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**

APPELLANT'S REPLY BRIEF TO THE HORSERACING AND SAFETY AUTHORITY'S ANSWERING BRIEF

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INTRODUCTION

The Authority spends much of its response encouraging the Commission to avoid the Seventh Amendment. Authority Brief ("Auth.Br.") at 8–20. But good cause abounds to reach it. Serpe faces a $25,000 fine, and the question whether the Seventh Amendment precludes that fine is squarely before the Commission. Indeed, "any decision to impose a disciplinary sanction is subject to plenary Commission review." *Walmsley v. FTC*, No. 23-2687, 2025 WL 3751359 (8th Cir. 2025), Suppl.Br. for the FTC at *1 (Dec. 23, 2025). And here, the Commission *sua sponte* selected the ALJ's decision for review. It should take this opportunity and decide the significant constitutional questions presented.

I. The Seventh Amendment Prohibits the Commission from Exercising Its Statutory Authority to Impose a Fine on Serpe

The first off-ramp the Authority offers to avoid the Seventh Amendment is the ALJ's supposed lack of power to add fines. Auth.Br. at 11–12. But the Horseracing Integrity and Safety Act ("HISA") gives ALJs that authority. In fact, HISA instructs ALJs to determine *de novo* whether an arbitrator's final civil sanction is "in accordance with law." 15 U.S.C. § 3058(b)(2)(A)(iii). This is an open-ended authorization not limited to whether the sanctions were excessive. Otherwise, one might expect the ALJ's review authority to resemble that of the SEC, which may amend a sanction imposed by FINRA only if it is "not necessary or appropriate" or "excessive or oppressive." 15 U.S.C. § 78s(e)(2).

The Authority asserts that HISA does not contemplate ALJs adding sanctions because the Horseracing Integrity Welfare Unit ("HIWU") can't appeal an arbitrator's

sanctions decisions and covered persons won't appeal favorable sanctions decisions. Auth.Br. at 11–12. This position contradicts HIWU's previous stance, to which the Authority acquiesced. *See In re Shell, DVM*, FTC Docket No. 9439, HIWU's Resp. to Briefing Order, at 6–10 (Nov. 12, 2024). There, HIWU considered it "inconsistent with the Act's . . . purposes [of deterrence and uniformity]" if it could not seek review of an arbitrator's decision misapplying mandatory rules. *Id.* at 9. The Authority did not disagree. *See id.*, Authority's Resp. to Briefing Order, at 2 (Nov. 12, 2024). Regardless, the Commission can file an application for review of an arbitrator's sanctions decisions even if HIWU cannot. 15 U.S.C. § 3058(b)(1); 16 C.F.R. § 1.146(a)(2). And the Commission might reasonably seek the addition of a fine by the ALJ.

Ultimately, the Authority contends that ALJs must defer to an arbitrator's non-imposition of a fine. But HISA requires ALJs to review sanctions decisions *de novo*, 15 U.S.C. § 3058(b)(1), in which case "no deference [is] owed," *In the Matter of Jeffrey Poole*, FTC Docket No. 9417, ALJ Decision on Appl. for Review at 4 (citation omitted). Thus, the ALJ "review[s] the Sanctions anew, as though the issue had not been heard before, and no decision had previously been rendered." *Id.* (citation omitted). And the ALJ's review of the sanctions turns on "the HISA statute and the implementing regulations," *In the Matter of Dr. Scott Shell, DVM*, FTC Docket No. 9435, ALJ Decision on Appl. for Review, at 8 (Oct. 31, 2024), not the arbitrator's decision.

II. The Imposition of a $25,000 Fine Was Inappropriate

A. The Authority's second proposed off-ramp is that Serpe's failure to raise the Seventh Amendment with the arbitrator precluded the ALJ from imposing the fine. Auth.Br. at 12–15. But Serpe's counsel discussed the potential fine with the arbitrator, s*ee* AB2 Tab 45, 3109–121, and HIWU responded. *See id.* at 3122–125. The Commission's rules require only that issues be "presented to the Authority," 16 C.F.R. § 1.146(a)(1)—they do not specify when or how. Auth.Br. at 13.

Nonetheless, good cause exists to consider the appropriateness and constitutionality of the fine. *See* 16 C.F.R. § 1.146(a)(1). The ALJ has now "analyze[d] the constitutional argument for over 50 pages," Auth.Br. at 5, and reached a "decision of law or policy that warrants review by the Commission." 16 C.F.R. § 1.147(b)(4)(ii)(B)(2). And the Commission itself ordered *sua sponte* review of the legality, appropriateness, and constitutionality of the fine. Order Partially Staying ALJ's Decision, Granting Review, and Ordering Briefing Schedule (Sept. 15, 2025). Rather than avoid these issues now on preservation grounds, the Commission should resolve them and provide necessary guidance to all involved.

Substantive resolution now would also put a stop to HIWU's and the Authority's gamesmanship.[1] Otherwise, the Authority and HIWU can insulate review of sanctions by withdrawing the sanctions if a Covered Person objects. Aside from being underhanded, the tactic is legally unsound, since the Seventh Amendment

[1] For more on this gamesmanship, *see* Op.Br. at 4; Appeal Book 1 ("AB1") Tab 31, 2448–50.

is triggered when a charge that *may* result in a fine is brought—not after a fine has been imposed. A jury is required for all claims that are legal in nature, *see SEC v. Jarkesy*, 603 U.S. 109, 122 (2024), not merely for claims that result in a fine. *See also Tull v. United States*, 481 U.S. 412, 426 (1987) (holding that, while the finding of liability is "a fundamental element of a jury trial," the "assessment" of civil penalties is not). The argument thus remains ripe for review; *but see id.* at 427 (Scalia, J., concurring in part) (considering the jury right to extend to the determination of the fine's amount). Otherwise, future litigants must face the same Hobson's choice presented below: challenge the non-imposition of the fine (i.e., seek a fine) or complicate a Seventh Amendment claim, even though a fine remains possible throughout the FTC process.

B. For the reasons set forth above and below, because the Seventh Amendment precludes the imposition of a fine without a jury trial, the Commission should vacate the ALJ's fine. Additionally, even if the Commission concludes that the ALJ lacked legal authority to impose the fine, the result is the same.

III. The Fine Violated the Seventh Amendment

A. The Commission May Consider the Seventh Amendment

1. The Authority's Arbitration Agreements Do Not Foreclose Review

The Authority says Serpe waived his Seventh Amendment right upon registering with the Authority and that he has not demonstrated otherwise. Auth.Br. at 17–19. Neither contention is correct.

First, contract law is not the right framework here because the mandatory arbitration agreement foists an unconstitutional condition on Serpe's right to pursue his livelihood. The unconstitutional-conditions doctrine prohibits the government from conditioning the exercise of a constitutional right on the "relinquishment of a constitutional right." *Bourgeois v. Peters*, 387 F.3d 1303, 1324 (11th Cir. 2004). But that is precisely what the HISA process requires; it conditions Serpe's constitutional right to pursue a career in thoroughbred training on his waiving his federal jury trial right. *See* 15 U.S.C. § 3054(d); *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972).

Serpe's registration thus cannot reasonably signify consent or a genuine intention to relinquish his Seventh Amendment rights. Government action "premised on consent where it has been shown that consent was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right" is generally invalid. *Lebron v. Sec'y, Fla. Dept. of Child. and Families*, 710 F.3d 1202, 1214–15 (11th Cir. 2013) (citation omitted).

Second, the arbitration agreement is unenforceable even if contract law applies: Serpe's entry into the agreement was neither knowing nor voluntary because he lacked bargaining power,[2] the arbitration provision was inconspicuously placed, and the Authority could still choose to enforce its rules in an Article III court. Op.Br. at 14–16. Courts routinely hold arbitration agreements unenforceable under these

[2] The rejection of the knowing and voluntary test in *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1371 (11th Cir. 2005), is inapposite because Serpe did not consent to a private arbitration covered by the Federal Arbitration Act.

circumstances. *See Addit, LLC v. Hengesbach*, 341 So. 3d 362, 367 (Fla. Dist. Ct. App. 2022); *Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119, 1135 (11th Cir. 2010).

Third, the Authority's suggestion that Serpe has not disproved waiver, Auth.Br. at 18, is misguided. Because the Authority seeks to enforce arbitration, it carries the burden to demonstrate waiver. *Bakrac, Inc. v. Villager Franchise Sys., Inc.*, 164 F. App'x 820, 823 n.1 (11th Cir. 2006). *See also, e.g.*, *Teleflex Med. Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 851 F.3d 976, 984 (9th Cir. 2017). And because Serpe's mandatory registration is an unconstitutional condition and because he did not reasonably consent and lacked bargaining power, the Authority failed to carry its burden. *See Terral v. Burke Constr. Co.*, 257 U.S. 529, 532 (1922).

2. The Seventh Amendment Applies to the Entire Adjudication Process

Because the HIWU arbitration constitutes state action, the Seventh Amendment applies to the entirety of Serpe's adjudication, *see* Op.Br. at 13, contrary to the Authority's argument. Auth.Br. at 19. The Authority is distinct from FINRA because membership in the Authority and its adjudication scheme is statutorily compelled, 15 U.S.C. § 3054(d)(1), whereas securities industry participants can register with any self-regulatory organization. *See* 15 U.S.C. § 78l(b). Regardless, the Authority does not contest that the Seventh Amendment applies to the ALJ and the Commission itself.

3. The Seventh Amendment Applies Regardless of Whether a Fine Is Imposed

As noted above, the Authority errs claiming "that absent a fine the Seventh Amendment is not implicated." Auth.Br. at 19. When, as here, a case involves (1) a

cause of action that is analogous to a common-law claim, and (2) a legal remedy, the Seventh Amendment requires a jury trial in an Article III court—regardless of the ultimate outcome of the case. *Jarkesy*, 603 U.S. at 122, 134. And even when both equitable and legal relief are possible, the jury trial right still attaches where, as here, there are common factual questions. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 479 (1962).

B. The Seventh Amendment Is Implicated

Therefore, whether the banned-substances claim implicates the Seventh Amendment turns on whether its cause of action and remedy ("the more important" consideration) could be enforced only in courts of law. *Jarkesy*, 603 U.S. at 122–23 (citation modified). The Authority doesn't dispute that the fine is a legal remedy, which is "all but dispositive" of the Seventh Amendment claim. *See id.* at 123; Op.Br. at 17–18.

The Authority's arguments against Serpe's common-law analogs do not move the needle. *See* Auth.Br. at 20–22. The Authority rejects the common-law fraud analog because "the Authority's anti-doping rules are agnostic as to whether the use of a Banned Substance is concealed or not." Auth.Br. at 20. But that isn't true: A fundamental principle of the Anti-Doping and Controlled Medication Protocol ("ADMC Program") is "full disclosure to regulatory authorities regarding the administration of medications and treatments" to maintain "the integrity of the sport, and the confidence of the betting public." 15 U.S.C. § 3055(b)(7). HISA's rules clearly

prohibit "'misrepresenting or concealing material facts'" about the use of banned substances. *See Jarkesy*, 603 U.S. at 125.

The Authority is also wrong that common law breach of contract is not analogous because any such claim would be "collateral to the harm the [Act] seeks to address" (presumably horse safety). Auth.Br. at 20 (citation modified). But horse safety is not the anti-doping rules' only target; "integrity of the sport" is as well. 15 U.S.C. § 3055(b)(7).

HISA's integrity provisions also undermine the Authority's argument (Auth.Br. at 20–21) that the banned-substances claim is unlike a common-law claim because it does not involve third parties. The betting public and industry participants are third parties. And, as in *Jarkesy*, 603 U.S. at 126, the lack of a harm element in this statutory-fraud claim does not eliminate the common-law analog. Indeed, "a precisely analogous common-law cause of action" is not necessary for the Seventh Amendment to apply. *Tull*, 481 U.S. at 421 (citation modified).

Finally, the Authority is wrong (Auth.Br. at 21) that a fine must be fixed to constitute an action in debt. *See Tull*, 481 U.S. at 422–23.

C. The Public Rights Exception Does Not Apply

The Authority does not contend that the banned-substances claim falls within any of the public-rights exception's recognized categories. *See* Op.Br. at 21–25; *Jarkesy*, 603 U.S. at 128–30. Rather, the Authority relies on (1) *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 450 (1977) and (2) historical practice. *See* Auth.Br. at 21–22.

Atlas Roofing is inapposite. It involved a "self-consciously novel" regime whereby Congress sought "innovative" solutions to occupational health and safety concerns. *See Jarkesy*, 603 U.S. at 137. What resulted was a regulatory environment reminiscent of a "detailed building code." *Id.* By contrast, HISA's banned-substances offense is analogous to several common-law claims. 15 U.S.C. § 3055(c)(1)(B); Op.Br. at 23–24.

The Authority's appeal to historical practice is unpersuasive. It says ADMC Program charges historically were determined exclusively by the executive and legislative branches. Auth.Br. at 21. But the Authority provides no evidence of such exclusivity. Instead, it musters for support the historically private regulation of horseracing and a few state statutes that do not provide for jury trials of horseracing violations. Auth.Br. at 22. As neither private parties nor states are subject to the Seventh Amendment, these sources do not answer the question here: whether Article III and the federal jury-trial right apply to federal regulation of horseracing.

It is also a far cry from the "centuries-old rules," plenary Congressional authority and public ownership that justified the existing public-rights exceptions. *Jarkesy*, 603 U.S. at 129–30. Here, Congress relied on its interstate commerce power to enact HISA, *see* 15 U.S.C. § 3051(5), which *Jarkesy* confirmed *cannot* be a basis for the public-rights exception. 603 U.S. at 129 n.1. Regardless, it is "unclear how practice could transmute a private right into a public one, or how the absence of legal challenges brought by one generation could waive the individual rights of the next." *Id.* at 131 n.2.

IV. The Commission Should Hear Serpe's Additional Constitutional Claims

The Commission should review Serpe's Article III claim and his claim that HISA's enforcement regime violates the private nondelegation doctrine and due process. Mot. for Leave to Br. Additional Issues (Dec. 10, 2025). The Authority says Serpe forfeited these issues, Auth.Br. at 23, but it is unclear how the Authority would have had Serpe preserve them. It faults Serpe for failing to raise them with the arbitrator but, as HIWU acknowledged, the arbitrator "does not have jurisdiction to decide [these] constitutional questions." AB1 Tab 14, 466 ¶ 41. With no decision by the arbitrator, the Authority would likely have said what it does here: "there is nothing for the [ALJ] to review." *See* Auth.Br. at 23. The Commission thus has good cause to reject the Authority's self-serving reasoning and consider these claims. *See* 16 C.F.R. § 1.146(a)(1).

CONCLUSION

The Commission should vacate Serpe's sanctions and dismiss this adjudication.

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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 March 6, 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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