress, or some other misconduct or wrongful act recognized by the law of contracts."[98] He never attempts to do so.[99]

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to be the exclusive remedy in all cases" arising under ADMC violations, and questioning whether Appellant's Seventh Amendment claim can "withstand[] his assent to the Covered Person Agreement"); *see also, e.g.*, Rule 7450 ("The Rule 1000-9000 Series shall be considered part of the agreement to arbitrate.").

[93] *Koveleskie v. SBC Cap. Mkts., Inc.*, 167 F.3d 361, 368 (7th Cir. 1999); *see also, e.g., Desiderio v. National Ass'n of Secs. Dealers, Inc.*, 191 F.3d 198, 206-207 (2d Cir. 1999) (rejecting similar Seventh Amendment argument due to agreement to arbitrate).

[94] Appellant's Br. 15.

[95] *Id.* at 14-16 (citing *Bakrac, Inc. v. Villager Franchise Sys., Inc.*, 164 F. App'x 820, 823 (11th Cir. 2006)).

[96] *Caley*, 428 F.3d at 1372; *see* PI at 27-28 (citing *Caley*).

[97] *Caley*, 428 F.3d at 1372.

[98] *Id*. at 1371.

[99] *See* Decision of the Commission at 5, *In the Matter of Luis Jorge Perez*, No. 9420 (Aug. 8, 2024) (review of argument "not warranted" where appellant did not "present that argument to the ALJ or in his application for [Commission] review").

For good reason: Nothing in the record comes remotely close to suggesting any of those acts here. The bare fact that the agreement to arbitrate is a condition of participation in covered horseracing does not suffice to show Appellant faced duress or otherwise unconscionable circumstances.[100]

B. The Seventh Amendment Does Not Apply To HIWU Arbitration.

Brushing past his agreement to arbitrate, Appellant contends that the Seventh Amendment applies to the arbitration proceedings because, even though HIWU and the Authority are "private entities," those proceedings should be deemed state action.[101] That is beside the point: All agree that a fine was never sought nor imposed during the arbitration and that absent a fine the Seventh Amendment is not implicated. So the Commission need not reach that issue.

Regardless, "every court to have considered this state actor argument" with respect to the parallel eight-decade-long relationship between FINRA (or its predecessor) and the SEC, on which the Act was based, "has rejected it."[102] Appellant urges that the Authority and HIWU are "intertwined" with the federal government because the Commission approves the Authority's rules and reviews its disciplinary sanctions.[103] But FINRA is subject to the same "extensive and detailed" oversight by the SEC, and yet courts have found, "repeatedly, that [FINRA or its predecessor] is not a government functionary."[104] The same conclusion follows here.

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[100] *See* 28 WILLISTON ON CONTRACTS § 71:41 (4th ed.) (claim of duress owing to threat to livelihood generally requires showing that threat was wrongful); *see also Koveleskie*, 167 F.3d at 367-368 (rejecting argument that requirement to sign arbitration agreement "under federally-compelled and [agency]-approved procedures" as a condition of employment created an unconscionable contract of adhesion).

[101] Appellant's Br. 13-14.

[102] *Kim v. FINRA*, 698 F. Supp. 3d 147, 161 (D.D.C. 2023) (collecting cases).

[103] Appellant's Br. 13-14.

[104] *D.L. Cromwell Invs., Inc. v. NASD Regul., Inc.*, 279 F.3d 155, 161-162 (2d Cir. 2002*); see also, e.g.*, *Desiderio*, 191 F.3d at 201, 206-207 ("requisite state action is absent," even if "the SEC approved the arbitration" mandate and exercises "close supervision" over its "application or

C. The Banned Substances Claim Concerns A Public Right.

Even if the Seventh Amendment were in play, that claim would fail on the merits. Cases "concerning what [courts] have called 'public rights'" (as opposed to "private rights") can be determined by "an agency without a jury, consistent with the Seventh Amendment."[105] Whether a particular claim qualifies depends on whether it sounds in common law and "historical practice."[106]

Anti-doping and medication-control regulation of horseracing has no common-law analogue. Appellant points to fraud, breach of contract, tortious interference, and action in debt.[107] But the anti-doping charge at issue hardly "target[s] the same basic conduct" as those claims traditionally adjudicated in a court of law.[108] For example, while common-law fraud targets "misrepresenting or concealing material facts,"[109] the Authority's anti-doping rules are agnostic as to whether the use of a Banned Substance is concealed or not.[110] Similarly, "[t]he heart of [Appellant's] violation is the fact that the horse was [endangered]; any potential breach of contract associated with that is collateral to the harm that the [Act] seeks to address."[111] Each of common-law fraud, breach of contract, and tortious interference "require some form of damage to a third

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enforcement."); *Jones v. SEC*, 115 F.3d 1173, 1182 (4th Cir. 1997) ("While its self-regulating powers are supervised by the SEC, which is essentially given a veto power over [FINRA's predecessor's] disciplinary action, that review power does not convert [FINRA's predecessor's] interest to the same interest as that of the regulating agency.").

[105] *Jarkesy*, 603 U.S. at 127-128.

[106] *Id.* at 128-130.

[107] Appellant's Br. 18-23.

[108] *Jarkesy*, 603 U.S. at 134.

[109] *Id*. at 125.

[110] *See* Rule 3212.

[111] *Manis v. USDA*, 796 F. Supp. 3d 178, 206 (M.D.N.C. Aug. 19, 2025) (rejecting Seventh Amendment challenge to Horse Protection Act enforcement proceeding).

party,"[112] while a Banned Substance claim does not.[113] And an action in debt involves enforcement of a fixed amount already obligated,[114] unlike the anti-doping violation here, which does not trigger a fine of any set amount, much less an action to collect that fine.

In sum, the ADMC Program Rules do not "employ the same terms of art[] and operate pursuant to similar legal principles" as Appellant's proffered analogues, nor are they "interpreted in light of[] their [proposed] common law counterparts."[115] The ALJ was thus right that "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.'"[116] Instead, the Authority's rules "consist of technical prescriptions for engaging in the regulated activity" of horseracing that "are 'unknown to the common law.'"[117]

Even if these ADMC Program charges "were presented in such form that the judicial power was capable of acting on them," "no involvement by an Article III court in the initial adjudication is necessary" because they "historically could have been determined exclusively by the executive and legislative branches"—and, in fact, have been so determined.[118] For the first 100 years of this country's existence, horseracing was functionally "unregulated," with no evidence of any anti-doping enforcement in common-law courts.[119] By the latter part of the nineteenth century, a

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[112] *See id.*; Restatement (Third) of Torts § 18.

[113] *See* Rule 3212.

[114] Appellant's Br. 18-19.

[115] *Jarkesy,* 603 U.S. at 134, 138.

[116] ALJ Decision 117 (quoting *Jarkesy*, 603 U.S. at 135) (alteration in original).

[117] *Axalta Coating Sys. LLC v. FAA*, 144 F.4th 467, 476-477 (3d Cir. 2025) (quoting *Jarkesy*, 603 U.S. at 137); *see generally, e.g.*, Series 4000 Rules (providing detailed list of hundreds of Banned or Controlled Substances and technical specifications for testing and enforcement).

[118] *Jarkesy*, 603 U.S. at 128 (citation modified).

[119] Robert L. Heleringer, EQUINE REGULATORY LAW 43-44 (2012).

private organization known as the Jockey Club "wrote the rules of racing" and "enforced *** and interpreted them as a court of last appeal," without any resort to jury trials.[120] When those efforts soon proved lacking, states started to create their own racing commissions to regulate the sport.[121] Those commissions, in turn, enforced horseracing regulations (subject to monetary penalties) through administrative processes that provided no right to a jury trial.[122]

In the face of that history, Appellant cannot offer a single example of an Article III court's direct adjudication of an anti-doping charge. While Appellant stretches to provide inapt illustrations related to gambling suits, the ALJ correctly rejected that analogy, finding "there is no 'enduring link' between the anti-doping provisions" at issue here and "any 'common law ancestor'" Appellant proposes.[123] Rather, those rules are "closely intertwined" with the extensive regulatory scheme Congress enacted to curb the health-and-safety problems that had emerged under the states' longstanding regulatory regimes.[124] So adjudicating violations of those rules "is a public right that Congress may assign to the executive branch for adjudication without offense to the Seventh Amendment."[125]

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[120] *Id*. at 44.

[121] *E.g., id*. at 48, 76.

[122] *See, e.g.*, FLA. STAT. § 550.0251(10) (2024) (Florida Gaming Control Commission may impose fines and suspensions for horseracing violations); FLA. ADMIN. CODE R.75-3.001(2) (horseracing violations adjudicated by board of stewards and Division of Pari-Mutuel Wagering judge, not a jury); LA. STAT. ANN. §§ 4:224, 49:955, 49:964(F) (2022) ("commission's hearings, practice and procedure, and rule making procedure are as provided in the [Louisiana] Administrative Procedure Act," which does not guarantee jury trial); W. VA. CODE §§ 19-23-14(b), 19-23-16(f) ("civil penalties" are "imposed by the [commission's] stewards, or the commission," and hearings are "conducted by a quorum of the Racing Commission or by a hearing examiner appointed by the Racing Commission").

[123] ALJ Decision 84 (quoting *Jarkesy*, 603 U.S. at 125).

[124] *Jarkesy,* 603 U.S. at 133-134 (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54 (1989)).

[125] *Axalta*, 144 F.4th at 477.

IV. APPELLANT'S REMAINING CONSTITUTIONAL CHALLENGES ARE BOTH FORFEITED AND MERITLESS

A. Appellant Forfeited His Remaining Challenges.

Appellant attempts at the last minute to insert three additional issues: (1) whether he is entitled to immediate adjudication in an Article III court on the Banned Substances claim; (2) whether HIWU's role in these proceedings violates the private-nondelegation doctrine; and (3) whether HIWU's decision not to seek a fine violates due process. But Appellant did not raise any of these issues in either the arbitration or the ALJ appeal. Before the Arbitrator, he challenged only whether there was a factual basis to conclude that he violated the Authority's ADMC Program Rules.[126] Before the ALJ, he challenged only whether the ADMC Program Rules "require[d]" the Arbitrator to impose a fine.[127] It is thus no surprise that neither decision resolves any of the three newly asserted constitutional claims; there is nothing for the Commission to review.

Even before the Commission, Appellant raised no challenge whatsoever. In fact, Appellant asked the Commission to clarify the scope of its *sua sponte* review because he had not "identified *any* error for appeal."[128]

Accordingly, as explained more fully in the Authority's opposition to Appellant's motion, Appellant forfeited the claims he seeks to raise—not just once, but several times over.[129] And neither his motion nor his opening brief even attempted to justify any—let alone all—of those forfeitures. Because Appellant failed to present these issues at earlier stages of the proceedings, he cannot do so now.[130]

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[126] *See* Exhibit A to Notice of Appeal ¶¶ 4.1-4.4.
[127] Appellant's ALJ Br. 4.
[128] Mot. for Clarification 1 (emphasis added).
[129] *See* Opp'n to Mot. for Leave 2-3 (discussing Commission rules).
[130] *See In the Matter of Luis Jorge Perez*, No. 9420, at 5.

B. Appellant's Remaining Challenges Fail On The Merits.

Regardless, each of Appellant's late-breaking constitutional challenges is easy to dispatch on the merits. For example, he contends he is entitled to an Article III forum because the Banned Substances claim "does not concern public rights."[131] But that argument fails for the same reasons discussed above (pp. 20-22, *supra*) in the Seventh Amendment analysis.[132]

Likewise, Appellant's private-nondelegation challenge—the subject of years-long litigation in multiple courts of appeals and the U.S. Supreme Court—falters because HIWU's enforcement authority is "'subject to the FTC's pervasive surveillance and authority,' making [HIWU] 'an aid' to the FTC, not its choreographer."[133] Indeed, this proceeding—arising from the enforcement of FTC-approved rules and where the Commission stepped in *sua sponte* to exercise *de novo* review—illustrates the Commission's "capacity to control [HIWU's] enforcement activities" and "ensure[] that the FTC, not [HIWU], is the agency of ultimate resort."[134] "No sanction thus goes into final effect without the FTC's say-so."[135]

Finally, Appellant's due process argument also falls flat. He contends that "any possibility that HIWU may be trusted as an unbiased adjudicator" was "vitiated" because the Authority directed HIWU not to pursue a fine against Appellant.[136] But taking steps to *remove* a constitutional concern cannot violate due process. In any event, none of the actions to which

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[131] Appellant's Br. 24-25.

[132] *See Jarkesy*, 603 U.S. at 128 ("In contrast to common law claims, no involvement by an Article III court in the initial adjudication is necessary in [a case concerning public rights].").

[133] *Oklahoma*, 2025 WL 3653642, at *11 (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940)).

[134] *Id.* at *12; *see also Walmsley*, 117 F.4th at 1039-40 (rejecting private-nondelegation challenge to Act's enforcement provisions).

[135] *Oklahoma*, 2025 WL 3653642, at *11.

[136] Appellant's Br. 27 (citing ALJ Decision 55).

Appellant or the ALJ point calls into question the neutrality of the independent JAMS Arbitrator who was not selected by or subordinate to HIWU.[137] Indeed, on the ALJ's own telling, "HIWU's exercise of prosecutorial discretion did not disable the Arbitrator from exercising his own authority under Rule 3223(b)."[138] Appellant thus provides no basis for concluding that any coordination between the Authority and HIWU "deprived [Appellant] of his fundamental right to 'a fair trial in a fair tribunal'" through the arbitration, much less these subsequent administrative proceedings.[139] And the Authority and HIWU have hardly "cut off [Appellant's] path to judicial review" in federal court,[140] where Appellant continues to press his claims on summary judgment after having lost two preliminary-injunction motions.

CONCLUSION

For the foregoing reasons, the Commission should set aside the fine the ALJ imposed against Appellant, and otherwise affirm the original sanctions imposed by the Arbitrator and upheld by the ALJ.

STATEMENT REGARDING ORAL ARGUMENT

Should the Commission determine that oral argument would be helpful to its resolution of this case, the Authority is prepared to participate.

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[137] *See* Authority's Reply to Appellant's Proposed Findings of Fact, Conclusions of Law, and Legal Brief 7 (Arbitrator selected by JAMS).

[138] ALJ Decision 58.

[139] Appellant's Br. 26 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

[140] *Id.* at 28.

DATED: January 23, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to 16 CFR § 1.146(a) and 16 CFR § 4.4(b), I certify that on January 23, 2026, 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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