

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
FTC DOCKET NO. 9449**

**ADMINISTRATIVE LAW JUDGE:**

**JAY L. HIMES**

**IN THE MATTER OF:**

**DR. JASON SCOTT**

**APPELLANT**

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**THE AUTHORITY'S BOOK OF AUTHORITIES**

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May 4, 2026

Respectfully submitted,

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INDEX

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<b>TAB</b>	<b>DOCUMENT DESCRIPTION</b>	<b>PAGE NO.</b>
1.	<i>In the Matter of Dr. Larry Overly, DVM</i> , Administrative Law Judge Decision on Application for Review (January 27, 2026)	003-102
2.	<i>In the Matter of Dr. Scott Shell, DVM</i> , Administrative Law Judge Decision on Application for Review (March 6, 2025)	103-176
3.	<i>Scott v. Horseracing Integrity &amp; Safety Auth.</i> , 2025 U.S. Dist. LEXIS 208979 (D.N.M. Oct. 22, 2025)	177-188
4.	<i>Oklahoma v. United States</i> , 163 F.4th 294 (6th Cir. 2025)	189-205

# TAB 1



TABLE OF CONTENTS

TABLE OF CONTENTS..... i
TABLE OF ABBREVIATIONS ..... iii
I. INTRODUCTION..... 1
II. SUMMARY OF THE CASE..... 4
A. The Two Banned Substances ..... 4
B. HIWU’s Discovery of Testosterone and Isoxsuprine..... 7
C. The Possession Violations Charged..... 10
1. Mixed Practice Composition: Covered and non-Covered Horses ..... 12
2. Dr. Scollay’s Racetrack Remarks..... 13
D. The Arbitrator’s Decision ..... 14
III. THE PARTIES’ POSITIONS ON REVIEW ..... 17
IV. ISSUES ON REVIEW ..... 19
V. SCOPE OF REVIEW..... 20
VI. ANALYSIS OF THE ISSUES ..... 22
A. Dr. Overly Failed to Prove Compelling Justification for Possession of Either Testosterone or Isoxsuprine ..... 22
1. Overview of Dr. Overly’s Position on Compelling Justification: A Manufactured Defense ..... 24
2. Possession of Testosterone..... 28
a. Testimony Relating to the Discovery of Testosterone During the Search..... 28
b. Documents Offered by Dr. Overly ..... 33
3. Possession of Isoxsuprine..... 41
a. Testimony Relating to the Discovery of Isoxsuprine During the Search..... 41
b. Documents Offered by Dr. Overly ..... 45

- B. Summary of Dr. Overly’s Proof of Compelling Justification ..... 48
- C. Dr. Overly’s “Mixed Practice” Argument: Another Smokescreen ..... 49
  - 1. Covered and Non-Covered Horses ..... 49
  - 2. Dr. Scollay’s Will Rogers Downs Racetrack Remarks ..... 53
- D. Dr. Overly’s Constitutional Challenge to Rule 3214(a) Fails ..... 61
- VII. SANCTIONS ISSUES AND THEIR RESOLUTION..... 62**
  - A. HIWU Properly Charged Dr. Overly with Two Possession ADRVs..... 62
  - B. Sanctions Should Not be Eliminated or Reduced for Either No Fault or Negligence (“NF”), or for No Significant Fault or Negligence (“NSF”) ..... 67
    - 1. Overview of Dr. Overly’s NF and NSF Arguments..... 68
    - 2. NF: Applying Rule 3324..... 70
    - 3. NSF: Applying Rule 3225..... 73
      - a. Objective Considerations ..... 75
      - b. Subjective Considerations..... 79
    - 4. Sanctions Summary ..... 84
  - C. Consecutive Periods of Ineligibility and Aggregated Fines May Be Awarded..... 85
    - 1. Ineligibility ..... 86
    - 2. Monetary Sanctions ..... 92
    - 3. Arbitration Costs..... 93
    - 4. Sanctions Awarded..... 94
- VIII. CONCLUSION ..... 95**

## 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

AB – Appeal Book

AuOBr. – Authority’s Opening Brief

AuPCOL – Authority’s Proposed Conclusions of Law

AuPFOF – Authority’s Proposed Findings of Fact

AuPO – Authority’s Proposed Order

AuRBr. – Authority’s Reply Brief

OOBr. – Overly’s Opening Brief

OPCOL – Overly’s Proposed Conclusions of Law

OPFOF – Overly’s Proposed Findings of Fact

ORAuPFOF – Overly’s Reply to the Authority’s Proposed Findings of Fact

ORBr. – Overly’s Reply Brief

## I. INTRODUCTION

In 2020, Congress enacted the Horseracing Integrity and Safety Act (“HISA”), designed to provide national uniformity to safety and substance control in the nation’s thoroughbred racing industry.<sup>1</sup> 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.<sup>2</sup>

The Authority promulgated, and the Federal Trade Commission approved, regulatory rules, which include the statutorily-required Anti-Doping and Medication Control (“ADMC”) Program.<sup>3</sup> HISA and the 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, or are regulated as controlled medications; (3) the conduct constituting violations and corresponding sanctions; and (4) investigation and enforcement in furtherance of the statute.<sup>4</sup> Under the ADMC Program, the more

<sup>1</sup> See 15 U.S.C. §§ 3051-60.

<sup>2</sup> *Id.* § 3052(a).

<sup>3</sup> *Id.* §§ 3053, 3055, 3057.

<sup>4</sup> See generally ADMC Rule 3000 series; 88 Fed. Reg. 5070-5201 (Jan. 26, 2023) (FTC Notice of HISA Proposed Rule and Request for Public Comment); Order Approving the ADMC Rule Proposed by HISA (Mar. 27, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P222100CommissionOrderAntiDopingMedication.pdf](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), <https://hisaus.org/regulations?modal-shown=true#equine-anti-doping-and-controlled-medication-protocol-rules>.

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.<sup>5</sup>

The Authority has contracted with the Horseracing Integrity & Welfare Unit (“HIWU”) to implement and enforce the ADMC Program on behalf of the Authority.<sup>6</sup> HIWU charges of ADRV are heard by an Internal Adjudication Panel, which may, as here, consist of a single arbitrator.<sup>7</sup> The FTC has authority to review arbitrator decisions resolving HIWU-initiated enforcement proceedings.<sup>8</sup> Further review is available under the Administrative Procedures Act.<sup>9</sup>

Rules issued to implement the ADMC Program prohibit Possession of Banned Substances by individuals subject to HISA, such as trainers and veterinarians, who are known as Covered Persons. This prohibition applies regardless of whether the Covered Person administers the Banned Substance to a Covered Horse.<sup>10</sup>

Appellant Larry Overly is a veterinarian whose practice includes Los Alamitos racetrack in Cypress, California, as well as nearby farms and other

<sup>5</sup> 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.

<sup>6</sup> 15 U.S.C. §§ 3054(e)(1)(B)-(E), 3055; Rules 3010(e)(1), 5720(a).

<sup>7</sup> Rules 3360, 7020.

<sup>8</sup> 15 U.S.C. § 3058; 16 C.F.R. §§ 1.145-148. *See* 87 Fed. Reg. 60077 (Oct. 4, 2022) (Final Rule).

<sup>9</sup> 5 U.S.C. §§ 701-06.

<sup>10</sup> Rule 3214.

locations where horses are stabled. Dr. Overly attends to both Covered Horses subject to HISA, and those not subject to the statute, referred to here as “non-Covered Horses.” Both Covered and non-Covered Horses race at Los Alamitos, and both groups also are stabled off-track.

In July 2024, HIWU searched Dr. Overly’s veterinary truck at Los Alamitos and discovered testosterone and isoxsuprine, both of which are Banned Substances. HIWU charged Dr. Overly under Rule 3214(a) with two Possession violations, which were heard by an arbitrator under the Rules’ dispute resolution procedures.<sup>11</sup> Possession is undisputed, but Dr. Overly argued that he had a “compelling justification” for Possession, a defense expressly recognized by Rule 3214(a). The Arbitrator rejected Dr. Overly’s defense and awarded sanctions, detailed further below. Dr. Overly thus has brought this review proceeding.<sup>12</sup>

I hold that HIWU proved Dr. Overly committed two ADRVs and that Dr. Overly failed to demonstrate compelling justification, or any other available defense. However, I also conclude that the Arbitrator erred in ruling that only one set of combined sanctions should be imposed and in reducing the period of Dr. Overly’s Ineligibility to 23 months. Instead, I rule that, besides requiring individual sanctions for each ADRV, the two Ineligibility periods must run consecutively, not concurrently. Therefore, the total Ineligibility period is 48 months, less a “time-served” credit. As for the monetary sanctions, I agree a

<sup>11</sup> See Rules 3360, 7020.

<sup>12</sup> 15 U.S.C. § 3058; 16 C.F.R. §§ 1.145-.148. See 87 Fed. Reg. 60077 (Oct. 4, 2022) (Final Rule).

\$25,000 fine is appropriate, but that it should be imposed for each ADRV, for a total of \$50,000. Last, I agree that Dr. Overly must make one \$15,000 contribution towards HIWU's arbitration costs.

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.

## II. SUMMARY OF THE CASE

### A. The Two Banned Substances

Dr. Overly has been a veterinarian since 1997.<sup>13</sup> Since he provides services to Covered Horses, Dr. Overly is a Covered Person subject to HISA, to the ADMC Program Rules, and to the enforcement system created.<sup>14</sup> The two Banned Substances HIWU has charged him with possessing—testosterone and isoxsuprine—may be summarized as follows:

**Testosterone:** An anabolic steroid, testosterone is not only a Banned Substance under the Rules, but also a Schedule III Controlled Substance that the United States Drug Enforcement Agency (“DEA”) regulates.<sup>15</sup> Briefly, DEA classifies Scheduled Drugs from I to V, based on the degree of regulatory control.

<sup>13</sup> AB 6075 (Overly).

<sup>14</sup> 15 U.S.C. §§ 3051(6), (21); Rule 1020 (definitions of “Attending Veterinarian” and “Covered Person”).

<sup>15</sup> AB 2677-78, at ¶ 12 (Benson Exp. Rep.). *See also id.* 6366-67 (Benson).

The goal “is to balance legitimate clinical use with the risk of abuse or misuse.”<sup>16</sup>

DEA licenses veterinarians who seek to dispense DEA-Controlled Substances, and they must maintain detailed recordkeeping and drug security requirements.<sup>17</sup>

California law similarly classifies testosterone as a Schedule III substance, subject to analogous licensing, recordkeeping, and drug security requirements.<sup>18</sup> While the California Horse Racing Board (“CHRB”) does not prohibit testosterone, a horse receiving the steroid is barred from racing for six months.<sup>19</sup>

Pre-2008, testosterone “had been given to almost every race horse, or a large percentage of race horses, mostly to improve performance and increase aggressiveness, increase eating.”<sup>20</sup> However, there are “very limited, credible [medical] justifications for using Testosterone in veterinary practice.”<sup>21</sup> HIWU’s expert, Dr. Barbara Benson, identified two:

- (a) Use on significantly debilitated horses as result of disease, prolonged anorexia, surgery recovery, and stress to promote weight gain and acceleration of recovery from disease . . . ; and
- (b) To encourage the closing of growth plates in young horses (generally less than 1-2 years old) suffering phytitis [associated inflammation] . . . .<sup>22</sup>

<sup>16</sup> *Id.* 2677-78, at ¶ 12 (Benson Exp. Rep.).

<sup>17</sup> *Id.* 2678, at ¶¶ 13-15 (Benson Exp. Rep. detailing relevant regulations).

<sup>18</sup> *Id.* 2679, ¶ 16 (Benson Exp. Rep. detailing California regulations).

<sup>19</sup> *Id.* 6372 (Benson).

<sup>20</sup> *Id.* 6367 (Benson).

<sup>21</sup> *Id.* 2675, at ¶ 7(a), 2679-80, at ¶ 18 (Benson Exp. Rep.) (references omitted).

<sup>22</sup> *Id.* 2680, at ¶ 18 (Benson Exp. Rep.) (citations omitted); 5606 (Benson).

Neither condition arises so quickly as to require urgent use of testosterone.<sup>23</sup>

Briefly, debilitation due to disease or prolonged anorexia “are chronic conditions” that generally are not “treated with anabolic steroids as a first line of defense.”<sup>24</sup> Before testosterone is prescribed to treat young horses suffering from physitis, there is typically unsuccessful treatment “with cox selective or non-selective non-steroidal anti-inflammatories and other palliative care such as managing rest and exercise.”<sup>25</sup>

**Isoxsuprine:** Once considered a vasodilator, intended to improve blood circulation by increasing blood vessel size, isoxsuprine was used “to treat navicular disease or laminitis in horses. Navicular disease is a degenerative disorder in the navicular bone of a horse’s foot which results in foot pain and lameness.”<sup>26</sup> But “there is no evidence-based medicine to support use of Isoxsuprine for laminitis,” and it “is not a prophylactic treatment for either ailment.”<sup>27</sup>

The FDA revoked its approval of isoxsuprine in 2020 after determining “it lacked efficacy for specific disease processes.”<sup>28</sup> Now a non-FDA approved drug,

<sup>23</sup> *Id.* 2680, at ¶ 20, 2685, at ¶ 36 (Benson Exp. Rep.), 6372-75 (Benson).

<sup>24</sup> *Id.* 2680, at ¶ 20 (Benson Exp. Rep.).

<sup>25</sup> *Id.* (“Cox selective” drugs relieve pain and inflammation. *See, e.g.*, <https://go.drugbank.com/categories/DBCAT000887>.)

<sup>26</sup> *Id.* 2685, at ¶ 36 (Benson Exp. Rep.). *See generally id.* 6372-75 (Benson) (discussing testosterone treatment in horses).

<sup>27</sup> *Id.* 2676, at ¶ 7(c) (Benson Exp. Rep.). *See also Matter of Shell (“Shell II”)*, No. 9439, 2025 WL 1784696, at \*5-6 (FTC ALJ Mar. 6, 2025) (discussing isoxsuprine).

<sup>28</sup> AB 2685, at ¶ 34 (Benson Exp. Rep.).

isoxsuprine is a Banned Substance under the Rules.<sup>29</sup> The CHRB prohibits isoxsuprine at tracks under its jurisdiction, such as Los Alamitos.<sup>30</sup>

**B. HIWU’s Discovery of Testosterone and Isoxsuprine**

On July 23, 2024, HIWU searched a Hummer Dr. Overly owned while located at Los Alamitos racetrack. HIWU investigators discovered a container of isoxsuprine.<sup>31</sup> Dr. Overly told the investigators that he “did not know the isoxsuprine was on [his] truck.”<sup>32</sup> He also said the container “looked like it [had] been . . . sitting in the back of a truck for a while.”<sup>33</sup> At the arbitration hearing, Dr. Overly explained further:

I haven’t used isoxsuprine in 25 years. I literally don’t use it in my practice. . . . I never really saw a benefit. And after the first couple of years practicing, I just didn’t like the drug. Just chose never to use it. . . . you could run my computer, you’re not going to find a [sic] isoxsuprine for the last 25 years. It just doesn’t exist.<sup>34</sup>

After HIWU discovered the isoxsuprine, Dr. Overly volunteered that there also was testosterone on his Hummer, and he pointed out the substance’s location for the investigators.<sup>35</sup> There were four vials; three were sealed, and the fourth

<sup>29</sup> See 88 Fed. Reg. 5143 (No. 17 Jan. 26, 2023) (Appendix 1 to Rule Series 4000); AB 2676, at ¶ 7(c) (Benson Exp. Rep.).

<sup>30</sup> AB 1173, at ¶ 56 (Overly Wit. Stmt.), 2685, at ¶ 35 (Benson Exp. Rep.), 6379 (Benson).

<sup>31</sup> ORAuPFOF ¶ 2.b.

<sup>32</sup> AB 6219 (Overly).

<sup>33</sup> *Id.* 6127 (Overly).

<sup>34</sup> *Id.* See also ORAuPFOF ¶ 12 (admitting that no records of use were produced).

<sup>35</sup> AB 6128 (Overly). See also *id.* 156 (Bennett Interview Rep.), 2668, at ¶ 17 (Bennett Wit. Stmt.).

was nearly empty.<sup>36</sup> Dr. Overly’s response is not in serious dispute, but the tenor of his remarks, and whether there was any further explanation, are.

Dr. Overly testified he told the investigators that “I take [testosterone] myself every Friday,” and “all the investigators laughed . . . I stated in nervous jest that I use the testosterone on myself and injected myself every Friday.”<sup>37</sup> HIWU’s investigator, Brian Bennett, asked whether Dr. Overly was simply joking, or being facetious. According to Mr. Bennett, Dr. Overly said: “No seriously . . . I can’t remember the amount of CCs. It’s either five or 10 ccs every Friday.”<sup>38</sup> Mr. Bennett understood “[h]e was being truthful when he made the statement.”<sup>39</sup>

Jessica Ingram, Dr. Overly’s veterinary assistant and “girlfriend,” was also present during the search.<sup>40</sup> Ms. Ingram testified that, “when HIWU investigators questioned Dr. Overly about the testosterone, I advised them clearly the testosterone was to be used on older, non-covered horses outside the race track.”<sup>41</sup> Mr. Bennett, however, maintains that Ms. Ingram’s account is “not true. Categorically not true.”<sup>42</sup> Dr. Overly himself recalled her remarks as, “Ricky

<sup>36</sup> *Id.* 151 (Investigative Rep. photo); *id.* 5832-33 (Bennett), 6240 (Overly); ORAuPFOF ¶ 2.a.

<sup>37</sup> AB 6129, 6235 (Overly).

<sup>38</sup> *Id.* 5844 (Bennett).

<sup>39</sup> *Id.* 5845 (Bennett).

<sup>40</sup> *Id.* 6351 (Ingram). *See also id.* 6281 (Overly) (“I don’t know if you’d classify Jessica as my girlfriend . . . We have a relationship.”).

<sup>41</sup> *Id.* 6344 (Ingram).

<sup>42</sup> *Id.* 5871 (Bennett).

[Dr. Overly], quit kidding around. Tell them the truth. We use it on over [sic] geldings on the outside.”<sup>43</sup>

Mr. Bennett prepared a contemporaneous report of the search, which memorializes the substance of Dr. Overly’s response: “OVERLY claimed he kept the Testosterone in his veterinary truck’s medication cabinet for personal use, injecting himself with a dose every Friday.”<sup>44</sup> Mr. Bennett further testified that “[i]f there was any indication that Dr. Overly was joking,” he would have clarified Dr. Overly’s remarks in his report.<sup>45</sup> His report similarly says nothing about any remarks by Ms. Ingram or about using testosterone to treat “older horses,” or “geldings” that were non-Covered Horses.

In late August 2024, five weeks after the HIWU search, Dr. Overly’s counsel sent HIWU a letter, with enclosed documents, that he offered to justify the testosterone HIWU found. Counsel stated that the documents showed “regular treatment” “for the non-covered horse ‘Cosmo’ . . . .”<sup>46</sup> The letter said nothing, however, about Dr. Overly’s or Ms. Ingram’s remarks during the search itself. And although counsel identified Cosmo, he did not disclose, as HIWU later would learn, that Ms. Ingram owned the horse.<sup>47</sup>

<sup>43</sup> *Id.* 6236 (Overly).

<sup>44</sup> *Id.* 156 (Bennett Interview Rep.) (capitalization in original).

<sup>45</sup> *Id.* 2669, at ¶ 19 (Bennett Wit. Stmt.). *See also id.* 5863-66 (Bennett).

<sup>46</sup> *Id.* 166 (counsel’s letter).

<sup>47</sup> *Id.* 177 (Bennett Interview Rep.), 6450-52 (Bennett).

Counsel's letter also said nothing about the isoxsuprine seized, which Dr. Overly had told HIWU he knew nothing about. During the arbitration, however, Dr. Overly testified that, after inquiring of his staff after the search, he learned Ms. Ingram had loaded the drug on the truck for possible use with another off-track horse, Brownie. Dr. Overly further maintained, in the arbitration, that he examined Brownie a few days before the search, discussed isoxsuprine with the horse's owner, and rejected the drug's use.<sup>48</sup>

In October 2024, HIWU sent Dr. Overly an EAD Notice, which rejected Dr. Overly's counsel's attempt to justify Dr. Overly's possession of testosterone. The EAD Notice stated, in relevant part: "[Y]ou have been found to be in possession of two Banned Substances," as a result of which "you could be determined to have committed two Anti-Doping Rule Violations, with the potential for combined Consequences totaling four years of Ineligibility for you and a fine of up to \$50,000 USD."<sup>49</sup> Subsequently, HIWU charged Dr. Overly with two Possession violations, one for each Banned Substance.<sup>50</sup>

### **C. The Possession Violations Charged**

Rule 3214(a) of the ADMC Program prohibits "Possession of a Banned Substance . . . unless there is compelling justification for such Possession." Rule 1020 defines "Possession," providing in pertinent part:

<sup>48</sup> *Id.* 6135-36 (Overly).

<sup>49</sup> *Id.* 103, 105 (EAD Notice).

<sup>50</sup> *Id.* 122 (EAD Charge Letter).

Possession means actual, physical possession, or constructive possession (which shall be found only if the Covered Person has exclusive control or intends to exercise exclusive control over the Prohibited Substance . . . or the premises in which a Prohibited Substance . . . exists).

The Rule imposes strict liability, regardless of knowledge or intent, except where “constructive Possession” is charged.<sup>51</sup> However, there is no dispute that Dr. Overly had actual Possession of testosterone and isoxsuprine, thereby obviating any need for HIWU to prove either knowledge of possession, or intent to possess.<sup>52</sup>

Violation of Rule 3214(a) carries a mandatory 24-month Ineligibility period for a first offender. A fine of “up to” \$25,000 may also be imposed, plus other monetary sanctions.<sup>53</sup>

HIWU has the burden of proving its Possession charges against Dr. Overly to the “comfortable satisfaction” of the factfinder—a standard of proof that “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.”<sup>54</sup> If it meets that burden, then Dr. Overly may rebut HIWU’s *prima facie* case by

<sup>51</sup> *Shell II*, 2025 WL 1784696, at \*11, n.16; *HIWU v. Poole*, JAMS Case 1501000576, at ¶¶ 7.7-8 (Aug. 8, 2023), *aff’d*, No. 9417, 2023 WL 8435860 (FTC ALJ Nov. 13, 2023); *USADA v. Drummond*, Case No. AAA 01-14-000-6146, at 19 (Dec. 17, 2014) (“The Panel rejects Drummond’s contention that actual possession requires his specific intent to have under his custody and control a particular banned substance whose characteristics were fully known to him.”). *See also* Rule 1020 (defining “constructive Possession” as including knowledge and intent elements).

<sup>52</sup> *See* AB 1119-20, at ¶¶ 3.a-3.b (Uncontested stip. facts), 6690-91, at ¶¶ 4.2.1-2.4 & 6710-11, at ¶ 7.2 (Corrected Final Decision).

<sup>53</sup> Rule 3223(b).

<sup>54</sup> Rule 3121(a).

proving “compelling justification” for Possession by a preponderance of the evidence.<sup>55</sup> He can also eliminate any sanctions by proving “No Fault or Negligence” (“NF”) on his part, or reduce the sanctions by showing he had “No Significant Fault or Negligence” (“NSF”).<sup>56</sup> I discuss these three defenses further below.

Since Dr. Overly’s Possession of testosterone and isoxsuprine is undisputed, the case turns on whether he had “a compelling justification” for Possession,” as well as on the NF and NSF defenses he asserted. Dr. Overly’s compelling justification argument revolves around two matters: (1) the mixed nature of his practice; and (2) public remarks HIWU provided to veterinarians with a mixed practice.

### **1. Mixed Practice Composition: Covered and non-Covered Horses**

Dr. Overly’s practice at Los Alamitos and off-track includes both thoroughbred Covered Horses and non-Covered Horses:

I’ll take care of primarily [non-Covered] quarter horses at Los Alamitos. However, I take care of a number of thoroughbreds as well on the outside. I’ll work rodeo horses. I’ll work on dressage horses, Hunters, jumpers, backyard riding horses.<sup>57</sup>

<sup>55</sup> Rules 3121(b) & 3214(a).

<sup>56</sup> Rules 3224 & 3225.

<sup>57</sup> AB 6084 (Overly). *See also id.* 6086 (At Los Alamitos, “it’s always been around . . . 70% quarter horses, 30% thoroughbreds.”)

Depending on the measure used, roughly 65-70% of his practice involves attending to non-Covered Horses. The rest involves Covered Horses. Specifically:

<b>Composition of Dr. Overly’s Practice (2024)</b>	
<b>Measure</b>	<b>Non-Covered v. Covered Horses (%)</b>
Los Alamitos quarter horse patients	65.71 v. 34.29
Los Alamitos quarter horse treatments	79.58 v. 20.42
Outside (off-track) Los Alamitos	68.35 v. 31.65
Sources: AB 1193-94, at ¶¶ 7, 10, 12 & 2043, 2157-60 (Corbett Wit. Stmt. & Exs. 1, 3), 6013, 6055 (Corbett).	

The Authority and HIWU have no jurisdiction over non-Covered Horses, however.<sup>58</sup> Thus, the second part of Dr. Overly’s compelling justification argument relies on remarks HIWU made publicly to racing industry participants during the period leading up to the ADMC Program becoming effective in May 2023. I summarize the remarks here, leaving the fuller discussion for later in this Decision as part of my analysis of compelling justification.

**2. Dr. Scollay’s Racetrack Remarks**

Dr. Mary Scollay was HIWU’s chief of science during 2023 and thereafter. She is also a regulatory veterinarian with 35+ years’ experience.<sup>59</sup> Her responsibilities at HIWU included “a large educational component that involve[d]

<sup>58</sup> *Id.* 5948-49 (Scollay).

<sup>59</sup> *Id.* 5916-17 (Scollay).

direct outreach as well as responding to questions from horsemen.”<sup>60</sup> After HISA’s enactment, she made public presentations throughout the country during 2023 to educate horserace industry participants on the new, not yet effective, ADMC Program. The presentations were themselves substantially the same, and each afforded those attending an opportunity to ask questions <sup>61</sup>

One of Dr. Scollay’s presentations took place in March 2023 at Will Rogers Downs Racetrack in Oklahoma, where an attendee recorded her remarks.<sup>62</sup> She stated, in summary, that since the Authority and HIWU lacked jurisdiction over non-Covered Horses, veterinarians whose practice included non-Covered Horses might be able to justify possession of Banned Substances for use in that part of their practice.<sup>63</sup> Like Los Alamitos, Will Rogers Downs “houses a mixed population of horses, so covered thoroughbreds and then . . . quarter horses that are not covered horses.”<sup>64</sup> Although he was not present at Will Rogers Downs, Dr. Overly testified he relied on these remarks in conducting his practice.<sup>65</sup>

#### **D. The Arbitrator’s Decision**

The Arbitrator heard HIWU’s charges in May 2025. Witnesses testified for both sides, and documentary exhibits were admitted into evidence, after which the

<sup>60</sup> *Id.* 5918-19 (Scollay).

<sup>61</sup> *Id.* 5919-20, 5922 (Scollay).

<sup>62</sup> *Id.* 5922 (Scollay). *See generally id.* 2638-40, at ¶¶ 3-6 (Scollay Wit. Stmt.).

<sup>63</sup> *Id.* 5926-28 (Scollay).

<sup>64</sup> *Id.* 5926 (Scollay).

<sup>65</sup> *Id.* 6108-09, 6111-12, 6170-72, 6193 (Overly).

parties submitted post-hearing briefing and presented oral closing arguments. Thereafter, the Arbitrator rendered her decision.<sup>66</sup>

Regarding Dr. Overly's compelling justification argument, the Arbitrator noted that this defense calls for "a fact specific, case by case inquiry . . . ."<sup>67</sup> Dr. Overly had to prove "a legitimate and legal veterinary purpose that is not connected to Thoroughbred horseracing."<sup>68</sup> Although the Arbitrator accepted as proven that 65.7% of his Los Alamitos practice, and 68.7% of his off-track practice, consisted of non-Covered Horses, that alone did not "create a compelling justification for carrying a Banned Substance at Los Alamitos."<sup>69</sup> Instead, Dr. Overly had to show a need for each Banned Substance on his truck at Los Alamitos on the date of the search.

The Arbitrator rejected Dr. Overly's "impracticality" argument—that the ambulatory nature of his practice created a potentially "prophylactic need" to use the Banned Substances to treat non-Covered Horses.<sup>70</sup> The Arbitrator reviewed the evidence for testosterone and isoxsuprine individually, and concluded that, for both his Los Alamitos and off-track practice, Dr. Overly failed to show compelling justification.<sup>71</sup>

<sup>66</sup> *Id.* 6681 (Corrected Final Decision).

<sup>67</sup> *Id.* 6711, at ¶ 7.5.1 (Corrected Final Decision).

<sup>68</sup> *Id.* (footnote omitted).

<sup>69</sup> *Id.* 6711-12, at ¶ 7.5.2 (Corrected Final Decision).

<sup>70</sup> *Id.* 6712 at ¶¶ 7.5.4-.5.5 (Corrected Final Decision).

<sup>71</sup> *Id.* 6712-15, at ¶¶ 7.5.5-.5.8 (Corrected Final Decision).

The Arbitrator also rejected Dr. Overly’s NF and NSF defenses. NF, in summary, required Dr. Overly to show that “despite the exercise of utmost caution he could not have reasonably known or suspected he was committing an ADRV by having Testosterone and/or Isoxsuprine on his veterinary truck at Los Alamitos.”<sup>72</sup> However, he knew he had testosterone, a Banned Substance, on his Hummer and, besides learning of Dr. Scollay’s presentation remarks, took no steps to discuss his mixed practice with Dr. Scollay or anyone else at HIWU. Thus, he failed to show exercise of “utmost caution” to avoid a Possession ADRV.<sup>73</sup>

NSF required Dr. Overly to prove that, “viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence,” his conduct “was not significant in relationship to” the Possession ADRV charged.<sup>74</sup> Reviewing the evidence, the Arbitrator held Dr. Overly showed grounds for only “a very modest” reduction in the level of his fault.<sup>75</sup>

The Arbitrator further held that HIWU “properly charged Dr. Overly with two separate ADRV’s”—“one for each of the Banned Substances”—even though HIWU discovered both “in a single search.”<sup>76</sup> However, still at issue was whether the two violations could result in two *consecutive* Ineligibility periods and

<sup>72</sup> *Id.* 6718, at ¶ 7.8.4 (Corrected Final Decision).

<sup>73</sup> *Id.* 6718, at ¶¶ 7.8.5-6 (Corrected Final Decision).

<sup>74</sup> *Id.* 6719, at ¶ 7.8.8 (quoting Rule 1020 (definition of NSF)) (Corrected Final Decision).

<sup>75</sup> *Id.* 6722, at ¶ 7.8.17. *See generally id.* 6719-22, at ¶¶ 7.8.9-16 (discussing evidence and case law analysis) (Corrected Final Decision).

<sup>76</sup> *Id.* 6716, at ¶ 7.6.3 (citing *Shell II*, 2025 WL 1784696) (Corrected Final Decision).

*cumulative* monetary fines. The Arbitrator held that both ADRVs arose from “Dr. Overly’s professed and mistaken belief that because he had a majority of Non-Covered horses in his practice, he was able to carry Banned Substances on his truck at Los Alamitos . . . without having to articulate or establish a specific need to carry that Banned Substance at Los Alamitos for any particular part of his Non-Covered practice.”<sup>77</sup> Thus, the Arbitrator held that the sports law principle of proportionality favored a combined sanction, and not two individual ones.<sup>78</sup>

The Arbitrator’s sanctions therefore consisted of: (a) an Ineligibility period of 23 months (the “very modest” one month reduction from the 24-month maximum); (b) \$25,000 fine (the maximum allowable); and (c) a \$15,000 contribution toward HIWU’s share of arbitration costs.<sup>79</sup>

### III. THE PARTIES’ POSITIONS ON REVIEW

Dr. Overly contends, in summary, that the Arbitrator erred for multiple reasons. More specifically, he maintains:

1. He met his burden of proving compelling justification for Possession of both the testosterone and isoxsuprine that HIWU’s search discovered.<sup>80</sup>

<sup>77</sup> *Id.* 6717, at ¶ 7.7.5 (Corrected Final Decision).

<sup>78</sup> *Id.* 6716-17, at ¶¶ 7.7.3-7.5 (discussing *Shell II*, 2025 WL 1784696 and *HIWU v. Puype*, JAMS Case No. 1501000973 (Dec. 12, 2024)) (Corrected Final Decision).

<sup>79</sup> *Id.* 6723-24, at ¶ 8.1 (Corrected Final Decision).

<sup>80</sup> OPCOL ¶¶ 8, 9, 13.

2. Rule 3214(a) and the Decision violate his Fifth and Fourteenth Amendment Due Process rights as unconstitutionally vague.<sup>81</sup>

3. He proved NF and, as a result, sanctions should not have been awarded at all.<sup>82</sup>

4. In any event, he proved NSF at the level of “insignificant,” such that sanctions should be reduced “to the minimum.”<sup>83</sup>

In consequence, Dr. Overly argues that the Decision should be reversed and HIWU’s charges dismissed with prejudice.

By contrast, the Authority contends that:

1. Dr. Overly failed to prove compelling justification for Possession of either Banned Substance.<sup>84</sup>

2. HIWU properly charged and proved two Possession ADRVs for which “separate,” rather than combined, sanctions should be awarded.<sup>85</sup>

3. Dr. Overly failed to prove NF.<sup>86</sup>

<sup>81</sup> *Id.* ¶¶ 14-15.

<sup>82</sup> *Id.* ¶ 16.

<sup>83</sup> *Id.* ¶ 18.

<sup>84</sup> AuPCOL ¶ 1 & AuPO ¶ a.

<sup>85</sup> AuPCOL ¶¶ 2-3 & AuPO ¶ b.

<sup>86</sup> AuPCOL ¶¶ 4-5.

4. On NSF, the Arbitrator correctly determined that only a “modest” one month reduction was warranted, but erred in applying the reduction to the “combined” Ineligibility period of 24 months. Instead, two 23-month Ineligibility periods should have been imposed, to run consecutively, thereby resulting in Ineligibility of 46 months, less the undisputed credit for days served.<sup>87</sup>

5. The fine awarded should also be increased from \$25,000 to \$35,000.<sup>88</sup>

#### IV. ISSUES ON REVIEW

As framed by the parties, the following issues must be resolved:

A. Did Dr. Overly show compelling justification for Possession of either of the two Banned Substances?

B. Does Rule 3214(a) violate the Constitution on grounds of vagueness?

C. If Dr. Overly’s compelling justification defense fails:

1. Did HIWU properly charge Dr. Overly with two Possession ADRVs?

2. Is Dr. Overly subject to individual sanctions for each of the two Possession violations?

<sup>87</sup> AuPO ¶¶ c-d.

<sup>88</sup> *Id.* ¶ e.

3. May consecutive periods of Ineligibility, one for each ADRV, and individual fine awards, be imposed?

4. Is Dr. Overly entitled, under the NF or NSF provisions in Rules 3224 or 3225, to eliminate or reduce the 24-month Ineligibility period applicable to each of the Possession ADRVs and to comparable adjustment of any monetary sanctions?

## V. 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.<sup>89</sup> 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.”<sup>90</sup>

<sup>89</sup> 15 U.S.C. §§ 3058(b)-(c); FTC Rules 1.146-.147.

<sup>90</sup> 15 U.S.C. § 3058(b)(2)(A). *See also* FTC Rule 1.146(b)(1)-(3).

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.”<sup>91</sup> Thus, the 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.”<sup>92</sup> “[T]o pass muster under the arbitrary and capricious standard,” the ALJ must only find a “rational connection between facts and judgment.”<sup>93</sup> 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.”<sup>94</sup>

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.”<sup>95</sup> To find an abuse of discretion, there must be “a plain error, discretion

<sup>91</sup> *Shane v. Albertson’s Inc.*, 504 F.3d 1166, 1168 (9th Cir. 2007) (review under Federal Rule of Civil Procedure 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 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”).

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

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

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

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

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.”<sup>96</sup> 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.

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.”<sup>97</sup>

## VI. ANALYSIS OF THE ISSUES

### A. Dr. Overly Failed to Prove Compelling Justification for Possession of Either Testosterone or Isoxsuprine

Since Possession is not disputed, Dr. Overly’s liability for violation of Rule 3214(a) calls for analysis of whether he demonstrated a compelling justification to have either testosterone or isoxsuprine on his Hummer when HIWU searched the vehicle at Los Alamitos on July 23, 2024. This is the second time I have been asked to review the compelling justification defense and to assess the persuasiveness of a veterinarian’s claimed reliance on Dr. Scollay’s 2023 remarks at Will Rogers Downs racetrack. I defer discussing Dr. Overly’s fact-based reliance argument

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

<sup>97</sup> 15 U.S.C. § 3058(b)(3)(A)(ii-iii); FTC Rule 1.146(d)(3).

until later on, and here will summarize my prior discussion of the compelling justification defense generally.<sup>98</sup>

While a defense of ‘compelling justification’ to possession is common in sports law anti-doping codes generally, as in the HISA Rules the expression is invariably undefined. However, “[w]hen interpreting a statute, we begin with the text.”<sup>99</sup>

Dictionaries reflecting ordinary word usage can be helpful. An authoritative dictionary’s definition of “justification” is:

1. A lawful or sufficient reason for one’s acts or omissions; any fact that prevents an act from being wrongful.
2. A showing, in court, of a sufficient reason why a defendant acted in a way that, in the absence of the reason, would constitute the offense with which the defendant is charged.<sup>100</sup>

For that “reason” to be “compelling,” it must be “both powerful and convincing.”<sup>101</sup>

This defense is fact-driven and thus case-specific. Moreover, Rule 3214(a)’s Possession violation is part of a regulatory scheme directed to banishing doping from thoroughbred horseracing; compelling justification is the exception and

<sup>98</sup> *Shell II*, 2025 WL 1784696, at \*11-12.

<sup>99</sup> *Lackey v. Stinnie*, No. 23-621, 604 U.S. 192, 199 (2025).

<sup>100</sup> BLACK’S LAW DICTIONARY (12th ed. 2024).

<sup>101</sup> WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 462; *United States v. Canales-Ramos*, 19 F.4th 561, 567 (1st Cir. 2021) (construing the federal “compassionate release” statute, applicable to incarcerated individuals).

should, accordingly, “be interpreted restrictively.”<sup>102</sup> Further guidance is found in recent federal District Court remarks:

Permitting possession when there is a compelling justification for doing so is an exception to the rule. Veterinarians can always comply with Rule 3214 by not possessing the substances it prohibits. Because Rule 3214 imposes strict liability for possession, the scenarios where the “compelling justification” exemption applies will be a small minority. . . . Moreover, the definition of “compelling” excludes a vast array of justifications, such as a *covered person merely wanting to possess the substance, thinking they should be able to, or forgetting that they have it on hand.*<sup>103</sup>

Against this backdrop, I consider Dr. Overly’s proof.

**1. Overview of Dr. Overly’s Position on Compelling Justification: A Manufactured Defense**

I will cut to the chase. In asserting he had a compelling justification to have both testosterone and isoxsuprine on his Hummer when the HIWU investigators discovered the substances during their search, Dr. Overly is trifling with the Authority—and with this Court.

**Testosterone:** An anabolic steroid, testosterone “is not a medication used on a regular basis and does not need to be ethically carried by veterinarians for ‘prophylactic’ use.”<sup>104</sup> Thus, Dr. Overly’s compelling justification argument for having four vials of this Banned Substance—three of which were sealed—when

<sup>102</sup> *WADA v. Contreras*, CAS 2013/A/3341, at ¶ 116 (May 28, 2014).

<sup>103</sup> *Scott v. Horseracing Integrity & Safety Authority*, No. 2:25-cv-632-SMD-GJF, 2025 WL 2987598, at \*7 (D.N.M. Oct. 22, 2025) (emphasis added).

<sup>104</sup> AB 2675, at ¶ 7(a), 2677-78, at ¶ 12 (Benson Exp. Rep.).

HIWU searched his Hummer at Los Alamitos begins from a position of weakness and goes downhill from there.<sup>105</sup>

On Dr. Overly's best version of the facts, over the one-year period preceding HIWU's search, he injected Cosmo three times; the injections were two and five months apart, and the most recent one had been for 8cc, the equivalent of 8ml.<sup>106</sup> According to a document that his counsel provided with his August 2024 letter and introduced at the arbitration hearing, Dr. Overly gave Cosmo a fourth injection, this time of 10cc, during an off-track appointment on July 30, 2024, a week after the search.<sup>107</sup> That was more than four months after the previous injection.

Assuming continued 10cc injections after the July 30 injection, administered to Cosmo roughly four months apart, Dr. Overly had enough testosterone on his Hummer to inject the horse for roughly the next eight months. He would not have needed to reorder testosterone for another injection for four more months after that. Dr. Overly offered *no proof* that he treated any horse other than Cosmo with testosterone, but if one surfaced during the ensuing eight months, Dr. Overly could have re-ordered at any point.<sup>108</sup>

<sup>105</sup> See *id.* 151 (vial photo), 170-71 (invoices for testosterone), 1120, at ¶ 3.b (Uncontested stip. facts), 5832-33 (Bennett), 6240 (Overly).

<sup>106</sup> *Id.* 166 (counsel's letter, quoted above), 172-73 (Controlled Substance logs).

<sup>107</sup> *Id.* 174 (Controlled Substance log).

<sup>108</sup> See *id.* 5980, 6051, 6053 (Corbett) (Practice manager Cassandra Corbett's search of office records disclosed no testosterone treatments).

Thus, Dr. Overly had *no* justification, much less a compelling one, for having the quantity of testosterone HIWU’s investigators found when they searched his Hummer. This alone suffices to hold that Dr. Overly failed to meet his burden of proving compelling justification.

**Isoxsuprine:** A non-FDA-approved substance, “isoxsuprine is banned at Los Alamitos” under CHRB rules.<sup>109</sup> Isoxsuprine’s past uses were to treat navicular bone degeneration and ringbone in horses. Since both are “chronic conditions,” a veterinarian doesn’t need to have isoxsuprine readily at hand to use.<sup>110</sup> Moreover, early in his practice, Dr. Overly “never really saw a benefit” from isoxsuprine, “just didn’t like the drug,” and “chose *never* to use it. . . .”<sup>111</sup> He further testified he was “really shocked and surprised that that was even in [his Hummer], because I had no knowledge that was there.”<sup>112</sup>

For Dr. Overly to argue he had compelling justification to keep a Banned Substance he never used is oxymoronic. Again, Dr. Overly has failed to satisfy his burden of proof.

**Non-Covered Horse Practice:** Dr. Overly contends that the need to treat non-Covered Horses at both Los Alamitos and off-track show compelling

<sup>109</sup> *Id.* 2685, at ¶ 35 (Benson Exp. Rep.).

<sup>110</sup> *Id.* 2685, at ¶ 36 (Benson Exp. Rep.). *See also* ORAuPFOF ¶ 13 (Dr. Overly agrees isoxsuprine “could not be used on non-Covered Horses at Los Alamitos.”).

<sup>111</sup> AB 6127 (Overly) (emphasis added). *See also* ORAuPFOF ¶ 12 (Dr. Overly agrees no records of isoxsuprine use were produced).

<sup>112</sup> AB 6127-28 (Overly). *See also id.* 6518 (Overly) (Dr. Overly “didn’t” know the isoxsuprine was there), 6533 (Overly) (“I had no idea it was on the truck.”).

justification for having his Hummer loaded with testosterone and isoxsuprine on any given day's trip to Los Alamitos. As part of his proof, Dr. Overly introduced evidence showing that, in 2024 alone, he administered 15,857 treatments to 573 non-Covered quarter horses at Los Alamitos, and also made 167 off-track visits to see 73 non-Covered Horses.<sup>113</sup> Yet, the *entirety* of the testosterone and isoxsuprine evidence he offered involving Covered or non-Covered Horses consisted of: (1) Cosmo, an off-track horse that allegedly received three testosterone injections over a roughly one-year period preceding the HIWU search, and one more a week after; and (2) Brownie, also an off-track horse, for which treatment with isoxsuprine allegedly was discussed and rejected.

How much *weaker* could proof of compelling justification be?

And if a more granular analysis of Dr. Overly's compelling justification defense for each Banned Substance were needed, there are facts aplenty. They thoroughly discredit even the limited evidence Dr. Overly offered. Accordingly, as alternative grounds for my compelling justification rulings, I will review the evidence relating to testosterone and isoxsuprine individually. After that, I will address further the nature of Dr. Overly's mixed practice, attending to both Covered and non-Covered Horses, and his professed reliance on Dr. Scollay's Will Rogers Downs racetrack remarks. As this discussion will show, Dr. Overly's evidence is smoke and mirrors, offered simply to divert attention.

<sup>113</sup> *Id.* 1193, at ¶¶ 7, 10 (Corbett Wit. Stmt.), 2043, 2157-60 (Corbett Exs. 1 & 3).

**2. Possession of Testosterone**

**a. Testimony Relating to the Discovery of Testosterone During the Search**

The discussion that transpired upon HIWU finding testosterone on Dr. Overly's Hummer is disputed. At the time of HIWU's search, Dr. Overly supposedly "stated in nervous jest that I use the testosterone on myself and injected myself every Friday . . . . That is the statement I made."<sup>114</sup> Dr. Overly testified further:

Q [counsel for HIWU]: You would agree with me that you made no statements to the investigators about using . . . having the testosterone or having it on your truck for non-covered horses, correct?

A: No, as I stated earlier, it was said in jest, and they laughed, and then they made their statements as well.

Q: But my question to you just now was you made no other statements or offered no other explanations other than personal use to investigators on the day of the search. Correct?

A: I did not, but as soon as I said it, Ms. Ingram actually said "Ricky, quit kidding around. Tell them the truth. We use it on over geldings [castrated male horses] on the outside."

. . . .

Q: So you didn't think it was important to tell investigators the purported real reason you kept a banned substance on your truck at the backside, even after your assistant allegedly said it?

<sup>114</sup> *Id.* 6235 (Overly) (adopting *id.* 1166, at ¶ 23 (Overly Wit. Stmt.)) (internal quotation marks omitted).

A: Correct, I said nothing else.<sup>115</sup>

Dr. Overly's testimony is not credible. After the explanation Dr. Overly said Ms. Ingram offered, Dr. Overly should have been highly motivated to walk back his "joke." He knew his personal use of testosterone could have "serious implications for both his DEA-issued license and his California State veterinary license."<sup>116</sup> With his very practice at risk, silence was not an option. But that is what Dr. Overly testified transpired.

Ms. Ingram, Dr. Overly's only witness on the search and the treatment of Cosmo, did not help matters. Ms. Ingram is Dr. Overly's "girlfriend"—a description that she admitted, but that Dr. Overly himself evaded: "I don't know if you'd classify Jessica as my girlfriend. . . . We have a relationship."<sup>117</sup> Ms. Ingram's bias towards Dr. Overly is, of course, a factor in assessing her credibility and the weight to give her testimony.<sup>118</sup> So too was her reluctance to testify, which Dr. Overly's counsel reported at the arbitration hearing after Dr. Overly's testimony concluded:

I've spoken to Ms. Ingram, given the tenor, where things have gone, she stands by her witness statement. I'm not calling her . . . . [G]iven the fact

<sup>115</sup> *Id.* 6235-37 (Overly).

<sup>116</sup> *Id.* 6237-38 (Overly).

<sup>117</sup> *Id.* 6281 (Overly). *See id.* 6351 (Ingram).

<sup>118</sup> *See, e.g., United States v. Williams*, 985 F.2d 634, 639 (1st Cir. 1993) (The trial court appropriately permitted defense counsel "ample opportunity to undermine [the girlfriend of a defendant's] credibility by probing her bias and motive for testifying.").

that her personal life has been entered into this proceeding, she is uncomfortable testifying, and says she won't.<sup>119</sup>

Ms. Ingram appeared only after the Arbitrator directed that “[s]he has to testify.

. . . [I]t's not a question . . . . There's a huge prejudice to your client, if she does not testify.”<sup>120</sup>

Testifying did not help, however. For starters, Ms. Ingram never confirmed the words Dr. Overly put in her mouth during his own testimony. Her silence on this subject impeaches Dr. Overly's testimony. Instead, at the hearing Ms. Ingram adopted her witness statement explanation: “when HIWU investigators questioned Dr. Overly about the testosterone, I advised them clearly that testosterone was to be used on older, non-covered horses outside the race track. . . .”<sup>121</sup> But Ms. Ingram's explanation, attributing the testosterone's presence to treating “older, non-covered horses,” also lacks credulity. She did not mention her own horse, Cosmo, although that was the only horse she had in mind.<sup>122</sup>

Equally important, Ms. Ingram's explanation casts further doubt on Dr. Overly's own credibility. Dr. Overly heard Ms. Ingram's explanation in response to his own “flippant statement,” which included her statement “[w]e use

<sup>119</sup> AB 6313, 6315. *See, e.g., Baltazar v. Lewis*, No. CV 14-01299-DOC (VBK), 2015 WL 300490, at \*11 (C.D. Calif. Jan. 21, 2015) (A witness's “reluctance to testify could be helpful to the jury's assessment of her credibility.”). *Cf.* Rule 3122(f) (permitting an adverse inference to be drawn against a “Covered Person's refusal to cooperate”). As an employee of Dr. Overly, Ms. Ingram is a Covered Person. Rule 1020 (definition).

<sup>120</sup> AB 6313, 6315, 6318 (the Arbitrator).

<sup>121</sup> *Id.* 6344-45, 6346 (Ingram) (adopting *id.* 1189, at ¶ 8 (Ingram Wit. Stmt.)).

<sup>122</sup> *Id.* 6347, 6349-50 (Ingram).

it on over [sic] geldings on the outside.”<sup>123</sup> As of the time of the search, Dr. Overly supposedly had treated Cosmo, which he knew was a gelding, with testosterone for as long as two years.<sup>124</sup> If so, it strains credulity to believe Dr. Overly would have failed to connect Ms. Ingram’s remarks with Cosmo—supposedly his *only* testosterone horse-patient—and have refrained from confirming the explanation she gave.

The “Cosmo explanation” rings hollow for still another reason. Not until five weeks after the HIWU search did Dr. Overly, through his counsel, tell HIWU about Cosmo’s testosterone injections. Counsel’s disclosure was limited, however. First, he did not provide any account of what either Dr. Overly or Ms. Ingram supposedly said during the search. Second, Dr. Overly’s counsel never disclosed that Ms. Ingram herself owned Cosmo. HIWU’s investigator, Mr. Bennett, had to figure that out on his own.<sup>125</sup>

Mr. Bennett followed up by interviewing Ms. Ingram, who was circumspect in providing information:

INGRAM advised COSMO began receiving testosterone treatments from Dr. LARRY OVERLY . . . approximately 2 years ago. The treatments were in response to the horse’s perceived lack of energy. INGRAM was unable to provide specific details concerning the frequency of these treatments and

<sup>123</sup> *Id.* 6236, 6237, 6280 (Overly), 6344-47 (Ingram).

<sup>124</sup> *Id.* 1188, at ¶ 7 (Ingram Wit. Stmt.); *id.* 6264 (Overly) 6324-30 (Ingram). But *see id.* 172-74 (Controlled Substance records showing treatment of Cosmo no earlier than July 20, 2023, and not in January 2023).

<sup>125</sup> *Id.* 166 (counsel’s letter), 6238 (Overly). *See id.* 5858-66 (Bennett) (describing his investigation to establish Cosmo’s ownership).

advised, ‘They varied depending on the need,’ and claimed they were currently ongoing.”<sup>126</sup>

One might infer that, at the point of the interview, Ms. Ingram wasn’t sure of the account Dr. Overly would eventually decide had to be told.

As noted earlier, HIWU investigator Bennett disputes both Dr. Overly’s and Ms. Ingram’s accounts of what was said during the search. He testified that after Dr. Overly’s “joke,” Ms. Ingram “started blushing,” and Mr. Bennett “assume[d] they probably had a . . . personal relationship . . . .”<sup>127</sup> Further, when he questioned Dr. Overly regarding his “joke,” Dr. Overly said “[n]o seriously,” which Bennett took to mean “[h]e was being truthful.”<sup>128</sup> Mr. Bennett also testified Dr. Overly “[n]ever” said he was “just kidding,” or that the testosterone was “really for my non-covered horse practice.”<sup>129</sup>

In addition, Mr. Bennett testified that besides asking for the testosterone lot numbers on the four vials seized, Ms. Ingram made no other statements.<sup>130</sup> Shown Ms. Ingram’s witness statement account—that the testosterone was for “older non-covered horses outside the racetrack”—Mr. Bennett testified: “That is not true. Categorically not true.”<sup>131</sup> He confirmed his own witness statement remarks:

<sup>126</sup> *Id.* 177 (Interview Rep.) (capitalization in original). *See also id.* 5866-67 (Ms. Ingram said she had no purchase records for Cosmo, and that Dr. Overly would have any medical records).

<sup>127</sup> *Id.* 5846 (Bennett).

<sup>128</sup> *Id.* 5844-45 (Bennett).

<sup>129</sup> *Id.* 5848 (Bennett).

<sup>130</sup> *Id.* 5853-54 (Bennett).

<sup>131</sup> *Id.* 5871 (Bennett). *See id.* 1189, at ¶ 8 (Ingram Wit. Stmt.).

I have no recollection of Ms. Ingram offering any explanation for Dr. Overly's use of Testosterone during the Search. In fact, I do not recall Ms. Ingram providing any statements, comments, or explanations on the Testosterone at any time during the Search. If Ms. Ingram had offered any such contemporaneous statements, it would have been my standard practice to record any such comments in my Interview/Intelligence Report.<sup>132</sup>

Mr. Bennett's account is more believable, particularly since he memorialized in writing the conversations during the search. An experienced investigator, Mr. Bennett states: "If there was any indication that Dr. Overly was joking, it would have been my standard practice to ask him follow up questions, clarify his explanation, and record his comments in my Interview/Intelligence Report."<sup>133</sup>

And, if there were any reason to doubt how to resolve the conflicting accounts of who said what during the search, documents offered by Dr. Overly dispel it.

**b. Documents Offered by Dr. Overly**

The letter Dr. Overly's counsel sent to HIWU five weeks after the search included records relating to Dr. Overly's testosterone treatments. Counsel wrote, in relevant part, that the enclosed materials "document[ed] treatment for the . . . quarter horse 'Cosmo,' which demonstrates that Dr. Overly administered the

<sup>132</sup> *Id.* 2670, at ¶ 21 (Bennett Wit. Stat.). *See also id.* 5874-75 (Bennett) (adopting his witness statements).

<sup>133</sup> *Id.* 2669, at ¶ 19 (Bennett Wit. Stmt.). *See also id.* 5807-08, 5829-31 (Bennett) (describing his practice regarding memorializing statements made), 5847-48 (Bennett) (if Dr. Overly had clarified, Bennett "would have included more, probably, context to the statement.").

testosterone to this horse with regularity, including pre-and-post [HIWU] seizure, on July 20, 2023, September 20, 2023, March 1, 2024, and July 30, 2024.”<sup>134</sup>

Dr. Overly testified “[t]his is the only testosterone that was ordered for the practice.”<sup>135</sup> The records included three pages (Controlled Substance logs) purporting to show Cosmo’s four testosterone injections, which were “the sum total of the testosterone injections” given to Cosmo over the “year period [July 2023-July 2024].”<sup>136</sup> The handwritten entries on the records were all made by Ms. Ingram.<sup>137</sup> Dr. Overly testified that the documents were “normal course of business” records, “original and proper,” and he relied on them at the arbitration hearing to establish injection of Cosmo on dates shown.<sup>138</sup>

Parts of the three Controlled Substance logs are obvious copies of each other, with only lot numbers and expiration dates changed<sup>139</sup>:

<b>Controlled Substance:</b> Testosterone Cypionate 200mg/mL Schedule (I-V): III		
<b>Container Type:</b>	<b>Container Size:</b> 10 mLs	<b>Concentration:</b>
<b>Lot #</b> 10614351444924	<b>Expiration:</b> 04/2025	

<sup>134</sup> *Id.* 166 (counsel’s letter).

<sup>135</sup> *Id.* 6251 (Overly).

<sup>136</sup> *Id.* 6266 (Overly). *See id.* 172-74 (Controlled Substance logs).

<sup>137</sup> *Id.* 6144 (Overly), 6330-32 (Ingram).

<sup>138</sup> *Id.* 6144, 6164-66 (Overly). *See generally id.* 6159-66 (Overly); *id.* 6331-37 (Ingram) (vouching for the accuracy of the records).

<sup>139</sup> Respectively, *id.* 172 (July 20 and September 20, 2023 injections), 173 (March 1, 2024 injection), 174 (July 30, 2024 injection).

**Controlled Substance:** Testosterone Cypionate 200mg/mL Schedule (I-V): III  
**Container Type:**                      **Container Size:** 10 mL                      **Concentration:**  
**Lot #** 2302161.1                      **Expiration:** 08/2026

**Controlled Substance:** Testosterone Cypionate 200mg/mL Schedule (I-V): III  
**Container Type:**                      **Container Size:** 10 mL                      **Concentration:**  
**Lot #** 2402020.1                      **Expiration:** 01 | 2027

The last of these images purports to memorialize a July 30, 2024 injection of Cosmo—*after* the HIWU search itself. An inference of fabrication is irrepressible.

And it gets still worse.

The injection entries on the Controlled Substance logs don't reconcile to the supply invoices Dr. Overly introduced. By way of illustration:

- The document memorializing Cosmo injections on 7/20/23 and 9/20/23, is sourced to lot 10014351444924.<sup>140</sup> There is no supplier invoice reflecting delivery of testosterone from that lot number.<sup>141</sup>
- The document memorializing the 3/1/24 injection is sourced to lot 2302161.1, with an expiration of 08/2026.<sup>142</sup> The only invoice sourced to lot 23021611 is dated 03/04/24—three days *after* the claimed injection, and has multiple expiration dates, none of which are the same as that on the

<sup>140</sup> *Id.* 172 (Controlled Substance log).

<sup>141</sup> *See id.* 169-71 (Supplier invoices).

<sup>142</sup> *Id.* 173 (Controlled Substance log).

injection record.<sup>143</sup> The only supplier invoice *before* the injection, dated 2/28/24, similarly has different expiration dates.<sup>144</sup> The only lot information on that supplier invoice is 23021231—different than that on the injection record.<sup>145</sup>

- The record for the July 30, 2024 injection of Cosmo identifies the vial lot number as 2402020.1, having an expiration date of 01/2027.<sup>146</sup> Dr. Overly introduced only one relevant invoice, for a testosterone order placed on July 23, 2024 to replace the testosterone HIWU seized.<sup>147</sup> But that invoice does not show either a lot number or an expiration date.<sup>148</sup> Thus, Ms. Ingram had to get her handwritten information on the injection record from some other source that was never produced.

Perhaps not surprisingly, the labels on the vials HIWU seized also “don’t match” those on the supply invoices Dr. Overly produced.<sup>149</sup> This table summarizes the mismatch:

<sup>143</sup> *Id.* 170 (Supplier invoice).

<sup>144</sup> *Id.* 171 (Supplier invoice).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* 174 (Controlled Substance log).

<sup>147</sup> *Id.* 169 (Supplier invoice), 6266-68 (Overly).

<sup>148</sup> *Id.* 169 (Supplier invoice).

<sup>149</sup> *Id.* 6249 (Overly’s counsel’s statement). *See also id.* 6250-51 (Overly) (“Until this moment, I did not know they didn’t match . . . . Why . . . whether or not the numbers match, I have no idea.”) (second ellipse in original), 6255 (“I have no idea.”).

Vial Labels		Supplier Invoices	
Lot Number	Expiration	Lot Number	Expiration
2302161.1 (three vials)	2026/08	23021231 (three vials)	11/30/2025 12/31/2026
2302123.1 (one vial)	2026/06	23021231 23021611 (one vial showing two lot numbers)	11/30/2025 05/31/2024 12/31/2026
Sources: AB 170, 171, 5840-41 (Bennett), 6245-46, 6248 (Overly).			

There are yet more facts that discredit Dr. Overly’s explanation for possessing testosterone. First, Dr. Overly testified that, after returning from rounds at Los Alamitos, he devoted Wednesday afternoons to his off-track practice.<sup>150</sup> But based on the injection entries in the Controlled Substance logs, Cosmo’s four alleged off-track injections took place on the following days of the week:

July 20, 2023:	Thursday
September 20, 2023:	Wednesday
March 1, 2024:	Friday
July 30, 2024:	Tuesday

Dr. Overly never accounted for supposedly injecting Cosmo on dates that don’t jibe with his Wednesday afternoon off-track practice.

<sup>150</sup> *Id.* 6092-93, 6203-04, 6310-11 (Overly).

Second, Dr. Overly also testified that, before leaving for his Wednesday afternoon off-track appointments, a member of his staff “will actually give me a report of what scheduled clients I’m going to see on the outside . . . .”<sup>151</sup> No such reports were produced for any of the four alleged injections of Cosmo.

Third, HIWU’s search occurred the morning of July 23, 2024, a Tuesday.<sup>152</sup> There is no evidence that Dr. Overly intended to treat Cosmo that Tuesday afternoon or on a regular Wednesday afternoon trip. But even if that were intended, it would not have justified having the steroid at Los Alamitos. Dr. Overly’s office is “adjacent” to Los Alamitos, and his staff typically load and unload his truck “every morning” and “in the middle of the day. We are constantly loading the truck”—generally, 10 times a week.<sup>153</sup> Any testosterone needed for a July 23 or 24 appointment could have been added to the Hummer once Dr. Overly had finished at Los Alamitos. And, if Cosmo were to be injected on July 30 during an atypical Tuesday trip off-track, Dr. Overly’s staff certainly did not need to add testosterone to the Hummer a week beforehand. Nor, as noted earlier, did they need to load multiple vials of testosterone—enough to treat Cosmo for the next eight months or so.

Finally, Dr. Overly failed to produce medical records corresponding to the claimed injections of Cosmo. Dr. Benson testified:

<sup>151</sup> *Id.* 6311 (Overly).

<sup>152</sup> *Id.* 140, at ¶ 5 (Bennett Wit. Stmt.), 148 (Investigative Rep.), 5852, 5876 (Bennett).

<sup>153</sup> *Id.* 6226 (Overly). *See also id.* 6094, 6124-25, 6226-27, 6228-29, 6309-10 (Overly).

[T]hat's a very important thing, . . . you have to have . . . these checks and balances. So you should have a medical record that . . . is supposed to include that the medication was administered, and so it's like you have half of the information, but you don't have the confirmation that it went into the horse . . . . [T]his is the perfect storm of what could happen if you had someone who was trying to, like, hide drug use.<sup>154</sup>

Dr. Overly testified he had—but did not produce—“veterinary medical record[s], documenting the examination, diagnosis, prognosis, a SOAP for Cosmo, relating to the four injections of testosterone . . . .”<sup>155</sup> His pre-hearing witness statement similarly implies document selectivity: “I have provided all the records I have for Cosmo and the use of the Testosterone for that horse, which *in my opinion* is proper and sufficient to document the treatment of Cosmo and Non-Covered use of Testosterone and intended use shortly after it was seized.”<sup>156</sup> Ms. Ingram, Cosmo's owner also testified there were more testosterone injection records than the four produced, as well as corresponding “veterinary medical records” that were “in [her] possession.”<sup>157</sup> Although some of these records may pre-date July 2023, when the first documented treatment was given, the treatment dates are not what matters.

<sup>154</sup> *Id.* 6377-78 (Benson).

<sup>155</sup> *Id.* 6269-70 (Overly). “SOAP” is the acronym for “subjective, objective assessment, and plan,” referring to medical records veterinarians typically maintain. *Id.* 5997-98 (Corbett), 6341, 6576 (Ingram).

<sup>156</sup> *Id.* 1168, at ¶ 29 (Overly Wit. Stmt.) (emphasis added; bold-face emphasis deleted). *See also id.* 6557 (Overly) (“There could have been some earlier [injections, before July 2023] as well.”)

<sup>157</sup> *Id.* 6341 (Ingram). *See generally id.* 6339-41 (Ingram).

Both the DEA and California, among others, require detailed recordkeeping to assure proper management and dispensation of testosterone.<sup>158</sup> As Dr. Benson explained:

You have to have all sorts of information on your DEA logs, such as the lot number, the concentration, the number of MLs, the drug that it is, and then, as you use it, you are required to account for any use, any waste, any loss . . . the patient, the person, how it's dispensed. So is it administered or actually given? And if it's administered, how is it administered? The person who enters the log information has to put in their initials, so you can track not just who it went to, but who entered that information. So you really have a whole kind of history of that drug.<sup>159</sup>

Despite his record-keeping obligations, Dr. Overly has offered only a handful of selective testosterone-related documents. Cassandra Corbett, Dr. Overly's practice manager, testified she was never asked to look for relevant material in the office's DEA treatment logs, which were maintained in a binder in her office.<sup>160</sup>

The selective quality of the documents offered, the inconsistencies among the produced materials, and the inattention to regulatory obligations—as well as the testimony given—all undermine the integrity and reliability of the evidence Dr. Overly provided on a defense where he bears the burden of proof.<sup>161</sup>

Dr. Overly's evidence on isoxsuprine fares no better.

<sup>158</sup> *Id.* 2678, at ¶13, 2679, at ¶ 16 (Benson Exp. Rep.).

<sup>159</sup> *Id.* 6369-70 (Benson).

<sup>160</sup> *Id.* 6030-32 (Corbett).

<sup>161</sup> *See Shell II*, 2025 WL 1784696, at \*18 (documentary proof lacked probative value on compelling justification defense).

**3. Possession of Isoxsuprine**

**a. Testimony Relating to the Discovery of Isoxsuprine During the Search**

Dr. Overly looked again to Ms. Ingram to explain isoxsuprine’s presence in his Hummer. She testified that Ms. Chantal, the owner of an off-track, non-Covered Horse named Brownie, spoke by phone with Dr. Overly’s (unidentified) office receptionist. According to Ms. Ingram, Ms. Chantal told the receptionist that isoxsuprine might be used to treat Brownie’s ringbone, a condition that can cause lameness. A July 17, 2024 appointment was arranged.<sup>162</sup> Ms. Ingram “was kind of concerned, because isoxuprine isn’t something that we typically keep in stock at the clinic anymore.”<sup>163</sup> However, she found “a tub” of isoxsuprine in Dr. Overly’s office and loaded it onto the Hummer so that it would be available to dispense.<sup>164</sup> And off she went to the scheduled appointment, along with Dr. Overly and one of his newer veterinarian colleagues, Dr. Chaparro. Ms. Ingram supposedly did not tell Dr. Overly or Dr. Chaparro about the loaded isoxsuprine.<sup>165</sup>

During the July 17 examination, Dr. Overly discussed with Ms. Chantal treating Brownie with isoxsuprine: “She brought up the isoxsuprine. I told her isoxsuprine was old and antiquated, and I didn’t use it [in] my practice.”<sup>166</sup> He

<sup>162</sup> AB 6354-55 (Ingram).

<sup>163</sup> *Id.* 6355 (Ingram).

<sup>164</sup> *Id.* 6355-56(Ingram). *See also id.* 6131-33, 6229-30 (Overly) (giving his hearsay account, based on his post-search inquiry).

<sup>165</sup> *Id.* 6356-57 (Ingram).

<sup>166</sup> *Id.* 6135 (Overly).

further advised Ms. Chantal that treating Brownie with isoxsuprine “will have no benefit.”<sup>167</sup> A few weeks later, after trying other substances, Dr. Overly prescribed ospfos to treat Brownie.<sup>168</sup>

During the six days after Brownie’s appointment before HIWU’s search, and despite twice a day loading and unloading the Hummer, no one removed the isoxsuprine—a drug that Ms. Ingram and the rest of Dr. Overly’s staff surely knew he never used.<sup>169</sup> Other than testifying that “this particular drug fell through the cracks,” Dr. Overly had no explanation for failure to unload the isoxsuprine.<sup>170</sup>

Throughout the discussion of Brownie with Ms. Chantal, Dr. Overly maintains that he was ignorant of the isoxsuprine on his Hummer. Only after the search disclosed it did Dr. Overly query his staff and learn how isoxsuprine came to be there.<sup>171</sup> But Dr. Overly’s explanation for having isoxsuprine on his Hummer lacks credibility for many reasons.

1. Of those with personal knowledge of the facts, Ms. Ingram is the only one to testify or to submit a witness statement. Neither Ms. Chantal, Dr. Chaparro, nor the unidentified office receptionist offered any evidence corroborating either Chantal’s alleged request or even the alleged July 17, 2024 appointment to

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* 6136 (Overly). *See also id.* 6062 (Corbett).

<sup>169</sup> *Id.* 6226-27, 6230, 6547-48 (Overly). *See id.* 6357 (Ingram).

<sup>170</sup> *Id.* 6231 (Overly).

<sup>171</sup> *Id.* 6131-34, 6208-09 (Overly). *See also id.* 1165, at ¶ 18 (Overly Wit. Stmt.).

examine Brownie. Dr. Overly's failure to produce witnesses with first-hand knowledge of the facts—other than his girlfriend— and his failure to produce corroborating documents permit an adverse inference to be drawn.<sup>172</sup>

2. Dr. Overly's own testimony accounting for the isoxsuprine's availability is implausible. He claimed: "I literally don't use [isoxsuprine] in my practice. . . . [Y]ou could run my computer, you're not going to find a [sic] isoxsuprine for the last 25 years."<sup>173</sup> However, Ms. Ingram found a container of isoxsuprine at Dr. Overly's office. Dr. Overly attributes the isoxsuprine to an order by Dr. Stephanie Smith, "another practitioner in my practice."<sup>174</sup> Predictably, Dr. Smith never testified, and Dr. Overly offered no documents to corroborate the order he asserts she placed.

3. Likewise, Ms. Ingram's testimony lacks credulity. Because isoxsuprine was a special order "red bin" item, Ms. Chantal's request to consider treating Brownie with isoxsuprine "concerned" Ms. Ingram.<sup>175</sup> She would be expected to

<sup>172</sup> 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."); *Graves v. United States*, 150 U.S. 118, 121 (1893) ("[I]f 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); *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 on the issues authorizes, under certain circumstances, an inference or presumption unfavorable to such party.").

<sup>173</sup> AB 6127 (Overly).

<sup>174</sup> *Id.* 6132 (Overly).

<sup>175</sup> *Id.* 6355 (Ingram).

have informed Dr. Overly—if not before loading it, then certainly during the 45 to 60 minute drive to Brownie’s stable.<sup>176</sup> Her explanation for not doing so—“I didn’t think I needed to”—defies common sense.<sup>177</sup> Significantly, Ms. Ingram’s witness statement says *nothing at all* about the isoxsuprine found during HIWU’s search.<sup>178</sup>

Indeed, Ms. Ingram’s testimony is doubly implausible. The isoxsuprine that Ms. Ingram found had a July 2023 expiration date—one year before the Brownie appointment. Dr. Overly’s staff knew that an expired substance could not be administered to a horse, and Ms. Ingram did not testify she missed the expiration information.<sup>179</sup> It is unlikely she would have neglected to bring to Dr. Overly’s attention the expiration of the isoxsuprine she’d found, either before loading it or during the trip to examine Brownie.

4. Dr. Overly’s isoxsuprine comments during the HIWU search similarly lack believability. Dr. Overly testified that, during the July 17 examination, he and Ms. Chantal discussed treating Brownie with isoxsuprine. A few days after that, when HIWU’s investigators asked about the isoxsuprine found in Dr. Overly’s Hummer, Dr. Overly said that he “didn’t know the drug was in the truck, but the tub was older looking. It looked like it been beat up, sitting in the

<sup>176</sup> *Id.* 6093, 6209-10, 6219 (Overly).

<sup>177</sup> *Id.* 6357 (Ingram).

<sup>178</sup> *Id.* 1188-89 (Ingram Wit. Stmt.).

<sup>179</sup> *Id.* 6230-31 (Overly).

back of a truck for a while.”<sup>180</sup> Although the isoxsuprine had a distinctive look, and although the Brownie discussion with Ms. Chantal must have been relatively fresh in Dr. Overly’s mind, he did not “mention the July 17, 2024 appointment or offer any reason why the Isoxsuprine was on his truck during the Search.”<sup>181</sup>

5. Ms. Ingram, of course, knew exactly how the isoxsuprine came to be on the Hummer. But she did not explain its presence to the HIWU investigators either. Asked why not, Ms. Ingram answered: “They didn’t ask.”<sup>182</sup> However, Ms. Ingram had worked for Dr. Overly since 2016, and she doubtless understood the seriousness of his possessing a Banned Substance at Los Alamitos.<sup>183</sup> She also knew isoxuprine was “a red bin item”—used at most infrequently.<sup>184</sup> If, as she maintains, Dr. Overly knew nothing about the isoxsuprine on his Hummer, Ms. Ingram could reasonably be expected to explain its presence to HIWU’s investigators, regardless of whether they asked. Her testimony is not believable.

**b. Documents Offered by Dr. Overly**

Similar to his testosterone proof, the documents Dr. Overly introduced regarding isoxsuprine fail to meet his burden of proof. Those he never introduced themselves discredit the produced material.

<sup>180</sup> *Id.* 6127 (Overly). *See also id.* 6219-20 (Overly) (The tub of isoxuprine “[l]ooked like it [had] been somewhere for a long time . . .”).

<sup>181</sup> *Id.* 2671, at ¶ 25 (Bennett Wit. Stmt.).

<sup>182</sup> *Id.* 6357 (Ingram).

<sup>183</sup> *Id.* 1188, at ¶ 3 (Ingram Wit. Stmt.).

<sup>184</sup> *Id.* 6355 (Ingram).

1. As with testosterone, the report listing off-track patients, regularly provided for Dr. Overly's Wednesday afternoon trips, is missing in action for the Brownie appointment.<sup>185</sup> Worse still, Dr. Overly offered *no* documents at all memorializing the alleged July 17, 2024 appointment and examination of Brownie.<sup>186</sup> The limited documentary evidence regarding Brownie reflects treatment on January 11 and 17, and September 26, 2024. Osphos is listed for the September 26 entry.<sup>187</sup>

The absence of any record covering the claimed July 17, 2024 visit is significant. Although Brownie apparently is a non-Covered Horse, California law requires Dr. Overly to prepare and maintain written records for every horse he *examines* or treats.<sup>188</sup> Dr. Overly testified the relevant records, allegedly prepared by Dr. Chaparro, exist: "Have I seen the record where we saw Brownie and it's on the medical record at the clinic? Yes."<sup>189</sup> But Dr. Overly never offered them into evidence despite knowing full-well that he has the burden of proof on compelling justification.<sup>190</sup> Dr. Overly's explanation—because he did not *bill* for Brownie's

<sup>185</sup> *Id.* 6311 (Overly).

<sup>186</sup> *See id.* 6134 (Overly).

<sup>187</sup> *Id.* 2157 (Corbett treatment exhibit), 6062-63 (Corbett). *See also id.* 2176 (record of Brownie's treatment with osphos on Sept. 25, 2024), 2686-87, at ¶¶ 39-40 (Benson Exp. Rep. with prints of Brownie treatment records).

<sup>188</sup> *Id.* 6216 (Overly). *See id.* 2680-81 (Benson Exp. Rep.) (detailing California recordkeeping requirements).

<sup>189</sup> *Id.* 6214 (Overly). *See also id.* 6133 (Overly) (Dr. Chaparro "actually wrote the case up as she saw the case with me.").

<sup>190</sup> *Id.* 6215 (Overly).

examination, the visit is undocumented—is a distraction, not an explanation.<sup>191</sup> California law’s recordkeeping calls for documenting diagnosis and treatment, regardless of billing.<sup>192</sup> And while not applicable to non-Covered Horses, the recordkeeping requirements under HISA, reflecting sound professional practice, cover examination.<sup>193</sup>

2. Cassandra Corbett, Dr. Overly’s practice manager, introduced detailed records of horses examined.<sup>194</sup> In preparing this summary evidence, Ms. Corbett “looked for records [of administration of isoxsuprine] and was unable to locate any, because that’s a more unusual treatment . . . I actually did pull a report on that one and did not find anything.”<sup>195</sup> Isoxsuprine, she further testified, “is not something that we give at the track. . . . I can’t remember if I’ve ever seen isoxsuprine on the track.”<sup>196</sup> If, as Dr. Overly testified, Dr. Smith ordered the tub of isoxsuprine seized in the search, Ms. Corbett found no record of it. In any event, Ms. Corbett’s evidence confirmed that Dr. Overly had *no* need for isoxsuprine when HIWU discovered it during its search.

<sup>191</sup> *Id.* 6136-37 (Overly).

<sup>192</sup> *Id.* 2679, at ¶ 16 (Benson Exp. Rep.).

<sup>193</sup> *See* Rule 2251(b) (recordkeeping applies to “every Veterinarian who examines or treats a Covered Horse”).

<sup>194</sup> AB 2045-55 (sample veterinary records for horses treated at Los Alamitos), 2157-91 (records of horses treated off-track).

<sup>195</sup> *Id.* 6051, 6067 (Corbett).

<sup>196</sup> *Id.* 6051, 6053 (Corbett).

## B. Summary of Dr. Overly's Proof of Compelling Justification

For both testosterone and isoxsuprine, the evidence from Dr. Overly and Ms. Ingram—testimony and witness statement alike—may appropriately “be taken with a grain of salt.”<sup>197</sup> Dr. Overly’s documentary evidence similarly is unreliable; some of it is more likely than not fabricated. As the Court of Appeals wrote in *Garcia v. Berkshire Life Ins. Co. Of America*,<sup>198</sup> “[a] party’s willingness to fabricate evidence bears on character and credibility, which often is broadly at issue in a given case.” I attach no weight to the evidence from either Dr. Overly or Ms. Ingram, which I find unworthy of belief.<sup>199</sup>

Dr. Overly failed to prove he had a compelling justification for Possession of testosterone or isoxsuprine at Los Alamitos on July 23, 2024. I turn now to his “practice mix” argument, for which he seeks support in Dr. Scollay’s Will Rogers Downs racetrack remarks.

<sup>197</sup> *De Vargas v. Brownell*, 251 F.2d 869, 871 (5th Cir. 1958).

<sup>198</sup> 569 F.3d 1174, 1181 (10th Cir. 2009).

<sup>199</sup> *See generally The Santissima Trinidad*, 20 U.S. 283, 339 (1822) (explaining that “where the party speaks to a fact in respect to which he cannot be presumed liable to mistake,” the principle false in one, false in all, applies with strongest force); *Siewe v. Gonzales*, 480 F.3d 160, 170 (2d Cir. 2007) (“[A] single instance of false testimony may . . . infect the balance of the [party’s] uncorroborated . . . evidence.”); *Parker v. United States*, 801 F.2d 1382, 1385 (D.C. Cir. 1986) (Scalia, J.) (upholding a jury instruction that “[i]f you believe that any witness has willfully testified falsely with respect to any material fact which the witness can not reasonably be mistaken about, then you may, if you deem fit to do so, disregard all or any part of the testimony of that witness or you may accept such portion of his testimony as you find worthy of belief”).

**C. Dr. Overly’s “Mixed Practice” Argument: Another Smokescreen**

**1. Covered and Non-Covered Horses**

As detailed above, depending on the measure used, roughly 65-70% of Dr. Overly’s practice involves attending to non-Covered Horses, while the rest are Covered Horses. The ratio doesn’t differ materially between horses serviced at Los Alamitos and those serviced off-track. That said, the breakdown itself takes us nowhere. It tells us nothing about: (1) whether or not Dr. Overly *needed* to have either testosterone or isoxsuprine on his Hummer at Los Alamitos on July 23, 2024 when HIWU’s search discovered the Banned Substances, and thus was “justified”; or (2) whether or not that “need” was uncommonly pressing, and hence “compelling.”

Dr. Overly offered no proof that he *ever* treated *any* non-Covered Horse at Los Alamitos with either testosterone or isoxsuprine.<sup>200</sup> By contrast, the evidence refutes a likely need for using either Banned Substance there. Under California law, a non-Covered Horse treated with testosterone “cannot race for six months. So, it’s a very . . . seriously addressed medication. It’s not something you give out on a daily basis.”<sup>201</sup> And for isoxsuprine, besides being banned at Los Alamitos, Dr. Overly himself claimed not to use it at all in his practice because he “never

<sup>200</sup> See ORAuPFOF ¶ 5 (Admitting there are “no records to show that he had ever administered Testosterone to a non-Covered Horse at Los Alamitos.”), ¶ 12 (Admitting there are “no records to show that he had ever administered Isoxsuprine to a non-Covered Horse, at Los Alamitos or off-track.”).

<sup>201</sup> AB 6372 (Benson).

really saw a benefit”—essentially the conclusion the FDA itself reached years ago.<sup>202</sup>

Dr. Overly, however, argues what might be called a “better safe than sorry” (or prophylactic) theory of compelling justification. Since a majority of his practice involves non-Covered Horses, on any given day, whether at Los Alamitos or off-track, he had a better than even chance of attending to a non-Covered Horse for *some* veterinary reason.<sup>203</sup> Dr. Overly explained the idea this way:

Q [counsel for Dr. Overly]: And is it fair to say that it would be inconceivable for you to run a practice where you could get to Rolling Hills [off track] and not have what you needed on the truck?

A: I carry all the drugs that I need on my truck all the time in order to practice. . . . [T]here’s no way I could practice. If I don’t have the things I need, then I’m not a very good veterinarian.<sup>204</sup>

This is obfuscation. Dr. Overly’s evidence proves nothing about whether this hypothetical treatment of a non-Covered Horse on any given day would require administering either testosterone or isoxsuprine essentially immediately upon

<sup>202</sup> *Id.* 2685, at ¶ 35 (Benson Exp. Rep.), 6127 (Overly), 6379 (Benson) (The FDA “found it had no efficacy.”).

<sup>203</sup> *See id.* 1166, ¶ 21, 1170, at ¶ 42 (Overly Wit. Stmt.).

<sup>204</sup> *Id.* 6176 (Overly). *See also id.* 1170, at ¶ 43 (Overly Wit. Stmt.) (“Perhaps HISA/HIWU did not think this through, but there is *always* a need (and what the Rules refer to as compelling justification) for veterinarians like me, to carry substances deemed banned by HISA/HIWU at Los Alamitos prophylactically and in preparation for possible or intended use in Non-Covered practice.”) (emphasis added); OObR. at 5 (Because a majority of his practice involves non-Covered Horses, Dr. Overly “had compelling justification to carry and possess legal medications at Los Alamitos for use or intended use in his Non-Covered practice.”).

diagnosing the condition requiring treatment. Again, the evidence overwhelmingly refutes his argument.

Testosterone and isoxsuprine have limited, if any, uses in an equine veterinary practice, and even where indicated, treat chronic, not exigent, conditions.<sup>205</sup> Testosterone, for example, can be administered “the next day, and it won’t . . . necessarily affect the outcome for that horse.”<sup>206</sup> Moreover, Dr. Overly’s own evidence shows *no* use of testosterone at all at Los Alamitos in 2024.<sup>207</sup> And the testosterone injections that Dr. Overly gave Cosmo were “incredibly sporadic”—four times over roughly a one year period.<sup>208</sup> As Dr. Benson testified: “The testosterone could [have] been picked up at the end of . . . the Los Alamitos day and brought to Cosmos, if that was the intended purpose.”<sup>209</sup> Regarding isoxsuprine, as noted, Dr. Overly dismissed the substance as ineffective and consequently didn’t use it anyway.

In all events, Dr. Overly’s office is “adjacent” to Los Alamitos.<sup>210</sup> If there were a need, however unlikely, to administer testosterone or isoxsuprine to a horse

<sup>205</sup> AB 2675-76, at ¶¶ 7(a) & (c), 2679-80, at ¶¶ 18-20, 2685, at ¶ 36 (Benson Exp. Rep.), 6367, 6374-75 (Benson).

<sup>206</sup> *Id.* 6375 (Benson).

<sup>207</sup> *See id.* 1197-2043 (Corbett Ex. 1 listing 19,927 treatments at Los Alamitos in 2024), 5994-95, 6028 (Ex. 1 is “all strictly racetrack. All of these treatments are just racetrack . . . Los Alamitos[.]”), 6052 (Corbett did not “recall seeing any” records of testosterone treatment. “[I]f I found anything, I was going to just highlight it.”) (Corbett).

<sup>208</sup> *Id.* 6381 (Benson).

<sup>209</sup> *Id.* 6382 (Benson).

<sup>210</sup> *Id.* 6094, 6124-25 (Overly).

at Los Alamitos, Dr. Overly could obtain the substance from his office with minimal inconvenience. Besides that, Dr. Overly regularly services his off-track patients on Wednesday afternoons, after returning from Los Alamitos.<sup>211</sup> So, loading his Hummer specifically for those off-track visits, based on the appointments for the trip, should be a routine practice: “it is possible, yes.”<sup>212</sup> In fact, the day of the search here—July 23, 2024—was a Tuesday; Dr. Overly could have added either testosterone or isoxsuprine to his Hummer if there had been any genuine need to use either substance off-track on Wednesday afternoon. Finally, despite ceasing to include testosterone and isoxsuprine on his trips to Los Alamitos since HIWU’s search in July 2024, Dr. Overly is “able to nonetheless meet [his] ethical obligations as a veterinarian at Los Alamitos.”<sup>213</sup>

Dr. Overly’s better-safe-than-sorry argument is meritless. The mixed nature of his practice does not demonstrate any “justification”—much less a “compelling” one—that could excuse his Possession of testosterone and isoxsuprine at Los Alamitos on July 23, 2024.

Although Dr. Overly’s mixed practice evidence fails to satisfy his burden of proof, I do not reject this approach altogether.<sup>214</sup> A veterinarian’s practice might skew so heavily to non-Covered Horses that demonstrated use of a Banned

<sup>211</sup> *Id.* 6093, 6203-04, 6310-11 (Overly).

<sup>212</sup> *Id.* 6311 (Overly) (“[W]e always go back” to the office from Los Alamitos so that Dr. Overly can receive “a report of what scheduled clients I’m going to see on the outside . . .”).

<sup>213</sup> *Id.* 6277 (Overly).

<sup>214</sup> *See id.* 5964 (Scollay).

Substance, together with other evidence of diligent compliance efforts, could permit finding compelling justification. Dr. Scollay herself admitted as much, positing the practices of two different veterinarians. One had “almost exclusively racetrack practice[]”—“90 plus percent”—“but d[id] the odd pet horse, backyard horse for friends or neighbors.”<sup>215</sup> The other had “one or two [racetrack] clients, but the majority of the practice is out in the country . . . .”<sup>216</sup> The veterinarians thus have “very different practices, and what they need/should carry in their vehicles is largely based on the population of horses that they’re caring for.”<sup>217</sup>

This is not such a case, however. Dr. Overly’s patient base of Covered Horses, both at Los Alamitos and off-track, is roughly 30%—a sizable share of his practice population—and other factors point against his need for either testosterone or isoxsuprine—as does the veracity of his evidence itself. This, then, takes us to Dr. Scollay’s remarks. As will be seen, however, they do not move the needle in favor of compelling justification.

## 2. Dr. Scollay’s Will Rogers Downs Racetrack Remarks

To reiterate, Will Rogers Downs racetrack in Oklahoma was the site of one of Dr. Scollay’s 2023 presentations to educate industry participants on HISA’s soon-to-be-effective ADMC Program. An audience member recorded Dr. Scollay’s

<sup>215</sup> *Id.* 5933 (Scollay). *See also* ORAuPFOF ¶ 23 (admitting Dr. Scollay’s testimony “that the specific intended use of Banned Substances must be considered in every context to determine if there is a need to have it at the racetrack”).

<sup>216</sup> AB 5933 (Scollay).

<sup>217</sup> *Id.* *See also id.* 5972-73 (Scollay) (proof of justification is “practice-specific”).

remarks. Dr. Overly did not attend the presentation, or even know there was a video of Dr. Scollay's remarks.<sup>218</sup> However, he seeks to rely on them as part of his compelling justification proof.

While researching HISA's impact and reading the new Rules, Dr. Overly was "[d]efinitely" concerned about the Possession prohibition in Rule 3214(a) and the "banned substance aspect of HISA regulations."<sup>219</sup> He explained further: "[T]hey're talking about drugs being banned that had never been banned before, and . . . can be used on uncovered horses, but can't be used on covered horses. I mean, it gets a little tricky."<sup>220</sup>

At the arbitration hearing, Dr. Overly testified that this "research" brought to his attention "statements made by Dr. Mary Scollay."<sup>221</sup> He learned "[b]asically that HISA/HIWU had no jurisdiction over the veterinarian that was practicing on uncovered horses."<sup>222</sup> That said, he testified to nothing else about the contents of what it was he supposedly saw. His counsel then had him read the following excerpts of Dr. Scollay's Will Rogers Downs remarks, quoted in *HIWU v. Perez*, a prior HISA case. Her remarks came in response to a question about veterinarians whose practice included "farm work or non-Covered Horses":

<sup>218</sup> *Id.* 6193-94 (Overly); ORAuPFOF ¶¶ 19-20.

<sup>219</sup> AB 6104-05, 6512 (Overly).

<sup>220</sup> *Id.* 6105 (Overly).

<sup>221</sup> *Id.* 6106 (Overly).

<sup>222</sup> *Id.* 6107 (Overly).

If the veterinarians are practicing also on a population of non-covered horses, they are taking care of quarter horses, or they've got a country practice part time, they're able to possess banned substances because we don't have control over those horses, and so to the extent that they want to use bisphosphonates on a non-covered horse, we can't ban them from possessing them. We can't penalize people for something that you don't have control over. You know, let's just say, because we have the ability to investigate, if the story starts to get a little weird or a little extreme, you're going to get more than a raised eyebrow. But at the end of the day, if someone's practice is out in the country, we don't have the authority to control the medications they administer or carry . . . carry for non-covered horses, the regulation addresses is there is a justification for them to be in possession of a banned substance, and certainly a practice incorporates non-covered horses.<sup>223</sup>

After reading from *Perez*, Dr. Overly testified that the “statement applied” to him.<sup>224</sup> Elaborating, he testified that, because non-Covered Horses were the “predominance of my practice. . . if I was working on non-covered horses, I was entitled to carry the medication that I'm allowed to legally have.”<sup>225</sup>

There are several reasons for discounting the veracity of Dr. Overly's testimony, however:

First, Dr. Overly “think[s]” he *may* have read about remarks by Dr. Scollay remarks in an unidentified blog at some point before the HIWU search in 2024.<sup>226</sup> He recalled no details concerning the blog or how it came to his attention.

<sup>223</sup> *Id.* 6108-09 (Overly) (reading from *HIWU v. Perez*, JAMS Case No. 1501000589, at ¶ 2.29(2) (Oct. 9, 2023) (AB 528)). *See also* OObR. at 4; AuPFOF ¶ 20; AB 5944 (Scollay).

<sup>224</sup> AB 6109 (Overly).

<sup>225</sup> *Id.* 6111-12 (Overly).

<sup>226</sup> *Id.* 6189-90 (Overly). *See also id.* 6193 (“I believe that I read it on a blog at some point in time.”).

Second, Dr. Overly testified he did not see the excerpts of Dr. Scollay’s recorded remarks, quoted in *Perez*, until his counsel had “brought [them] to his attention,” and that was *not* “before July 2024.”<sup>227</sup> But his testimony is *inconsistent* with his pre-hearing witness statement:

In the course of my due diligence and through my review of industry blogs and general industry discussions, *prior to* July 2024, I became aware of educational presentations given by Dr. Mary Scollay and statements made by Dr. Scollay, including a statements [sic] made on March 24, 2023, at Will Roger’s [sic] Downs.<sup>228</sup>

Third, in seeking to explain the testosterone found in Dr. Overly’s Hummer, his counsel’s follow-up letter to HIWU referred to “educational policy guidance” from Dr. Scollay.<sup>229</sup> But despite Dr. Overly’s witness statement claim to have read about Dr. Scollay’s remarks *before* the HIWU search, his counsel’s letter did *not* assert his client relied on those remarks.

Fourth, at the time of his research, Dr. Overly himself testified:

I was actually excited for HISA to come in existence. . . . I thought it was a great idea, and championed it . . . when I was asked about it. Matter of fact, I felt like getting rid of some of the CHRB rules and having a more concise data would be actually advantageous.<sup>230</sup>

<sup>227</sup> *Id.* 6108 (Overly).

<sup>228</sup> *Id.* 1163, at ¶ 7 (emphasis added) (Overly Wit. Stmt.).

<sup>229</sup> *Id.* 167 (counsel’s letter).

<sup>230</sup> *Id.* 6097 (Overly).

Dr. Overly also knew the position Dr. Scollay had at HIWU, and he considered her an authoritative source of information: “If I couldn’t trust the scientific director for HISA, who can I trust,” he asked rhetorically.<sup>231</sup>

Despite this, Dr. Overly never reached out directly to Dr. Scollay or anyone else at HIWU to discuss his mixed practice.<sup>232</sup> As Dr. Overly put it: “I felt like that I was in compliance. I felt like that. I never had an issue so I didn’t feel the need to have to reach out at any point in time.”<sup>233</sup> At the same time, however, Dr. Overly testified he looked to the CHRB’s chief veterinary officer for guidance.<sup>234</sup>

With the new ADMC Program taking effect, Dr. Overly could reasonably have figured out—if he did not already know—how to reach Dr. Scollay or others at HIWU to discuss compliance.<sup>235</sup> His explanation for not contacting Dr. Scollay directly—“I didn’t know that Dr. Scollay was approachable”—is not believable.<sup>236</sup> It is also inconsistent with earlier testimony. Asked why he put “so much weight” on Dr. Scollay’s Will Rogers Downs remarks, Dr. Overly answered: “She’s the director of science for HISA/HIWU. She’s supposed to be the person *that you ask*.”<sup>237</sup>

<sup>231</sup> *Id.* 6107 (Overly). *See also id.* 6110, 6195-96 (Overly).

<sup>232</sup> *Id.* 6197-98 (Overly). *See also id.* 6470 (Scollay) (Scollay did not recall any contact with Overly).

<sup>233</sup> *Id.* 6201 (Overly)

<sup>234</sup> *Id.* 6198-200 (Overly).

<sup>235</sup> *Id.* 6097-98, 6191-92, 6198-99 (Overly).

<sup>236</sup> *Id.* 6197-98 (Overly).

<sup>237</sup> *Id.* 6171-72 (Overly) (emphasis added).

Fifth, describing the action he took in anticipation of the ADMC Program becoming effective, Dr. Overly testified he removed “bisphosphonates . . . from the truck,” but could not recall any other substance similarly removed.<sup>238</sup>

Bisphosphonates, which can be used to clean and rebuild bone, are among the substances prohibited under the ADMC Program.<sup>239</sup> They are the one substance Dr. Scollay mentioned in the excerpted remarks that Dr. Overly was asked to read at the arbitration.<sup>240</sup> Coincidence? I am skeptical.

The totality of the evidence suggests that Dr. Overly’s testimony concerning Dr. Scollay’s public remarks is unworthy of belief. I give no weight to his testimony.<sup>241</sup>

In all events, Dr. Overly over-reads Dr. Scollay’s remarks in arguing they meant that any Veterinarian whose practice included non-Covered Horses would be entitled to possess Banned Substances.<sup>242</sup> Dr. Scollay did not offer any such “blanket exception” in her Will Rogers Downs remarks or in any other public

<sup>238</sup> *Id.* 6221-22, 6224 (Overly).

<sup>239</sup> Rule 4117(a). *See Shell II*, 2025 WL 1784696, at \*6.

<sup>240</sup> AB 6109 (Overly).

<sup>241</sup> *See, e.g., Runyon v. United States*, No. 4:15cv108, 2024 WL 2992712, at \*29 (E.D. Vir. June 14, 2024) (testimony that is “incredible” and “unreliable” is entitled to “little to no weight”); *United States v. Granado*, Crim. No. 09-471-6, 2012 WL 12888670, at \*7 (E.D. Pa. Feb. 9, 2012) (where an expert’s diagnosis was “utterly incredible,” “no weight” was given to his testimony); *Massachusetts Medical Soc. v. Dukakis*, 637 F. Supp. 684, 696 (D. Mass. 1986) (testimony was so patently incredible that it was given “no weight whatsoever”), *aff’d*, 815 F.2d 790 (1st Cir. 1987). *See also Robinson v. Colvin*, No. 11 C 0584, 2013 WL 1914317, at \*20 (N.D. Ill. May 8, 2013) (Of course, lies and inconsistent statements provide a valid basis for finding a witness not credible.”).

<sup>242</sup> *See, e.g., ORBr.* at 2-3.

presentation.<sup>243</sup> Much the contrary, she caveated her guidance: “we have the ability to investigate, if the story starts to get a little weird or a little extreme, you’re going to get more than a raised eyebrow.”<sup>244</sup> As she also testified, “you might get more than a raised eyebrow. You might get charged with a doping violation.”<sup>245</sup> Explaining further, Dr. Scollay stated that, whether Possession of a Banned Substance can be excused is “specific to that [veterinary] practice . . . because no two practices are exactly alike . . . . So each practice has its own client base, and it is unique to that practice.”<sup>246</sup>

Dr. Overly protests nonetheless that neither the Authority nor HIWU issued any guidance on “compelling justification” or any further discussion of the defense beyond Dr. Scollay’s remarks.<sup>247</sup> But that complaint rings hollow. As the District Court for the District of New Mexico recently wrote:

[T]o comport with Rule 3214(a) is by refraining from the conduct it proscribes, i.e. possessing banned substances or banned methods. Those substances are enumerated in the Authority’s “Prohibited List,” leaving scant room for confusion over what can and cannot be possessed. *See* HISA Rule Series 4000.

. . . .

The Authority’s decision not to define “compelling justification” does not alter the Court’s conclusion. Permitting possession when there is a compelling justification for doing so is an exception to the rule.

<sup>243</sup> *See* AB 5929 (Scollay).

<sup>244</sup> *Id.* 5949, 6109 (Scollay).

<sup>245</sup> *Id.* 5929 (Scollay); ORAuPFOF ¶ 21.

<sup>246</sup> *See* AB 5953-54, 5956-57 (Scollay). *See also id.* 5935-36 (Scollay) (discussing specific considerations Scollay considers if asked for guidance).

<sup>247</sup> *Id.* 6474-75 (Scollay). *See, e.g.,* ORBr. at 7-8

Veterinarians can always comply with Rule 3214 by not possessing the substances it prohibits. Because Rule 3214 imposes strict liability for possession, the scenarios where the “compelling justification” exemption applies will be a small minority.<sup>248</sup>

The District Court’s intuitive conclusion—that compelling justification cases “will be a small minority”—accords with the facts in this case. Dr. Scollay, who regularly responds to veterinarian questions, testified: “I have yet to have a veterinarian tell me that any one of [the Banned Substances the veterinarian raised] constitutes an emergency drug that they have to have immediately on hand.”<sup>249</sup>

In sum, nothing Dr. Scollay said publicly can reasonably be read to suggest Dr. Overly had—or reasonably could believe he had—any entitlement to escape Rule 3214(a)’s Possession prohibition just because he treated non-Covered Horses. Instead, he has the burden of proving, by a preponderance of the evidence, that he had a compelling justification to have testosterone and isoxsuprine when HIWU searched his Hummer on July 23, 2024. On that score, he has failed.

I turn next to Dr. Overly’s constitutional argument, which requires only brief treatment. After that, I discuss sanctions, including the defenses of No Fault or Negligence (“NF”) and No Significant Fault or Negligence (“NSF”).

<sup>248</sup> *Scott*, 2025 WL 2987598, at \*7.

<sup>249</sup> AB 5968 (Scollay).

**D. Dr. Overly’s Constitutional Challenge to Rule 3214(a) Fails**

Dr. Overly argues that Rule 3214(a)’s “compelling justification” defense is “vague on its face” and “void,” thereby violating his “Fifth and Fourteenth Amendment Due Process rights . . . .”<sup>250</sup> This argument is not properly raised on this review, and in any event lacks merit.

FTC Rule 1.146(a)(1) 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.”<sup>251</sup> Neither Dr. Overly’s pre-hearing or post-hearing papers before the Arbitrator raised the constitutional arguments now asserted.<sup>252</sup> Likewise, Dr. Overly never argued it in the arbitration hearing. No good cause for these failures is argued in his briefing on this review. Regardless, the argument also fails on the merits.

In *Shell II*, I rejected this same argument—that the compelling justification defense was unconstitutionally vague.<sup>253</sup> Nothing that Dr. Overly now asserts persuades me that I should revisit that ruling. The *Scott* court has since similarly rejected the argument in denying the veterinarian’s preliminary injunction

<sup>250</sup> OOB. at 1, 9-10; OPCOL ¶¶ 14-15.

<sup>251</sup> Regarding the need to construe “the Authority” to refer here to the “Arbitral Body,” see *Matter of Juarez-Rufino*, No. 9444, 2025 FTC Lexis 122, at \*29 n.120 (ALJ Dec. 2, 2025).

<sup>252</sup> See AB 1123 (pre-hearing brief), 3112 (post-hearing brief).

<sup>253</sup> 2025 WL 1784696, at \*27-28.

motion: “Plaintiffs are not likely to succeed on the merits of their vagueness claim.”<sup>254</sup>

## VII. SANCTIONS ISSUES AND THEIR RESOLUTION

### A. HIWU Properly Charged Dr. Overly with Two Possession ADRVs

HIWU charged Dr. Overly with Possession of two Banned Substances, for which it sought individual sanctions “for each first-time Violation of ADMC Program Rule 3214(a).”<sup>255</sup> Dr. Overly argues that, although HIWU discovered two Banned Substances during its search, the principle of proportionality—requires that only a single, combined sanction could be imposed.<sup>256</sup> This sports law principle counsels that “the severity of a penalty must be in proportion with the seriousness of the infringement.”<sup>257</sup> The Authority, however, maintains that: (1) HIWU properly charged two Possession ADRVs; (2) the proportionality principle does not apply on the facts here; and (3) per violation sanctions may be imposed, resulting in consecutive periods of Ineligibility and aggregated fines.<sup>258</sup>

The parties’ dispute revolves around my decision in *Shell II*, where I construed HIWU’s charging authority under Rule 3228(d). The Rule provides as follows:

<sup>254</sup> 2025 WL 2987598, at \*7.

<sup>255</sup> AB 123 (Charge Letter).

<sup>256</sup> *See, e.g.*, OPCOL ¶ 19 (citing to AB 6716-17, ¶¶ 7.7.1.-.5, (Corrected Final Decision), where the issue is discussed); ORBr. at 4-6.

<sup>257</sup> *W. v. FEI*, CAS 99/A/246, at ¶ 31 (May 11, 2000).

<sup>258</sup> AuPFOF ¶¶ 26-29; AuOBr. at 25-26.

(d) Violations involving both a Banned Substance or Method and a Controlled Medication Substance or Method.

Where a Covered Person is found, based on a common set of facts, to have committed a (1) violation involving one or more Banned Substance(s) or Banned Method(s), and (2) a violation involving one or more Controlled Medication Substance(s) or Controlled Medication Method(s), they shall be treated as separate violations, but shall be adjudicated together in consolidated proceedings pursuant to the procedure that applies to Anti-Doping Rule Violations under the Arbitration Procedures.

In *Shell II*, I construed Rule 3228(d) to permit HIWU to charge, as “separate violations,” a Veterinarian’s Possession of four Banned Substances arising from “a common set of facts”—there, as here, a single search.<sup>259</sup> While anchored in Rule 3228(d), this construction finds support in sports law generally.<sup>260</sup>

But I also held, based on the facts of *Shell II*, that the proportionality principle precluded imposing sanctions for each of the four proven ADRVs, and instead permitted issuance of single, combined sanction award.<sup>261</sup> In Dr. Overly’s case, the Arbitrator ruled that the *Shell II* analysis applied and thus awarded a combined sanction.<sup>262</sup> I disagree.

I adhere to the construction of Rule 3228(d) that I reached in *Shell II*.

HIWU has authority to bring two Possession charges, which were adjudicated in a

<sup>259</sup> 2025 WL 1784696, at \*33-34. *See also* Rules 3226(c), 3228, 3323(d), 3328.

<sup>260</sup> *See, e.g., Matter of Vogg*, FEI 2022/HD02, at ¶ xxvi, n.16 (Dec. 20, 2022) (two violations, presence and use of single substance, were “considered together as one single first violation”); *Decision of The Athletics Integrity Unit in the Case of Ms Sitora Khamidova* ¶ 24 (Mar. 6, 2024) (multiple violations involving different drugs “were committed simultaneous” and were “considered together as a single first” violation).

<sup>261</sup> 2025 WL 1784696, at \*34.

<sup>262</sup> AB 6717, at ¶ 7.7.5 (Corrected Final Decision).

single arbitration. *Shell II*, however, does not, as Dr. Overly contends, mean that the proportionality principle automatically applies and thus resolves whether combined or separate sanctions may be imposed when, as here, multiple ADRVs are proven. “Two” is, after all, the least number of multiple ADRVs that can trigger subsection (d) to begin with. And the proportionality principle is a case law-derived *exception*. As such, it should not become the norm.

Much the contrary, facts matter. There is a meaningful difference between: (1) four consecutive Ineligibility periods, each of 24 months, imposed as a career servicing Covered Horses sunsets—facts in *Shell II*—and (2) two potentially consecutive periods earlier in a Veterinarian’s career, where the practice involves mostly non-Covered Horses—facts in this case. While that alone may not be enough, whether to apply the proportionality principle may also take account of the facts overall.

*First*, Dr. Overly maintains that, although he had multiple vials of testosterone—a Banned Substance—on his truck when HIWU searched it at Los Alamitos, he did nothing wrong even though: (1) he had last used testosterone to treat non-Covered Horse Cosmo four months earlier; (2) he had no imminent treatment appointment for Cosmo, but instead would not again treat the horse for another week; (3) during that time his staff repeatedly attended to the substances on his Hummer; and (4) the testosterone found on his Hummer far exceeded that needed for Cosmo’s next treatment.

*Second*, Dr. Overly similarly contends that he did nothing wrong by having on his truck a tub of isoxsuprine—also a Banned Substance—that: (1) he did not use in his practice and did not know was on his truck; but that (2) his girlfriend had put there without telling Dr. Overly; (3) supposedly, for an appointment to examine Brownie, another non-Covered horse; (4) for which no appointment or examination records were introduced; and that (5) was never used to treat Brownie anyway.

For each Banned Substance, Dr. Overly’s defense is incredulous. Taken as a whole, his evidence simply diverts attention from these two implausible scenarios.

*Third*, Dr. Overly’s lack of candor includes trying to whitewash his past. His witness statement asserts: “prior to the Horseracing Integrity and Safety Act of 2020 . . . coming into effect, in approximately 27 years of practice, I had *never been charged* for any violation at Los Alamitos Racecourse in Cypress, California.”<sup>263</sup> However, in 2018, he was adjudicated to have violated CHRB “Rules #1843(A) & (D) (Medication, Drugs and Other Substances), #1843.1(B) (Prohibited Drug Substances) and #1844(F)(1) (Authorized Medication-Betamethasone (66pg/mL) in Excess of Authorized Level (10.0pg/mL).”<sup>264</sup> He has three other adjudicated CHRB Rule violations.<sup>265</sup> Dr. Overly further has been charged in a 15-count proceeding

<sup>263</sup> *Id.* 1162, at ¶ 5 (Overly Wit. Stmt.) (emphasis added). *See also id.* 6075, 6079 (Overly) (Dr. Overly has practiced as a veterinarian since 1997).

<sup>264</sup> *Id.* 3099 (2018 CHRB Stewards Ruling), 6294-95 (Overly).

<sup>265</sup> *Id.* 3101, 3103, 3105 (2009 and 2011 CHRB Stewards Rulings). *See generally id.* 6284-95 (Overly).

before the California Veterinary Medical Board, which includes a count alleging administration of Ritalin to 25 horses between September 2019 and July 2020, arising from conduct at Los Alamitos.<sup>266</sup>

Dr. Overly's witness statement is untrue. He not only has been "charged," but also adjudged liable, for violations arising from his Los Alamitos practice.

Taking account of all the evidence in this case, the basis for applying the proportionality principle to favor Dr. Overly escapes me. I will not do so.

This proceeding calls for *de novo* review of the record.<sup>267</sup> An ALJ is authorized to "affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part" the sanctions imposed, and to "make any finding or conclusion that, in [its] judgment . . . is proper and based on the record."<sup>268</sup> This authority includes determining whether the sanctions are "an abuse of discretion, or otherwise not in accordance with law."<sup>269</sup> Applying these review criteria to the facts here, I cannot uphold awarding a single, combined set of sanctions for the two proven ADRVs. Sanctions must be imposed individually for each of the two proven ADRV Possession violations.

<sup>266</sup> *Id.* 2939-40, at ¶ 70 (Mar. 13, 2025 California Vet. Bd. First Amended Accusation), 6284-85, 6287, 6289 (Overly).

<sup>267</sup> 15 U.S.C. § 3058(b)(1); FTC Rule 1.146(b)(3).

<sup>268</sup> 15 U.S.C. § 3058(b)(3)(A); FTC Rule 1.146(d)(3).

<sup>269</sup> 15 U.S.C. § 3058(b)(2)(A)(iii). *See also* FTC Rule 1.146(b)(3).

Next, I discuss whether either sanctions award may be adjusted for NF or NSF on the part of Dr. Overly, followed by whether consecutive Ineligibility periods and aggregated damages may be imposed.

**B. Sanctions Should Not be Eliminated or Reduced for Either No Fault or Negligence (“NF”), or for No Significant Fault or Negligence (“NSF”)**

By way of summary, to *eliminate* entirely the sanctions that may be imposed for an ADRV, Dr. Overly has the burden of proving NF on his part.<sup>270</sup> Failing proof of NF, Dr. Overly may *reduce* the sanctions by proving NSF.<sup>271</sup> Both equine sporting association codes and those in sports generally include analogous provisions.<sup>272</sup>

While ruling that only a single, combined sanctions award was appropriate, the Arbitrator also considered Dr. Overly’s NF and NSF arguments. After extended analysis, the Arbitrator concluded that NF did not apply and that, for NSF, the only mitigating factors were the absence of evidence that “Dr. Overly ever intended to or did treat any Covered horse” with either testosterone or isoxsuprine or “intended to cheat.”<sup>273</sup> Holding that “Dr. Overly may only benefit

<sup>270</sup> Rule 3224(a).

<sup>271</sup> Rule 3225(a). *See generally Shell II*, 2025 WL 1784696, at \*40-46; *Poole*, 2023 WL 8435860 at \*2; *Matter of Lewis*, No. 9434 (FTC ALJ Oct. 17, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/611976.2024.10.17\\_administrative\\_law\\_judge\\_decision\\_on\\_application\\_for\\_review.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/611976.2024.10.17_administrative_law_judge_decision_on_application_for_review.pdf).

<sup>272</sup> *See, e.g.*, Federation Equestre Internationale (FEI) Equine Anti-Doping and Controlled Medication Regulations, Article 2.6 (4th ed. 2025); World Anti-Doping Agency (WADA) Code, Article 2.6 (2021).

<sup>273</sup> AB 6722, at ¶ 7.8.16 (Corrected Final Decision).

from a very slight reduction” in fault, the Arbitrator awarded “a very modest 1 month reduction” from the otherwise applicable 24-month Ineligibility period.<sup>274</sup>

Dr. Overly argues that he proved NF and should receive no sanction at all.<sup>275</sup> Alternatively, he contends that his fault was “insignificant” and, therefore, the Arbitrator should have reduced sanctions “to the minimum” permitted under NSF analysis.<sup>276</sup> The Authority agrees the Arbitrator correctly rejected Dr. Overly’s NF argument, and accepts the one-month Ineligibility reduction, arguing, however, that two 23-month Ineligibility periods, running consecutively, should be imposed and the fine increased from \$25,000 to \$35,000.<sup>277</sup>

Again, reviewing the record *de novo*, I agree the Arbitrator correctly rejected NF as a defense. However, on NSF, I conclude the Arbitrator was too lenient in awarding even a one-month reduction in the Ineligibility period, and that this error is correctable as either an abuse of discretion or not otherwise in accordance with law.

### 1. Overview of Dr. Overly’s NF and NSF Arguments

Under Rule 3224(b), NF applies only “in exceptional circumstances.” NSF, provided for in Rule 3225, itself imports “the criteria” for NF. Further, NSF applies “where the circumstances are truly exceptional and not in the vast

<sup>274</sup> *Id.* 6722, at ¶¶ 7.8.17-18 (Corrected Final Decision).

<sup>275</sup> OPCOL ¶ 16; OOBBr. at 11; ORBr. at 4.

<sup>276</sup> OPCOL ¶ 18; OOBBr. at 12.

<sup>277</sup> AuPFOF ¶¶ 30-35; AuPO ¶¶ d-e; AuOBr. at 16, 22-25.

majority of cases.”<sup>278</sup> Having carefully reviewed the testimony and documents comprising the record, I find that the “exceptional circumstances” filter for both NF and NSF is not met. The version of the facts Dr. Overly has introduced to support his arguments are not only unpersuasive, but—more likely than not—contrived. I reach this assessment based on the evidence as a whole, which I have already detailed. Too many tiles in the evidentiary mosaic Dr. Overly seeks to create don’t fit together—or are missing entirely.

In *Pope v. Federal Express Corp.*,<sup>279</sup> the Court of Appeals held that dismissal of the case with prejudice was appropriate where the plaintiff manufactured evidence and gave untruthful testimony: “When a litigant’s conduct abuses the judicial process, the Supreme Court has recognized dismissal of a lawsuit to be a remedy within the inherent power of the court.”<sup>280</sup> As the Court similarly wrote in *REP MCR Realty, L.L.C. v. Lynch*,<sup>281</sup> “when a litigant fabricates critical evidence, the interests of the judicial system militate strongly in favor of dismissal of the suit so as to deter all litigants from such misconduct in the future.”<sup>282</sup>

<sup>278</sup> *Ali Alabbar v. FEI*, CAS 2013/A/3124, at ¶¶ 12.17(1), 12.18 (Sept. 27, 2013) (cleaned up).

<sup>279</sup> 974 F.2d 982 (8th Cir. 1992).

<sup>280</sup> *Id.* at 984.

<sup>281</sup> 363 F.Supp.2d 984 (N.D. Ill. 2005).

<sup>282</sup> *Id.* at 1012 (citing authorities). See also *Jimenez v. Madison Area Tech. Coll.*, 321 F.3d 652, 657 (7th Cir. 2003) (dismissal for evidence of fabrication is appropriate “to deter repetition of the misconduct or to deter similar conduct by third parties”); *Carroll-Harris v. Wilkie*, No. 2:17-cv-11711, 2019 WL 2205851, at \*7 (E.D. Mich. May 22, 2019) (“Submission of falsified evidence substantially prejudices an opposing party by casting doubt on the veracity of all of the culpable party’s submissions throughout litigation,” and” is “prejudicial to the system of civil justice

The integrity of HISA arbitration proceedings and FTC review proceedings demand no less. The facts here call for an analogue to dismissal, bearing in mind that the Authority seeks to impose greater sanctions than those awarded by the Arbitrator. That analogue includes determining that Dr. Overly’s NF and NSF defenses fail as a matter of law. A contrived set of facts simply cannot satisfy the “no” element, which is a condition of each defense. Nevertheless, as an alternative ground for my sanctions rulings, I will analyze the NF and NSF defenses for the two Banned Substances.

**2. NF: Applying Rule 3324**

To establish no fault or negligence for a Possession ADRV, Dr. Overly must establish “that he . . . did not know or suspect, and could not reasonably have known or suspected, even with the exercise of utmost caution, that he . . . had committed” the violation.<sup>283</sup> Once again, by arguing that he exercised the utmost caution, Dr. Overly is trifling with the Authority and this Court.

Under Rule 3210(c), as a Covered Person, Dr. Overly is “responsible for knowing” what constitutes an ADRV and what Banned Substances the Rules cover.<sup>284</sup> Dr. Overly admittedly read the Rules, and it is also undisputed that

generally because it involved a fraud on the court.”) (cleaned up); *Slate v. Am. Broadcasting Cos., Inc.*, 941 F.Supp.2d 27, 52 (D.D.C. 2013) (Dismissal directed to “adequately punish the serious and multifarious conduct of the plaintiff in this action and deter similar conduct by future litigants.”).

<sup>283</sup> Rule 1020 (definitions).

<sup>284</sup> *See also* Rule 3040(a) (Covered Persons have “the personal responsibility” to know and comply with the ADMC “Protocol and related rules at all times.”); AB 6537 (Overly) (Dr. Overly read the Rules, including that covering Possession, before they took effect).

Dr. Overly knew the testosterone that HIWU’s search found was loaded on his Hummer.<sup>285</sup> Caught with a performance-enhancing Banned Substance, Dr. Overly’s reaction was to joke about it.<sup>286</sup>

For the isoxsuprine, Dr. Overly claims not to have known Ms. Ingram loaded the substance onto the vehicle in response to the request of Ms. Chantal, Brownie’s owner. Under the Rules and sports law decisions generally, Ms. Ingram’s knowledge and conduct are imputed to Dr. Overly. “There is no more consistent theme in CAS jurisprudence on anti-doping than that the duty of utmost caution or due diligence—the phrases are in context interchangeable—is a nondelegable duty . . . .”<sup>287</sup> As a Covered Person, Dr. Overly is responsible for the conduct of Ms. Ingram, regardless of whether or not he knew she had loaded isoxsuprine on his Hummer.<sup>288</sup> To paraphrase the Panel’s ruling in *Decision of the FEI Tribunal (Lunatica)*,<sup>289</sup> Dr. Overly had a “duty . . . to make inquiries whether” his Hummer “was free of Prohibited Substances, and put measures in place to assure that he is informed of all medications” loaded onto his vehicle.<sup>290</sup>

<sup>285</sup> AB 6128, 6231-32,6184-86 (Overly).

<sup>286</sup> *Id.* 6129, 6235-36 (Overly).

<sup>287</sup> *Stroman v. FEI*, CAS 2013/A/3318, at ¶ 72 (Mar. 14, 2014). *See also Al Rumaithi v. FEI*, CAS 2015/A/4190, at ¶ 44 (Mar. 1, 2016). *Cf.* Rule 3212(a) (stating the “personal and non-delegable duty” to “ensure that no Banned Substance is present in the body of” Covered Horses).

<sup>288</sup> *See, e.g., Al Nahyan v. FEI*, CAS 2014/A/3591, at ¶¶ 231, 235 (June 8, 2015).

<sup>289</sup> No. 2025/BS01, at ¶ 9.7 (July 7, 2016). *Cf. Poole*, 2023 WL 8435860, at \*7 (A Possession ADRV is proven regardless of the veterinarian’s lack of knowledge).

<sup>290</sup> *See also Decision of the FEI Tribunal (Carinjo)*, No. 2015/CM07, at ¶ 9.11 (July 27, 2016) (“[T]he PR [person responsible] has to assume responsibility for the actions taken by the groom(s).”).

In addition, Dr. Overly also testified that, prior to HIWU's search, he "think[s]" he read a blog recounting Dr. Scollay's Will Rogers Downs racetrack remarks.<sup>291</sup> He understood from the blog that the Covered Horse portion of his practice was subject to the new HISA regime and that, broadly speaking, the non-Covered Horse part, which included patients at both Los Alamitos and off track, was not.<sup>292</sup> But he never reached out to Dr. Scollay or anyone else at HIWU to discuss how to assure his mixed practice did not run afoul of the Rules.<sup>293</sup>

Also significant, neither testosterone nor isoxsuprine was needed to treat emergency or otherwise exigent conditions.<sup>294</sup> If a need for either Banned Substance were to arise, each was available at Dr. Overly's office, "adjacent" to Los Alamitos, and Dr. Overly's staff regularly loaded his Hummer ten times a week—morning and afternoon.<sup>295</sup> Isoxsuprine itself was non-FDA approved, and Dr. Overly testified he did not use the substance in his practice anyway.<sup>296</sup>

On these facts alone, Dr. Overly failed to meet his burden of showing he exercised the utmost caution to see to it that, before he left for Los Alamitos, his staff not load onto his Hummer: (1) isoxsuprine, a Banned Substance not used in

<sup>291</sup> AB 6189 (Overly).

<sup>292</sup> *Id.* 6111-12 (Overly).

<sup>293</sup> *Id.* 6198-99 (Overly). *See also id.* 5936 (Scollay) (Dr. Scollay did not recall any contact with Overly); ORAuPFOF ¶ 33 (Admitting "he made no effort to reach out to Dr. Scollay or anyone else at HIWU to discuss the mixed nature of his practice, his need to carry Testosterone (or Isoxsuprine) at Los Alamitos, and whether he was at risk of violating the Possession Rule.").

<sup>294</sup> AB 2675, at ¶¶ 7(a) & (c), 18-20, 36 (Benson Exp. Rep.), 6374-75 (Benson).

<sup>295</sup> *Id.* 6094, 6124-25, 6226-29, 6309-10 (Overly).

<sup>296</sup> *Id.* 6127 (Overly), 6379 (Benson) (The FDA "found it had no efficacy.").

the practice; or (2), testosterone, a Banned Substance, unless Dr. Overly had previously determined, through examination, that a non-Covered Horse needed the steroid as treatment. This simply is not, under any definition, a “truly exceptional” case.<sup>297</sup> His NF argument fails.

### 3. NSF: Applying Rule 3225

The stringent “utmost caution” standard called for under NF is relaxed when the focus shifts to NSF. To demonstrate NSF, Dr. Overly 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.”<sup>298</sup> If NSF for the ADRV charged is established, “then . . . the period of Ineligibility shall be fixed between 3 months and 2 years, depending on the Covered Person’s degree of Fault.”<sup>299</sup>

No similar Rule applies fault principles to adjust the appropriate financial penalties under Rule 3223(b). The amount of the fine is discretionary, allowing for

<sup>297</sup> *FIS v. Johaug*, CAS 2017/A/5015 & 5110, ¶ 190 (Aug. 21, 2017) (Veterinarians, like athletes, “have a duty to cross-check assurances” by staff, even when experienced). *See also Stroman*, CAS 2013/A/3318, at ¶¶ 70-74 (Equestrian competitor who permitted an unknown substance, provided by a veterinarian, to be injected without further inquiry, failed to exercise utmost caution.); *Decision of the FEI Tribunal (Carriere Zwei)*, No. 2007/08, at ¶ 4.1x (Aug. 10, 2007) (despite assurances of a stable veterinarian that a supplement with a “suspicious name” would not increase testosterone level, an equestrian rider “acted with gross negligence and disregard to the risks” by not “receiving written advices [sic] from renowned veterinarians”).

<sup>298</sup> Rule 1020 (Definitions) (emphasis added).

<sup>299</sup> Rule 3225(a). *See also Al Nahyan*, 2014/A/3591, at ¶ 237 (“the exercise [in analyzing NSF] is essentially one of considering the possible application of the defence in the circumstances that led to the violation.”); *Ali Alabbar*, CAS 2013/A/3124, at ¶ 12.17(1) (“Significant fault or negligence must mean something different from (mere) fault of negligence. Otherwise one or other of the concepts would be redundant.”).

a first offense an amount “up to” \$25,000 or twenty-five percent of the purse, whichever is greater, and payment of “some or all” of adjudication and legal costs.<sup>300</sup> However, the degree of fault, among other facts and circumstances, may be considered in exercising discretion to determine an appropriate fine.<sup>301</sup>

Analysis of NSF in HISA cases takes account of the three-tiered approach applied in *Cilic v. ITF*,<sup>302</sup> which adjusts the maximum period of ineligibility and appropriate fines where NSF is shown.<sup>303</sup> Under the *Cilic* framework, the NSF analysis requires consideration of both “objective” and “subjective” elements of fault: The objective element describes what standard of care could have been expected from a reasonable person in the athlete’s situation. The subjective element describes what could have been expected from that particular athlete, in light of their personal capacities.<sup>304</sup>

The conclusion of the analysis places the offender in one of three ineligibility ranges, depending on degree of fault. As adapted for HISA cases under Rule 3225(a), the tiers are:

<sup>300</sup> Rule 3223(b).

<sup>301</sup> *See, e.g., Poole*, 2023 WL 8435860, at \*2; *Lewis*, No. 9434 (FTC ALJ Oct. 17, 2024) at 8-9, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/611976.2024.10.17\\_administrative\\_law\\_judge\\_decision\\_on\\_application\\_for\\_review.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/611976.2024.10.17_administrative_law_judge_decision_on_application_for_review.pdf).

<sup>302</sup> CAS 2013/A/3327 (Apr. 11, 2014).

<sup>303</sup> *See, e.g., Shell II*, 2025 WL 1784696, at \*41-42; *Poole*, JAMS Case No. 1501000576, at ¶¶ 7.16-.20, *aff’d*, 2023 WL 8435860, at \*5-7 (discussing the arbitrator’s three-tiered analysis, and holding *de novo* that the sanctions imposed were “reasonable, and rationally related to Appellant’s degree of fault”).

<sup>304</sup> *Cilic*, CAS 2013/A/3327, at ¶ 71.

- a. Slight or Insignificant Fault – 3 to 10 months;
- b. Moderate Fault – 10 to 17 months; and
- c. Significant Fault – 17 to 24 months.<sup>305</sup>

**a. Objective Considerations**

HISA's ADMC Program represented a change in the horseracing industry nationwide. Various ADRVs and defenses were defined, and a Prohibited List was created for designated substances. Stringent sanctions for Possession of Banned Substances, among other ADRVs, were adopted. Accordingly, prior to the ADMC Program's effective date in May 2023, Dr. Scollay made presentations at "every race track that was going to be functioning under HISA's regulations in advance of the launch of the program."<sup>306</sup> She used a PowerPoint presentation that included her cell number and email address, and she invited those in the industry to contact her if they had questions.<sup>307</sup> HIWU also produced videos and educational pieces, which were available online to download. An online application program enabled industry participants to research substances to determine whether they were banned or controlled.<sup>308</sup> This extensive outreach was intended to educate industry participants, including veterinarians such as Dr. Overly, on the new regulatory regime.

<sup>305</sup> See, e.g., *Shell II*, 2025 WL 1784696, at \*42; *Poole*, JAMS Case No. 1501000576, at ¶ 7.17, *aff'd*, 2023 WL 8435860, at \*5. See also *Cilic*, CAS 2013/A/3327, at ¶ 69.

<sup>306</sup> AB 5919 (Scollay).

<sup>307</sup> *Id.* 2644-62 (PowerPoint presentation), 5919-21 (Scollay).

<sup>308</sup> *Id.* 5919 (Scollay).

Dr. Scollay's presentations explained changes the ADMC Program would bring about. For example, under prior rules, for "many horsemen . . . only drug testing . . . determined [whether] a banned substance or a violation occurred."<sup>309</sup> The ADMC program "is different . . . . [I]f you possess it, it is the same as if it is detected in a horse's sample."<sup>310</sup> As discussed earlier, Dr. Scollay noted that while a veterinarian with a mixed or farm practice could use a Banned Substance in that practice, they had "to have justification for possessing it."<sup>311</sup> And there were limits: "if the story starts to get a little weird or a little extreme," that could raise an "eyebrow" and "result[] in investigative action."<sup>312</sup>

The advent of the ADMC Program marked a time for a reasonable Veterinarian to take stock of their practice and existing routines to assure ADMC Program compliance—particularly where the Veterinarian treated both Covered Horses and non-Covered Horses. Since Banned Substances were subject to the ADMC Program, a reasonable Veterinarian with an off-track practice would recognize the possible need to accommodate their possession and use to the HISA Rules—and to be able to show compliance if HIWU questioned possession or use. The existence of the Authority's Prohibited Substances List would have been of particular interest. A reasonable Veterinarian would have determined whether substances being used were on that List, and whether switching to an available

<sup>309</sup> *Id.* 5924 (Scollay).

<sup>310</sup> *Id.*

<sup>311</sup> *Id.* 5928 (Scollay). *See id.* 5926-30, 5934, 5944 (Scollay).

<sup>312</sup> *Id.* 5926-27 (Scollay).

permissible substance might be prudent. An ounce of prevention is worth a pound of cure.

Besides assessing existing office routines for potential adjustment, a reasonable Veterinarian with a practice that included a significant Non-Covered Horse population could be expected to seek guidance, beyond that available from Dr. Scollay's public presentations, from the Authority or HIWU or perhaps from an attorney. Dr. Scollay's public PowerPoint presentation included here contact information, and in fact "plenty of people have taken me up on the offer to call me at any hour of the day or night, any day or time."<sup>313</sup> No less than human athletes, in appropriate circumstances such as those here, Veterinarians can have a duty to cross-check.<sup>314</sup>

Once the ADMC Program became effective, a reasonable Veterinarian would have known that inasmuch as testosterone was a steroid with performance-enhancing potential:

- a. Testosterone was a Banned Substance under the ADMC Program;

<sup>313</sup> *Id.* 5921 (Scollay).

<sup>314</sup> *See, e.g., Radojevic v. FINA*, CAS 2018/A/5581, at ¶¶ 54-56, 60-63, 81 (July 10, 2018) (rejecting NSF where the athlete failed to inquire further regarding a substance prescribed by his doctor); *WADA v. Nilforushan*, CAS 2012/A/2959, at ¶¶ 8.17, 8.19 (Apr. 30, 2013) (rejecting NSF where "an extremely experienced" equestrian rider took medicine prescribed by his doctor without a "cross check"); *WADA v. CISM*, 2008/A/1565, at ¶¶ 60, 66-67 (Nov. 4, 2008) (rejecting NSF where the athlete relied on the advice of his personal physician, but took no further steps to determine the ingredients in a medication prescribed for a serious eye condition).

b. The substance had limited, legitimate equine veterinary uses to treat chronic conditions, and was not indicated for emergency or otherwise urgent conditions;

c. While testosterone was not banned by California law for non-Covered Horses, CHRB regulations included barring a horse treated with testosterone from racing for six months.

d. It would not be prudent to take testosterone to a racetrack subject to CHRB regulations to treat a non-Covered Horse unless: (1) the Veterinarian had previously examined the patient and determined in the exercise of reasonable professional judgment that administration of testosterone was indicated for the diagnosed condition; (2) treatment was intended on the day the testosterone was taken to the racetrack; (3) after treatment any remaining substance was returned to an appropriate off-track storage facility; and (4) veterinary medical records regarding the dispensation, examination and treatment were prepared and maintained in compliance with DEA and California state requirements.

e. It would not be prudent to take testosterone to a racetrack subject to CHRB regulations if the testosterone was intended to be administered to a horse that was not located at the racetrack unless scheduling travel to the racetrack separate from travel to the off-track location was impractical or otherwise unreasonable.

Once the ADMC Program became effective, a reasonable Veterinarian would also have known that, inasmuch as isoxsuprine was a non-FDA approved substance:

- a. Isoxsuprine was a Banned Substance under the ADMC Program and CHRB regulations.
- b. There were no recognized legitimate equine veterinary uses for isoxsuprine.
- c. Substitute substances, such as osphos, were available to treat conditions for which isoxsuprine previously was used.
- d. It would not be prudent to take isoxsuprine to a racetrack subject to HISA or to CHRB jurisdiction at any time or for any reason.

As HISA's effective date in May 2023 approached and afterwards, Dr. Overly took little action to adjust his practice. The little he did claim to do, discussed below in the Subjective Considerations section, is, at best, the least amount that might be expected of a reasonable Veterinarian. Objective considerations do not support a sanctions reduction under Rule 3225.

**b. Subjective Considerations**

The facts discussed in the NF analysis above are relevant to Dr. Overly's individual circumstance—the subjective part of the NSF inquiry—and I incorporate them here by reference. Additional facts bear mention.

With the ADMC Program scheduled to become effective in the spring of 2023, Dr. Overly was “[d]efinitely” concerned about the Possession prohibition in Rule 3214(a) and the “banned substance aspect of HISA regulations.”<sup>315</sup> Dr. Overly testified: “I basically educated myself, I listened to blogs, I read whatever data that I actually got emailed. I talked with other colleagues. . . . I read everything that was available to me.”<sup>316</sup> Dr. Overly testified in generalities, however; the only specific source of information was the blog that reported Dr. Scollay’s Will Rogers Downs remarks, which Dr. Overly “think[s]” or “believes” he read.<sup>317</sup> Despite this research, Dr. Overly did not know a recording of Dr. Scollay’s Will Rogers Downs remarks existed and never reviewed her PowerPoint presentation available online.<sup>318</sup>

If Dr. Overly’s testimony that he read about Dr. Scollay’s remarks is to be believed at all, it is reasonable to infer he learned about her cautionary admonition: “if the story starts to get a little weird or a little extreme, you’re going to get more than a raised eyebrow.”<sup>319</sup> He knew, as well, from his reading of the Rules that Possession of Banned Substance could be excused only if “compelling

<sup>315</sup> AB 6104, 6196-97 (Overly). *See also* ORAuPFOF ¶ 30 (Admitting he “was aware that the ADMC Program was new and that it regulated the use and possession of certain substances that may have previously been permitted.”).

<sup>316</sup> AB 5788, 6097-98, 6184-87, 6191-92, 6537 (Overly).

<sup>317</sup> *Id.* 6189, 6190 (Overly) (“More than likely” he read it “off one of the blogs.”), 6193 (“I believe that I read it on a blog at some point in time.”).

<sup>318</sup> *Id.* 6193-95 (Overly).

<sup>319</sup> *Id.* 6109 (Overly) (reading *Perez* excerpts).

justification” existed.<sup>320</sup> With his practice consisting of roughly 2/3’s non-Covered Horses, Dr. Overly could be expected to have been sensitive to assuring his ability to document his use of Banned Substances in his non-Covered Horse practice. But there is minimal evidence that he took steps to assess, much less improve, the state of his veterinary ordering or record-keeping, or sought guidance to make sure he could justify his possession and use of Banned Substances for non-Covered Horses. While he talked to CHRB’s medical director about the new rules, he admittedly never contacted Dr. Scollay or anyone else from HIWU for guidance.<sup>321</sup> The handful of documents Dr. Overly introduced in this case are so shoddy as to be unreliable as proof.

Knowing a change was coming, Dr. Overly removed bisphosphonates, a Banned Substance, from his Hummer. Although the list of Banned Substances includes more items, that is the extent to which Dr. Overly changed the inventory of substances loaded onto his vehicle.<sup>322</sup> Moreover, as noted earlier, I am skeptical of the veracity of Dr. Overly’s bisphosphonate removal testimony.

Dr. Overly’s regular practice was to attend to his off-track patients on Wednesdays. But there is no evidence he instructed his staff to adjust the contents of his Hummer to make sure that if an off-track appointment might need him to administer a Banned Substance, it would not be on his Hummer before or after his

<sup>320</sup> *Id.* 6169-70, 6186 (Overly).

<sup>321</sup> *Id.* 6097-98, 6198-202 (Overly). *See also id.* 5936 (Scollay).

<sup>322</sup> *Id.* 6221-22 (Overly); ORAuPFOF ¶ 31 (Admitting he “only removed bisphosphonates”).

Wednesday off-track round. Minor practice adjustments like this were feasible for a reasonable Veterinarian, and Dr. Overly had both the incentive and ability to take such action. Proof of concept:

- Since being charged in this case, Dr. Overly ceased loading testosterone and isoxsuprine on his Hummer while still meeting his treatment and ethical obligations.<sup>323</sup>
- While Dr. Overly removed bisphosphonates from his Hummer when attending to Covered Horses, he has it “on [his] truck . . . whenever I go on farm calls.”<sup>324</sup>

The subjective NSF analysis should also consider Dr. Overly’s dealings with the Banned Substances individually.

**Testosterone:** Testosterone is not only a Banned Substance under the ADMC Program, but also a DEA Controlled Substance and closely regulated by the CHRB. DEA and CHRB oversight includes “strict licensing and recordkeeping requirements,” as well as product storage requirements.<sup>325</sup> The limited, conflicting records that Dr. Overly offered for his injections of Cosmo with testosterone fail to meet DEA and CHRB requirements.<sup>326</sup>

<sup>323</sup> AB 6277-78 (Overly).

<sup>324</sup> *Id.* 6225 (Overly).

<sup>325</sup> *Id.* 2678-79, at ¶¶ 12-17 (Benson Exp. Rep.).

<sup>326</sup> *Id.* 2680-84, at ¶¶ 21-30 (Benson Exp. Rep.).

Dr. Overly should have known that when HIWU discovered testosterone on his Hummer during its search at Los Alamitos, that was not a joking matter, and that if he “flippantly” treated it as such, he needed to promptly and personally explain to the HIWU investigators that he was not being serious. Dr. Overly did not do so, however.

**Isoxsuprine:** A non-FDA approved substance, isoxsuprine is a Banned Substance under both the ADMC Program and CHRB regulations.<sup>327</sup> Once the HIWU investigators discovered isoxsuprine while searching his Hummer at Los Alamitos, if Dr. Overly did not know why the isoxsuprine was on the vehicle, he should have promptly asked his veterinary assistant, Ms. Ingram, whether she knew how the isoxsuprine came to be there. Dr. Overly did not do so, however.

If there was in fact an appointment to see Brownie on July 17, 2024—as Dr. Overly and Ms. Ingram testified there was—“there should be a full veterinary medical record documenting this visit and the ‘alternative treatment’ he provided instead of Isoxsuprine.”<sup>328</sup> Dr. Overly offered no documentation, however, other than a document showing Brownie’s osphos treatment two months later.<sup>329</sup>

Finally, as the Arbitrator noted, there is no evidence that Dr. Overly administered either testosterone or isoxsuprine to a Covered Horse, or intended to

<sup>327</sup> *Id.* 2685, at ¶ 35 (Benson Exp. Rep.).

<sup>328</sup> *Id.* 2687, at ¶ 42 (Benson Exp. Rep.).

<sup>329</sup> *Id.* 1193, at ¶ 10 (Corbett Wit. Stmt.), 2157 (Ex. 3: 2024 off-track treatment records), 6062 (Corbett).

cheat. However, the Possession prohibition in Rule 3214(a) is a strict liability violation.<sup>330</sup> Intent is irrelevant as a matter of law except insofar as it may be factored into the NF or NSF analysis. Lack of a bad intent is simply part of “the totality of the circumstances” that may be taken into account.<sup>331</sup> As the Panel wrote in *Ali Alabbar v. FEI*, NSF applies “where the circumstances are truly exceptional and not in the vast majority of cases.”<sup>332</sup> Here, the evidence—and assessment of the veracity of that introduced—weighs so heavily against Dr. Overly that neither absence of administration nor professed lack of intent to cheat provide any cognizable offset.

Regardless of whether the NSF’s subjective considerations are viewed for both substances together or individually, I find no basis for adjusting downward the 24-month Ineligibility period called for by Rule 3223(b).

#### 4. Sanctions Summary

The Authority imposed sanctions, based on the Arbitrator’s award of: (1) “combined” sanctions for both ADRVs; (2) no benefit based on NF; and (3) a one-month Ineligibility reduction for NSF under a *Cilic* analysis. In consequence, the Authority imposed a 23-month Ineligibility period, less credit for Dr. Overly’s

<sup>330</sup> See *Shell II*, 2025 WL 1784696, at \*11, n.16; *Poole*, JAMS Case 1501000576, at ¶¶ 7.7-8, *aff’d*, 2023 WL 8435860, at \*7.

<sup>331</sup> Rule 1020 (Definition).

<sup>332</sup> CAS 2013/A/3124, at ¶ 12.18 (cleaned up).

Voluntary Provision Suspension.<sup>333</sup> The Arbitrator also awarded, and the Authority imposed a \$25,000 fine award, the maximum allowable amount for a single violation, commensurate with the level of Dr. Overly's fault; and a \$15,000 contribution to HIWU's arbitration costs.<sup>334</sup>

I have reviewed *de novo* the sanctions awarded by the Arbitrator and imposed by the Authority. I have ruled that: (1) sanctions should be imposed individually for each proven Possession ADRV; (2) Dr. Overly cannot demonstrate either NF or NSF as a matter of law; and in any event, (3) on the facts, neither NF nor NSF provide a basis for reducing the sanctions that may otherwise be imposed. Since I conclude individual periods of Ineligibility must be imposed, with no reduction in the 24-month period, I must next decide whether the two periods can run consecutively, as well as whether fines for each ADRV may be aggregated.

### **C. Consecutive Periods of Ineligibility and Aggregated Fines May Be Awarded**

HIWU not only charged Dr. Overly with two individual Possession ADRVs and sought individual sanctions for each one, but also asserted: "As you are being charged with two Anti-Doping Rule Violations, your combined Period of Ineligibility would be four (4) years and the combined fine would be \$50,000

<sup>333</sup> AB 6717, at ¶ 7.7.5, 6718-19, at ¶ 7.8.6, 6722, at ¶¶ 7.8.17-18, 6723-24, at ¶ 8.1.a (Corrected Final Decision); Sept. 24, 2025 Overly Notice of Appeal and Application for Review, Ex. 2.

<sup>334</sup> AB 6723, at ¶¶ 7.9.3-4 & 7.9.6, 6724, at ¶ 8.1.b-c (Corrected Final Decision); Overly Notice of Appeal, Ex. 2.

USD.”<sup>335</sup> In other words, HIWU maintains that consecutive periods of Ineligibility may be imposed, and individual monetary sanctions aggregated. The Authority argues that position, which Dr. Overly opposes, on this review.<sup>336</sup> The parties’ initial set of papers here did not, in my view, cover this issue adequately. Therefore, I instructed that their reply papers do so, and I now have received their additional briefing.

### 1. Ineligibility

The Authority cites four decisions in which arbitrators awarded consecutive Ineligibility periods—in one case for as long as 15 years—and aggregated fines for multiple ADRVs—including a \$180,000 total.<sup>337</sup> The decisions are unhelpful, however, as each involved the *Presence* of one or more Banned Substance in one or more Covered Horses, and not *Possession*, as here. In one case—*HIWU v. Ruiz*<sup>338</sup>—the arbitrators’ consecutive Ineligibility ruling turned on Rule 3228(c)(1), which does not cover Possession cases at all.

<sup>335</sup> AB 123 (Charge Letter). *See also id.* 2621, (Feb. 14, 2025 HIWU pre-hearing reply brief, asserting that “separate charges and consecutive penalties are permissible”) (deleting upper case and boldface font), 6716-17, at ¶¶ 7.7.1-5 (Corrected Final Decision, considering and rejecting consecutive periods of Ineligibility).

<sup>336</sup> *See* AuOBr. at 16, 25, 27; AuPO ¶¶ d-e.

<sup>337</sup> AuRBr. at 21.

<sup>338</sup> JAMS Case No 1501000609, at ¶¶ 8.5-.8 (Apr. 2, 2024).

Two other decisions—*Pineda v. HIWU*<sup>339</sup> and *HIWU v. Cano*<sup>340</sup>—apply Rule 3223(c)(2):

(c) Commencement of the period of Ineligibility for a Covered Person.

....

(2) Where a Covered Person is already serving a period of Ineligibility for another violation of the Protocol, any new period of Ineligibility shall start to run the day after the original period of Ineligibility ends.

The provision, however, applies only where the Covered Person is “already” serving a period of Ineligibility “for another” ADRV. The Authority does not, however, argue that Dr. Overly was subject to any prior Ineligibility period.

In the fourth cited decision—*HIWU v. Taylor*<sup>341</sup>—two horses tested positive for the same two Banned Substances, and HIWU charged four ADRVs for both horses on the same day.<sup>342</sup> The arbitrator rejected application of Rule 3223(c)(2): “‘Already’ means necessarily that that period of Ineligibility would have to pre-date the imposition of the subsequent period of Ineligibility to which it refers.”<sup>343</sup> That was not Taylor’s situation: “there is no period of Ineligibility in place as these are each first-time anti-doping violations for Mr. Taylor that will issue

<sup>339</sup> JAMS Case No. 1501000613, at ¶ 8.16 (Mar. 12, 2024).

<sup>340</sup> JAMS Case No. 1501001058, at ¶¶ 8.24-27 (Sept. 30, 2025).

<sup>341</sup> JAMS Case No. 1501000596 (July 2, 2024).

<sup>342</sup> *Id.* at ¶¶ 2.3.7, 2.3.14, 7.21.

<sup>343</sup> *Id.* at ¶ 7.21.

simultaneously when this Final Decision issues, and there are no other periods of Ineligibility in place or running for Mr. Taylor.”<sup>344</sup>

Thus, the *Taylor* arbitrator applied Rule 3228(c)(1), which covers Presence violations:

(c) Additional rules for certain multiple violations.

....

(1) Multiple violations for the same Banned Substance/Method incurred by a Covered Person in relation to the same Covered Horse prior to delivery of an EAD Notice may (at the Agency’s discretion) be treated together as a single Anti-Doping Rule Violation, unless the facts demonstrate that there was more than one administration. Multiple violations for the same Banned Substance/Method incurred by a Covered Person in relation to different Covered Horses prior to delivery of an EAD Notice may (*at the Agency’s discretion*) each be treated as a first Anti-Doping Rule Violation. Where multiple Banned Substances are detected in a single Post-Race Sample or Post-Work Sample, each Banned Substance may (at the Agency’s discretion) be treated as a separate violation.<sup>345</sup>

The arbitrator held that the discretion this subsection expressly authorized HIWU to exercise included treating multiple Possession ADRVs as “separate violations” and, in consequence, also authorized consecutive Ineligibility periods for each proven ADRV.<sup>346</sup> Otherwise, there would be no reason for HIWU to charge

<sup>344</sup> *Id.*

<sup>345</sup> Emphasis added.

<sup>346</sup> *Id.* at ¶ 7.20.

“separate” ADRVs if that resulted in “absolutely no impact” on the Ineligibility period “the Covered Person would end up serving.”<sup>347</sup>

*Taylor* is instructive in recognizing that the consecutive Ineligibility feature of Rule 3223(c)(2) does not apply when, as here, there is no prior Ineligibility period being served for an ADRV. At the same time, however, the underpinning of *Taylor*—Rule 3228(c)(1)—also is inapplicable. That Rule deals with Banned Substances detected in a horse sample—Presence cases, *not* as here Possession ADRVs. Again, the Authority does not contend Rule 3228(c)(1) applies to Dr. Overly’s ADRVs.

*HIWU v. Puype*,<sup>348</sup> on which Dr. Overly relies, was a Possession case. HIWU charged Puype, a trainer, with two Possession violations after finding two Banned Substances during a single HIWU search. Relying on Rule 3223(c)(2), HIWU argued for consecutive sanctions, but, as in *Taylor*, the arbitrator rejected that position: the Rule’s “plain language . . . makes explicit reference to a Covered Person who is ‘already serving a period of Ineligibility for another violation of the Protocol.’”<sup>349</sup> Puype, however, was not subject to a pre-existing Ineligibility period. The arbitrator found support for her non-applicability ruling in WADA Art. 10.9.3.1, which permits multiple violations to be charged *only* where a second one

<sup>347</sup> *Id.*

<sup>348</sup> JAMS Case No. 1501000973. *See* ORBr. at 5-6.

<sup>349</sup> *Id.* ¶ 8.31. *See also id.* at ¶ 8.36.

is committed *after* notice of the first is given.<sup>350</sup> HIWU’s two charges against Puype, arose however, from a single search and single charging Notice. Because the two Possession ADRVs were simultaneous, not sequential, there was no prior ADRV that would provide the Covered Person “an opportunity to correct the problem and change the conduct.”<sup>351</sup>

Dr. Overly would have me read *Puype*, along with *Shell II*, as establishing a per se principle: a single search that discloses two or more Banned Substances must not only be held a single violation, but also give rise to one combined set of sanctions. I reject that argument as inconsistent with Rule 3228(d). Circling back, Rule 3228(d), as relevant here, covers multiple Banned Substance violations “based on a common set of facts,” which nevertheless “shall be treated as separate violations” although “adjudicated together.” Rule 3228(d) is not limited to Presence ADRVs, and by its terms at least presumes that multiple charges of ADRVs—including those of Possession—“shall be treated as separate violations.”

Construction of Rule 3228(d) “should be reasonable, and where the result of one interpretation is unreasonable, while the result of another interpretation is

<sup>350</sup> See, e.g., *WADA v. Oduduru*, SR/171/2023, ¶¶ 86, 100.a, 111, 117 (Sept. 18, 2023) (possession of multiple prohibited substances was treated as one single first violation where the second one was committed before notice was given of the first violation); *Decision of the FEI Tribunal (Ger Ashir and Takada Prince)*, No. 2020/BS12, at ¶ 18 (Aug. 27, 2021) (since the FEI “was not able to notify” the responsible person of “the first Rule Violation before the second Rule Violation was committed, therefore the violations shall be considered together as one single first violation.”); *IAAF v. RFEA*, CAS 2009/A/1805, at ¶ 101 (Sept. 22, 2009) (where IAAF did not “establish that the Athlete committed the second anti-doping rule violation after the Athlete had received notice . . . of the first violation . . . the two anti-doping rule violations are to be considered as a single violation”).

<sup>351</sup> *Puype*, JAMS Case No. 1501000973, at ¶ 8.35. See also *id.* at ¶¶ 8.33-34.

logical, the latter should prevail.”<sup>352</sup> For example, in *United States v. Rawlings*,<sup>353</sup> the government charged the defendant with two bank robberies and with using a firearm in each robbery—a single indictment with four counts. The jury found the defendant guilty on each count. Federal law provided for an enhanced sentence if a convicted individual received a “second” conviction. The defendant argued that the enhancement provision did not apply because all his convictions were in a single case.

The Court of Appeals rejected the defendant’s argument as not reasonable. Under the defendant’s view of the law, the government, the Court noted, could “simply bring the two offenses in two separate indictments, thereby insuring that one of the convictions would occur later in time than the other. Such manipulation of the court system would add to the court’s caseload and serve no useful purpose.”<sup>354</sup>

The situation here is comparable. If Rule 3228(d) permitted HIWU to prosecute “separate violations,” but to secure only a single set of sanctions despite proof of multiple ADRVs, that would encourage HIWU efforts to evade the Rule. By clever charging, HIWU could bring separate cases that could adjudicated

<sup>352</sup> *Sierra Club v. Train*, 557 F.2d 485, 490 (5th Cir. 1977) (citing authorities). *See also Kelly v. United States*, 924 F.2d 355, 361 (1st Cir. 1991) (“[U]nreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result.”) (cleaned up).

<sup>353</sup> 821 F.2d 1543 (11th Cir. 1987).

<sup>354</sup> *Id.* at 1546. *See also* 2A SUTHERLAND STATUTORY CONSTRUCTION § 45:12 (7th ed. Nov. 2025) (“[A] statute should not be read in an atmosphere of sterility, but in the context of what actually happens when humans fulfill its purpose.”) (footnote omitted).

sequentially in an effort to get the consecutive sanctions benefit of Rule 3223(c)(2). That would itself run counter to Rule 3228(d)'s instruction for "adjudication together" to minimize the burdens on both HIWU and those charged, and on the HISA arbitration and review scheme generally. As in *Rawlings*, this would "serve no useful purpose."

Accordingly, although Rule 3228(d) does not expressly prescribe consecutive sanctions, that authorization is reasonably implicit in the language directing that charges arising from "common facts" be "treated as separate violations." Dr. Overly is liable for both Possession ADRVs, and I have found no basis for reducing the 24 month mandatory per violation Ineligibility period. Moreover, even assuming for argument's sake discretion in deciding the matter, the evidence in this case does not provide grounds for anything but consecutive periods of Ineligibility.<sup>355</sup>

## 2. Monetary Sanctions

In addition to a period of Ineligibility, Rule 3223(b) permits fines in a discretionary amount "up to \$25,000 or 25% of the total purse," the latter of which is inapplicable here. That the fine should "follow"—that is, "be commensurate with"—the fault "is a useful convention"—a well-recognized default principle, but

<sup>355</sup> This case raises no issue regarding HIWU's exercise of prosecutorial discretion in charging or in seeking sanctions. HIWU and now the Authority have sought consecutive sanctions throughout this case. *See, e.g.*, AB 123 (EAD Charge Letter), 6418 (HIWU post-hearing submission) (sanctions "should separately apply for Dr. Overly's Possession of Testosterone and Isoxsuprine."), 6715, at ¶ 7.6.1 (Corrected Final Decision) (HIWU "seeks the imposition of Consequences . . . for each ADRV" under Rule 3228(d) & 6717, at 7.7.5 (finding that "the sanctions should be combined"); AuPCOL ¶ 3; AuOBr. at 25-27; AuRBr. at 21-22. Accordingly, I express no view on this matter.

subject to individual case adjustment.<sup>356</sup> Since I have not only rejected any NF or NSF adjustment, but also found Dr. Overly's version of the facts unworthy of belief, I agree with the Arbitrator that the maximum allowable fine of \$25,000 is appropriate. However, the fine should be awarded for each of the two proven ADRVs, thus aggregating \$50,000. Under Rule 3228(b), for a second ADRV, the maximum increases to \$50,000 or 50% of the purse. Although there is no second-in-time violation here, the Rule's increased maximum further supports a fine level appropriate for two ADRVs committed and resolved simultaneously.

The Authority argues that the fine should be increased from \$25,000 to \$35,000. However, I see no factual basis for this lesser increase and accordingly decline to accept the Authority's recommendation.<sup>357</sup> Maximum deterrence is appropriate when, as here, evidence that is more likely than not false is offered.

### 3. Arbitration Costs

The Arbitrator also exercised her discretion under Rule 3223(b) to assess a portion of the HIWU's arbitration costs against Dr. Overly. The Arbitrator awarded \$15,000, admitting the amount was not "a scientific calculation."<sup>358</sup> HIWU has not introduced facts establishing its arbitration costs. Whatever they

<sup>356</sup> See *Poole*, JAMS Case No. 1501000576, at ¶¶ 7.24-.25, *aff'd*, 2023 WL 8435860, at \*5; *HIWU v. Saldana*, JAMS Case No. 1501000587, at ¶¶ 7.29-.30 (Dec. 4, 2023).

<sup>357</sup> See 15 U.S.C. § 3058(b)(3)(A) & FTC Rule 1.146(d)(3) (conferring authority to "modify [or], set aside," sanctions imposed and to "make any finding or conclusion that, in [the ALJ's] judgment . . . is proper and based on the record."); *Matter of Serpe*, No. 9441 (FTC ALJ Sept. 12, 2025), at 58-59, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/614069.2025.09.12\\_alj\\_decision\\_on\\_application\\_for\\_review.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/614069.2025.09.12_alj_decision_on_application_for_review.pdf).

<sup>358</sup> AB 6723, at ¶ 7.9.6 (Corrected Final Decision).

might be, having to establish individual, rather combined, sanctions for each ADRV did not meaningfully increase them. Therefore, I accept without change the \$15,000 amount awarded.

One final consideration: Rule 3227, provides that, absent exceptions not applicable here, an individual held to have committed an ADRV may be subject to additional sanctions if HIWU “establishes that Aggravating Circumstances are present” and not rebutted. “Aggravating Circumstances” include “deceptive or obstructive conduct to avoid the detection *or adjudication* of an Anti-Doping Rule Violation . . . for which the Covered Person has not been separately sanctioned for Tampering.”<sup>359</sup> Although HIWU’s EAD Charge Letter advised Dr. Overly of the potential for increased sanctions due to Aggravating Circumstances, HIWU did not pursue the point before the Arbitrator; nor does the Authority on this review.<sup>360</sup> In these circumstances, I will, as a matter of discretion, refrain from invoking Rule 3227, despite my conclusion that the evidence Dr. Overly has offered lacks believability.

#### 4. Sanctions Awarded

For the reasons set forth above, on *de novo* review, I hold the following sanctions for Dr. Overly’s two Possession ADRVs are:

<sup>359</sup> Rule 3227(b)(4) (emphasis added).

<sup>360</sup> AB 24 (Charge Letter).

1. A period of Ineligibility of 24 months for Possession of testosterone and a period of Ineligibility of 24 months for Possession of isoxsuprine, beginning as of the issuance of the Arbitrator's Final Decision. The two Ineligibility periods will run consecutively, but will be reduced by 169 days for Ineligibility served.

2. A fine of \$25,000 for Possession of testosterone and a fine of \$25,000 for Possession of isoxsuprine, for an aggregate fine of \$50,000.

3. An amount of \$15,000 contribution to the adjudication costs for this matter.

## VIII. CONCLUSION

Based on my *de novo* review—which includes not only reviewing the written arbitration transcript, but also viewing the video of the proceedings—I have set aside and modified the sanctions the Arbitrator awarded and that the Authority imposed. I have considered all the matters raised by the parties on this review and find them unpersuasive except to the extent set forth above.

ORDERED:

*Jay L. Himes*

\_\_\_\_\_  
Jay L. Himes  
Administrative Law Judge

Date: January 27, 2026

# TAB 2

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

_____ )	
In the Matter of )	
Dr. Scott Shell, DVM )	
Appellant. )	Docket No. 9439
_____ )	

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

**TABLE OF CONTENTS**

**TABLE OF CONTENTS** ..... i

**TABLE OF ABBREVIATIONS** ..... ii

**I. INTRODUCTION**..... 1

**II. THE UNDERLYING FACTS**..... 2

    A. Summary of the Case..... 2

    B. Dr. Shell’s Practice and HIWU’s Search..... 3

    C. The Four Banned Substances Charged As Possession Violations..... 4

    D. The Federal Injunction Covering West Virginia ..... 7

    E. HIWU’s Other “Administration” Case ..... 8

    F. The Arbitration Subject to this Review ..... 8

        1. Compelling Justification..... 9

        2. Sanctions..... 11

**III. ISSUES ON REVIEW** ..... 12

**IV. SCOPE OF REVIEW** ..... 12

**V. ANALYSIS OF THE ISSUES**..... 14

    A. The Possession Violation and Compelling Justification Defense..... 14

        1. “Compelling Justification” ..... 15

        2. Dr. Shell’s “Non-Covered Horses” Practice as a Compelling Justification ..... 16

            a. Otherwise Covered Horses Physically in West Virginia ..... 17

            b. Dr. Shell’s Farm Practice Proof..... 20

                i. Dr. Scollay’s Mahoning Presentation..... 20

                ii. Dr. Shell’s Follow-up Conversation..... 22

                iii. The Randall Equine Email Exchange..... 23

            c. Inadequacy of Dr. Shell’s Proof..... 24

                i. Dr. Shell’s Records Overall..... 24

                ii. The Four Banned Substances ..... 26

            d. Overall Assessment of Dr. Shell’s Compelling Justification Proof..... 33

    B. Dr. Shell’s Estoppel Argument..... 35

    C. Dr. Shell’s Constitutional Arguments..... 40

        1. Rule 3214 Is Not Unconstitutionally Vague..... 40

        2. Prosecution of this Case by the Authority and HIWU is Not Unconstitutional..... 42

**VI. SANCTIONS** ..... 44

    A. Single or Separate Violations Under Rule 3228(d) ..... 44

    B. Consecutive Ineligibility Based on the Administration Case Sanction ..... 51

    C. Applying the No Fault or Negligence (NF) and No Significant Fault or Negligence (NSF) Analyses to the Sanctions ..... 58

        1. Overview ..... 58

        2. NF: Applying Rule 3324..... 58

        3. NSF: Applying Rule 3225 ..... 60

            a. Objective Considerations ..... 62

            b. Subjective Considerations..... 64

        4. Sanctions Summary ..... 69

**VII. CONCLUSION** ..... 70

## TABLE OF ABBREVIATIONS

AB1 – Appeal Book Part 1

AB2 – Appeal Book Part 2

ADMC – Anti-Doping and Medication Control

ADRV – Anti-Doping Rule Violation

AOBr. – Appellant’s Opening Brief

ARBr. – Appellant’s Reply Brief

ARPFOF – Appellant’s Reply to Authority’s Proposed Findings of Fact

AuOBr. – Authority’s Opening Brief

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

AuRPFOF – Authority’s Reply to Appellant’s Proposed Findings of Fact

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

HIWU – Horseracing Integrity & Welfare Unit

The Authority – Horseracing Integrity and Safety Authority

## I. INTRODUCTION

This decision arises under the Horseracing Integrity and Safety Act (“HISA”), 15 U.S.C. §§ 3051 *et seq.*, and the Rules implementing the Act. 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.<sup>1</sup>

The Authority promulgated, and the Federal Trade Commission approved, rules that include the statutorily-required Anti-Doping and Medication Control (“ADMC”) Program.<sup>2</sup> 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, or are regulated as controlled medications; (3) the conduct constituting violations and corresponding sanctions; and (4) investigation and enforcement in furtherance of the statute.<sup>3</sup> The Authority has contracted with the Horseracing Integrity & Welfare Unit (“HIWU”) to implement and enforce the ADMC Program on behalf of the Authority.<sup>4</sup> HIWU charges of ADMC Program violations are heard by an Internal Adjudication Panel, which, as

<sup>1</sup> 15 U.S.C. § 3052(a).

<sup>2</sup> 15 U.S.C. §§ 3053, 3055, 3057.

<sup>3</sup> *See generally* ADMC 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 (Mar. 27, 2023) ([https://www.ftc.gov/system/files/ftc\\_gov/pdf/P222100CommissionOrderAntiDopingMedication.pdf](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) (available at <https://hisaus.org/regulations?modal-shown=true#equine-anti-doping-and-controlled-medication-protocol-rules>).

<sup>4</sup> 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>.

here, may consist of a single arbitrator.<sup>5</sup> The FTC has authority to review civil sanctions imposed for ADMC Program Rule violations in HIWU-initiated enforcement proceedings.<sup>6</sup>

Under the ADMC Program, the more serious violations are Anti-Doping Rule Violations (“ADRVs”), which include Banned Substances that “should never be in a horse’s system.”<sup>7</sup> To implement the Program, the Authority issued a Prohibited List of Banned Substances.<sup>8</sup> Rule 3214(a), applicable to Covered Persons, prohibits “Possession of a Banned Substance . . . unless there is a compelling justification for such Possession.”

## II. THE UNDERLYING FACTS

### A. Summary of the Case

As a veterinarian who provides services to Covered Horses, Appellant Dr. Scott Shell is a Covered Person subject to HISA, to the ADMC Program Rules, and to the enforcement system created.<sup>9</sup> HIWU has charged Dr. Shell with Possession of four Banned Substances, discussed more fully below. Possession is undisputed. Therefore, the case turns on whether Dr. Shell had “a compelling justification for such Possession,” as well as on other defenses asserted. Rule 3214(a). One additional wrinkle is worthy of mention at this point.

Dr. Shell practices in both Ohio and West Virginia, and services both Covered Horses, subject to HISA, and non-Covered Horses, commonly found on farms. Also, while HISA and the

<sup>5</sup> Rules 3360, 7020.

<sup>6</sup> 15 U.S.C. § 3058; 16 C.F.R. § 1.145 *et seq.*; *see* 87 Fed. Reg. 60077 (Oct. 4, 2022) (Final Rule).

<sup>7</sup> 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.

<sup>8</sup> Rules 1020 (definition of Prohibited List), 3111(a).

<sup>9</sup> 15 U.S.C. §§ 3051(6), (21); Rule 1020 (definitions of “Attending Veterinarian” and “Covered Person”).

Rules apply in Ohio, in 2022 a United States district court issued an order that, in effect, prohibits enforcement by the Authority and HIWU in West Virginia. Although HIWU’s charges against Dr. Shell arise from his Possession of four Banned Substances at an Ohio racetrack, he contends that Possession was permitted as part of his providing services to horses on farms and in West Virginia where enforcement is prohibited.

In this review decision, I first set forth the facts forming the basis for HIWU’s charges against Dr. Shell and then summarize the Arbitrator’s ruling, which found HIWU’s charges proven and determined the sanctions to be imposed. After that, I address the issues presented, the scope of the review under HISA, and my analysis of the issues raised and the sanctions ordered.

**B. Dr. Shell’s Practice and HIWU’s Search**

Dr. Scott Shell, a licensed Veterinarian in both Ohio and West Virginia, practices in both States under the corporate name, Scott Shell DVM Inc. AB1 at 2012 (¶¶ 1, 3); AB2 at 6672-75, 6680 (Shell). His practice includes two other veterinarians, Dr. Barbara Hippie and Dr. Maggie Smyth, and a head veterinary assistant, Janet Duhon. AB1 at 2012 (¶ 3); AB2 at 6756-57 (Shell). Dr. Shell is a Covered Person under the ADMC Program, administered by the Authority. AB1 at 1784 (¶ 13); ARPFOF at 1 (¶ 2). Besides servicing Covered Horses, Dr. Shell has a farm practice where he provides veterinary services to non-Covered Horses. AB2 at 6675, 6682-83 (Shell).

On September 28, 2023, HIWU investigators conducted searches of: (1) Dr. Shell’s office at the JACK Thistledown Racino racetrack in Ohio (“Thistledown”); (2) Dr. Shell’s veterinary truck; and (3) a veterinary truck registered to Dr. Shell’s practice, operated by Dr. Hippie. AB1 at 622-37. The search uncovered four substances that the ADMC Program prohibits as Banned Substances:

- Carolina Gold (sometimes referred to as “GABA”)
- Sarapin (“Pitcher Plant”)

Isoxsuprine, and  
Osphos.

AB1 at 507-08, 607-609, 642; AB2 at 6834-35. HIWU charged Dr. Shell with—and he admits— Possession of the four Banned Substances. *See* HISA Rule 3214(a); AB1 at 507, 607 (EAD Charge Letters), 1784-85.<sup>10</sup>

### C. The Four Banned Substances Charged As Possession Violations

The four Banned Substances may be summarized as follows:

**Carolina Gold (GABA):** HIWU’s search found two bottles of Carolina Gold, a Category S0 Banned Substance on the ADMC Program’s Prohibited List. Carolina Gold is also prohibited at West Virginia racetracks under West Virginia Racing Commission Rules. AB1 at 642 (¶ 6), 1174; AB2 at 6836-37 (Shell), 7209 (Benson).

Carolina Gold contains Gamma Aminobutyric Acid (“GABA”), an endogenous neurotransmitter, which exerts an inhibitory effect on the central nervous system and thus has a calming effect on a horse. AB2 at 6710-11, 6837 (Shell), 7087 (Scollay). If Carolina Gold is given to a racehorse, “it can be performance limiting, if not, potentially fatal, depending on the severity of its effect [‘in preventing exercise induced pulmonary hemorrhage’].” AB2 at 7090 (Scollay). GABA has a half-life of approximately 22 minutes when given intravenously and ceases to be detected between six and eight hours later. AB2 at 7524 (Benson).

Carolina Gold is not FDA-approved, which means that “[i]t is an illicitly manufactured, illegal, unapproved new animal product.” AB2 at 7088 (Scollay), 7209 (Benson). A compounded substance, Carolina Gold does not comply with FDA guidance for compounding. AB2 at 7091

<sup>10</sup> HIWU originally charged Dr. Shell with Possession of three Banned Substances and Dr. Hippie with one, for Possession of Pitcher Plant. After the Provisional Suspension of Dr. Hippie was lifted, HIWU added Possession of Pitcher Plant to the charges against Dr. Shell.

(Scollay), 7491, 7494 (Roberts). As Dr. Scollay explained:

It has not been examined by the FDA for safety, efficacy, purity, stability, any of that stuff, and so it qualifies essentially as administering an unknown.

. . . .

Has it been contaminated with bacteria, with fungus, with other substances? I mean, you'd have to do a pretty serious risk benefit analysis to put that into a horse when, if you're trying to calm it down . . .

AB2 at 7088, 7089.

Dr. Shell's expert veterinarian witness, Dr. Andrew Roberts, testified similarly: "what is actually in the bottle, it would be of interest to know." AB2 at 7492 (Roberts). Dr. Roberts has never used Carolina Gold in his practice and has never kept it on his truck. AB2 at 7492, 7501 (Roberts).

There is no significant, legitimate use for Carolina Gold on non-Covered Horses. AB2 at 7088-90, 7112 (Scollay). Nor is it life-saving or needed for emergency use. AB2 at 6891 (Shell), 7088-89 (Scollay). FDA-approved substances having a similar calming effect are available. AB2 at 7087, 7089 (Scollay). Indeed, Dr. Roberts "agreed" that there are "no recognized medical uses" for a product, such as Carolina Gold, that contains GABA. AB2 at 7489 (Roberts).

**Pitcher Plant:** HIWU investigators found a bottle of Sarapin, also known as "Pitcher Plant," during their search of a truck operated by Dr. Hippie, which Dr. Shell owned. AB1 at 643; AB2 at 6704 (Shell). Pitcher Plant is a Category S6 Banned Substance on the Prohibited List and is also prohibited at West Virginia racetracks under the West Virginia Racing Commission Rules. AB1 at 1202, 3396; AB2 7224-25 (Benson), 7505 (Roberts). Pitcher Plant is an herbal analgesic that reduces inflammation and relieves pain. AB1 at 1202; AB2 at 6713 (Shell), 7091-92 (Scollay). Its use is not limited to emergencies. AB2 at 7092-93 (Scollay).

Pitcher Plant was, but no longer is, FDA-approved. AB2 at 7225 (Benson). There are multiple FDA-approved analgesics that can be used instead. AB2 at 7093 (Scollay). There is no

approved analytical method to detect administration of the substance in a horse. AB2 at 7225 (Benson), 7504-05 (Roberts).

**Isoxsuprine:** During their search of Dr. Shell's truck, HIWU investigators also found a tub of Isoxsuprine powder. AB1 at 642, 654; AB2 at 6703-04 (Shell). Isoxsuprine also is a Category S0 Banned Substance on the Prohibited List, as well as prohibited under the West Virginia Racing Commission Rules. AB1 at 1178; AB2 at 7231 (Benson). Dr. Shell testified he uses Isoxsuprine to vasodilate the feet of older horses and horses that have navicular disease or founder (lameness). AB2 at 6707 (Shell). A chronic condition, navicular disease is "a degenerative disorder of a small bone in the horse's foot and results in foot pain, lameness . . . ." AB2 at 7094 (Scollay), 7223 (Benson). Isoxsuprine's use is not limited to emergencies. AB2 at 7100 (Scollay), 7224 (Benson).

The FDA's previous approval of Isoxsuprine for use in humans has since been withdrawn as lacking a pain-relieving effect. AB2 at 6990 (Shell); 7094 (Scollay). To treat these conditions in horses, there are FDA-approved, HISA-permitted Controlled Medication Substances. AB2 at 7096-97 (Scollay).

**Osphos:** During their search, HIWU investigators also recovered two boxes of Osphos, a bisphosphonate, from Dr. Shell's office located on the backside of Thistledown. AB1 at 643 (¶ 11); AB2 at 6996 (Shell). Bisphosphonates are a Category S6 Banned Substance on the Prohibited List. AB1 at 1159. Osphos is used to strengthen bones and to treat navicular disease, repairing bone erosion. AB2 at 6709-10 (Shell), 7223 (Benson); *see also* AB2 at 7098-99 (Scollay) (describing the effect of bisphosphonates to clean and rebuild bone). Since the underlying condition is chronic, Osphos has uses in circumstances that are non-urgent and non-emergency. AB2 at 6997 (Shell), 7223-24 (Benson).

Unlike the other three Banned Substances found, Osphos is FDA-approved for treatment of horses that are more than four years old. AB2 at 7099 (Scollay), 7363 (Roberts). However, it should not be administered to young, growing horses or to racehorses because it “makes the bone too brittle” and risks fracture. AB2 at 6710 (Shell), 7099-100 (Scollay). If administered to young horses, Osphos will remain in the body, able to act, for years. AB2 at 7100 (Scollay).

#### **D. The Federal Injunction Covering West Virginia**

A specific issue in this case arises from Dr. Shell’s practice in West Virginia. In 2022, the United States District Court for the Western District of Louisiana held that the Authority violated the Administrative Procedure Act in the process of promulgating the HISA Rules. The Court thus issued a preliminary injunction against enforcement of the Rules against the plaintiffs, one of whom was the State of West Virginia. *Louisiana v. Horseracing Integrity & Safety Auth. Inc.*, 617 F.Supp.3d 478 (W.D. La. 2022), *remanded*, No. 22-30458, 2022 WL 17074823 (5th Cir. 2022). As a result of the district court’s injunction, the Authority and HIWU do not enforce HISA in West Virginia. AuRPCOL ¶ 10; AB2 at 7125-26 (Scollay).

Dr. Shell thus argues that Covered Horses under HISA—those that are authorized to run in races subject to HISA—become “non-Covered Horses” while in West Virginia. Even though three of the four Banned Substances found in Dr. Shell’s Possession in Ohio are also prohibited in horseracing in West Virginia (Osphos is the exception), Dr. Shell contends that he may dispense or administer them to otherwise Covered Horses while they are in West Virginia. This outlier circumstance, he further maintains, provides a compelling justification for his Possession of these substances in Ohio.

The Arbitrator rejected this argument, as do I in the analysis that follows.

### E. HIWU's Other "Administration" Case

Another matter also gives rise to an issue I must decide. Besides this Possession case, HIWU charged Dr. Shell with administering, by injecting into many racehorses, a Banned Substance that Dr. Shell believed was an unregulated vitamin and thus permissible to use. The arbitrator in that case—referred to as the "Administration Case"—upheld HIWU's charges, and, among other things, determined that Dr. Shell should be subject to a two-year period of Ineligibility, during which he may not offer services to Covered Horses or Covered Persons. On review, I upheld the sanctions imposed.<sup>11</sup> The possible effect of the Ineligibility arising from the Administration Case is an issue in this proceeding.

### F. The Arbitration Subject to this Review

Upon service of HIWU's EAD Charge Letter in October 2023, a Provisional Suspension was imposed on Dr. Shell. *See* Rule 3247(a)(3); AB2 at 6593. He sought to lift the Suspension pending the arbitration hearing to resolve the merits of HIWU's charges, but the hearing officer denied his request. AB1 at 1136, 1138-39; AB2 at 6593-94. During the pre-hearing phase of the arbitration, HIWU moved for an order directing Dr. Shell to produce documents relating to his compelling justification defense. *See* AB1 at 2046-59, 2090-107. While the Arbitrator directed limited production, she also wrote:

Dr. Shell has made the nature of his practice relevant, and has placed at issue whether he had a noncovered horse practice that ***required*** the carrying of the Targeted Banned Substances. . . . Dr. Shell opened the door to this line of inquiry by raising the defense that the Targeted Banned Substances ***were only used in non-covered horses***. Accordingly, Dr. Shell has the burden of supporting that defense with his veterinary records for covered and non-covered horses. As such, ***the complete veterinary medical records*** for all horses in his practice from the implementation of HIWU's regulations until he was charged are ***relevant and material to the defense***.

<sup>11</sup> AB1 at 99-136 (*HIWU v. Shell*, JAMS Case No. 1501000708 (June 11, 2024)), *aff'd*, FTC No. 9435 (ALJ Oct. 31, 2024).

AB1 at 2278 (emphasis added); *see also* AB1 at 2044-128. In response, Dr. Shell produced additional—albeit, still limited—documents. *See* AB1 at 2297.

In April 2024, a multi-day arbitration hearing was held, during which Dr. Shell and other fact and expert witnesses testified, and numerous exhibits were received in evidence. The parties made voluminous post-hearing submissions, and the Arbitrator heard closing arguments in August 2024. AB2 at 3892-6567, 7528-613. After requesting additional papers on an issue regarding sanctions, discussed further below, the Arbitrator issued her decision. *See* AB2 at 6571-82, 6588-622.

### **1. Compelling Justification**

The Arbitrator concluded that Dr. Shell failed to prove a compelling justification to possess any of the Banned Substances, holding that Dr. Shell’s records and other evidence were inadequate to justify Possession under Rule 3214(a). Despite the admonition from her discovery order, the Arbitrator noted that Dr. Shell produced only “limited” records, which “showed some dispensation of the Banned Substances to farm horses and Thoroughbreds in West Virginia, but [these were] not complete records sufficient to justify the possession of the Banned Substances at the Ohio racetrack.” AB2 at 6613 (¶ 7.18).

The Arbitrator rejected Dr. Shell’s “convenience” argument for Possession of Banned Substances. Additional travel time, needed to avoid Banned Substances at an Ohio racetrack, was unpersuasive unless the “medications [were] needed on a regular basis for time-sensitive emergency treatment.” AB2 at 6614 (¶ 7.21). The Banned Substances found in Dr. Shell’s truck and office at Thistledown, however, “were not emergency medications required for life-threatening injuries . . . .” AB2 at 6614 (¶ 7.22). Analyzing each individual substance, the

Arbitrator held that Dr. Shell failed to show compelling justification. AB2 at 6615-16 (¶¶ 7.28-33).

The Arbitrator recognized that a federal court injunction “suspended HIWU’s operations” in West Virginia. AB2 at 6591 (¶ 2.14); *see also* AB2 at 6601, 6603 (¶¶ 6.7, 6.24). Accordingly, she agreed with Dr. Shell that the Authority and HIWU could not legally regulate the dispensation of Banned Substances in West Virginia, or charge a Veterinarian with a HISA Rule violation for treating a Covered Horse in West Virginia. AB2 at 6614 (¶ 7.25). However, that “does not mean that having a clientele of Thoroughbred horse trainers in West Virginia is a compelling justification for possessing Banned Substances at Ohio racetracks.” AB2 at 6614 (¶7.25). The Banned Substances in Dr. Shell’s Possession were not “emergency medications that Dr. Shell needed to have at the ready to dash to West Virginia.” AB2 at 6614 (¶ 7.25). The Arbitrator further found it significant that Dr. Shell testified that he no longer carries the four Banned Substances on his truck and, despite this changed practice, he is able to meet his ethical obligations as a veterinarian. AB2 at 6616 (¶ 7.34).

The Arbitrator also rejected Dr. Shell’s argument that, as a result of HISA’s non-enforcement in West Virginia, otherwise Covered Horses automatically became non-Covered Horses while in West Virginia. The Arbitrator held that allowing Dr. Shell to possess Banned Substances in Ohio in order to treat Covered Horses located in West Virginia would create a “loophole” that would “undermine[] the integrity of the ADMC Program and is not justified, much less compelling.” AB2 at 6614-15 (¶ 7.25).

Finally, Dr. Shell argued that HIWU made various statements regarding compelling justification, as applied to Veterinarians with farm practices, such as Dr. Shell. He argued that he relied on these statements and thus kept the substances on his trucks and at his Thistledown

facility as a result. Therefore, he maintained, HIWU should be precluded (“estopped”) from prosecuting him for Possession. Analyzing the facts, the Arbitrator rejected Dr. Shell’s argument. AB2 at 6616-17 (¶¶ 7.37-41).

## 2. Sanctions

Having concluded that Dr. Shell was liable for Possession, the Arbitrator considered the sanctions to be imposed. The HISA Rules set forth detailed, often intricate, provisions regarding sanctions, which include a two-year period of Ineligibility, during which a Covered Person may not participate in HISA-covered activity, as well as fines and costs. Sanctions can, however, be eliminated or reduced if the Covered Person establishes either No Fault or Negligence (“NF”) or No Significant Fault or Negligence (“NSF”). Rules 3224 & 3225.

The Arbitrator held that Dr. Shell failed to establish NF. Dr. Shell admitted Possession of the four Banned Substances and displayed a sufficient lack of appropriate care as to preclude an NF finding. AB2 at 6617 (¶¶ 7.44-48). For NSF, the Arbitrator concluded that Dr. Shell should receive a three-month reduction of the maximum two-year Ineligibility period, resulting in one 21-month period of Ineligibility for all four Possession violations, beginning as of the date of his Provisional Suspension in October 2023. AB2 at 6618-20, 6622 (¶¶ 7.49-60, 8.1). The Arbitrator further imposed a total fine of \$20,000, less than \$25,000 per violation permitted under the Rules, while declining to direct Dr. Shell to bear any costs of the arbitration. AB2 at 6620-21, 6622 (¶¶ 7.65-66, 8.1).

In ruling on sanctions, the Arbitrator rejected two HIWU arguments: (1) that sanctions should be imposed for each of the four Possession charges; and (2) that Dr. Shell’s Ineligibility period should run consecutively after the two-year Ineligibility period arising from the

Administration Case ended, and not concurrent with that other sanction. AB2 at 6621-22

(¶¶ 7.67-7.74).

### III. ISSUES ON REVIEW

The following issues are presented for review:

(1) Did Dr. Shell show compelling justification for Possession of any of the four Banned Substances?

(2) Is HIWU, and therefore the Authority, estopped from prosecuting the Possession charges against Dr. Shell?

(3) Does the “compelling justification” defense, recognized in Rule 3214(a), violate the Due Process provision of the Fifth Amendment as unconstitutionally vague?

(4) Is HISA unconstitutional under the private non-delegation doctrine?

(5) Is Dr. Shell subject to either (a) individual sanctions for each of the four Possession violations, or (b) consecutive periods of Ineligibility arising from the Administration Case?

(6) Is Dr. Shell entitled, under the No Fault or Negligence or No Significant Fault or Negligence provisions in Rules 3224 or 3225, to elimination or reduction of the two-year Ineligibility period applicable to Possession violations or to any other part of the sanctions?

### 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.<sup>12</sup> 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;

<sup>12</sup> 15 U.S.C. §§ 3058(b) & (c); FTC Rules 1.146 & 1.147.

(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.”

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

The ALJ’s review is *de novo*, as though the issue had not been heard before, and no decision had previously been rendered. 15 U.S.C. § 3058(b)(1); FTC Rule 1.146(b)(3); *Adirondack Med. Center v. Sebelius*, 740 F.3d 692, 696 (D.C. Cir. 2014), and *Agyeman v. INS*, 296 F.3d 871, 876 (9th Cir. 2002) (both describing scope of *de novo* review of agency’s interpretations of statute).<sup>13</sup>

Thus, the 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.”<sup>14</sup> “[T]o pass muster under the arbitrary and capricious standard,” a court must only find a “rational connection between facts and judgment.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 56 (1983). “To make this finding, 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.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

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

<sup>13</sup> *See also* *Barrientos v. Wells Fargo Bank, N.A.*, 633 F.3d 1186, 1188 (9th Cir. 2011), and *Aquarius Marine Co. v. Pena*, 64 F.3d 82, 87 (2d Cir. 1995) (both holding that, on *de novo* review by an appellate court, there is no deference to the district court); *Coalition for Competitive Electricity, Dynergy Inc. v. Zibelman*, 906 F.3d 41, 48 (2d Cir. 2018), and *Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1004 (9th Cir. 2006) (both describing *de novo* review by an appellate court of district court dismissal of complaint under Federal Rule of Civil Procedure 12(b)(6)).

<sup>14</sup> 15 U.S.C. § 3058(b)(2)(A); FTC Rule 1.146(b)(1)-(3).

issues and reasonably explained the decision.” *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021). 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.” *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 422 F.3d 782, 798 (9th Cir. 2005).

Finally, whether the sanctions are in accordance with the law is determined with reference to the substantive law embodied in HISA and the implementing regulations, summarized above.

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.”<sup>15</sup>

## V. ANALYSIS OF THE ISSUES

### A. The Possession Violation and Compelling Justification Defense

Rule 3214(a) provides that “Possession of a Banned Substance” is an “Anti-Doping Rule Violation” “unless there is compelling justification for such Possession.” The violation imposes strict liability.<sup>16</sup> Both equine sporting association codes and those in sports generally include analogous provisions. *See e.g.*, Federation Equestre Internationale (FEI) Equine Anti-Doping and Controlled Medication Regulations, Article 3.1 (4th ed. 2025); World Anti-Doping Agency (WADA) Code, Article 3.1 (2021).

<sup>15</sup> 15 U.S.C. § 3058(b)(3)(A); FTC Rule 1.146(d)(3).

<sup>16</sup> *See, e.g., USADA v. Drummond*, Case No. AAA 01-14-000-6146, at 19 (Dec. 17, 2014) (“The Panel rejects Drummond’s contention that actual possession requires his specific intent to have under his custody and control a particular banned substance whose characteristics were fully known to him.”); *Eder v. International Olympic Committee (IOC)*, CAS 2007/A/1286, 1288 & 1289, at ¶¶ 42, 52 (Jan. 4, 2008) (possession does not require proving “subjective intent,” or “intent to use”); *Diethart v. IOC*, CAS 2007/A/1290, at ¶ 40 (Jan. 4, 2008) (possession “constitutes in itself an antidoping rules violation”).

Dr. Shell has the burden of providing that defense “by a balance of probability (*i.e.*, a preponderance of the evidence) . . . .” Rule 3121(b). Since he does not dispute Possession of the four Banned Substances, his liability turns on the defense of “compelling justification.”<sup>17</sup>

### 1. “Compelling Justification”

While a defense of “compelling justification” to possession is common in sports law anti-doping codes generally, as in the HISA Rules the expression is invariably undefined. Further, decisions considering the defense typically arise under a rule that prohibits a human athlete from failing to provide a test sample “without compelling justification.”<sup>18</sup> Thus, these sports world decisions, arising in a different factual context, offer only limited guidance. In any event, “[w]hen interpreting a statute, we begin with the text.” *Lackey v. Stinnie*, No. 23-621, slip op. at 5 (U.S. Feb. 25, 2025).

Dictionaries reflecting ordinary word usage can be helpful. An authoritative dictionary’s definition of “justification” is:

1. A lawful or sufficient reason for one’s acts or omissions; any fact that prevents an act from being wrongful.
2. A showing, in court, of a sufficient reason why a defendant acted in a way that, in the absence of the reason, would constitute the offense with which the defendant is charged.

BLACK’S LAW DICTIONARY (12th ed. 2024). And for that “reason” to be “compelling,” it must be “both powerful and convincing. *See* [WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 462] (defining ‘compelling’ as ‘forcing, impelling, [or] driving [circumstance]’ and as ‘tending to convince or convert by or as if by forcefulness of

<sup>17</sup> The arbitrator found that Dr. Shell has failed to prove compelling justification to her “comfortable satisfaction.” AB2 at 6616 (¶ 7.35). That was error. On this review, the parties recognize that the preponderance standard applies. AuRPCOL at 13 (¶ 3).

<sup>18</sup> *See, e.g., Klein v. ASADA*, CAS A4/2016 (May 25, 2017), cited by both Shell and the Authority.

evidence’) . . . .” *United States v. Canales-Ramos*, 19 F.4th 561, 567 (1st Cir. 2021) (construing the federal “compassionate release” statute, applicable to incarcerated individuals).<sup>19</sup>

Of necessity, this defense is fact-driven and thus case-specific. Moreover, we should not lose sight of the forest. Rule 3214(a)’s Possession violation is part of a regulatory scheme directed to banishing doping from thoroughbred horseracing; compelling justification, excusing Possession, is the exception and should, accordingly “be interpreted restrictively.” *WADA v. Contreras*, CAS 2013/A/3341, at 20 (¶ 116) (May 28, 2014).

## **2. Dr. Shell’s “Non-Covered Horses” Practice as a Compelling Justification**

As described above, Dr. Shell practices in both Ohio and West Virginia. He provides veterinary services not only to Covered Horses regulated under HISA, but also to farm horses that do not run in Covered Horseraces. Dr. Shell contends that he had the Banned Substances that HIWU seized in Ohio because he needed them in his farm practice to treat these non-Covered Horses in both Ohio and West Virginia.

For his West Virginia practice, Dr. Shell makes still another argument. The federal court’s preliminary injunction prevents HIWU and the Authority from enforcing the HISA Rules in West Virginia. Accordingly, Dr. Shell maintains, any otherwise Covered Horse is “non-Covered” while in that State and, therefore, he may dispense or administer Banned Substances to those horses in West Virginia. Since the Banned Substances are part of his practice in West Virginia, according to Dr. Shell, he had a compelling justification to possess them at Ohio’s Thistledown racetrack.

I consider this argument, applicable to otherwise Covered Horses in West Virginia, first.

<sup>19</sup> See also <https://dictionary.cambridge.org/us/dictionary/english/compelling.&/justification>. I do not suggest that dictionary definitions are always useful, much less dispositive. However, particularly where other sources of guidance are limited, they can assist the analysis.

Then, I address his other argument that the four Banned Substances are necessary for his farm practice.<sup>20</sup>

**a. Otherwise Covered Horses Physically in West Virginia**

Rule 1020 defines “Covered Horse” to mean:

[A]ny Thoroughbred horse, or any other horse made subject to the Act by election of the applicable State Racing Commission or the breed governing organization for such horse under section 3054(1), *during the period*: (A) beginning on the date of the horse’s first Timed and Reported Workout at a Racetrack that participates in Covered Horseraces or at a training facility; and (B) ending on the date on which the horse is deemed retired pursuant to Rule 3050(b).

(Emphasis added). Rule 3050(b)(1) provides that: “If an Owner wishes to retire a Covered Horse such that it is no longer made available for Testing, the Owner must provide *written notice* of such retirement to the Agency, in accordance with its procedures.” (Emphasis added). Other subsections in Rule 3050(b) establish processes for “unretiring” a Covered Horse, and limitations once unretirement is accomplished. *See* AB2 at 7101-07 (Scollay) (explaining operation of the definition and the retirement process).

No HISA Rule recognizes an automatic change from Covered to non-Covered that occurs if a Covered Horse is moved from a jurisdiction subject to HISA to one that is not. As Dr. Mary Scollay, HIWU’s chief scientist since October 2022, explained:

Q: Can you help us understand exactly what a covered horse is, what the definition is?

A: Sure, it is a thoroughbred from the time that it has generated its first published work or made its first start until it is either retired or it is deceased.

...

Q: And so if someone were to attempt to cover their horse and then uncover the horse and then cover their horse and uncover their horse, that’s simply not permissible under the regs., is it?

A: No.

AB2 at 7101, 7106 (Scollay).

<sup>20</sup> Many records Dr. Shell produced in this case contain hand notations such as “non-covered” or “farm horse.” Dr. Shell testified that his secretary made the notations, but did not explain why. AB2 at 6853. I infer these hand notations were made simply for production purposes in this case, not as ordinary course business records.

Although Dr. Shell testified that he met with Dr. Scollay after a presentation she made at Mahoning racetrack in Ohio, it is undisputed that he never asked her whether he could dispense Banned Substances to horses in West Virginia; nor is there any evidence he asked anyone else from HIWU or the Authority. *See* AB2 at 6822-25 (Shell). He similarly offered no evidence that he sought advice concerning the effect of the Western District of Louisiana preliminary injunction. Instead, he testified, without corroboration, that trainers “unregister” and “re-register” Covered Horses when transporting them from a State subject to HISA, such as Ohio, to one not subject to HISA, such as West Virginia. AB2 at 6792-98 (Shell).

The Arbitrator concluded that holding otherwise Covered Horses located in West Virginia as no longer covered would “undermine[] the integrity of the ADMC Program and is not justified, much less compelling.” AB2 at 6614-15 (¶ 7.25). I agree.

If accepted, Dr. Shell’s position would permit evasion of the ADMC Program. Covered Persons, such as owners or trainers, who may be in West Virginia could receive and use Banned Substances with otherwise Covered Horses, or have them administered in West Virginia. Their racehorses could then be transported to run out of the State in Covered Horseraces. Any such result would fly in the face of a core principle of the ADMC Program: “Covered Horses should compete only when they are free from the influence of medications, other foreign substances, and treatment methods that affect their performance.” Rule 3010(d)(1). And, since three of the four Banned Substances here also are prohibited by the West Virginia Racing Commission, permitting their dispensation in West Virginia could impair the integrity of races in that State as well.

This case illustrates the potential for evasion of the ADMC Program. Dr. Shell dispensed Carolina Gold—often identified in his records as for “farm use”—to various West Virginia

trainers, who ran thoroughbred racehorses throughout the country in HISA-covered States. Lack of individual horse identification in the records Shell produced makes it impossible to determine whether—or which of—those horses had received Carolina Gold in West Virginia. *See* AB1 at 3451-98; AB2 at 6868-74, 6920-30 (Shell). Moreover, Dr. Shell dispensed the Carolina Gold in a vial, sometimes with instructions to the trainer for its use, rather than treating the horse himself. *See* AB2 at 6761-62, 6852 (Shell). For example:

- Dr. Shell dispensed Carolina Gold to a Covered Trainer in West Virginia for a thoroughbred racehorse that thereafter raced at Mahoning Valley in Ohio, and previously at Monmouth Park in New Jersey. AB1 at 3451-52; AB2 at 6878-83 (Shell).
- Dr. Shell dispensed Carolina Gold to Covered Trainers for thoroughbred racehorses with the instructions:
  - “Give 5cc IM [in the muscle] before race at Mountaineer [in West Virginia] for calming/relaxation.” AB1 at 3426-27; AB2 at 6845-47, 6853-55 (Shell).
  - “Give 5cc IM night before race or work for nerves Give IM.” AB1 at 3429-30; AB2 at 7214 (Benson).
  - “Give 5cc IM night before training or race for nerves.” AB1 at 3442-43; AB2 at 6872-73 (Shell).
- Dr. Shell dispensed Carolina Gold to a Covered Trainer in Ohio for a thoroughbred racehorse stabled in West Virginia that raced at Mountaineer. AB1 at 3445, 3447; AB2 6874-77 (Shell).

Once the Banned Substance is dispensed in West Virginia to a trainer with administration instructions, the opportunity to inject the Covered Horse for races elsewhere is obvious. I reject

Dr. Shell's loophole argument: that he was entitled to provide Banned Substances to thoroughbred racehorse trainers in West Virginia to use as they pleased. Covered Horses that are not "retired" in accordance with Rule 3050(b)(1) remain Covered Horses while in West Virginia for purposes of Rule 3214(a) charges of Possession of Banned Substances at HISA-covered locations in Ohio.

**b. Dr. Shell's Farm Practice Proof**

Dr. Shell also argues that his farm practice, often involving non-Covered Horses, required his Possession of the Banned Substances that HIWU seized. The factual backdrop for his defense revolves around remarks by HIWU's Dr. Scollay to educate industry participants on the HISA Rules during the period after the law's enactment, but prior to the ADMC Program taking effect in May 2023. Dr. Scollay's remarks, Dr. Shell argues, informed his view of the proof he would need to demonstrate compelling justification.

**i. Dr. Scollay's Mahoning Presentation**

Besides serving as HIWU's chief scientist, Dr. Scollay is a regulatory veterinarian with 37 years of industry experience. AB2 at 7056-57 (Scollay). After HISA's enactment, she made public presentations throughout the country to educate horserace industry participants on the new, not yet effective, ADMC Program. AB2 at 7059-60 (Scollay). The presentations were themselves substantially the same, and each afforded those attending an opportunity to ask questions. AB2 at 7060-62, 7065 (Scollay). Discussion of compelling justification as a defense to Banned Substance possession charges under Rule 3214(a) typically arose in response to audience questions:

I'd had several questions at different presentations about non-covered horses or mixed populations in some race tracks, trainers have populations of thoroughbreds which are covered horses and quarter horses which are not under HISA jurisdiction. And so they asked questions about a trainer possessing a

banned substance in his barn if it were prescribed for a non-covered horse. And I explained that HISA regulations do not have authority over non covered horses.

AB2 at 7066 (Scollay); *see also* ARPFOF at 9 (¶ 34).

One of Dr. Scollay’s presentations took place in March 2023 at the Will Rogers Downs Racetrack in Oklahoma, where an audience member recorded her remarks. AB2 at 7062-63 (Scollay). During discussion of Banned Substances, an audience member asked whether the “banned possession” rule applied to veterinarians.<sup>21</sup> Dr. Scollay replied that veterinarians were covered and “you don’t need that on your truck.”<sup>22</sup> She continued: the “*caveat* I will tell you is:

... [i]f the veterinarians are practicing also on a population of non-Covered horses, they’re taking care of quarter horses or they’ve got a country practice part-time they are able to possess a Banned Substance because we don’t have control over those horses, and so to the extent that they want to use bisphosphonates on a Non-Covered horse, we can’t ban them from possessing them ... we can’t penalize people for something that we don’t have control over so, you know, let’s just say because we have the ability to investigate, if the story starts to get a little weird or a little extreme, you’re going to get more than a raised eyebrow. But at the end of the day if someone is practicing out in the country, we don’t have the authority to control the medications they administer or carry for Non-Covered Horses ... the regulation addresses if there is justification for them to be in Possession of a Banned Substance and certainly a practice that incorporates Non-Covered horses.

AuRPFOF at 3 (¶ 9) (emphasis added); AB1 at 1547-48; AB2 at 7117-18 (Scollay) (the recorded remarks “[s]ound[] exactly like what I said.”).<sup>23</sup>

Although Dr. Shell did not attend the Will Rogers Downs presentation, he testified to attending one at Mahoning racetrack in Ohio, where Dr. Scollay spoke. AB2 at 6687, 6789,

<sup>21</sup> [https://www.facebook.com/Traoracing/videos/891125828812595/?extid=CL-UNK-UNK-UNK-AN\\_GK0T-GK1C&mibextid=2Rb1fB&ref=sharing](https://www.facebook.com/Traoracing/videos/891125828812595/?extid=CL-UNK-UNK-UNK-AN_GK0T-GK1C&mibextid=2Rb1fB&ref=sharing) (Video Mark ≈24:40-50). *See also* AB1 at 2576 (Scollay witness statement).

<sup>22</sup> *Id.*

<sup>23</sup> *See also HIWU v. Perez*, JAMS Case No. 1501000589, *aff’d*, FTC No. 9420 (ALJ Decision on Application for Review, Feb. 7, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/609612\\_d09420-administrative\\_law\\_judge\\_decision\\_on\\_application\\_for\\_review\\_-\\_public.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/609612_d09420-administrative_law_judge_decision_on_application_for_review_-_public.pdf), *review denied*, 2024 WL 3824065 (F.T.C. Aug. 8, 2024).

6813-15 (Shell). Dr. Scollay gave substantially the same prepared remarks as at other racetracks, “absent the spontaneous exchanges that occur[red] at each racetrack . . . .” AB2 at 7083 (Scollay). According to Dr. Shell, Dr. Scollay made “it clear that it was prohibited to possess or prescribed [sic] banned substances to a covered horse.” AB2 at 6815 (Shell). The subject of compelling justification, as applied to veterinarians, again came up. Dr. Scollay’s response echoed those given at Will Rogers Downs. AB2 at 6693-94 (Shell). Dr. Shell further testified:

[Dr. Scollay] said that we were allowed to carry banned substances on our vehicles. In fact, she said you do not have to unload and reload your truck every time you leave the track to go to a farm.

. . . .

She said, as long as you have a farm practice, that with justification, you are allowed to carry them.

AB2 at 6693, 6816 (Shell).

During her Mahoning presentation or those at other racetracks, Dr. Scollay “did not” say that “veterinarians have carte blanche to carry banned substances on their trucks at racetracks if they claim to have a farm practice.” AB2 at 7083, 7144-45 (Scollay). She also made “it clear that HIWU would have the ability to investigate any possession of a banned substance,” and said “you have to be able to support why you had medication on your truck.” AB2 at 6821 (Shell).

Thus, as the parties agree:

[During her presentations] Dr. Scollay would confirm that the ADMC Program has no authority over non-Covered Horses but explain[ed] that Possession needed to be justified and would be further investigated where suspicions or inconsistencies arose.

ARPF0F at 9 (¶ 34).

## ii. Dr. Shell’s Follow-up Conversation

Having heard Dr. Scollay’s Mahoning remarks, Dr. Shell was, nevertheless, “a little antsy.” AB2 at 6694, 6822 (Shell). He testified that, after the presentation had concluded, he

spoke to Dr. Scollay. Dr. Shell sought further information regarding his practice of servicing non-Covered horses. According to Dr. Shell: “She reassured me . . . after the meeting that there were [sic] absolutely no reason that I would have to remove banned substances and put them back on my truck every time I drove off the racetrack.” AB2 at 6694 (Shell). Dr. Shell further testified:

Q: And you never asked her the question of whether or not you could have banned substances on your truck to provide to race horses in West Virginia on a farm or otherwise, you never asked her, right?

A: No, I did not ask her.

AB2 at 6823 (Shell).

Dr. Shell had no other contacts with Dr. Scollay after the Mahoning racetrack presentation and follow-up, nor any further “guidance” on compliance with Rule 3214(a). AB2 at 6695-69 (Shell), 7070 (Scollay). Dr. Scollay, who did not know Dr. Shell, did not recall any conversation with him at Mahoning, although she did not deny it could have occurred; nor did she have any calls or emails with him. AB2 at 7071, 7084-85, 7153-54 (Scollay).

### iii. The Randall Equine Email Exchange

After the Mahoning presentation, Dr. Meghan Naylor, who practices with Randall Equine Vet Group, emailed Dr. Scollay “to confirm that banned substances legal in non-covered horses such as thyro 1 were allowed to be carried by veterinarians that practice off track as well.” AB1 at 2601; AB2 at 7070-71 (Scollay). After quoting Rule 3214, Dr. Scollay wrote:

The regulation above provides for *the ability* to justify the possession of Banned Substances. *To the extent* that your practice provides veterinary care to non-Covered horses—and *can demonstrate* (through records, day sheets, etc.) the need to carry those substances you *can establish* compelling justification.

AB1 at 2601 (emphasis added); *see also* AB2 at 7072-73 (Scollay). Dr. Shell reviewed this email exchange in June 2023. AB2 at 6804, 6806-07 (Shell). There is no evidence that he thereafter

made any outreach to Dr. Scollay, or anyone. *See* AB2 at 6824-25, 6827-28 (Shell).

Dr. Shell argues that Dr. Scollay’s Mahoning remarks and response to Dr. Naylor guided him in accommodating his practice servicing non-Covered Horses to the requirements of the HISA’s Rules. More specifically, he came away with the view that “compelling justification” would be met if he “show[ed] through *any* records, need to carry the Charged Banned Substances for use or intended in Non-Covered practice.” AOBBr. at 5 (emphasis added); *see also* ARBr. at 1. That “need,” Dr. Shell maintains, “resides in Non-Covered use,” without more. ARBr. at 3.

This argument, however, disregards that compelling justification calls for strong proof *by Dr. Shell*. He must demonstrate, through veterinarian practice records or other evidence, that his non-Covered Horse practice requires him to keep Banned Substances on his truck while at racetracks in Ohio, a HISA-covered jurisdiction.

**c. Inadequacy of Dr. Shell’s Proof**

Whether considered overall or for the four Banned Substances individually, Dr. Shell’s proffered proof fails to establish compelling justification.

**i. Dr. Shell’s Records Overall**

In Discovery Order No. 1, the Arbitrator made clear that, by undertaking to prove compelling justification, Dr. Shell “opened the door” to showing Banned Substances were “only used in non-covered horses . . . . [T]he *complete veterinary medical records* for all horses in his practice . . . are *relevant and material* to the defense.” AB2 at 5974 (emphasis added). Dr. Shell read and understood the Order. AB2 at 6831-32. Instead of heeding the Arbitrator’s advice, his compelling justification proof consisted of a self-selected slice of documents. *See, e.g.*, AB2 at 6893 (Arbitrator), 6959-62, 6964-65 (Shell). Even then, many documents reflect shoddy

recordkeeping practices, often lacking the information Ohio and West Virginia law require veterinarians to keep, include inaccurate entries, and fail to show diagnosed conditions appropriate for dispensing Banned Substances. *See* pp. 27-33, below.

A veterinary medical record should contain the thoughts and impressions of a veterinarian, including any examination, diagnosis, or treatment administered to a specific horse. AB2 at 7184-85 (Benson). It should have sufficient detail so that “somebody else with appropriate training could pick up that record, read it, review it, understand all that had been done, and whether they agreed with it or not, they could carry on with care for that patient because they had the full history on the animal up to the point where they received it.” AB2 at 7076 (Scollay); *see also* AB2 at 7075-81 (Scollay) (describing recordkeeping generally). A properly created and maintained veterinary record is, therefore, distinct from a billing record. AB2 at 7184-85 (Benson).

Yet, the documents Dr. Shell produced to show the medications he prescribed to horses “were mostly billing records . . . they didn’t have the detail that would be required of a medical record.” AB2 at 7181-82 (Benson). The records typically would not enable continuity of care, indicating only the substance Dr. Shell billed for, often without any medical justification for using the substance. AB2 at 5631, 6096-97, 7181-82, 7188-92, 7205-07, 7212, 7249-50 (Benson).

Licensed in both Ohio and West Virginia, and an Attending Veterinarian under HISA Rules, Dr. Shell is obliged to follow prescribed recordkeeping provisions. AB1 at 2728 (Ohio requirements), 2729-30 (West Virginia requirements); HISA Rules 1020 (definitions), 2251, and 3040(d). Dr. Shell knows these rules. *See* AB2 at 6780-83 (Shell). However, overall, records

relating to the four Banned Substances that he offered pale by comparison to those expected of veterinary professionals.

Dr. Shell's frequent argument—that HIWU has not charged him with a recordkeeping violation—misses the point. Both the absence of complete medical documentation, and the state of many records Dr. Shell did produce, impeach the reliability of the documents he relies on to meet *his* burden to demonstrate compelling justification for possessing Banned Substances.

What is more, HIWU's review of medical records required under HISA Rule 3040(d) casts further doubt on the probative value of Dr. Shell's proffered evidence. Rule 3040(d) requires Dr. Shell to input all records of treating Covered Horses into an electronic database designated by the Authority. HIWU's comparison of Dr. Shell's inputted records with his practice records disclosed “[p]retty consistent lack of information being inputted into the HISA portal.” AB2 at 7289-90 (Wallace); *see also* AB1 at 2499, 2502, 2537, 2568; AB2 at 7291-03, 7307-12 (Wallace). Compared to the input deficiencies of other Attending Veterinarians, “there were more for Dr. Shell's practice.” AB2 at 7303 (Wallace). These missing records, too, confirm that Dr. Shell's lack of attention to recordkeeping render his documentary proof too unreliable to demonstrate compelling justification.

Dr. Shell regularly provided trainers with prescriptions—including those for, Carolina Gold and Pitcher Plant—that lacked specific horse names, and instead listed “Farm Use” as the horse name. AB2 at 5999, 6002, 6013, 6016, 6018, 6023, 6087, 6094. Many of Dr. Shell's documents also fail to indicate whether Dr. Shell examined the horse for which he prescribed medication. AB2 at 7211, 7213-20 (Benson).

## **ii. The Four Banned Substances**

Considered individually for each of the four Banned Substances, Dr. Shell's proof comes

up well short of demonstrating compelling justification.

**Carolina Gold:** Dr. Shell testified he used Carolina Gold “on farms in both Ohio and West Virginia,” largely on young horses. AB2 at 6891 (Shell). Yet, the evidence, including Dr. Shell’s own testimony, is much the contrary. Dr. Shell often provided Carolina Gold to thoroughbred racehorse trainers in West Virginia. AB2 at 6856-59, 6862-63 (Shell). Although Dr. Shell maintained he dispensed this Banned Substance for races in West Virginia, many of his records identify the “Patient” as “Farm Use.” AB1 at 3426-43, 3460-92; AB2 at 6845-66, 6868, 6874 (Shell). Dr. Shell did not have permission from the West Virginia Racing Commission to possess or dispense Carolina Gold in that State. AB2 at 7209-10 (Benson).

More specifically:

- The prescription labels on the Carolina Gold bottles HIWU seized in September 2023 identified Dr. Shell as the prescribing doctor and the patient as “Snazzy Horse,” a “Covered Horse at Thistledown Race Track in Ohio,” trained by Michael Rone, a Covered Person. AB1 at 481, 642 (¶¶ 4, 7), 647, 652; AB2 at 6005, 6757-58, 6838-39, 6841-42 (Shell). The Snazzy Horse identification is said to illustrate Dr. Shell’s office practice when ordering non-FDA approved compounded substances, such as Carolina Gold: “just give [the supplier pharmacy] a name so that we can get the medication ordered, not necessarily the name of that particular horse that is being ordered for.” AB2 at 6759-60 (Shell). The Carolina Gold was intended for “[m]ultiple injections.” AB2 at 6761 (Shell)
- According to Dr. Shell, the vials of Carolina Gold that HIWU seized were in fact intended for Eddie Clouston, Bill Howard, and John Michael Baird—all thoroughbred

- racehorse trainers in West Virginia—based on what Dr. Shell testified were earlier examinations of their horses. AB2 at 6842-45 (Shell). Dr. Shell produced no medical records of the examinations. AB2 at 6844 (Shell).
- The day after HIWU’s September 2023 search, Dr. Shell re-stocked his veterinary truck with a vial of Carolina Gold and delivered it to Timothy Collins, a thoroughbred racehorse trainer and Covered Person. AB2 at 5999, 6856-59 (Shell). Dr. Shell dispensed the vial to Collins for use with “two or more thoroughbred racehorses in West Virginia.” AB2 at 6862-63 (Shell).
  - In August 2023, Dr. Shell dispensed a vial of Carolina Gold to Christopher Logston, a thoroughbred racehorse trainer and Covered Person, in West Virginia for use on “thoroughbred racehorses mares.” AB2 at 6853-54 (Shell). There is no prescription; according to Dr. Shell, Logston “had several [horses] that were requiring treatment.” AB2 at 6852 (Shell). *See also* AB1 at 3426-27; AB2 at 6002, 6007, 6846-48, 6852-53, 6863 (Shell).
  - In December 2023—after HIWU’s search—Dr. Shell dispensed Carolina Gold for thoroughbred racehorse Resvalon, which ran in Covered Races, both before and after this date. AB2 at 6032, 6879-83 (Shell); AB1 at 2109, 2300. Dr. Shell offered no medical record for dispensing Carolina Gold to Resvalon, only billing record with the notation “Give 5ccs IM as needed for training to calm nerves, Dispensed.” AB2 at 6032, 6880-81 (Shell).
  - In 2023, Dr. Shell dispensed Carolina Gold to the following thoroughbred racehorse trainers, all of whom are Covered Persons:
    - Timothy Collins

- Christopher Logston
- Dennis Van Meter
- Shannon Simpson
- Gregory Eidschun
- Annette McCoy

See AB2 at 6845-74 (Shell).

Of the eight records dispensing Carolina Gold that Dr. Shell produced to establish administering the substance to non-Covered Horses, six do not have a particular horse's name, and erroneously list "Farm Use" as the patient name. AB2 at 5521, 5999-6000, 6002-03, 6007, 6013-14, 6016, 6018, 6023-24. Dr. Shell produced no records showing the horses that received Carolina Gold from the vials HIWU seized. AB2 at 6959, 6961-62 (Shell).

Except for two records that postdate HIWU's search, none of the records showing Dr. Shell's dispensation of Carolina Gold contain examination findings or diagnostic assessment of need (in veterinary terms, "differential diagnosis"). See AB2 at 5631 (Benson), 6026, 6032. Nor do they include other basic identifying information, such as the patient date of birth, sex, weight, and breed, that a medical record should memorialize. AB2 at 5521, 5999-6000, 6002-03, 6007, 6013-14, 6016, 6018, 6023-24.

To the documents Dr. Shell prepared after HIWU's search, I attach limited weight. Created post-search, this proof is subject to manipulation to bolster his litigation position. Such post-event evidence has been called "all-but-meaningless." *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1047 (D.C. Cir. 2008) (Tatel, J., concurring).<sup>24</sup>

<sup>24</sup> See also *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 435 (5th Cir. 2008) ("The probative value of such evidence is deemed limited not just when evidence is actually subject to manipulation, but rather is deemed of limited value whenever such evidence *could arguably* be subject to manipulation.") (emphasis in original); *Hosp.*

**Pitcher Plant:** Dr. Shell contends that he uses Pitcher Plant for his farm practice, and in West Virginia where he regarded all thoroughbred racehorses as non-Covered Horses, regardless of whether they ran at tracks subject to HISA. The records he offered show the following:

- The prescription label on the seized bottle of Pitcher Plant identified Dr. Shell as the prescribing doctor and the patient as “Totally Obsessed.” AB1 at 484, 643-44, 650. Totally Obsessed is a Covered Horse “stabled at Thistledown,” trained by Gary Johnson, a Covered Person. AB2 at 6953-54 (Shell). The Totally Obsessed identification allegedly is another “administrative error” resulting from Dr. Shell’s office practice. AB2 at 6954-55 (Shell).
- In June 2023, Dr. Shell dispensed Pitcher Plant to trainer Mark Tomczak, a Covered Person, using as the patient name “Farm Use.” AB1 3590; AB2 6980-84 (Shell). Tomczak has an Ohio billing address and regularly raced horses in Covered Races in 2023, including Laurel Park in Maryland and Colonial Downs in Virginia. AB1 at 3590, 3592; AB2 at 6982-83 (Shell). Dr. Shell offered no records identifying the horses who received the Pitcher Plant dispensed to Tomczak. AB2 at 6981-82, 6984 (Shell).
- In September 2023, Dr. Shell dispensed Pitcher Plant to “Venezuelan Dreamer,” a thoroughbred racehorse trained by Juan Gotera, a Covered Person. AB1 at 3587. Venezuelan Dreamer ran in a Covered Race a few days later. AB2 at 6978 (Shell); AB1 at 2491, 3587-88.
- In October 2023, Dr. Shell dispensed Pitcher Plant to trainer Larry Reed, a Covered

*Corp. of Am. v. FTC*, 807 F.2d 1381, 1384 (7th Cir.1986) (“Post-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight.”); *United States v. Bazaarvoice, Inc.*, No. 13-cv-00133, 2014 WL 203966, at \*57 (N.D. Cal. Jan. 8, 2014).

Person, for the thoroughbred racehorse “High Rolling Dude.” AB1 at 3596; AB2 at 6984-88 (Shell); AB1 at 3596-600. Although Reed has a farm in West Virginia, Dr. Shell billed him at an Ohio address, where Reed lives. AB1 at 3596; AB2 6986 (Shell). Reed raced High Rolling Dude at Mahoning racetrack in Ohio on several occasions. AB1 at 3598-99; AB2 6987 (Shell).

- After the ADMC Program became effective in May 2023, Dr. Shell dispensed Pitcher Plant repeatedly in 2023 to the following additional thoroughbred racehorse trainers, all Covered Persons, in West Virginia, using the Patient Name “Farm Use”:

- Eddie Clouston
- Greg Eidschun
- Dennis Van Meter

AB1 at 3578-85; AB2 6977-79 (Shell).

Three of the seven records produced for Pitcher Plant erroneously list “Farm Use” as the patient name. AB2 at 6087-89, 6094, 6099. All seven records, including the four with a specific horse name, lack key identifying information; one postdates the search and thus has limited probative value. AB1 at 2389; AB2 at 6092, 6096, 6105. *See* pp. 29-30 & n.24. Moreover, none of the Pitcher Plant records Dr. Shell offered contain any examination findings or differential diagnoses, making them deficient as medical records, and akin to billing records.

**Isoxsuprine:** The tub of Isoxsuprine found in Dr. Shell’s truck had his prescription label, but no horse listed as a patient. AB1 at 430, AB2 at 6992 (Shell). The records Dr. Shell offered for this Banned Substance are limited.

For Isoxsuprine, Dr. Shell produced only four records memorializing his dispensation. One record, covering an older horse named “Cat,” is largely a billing record covering many unexplained dispensations of the substance, most of which took place before the ADMC program

took effect in May 2023. AB1 at 3797. For one post-effective date entry, there are notes of a physical examination by Dr. Hippie, which state that Cat is “acutely lame,” and which include additional medical information. The Hippie notes do not include Isoxsuprine as recommended treatment; nor are they a fulsome medical record. *See generally* AB2 at 7232-36 (Benson). The same billing record further shows Dr. Shell prescribed Isoxsuprine the next day, as well as a month later, with no explanation.

A second record, from October 2023, shows dispensation to Cool Stance, along with a brief diagnosis (“laminitis both front feet”) and administration instructions by Dr. Shell. AB2 at 6081. But the record does not disclose he contemporaneously examined Cool Stance. Dr. Shell testified that Cool Stance’s founder (lameness) prevented his racing. AB2 at 6750 (Shell). As a post-search record, it is, again, of minimal probative value.

A billing record produced by Dr. Shell shows that Isoxsuprine was dispensed to Michael J. Baird, a West Virginia trainer who raced Covered Horses in Covered Races. AB1 at 3799-800; *see also* AB1 at 2478 (HIWU schedule), 2720 (Benson reply report). Another billing record, apparently for a quarter horse, also was produced. AB1 at 3798. However, Dr. Shell offered no corresponding medical records.

There are FDA-approved, HISA-permitted substances to treat lameness, and the condition, although discomforting, does not require urgent treatment. AB2 at 7096-97, 7100 (Scollay), 7223-24 (Benson). Dr. Shell’s proof regarding Isoxsuprine is insufficient to establish compelling justification for carrying this Banned Substance at a covered racetrack in Ohio.

**Osphos:** The boxes of Osphos recovered from Dr. Shell’s office did not contain prescription information. AB1 at 662. The only documentary record of Dr. Shell directly dispensing Osphos, is to a quarter horse named “Hornet.” AB2 at 6083. Dr. Shell billed Mike

Roberts, a blacksmith. AB2 at 6742 (Shell). This record, too, postdated the HIWU search, and is thus lacking probative value. AB2 at 6083. Perhaps unsurprisingly, the contents of this post-search billing record improves on those from the pre-search period, where comparable information is absent. AB2 at 6083 (“Navicular disease short striding, both front, uncomfortable on turns, preparing for barrel race in two weeks”), 7222 (Benson). Dr. Shell has also treated the horse Cat with Osphos, as has Dr. Hippie, for several years. AB1 at 528-37; AB2 at 7043, 7045-46 (Schulman).

This minimal proof is insufficient to demonstrate a compelling need for Dr. Shell to carry Osphos on an Ohio covered racetrack. Osphos simply is not needed on an emergency basis. AB1 at 528; AB2 at 6997 (Shell), 7100 (Scollay), 7223-24 (Benson).

**d. Overall Assessment of Dr. Shell’s Compelling Justification Proof**

Dr. Shell attempted to minimize incorrect document entries, such as “farm use,” as “ministerial” errors made by Janet Duhon, his head veterinary technician. *See, e.g.*, AB1 at 647, 686; AB2 at 6932-33 (Shell). However, Dr. Shell admitted that he knew Ms. Duhon “pulled” the horse’s name “out of her hat” when restocking substances in bulk, and that he was ultimately responsible for his employees’ conduct. AB2 at 6956 (Shell); *see also* AB2 at 6759-61, 6933-38 (Shell). Worse still, he admitted often failing to provide her with specific horse information for the reorders. AB2 at 6937-38. Dr. Shell’s own expert witness, Dr. Roberts, conceded that these types of error should not regularly occur. AB2 at 7510-11, 7515 (Roberts).

The frequency of the claimed errors is too great to accept Dr. Shell’s clerical or scrivener’s miscue explanation. And, to reiterate, the practice records Dr. Shell offered, some of which he referred to as “cliff notes,” are not comprehensive to begin with. AB2 at 6748, 6750 (Shell). The errors are all the more unacceptable in view of both State regulatory and HISA Rule

obligations. A veterinarian may be able to prove compelling justification despite imperfect recordkeeping, of course. But wherever the line may be drawn in an individual case, the records Dr. Shell offered were insufficient to establish that he had a compelling justification to possess the Banned Substances seized in Ohio only, or even primarily, for use in his Ohio or West Virginia farm practice or to supply trainers in West Virginia. Besides lacking medical records that Dr. Shell is required to keep, the mostly billing records offered are too incomplete and too riddled with claimed errors to find Dr. Shell to have discharged his burden of proof. *See generally* AB2 at 7181-83, 7187-96, 7205-07, 7250 (Benson); AB1 at 2722 (Benson Expert Report ¶¶ 51-52).

Adopting the standard of proof for compelling justification that Dr. Shell advocates and attempted—showing need “through any records”—would so dilute Rule 3214(a)’s compelling justification requirement as to render Possession charges against a veterinarian with a non-Covered Horse practice effectively illusory.

Dr. Shell also sought support for his compelling justification defense from Christine Schulman, the owner of Cat, one of the Ohio farm horses he serviced. Cat received two of the four Banned Substances, Isoxsuprine and Osphos. AB2 at 7036-54 (Schulman). Both can be used to treat lameness, but neither is required on an urgent basis. Although Ms. Schulman was complimentary of Dr. Shell’s care generally, she had no experience with Dr. Shell’s use of Carolina Gold or Pitcher Plant and lacked any knowledge of his conduct with racehorses or their trainers. AB2 at 7052 (Schulman).

To be sure, the testimony of fact witnesses can be probative of compelling justification. But here, the incremental support from this single witness is minimal, especially when evaluated in relation to the evidence at large. It is insufficient to show compelling justification for

Dr. Shell’s Possession in Ohio of Isoxsuprine and Osphos, much less for that of Carolina Gold and Pitcher Plant.

Dr. Shell has not met his burden of proving compelling justification.

**B. Dr. Shell’s Estoppel Argument**

Dr. Shell contends that estoppel precludes HIWU from prosecuting him for possessing the four Banned Substances in Ohio. He bases his argument on the same conduct by HIWU’s Dr. Scollay that informed Dr. Shell’s views on proving his farm practice defense.<sup>25</sup>

The elements of estoppel are not controversial: “the party claiming the estoppel must have relied on its adversary’s conduct in such a manner as to change his position for the worse, and that reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary’s conduct was misleading.” *Heckler v. Community Health Services of Crawford Cty., Inc.*, 467 U.S. 51, 59 (1984) (internal quotation marks omitted). *See also*, e.g., *Ohio State Bd. of Pharmacy v. Frantz*, 555 N.E.2d 630, 633 (Ohio 1990).

In sports law specifically, “the doctrine of estoppel, which primarily prevents sports federations from taking explicit contradictory positions, . . . has a very limited scope in disciplinary proceedings.” *Sport Lisboa e Benfica SAD v. FIFA*, CAS 2021/A/8076, at ¶ 58 (Oct. 10, 2002) (citing authorities). Broader application, leading to “the (temporary) non-enforcement of legitimate and binding provisions[,]” could mean that “many sports and state provisions would run the risk of no longer achieving their goals due to previous unpunished violations. . . .” *Id.*

¶ 58. *See also New Zealand Olympic Committee (NZOC) v. The Salt Lake Organizing Committee*

<sup>25</sup> The Authority, the opposing party here, is, of course, bound by Dr. Scollay’s acts. HIWU implements and enforces the ADMC Program on behalf of the Authority. Rule 3010(e) (“The Protocol will be implemented and enforced on behalf of the Authority by: (1) an anti-doping and controlled medication enforcement agency known as the Horseracing Integrity and Welfare Unit”); *see also* 15 U.S.C. § 3054(e)(1)(E)(i) (directing the Authority to enter an agreement to “implement[] the anti-doping and medication control program on behalf of the Authority”); AB1 at 313, 315-16 (HIWU response), 324, 326-27, 329 (Authority response).

*for the Olympic Winter Games of 2002 (SLOC)*, CAS OG/02/006, at ¶ 18 (Feb. 20, 2002) (recognizing “[a]n estoppel that arises when one makes a statement or admission that induces another person to believe something and that results in that person’s reasonable and detrimental reliance on the belief” (quoting BLACKS LAW DICTIONARY, 7th ed. 1999)).

Dr. Shell bases his estoppel argument on his reliance on the farm practice statements detailed above, which arise from: (1) Dr. Scollay’s substantially similar industry presentations, given at the Will Rogers Downs and Mahoning racetracks; (2) the follow-up conversation Dr. Shell testified he had with Dr. Scollay that same day; and (3) the subsequent email exchange between Dr. Scollay and the Randall Equine veterinarian group. These facts are simply insufficient to demonstrate estoppel.

Dr. Shell admits there was no other “guidance” forthcoming from either Dr. Scollay, the Authority, or HIWU. AB2 at 6695-96 (Shell). The information that Dr. Scollay did impart would not reasonably be understood to suggest that possession of a Banned Substance would be excused whenever a veterinarian had a non-Covered Horse practice for which the Banned Substance might be useful, so long as there were some supporting records or other evidence, however incomplete or unreliable.

During her racetrack presentations, Dr. Scollay noted that the HISA Rule on Possession of Banned Substance applied to Veterinarians, who should not have the substances on their trucks. As “a caveat”—that is, as a caution or exception—she explained during her Will Rogers Downs presentation that, if a veterinarian’s practice included non-Covered Horses, the Authority and HIWU could not sanction the veterinarian for possession “because we don’t have control over those horses . . . [W]e can’t penalize people for something that we don’t have control over,” AuRPFOF at 3 (¶ 9); *see also* AB1 at 1114; AB2 at 7117-18 (Scollay). However, she

expressly qualified these remarks, stating that Possession would not be excused based on the mere assertion that a veterinarian's practice included "non-Covered Horses . . . or . . . a country practice." Rather, HIWU had "the ability to investigate, [and] if the story starts to get a little weird or a little extreme, you're going to get more than a raised eyebrow." AuRPFOF at 3 (¶ 9).

Dr. Shell also testified that, during Dr. Scollay's follow-up remarks to him at Mahoning, she said, in substance, that Dr. Shell did not have to reload his truck "every time [he] drove off the racetrack." This essentially impromptu comment neither detracts from nor materially enhances the thrust of her "caveated" public guidance. Dr. Shell could not reasonably have understood Dr. Scollay's comment to mean he could possess Banned Substances whenever he drove his truck to an Ohio racetrack. He similarly could not reasonably have thought his West Virginia practice would excuse possession in Ohio. Indeed, in talking with Dr. Scollay, Dr. Shell knew his practice extended to West Virginia. But he admittedly did not raise the topic with Dr. Scollay, who did not even know him. AB2 at 6727-28 (Shell), 7084, 7085-86 (Scollay). And Dr. Shell offered no proof that the Authority or anyone else at HIWU knew anything about his West Virginia activity.

Dr. Scollay's response to the Randall Equine email from Ms. Naylor similarly reiterated that merely having a practice that included "non-Covered horses" did not provide a defense to possession. Instead, "to the extent" that a veterinarian "can demonstrate"—"through records, day sheets, etc."—a need "to carry" Banned Substances, the veterinarian "can establish compelling justification." AB1 at 2601.

Fairly considered overall, Dr. Scollay's guidance acknowledged that, if a veterinarian's practice included non-Covered Horses, to meet the burden of showing compelling justification, the veterinarian had to offer reliable proof. Further, with Dr. Scollay's response to the Randall

Equine email exchange, if not earlier, Dr. Shell should reasonably have understood that simply having a non-Covered Horse practice did not entitle him to keep Banned Substances in his truck; he had to have adequate practice records as proof of need. AB2 at 6807-08, 6812 (Shell).

One other estoppel consideration should be discussed. It is undisputed that Dr. Scollay's remarks at both the Will Rogers Downs and Mahoning presentations concerning the Possession ADRV, its applicability to Veterinarians, and the compelling justification defense were substantially the same. And thus far throughout this decision, I have assumed Dr. Shell's best version of the facts relating to Dr. Scollay's presentation remarks and to her follow-up conversation with him. However, I have serious reservations concerning at least parts of Dr. Shell's testimony on these matters.

In pre-arbitration hearing filings—including Dr. Shell's two pre-hearing briefs, his witness statement, and the synopsis of his testimony—he referred—repeatedly and consistently—*only* to Dr. Scollay's remarks *at Will Rogers Downs* in Oklahoma and to her response to the Randall Equine email, both of which he quoted and otherwise cited. For example, his pre-hearing brief stated:

It cannot be disputed that on March 24, 2023, Dr. Mary Scollay gave a presentation at Will Rogers Downs in Oklahoma, about the HISA program . . . .

. . . .

Dr. Scollay confirmed her position in an email dated June 16, 2023, at 10:46:24 a.m., EDT, *to Randall Equine Vet group* . . . .

. . . .

Dr. Shell objectively, and reasonably *relied on an objective statement* of HIWU's Chief of Science, made . . . *at an Oklahoma presentation* . . . .

. . . .

Dr. Scollay elaborated in an email . . . *to Randall Equine Vet Group* . . . .

. . . .

[H]e *relied on* an objective statement from Dr. Scollay.<sup>26</sup>

<sup>26</sup> AB1 at 1513 (¶¶ 27, 28), 1520 (¶¶ 49, 50), 1527 (¶ 75), (emphasis added). *See also* AB1 at 1522-23 (¶¶ 55, 57-58), 1523-24 (¶ 61), 1534-35 (¶¶ 108-10, 114), 1537-38 (¶ 123).

Dr. Shell made similar representations in his other pre-hearing filings.<sup>27</sup>

In these filings, Dr. Shell *never* said he attended the Mahoning presentation and heard Dr. Scollay say substantially the same thing there as she had at Will Rogers Downs. Dr. Shell similarly *never* mentioned a follow-up conversation with Dr. Scollay at Mahoning. Moreover, at the arbitration hearing, although Dr. Shell testified he “took notes” of Dr. Scollay’s Mahoning remarks, he offered no notes to corroborate his Mahoning testimony. AB2 at 6689 (Shell). Further, while Dr. Shell testified that Randall Equine’s Ms. Naylor participated in the follow-up conversation, he never called Dr. Naylor to testify.

The absence of both Dr. Shell’s own notes or testimony from Dr. Naylor to corroborate the public and follow-up remarks attributed to Dr. Scollay cast significant doubt on Dr. Shell’s own testimony. I attach limited weight to it in evaluating his asserted estoppel argument.<sup>28</sup> In all events, however, Dr. Shell was admittedly on notice that, if he sought to rely on a compelling justification defense, he would have to prove it with fulsome evidence. There is no basis for estopping the Authority from imposing sanctions for his violations of Rule 3214(a).

<sup>27</sup> See AB1 at:

1. Amended pre-hearing brief: 1779-81 (¶¶ 2-4), 1785-86 (¶¶ 21-22), 1788 (¶ 27), 1791-92 (¶¶ 37-38), 1793-94 (¶¶ 41-42), 1795 (¶ 45), 1798 (¶ 56), 1805 (¶ 79), 1806 (¶ 82), 1808 (¶ 88);
2. Witness statement: 2014-15 (¶¶ 15-16, 18-20), 2016 (¶ 22), 2019 (¶ 38), 2021-23 (¶¶ 49-52, 54); and
3. Synopsis of testimony: 2040-41.

<sup>28</sup> 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”); *Graves v. United States*, 150 U.S. 118, 121 (1893) (“[I]f 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); *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 on the issues authorizes, under certain circumstances, an inference or presumption unfavorable to such party.”).

**C. Dr. Shell’s Constitutional Arguments**

**1. Rule 3214 Is Not Unconstitutionally Vague**

Dr. Shell contends that Rule 3214(a) violates due process, as overly vague. He argues that, “no Covered Person of reasonable intelligence could know what facts must be proved to demonstrate ‘compelling justification,’ or how to comport their behavior.” AOBBr. at 11.

According to Dr. Shell, without more content, “compelling justification is always/was subject to the adjudicator’s arbitrary and capricious whim.” AOBBr. at 11 (internal quotation marks deleted).

As applied to him specifically, Dr. Shell maintains that he “reasonably relied on Dr. Scollay’s guidance,” but that the Arbitrator arbitrarily and capriciously “credited post-hoc requirements to show Compelling Justification . . . .” AOBBr. at 11.

Dr. Shell’s argument is unpersuasive.

To satisfy the Constitution’s Due Process requirement of fair notice, a regulation must be “reasonably comprehensible to people acting in good faith.” *MobileTel, Inc. v. FCC*, 107 F.3d 888, 896 (D.C. Cir. 1997) (cleaned up); *see also, e.g., United States v. Ancient Coin Collectors Guild*, 899 F.3d 295, 321-22 (4th Cir. 2018). This inquiry includes examining “the particular situation of the defendant,” and whether, as one to whom the regulation is directed, “it lacked reasonable notice.” *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1330 (D.C. Cir. 1995). “Words or phrases having a technical or other special meaning” may be “well enough known to enable those within its reach to correctly apply them.” *United States v. Weitzenhoff*, 35 F.3d 1275, 1289 (9th Cir. 1993) (cleaned up). Thus, the understanding and practice among those subject to regulation are relevant considerations. *See, e.g., Ohio Cast Prods., Inc. v. Occupational Safety & Health Review Com’n*, 246 F.3d 791, 799 (6th Cir. 2001).

Moreover, the Supreme Court has “expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.” *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982) (footnote omitted). Finally, vagueness challenges to laws “which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand.” *United States v. Mazurie*, 419 U.S. 544, 550 (1975).

As discussed above, Dr. Shell’s contacts with Dr. Scollay at the Mahoning racetrack presentation and via her email exchange with Randall Equine put Dr. Shell on notice that a “compelling justification” could arise from a veterinarian practice that HISA did not reach, such as “if veterinarians are practicing also on a population of non-Covered Horses, . . . or they’ve got a country practice . . . .” AuRPFOF at 2-3 (¶¶ 8, 9); AB2 at 7117-18 (Scollay). At the same time, Dr. Scollay cautioned that HIWU had “the ability to investigate,” and that if a veterinarian’s “story starts to get a little weird or a little extreme, you’re going to get more than a raised eyebrow.” AuRPFOF at 2-3 (¶¶ 8, 9); AB2 at 7117-18 (Scollay).

A veterinarian subject to HISA, such as Dr. Shell, would reasonably understand that a practice that included non-Covered horses could provide a “justification” for a defense to a charge of possessing a Banned Substance. Dr. Shell himself clearly had this understanding, as this is, itself, the basis for his defense. But as Rule 3214(a) expressly states, Dr. Shell’s proof had to be “compelling”—strongly persuasive—and on this score, he failed. *See Village of Hoffman Estates*, 455 U.S. at 489 (rejecting a vagueness challenge to the constitutionality of a local ordinance that prescribed civil penalties and including licensing guidelines).

Because Dr. Shell was on notice that a non-Covered horse practice could, depending on the proof offered, satisfy Rule 3124(a)’s “compelling justification” element, the Rule is not

unconstitutional as applied to him. And since a litigant “who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others,” I need not reach Dr. Shell’s facial challenge to Rule 3124. *Village of Hoffman Estates*, 455 U.S. at 495 & n.7; *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973) (“Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.”) (citing authorities); *United States v. Nassif*, 97 F.4th 968, 981-82 (D.C. Cir. 2024) (rejecting defendant’s vagueness challenge where the law “clearly proscribed his own conduct”).

My determination regarding Dr. Shell’s Due Process argument is fully consistent with my also rejecting Dr. Shell’s estoppel argument. Dr. Scollay’s guidance was sufficient to provide reasonable notice to Dr. Shell that his practice, which included non-Covered horses, *could—if* adequately proven—be a “justification” that Rule 3214(a) recognizes. That disposes of Dr. Shell’s argument that the Rule is unconstitutionally vague. The reasonable import of Dr. Scollay’s guidance does not, however, enable Dr. Shell to satisfy the elements of an estoppel sufficient to defeat HIWU’s Possession charges.

**2. Prosecution of this Case by the Authority and HIWU is Not Unconstitutional**

Relying on the Fifth Circuit’s decision in *National Horsemen’s Benevolent and Protective Ass’n v. Black*, 107 F.4th 415 (5th Cir.), *cert. pet’s filed*, Nos. 24-429, 24-433 & 24-472 (Oct. 15, 16, and 22, 2024), Dr. Shell argues that HIWU’s enforcement proceeding here violates the private nondelegation doctrine and thus is unconstitutional. AOB. at 14. The Sixth Circuit, however, rejected this same argument and upheld HISA’s constitutionality, as did an Eighth Circuit majority in a recent decision affirming denial of a preliminary injunction.

*Oklahoma v. United States*, 62 F.4th 221 (6th Cir. 2023), *cert. denied*, 144 S.Ct. 2679 (2024); *Walmsley v. FTC*, 117 F.4th 1032 (8th Cir.), *cert. pet. filed*, No. 24-420 (Oct. 15, 2024). In the prior Administration Case involving Dr. Shell, I also rejected this constitutional argument, and the Authority's opposition in this case is based substantially on my earlier ruling. *In re Shell*, Docket No. 9345 (Oct. 31, 2024); AuOBr. at 11. Although I again reject Dr. Shell's argument, I believe further discussion is warranted.

As my prior decision noted, the Sixth Circuit's geographic scope includes Ohio, and Dr. Shell is himself an Ohio-based and licensed veterinarian. He also is licensed in West Virginia, and he practices in both States. AB1 at 2012 (¶ 1); AB2 at 6672, 6677 (Shell). The HIWU search giving rise to this case involved his two trucks and storage facility at Thistledown, located near Cleveland, Ohio. AB1 at 168-69, 452 (¶ 4), 2012 (¶ 8), 2018 (¶ 34), 3612; AB2 at 6996 (Shell). Both trucks, registered to Dr. Shell, bore an Ohio tag number. AB1 at 168-69, 2018 (¶ 35). Dr. Scollay's remarks, which form a substantial part of Dr. Shell's defense in this case, took place during a presentation, which Dr. Shell testified he attended, at Mahoning racetrack in Ohio. AB2 at 6687-89, 6693-94, 6813-16, 6822-23 (Shell). Thus, the contacts with the Sixth Circuit predominate. By contrast, this case has no connection whatsoever to horseracing within the States covered by the Fifth Circuit.

Although not located within the Fifth Circuit, West Virginia's connection to this case should be addressed—a consideration that did not arise in Dr. Shell's earlier case. As described above, in 2022 the District Court for the Western District of Louisiana issued a preliminary injunction that enjoins HISA's operation in the State of West Virginia. *Louisiana v. Horseracing Integrity & Safety Auth. Inc.*, 617 F.Supp.3d 478 (W.D. La. 2022). The Western District based its ruling on the Authority's non-compliance with the Administrative Procedure Act during

adoption of various HISA rules, and “not [on] the constitutionality of the Act.” *Id.* at 501. However, in another case, begun in federal district court in Texas, the Fifth Circuit issued its *National Horsemen’s* decision. The Fifth Circuit thereafter remanded an appeal from the Western District’s preliminary injunction, and the Western District has since stayed proceedings. *Louisiana v. Horseracing Integrity & Safety Auth. Inc.*, No. 22-30458, 2022 WL 17074823 (5th Cir. Nov. 18, 2022); Order, 6:22-CV-01934 (W.D. La. Sept. 14, 2023).

As a result of the Western District’s injunction, the Authority and HIWU do not enforce HISA in West Virginia. AuRPCOL ¶ 10; AB2 at 7125-26 (Scollay). This position, however, is not based on the Fifth Circuit’s later constitutional ruling, which does not apply outside the States covered by the Fifth Circuit. Therefore, the Western District’s injunction, issued for APA non-compliance, does not factor into my deciding whether the overall case contacts warrant reaching the same conclusion as the Fifth Circuit on HISA’s constitutionality.

The “presumption of constitutionality” instructs that a federal law may be invalidated “only upon a plain showing that Congress has exceeded its constitutional bounds.” *United States v. Morrison*, 529 U.S. 598, 607 (2000); *see also Turner Broadcasting System, Inc. v. FCC*, 507 U.S. 1301, 1301 (1993) (A federal statute “is presumptively constitutional.”) (Rehnquist, C.J., in chambers). Bearing in mind both the presumption and the particular facts here, I follow the Sixth and Eighth Circuit’s rulings upholding the Authority and HIWU’s authority. Thus, Dr. Shell’s argument fails.

## **VI. SANCTIONS**

### **A. Single or Separate Violations Under Rule 3228(d)**

HIWU charged Dr. Shell with Possession of each of the four Banned Substances as separate Rule 3214 violations. AB1 at 439 (EAD Charge Letter, covering Isoxsuprine, Carolina

Gold (GABA), and Osphos (Bisphosphonate)), 607 (EAD Notice Letter, covering Sarapin (Pitcher Plant)). In doing so, it relied on Rule 3228(d):

(d) Violations involving both a Banned Substance or Method and a Controlled Medication Substance or Method.

Where a Covered Person is found, based on a common set of facts, to have committed a (1) violation involving one or more Banned Substance(s) or Banned Method(s), **and** (2) a violation involving one or more Controlled Medication Substance(s) or Controlled Medication Method(s), they shall be treated as separate violations, but shall be adjudicated together in consolidated proceedings pursuant to the procedure that applies to Anti-Doping Rule Violations under the Arbitration Procedures.

(Emphasis added).

Dr. Shell challenged HIWU's resort to Rule 3228(d), arguing that, to assert "separate violations," HIWU had to allege violations involving:

"(1) . . . one or more Banned Substance(s) . . . , **and**

(2) . . . one or more Controlled Medication Substance(s) . . . ."

Since HIWU alleged four Banned Substance violations, but **no** Controlled Medication violations, Rule 3228(d), Dr. Shell argued, did not apply. *See, e.g.*, AB1 at 1510 (Shell Pre-Hearing Brief).

The Arbitrator agreed with Dr. Shell. By virtue of the "and" conjunction, the Arbitrator concluded that, to trigger Rule 3228(d), there needed to be at least one Controlled Medication violation charged along with at least one Banned Substance violation. And here there was no Controlled Medication charge. AB2 at 6612 (¶¶ 7.7-7.9). Accordingly, the Arbitrator rejected HIWU's use of Rule 3228(d).

On this review, the Authority maintains that the Arbitrator misconstrued Rule 3228(d). AuOBr. at 7, 14-16. Dr. Shell contends that the Arbitrator's ruling was correct. AOBBr. at 14-15; ARBr. at 6. Resolution of this issue can affect the sanctions potentially imposed, including the calculation of the length of any period of Ineligibility. I can review the construction of Rule

3228(d) de novo. I conclude that the Arbitrator erred as a matter of law.

The alternative construction here is that, where HIWU asserts (a) one or more Banned Substances violations, *or* (b) one or more Controlled Medications violations, *or* (c) one or more of both, then Rule 3228(d) authorizes separate charges, which are consolidated for arbitration. In effect, this alternative requires construing “and” as though it were “or.” If perhaps counter-textual, this result is, indeed, judicially-recognized in appropriate circumstances: “In the construction of statutes, it is the duty of the court to ascertain the clear intention of the legislature. In order to do this, courts are often compelled to construe ‘or’ as meaning ‘and,’ and again ‘and’ as meaning ‘or.’” *United States v. Fisk*, 70 U.S. 445, 447 (1865).

*Pulsifer v. United States*, 601 U.S. 124 (2024) is a much more recent example. There, the Supreme Court construed a “safety valve” provision of federal sentencing law, which exempted a defendant from mandatory minimum penalties. To qualify, the defendant had to meet specified criteria. One was that the defendant did not have what the Court summarized as “A, B, and C,” which “refer[red] to three ways in which past criminality may suggest future dangerousness . . . .” *Id.* at 127. The defendant argued that safety valve relief was available unless all three criteria were met (here, “A, B, and C”). The government argued that if any one of the three applied, safety valve relief was unavailable. The Court agreed with the government.

Writing for the majority, Justice Kagan explained:

There are two grammatically permissible ways to read Paragraph (f)(1). Yes, one is Pulsifer’s [the defendant’s]. But the other is the Government’s—that a defendant is ineligible for relief unless he can satisfy each of the paragraph’s three conditions. The choice between the two . . . is not a matter of grammatical rules. It can sensibly be made only by examining . . . the paragraph’s content, as read in conjunction with the Guidelines. Or, as we usually say in statutory construction cases, by reviewing text in context.

*Id.* at 132-33.

In a lengthy discussion, Justice Kagan provided numerous examples of the need to consider the conjunctions “and” and “or” in context. To illustrate:

Article III provides that “[t]he judicial Power shall extend to all Cases ... arising under this Constitution, the Laws of the United States, and Treaties.” § 2. That statement means—but says more concisely—that the judicial power extends to cases arising under the Constitution; extends to cases arising under federal law; and extends to cases arising under treaties. The provision does not (as Pulsifer’s view might suggest) limit judges to hearing the few cases arising simultaneously under all three kinds of law.

*Id.* at 134-35.

Here, specifically, the alternative is more consistent with the overall structure and intent of the Rules, which treat Banned Substances and Controlled Medications separately. “Banned Substances” are those identified on the “Prohibited List,” and “are . . . (1) prohibited at all times . . . .” Rule 3110(a)(1); 88 Fed. Reg. 5085 (definition in Rule 1020). A “Controlled Medication Substance” is one “so described on the Prohibited List or the Technical Document—Prohibited Substances.” 88 Fed. Reg. 5086 (definition in Rule 1020), 5124 (Appendix 1 to Rule Series 4000). The “Prohibited List” is set forth in the Rule 4000 Series, which distinguishes, in separate Rules, between: (a) “Banned Substances” “that are prohibited at all times” (Rules 4010, 4100-17); and (b) “Controlled Medication Substances” that are prohibited “during the Race Period and . . . in a Post-Race Sample or Post-Work Sample, except as otherwise specified . . . .” (Rules 4200-25). 88 Fed. Reg. 5086 (definition in Rule 1020).

In short, Banned Substance violations are more serious, and thus carry more severe sanctions, than Controlled Medication violations. *See* Rules 3221-23, 3228-33 (Anti-Doping violations), 3321-23, 3327-31 (Controlled Medications), 4310 and 4330 (Covered Horses). Therefore, a Covered Person charged with possessing, for example, *two* Banned Substance violations ought to be exposed to *more* severe sanctions than one charged with possession of one Banned Substance and one Controlled Medication violation. Yet, under the Arbitrator’s

construction, HIWU could charge the latter with two violations, but the former with only one.

That is plainly illogical; it cannot be the likely intent of Rule 3228(d). *Cf. Holy Trinity Church v. United States*, 143 U.S. 457, 460 (1892) (“If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity. . . . The object designed to be reached by the act must limit and control the literal import of the terms and phrases employed.”); *Dupuch-Carron v. Secretary of HHS*, 969 F.3d 1318, 1330-31 (Fed. Cir. 2020) (citing authorities).

The very structure of the HISA Rules demonstrates that the Arbitrator’s ruling on Rule 3228(d) was erroneous:

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.

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

In consequence, after finding four Banned Substances in Dr. Shell’s possession, HIWU had the authority to charge separate violations under Rule 3228(d). As discussed further below, HIWU prosecuted the case on this basis. Contrary to Dr. Shell’s argument, this is not a “new” argument or theory, raised by the Authority only “after the close of the record.” AOB. at 15. *See* pp. 53-55 below; AB2 at 5961, 5962, 5963-66 (HIWU’s Closing Written Submissions), 6611-12 (¶ 7.6).

Despite Rule 3228(d)'s charging authority, however, an over-arching consideration is inescapable. HIWU's September 2023 search, identifying four Banned Substances in Dr. Shell's possession, arises from a single course of conduct; it does not reflect multiple violations carried out at different times. On these facts, whether each of the four alleged ADRVs can properly be charged and proven individually needs to be assessed.

*HIWU v. Puype*, JAMS Case No. 1501000973 (Dec. 12, 2024), is instructive. As here, a single HIWU search at a Santa Anita Park barn disclosed two Banned Substances in the possession of Puype, a trainer and Covered Person. HIWU charged Puype with two ADRVs, which it proved at the arbitration hearing. *Id.* ¶ 8.9. The arbitrator, however, declined to sanction Puype for "two violations that arose from the same investigation . . . ." *Id.* ¶ 8.36. Although the arbitrator reached this conclusion in rejecting HIWU's request to impose consecutive periods of ineligibility under Rule 3223(2)(c), the arbitrator applied it generally, imposing only one set of sanctions. *Id.* ¶ 9.1(a). I consider the matter of consecutive sanctions, which the Authority seeks against Dr. Shell, below. Suffice it here to say that *Puype's* ruling accords with many decisions in the sports world globally.

"[I]t is a widely accepted general principle of sports law that the severity of a penalty must be in proportion with the seriousness of the infringement." *W. v. FEI*, CAS 99/A/246, at ¶ 31 (May 11, 2000). Thus, "the substance and the possible application of the [proportionality] principle are not in doubt." *Klein v. ASADA*, CAS A4/2016, at ¶ 232 (May 25, 2017).<sup>29</sup>

Accordingly, multiple ADRVs, based on a common set of facts, are often treated as a single

<sup>29</sup> See also *Sport Lisboa e Benfica SAD v. FIFA*, CAS 2021/A/8076, at ¶ 131 (Oct. 10, 2022) (reducing a "manifestly disproportionate" sanction); *I. v. FIA*, CAS 2010/A/2268, at ¶¶ 133-43 (Sept. 15, 2011) (discussing arbitration proportionality rulings); *Puerta v. ITF*, CAS 2006/A/1025, at ¶ 88 (July 12, 2006) ("[T]he war against doping . . . is a hard war, and to fight it requires eternal vigilance, but no matter how hard the war, it is incumbent on those who wage it to avoid, so far as is possible, exacting unjust and disproportionate retribution.").

violation for sanctions purposes. *See, e.g., World Athletics v. Oduduru*, SR/171/2023, ¶ 117 (Sept. 18, 2023) (possession, and use or attempted use, of multiple prohibited substances found during an apartment search); *Decision of The Athletics Integrity Unit in the Case of Khamidova* ¶ 24 (Mar. 6, 2024) (multiple violations involving different drugs “were committed simultaneous”).<sup>30</sup>

Dr. Shell has practiced veterinary medicine for more than 37 years. When HIWU discovered Banned Substances in his Possession, it charged him as a “first-time” offender. AB1 at 440. There is no dispute that, until these proceedings, he had never been sanctioned by a veterinary board or racing authority in either Ohio or West Virginia. AB2 at 6677-68 (Shell). The four ADRVs here arise from his professed, but mistaken, belief concerning his ability to possess Banned Substances for his farm practice or use in West Virginia. Imposing consecutive Ineligibility periods and cumulative fines on him for each of the four Possession violations would be grossly disproportionate to the misconduct underlying this case. For Dr. Shell, a longtime veterinarian nearing retirement, cumulative Ineligibility of eight years would be tantamount to permanent expulsion from practicing in the HISA-covered racing industry. A \$100,000 fine, for possessing four Banned Substances discovered during a single search, would similarly inflict undue financial burden.

The Arbitrator rejected HIWU’s effort to impose individual sanctions for each ADRV, and so do I.

<sup>30</sup> *See also Salazar and Brown v. USADA*, CAS 2019/A/6530 & 6531, at ¶¶ 444, 466 (Sept. 15, 2021) (multiple tampering violations); *IWF v. Beytula*, 2022/ADD/49, at ¶¶ 115 & 117 (Nov. 7, 2023) (tampering and failure to submit to sample collection were “considered together as one single violation”); *Matter of Vogg*, FEI 2022/HD02, at ¶ xxvi, n.16 (Dec. 20, 2022) (presence and use of single substance “considered together as one single first violation”) (heavily redacted); *FINA Proceedings against Villanueva*, ¶¶ 5.11-13 (Aug. 19, 2020) (six presence violations involving the same substance, collection on different days, were treated as a single violation).

**B. Consecutive Ineligibility Based on the Administration Case Sanction**

The Arbitrator ruled that Dr. Shell’s 21-month Ineligibility period should begin on October 3, 2023, the date his Provisional Suspension began. AB2 at 6621 (¶ 7.64). This determination means, in effect, that Dr. Shell’s Ineligibility period runs concurrently with—not consecutive to—the Ineligibility period imposed in the Administration Case. The Authority asserts this was “a clear error of judgment,” as it did not account for the fact that, as a result of the Administration Case, Dr. Shell “is already serving a period of ineligibility that ends on January 7, 2026 . . . .” AuOBr. at 13; *see* AB1 at 138. Dr. Shell contends that HIWU raised this argument *after* the arbitration hearing had closed, and that it may not properly be raised in this review proceeding. AOB. at 15. I agree with Dr. Shell.

As support for its “consecutive Ineligibility” argument, the Authority cites Rule 3223(c)(2), which provides: “Where a Covered Person is already serving a period of Ineligibility for another violation of the Protocol, any new period of Ineligibility shall start to run the day after the original period of Ineligibility ends.” In resolving whether the Authority’s argument is reviewable, additional discussion of HIWU’s position in the arbitration proceedings is appropriate.

HIWU’s EAD Charge Letter, issued in October 2023, stated its position on sanctions:

Our records indicate that you have no prior Anti-Doping Rule Violations. Therefore, HIWU is seeking imposition of the following proposed Consequences for three first-time Violations of ADMC Program Rule 3214(a):

- A period of Ineligibility of six years (two years *per violation*), for you as a Covered Person, beginning on October 5, 2023, the date you received notice of your Provisional Suspension (ADMC Program Rule 3223) (Protocol);
- A fine of USD \$75,000 (\$25,000 *per violation*) and payment of some or all of the adjudication costs and HIWU’s legal costs (ADMC Program Rule 3223) (Protocol) . . . .

AB1 at 439, 440 (emphasis added). Thus, HIWU sought sanctions for each individual charge, including consecutive Ineligibility periods and cumulative fines. HIWU's position was based on Rule 3228(d), discussed above. *See* AB1 at 453 (¶ 7). The Charge Letter referred only to three ADRVs, although later HIWU charged and consolidated for hearing the fourth violation for Possession of Pitcher Plant. *See* AB1 at 607, 6497 (¶ 3.3).

HIWU's position did not change. In its pre-hearing brief to the arbitrator, HIWU sought:

- a. A period of Ineligibility of six (6) years for Dr. Shell as a Covered Person, beginning on October 5, 2023, the date the Provisional Suspension was imposed;
- b. A fine of USD \$75,000.00 and payment of some or all of the adjudication costs . . . ."

AB1 at 449, 469 (¶ 54). HIWU's pre-hearing reply brief (after the Pitcher Plant consolidation) was similar, seeking:

- a. A period of Ineligibility of ten (10) years for Dr. Shell as a Covered Person (two (2) years for each violation and two (2) years for Aggravating Circumstances), ***beginning on the date a decision is rendered in this case;***
- b. A Fine of USD \$110,000.00 (\$25,000.00 for each violation and \$10,000 for Aggravating Circumstances) and payment of some or all of the adjudication costs . . . .

AB1 at 2453, 2474.

The arbitration hearing was held during April 2024. AB2 at 5922 (¶ 12), 6636, 7035, 7338. HIWU's closing submissions were filed with the Arbitrator in late June 2024. AB2 at 5916.

Meanwhile, weeks earlier in June, the arbitrator in the Administration Case against Dr. Shell issued his decision, which resulted in a single two-year Ineligibility period, despite Dr. Shell's multiple injections of the same substance. AB2 at 6494, 6530. HIWU's subsequent closing submissions made no explicit mention of consecutive periods of Ineligibility, although HIWU did write that the sanctions "for a first ADRV of ADMC Program Rule 3214(a) (Possession) for the Banned Substances *each* include: (i) a period of Ineligibility of two (2) years

for the Covered Person, [and] (ii) a fine of up to \$25,000, . . . .” AB2 at 5958 (emphasis added).

In its closing submissions, HIWU discussed the Administration Case decision for purposes unrelated to whether the Ineligibility period in that case triggered operation of Rule 3223(c)(2)’s consecutive sanctions provision—the very point the Authority now seeks to argue in this review proceeding. *See* AB2 at 5958-62 (¶¶ 85, 87, 93, 94 & nn.77-79, 84). HIWU also submitted the full decision in the Administration Case in its closing book of evidence and authorities. AB2 at 6494.

Following the parties’ post-hearing submissions, in August 2024 the Arbitrator heard the parties’ closing statements. HIWU did not raise consecutive sanctions at all; nor was the decision in the Administration Case—*issued two months earlier*—mentioned. AB2 at 7603-12. A few days later, the Arbitrator issued a Request for Additional Authority:

HIWU asserts that under ADMC Program Rule 3228(d), possession of *each* of the Banned Substances at issue in this proceeding constitutes a separate ADRV and, therefore, seeks the imposition of the Consequences [i.e., sanctions] as set out in ADMC Program Rule 3223, for *each* separate ADRV, i.e., *four times* the period of ineligibility and financial penalty.”

AB2 at 6571 (emphasis added). That was, to reiterate, HIWU’s consistent argument in the arbitration.

The Arbitrator sought further guidance on Rule 3228(d) applicability. She:

- (a) emphasized Dr. Shell’s argument that “Rule 3228(d) does not permit HIWU to charge several counts, for several substances recovered at the same time, as part of one incident”;
- (b) noted HIWU’s post-hearing discussion of the decision in the Administration Case, which, HIWU “cite[d] . . . for a different proposition, namely a situation in which the multiple administrations were all with regard to the same substance”; and
- (c) questioned whether “that decision appl[ies] to this case . . . .”

AB2 at 6571-72. The Arbitrator’s Request did not mention Rule 3223(c)(2) or any issue of

consecutive Ineligibility periods arising from the Ineligibility sanction in the Administration Case. HIWU still hadn't raised the issue.

HIWU responded to the Arbitrator's Request, arguing that "each Banned Substance constitutes a separate ADRV . . . ." AB2 at 6577. Again, HIWU said nothing about consecutive Ineligibility periods, based on the Administration Case decision. AB2 at 6577.

During the closing statements and throughout the post-hearing briefing and Request for Additional Authorities, Dr. Shell did not address whether Rule 3223(c)(2) permitted imposing a consecutive Ineligibility period resulting from the decision in the Administration Case. HIWU simply *had not raised any such issue*.

The Arbitrator then issued her final decision. AB2 at 6588. Referring to HIWU's contentions, the Arbitrator quoted from HIWU's pre-hearing reply brief:

HIWU now seeks the imposition of the following Consequences:

- a. A period of Ineligibility of ten (10) years for Dr. Shell as a Covered Person (two (2) years for each violation and two (2) years for Aggravating Circumstances), ***beginning on the date a decision is rendered in this case***;
- b. A Fine of USD \$110,000.00 (\$25,000.00 for each violation and \$10,000 for Aggravating Circumstances) and payment of some or all of the adjudication costs . . . .

AB2 at 6611 (¶ 6.81). The Arbitrator reiterated the point in her analysis:

HIWU relied upon Rule 3228(d) in prosecuting this case, treating the charged Banned Substances as separate violations, and seeking separate the imposition of the Consequences, as set out in ADMC Program Rule 3223, for each separate ADRV, i.e., four times the period of ineligibility and financial penalty, to run sequentially.

AB2 at 6621 (¶ 7.67).

The Arbitrator rejected HIWU's argument that each Banned Substance ADRV gave rise to a consecutive period of Ineligibility:

7.72 HIWU also relies upon Rule 3223(c)(2) to support ***consecutive punishments for the four violations***. Rule 3223(c)(2) provides: "Ineligibility and Financial Penalties for

Covered Persons . . . (c) Commencement of the period of Ineligibility for a Covered Person. . . . (2) Where a Covered Person is *already serving a period of Ineligibility for another violation* of the Protocol, any new period of Ineligibility shall start to run the day after the original period of Ineligibility ends.”

7.73 The Arbitrator is not convinced by HIWU’s argument that Rule 3223(c)(2) supports *consecutive punishments* based on its language. HIWU did not introduce evidence that Dr. Shell was “already” serving a period of Ineligibility that pre-dated the imposition of the subsequent period of Ineligibility to which it refers. The date of the Provisional Suspension in this case was October 5, 2023, and HIWU identified these charges as first-time antidoping violations.

7.74 Accordingly, these are charged and ruled upon as first-time anti-doping violations for Dr. Shell that will issue simultaneously when this Final Decision issues.

AB2 at 6621-22 (ellipses in original). Not surprisingly, the Arbitrator’s ruling did not mention consecutive Ineligibility based on the sanction in the Administration Case. HIWU *had never raised the issue*.

After the Arbitrator’s decision, HIWU made a written request, citing Rule 7380, “to address a computational error . . . with respect to the period of Ineligibility to be imposed on Dr. Shell.” AB2 at 6624.<sup>31</sup> The “computational error,” HIWU argued, was the Arbitrator’s determination to impose a concurrent, rather than consecutive, Ineligibility period on Dr. Shell. HIWU based its request to modify on the decision in the Administration Case, which “declared Dr. Shell Ineligible from January 8, 2024 through January 7, 2026. The award in the Administration Case was issued after the evidentiary hearing in this matter closed, but before closing submissions.” AB2 at 6624. HIWU therefore argued—*for the very first time*—that:

The start date for Dr. Shell’s period of Ineligibility in the present matter should be January 8, 2026, and he should receive credit for the two-day and three-month Provisional Suspension (“Credit Period”) he has served against the 21-month period of Ineligibility, such that his period of Ineligibility expires on July 5, 2027.

AB2 at 6625. In other words, HIWU sought—and in this review proceeding the Authority

<sup>31</sup> In pertinent part, Rule 7380 provides that, within seven days, “any party . . . may request the [arbitrator] to correct any clerical, typographical, or computational errors in the final decision.”

seeks—to add another roughly 18 months to Dr. Shell’s period of Ineligibility—the so-called “computational error.”

Dr. Shell opposed HIWU’s proposed lengthening of the Ineligibility period, and the Arbitrator rejected HIWU’s modification request as untimely:

HIWU raises this Rule [3323(c)(2)] for the first time in this arbitration, in this Request, submitted after the Final Decision, notwithstanding that HIWU was aware of the potential applicability of the Rule prior to submitting its post-Hearing briefing (June 28, 2024) and closing argument (August 7, 2024).

AB2 at 6631. The Arbitrator also noted that, while HIWU’s post-closing submissions referred to the Administration Case decision:

HIWU did not cite the *Shell Administration Case* for the position that Dr. Shell was already serving a period of Ineligibility. Had that issue been timely raised, the Parties could have briefed it.

...

HIWU had not raised the fact that it had imposed a period of Ineligibility, and the

Arbitrator has no way of knowing whether the period of Ineligibility had actually begun, or had been appealed, or otherwise was or was not in effect.

AB2 at 6631, 6632.

The Arbitrator’s decision to decline to modify the sanctions imposed so as to permit a consecutive, instead of concurrent, period of Ineligibility on Dr. Shell does not bind me on this de novo review. An ALJ is authorized to “affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part” and “make any finding or conclusion that, in [its] judgement [sic] . . . is proper and based on the record.” 15 U.S.C. § 3058(b)(3)(A); FTC Rule 1.146(d)(3). However, ALJ de novo review authority should also be considered in reference to FTC Rule 1.146(a)(1), which provides that, “[e]xcept for good cause shown, no assignment of error . . . may rely on any question of fact or law not presented to the Authority [in the arbitration].”

Certainly, once the arbitrator in the Administration Case issued his June 2024 decision, HIWU was well-aware that Dr. Shell was subject to a period of Ineligibility, and that Rule 3223(c)(2) could be applicable (or perhaps not) to any sanction of Ineligibility imposed in this case. Yet, while calling attention to the Administration Case decision in its post-closing submissions, and arguing that decision on other points, HIWU did not raise its applicability under Rule 3223(c)(2). Thereafter, it closed to the Arbitrator, again without arguing the decision in the Administration Case, issued months earlier, as a basis for consecutive periods of Ineligibility. In sum, HIWU did not raise the consecutive Ineligibility issue until after the Arbitrator had issued her decision. And, indeed, it then did so “based upon a Rule not previously cited or briefed or argued,” and despite the Arbitrator’s decision “in reliance upon HIWU’s positions taken throughout th[e] arbitration . . . .” AB2 at 6632.

HIWU’s omissions are inexcusable. Throughout the arbitration, HIWU repeatedly took the position that consecutive sanctions for each of the four charges of Possession it had asserted were appropriate under Rule 3228(d). Then, *after* the arbitration decision issued, HIWU changed course, asserting that the Administration Case decision required consecutive sanctions in this case under Rule 3223(c)(2). Fundamental fairness to Dr. Shell—as well as to the arbitration process itself—dictates that HIWU should have presented this changed position promptly to the Arbitrator *before* her decision issued.

Again, HIWU’s conduct binds the Authority on this review, as “both HIWU and the Authority are bound by [the arbitrator’s decision] . . . . Both entities are . . . legally bound to impose the resulting sanctions and have no discretion otherwise.” AB1 at 318. *See also* AB1 at 331 (“The Authority is legally bound to impose civil sanctions determined through arbitration.”). The Authority has failed to show “good cause,” required under Rule 1.146(d)(3), to secure

review of the applicability of the Administration Case decision to the Ineligibility period imposed on Dr. Shell. Equally and independently important, estoppel against the Authority is properly applied here. HIWU repeatedly took a consistent position in the arbitration, on which Dr. Shell and the Arbitrator both relied—only to belatedly change it. *See* pp. 53-54.

Therefore, in my discretion, I decline the Authority’s invitation to revisit the Arbitrator’s ruling imposing a concurrent period of Ineligibility.

**C. Applying the No Fault or Negligence (NF) and No Significant Fault or Negligence (NSF) Analyses to the Sanctions**

**1. Overview**

To eliminate entirely the sanctions that may be imposed for an ADRV, Dr. Shell has the burden of proving “no fault or negligence” (“NF”) on his part. Rule 3224(a). Failing proof of NF, Dr. Shell may reduce the sanctions by proving “no significant fault or negligence” (“NSF”). Rule 3225(a); *See In re Poole*, FTC No. 9417 at 10-11 (ALJ Decision on Application for Review, Nov. 13, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/d09417-administrative\\_law\\_judge\\_decision\\_on\\_application\\_for\\_review\\_-\\_public.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/d09417-administrative_law_judge_decision_on_application_for_review_-_public.pdf)); *In re Lewis*, FTC No. 9434 at 12-13 ([https://www.ftc.gov/system/files/ftc\\_gov/pdf/611976.2024.10.17-administrative\\_law\\_judge\\_decision\\_on\\_application\\_for\\_review.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/611976.2024.10.17-administrative_law_judge_decision_on_application_for_review.pdf)).

**2. NF: Applying Rule 3324**

To establish no fault or negligence for a Possession ADRV, the ADMC Rules require that the Covered Person establish “that he or she did not know or suspect, and could not reasonably have known or suspected, even with the exercise of utmost caution,” that he or she had committed the violation. Rule 1020 (definitions). Under Rule 3224(b), an NF finding “only applies in exceptional circumstances.”

It is undisputed that Dr. Shell knew each of the substances that HIWU’s search found

were Banned Substances under the ADMC Program. Dr. Shell was also aware, in contrast to HIWU, that besides practicing in Ohio, he also practiced in West Virginia, and that his practice in both States included non-Covered Horses on farms. He also testified that, after hearing Dr. Scollay's Mahoning presentation, he understood that:

(1) He "was prohibited to possess or prescribed [sic] banned substances to a covered horse." AB2 at 6815 (Shell).

(2) The prohibition on Possession "was a really important rule because it was new and it was a change to the way things had been done." AB2 at 6815.

(3) Even though he had a farm practice, "HIWU would have the ability to investigate any possession of a banned substance," and that he would "have to be able to support why [he] had medication on [his] truck," which mean relying on records from his practice. AB2 at 6821, 6825-26.

Dr. Shell also knew of the federal court order barring enforcement of HISA in West Virginia, but never sought advice on whether it might be problematic for him to possess Banned Substances in his trucks, or at HISA-covered facilities, in Ohio to treat thoroughbred racehorses located in West Virginia. AB2 at 6697-98, 6820-21, 6823, 6824-25, 6827-28 (Shell).

Nonetheless, Dr. Shell had Possession of three Banned Substances—Carolina Gold, Pitcher Plant, and Isoxsuprine—on his trucks and in his storage facility at Thistledown even though each of them:

- (1) was not needed for urgent or emergency use;
- (2) was not FDA-approved;
- (3) was not essential to treat even non-Covered Horses, inasmuch as FDA-approved substitutes were available; and

(4) was prohibited at locations regulated by the West Virginia Racing Rules, as well as by the HISA Rules.

On these facts alone, Dr. Shell has failed to meet his burden of showing he exercised the “utmost caution” that a finding of NF requires. This is not a “truly exceptional” case. *See, e.g., FIS v. Johaug*, CAS 2017/A/5015 & 5110, ¶ 190 (Aug. 21, 2017) (“[A]thletes have a duty to cross-check assurances given by a doctor even where such a doctor is a sports specialist.”); *D. v. FINA*, CAS 2002/A/432, at ¶ 43 (May 27, 2003) (athlete “clearly acted with negligence” by failing to “quer[y] both his physician and his coach” regarding an injected food supplement).<sup>32</sup>

Rule 3224 does not apply. Elimination of any sanction is unwarranted.

### 3. NSF: Applying Rule 3225

The stringent “utmost caution” standard that Dr. Shell must meet to show NF is relaxed when the focus shifts to NSF. To demonstrate NSF, the Covered Person must establish that “his or her 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.” HISA Rule 1020 (Definitions) (emphasis added). If a Covered Person establishes NSF for the ADRV charged, “then . . . the period of Ineligibility shall be fixed between 3 months and 2 years, depending on the Covered Person’s degree of Fault.” HISA Rule 3225(a).<sup>33</sup>

<sup>32</sup> *See also Stroman v. FEI*, CAS 2013/A/3318, at ¶¶ 70-74 (Mar. 14, 2014) (Equestrian competitor who permitted an unknown substance, provided by a veterinarian, to be injected without further inquiry, failed to exercise utmost caution.); *Carriere Zwei, FEI Tribunal Decision*, Case No. 2007/08, at ¶ 4.1x (Aug. 10, 2007) (despite assurances of a stable veterinarian that a supplement with a “suspicious name” would not increase testosterone level, an equestrian rider “acted with gross negligence and disregard to the risks” by not “receiving written advices [sic] from renowned veterinarians”).

<sup>33</sup> *See also Al Nahyan v. FEI*, 2014/A/3591, at ¶ 237 (8 June 2015) (“the exercise [in analyzing NSF] is essentially one of considering the possible application of the defence in the circumstances that led to the violation.”); *Ali Alabbar v. FEI*, CAS 2013/A/3124, at ¶ 12.17(1) (“Significant fault or negligence must mean something different from (mere) fault of negligence. Otherwise one or other of the concepts would be redundant.”).

No similar HISA Rule provision applies fault principles to determine the appropriate financial penalties under HISA Rule 3223(b). The amount of the fine is discretionary, allowing for a first offense an amount “up to” \$25,000 or twenty-five percent of the purse, whichever is greater, and payment of “some or all” of adjudication and legal costs. HISA Rule 3223(b). However, the degree of fault, among other facts and circumstances, may be considered in exercising discretion to determine an appropriate fine. *See In re Poole*, FTC No. 9417 at 10-11; *In re Lewis*, FTC No. 9434 at 8-9.

Analysis of NSF in HISA cases takes account of the three-tiered approach applied in *Cilic v. ITF*, CAS 2013/A/3327 (Apr. 11, 2014), which adjusts the maximum period of ineligibility and appropriate fines where NSF was shown. *See, e.g., HIWU v. Poole*, JAMS Case No. 1501000576, at ¶¶ 7.16-.20 (Aug. 8, 2023), *aff’d*, No. 9417, at 6-8, 11 (ALJ Nov. 13, 2023) (discussing the arbitrator’s three-tiered analysis, and holding de novo that the sanctions imposed were “reasonable, and rationally related to Appellant’s degree of fault”); AOB. at 13; AuOBr. at 12-13. Under the *Cilic* framework, the NSF analysis requires consideration of both “objective” and “subjective” elements of fault:

The objective element describes what standard of care could have been expected from a reasonable person in the athlete’s situation. The subjective element describes what could have been expected from that athlete, in light of his personal capacities.

*Cilic*, CAS 2013/A/3327, at ¶ 71. The conclusion of the analysis places the offender in one of three ineligibility ranges, depending on degree of fault. As adapted for HISA cases under Rule 3225(a), the tiers are:

- a. Slight or Insignificant Fault – three (3) to ten (10) months;
- b. Moderate Fault – ten (10) to seventeen (17) months; and
- c. Significant Fault – seventeen (17) to twenty-four (24) months.

*Poole*, JAMS Case No. 1501000576, at ¶ 7.17, *aff'd*, FTC No. 9417, at 7; *see also Cilic*, CAS 2013/A/3327, at ¶ 69.

**a. Objective Considerations**

HISA’s ADMC Program represented a change in the horseracing industry nationwide. Various ADRVs and defenses were defined, and a Prohibited List was created for designated substances. Stringent sanctions for Possession of Banned Substances, among other ADRVs, were adopted. Accordingly, prior to the ADMC Program’s effective date in May 2023, Dr. Scollay made presentations at more than 30 racetracks throughout the country to educate industry participants, including veterinarians such as Dr. Shell, on the new regulatory regime. AB2 at 7059-62 (Scollay).

Dr. Scollay’s presentations included discussion not only of Banned Substances, but also of the Possession ADRV’s application to Veterinarians. *See, e.g.*, AB1 at 2589-90 (Banned Substances slides); AB2 at 7063-68 (Scollay). As discussed earlier, Dr. Scollay noted that while a veterinarian with a farm practice could use Banned Substances in that practice, there were limits: “we have the ability to investigate, if the story gets a little weird or a little extreme, you’re going to get more than a raised eyebrow.” AB2 at 7117-18 (Scollay); *see also* AB2 at 7067 (Scollay). The defense of compelling justification where industry participants, such as veterinarians, handled Covered and non-Covered Horses was discussed. Dr. Scollay explained that the HISA Rules did not apply to non-Covered horses. However, Veterinarians would have to show a justification, including using proper labeling and documentation. AB2 at 7065-67, 7069-70, 7073-74, 7081-82, 7118, 7133-35, 7152 (Scollay).

The advent of the ADMC Program marked a time for a reasonable Veterinarian to take stock of their practices and existing routines to assure ADMC Program compliance—particularly where the Veterinarian treated both thoroughbred racehorse and farm horses. Although Banned

Substances were subject to the ADMC Program, a reasonable Veterinarian with a farm practice would recognize the possible need to accommodate use of Banned Substances to the HISA Rules—and to be able to show compliance if HIWU questioned possession or use. The existence of the Authority’s Prohibited Substances List would have been of particular interest. A reasonable Veterinarian would have determined whether substances in use were on that List, and whether switching to an available permissible substance might be prudent.

Simply put, an ounce of prevention is worth a pound of cure.

Dr. Scollay’s presentations offered no guidance on the special circumstance of West Virginia—where HISA could not be legally enforced. Therefore, a reasonable Ohio Veterinarian with a West Virginia practice involving thoroughbred racehorses would have an even greater incentive to take precautions. Besides assessing existing office practice for potential adjustments, a reasonable Veterinarian with a West Virginia practice could be expected to inquire further for guidance from the Authority or HIWU, the West Virginia Racing Commission, or perhaps an attorney.

Knowing a change was coming, Dr. Shell took some action to educate himself. AB2 at 6687-68, 6789-90 (Shell). But there is no evidence that Dr. Shell undertook any sort of practice assessment or sought guidance regarding his practice in West Virginia. There is no evidence that Dr. Shell looked, for example, at his ordering and recordkeeping practices to make sure he could justify his possession and use of Banned Substances in circumstances not subject to HISA Rules. Similarly, despite his active West Virginia practice, he did not ask anyone specifically on the effect, if any, of the federal court order on his dealings with thoroughbred racehorses or their trainers in West Virginia. Nor is there any evidence that he considered FDA-approved alternatives to substances he used that were to become Banned Substances.

Although his typical practice was to service Thistledown from Monday through Thursday, and West Virginia on Fridays, there is no evidence he adjusted the contents of his trucks or his Ohio storage facility at Thistledown to avoid Possession of Banned Substances. *See* AB2 at 6675, 6908 (Shell). Similarly, there is no evidence that any comparable adjustments took place for Dr. Hippie, who handled a majority of the Ohio farm practice, while also servicing Thistledown. AB2 at 6680 (Shell).

Perhaps temporarily inconvenient, adjustments like this were feasible for a reasonable Veterinarian. Since being charged in this case, Dr. Shell has improved his ordering and recordkeeping practices. AB2 at 6864, 6933-34 (Shell). There was, Dr. Shell testified, “a record keeping issue that I needed to correct? Absolutely. Have we corrected it? Absolutely.” AB2 at 6931 (Shell); *see also* AB2 at 7026-29 (Duhon). His two trucks now have “two sets of different drugs so that we can not only care properly for our clients at the racetrack . . . as well as our clients on the farm.” AB2 at 6771-72; *see also* AB2 at 6999-7001 (Shell). Despite the changes, Dr. Shell is able to discharge his ethical obligations as a veterinarian. AB2 at 7001-03 (Shell).

Prior to the ADMC Program taking effect, a reasonable Veterinarian comparable to Dr. Shell had both the incentive and ability to take action such as this. Objective considerations do not support a sanctions reduction under Rule 3225.

#### **b. Subjective Considerations**

The facts discussed in the NF analysis above are relevant to Dr. Shell’s individual circumstances—the subjective part of the NSF inquiry—and I incorporate them here. Additional facts bear mention.

Dr. Shell testified that after attending Dr. Scollay’s Mahoning presentation, he was “antsy” nonetheless. He sought further guidance regarding his farm practice. AB2 at 6693-94,

6822-23 (Shell). In the ensuing follow-up conversation, according to Dr. Shell, Dr. Scollay told him “if we had a large farm practice and had non-covered horses, that we were allowed to carry the banned substance.” AB2 at 6695; *see also* AB2 at 6816, 6823, 6828 (Shell). Dr. Scollay added: “[Y]ou must have records indicating that you are using the banned medication.” AB2 at 6825 (Shell). Dr. Shell “assume[d] every record I have would be sufficient,” and therefore did not ask what type of record would be needed. AB2 at 6826 (Shell).

Thereafter, Ms. Naylor, a Randall Equine veterinarian, asked Dr. Scollay “to confirm that banned substances legal in non-covered horses . . . were allowed to be carried by veterinarians that practice off track as well.” AB2 at 6118. After quoting Rule 3214(a)’s prohibition of Banned Substances “unless there is compelling justification,” Dr. Scollay wrote:

The regulation above provides for the ability to justify the possession of Banned Substances. To the extent that your practice provides veterinary care to non-Covered horses—and can demonstrate (through records, day sheets, etc.) the need to carry those substances you can establish compelling justification.

AB2 at 6118. Dr. Shell received and read a copy of the email “around the time it was sent in June.” AB2 at 6804, 6807 (Shell). He understood that to justify Possession, he would need records such as “day sheets” and “veterinarian patient records.” AB2 at 6807-08, 6812 (Shell).<sup>34</sup>

Despite what he learned at Mahoning and from the Randall Equine email exchange, there is no evidence Dr. Shell took any steps to assess his ability to demonstrate compelling justification using the documents prepared and maintained in his practice. There is no evidence

<sup>34</sup> A “day sheet” is:

[A] record of the interactions that the veterinarian has with respective horses, either scheduled or added on the ‘while you’re here, doc’, kind of situation. That day sheet can also record specific treatments or diagnostics for the purpose of the office administrator setting up the billing, and perhaps can also be sort of a cue for the veterinarian who then enters the information into the . . . patient’s medical record.

AB2 at 7074 (Scollay).

that Dr. Shell changed his substance ordering or recordkeeping practices in any way. Dr. Shell may be presumed to know the state of his practice routines and recordkeeping. Once the ADMC Program took effect, he could not reasonably have thought, for example, that listing an arbitrary horse's name on a bulk order would, without more, amount to a sufficiently reliable record to defend against Possession of a Banned Substance charge, such as that brought here.

Likewise, as noted above, there is no evidence Dr. Shell considered whether to adjust his practice to take account of the special circumstances of West Virginia. He simply "made the assumption that a racehorse in West Virginia was not covered." AB2 at 6821 (Shell). Therefore, Dr. Shell incorrectly believed—but took no steps to confirm—that he could possess Banned Substances in Ohio to use in his West Virginia practice, so long as he administered or dispensed the Banned Substance in West Virginia, outside of HISA jurisdiction. *See* AB2 at 6823-25, 6827-28 (Shell).

Dr. Shell knew that if he was found in possession of Banned Substances in Ohio, at the very least he could be required to explain their use in West Virginia. He therefore should have been particularly careful about his recordkeeping involving his practice in that State, but was not. Dr. Scollay's remarks simply do not absolve Dr. Shell of responsibility to both act and inquire further to assure that his practice complied with his ADMC Program obligations. By way of analogy, numerous sports law panels have rejected an NSF argument where the athlete used a drug prescribed by their doctor, even when "a specialist," and relied on the doctor's advice, but "did not conduct a thorough investigation" into the prescribed substance or further query her doctor. *P. v. ITF*, CAS 2008/A/1488, at ¶¶ 14, 17 (Aug. 22, 2008). On this subjective analysis, there is no basis for finding that Dr. Shell has met his burden of showing NSF sufficient to

reduce available sanctions.<sup>35</sup>

The subjective NSF analysis should also consider Dr. Shell's dealings with the Banned Substances individually.

First, Carolina Gold, which has a calming influence, is an illicitly manufactured substance—not FDA-approved. There are FDA-approved substances having a comparable effect. AB2 at 6710-11, 6837-38 (Shell), 7087-90 (Scollay). Carolina Gold is not needed for life-saving or emergency use. AB2 at 6891, 6909 (Shell), 7088-89 (Scollay).

Carolina Gold is not only a Banned Substance under the HISA Rules, its use also is prohibited by the West Virginia Racing Commission. AB2 at 6836-37, 6914-17 (Shell), 7209-10 (Benson). The substance thus lacks any legitimate use on Covered Horses. AB2 at 7088-90, 7112 (Scollay). Dr. Roberts, Dr. Shell's veterinary expert, has never used it. AB2 at 7429, 7501 (Roberts). Dr. Shell, however, uses Carolina Gold regularly in his farm practice in both Ohio and West Virginia, as well as in treating thoroughbred racehorses located in West Virginia. AB2 at 6732-34, 6739-42, 6744-46, 6752-54, 6842-48, 6851-84, 6890-91, 6909-10, 6962 (Shell).

Accordingly, Dr. Shell has failed to show NSF for possessing Carolina Gold at Thistledown in Ohio.

Second, Pitcher Plant, which reduces inflammation, is not needed to treat emergencies. AB2 at 6713, 6976 (Shell), 7091-93 (Scollay). Pitcher Plant is also banned at West Virginia racetracks. AB2 at 7224 (Benson). It is not FDA-approved, and there are multiple FDA-approved alternatives. AB2 at 7092-93 (Scollay), 7224-25 (Benson). Again, Dr. Shell used it in his farm

<sup>35</sup> See also *WADA v. Nilforushan*, CAS 2012/A/2959, at ¶¶ 8.17, 8.19 (Apr. 30, 2013) (rejecting NSF where “an extremely experienced” equestrian rider took medicine prescribed by his doctor without a “cross check”); *Radojevic v. FINA*, CAS 2018/A/5581, at ¶¶ 54-56, 60-63, 81 (July 10, 2018) (rejecting NSF where the athlete failed to inquire further regarding a substance prescribed by his doctor); *WADA v. CISM*, 2008/A/1565, at ¶¶ 41-42 (Nov. 4, 2008) (rejecting NSF where the athlete relied on the advice of his personal physician, but took no further steps to determine the ingredients in a medication prescribed for a serious eye condition).

practice, and also administered it to, or dispensed it to trainers for use with, thoroughbred racehorses in West Virginia. AB2 at 6723-27, 6730-31, 6736-37, 6746-47, 6976-88 (Shell).

Dr. Shell has failed to show NSF for possessing Pitcher Plant at Thistledown in Ohio.

Third, Isoxsuprine is used to treat navicular disease or founder—neither a condition requiring urgent treatment. AB2 at 7100 (Scollay), 7224 (Benson). Isoxsuprine is also prohibited at West Virginia racetracks, and there are FDA-approved alternatives available. AB2 at 7094, 7096-97 (Scollay). Dr. Shell used Isoxsuprine in his farm practice and with thoroughbred racehorses in West Virginia. AB2 at 6718-21, 6738-39, 6750-51, 6990-94 (Shell).

Dr. Shell similarly has failed to show NSF for his Possession at Thistledown in Ohio.

Finally, Osphos is used to strengthen bones and treat navicular disease. Unlike the others, although a Banned Substance, Osphos is FDA-approved for horses older than four years. AB2 at 7099 (Scollay), 7363 (Roberts). However, it is not needed on an emergency basis. AB2 at 6997 (Shell), 7223-24 (Benson). While Dr. Shell uses Osphos in his practice, none of the limited documentation he offered shows that he prescribed or dispensed it to thoroughbred racehorses. AB2 at 6721-22, 6742-43 (Shell). On the other hand, Dr. Shell offered witness testimony showing he treated a non-Covered Horse (Cat) with Osphos to the satisfaction of Cat's owner.

Thus, Dr. Shell has shown—albeit, barely—NSF with regard to his Possession of Osphos at Thistledown in Ohio.

Taking account of these facts, Dr. Shell has failed to demonstrate NSF for his Possession on his trucks and in his storage facility at Thistledown in Ohio either for Carolina Gold, Pitcher Plant, or Isoxsuprine. Reduction in the available sanctions is unwarranted under Rule 3225. Reduction under the Rule is, however, appropriate for Dr. Shell's Possession of Osphos.

#### 4. Sanctions Summary

As charged, I have reviewed the sanctions imposed by the Authority de novo. I have ruled that Dr. Shell has not demonstrated NF, but that he has shown a basis for a reduction based on NSF with respect to Possession of Osphos. The Arbitrator similarly held that Dr. Shell failed to show NF. Applying the three-tiered *Cilic* NSF structure, the Arbitrator concluded that Dr. Shell's "objective level of fault falls in the significant fault range," covering 17 to 24 months, resulting in a three-month reduction in Ineligibility. AB2 at 6620 (¶ 7.60). The Arbitrator further ruled that the resulting 21-month Ineligibility period would commence on October 5, 2023, the effective date of Dr. Shell's Provisional Suspension, and would run concurrently with the period of Ineligibility imposed in the Administration Case. AB2 at 6620 (¶ 7.64), 6221-22 (¶¶ 7.72-.73). In addition, the Arbitrator reduced the fine imposed from the maximum of \$25,000 to \$20,000 and declined to award any costs against Dr. Shell. AB2 at 6620-61 (¶¶ 7.63-66).

I agree with the Arbitrator's *Cilic* tier placement. But if I were the decisionmaker in the first instance, under the totality of the circumstances I would modify the Ineligibility reduction to 1.5 months, beginning as the Arbitrator did as of the date of Dr. Shell's Provisional Suspension. I also would modify the fine reduction by the same percentage, resulting in an Ineligibility period of 22.5 months and a fine of \$22,500. I would not modify the zero cost determination. However, my review authority is cabined, requiring that I determine whether the Arbitrator's sanctions rulings were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 15 U.S.C. § 3058(b)(2)(A)(iii). I do not believe the Arbitrator's rulings on sanctions meet any of the required standards.

In sum, although I have upheld HIWU's authority to charge four individual Possession violations under Rule 3228(d), I have rejected, under the recognized sports law proportionality

principle, per charge sanctions on the facts of this case. I also have held untimely the Authority's argument that the Ineligibility period here should run consecutively with that arising from the Administration Case. Since the Ineligibility period here will run concurrently, any modified length of the Ineligibility period would in all events be academic.

## VII. CONCLUSION

Accordingly, the sanctions awarded by the Arbitrator, and imposed by the Authority, are **AFFIRMED.**

**ORDERED:**

*Jay L. Himes*  
\_\_\_\_\_  
Jay L. Himes  
Administrative Law Judge

Date: March 6, 2025

# TAB 3



Cited

As of: April 28, 2026 3:51 PM Z

## [Scott v. Horseracing Integrity & Safety Auth.](#)

United States District Court for the District of New Mexico

October 22, 2025, Filed

No. 2:25-cv-632-SMD-GJF

### Reporter

2025 U.S. Dist. LEXIS 208979 \*; 2025 LX 438431; 2025 WL 2987598

JASON SCOTT, Plaintiff, v. HORSERACING INTEGRITY & SAFETY AUTHORITY, et al., Defendants.

Mark Meador, in his official capacity as commissioner of the Federal Trade Commission, Defendants: Taylor Pitz, LEAD ATTORNEY, Civ, Federal Programs Branch, Washington, DC.

### Core Terms

irreparable harm, preliminary injunction, prelim, horse, arbitrate, reply, horse racing, non-delegation, injunction, refine, facial challenge, district court, separation-of-powers, banned, administrative proceeding, irreparable, enjoin, vague, fine, veterinarian, race track, monetary, void, compelling justification, right to a jury trial, irreparable injury, covered person, common law, thoroughbred, anti-doping

**Counsel:** [\*1] For Jason Scott, Plaintiff: Clark O Brewster, PRO HAC VICE, Brewster & De Angelis, P.L.L.C., Tulsa, OK; Joseph C DeAngelis, PRO HAC VICE, Brewster & De Angelis, Oklahoma, Tulsa, OK; Billy R. Blackburn, Albuquerque, NM.

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For Horseracing Integrity & Welfare Unit, a federal administrative agency, Federal Trade Commission, a federal administrative agency, Andrew Ferguson, in his official capacity as commissioner of the Federal Trade Commission, Melissa Holyoak, in her official capacity as commissioner of the Federal Trade Commission, [\*2]

**Judges:** SARAH M. DAVENPORT, UNITED STATES DISTRICT JUDGE.

**Opinion by:** SARAH M. DAVENPORT

### Opinion

#### MEMORANDUM ORDER DENYING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

**THIS MATTER** comes before the Court on Plaintiff Jason Scott's ("Dr. Scott's" or "Plaintiff's") motion for a preliminary injunction, Doc. 8 ("Mot. for Prelim. Inj."). In the spring of 2025, the Horseracing Integrity and Welfare Unit ("HIWU"), a private non-profit organization housed within the Horseracing Integrity and Safety Authority (the "Authority") and overseen by the Federal Trade Commission ("FTC"), charged Plaintiff with possessing two "banned substances" which federal regulations prohibit for use in thoroughbred horses. See [15 U.S.C. § 3053](#); HISA Rule 3214(a). Plaintiff denied the allegations. HIWU and Plaintiff are set to arbitrate these charges on November 19, 2025. Plaintiff now moves to enjoin those proceedings, arguing that the Authority and Rule 3214 violate the non-delegation doctrine, [Fifth](#) and [Seventh Amendments](#), and the Administrative Procedure Act. Defendants HIWU and the Authority filed a response on behalf of themselves [\*3] and the FTC (collectively "Defendants") on August 8, 2025. See Doc. 37 ("Defs.' Resp."). The FTC also filed a notice of joinder and supplemental arguments opposing Plaintiff's motion, Doc. 38 ("FTC's Resp."). Upon review of the relevant law, record, and oral statements, the Court will **DENY** Plaintiff's request for a preliminary injunction.

## BACKGROUND

### I. History of the Horseracing Integrity and Safety Authority

In 2020, Congress passed the [Horseracing Integrity and Safety Act](#) ("the Act") to standardize horseracing regulations and reduce equine deaths on the track. See [15 U.S.C. § 3051 et seq.](#); 166 Cong. Rec. H4981 (statement of Rep. Tonko). The Act established the Horseracing Integrity and Safety Authority, which is a private, nonprofit organization supervised by the FTC, to advise the agency on and develop horseracing standards. [15 U.S.C. § 3052\(a\)](#). This allocation of regulatory power to a private entity is notable, though not entirely novel—the Maloney Act, passed 87 years ago, instituted a parallel relationship between the Securities and Exchange Commission ("SEC") and the Financial Industry Regulation Authority ("FINRA").<sup>1</sup> [15 U.S.C. § 78c](#); see also Doc. 46 at 4 (explaining that the HISA Rules and the Act are "modeled" on the FINRA scheme).

The Authority's board of directors is comprised of nine members, five of whom "shall be independent members selected from outside the equine industry." [15 U.S.C. § 3052\(b\)\(1\)](#). The selection of board members is left up to a nominating committee. *Id.* [§ 3052\(d\)](#). The Act tasks the Authority with "developing and implementing a horseracing anti-doping and medication control program and a racetrack safety program for covered horses, covered persons, and covered horseraces." *Id.* [§ 3052\(a\)](#). These regulations only apply to thoroughbred horses ("covered horses"); they do not concern quarter horses or other breeds. *Id.* [§§ 3051\(4\)-\(6\), 3054\(a\)\(2\)](#). Veterinarians engaged in the care, training, or racing of covered horses are "covered persons." *Id.* [§ 3051\(4\)](#). Congress amended the Act in 2022 to increase the FTC's oversight of the Authority and specified that the FTC may "abrogate, add to, or modify" rules the Authority promulgates as "necessary and appropriate." *Id.* [§ 3053\(c\)](#). Any standard drafted by the Authority must be approved by the FTC and deemed as "consistent with" the statute and the FTC's rules. *Id.* The Authority is empowered to investigate and discipline violations of the Act and participate in private arbitration proceedings with alleged violators. *Id.* [§§ 3054\(c\), 3057](#).

<sup>1</sup> The Maloney Act initially created the National Association of Securities Dealers. FINRA, its successor, was formed in 2007. [\[\\*4\] See \*Fiero v. Fin. Indus. Regul. Auth.\*, 660 F.3d 569, 571-72 \(2d Cir. 2011\)](#)

The FTC [\[\\*5\]](#) can conduct de novo review over the Authority's factual findings and conclusions of law and may "affirm, reverse, modify, or set aside, or remand" the Authority's decisions. *Id.* [§ 3058\(c\)](#). The FTC's decisions are subject to Article III judicial review. [5 U.S.C. § 704](#); see [15 U.S.C. § 3058\(b\)\(3\)\(B\)](#).

In early 2023, the Authority proposed anti-doping and medication control ("ADMC") standards to the FTC. See [Fed. Trade Comm'n, Notice, HISA Anti-Doping and Medication Control Rule, 88 Fed. Reg. 5070-5201 \(Jan. 26, 2023\)](#). The FTC approved the ADMC rules following public notice and comment. Fed. Trade Comm'n, [Order Approving the Anti-Doping and Medication Control Rule Proposed by the Horseracing Integrity and Safety Authority](#) (Mar. 27, 2023). Among other things, the ADMC banned the possession of certain substances "at all times" by "covered persons" "unless there is a compelling justification for such possession." HISA Rule 3214.<sup>2</sup> As with the rest of the Act, the ban is solely applicable to covered horses. HISA created the Horseracing Integrity & Welfare Unit ("HIWU") to enforce the ADMC Program. HISA Rule 3010(e)(1); see [§ 3054\(e\)](#). HIWU charges are adjudicated before the Internal Adjudication Panel, which may be a single arbitrator. *Id.*; HISA Rules 3360, 7020. If the arbitrator finds a covered person to have violated the HISA, they may impose sanctions, such as monetary fines or suspension from covered events. [\[\\*6\] 16 C.F.R. § 1.148\(b\)](#). Any civil sanction the arbitrator imposes is subject to de novo review by an administrative law judge ("ALJ"). [15 U.S.C. § 3058\(b\)\(1\)](#). The ALJ's decision is reviewable by the FTC, which is in turn reviewable in an Article III court. *Id.* [§ 3058](#); [5 U.S.C. § 704](#).

### II. Factual Background

The Court recounts the facts leading to these charges as expressed in Plaintiff's complaint, Doc. 1 ("Pl.'s Compl."), present motion, Pl.'s Mot. for Prelim. Inj. at 5-7,<sup>3</sup> and attached exhibits. Plaintiff is an equine veterinarian who resides and works in New Mexico. Pl.'s Compl. ¶ 17. Plaintiff's practice encompasses multiple

<sup>2</sup> The full set of HISA rules are published in the federal register, see [88 Fed. Reg. 5084 \(2023\)](#). For purposes of this order, the Court will cite the HISA rules in the format HISA uses, e.g. HISA Rule 1010. All of HISA's rule series are available here: <https://hisaus.org/regulations>.

<sup>3</sup> The page numbers referenced in this order correlate with the page numbers assigned through the ECF system, rather than those assigned by the parties.

breeds of horses, including thoroughbreds. *Id.* ¶¶ 25, 46. To serve his clients, Plaintiff operates a mobile veterinary clinic that enables him to travel to racetracks, training facilities, and farms across the state. *Id.* ¶ 25. Within his medication stock, Plaintiff carries Pitcher's Plant extract (also known as Sarapin) and Adenosine Monophosphate ("AMP"). *Id.* ¶ 27. Plaintiff exclusively administers Sarapin and AMP to quarter horses, *id.* ¶ 41; he does not use them for the treatment of thoroughbreds. *Id.* Under HISA Rule 4117, Sarapin is "prohibited at all times." AMP, though not specifically named in the ADMC, falls under the Rules' [\*7] catch-all provision, which bans "[a]ny pharmacological substance that is (i) not addressed by Rules 4112 through 4117 (ii) has no current approval by any governmental regulatory health authority for veterinary or human use, and (iii) is not universally recognized as a valid veterinary use." See HISA Rule 4111.

On February 13, 2025, Plaintiff was working a "Mixed Meet," i.e. a meet with quarter horse and thoroughbred events, at the Sunland Park Racetrack in New Mexico. *Id.* ¶¶ 42, 46. HIWU searched Plaintiff's vehicle, found two bottles of Sarapin and two bottles of AMP, and seized them. *Id.* ¶ 42. HISA Rule 3214(a) bans possession of both substances absent a "compelling justification." See [88 Fed. Reg. at 5100](#). On April 30, 2025, HIWU served Plaintiff with an Equine Anti-Doping ("EAD") notice, requesting that he "provide a 'compelling justification' for his possession of the two substances. Mot. for Prelim. Inj., Ex. 2. Dr. Scott responded shortly thereafter and explained that "he had medications intended for Quarter Horses on his truck during a Mixed Meet and that Quarter Horses he treats were stabled at the racetrack where medications were seized." Mot. for Prelim. Inj. at 14; Mot. for Prelim. Inj., Ex. 3. On June 5, 2025, HIWU replied and informed Plaintiff [\*8] that his justification was insufficient. See Mot. for Prelim. Inj., Ex. 4 at 1. HIWU further explained that Plaintiff could admit to the allegations and pay the associated fines or deny them and appear before an arbitrator. *Id.* Plaintiff opted to proceed to a hearing. That hearing is now scheduled for November 19, 2025. Doc. 51 at 1.

### III. Procedural History

Plaintiff brings three facial challenges to the HISA and Rule 3214: (1) that Congress's creation of the Authority violates separation of powers principles and the non-delegation doctrine; (2) that Rule 3214, the possession rule, was promulgated in violation of FTC regulations and the [Administrative Procedure Act \("APA"\)](#) and is void for vagueness under the [Fifth Amendment](#); and (3) that "the Act and the FTC Order unconstitutionally

assign private causes of action tried to a jury at common law to an administrative tribunal, in violation of the [Seventh Amendment](#) right to a jury trial." Mot. for Preliminary Inj. at 9. Although Plaintiff styles his motion as a facial challenge, his requested relief at this stage is far narrower. Plaintiff seeks "first and foremost, a stay of administrative proceedings pending a determination of the merits of his claims." Pl.'s Reply at 2; see also Mot. [\*9] for Prelim. Inj. at 1. Plaintiff "has not asked the Court to enjoin any rule that specifically relates to Covered Horses," nor for the Court "to enjoin post-race testing on Covered Horses," nor "to enjoin the racetrack safety program." Pl.'s Reply at 2.

The Court held a hearing on Plaintiff's motion on August 13, 2025. Doc. 44. Following oral argument, the Court requested supplemental briefing on the issue of jurisdiction—specifically, whether jurisdiction is precluded under [Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 114 S. Ct. 771, 127 L. Ed. 2d 29 \(1994\)](#). Plaintiff, the FTC, and the HISA all filed briefing on this issue. See Doc. 43; Doc. 45; Doc. 46.

### LEGAL STANDARD

A preliminary injunction is an "extraordinary remedy," warranted only where the movant evinces a "clear and unequivocal" right to relief. [Schrier v. Univ. of Colo., 427 F.3d 1253, 1258 \(10th Cir. 2005\)](#). "To obtain a preliminary injunction, the movant must show: (1) a substantial likelihood of success on the merits; (2) irreparable harm to the movant if the injunction is denied; (3) that the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) that the injunction, if issued, will not adversely affect the public interest." [Gen. Motors Corp. v. Urb. Gorilla, LLC, 500 F.3d 1222, 1226 \(10th Cir. 2007\)](#) (citation omitted). In the Tenth Circuit, the potential for irreparable harm "is the single [\*10] most important prerequisite for the issuance of a preliminary injunction, [and] the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered." [Dominion Video Satellite, Inc. v. EchoStar Satellite Corp., 356 F.3d 1256, 1260 \(10th Cir. 2004\)](#). The court "need not consider the other factors" if a movant fails to meet their burden as to any element. [Colorado v. United States EPA, 989 F.3d 874, 890 \(10th Cir. 2021\)](#).

### DISCUSSION

I. Plaintiff Has Failed to Demonstrate a Likelihood of Irreparable Harm.

The Court's analysis begins and ends with the most critical factor—irreparable harm. "To constitute irreparable harm, an injury must be certain, great, actual and not theoretical." [Heideman v. S. Salt Lake City](#), 348 F.3d 1182, 1189 (10th Cir. 2003) (internal quotation mark and citation omitted). "[T]he party seeking injunctive relief must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Id.* Economic harm typically does not warrant a preliminary injunction, since a party can almost always be made whole again through damages. [Sampson v. Murray](#), 415 U.S. 61, 90, 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974); [Heideman](#), 348 F.3d at 1189. In suits against the federal government, however, financial injury becomes irreparable because sovereign immunity results in "nonrecoverable compliance costs." [Chamber of Com. of U.S. v. Edmondson](#), 594 F.3d 742, 770-71 (10th Cir. 2010) ("Imposition of monetary damages that cannot later be [\*11] recovered for reasons such as sovereign immunity constitutes irreparable injury."); see, e.g., [Ryan LLC v. Fed. Trade Comm'n](#), 739 F. Supp. 3d 496, 518 (N.D. Tex. 2024). A plaintiff may also obtain a preliminary injunction if the economic harm is of such magnitude that delaying relief would threaten their "very existence." [Mountain Valley Pipeline, LLC v. 6.56 Acres of Land](#), 915 F.3d 197, 218 (4th Cir. 2019); [Vacqueria Tres Monjitas, Inc. v. Irizarry](#), 587 F.3d 464, 484 (1st Cir. 2009). A plaintiff who demonstrates that their business will close without judicial intervention can thus fulfill the irreparable harm prong, even if their financial injury could later be calculated. [Mountain Valley](#), 915 F.3d at 218 ("Only when a temporary delay in recovery somehow translates to permanent injury—threatening a party's very existence by, for instance, driving it out of business before litigation concludes—could it qualify as irreparable."); see, e.g., [Alpine Sec. Corp. v. Fin. Indus. Regul. Auth.](#), 121 F.4th 1314, 1329, 468 U.S. App. D.C. 484 (D.C. Cir. 2024) ("Alpine faces irreparable harm because it faces a grave risk of being forced out of business before full SEC review, rendering any opportunity for later review at best inadequate and, at worst, moot.").

Plaintiff initially identified three harms. Mot. for Prelim. Inj. at 48. First, violation of the [Seventh Amendment](#) right to a jury trial. Second, the denial of a due process right to fair notice. Third, irreparable financial harm from countering the HIWU's enforcement action and complying with Rule 3214 because he "cannot recover

damages [\*12] simply by showing that a regulation was arbitrary, capricious, or promulgated in a manner contrary to law." *Id.* at 48, 49. As to the jury trial and due process harms, Plaintiff avers that "the denial of these rights, without more, are irreparable harms" and "[s]uccess on any of these points voids the challenged actions here ab initio." *Id.* at 48.

None of the harms named in Plaintiff's motion relate to his separation-of-powers argument. Spurred by Defendants' argument that a separation-of-powers violation does not in and of itself work an irreparable harm, see Defs.' Resp. at 23, Plaintiff's reply located a new harm—a due process violation from being forced to proceed before an unconstitutional agency. Pl.'s Reply at 12-13 (citing [Panama Ref. Co. v. Ryan](#), 293 U.S. 388, 433, 55 S. Ct. 241, 79 L. Ed. 446 (1935)). This argument comes too late. All of Plaintiff's alleged harms should have been stated in his initial motion, rather than raised for the first time in reply. [Griffin v. Bell](#), 694 F.3d 817, 822 (7th Cir. 2012); [ClearOne Communs., Inc. v. Bowers](#), 643 F.3d 735, 782 (10th Cir. 2011). Nevertheless, the Court will discuss the purported due process violation flowing from Plaintiff's separation-of-powers argument insofar as it pertains to the contentions made in Defendants' response.

A. Requiring Plaintiff to proceed before the Authority does not constitute *per se* irreparable harm, [\*13] even if the Authority's power is unconstitutional under separation-of-powers principles.

Plaintiff challenges Congress's creation of the Authority as an unconstitutional delegation of legislative and executive power. Mot. for Prelim. Inj. at 15. Defendants counter that [Leachco](#) forecloses this claim as a viable route to injunctive relief. Defs.' Resp. at 23-24 (citing [Leachco, Inc. v. Consumer Prod. Safety Comm'n](#), 103 F.4th 748 (10th Cir. 2024), cert. denied, 145 S. Ct. 1047, 220 L. Ed. 2d 378 (2025)). There, the Tenth Circuit held that "a mere generalized separation of powers violation, by itself, does not establish irreparable harm." [Leachco](#), 103 F.4th at 753. Plaintiff rebuts that "a successful non-delegation [claim] necessarily entitles the party to retrospective relief[.]" Pl.'s Reply at 7. He then cites [Panama Refining](#) for the proposition that "if a statute conferring jurisdiction is void on non-delegation grounds," a preliminary injunction is necessary to protect the "right to be free from the unlawful exercise of jurisdiction." *Id.* at 12. In essence, Plaintiff views [Panama Refining](#) as empowering him to collapse the merits prong with the irreparable harm prong and fast-track his request for a preliminary injunction.

The Court finds Defendants' position to be persuasive. The maneuver Plaintiff attempts—to meet his irreparable [\*14] harm burden through a separation-of-powers claim—has no feasibility in this Circuit. "Indeed, two United States Courts of Appeals have considered whether *Appointments Clause* or Separation of Powers violations necessarily establish irreparable harm and have concluded that they do not." *Doe 1-26 v. Musk*, 771 F. Supp. 3d 637, 679 (D. Md. 2025) (first citing *Alpine*, 121 F.4th at 1333-34; and then citing *Leachco*, 103 F.4th at 753)). To try and circumvent *Leachco*'s reach, Plaintiff attempts to cabin *Leachco* to *Appointments Clause* cases. Pl.'s Reply at 9. This reading has no merit in the face of *Leachco*'s plain text. While it is true that *Leachco* addressed a challenge to federal officers' removal protections, its holding went beyond those facts; *Leachco* unequivocally stated that "merely being subjected to an agency *constructed in violation of the separation of powers* does not, by itself constitute irreparable harm." 103 F.4th at 753 (emphasis added).

The Tenth Circuit has made clear that per se irreparable harm is only assumed when the constitutional violation concerns "individual constitutional rights, such as the rights guaranteed by the *First* and *Fourteenth Amendments*." *Id.* at 753; see also *Aposhian v. Barr*, 958 F.3d 969, 990 (10th Cir. 2020) ("[O]ur cases finding that a violation of a constitutional right alone constitutes irreparable harm are limited to cases involving individual rights, not the allocation of powers among the branches of government"). Limiting per [\*15] se irreparable harm to individual rights preserves the extraordinary nature of preliminary injunctions. "One can only imagine the deluge of preliminary injunction litigation the courts would face if every action allegedly taken in excess of the agency's authority (whether couched in constitutional terms or not) was deemed irreparable, simply because the participants should not be compelled to participate in a proceeding that the agency arguably lacks authority to bring." *Meta Platforms, Inc. v. Fed. Trade Comm'n*, 723 F. Supp. 3d 64, 81 (D.D.C. 2024); *Imp. Motors II Inc. v. Cowen*, No. 25-CV-07284-RFL, 2025 U.S. Dist. LEXIS 175078, 2025 WL 2589046, at \*3 (N.D. Cal. Sept. 8, 2025) ("This Court declines to extend *Axon* to conclude that it overruled *Collins* and created a sweeping new 'entitlement on the merits to a preliminary injunction in every case where [collateral] constitutional challenges [to administrative proceedings] are raised.'" (quoting *Leachco*, 103 F.4th at 759)).

Plaintiff's belief that *Panama Refining* "proves the point" that "[i]f the statute conferring jurisdiction is void on non-

delegation grounds, it follows that the Constitution automatically displaced the agency's jurisdiction the moment the statute was enacted" has no force. Pl.'s Reply at 6. *Panama Refining* is one of two anomalous Supreme Court decisions that struck down laws under the non-delegation doctrine. See *Pan. Ref.*, 293 U.S. at 433; *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935). In *Panama Refining*, Congress [\*16] had enacted the Petroleum Act, 15 U.S.C. § 709 and granted the President authority, pursuant to Section 9(c) of the Act, to prohibit the interstate transport of petroleum "withdrawn from storage in excess of the amount permitted" by state law or regulation. 293 U.S. at 405-06. President Roosevelt issued an executive order proscribing just that. Then, in a subsequent executive order, the President authorized the Secretary of the Interior to "exercise all powers vested in the president for the purpose of enforcing Section 9(c) of said act and said order." *Id.* at 406-07 (internal quotation marks omitted). Petroleum companies challenged Section 9(c) as "an unconstitutional delegation to the President of legislative power and as transcending the authority of the Congress under the *commerce clause*." *Id.* at 410. The Supreme Court agreed and enjoined Section 9(c) for violating the non-delegation doctrine. "As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited." *Id.* at 430. The Court then reversed and remanded the cases to district court, instructing the lower court to "modify its decrees in conformity [\*17] with this opinion so as to grant permanent injunctions[.]" *Id.*

*Panama Refining* is unusable for determining whether Plaintiff has asserted an irreparable harm. It did not involve administrative proceedings, nor did it discuss irreparable harm, and it has never been expanded to permit pre-enforcement challenges of agency actions under separation-of-powers principles. Plaintiff does not offer any authority to the contrary. He instead ventures that that because *Panama Refining* involved a permanent injunction it "necessarily involv[ed] irreparable harm." Pl.'s Reply at 12. He then appears to subsume a finding of per se irreparable harm into the Supreme Court's decision on the merits of the non-delegation claim. *Id.* In doing so, Plaintiff conjures a holding that simply does not exist. *Panama Refining* did not explicitly discuss irreparable harm, but it is obvious that the litigants did not rest their right to equitable relief

on a constitutional violation alone. The *Panama Refining* plaintiffs sought to enjoin specific harms prompted by Section 9(c)—the government's invasion of their property and the risk of criminal penalties, as well as fines.<sup>4</sup> It was on these grounds that the Supreme Court held that [\*18] they "were entitled to invoke equitable jurisdiction to restrain enforcement." [293 U.S. at 414](#). The Court did not presume that the non-delegation claim would result in irreparable harm. Indeed, the Supreme Court has only extended that privilege to the infringement of [First Amendment](#) rights. See [Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 \(1976\)](#) ("The loss of [First Amendment](#) freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); [Nat'l Ass'n for Gun Rights v. Lamont, F.4th, 153 F.4th 213, 2025 U.S. App. LEXIS 21570, 2025 WL 2423599, at \\*23 \(2d Cir. 2025\)](#) ("[T]he Supreme Court has never applied [the presumption of irreparable harm] outside the [First Amendment](#) context.").<sup>5</sup>

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<sup>4</sup> Part of the harm the plaintiffs in *Panama Refining* sought to prohibit, the government's repeated intrusion onto their private property, has long been recognized as a prototypical form of irreparable harm. Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, [131 HARV. L. REV. 418, 433 \(2017\)](#) (explaining that the plaintiffs in *Panama Refining* "sought an injunction that would keep the defendants from coming upon the refining plant of the plaintiff"). "[L]egal remedies are presumptively inadequate in cases of continuing injury, whether that injury is to intellectual property rights or to other legally protected interests . . . This principle was well established by the early nineteenth century, when Joseph Story observed that "Courts of Equity" would enjoin "repeated trespasses" and "upon similar principles . . . interfere in cases of Patents for Inventions, and in cases of Copy-rights." Mark P. Gergen et. al., *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, [112 COLUM. L. REV. 203, 212-13 \(2012\)](#).

<sup>5</sup> Though not decisive in the present case, it is worth noting that whether a constitutional violation presumptively causes irreparable harm is an unsettled question and one on which the circuits have drastically split. Compare [Hanson v. Smith, 120 F.4th 223, 244, 468 U.S. App. D.C. 392 \(D.C. Cir. 2024\)](#); [Del. State Sportsmen's Ass'n v. Del. Dep't of Safety & Homeland Sec., 108 F.4th 194, 204 \(3d Cir. 2024\)](#) (limiting the presumption of irreparable harm to [First Amendment](#) violations), with [Lamont, 2025 U.S. App. LEXIS 21570, 2025 WL 2423599, at \\*23](#); [Siegel v. LePore, 234 F.3d 1163, 1178 \(11th Cir. 2000\)](#) (applying the presumption of irreparable harm to a select few constitutional amendments, such as the Fourth and Eighth), and [Leaders of a Beautiful Struggle v. Baltimore Police Dep't, 2 F.4th 330, 346 \(4th Cir. 2021\)](#); [Patel v. Glenn,](#)

Ultimately, *Panama Refining* does not relieve Plaintiff of his duty to demonstrate irreparable harm. He must face certain and great harm in the absence of judicial intervention to justify a preliminary injunction—a burden he has not and cannot meet through an alleged separation-of-powers violation alone. *Leacho* has already been applied to proceedings before the HIWU; the Western District of Oklahoma denied a temporary restraining order, seeking to prevent the Authority from enforcing HISA regulations, on the grounds that "being subjected to an unconstitutional exercise of authority or an illegitimate [\*19] decisionmaker" does not amount to irreparable harm. [Offolter v. Horseracing Integrity & Safety Auth., Case No. CIV-24-749-D, 2024 U.S. Dist. LEXIS 141046, 2024 WL 3732056, at \\*3 \(W.D. Okla. Aug. 8, 2024\)](#). Plaintiff's claim is no different. Because he has not stated a harm beyond subjection to the jurisdiction of an allegedly unconstitutional agency, his separation-of-powers claim does not warrant a preliminary injunction. [Leachco, 103 F.4th at 753](#).

B. Any costs Plaintiff incurs from defending against arbitration and the imposition of civil fines do not result in irreparable harm because Plaintiff can recover monetary damages from HIWU and HISA.

The Court now turns to Plaintiff's assertion that complying with a rule promulgated in violation of the APA and FTC regulations causes irreparable harm because he will be unable to obtain monetary damages after the arbitration. Mot. for Prelim. Inj. at 48. That concern has no bearing here. HIWU and HISA are private entities and do not enjoy the protection of sovereign immunity. See [15 U.S.C. §§ 3052\(a\), 3053](#) (stating that the Authority is a "private, independent, self-regulatory, non-profit corporation"); [Walmsley v. Fed. Trade Comm'n, 117 F.4th 1032, 1037 \(8th Cir. 2024\)](#) ("The Authority is a private, nonprofit corporation."), *cert. granted, judgment vacated*, 145 S. Ct. 2870, 222 L. Ed. 2d 1124 (2025); [Tuma v. Hawthorne Race Course, Inc., No. 24-CV-8307, 2025 U.S. Dist. LEXIS 142734, 2025 WL 2098700, at \\*7 \(N.D. Ill. July 25, 2025\)](#) ("HISA and HIWU (operating under HISA), are not government bodies but rather private organizations operating under the FTC."). And worries about [\*20] recovery from the FTC following appeal are premature. Plaintiff may prevail at arbitration or HIWU

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[2022 U.S. App. LEXIS 30641, 2022 WL 16647974, \(6th Cir. Nov. 3, 2022\)](#); [Morehouse Enters. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 78 F.4th 1011 \(8th Cir. 2023\)](#); [Baird v. Bonta, 81 F.4th 1036, 1046 \(9th Cir. 2023\)](#) (finding that nearly all constitutional violations presumptively cause irreparable harm).

may decline to impose fines. Thus, at this stage in the litigation, all monetary harm is recoverable. See [Kim v. Fin. Indus. Regul. Auth.](#), 698 F. Supp. 3d 147, 169-70 (D.D.C. 2023); cf. [Env'tl Prot. Agency](#), 989 F.3d at 886 (irreparable injury must be "imminent").

Delaying relief does not pose any threat to the "very existence" of Plaintiff's veterinary practice. [Mountain Valley](#), 915 F.3d at 218. Plaintiff has not demonstrated that Rule 3214's terms nor the enforcement proceeding itself threaten his practice's financial viability. Defendants underscore that Plaintiff "remains fully free to continue treating covered horses and otherwise engage in horseracing-related activities covered under HISA, not to mention activities that are not covered under HISA." Defs.' Resp. at 23. Plaintiff agrees that he is "permitted to continue his practice" during the pendency of the administrative proceedings. Pl.'s Reply at 7 (arguing that staying the arbitration would not cause Defendants harm because Plaintiff's "alleged conduct is so un-threatening that [the Authority] has permitted him to continue his practice during its pendency"); cf. [Dominion Video](#), 356 F.3d at 1261 (reversing district court's finding of irreparable harm where plaintiff had not established "any threat to its existence, [\*21] damage to its goodwill, loss of customers, or loss of its competitive position in the market"). Plaintiff also does not seek to enjoin the enforcement of Rule 3214 in general. Pl.'s Reply at 2. Thus, the "compliance costs" of adhering to Rule 3214 (assuming they exist, seeing as the cost of not possessing a drug is likely less than the cost of possessing it) would be unaffected by his requested relief. See [United States v. St. Bernard Par.](#), 756 F.2d 1116, 1123 (5th Cir. 1985) ("It is black letter law that an injunction will not issue when it would be ineffectual."); [Second Amend. Found., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives](#), 702 F. Supp. 3d 513, 540 (N.D. Tex. 2023). The Court finds Plaintiff has not shown any manifest harm caused by the presumed APA and FTC violations.

C. Plaintiff's [Fifth Amendment](#) due process claim fails on the merits and therefore does not result in irreparable harm.

Plaintiff contends that Rule 3214(a) provides insufficient notice of the conduct it prohibits and is therefore void-for-vagueness under the [Fifth Amendment](#). Mot. for Prelim. Inj. at 38. In parallel fashion to his non-delegation claim, Plaintiff maintains that proving a due process violation proves irreparable harm. *Id.* at 48. The Tenth Circuit has not addressed whether a [Fifth Amendment](#) violation suffices for irreparable harm, but

this Court will assume it does under the Tenth Circuit's holding that individual constitutional harms need "no further [\*22] showing of irreparable injury." [Planned Parenthood Ass'n v. Herbert](#), 828 F.3d 1245, 1263 (10th Cir. 2016); [Aposhian](#), 958 F.3d at 990. However, because the Court finds Plaintiff's due process claim unconvincing, it in turn finds a lack of irreparable harm.

Agency regulations are subject to constitutional challenge under the [Fifth Amendment's Due Process clause](#) for being impermissibly vague. [Brennan v. Occupational Safety & Health Rev. Comm'n](#), 505 F.2d 869, 872 (10th Cir. 1974). Prohibiting vague statutes and regulations serves twin aims: (1) it ensures that regulated parties are informed of what is required of them to conform their conduct with the law and (2) it provides "precision and guidance" to those enforcing the law so that they "do not act in an arbitrary or discriminatory way." [FCC v. Fox Television Stations, Inc.](#), 567 U.S. 239, 253, 132 S. Ct. 2307, 183 L. Ed. 2d 234 (2012). Plaintiff brings a facial challenge to Rule 3214. To succeed in that posture, Plaintiff must show that "no set of circumstances exists under which the [Rule] would be valid." [Wash. State Grange v. Wash. State Republican Party](#), 552 U.S. 442, 449, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008). Rules which are "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process." *Id.* A regulation is not void for vagueness if it "has a 'plainly legitimate sweep.'" [Fabrizius v. Dep't of Agric.](#), 129 F.4th 1226, 1238 (10th Cir. 2025) (quoting [Wash. State Grange](#), 552 U.S. at 449). Where, as here, the regulation is "promulgated pursuant to remedial civil legislation," it is interpreted "in the light of the conduct to which it is applied." *Id.*

Plaintiff accuses the Authority of not "provid[ing] [\*23] a single word of guidance as to how Covered Veterinarians must alter their practice to comply with Rule 3214(a)." Mot. for Prelim. Inj. at 29; see also *id.* at 38 ("The possession rule provides no reasonably discernable range of conduct that it prohibits."). The Court disagrees; the way veterinarians "must alter their practice" to comport with Rule 3214(a) is by refraining from the conduct it proscribes, i.e. possessing banned substances or banned methods. Those substances are enumerated in the Authority's "Prohibited List," leaving scant room for confusion over what can and cannot be possessed. See HISA Rule Series 4000. Further, Plaintiff's statement that "possession is not the fact on which liability depends" is simply untrue. Mot. for Prelim. Inj. at 37. Possession is the exact fact on which liability depends and "delineates [the Rule's] reach in words of

common understanding." [Brennan, 505 F.2d at 872](#); [United States v. Woods, 684 F.3d 1045, 1059 \(11th Cir. 2012\)](#) ("[T]he ordinary meaning of the terms in the statute show it is not unconstitutionally vague. 'Possession' is the act or condition of having in or taking into one's control or holding at one's disposal." (citation omitted)). The Rules also include thorough enforcement guidance, specifying what classes banned substances fall into, the penalty points [\*24] associated with each class, and the fines/suspension periods applicable to subsequent violations. See HISA Rules 3323-33.

The Authority's decision not to define "compelling justification" does not alter the Court's conclusion. Permitting possession when there is a compelling justification for doing so is an exception to the rule. Veterinarians can always comply with Rule 3214 by not possessing the substances it prohibits. Because Rule 3214 imposes strict liability for possession, the scenarios where the "compelling justification" exemption applies will be a small minority. Again, Plaintiff's burden is to show that "there is no set of circumstances where the rule would be valid." [Wash. State Grange, 552 U.S. at 449](#). Focusing on the possible ambiguity in granting exceptions ignores the Rule's "plainly legitimate sweep." [Fabrizius, 129 F.4th at 1238](#). Moreover, the definition of "compelling" excludes a vast array of justifications, such as a covered person merely wanting to possess the substance, thinking they should be able to, or forgetting that they have it on hand. What Plaintiff's critique amounts to is a question about edge cases. But a regulation "need not spell out all situations" where an activity is prohibited, [Jake's Fireworks Inc. v. Acosta, 893 F.3d 1248, 1258 \(10th Cir. 2018\)](#), nor speak with mathematical precision, [Fabrizius, 129 F.4th at 1239](#), to be constitutional. [\*25] It is enough that those enforcing the law can look to dictionary definitions and the term's use in comparable anti-doping schemes to discern its meaning. [Id. at 1238-39](#) (finding dictionary definitions to provide sufficient guidance on the meaning of the term "responsible"). In sum, "[t]here are at least some instances in which a reasonable person can infer meaning from the Final Rule . . . Therefore, the Court concludes that Plaintiffs are not likely to succeed on the merits of their vagueness claim." [Second Amend. Found., 702 F. Supp. 3d at 533](#).

D. Plaintiff has not identified an irreparable harm resulting from the alleged [Seventh Amendment](#) violation.

The Court now addresses the question of jurisdiction under [Thunder Basin](#) and Plaintiff's related [Seventh](#)

[Amendment](#) claim. "Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider" including "when, and under what conditions, federal courts can hear them." [Bowles v. Russell, 551 U.S. 205, 212-13, 127 S. Ct. 2360, 168 L. Ed. 2d 96 \(2007\)](#). There is a "strong presumption favoring judicial review of administrative action." [Mach Mining, LLC v. EEOC, 575 U.S. 480, 486, 135 S. Ct. 1645, 191 L. Ed. 2d 607 \(2015\)](#) (quoting [Bowen v. Mich. Acad. of Fam. Physicians, 476 U.S. 667, 670, 106 S. Ct. 2133, 90 L. Ed. 2d 623 \(1986\)](#)). "That presumption is rebuttable: It fails when a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct." *Id.* A district court may only intervene in administrative proceedings if it concludes that [\*26] a plaintiff's claims are not "of the type Congress intended to be reviewed within [the] statutory structure." [Thunder Basin, 510 U.S. at 212](#). The court first considers whether Congress intended to preclude judicial review either implicitly or explicitly. *Id. at 207*. If the statute does oust federal courts of jurisdiction, a plaintiff can still obtain review by demonstrating that (1) precluding district court jurisdiction would foreclose all meaningful judicial review; (2) their claims are wholly collateral to the statutory review scheme; and (3) the claims are outside the agency's expertise. *Id.*

The prototypical statute eliminating federal court jurisdiction under [Thunder Basin](#) is one which directs review of agency determinations to a U.S. Court of Appeals, instead of to a district court. [Bank of La. v. Fed. Deposit Ins. Corp., 919 F.3d 916, 922 \(5th Cir. 2019\)](#). The Act is not a statute of this ilk. Rather than vest review in a federal appellate court, the statute permits a final FTC decision to be challenged in a district court through the APA. [5 U.S.C. § 704](#); [15 U.S.C. § 3058\(b\)\(3\)\(B\)](#); cf. [Elgin v. Dep't of the Treasury, 567 U.S. 1, 26, 132 S. Ct. 2126, 183 L. Ed. 2d 1 \(1994\)](#).

During Plaintiff's requested hearing in support of his preliminary injunction, the Court asked the parties to share their view as to whether [Thunder Basin](#) divests the Court of jurisdiction over Plaintiff's [Seventh Amendment](#) claim. Numerous other courts have found that [Thunder Basin](#) counsels against [\*27] judicial interference in administrative proceedings, including those before FINRA, when the party alleges a [Seventh Amendment](#) violation, and the parent statute vests review in the courts of appeals. Although the Act does not mirror that appellate review structure, the Court ordered supplemental briefing as to whether district court review is implicitly displaced by the Act's "text, structure, and purpose." [Bank of Louisiana, 919 F.3d at](#)

[923](#) (noting that implicit preclusion requires a "more complex analysis"); see, e.g., [Connecticut v. Spellings](#), [453 F. Supp. 2d 459, 486 \(D. Conn. 2006\)](#) (finding that statute's administrative review scheme "reflect[e]d an intent to preclude the type of pre-enforcement action brought by the state" under [Thunder Basin](#) even though final agency decisions "could be reviewed by a district court under the APA"). However, because Plaintiff has not shown any irreparable harm resulting from the purported constitutional violations, there will be no judicial interference in his administrative proceeding. The Court therefore does not reach the [Thunder Basin](#) question.

i. Plaintiff's facial challenge under the [Seventh Amendment](#) fails because there is no per se irreparable harm.

Plaintiff challenges the HISA's "mandate to use binding arbitration" as a facial violation of the [Seventh Amendment](#) right to a jury trial. Mot. for Prelim. Inj. at 10. [\*28] Facial challenges "are the most difficult to mount successfully," but may be "brought under any otherwise enforceable provision of the constitution." [City of Los Angeles v. Patel](#), [576 U.S. 409, 415, 135 S. Ct. 2443, 192 L. Ed. 2d 435 \(2015\)](#). Plaintiff must demonstrate that the use of arbitration is "unconstitutional in all applications." [Id. at 418](#). "[W]hen assessing whether a statute meets this standard" the Court considers "only applications of the statute in which it actually authorizes or prohibits conduct." [Id.](#)

Plaintiff's [Seventh Amendment](#) argument confuses the difference between a facial and an as-applied challenge. He alternates between discussing why the specific claims brought against him and the actions HIWU is generally authorized to initiate warrant a jury trial. See [id.](#) at 41-47. For instance, he contends that a jury is necessary because "the claims against Dr. Scott have close analogues at common law," [id.](#) at 45, and predicts that Defendants will "attempt to distinguish the scope of common law fraud or breach-of-contract claims from the charges brought here," [id.](#) Yet later, Plaintiff compares the Act's goal of accurately reflecting a horse's condition by preventing doping to "a quintessential form of fraud," [id.](#) at 43. The "'anti-doping' violations defined in HISA's Rules therefore [\*29] confront a question tried to a jury at common law as a breach of agreement among competitors to run a fair race." [Id.](#) at 45. These statements reveal a significant discrepancy between the claim Plaintiff purports to bring—a facial challenge—and the one he actually argues—an as-applied challenge. This conflict becomes even more perplexing when

evaluating irreparable harm. Plaintiff at once assails HIWU's actions as "void ab initio" under the [Seventh Amendment](#), [id.](#) at 48, and protests that arbitration violates his "individual right" to a jury trial. [Id.](#) at 48; Pl.'s Reply at 11. In the end, both theories fail. Plaintiff has not mounted a viable facial challenge, nor has he articulated an irreparable harm flowing from his [Seventh Amendment](#) claim.

The right to a jury trial attaches when the suit is one which would have arisen "at common law." [Tull v. United States](#), [481 U.S. 412, 417, 107 S. Ct. 1831, 95 L. Ed. 2d 365 \(1982\)](#). The Supreme Court has held that, in the context of agency proceedings, Congress cannot "eliminate a party's [Seventh Amendment](#) right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity." [Granfinanciera, S.A. v. Nordberg](#), [492 U.S. 33, 61, 109 S. Ct. 2782, 106 L. Ed. 2d 26 \(1989\)](#). Courts use a two-step analysis to evaluate whether an agency adjudication is proper. First, [\*30] the court determines if the agency's claim against the individual is "legal in nature." [Id. at 53](#). Whether a claim is legal in nature depends on both (1) the cause of action and (2) the remedy it provides, [id. at 60](#), but the remedy is the "more important consideration," [id.](#) (internal quotations omitted). If it is a legal claim, the court then considers whether the right the agency seeks to enforce is subject to the "public-rights exception." [Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n](#), [430 U.S. 442, 455, 97 S. Ct. 1261, 51 L. Ed. 2d 464 \(1977\)](#). "Under this exception, Congress may assign the matter for decision to an agency without a jury, consistent with the [Seventh Amendment](#)." [SEC v. Jarkesy](#), [603 U.S. 109, 127, 144 S. Ct. 2117, 219 L. Ed. 2d 650 \(2024\)](#).

Plaintiff's primary case for his [Seventh Amendment](#) claim is [Jarkesy](#). Mot. for Prelim. Inj. at 41-43. In [Jarkesy](#), the Securities and Exchange Commission ("SEC") had initiated an enforcement action against two individuals, alleging securities fraud and seeking up to \$300,000 in civil penalties. See [Jarkesy](#), [603 U.S. at 123](#). Beginning with the remedy, the Court concluded that the SEC's imposition of civil penalties was "all but dispositive." [Id.](#) "What determines whether a monetary remedy is legal is if it is designed to punish or deter the wrongdoer, or, on the other hand, solely to restore the status quo." [Id.](#) (quoting [Tull](#), [481 U.S. at 422](#)). Because the relevant penalties would not be used to "return any money to victims," [\*31] but were "designed to punish and deter," they were a prototypical common law remedy. [Id. at 130](#). The Court then moved to the cause

of action and found that the "close relationship between the causes of action in this case and common law fraud" supported its conclusion. *Id.* Of particular import to the Court's analysis was Congress's "deliberate" use of "fraud" in the [Securities Exchange Act](#). See *id.* The majority interpreted this word choice as indicating that Congress "incorporated prohibitions from common law fraud in federal securities law" and sought to target the same misconduct as common law fraud, e.g., misrepresenting or concealing material facts. *Id.* The public rights exception was thus inapplicable because, regardless of the actions "statutory origins," fraud "resemble[d] a traditional legal claim." [Id. at 135](#).

Plaintiff leads with the assertion that "the suit in this case is virtually identical" to the one in [Jarkesy](#). Mot. for Prelim. Inj. at 42. To be "virtually identical" to Plaintiff's suit, [Jarkesy](#) would need to have considered a facial challenge. It did not. The Supreme Court answered a "straightforward question: whether the [Seventh Amendment](#) entitles a defendant to a jury trial when the SEC seeks civil penalties against *him* for securities fraud." [\*32] [603 U.S. at 120](#) (emphasis added). Nothing in [Jarkesy](#) limited agencies' power to seek civil fines for suits without a common law mirror or to pursue equitable remedies. Arbitration is thus obviously appropriate in at least one scenario where it will be applied—when the HIWU seeks exclusively equitable relief. [15 U.S.C. § 3057\(d\)\(3\)\(A\)](#); [Patel, 576 U.S. at 423](#).<sup>6</sup> Despite Plaintiff's contortion of the anti-doping rules into "common law" causes of action, the

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<sup>6</sup>In his reply, Plaintiff argues that the [Seventh Amendment](#) entitles individuals to a jury trial even where the sole penalty is a suspension because suspensions are not equitable remedies since they are "intended to punish culpable individuals." Pl.'s Reply at 16 (quoting [Tull, 481 U.S. at 412](#)). Plaintiff's analysis relies on a misapprehension of what distinguishes legal remedies from equitable remedies. While English common law permitted courts of equity to award certain monetary damages, such as restitution, it did not permit courts of law to issue injunctive relief, such as abating a public nuisance. [Tull, 481 U.S. at 424](#). Whether the fines the government seeks go beyond "restoring the status quo" is relevant for differentiating forms of monetary relief; it cannot be used to transform equitable relief into a legal remedy. See generally *id.* Here, suspension prohibits a covered person from participating in covered events. See HISA Rule 3229. It is a form of equitable relief aimed at preventing certain conduct. James Fleming, Jr., *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 682 (1963). The Authority's ability to order disgorgement of an individual's winnings following a rigged race is another equitable remedy.

regulations also go far beyond traditional concerns of fair play and "warranties as to the quality of a racehorse for purchase." Mot. for Prelim. Inj. at 46. The possession violation itself is unlike any common law claim and he includes no support for the idea that private parties could have sued an equine veterinarian for possessing a drug near a racetrack; all of Plaintiff's authorities pertain to private parties who could sue for "purse money" following a rigged horse race. [Id. at 46](#). Accordingly, to the extent that Plaintiff's facial challenge is meant to prove a "constitutional infringement" and "require no further showing of irreparable injury," it folds.

ii. Even if the Court construes Plaintiff's [Seventh Amendment](#) claim as an as-applied challenge, there is no evidence [\*33] of irreparable harm.

Though Plaintiff shies away from an as-applied challenge, the Court addresses the question of a [Seventh Amendment](#) right for Plaintiff's arbitration since it is frequently referenced in his filings. Plaintiff insists that he will suffer a "hear-and-now injury [sic]" from proceeding before an arbitrator. Mot. for Prelim. Inj. at 10. He pulls the "here-and-now" language from the Supreme Court's decision in [Axon](#). See [Axon Enter. v. Fed. Trade Comm'n, 598 U.S. 175, 191, 143 S. Ct. 890, 215 L. Ed. 2d 151 \(2023\)](#). That statement was made in the context of determining whether the Supreme Court had jurisdiction under [Thunder Basin](#) to hear challenges to the constitutional authority of administrative law judges. *Id.* The case did not involve injunctive relief and, in fact, [Leachco](#) refused to equate the "here-and-now" injury with irreparable harm because [Axon](#) "did not address the issue of irreparable harm, or any other issue regarding entitlement to injunctive relief." [103 F.4th at 758](#); cf. [Vape Cent. Grp., LLC v. United States FDA, Civil Action No. 24-3354, 2025 U.S. Dist. LEXIS 35620, 2025 WL 637416, at \\*9 \(D.D.C. Feb. 27, 2027\)](#) ("[I]t is far from clear that [company] will even suffer a "there-and-then injury" at some later time, since the company has yet to identify any genuine dispute of material fact that might, under any circumstances, support a [Seventh Amendment](#) claim.").

Plaintiff offers no other caselaw to prove that his "individual" [Seventh Amendment](#) injury is irreparable.<sup>7</sup>

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<sup>7</sup>Plaintiff's reliance on cases finding that the loss of a professional license is a type of forfeiture, and therefore require a jury, are inapposite. Pl.'s Reply at 11. The Authority cannot revoke Dr. Scott's veterinary license; it can only prevent him from participating in covered races and events.

Courts have consistently [\*34] reached the opposite conclusion. "It is well established that in the [Seventh Amendment](#) context, 'the harm resulting from the denial of a jury trial can be remedied on appeal, even after the case has already been tried' because a reviewing court can "simply order[ ] a new trial." [Lukezic v. Fin. Indus. Regul. Auth., Inc., No. 25-CV-00623 \(DLF\), 2025 U.S. Dist. LEXIS 153813, 2025 WL 2305859, at \\*3 \(D.D.C. Aug. 10, 2025\)](#). Accordingly, "merely being subject to a proceeding before an ALJ where a particular remedy sought is allegedly unconstitutional or not statutorily permissible does not leave YAPP without a remedy." [YAPP USA Auto. Sys., Inc. v. Nat'l Lab. Rels. Bd., 748 F. Supp. 3d 497, 517 \(E.D. Mich. 2024\), appeal dismissed, No. 24-1754, 2025 U.S. App. LEXIS 23663, 2025 WL 2606098 \(6th Cir. Aug. 4, 2025\)](#); [Vape Cent. Grp., LLC v. U.S. Food & Drug Admin., No. CV 24-3354 \(RDM\), 2025 U.S. Dist. LEXIS 35620, 2025 WL 637416, at \\*6 \(D.D.C. Feb. 27, 2025\)](#) ("It is thus unsurprising that every district court that has considered the question post-[Jarkesy](#) has held that the relevant statutory procedures for challenging final administrative orders provide a sufficient opportunity for 'meaningful review' of any [Seventh Amendment](#) defense.").

The Court therefore finds that Plaintiff has not established irreparable harm for any of his claims. The request for a preliminary injunction is denied. [Env'tl Prot. Agency, 989 F.3d at 890](#).

## CONCLUSION

**IT IS THEREFORE ORDERED** that Plaintiff's motion for a preliminary injunction, Doc. 8, is **DENIED**.

/s/ Sarah M. Davenport

**SARAH M. DAVENPORT**

**UNITED STATES DISTRICT JUDGE**

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TAB 4

163 F.4th 294

United States Court of Appeals, Sixth Circuit.

State of OKLAHOMA; Oklahoma Horse Racing Commission; Tulsa County Public Facilities Authority, dba Fair Meadows Racing and Sports Bar; State of West Virginia; West Virginia Racing Commission; Hanover Shoe Farms, Inc.; Oklahoma Quarter Horse Racing Association; Global Gaming RP, LLC, dba Remington Park; Will Rogers Downs, LLC; United States Trotting Association; State of Louisiana, Plaintiffs-Appellants,

v.

UNITED STATES of America; Horseracing Integrity and Safety Authority, Inc.; Leonard S. Coleman, Jr.; Nancy M. Cox; Federal Trade Commission; Andrew N. Ferguson, in His Official Capacity as the Chair of the Federal Trade Commission; Mark R. Meador, in his official capacity as Commissioner of the Federal Trade Commission; Steve Beshear; Adolpho Birch, Jr.; Ellen McClain; Charles P. Scheeler; Joseph Defrancis; Susan Stover; Bill Thomason; D. G. Van Clief, Defendants-Appellees.

No. 22-5487

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Argued: November 12, 2025

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Decided and Filed: December 17, 2025

### Synopsis

**Background:** States and their horseracing regulatory agencies brought action alleging that Horseracing Integrity and Safety Act (HISA) violated non-delegation and anti-commandeering doctrines. The United States District Court for the Eastern District of Kentucky, Joseph M. Hood, Senior District Judge, 2022 WL 1913419, dismissed complaint. Plaintiffs appealed. The Court of Appeals, Sutton, Chief Judge, 62 F.4th 221, affirmed. The Supreme Court, 145 S.Ct. 2836, granted petition for writ of certiorari, vacated judgment, and remanded to Court of Appeals.

**Holdings:** On remand, the Court of Appeals, Sutton, Chief Judge, held that:

amendment to HISA provision did not moot plaintiffs' challenges to HISA;

HISA's delegation of authority to private nonprofit corporation, the Horseracing Integrity and Safety Authority, to propose rules relating to thoroughbred horseracing did not violate private nondelegation doctrine;

HISA's delegation of enforcement authority to Authority, with regard to rules and provisions governing thoroughbred horseracing, did not violate private nondelegation doctrine;

plaintiffs lacked Article III standing to bring Tenth Amendment anti-commandeering challenge to constitutionality of HISA provision which required state authorities to "cooperate and share information with" Authority, in order to help regulate the industry under supervision of Federal Trade Commission (FTC); and

HISA subsection, which established mechanisms for funding the Authority, did not violate anti-commandeering prohibition of Tenth Amendment.

Affirmed.

**Procedural Posture(s):** On Appeal; Motion to Dismiss for Failure to State a Claim.

On Remand from the United States Supreme Court

United States District Court for the Eastern District of Kentucky at Lexington. No. 5:21-cv-00104—Joseph M. Hood, District Judge.

### Attorneys and Law Firms

ARGUED: Lochlan F. Shelfer, GIBSON, DUNN & CRUTCHER LLP, Washington, D.C., for Appellants. Courtney L. Dixon, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Federal Appellees. Pratik A. Shah, AKIN GUMP STRAUSS HAUER & FELD LLP, Washington, D.C., for Horseracing Authority Appellees. ON SUPPLEMENTAL BRIEF: Lochlan F. Shelfer, GIBSON, DUNN & CRUTCHER LLP, Washington, D.C., Zach West, OFFICE OF THE OKLAHOMA ATTORNEY GENERAL, Oklahoma City, Oklahoma, Michael R. Williams, OFFICE OF THE WEST VIRGINIA ATTORNEY GENERAL, Charleston, West Virginia, Joseph Bocock, BOCOCK LAW PLLC, Oklahoma City, Oklahoma, Todd Hembree, CHEROKEE NATION BUSINESSES, Catoosa, Oklahoma, Elizabeth B. Murrill, LOUISIANA DEPARTMENT OF JUSTICE, Baton Rouge, Louisiana, Michael Burrage,

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Before: [SUTTON](#), Chief Judge; [COLE](#) and [GRIFFIN](#), Circuit Judges.

## OPINION

[SUTTON](#), Chief Judge.

**\*300 \*\*1** Sometimes government works. And sometimes it works best after a dialogue between and within the various branches.

In 2020, Congress enacted the Horseracing Integrity and Safety Act to establish a nationwide framework for regulating thoroughbred horseracing. That led to several non-delegation and anti-commandeering challenges to the validity of the Act throughout the country. The lead challenge—the facial non-delegation challenge—focused on the reality that the Act replaced several state regulatory authorities with a private corporation, the Horseracing Authority, which became the Act's primary rulemaker and which was not subordinate to the relevant public agency, the Federal Trade Commission, in critical ways. The first circuit to assess the validity of the law, the Fifth Circuit, declared the Act facially unconstitutional because it gave “a private entity the last word” on federal law. *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black (Black I)*, 53 F.4th 869, 872 (5th Cir. 2022); see *id.* at 888–89.

In response to the Fifth Circuit's decision and after oral argument in a similar case in our circuit, Congress amended the Act to give the Federal Trade Commission discretion to “abrogate, add to, and modify” any rules that bind the industry. Consolidated Appropriations Act of 2023, [Pub. L. No. 117-328](#), 136 Stat. 4459, 5231–32 (2022). While the Constitution does not require constructive exchanges between Congress and the federal courts, it does not discourage them

either, and good government sometimes benefits from them. *Mistretta v. United States*, 488 U.S. 361, 408, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). A productive dialogue occurred in this instance, and, from our perspective, it ameliorated the concerns underlying the non-delegation challenge. In *Oklahoma v. United States*, we upheld the Act against a facial non-delegation challenge and an anti-commandeering challenge. 62 F.4th 221, 225 (6th Cir. 2023). The Eighth Circuit took the same view. *Walmsley v. FTC*, 117 F.4th 1032, 1038–40 (8th Cir. 2024). The Fifth Circuit agreed with both courts with respect to the rulemaking power created by the Act. *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black (Black II)*, 107 F.4th 415, 420 (5th Cir. 2024). But it facially invalidated the law on the ground that the Act afforded the Horseracing Authority the power to enforce federal law “without the FTC's say-so.” *Id.* at 421. The losing parties all filed petitions for writs of certiorari in the Supreme Court.

The Supreme Court held the various petitions while it considered a separate non-delegation challenge to another federal **\*301** law that used a private entity in implementing the law. In *FCC v. Consumers' Research*, the Court considered an as-applied challenge to the Federal Communications Commission's Universal Service Fund, premised on the reality that the FCC relied on a private administrator's policy recommendations in administering the program. 606 U.S. 656, 145 S.Ct. 2482, 222 L.Ed.2d 800 (2025). The Court ruled that the program did not impermissibly delegate government authority to a private entity because the FCC retained final “decision-making authority.” *Id.* at 693, 145 S.Ct. 2482. After its decision, the Court “GVR'd” the three certiorari petitions raising non-delegation challenges to the Horseracing Integrity and Safety Act. That is to say, the Court granted each petition, vacated the lower court judgments, and remanded the cases for reconsideration in light of *Consumers' Research*.

**\*\*2** That brings us to our second look at the Act. In view of the guidance provided by the Supreme Court in *Consumers' Research* and other recent decisions, we reject this facial challenge because the Act, as amended, gives the FTC, not the Horseracing Authority, the final say over the Act's key rulemaking and enforcement provisions.

### I.

Most Americans know horseracing through occasional high-visibility races, say the Kentucky Derby on the first Saturday

of May, or high-visibility books, say *Seabiscuit*. But as the partly initiated and the fully initiated alike can appreciate, the sport comes with risk. Racing a dozen or more jockeys atop sizeable horses around a mile or more track, all with prize money and gambling positions at stake, creates plenty of danger. Over the last seventy years or so, fatal accidents of jockeys in horseraces exceeded those of drivers in NASCAR races. Peta L. Hitchens, Ashley E. Hill, & Susan M. Stover, *Jockey Falls, Injuries, and Fatalities Associated with Thoroughbred and Quarter Horse Racing in California 2007–2011*, at 3, *Orthopedic J. of Sports Med.* (2013) (129 jockeys killed between 1940 and 2012); *NASCAR Deaths*, Ciancio Ciancio & Brown (Aug. 19, 2024), <https://tinyurl.com/3s73htny> (92 NASCAR drivers killed in accidents between 1948 and 2024). Faring worse, at least 850 racehorses died in 2024 alone due to racing injuries. Michael A. Fletcher, *How One Organization Plans to Improve Horse Racing Safety*, ESPN (May 2, 2025), <https://tinyurl.com/yzbha26u>.

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 initial question, as is so often the case, is whether the regulation should come from local governments or the national government.

The answer for a long time was local. Before 2020, thirty-eight state regulatory regimes supplied an array of horseracing protocols and safety requirements. Kjirsten Lee, *Transgressing Trainers and Enhanced Equines*, 11 *J. Animal & Nat. Res. L.* 23, 26 (2015).

In 2020, Congress tried a national answer. It did so in conventional and unconventional ways. Conventionally, it enacted a national law, the Horseracing Integrity and Safety Act, to centralize the regulation of thoroughbred racing. 15 U.S.C. §§ 3051–60. Less conventionally, it chose to use a private nonprofit corporation—the Horseracing Integrity and Safety Authority—to help with regulating and enforcing the Act under the supervision of the Federal Trade Commission. The decision to turn to a private entity to regulate sporting events was not wholly unprecedented. It echoed \*302 Congress's earlier choice to charter and empower the United States Olympic Committee to regulate American Olympic participation. See An Act to Incorporate the United States Olympic Association, Pub. L. No. 81-805, 64 Stat. 899 (1950); Amateur Sports Act of 1978, Pub. L. No. 95-606, 92 Stat. 3045.

The Act charges the Horseracing Authority with “developing and implementing a horseracing anti-doping and medication control program and a racetrack safety program.” 15 U.S.C. § 3052(a). The Authority's jurisdiction also includes the “safety, welfare, and integrity” of covered thoroughbreds, jockeys, and horseraces. *Id.* § 3054(a)(2)(A). The Authority may expand the Act's coverage to other breeds upon request by a state racing commission or a breed governing organization. *Id.* § 3054(1). “As a condition of participating in covered races and in the care, ownership, treatment, and training of covered horses,” individuals are required to register with the Horseracing Authority and to sign an agreement to comply with the Authority's rules, standards, and procedures and to cooperate with any investigation by the Authority. *Id.* § 3054(d).

\*\*3 The Act says that the Horseracing Authority's governing board of directors should have nine members, five “selected from outside the equine industry” and four from within the industry. *Id.* § 3052(b)(1)(A)–(B). A separate “nominating committee” comprised of “seven independent members selected from business, sports, and academia” selects the initial members of the governing board and thereafter recommends “individuals to fill any vacancy on the Board.” *Id.* § 3052(d)(1)(A)–(C). The FTC and the Authority may establish bylaws governing “the procedures for filling vacancies on the Board” and for establishing “term limits for members” of the board. *Id.* § 3052(b)(3)(C)–(D); see *id.* § 3053(a).

The Horseracing Authority funds its operations through fees on the horseracing industry. Each year, it calculates its budget and apportions amounts owed by each State. *Id.* § 3052(f)(1)(C). The States have two options. They may collect the fees themselves from covered entities and remit the fees to the Authority. *Id.* § 3052(f)(2)(D). Or they may allow the Authority to collect the fees directly from the relevant entities. *Id.* § 3052(f)(3)(D).

The Act empowers the Horseracing Authority to promulgate rules on a variety of subjects: prohibited medications, laboratory protocols and accreditation, racetrack standards and protocols, injury analysis, enforcement, and fee assessments. *Id.* § 3053(a). The Authority also develops procedures for its investigatory and subpoena powers. *Id.* § 3054(c). Once issued, the rules preempt state law. *Id.* § 3054(b).

The Horseracing Authority has initial authority to implement the rules, monitor compliance, and investigate potential rule infractions. *Id.* § 3054(c), (h), (i). The Act directs “the Authority and Federal or State law enforcement authorities” to “cooperate and share information” whenever a covered person may have violated federal or state law in addition to one of the Authority’s rules. *Id.* § 3060(b). After investigating an infraction, the Authority customarily enforces the rules through internal adjudications subject to “due process” and two layers of review: by an ALJ and the FTC. *Id.* §§ 3057(c) (3), 3058. The Authority also may initiate an enforcement action in federal court, *id.* § 3054(j), though it has yet to exercise this power since Congress passed the Act in 2020.

The Act also permits the Authority to enlist private and governmental organizations to assist in its enforcement efforts. The Act directs the Authority, for example, **\*303** to enter into an agreement with a separate private entity to serve as an “independent anti-doping and medication control enforcement organization” and to implement anti-doping rules “on behalf of the Authority.” *Id.* § 3054(e)(1) (E)(i). The Authority may enter into similar agreements with state horseracing commissions for assistance in enforcing racetrack safety rules. *Id.* § 3054(e)(2)(A)(i).

Under the Horseracing Act, as originally enacted, the Federal Trade Commission had a confined rulemaking role. When the Authority proposed rules, the FTC published them for public comment. After the comment period, the Act directed the FTC to approve any proposed rules if they were “consistent” with the Act and with other “applicable rules approved by the Commission.” *Id.* § 3053(b)–(c) (2020). The FTC also could issue an “interim” rule if it had “good cause” to do so and if the rule was “necessary to protect” the welfare of horses or the integrity of the sport. *Id.* § 3053(e) (2020); 5 U.S.C. § 553(b)(B).

This version of the Act prompted several legal challenges. In a case filed in federal court in Texas, several claimants argued that the Act violated the Constitution by delegating unmonitored lawmaking power to a private entity. The Fifth Circuit agreed, reasoning that the FTC’s confined oversight did not suffice because the FTC could not modify the rules or otherwise question the Horseracing Authority’s policy choices. *Black I*, 53 F.4th at 872–73, 886–87.

**\*\*4** Our court faced a similar challenge. Oklahoma, West Virginia, Louisiana, their racing commissions, and other entities (collectively, Oklahoma) claimed that the

Act unlawfully delegated federal power to a private entity and unlawfully commandeered the States to do the federal government’s bidding. The district court rejected Oklahoma’s claims as a matter of law.

After the Fifth Circuit issued its decision and after we heard oral argument in our case, Congress enacted, and the President signed into law, an amendment to the Act that expanded the FTC’s oversight role. The amendment eliminated the FTC’s interim-rule authority and instead empowered the FTC to create rules that “abrogate, add to, and modify the rules of the Authority.” 15 U.S.C. § 3053(e).

Oklahoma maintained that the Act remained unconstitutional. We disagreed, reasoning that the FTC’s newly expansive rulemaking power made the Horseracing Authority subordinate to the FTC. *Oklahoma*, 62 F.4th at 229–30. Neither the Act’s rulemaking structure nor its enforcement provisions, we held, violated the non-delegation doctrine. *Id.* at 231. Nor did the Act unlawfully commandeer the States, we added. *Id.* at 233.

Oklahoma filed a petition for a writ of certiorari, which the Supreme Court denied on June 24, 2024. *Oklahoma v. United States*, — U.S. —, 144 S. Ct. 2679, 219 L.Ed.2d 1298 (2024). On July 5, 2024, the Fifth Circuit revisited its earlier ruling with respect to a similar challenge to the amended Act. It held that the Authority’s new rulemaking power “cured the nondelegation defect” in the Act’s rulemaking structure that it identified in its previous decision. *Black II*, 107 F.4th at 421, 424. At the same time, however, it ruled that the Act’s enforcement provisions violated the private non-delegation doctrine. *Id.* at 429–30. The decision prompted Oklahoma to move for rehearing of its denied petition for certiorari on July 18, 2024. Petition for Rehearing, *Oklahoma v. United States*, No. 23-402 (U.S. July 18, 2024).

On September 20, 2024, the Eighth Circuit entered the picture. It held that neither the Act’s rulemaking structure nor its enforcement provisions facially violated the **\*304** non-delegation doctrine. *Walmsley*, 117 F.4th at 1038–39.

On October 7, 2024, the Supreme Court requested that the FTC and the Horseracing Authority respond to Oklahoma’s motion for rehearing. Request for Response, *Oklahoma v. United States*, No. 23-402 (U.S. Oct. 7, 2024). The responses were filed on November 6, 2024. Responses to Petition for Rehearing, *Oklahoma v. United States*, No. 23-402 (U.S. Nov. 6, 2024). In view of the division in the circuits, the FTC and

the Horseracing Authority agreed that the Court should grant review in one of the three cases. FTC's Response to Petition for Rehearing at 4, *Oklahoma v. United States*, No. 23-402 (U.S. Nov. 6, 2024); Horseracing Authority's Response to Petition for Rehearing at 11, *Oklahoma v. United States*, No. 23-402 (U.S. Nov. 6, 2024). As the Court considered these petitions for certiorari, it stayed the mandate in the Fifth Circuit case. Stay of Mandate, *Horseracing Integrity & Safety Auth. v. Nat'l Horsemen's Benevolent & Protective Ass'n*, No. 24A287 (U.S. Oct. 28, 2024).

Adding another layer of complication, the Court granted certiorari in a distinct private non-delegation challenge, *Consumers' Research*, on November 22, 2024. In June 2025, the Supreme Court decided *Consumers' Research*. In the context of that as-applied challenge, it held that an agency may delegate enforcement authority to a private entity so long as it “function[s] subordinately to” the agency and remains “subject to [the agency's] ‘authority and surveillance.’ ” 606 U.S. at 692, 145 S.Ct. 2482 (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399, 60 S.Ct. 907, 84 L.Ed. 1263 (1940)).

**\*\*5** On June 30, 2025, the Court granted Oklahoma's motion for rehearing, granted certiorari in all three horseracing non-delegation cases, and vacated and remanded all three cases for further consideration in light of *Consumers' Research*. *Oklahoma v. United States*, — U.S. —, 145 S. Ct. 2836, 222 L.Ed.2d 1122 (2025); *Nat'l Horsemen's Benevolent & Protective Ass'n v. Horseracing Integrity & Safety Auth., Inc.*, — U.S. —, 145 S. Ct. 2836, 222 L.Ed.2d 1125 (2025); *Walmsley v. FTC*, — U.S. —, 145 S. Ct. 2870, — L.Ed.2d — (2025). That brings us to this second assessment of the Act.

## II.

*Mootness*. First things first: Does the 2022 amendment to the Act transform this live controversy into a moot one? When Congress amends a statute, pending claims challenging the law sometimes become moot. See *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc). Not invariably, however. If the revised statute continues to place a material burden on the plaintiff that arises from the same theory of unconstitutionality set forth in the complaint, the case remains live. *Kenjoh Outdoor, LLC v. Marchbanks*, 23 F.4th 686, 692–93 (6th Cir. 2022). A similar

conclusion applies if the amendment does not affect other features of the challenge. *Id.* Both exceptions apply here.

The amendment to § 3053(e) of the Horseracing Act, clarifying that any rulemaking authority of the Horseracing Authority remains subordinate to the FTC, does not moot Oklahoma's non-delegation claim. While significant to the outcome of today's case, the amendment changes little else about the Act's basic structure. The revised Act “operates in the same fundamental ways,” with the Authority proposing and enforcing rules under the FTC's oversight, the key difference being that the FTC has more oversight than it did before. *Id.* at 693. The revised Act likewise presents fundamentally the “same controversy,” with Oklahoma continuing to argue **\*305** that the Act gives unsubordinated power to a private entity. *Id.*; see *Cam I, Inc. v. Louisville/Jefferson Cnty. Metro Gov't*, 460 F.3d 717, 720 (6th Cir. 2006). Nor does the Act moot Oklahoma's anti-commandeering claim. In reality, the amendment does not change that dispute in any meaningful way. No party to the case disagrees with these conclusions, and they all urge us to address the validity of the amended Act.

*Remand*. One other preliminary question remains. If a legislature changes a law while a non-moot challenge to it remains on appeal, appellate courts may remand the case to the district court to permit it to consider the challenge in the first instance. The option is discretionary, not mandatory. In this instance, we see little benefit from a remand because Oklahoma brings facial challenges that raise only legal issues and because the parties and panel have already devoted considerable time and resources to the dispute. Fortifying this conclusion is the reality that the challengers have asked us to proceed to the merits.

## III.

### A.

*Non-delegation principles*. Through the United States Constitution, the People separated the powers of the National Government into three branches. They vested the legislative power in Congress, the executive power in the President, and the judicial power in the federal courts. U.S. Const. art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1. The People also constrained each branch's use of its power through counterweights in the other branches. To preserve this balance, the Constitution bars further delegations of power between the branches. *Whitman*

*v. Am. Trucking Ass'ns*, 531 U.S. 457, 472, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). Any delegation from Congress to an agency within the Executive Branch at a minimum must contain “an intelligible principle” to guide the agency's implementation of the statute. *Id.* (quotation omitted).

**\*\*6** What about delegations to private entities? Surely, if the Vesting Clauses bar the three branches from exchanging powers among themselves, those Clauses bar unchecked reassignments of power to a non-federal entity. Just as it is a central tenet of liberty that the government may not permit a private person to take property from another private person, *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388–89, 1 L.Ed. 648 (1798) (opinion of Chase, J.), or allow private individuals to regulate other private individuals, *Washington ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 122, 49 S.Ct. 50, 73 L.Ed. 210 (1928), it follows that the government may not empower a private entity to exercise unchecked legislative or executive power. Those who govern the People must be accountable to the People. Transferring unchecked federal power to a private entity that is not elected, nominated, removable, or impeachable undercuts representative government at every turn.

Precedent confirms that unchecked delegations to private entities violate core separation-of-power guarantees. Consider *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935). A federal statute gave the President discretion to create far-reaching codes of fair competition based on proposals from private entities. *Id.* at 538, 542, 55 S.Ct. 837. Rejecting the government's view that this private participation cured any surplus delegation to the President, the Court explained that transforming private groups into legislatures would make things worse and was “utterly inconsistent” with the constitutional design. *Id.* at 537, 55 S.Ct. 837. The President's complete discretion **\*306** over the proposals, at any rate, meant that he made the law—the private entities counted only as advisors—and accordingly the Court refused to enforce the law on traditional non-delegation grounds. *Id.* at 538, 542, 55 S.Ct. 837; *id.* at 552–53, 55 S.Ct. 837 (Cardozo, J., concurring).

A year later, the Court applied a similar standard to a similar arrangement under the Bituminous Coal Act, though this one permitted private coal companies to have the final say over regulation of the industry. *Carter v. Carter Coal Co.* reasoned that, by empowering coal producers to set wages and to control the businesses of others, the Act amounted

to a “delegation in its most obnoxious form” because such regulation “is necessarily a governmental function.” 298 U.S. 238, 310–11, 56 S.Ct. 855, 80 L.Ed. 1160 (1936). Appreciating the problem, Congress amended the Act the next year to give the Coal Commission, a federal agency, power to set prices. *See Adkins*, 310 U.S. at 388, 60 S.Ct. 907. After Congress subordinated the private coal producers to a public body (the Coal Commission) that could modify or reject their proposals, the Court determined that the statute did not impermissibly delegate “legislative authority to the industry.” *Id.* at 399, 60 S.Ct. 907.

Nearly 90 years later, the Supreme Court applied these non-delegation principles with respect to private parties in *Consumers' Research*. To ensure universal access to communications technologies, Congress developed a mechanism to collect fees from telecommunications companies to subsidize communications services in low-income and rural areas. 606 U.S. at 662–64, 145 S.Ct. 2482. Congress empowered the Federal Communications Commission to administer the program and instructed the Commission to rely on a private corporation to help manage the program's operations. *Id.* Relying on *Adkins*, the Court held that this arrangement did not violate the non-delegation doctrine. *Id.* at 695, 145 S.Ct. 2482. The Court explained that an agency may “rely on advice and assistance from private actors” if the agency “retains decision-making power.” *Id.* at 692, 145 S.Ct. 2482. Because the private corporation must “follow[ ] the FCC's rules” and can only “make[ ] recommendations,” the FCC remains “in control.” *Id.* at 694–95, 145 S.Ct. 2482.

Taken together, these cases draw a line between impermissible delegations of unchecked lawmaking power to private entities and permissible participation by private entities in developing government standards and rules. *Adkins* and *Consumers' Research* show that a private entity may aid a public agency so long as the agency retains ultimate authority over the implementation of the federal law. *See Adkins*, 310 U.S. at 388, 60 S.Ct. 907; *Consumers' Rsch.*, 606 U.S. at 692, 145 S.Ct. 2482. If the private entity creates the law or retains full discretion over any regulations promulgated under it, however, an unconstitutional exercise of federal power emerges. *See Carter Coal*, 298 U.S. at 311, 56 S.Ct. 855; *Schechter*, 295 U.S. at 537, 55 S.Ct. 837.

**\*\*7** Decisions from the courts of appeals hold this line. Private entities may serve as advisors that propose regulations. *See Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th

Cir. 1974); *Cospito v. Heckler*, 742 F.2d 72, 87–89 (3d Cir. 1984); *Todd & Co. v. SEC*, 557 F.2d 1008, 1012–13 (3d Cir. 1977). And they may undertake ministerial functions, such as fee collection. See *Pittston Co. v. United States*, 368 F.3d 385, 395–97 (4th Cir. 2004); *United States v. Frame*, 885 F.2d 1119, 1128–29 (3d Cir. 1989). But a private entity may not be the principal decisionmaker in the use of federal power, *Pittston Co.*, 368 F.3d at 395–97, may not create federal law, \*307 *Texas v. Rettig*, 987 F.3d 518, 533 (5th Cir. 2021), may not wield equal power with a federal agency, *Ass'n of Am. R.R. v. Dep't of Transp. (Amtrak I)*, 721 F.3d 666, 671–73 (D.C. Cir. 2013), *vacated on other grounds*, 575 U.S. 43, 135 S.Ct. 1225, 191 L.Ed.2d 153 (2015), or regulate unilaterally, *Black I*, 53 F.4th at 872. These principles, for what it is worth, are American through and through. The state constitutions place similar limits on private exercises of public authority. See, e.g., *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 457 (Tex. 1997).

An illuminating example of how these principles work in practice comes from federal securities law. The Securities and Exchange Commission regulates the securities industry with the assistance of private, self-regulatory organizations called SROs. The SROs propose rules for the industry and initially enforce the rules through internal adjudication. The SEC oversees the rulemaking and the enforcement. As to the rules, the SEC approves proposed rules if they are consistent with the Maloney Act, and may “abrogate, add to, and delete from” an SRO’s rules “as the Commission deems necessary or appropriate.” 15 U.S.C. § 78s(b)(2)(C), (c). As to enforcement, the SEC applies fresh review to the SRO’s decisions and actions. *Id.* § 78s(e); see *Sartain v. SEC*, 601 F.2d 1366, 1369–71 & n.2 (9th Cir. 1979). In case after case, the federal courts have upheld this arrangement, reasoning that the SEC’s control over the rules and their enforcement makes the SROs permissible aids and advisors. See *R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir. 1952); *Todd & Co.*, 557 F.2d at 1012–13; *First Jersey Secs., Inc. v. Bergen*, 605 F.2d 690, 699 (3d Cir. 1979); *Sorrell v. SEC*, 679 F.2d 1323, 1325–26 (9th Cir. 1982); see also *Amtrak I*, 721 F.3d at 671 n.5 (describing the SROs’ role as “purely advisory or ministerial”).

These precedents all suggest that, at a minimum, a private entity must be subordinate to a federal actor in order to withstand a non-delegation challenge. Whether subordination always suffices to withstand a challenge raises complex separation-of-powers questions. Simplifying matters for today, if not for a future day, the parties accept this framing of

the appeal. See *United States v. Sineneng-Smith*, 590 U.S. 371, 375–76, 140 S.Ct. 1575, 206 L.Ed.2d 866 (2020); Appellants’ Br. 22, 55; FTC’s Br. 10; Horseracing Authority’s Br. 17. As the case comes to us, then, the determinative question is whether the Horseracing Authority remains inferior to the FTC with respect to rulemaking and enforcement.

B.

The Horseracing Authority is subordinate to the agency. The Authority yields to FTC supervision and lacks the final say over rulemaking and enforcement of the law, all tried and true hallmarks of an inferior body. But even if there were doubt about the application of these points to hypothetical rulemaking or enforcement settings, that would not help Oklahoma. In filing this lawsuit, Oklahoma brought a facial challenge to the law. “[T]hat decision comes at a cost.” *Moody v. NetChoice, LLC*, 603 U.S. 707, 723, 144 S.Ct. 2383, 219 L.Ed.2d 1075 (2024). In considering a facial challenge, we must focus our inquiry on the circumstances in which the Act is “most likely to be constitutional” rather than imagining “hypothetical scenarios where [the Act] might raise constitutional concerns.” *United States v. Rahimi*, 602 U.S. 680, 701, 144 S.Ct. 1889, 219 L.Ed.2d 351 (2024). To succeed, a facial claimant must establish that “no set of circumstances exists under which the Act would be valid.” \*308 *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

\*\*8 That burden does not diminish when a challenge implicates constitutional structure. The *Salerno* standard applies regardless of whether a facial challenge turns on an individual right or a structural guarantee. See, e.g., *Sabri v. United States*, 541 U.S. 600, 604–05, 608, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004) (rejecting facial challenge to Congress’s spending authority to pass an anti-bribery statute applicable to local officials). What matters is whether the theory of invalidity pierces all implementations of the challenged law. In the context of individual rights, as an example, a law that allocates a public benefit based solely on the race of the beneficiary will not have any constitutional applications, whether a potential beneficiary is denied a benefit based on race or receives a benefit based on race. In the context of structure, as another example, improperly designated officers under the Appointments Clause may never exercise power, no matter whether they propose to act modestly or aggressively. See *United States v. Arthrex, Inc.*, 594 U.S. 1, 14–16, 23–26, 141 S.Ct. 1970, 210 L.Ed.2d 268 (2021). To succeed in this

case, Oklahoma thus must demonstrate that the FTC lacks supervisory power over all of the Authority's rulemaking or enforcement powers. Oklahoma does not clear this "very high bar," *Moody*, 603 U.S. at 723, 144 S.Ct. 2383, in view of numerous applications of the Act's rulemaking and enforcement provisions in which the Horseracing Authority remains subordinate to the FTC.

1.

*Rulemaking.* The Horseracing Act gives the FTC supervision over the rules that govern the horseracing industry. The Act permits the Horseracing Authority to draft proposed rules on racetrack safety and anti-doping matters. But they are just that: proposals. No such proposal becomes a binding rule until the FTC approves it, and the Act permits the agency only to approve proposed rules if they are "consistent" with the Act. 15 U.S.C. § 3053(c)(2). In addition, the Act gives the FTC authority, as it "finds necessary or appropriate," to "abrogate, add to, and modify the rules." *Id.* § 3053(e). The FTC's power to review proposed rules, to abrogate existing rules, and to add new rules makes clear who is in charge and who has the final say.

Other features of § 3053(e) show that Congress gave the FTC a comprehensive oversight role. The provision adds that the FTC may act as it "finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to requirements of [this Act] and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of [this Act]." *Id.* The final catchall suggests that § 3053(e) spans the Horseracing Authority's jurisdiction. The parties are one in agreeing that this section allows the FTC to modify rules as it wishes. Appellants' First Suppl. Br. 1; FTC's Suppl. Br. 1; Horseracing Authority's Suppl. Br. 10.

With § 3053(e)'s broad grant of power to the FTC to write and rewrite the rules comes policymaking discretion. *See Cospito*, 742 F.2d at 88–89. When the FTC decides to act, whether by abrogating one of the Horseracing Authority's rules or by introducing its own, the FTC makes a policy choice and necessarily scrutinizes the Authority's proposed policy choices. That is no less true when the FTC decides *not* to act. In either setting, the FTC may "unilaterally change regulations," *Amtrak I*, 721 F.3d at 671, and "is free to prescribe" the rules, showing that it "retains ultimate authority," \*309 *Cospito*, 742 F.2d at 88. The FTC has

recognized as much, explaining that its new "rulemaking power" allows it to "exercise its own policy choices." *Order Ratifying Previous Commission Orders* 3, Fed. Trade Comm'n (Jan. 3, 2023), <https://tinyurl.com/dkenwspt>.

In full, § 3053(e) gives the FTC ultimate discretion over the content of the rules that govern the horseracing industry and the Horseracing Authority's implementation of those rules. It follows that ultimate "law-making is not entrusted to the [Authority]," *Adkins*, 310 U.S. at 399, 60 S.Ct. 907, as the Authority "must carry out all its tasks consistent with the [FTC's] rules," *Consumers' Rsch.*, 606 U.S. at 693, 145 S.Ct. 2482 (quotation omitted). That makes the FTC the primary rule-maker, and leaves the Authority as the secondary, the inferior, the "subordinate" one. *Id.* at 692, 145 S.Ct. 2482; *see Adkins*, 310 U.S. at 388, 60 S.Ct. 907.

\*\*9 Accountability considerations lead to the same destination. With its authority to have "the final word on the substance of the rules," the FTC bears ultimate responsibility for them. *Black I*, 53 F.4th at 887; *see Adkins*, 310 U.S. at 399, 60 S.Ct. 907; *cf. Lynn*, 502 F.2d at 59. The People may rightly blame or praise the FTC for how adroitly (or, let's hope not, ineptly) it "ensure[s] the fair administration of the Authority" and advances "the purposes of [the Act]." 15 U.S.C. § 3053(e).

Oklahoma makes several contrary arguments. It points out that the Act permits the FTC only to review proposed rules by the Authority for "consisten[cy]" with the Act. 15 U.S.C. § 3053(c). But that's searching for clouds on a cloudless day. A sure sign that Congress has not delegated too much authority to an agency or a private entity is a directive that *all* regulations promulgated under the Act must be consistent with it. Even so, Oklahoma adds, doesn't the word "consistency" at some level of generality permit the Horseracing Authority to obtain approval for proposed rules that contain embedded policy choices with which the FTC might disagree? We doubt any such risk exists. But even if it did, the FTC's authority to modify *any* rules for *any* reasonable reason at all, including policy disagreements, ensures that the FTC retains ultimate authority over implementation of the Horseracing Act.

The FTC's review authority in this respect parallels similar authority delegated to the SEC under the Maloney Act. It provides that the SEC "may abrogate, add to, and delete from ... the rules of [the private entity] as the Commission deems necessary or appropriate." 15 U.S.C. § 78s(b)(2)(C),

(c). The same is true under the Coal Act. It provides that the Coal Commission may “approve, disapprove, or modify” proposals. *See* Bituminous Coal Act of 1937, Pub. L. No. 75-48, § 4, 50 Stat. 72, 78. All of this explains why the Supreme Court upheld the Coal Act in *Adkins* and why every court of appeals to address the validity of this kind of delegation under the Maloney Act has upheld it.

Harking back to the “consistency” provision, Oklahoma worries that a proposed rule by the Horseracing Authority could govern a dispute until the FTC undoes a rule it dislikes through the sometimes slow, ever deliberate, notice-and-comment process. We doubt, to repeat, the premise of the argument—that the FTC’s consistency review will permit problematic rules to get through. But let us grant the premise for now to explain an independent reason this argument does not carry the day.

Even though the FTC’s modification authority under § 3053(e) customarily would run through ordinary rulemaking, that \*310 current reality need not be a future reality. For one, the threat of modification is not likely to miss the attention of the Authority. For another, the FTC has power to initiate new rules, not just to modify rules it does not like. To the extent this timing gap creates a problem, the FTC is free to resolve it ahead of time. It might adopt a rule, for example, that all newly enacted rules do not take effect for a certain period of time, thereby giving the FTC time to review rules and prepare preemptive modifications. Or it might decide to hold off on publishing a rule proposed by the Authority until the FTC has promulgated its own modified version of the rule. *See* 15 U.S.C. § 3053(c)(1) (requiring the FTC to approve or disapprove proposed Authority rules “[n]ot later than 60 days” after the FTC publishes the proposal, but placing no time limit on when the FTC publishes such proposals).

\*\*10 This argument overlooks another reality. When the FTC reviews the Horseracing Authority’s proposed rules, it asks not just whether they are “consistent” with the Act; it also asks whether they are “consistent” with other “applicable rules approved by the Commission.” *Id.* § 3053(c)(2). Any risk of a policymaking gap between initial consistency review and initial full review—and, to repeat, we doubt any such risk exists—will diminish over time as the FTC chooses to exercise (or not to exercise) its ample authority to initiate new rules or modify old ones. Over time, the FTC’s threshold consistency review will account for its own full-throated rulemaking power. None of these arguments, let us not forget, interferes with the FTC’s power to “abrogate, add to, and

delete from” the rules whatever it wishes and however often it wishes.

Oklahoma persists that the FTC’s duty under the Administrative Procedure Act to explain any changes to the rules limits its hand. But that means only that it may not arbitrarily alter the rules. The APA does not limit the FTC’s authority to disagree with the Horseracing Authority over a policy choice delegated to the agency by Congress. The FTC “need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009). It is enough that “there are good reasons” for the new policy “and that the agency believes it to be better.” *Id.* (emphasis omitted).

No matter, Oklahoma adds: The Horseracing Authority’s ability to expand its jurisdiction to breeds other than thoroughbreds escapes the FTC’s review. Not so. The FTC’s § 3053(e) power is sufficiently broad to allow it to revoke any decision from the Authority on this or any other topic, or to place procedural and substantive conditions on such decisions.

In the last analysis, “in the relationship between the two”—the FTC and the Horseracing Authority—the FTC “dominates” when it comes to rulemaking. *Consumers’ Rsch.*, 606 U.S. at 693, 145 S.Ct. 2482. The Act’s grant of power to the FTC to set whatever rulemaking policy it wishes will lead to plenty of constitutional exercises of that power and perhaps only constitutional exercises of that power. The existence of ample permissible exercises of power by itself suffices to uphold the Act’s rulemaking provisions against this facial challenge.

2.

*Enforcement.* A similar conclusion applies to Oklahoma’s attack on the enforcement provisions of the Act. This challenge is harder to answer in some ways and easier in others. It is the more difficult of the challenges to rebut because the Horseracing Authority appears to have \*311 more authority over some enforcement features of the Act than it does with respect to rulemaking. But it is easier because challenges to enforcement provisions quintessentially lend themselves to as-applied challenges, not to overriding facial challenges. *See Sabri*, 541 U.S. at 604–05, 124 S.Ct. 1941. Oklahoma’s “pre-enforcement” facial challenge to the Act’s enforcement provisions seeks “to leave nothing standing.”

*Warshak v. United States*, 532 F.3d 521, 528 (6th Cir. 2008) (en banc). Oklahoma asks us to declare the Act's enforcement provisions unconstitutional not only as to the parties before us, but also “on behalf of *all*” who fall under the Act and with respect to any potential enforcement of the Act. *Id.* (emphasis in original). “That is not how constitutional litigation typically proceeds.” *Id.* Because enforcement challenges often turn on “an understanding of complex factual issues,” *id.* (quotation omitted), plaintiffs generally, and wisely, choose to challenge enforcement provisions as applied to them, *cf. Morrison v. Olson*, 487 U.S. 654, 668, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988) (as-applied challenge to independent counsel's power to issue subpoenas), and seek relief only as to the parties in the case, *cf. Trump v. CASA, Inc.*, 606 U.S. 831, 850–52, 145 S.Ct. 2540, 222 L.Ed.2d 930 (2025).

**\*\*11** By pursuing a facial challenge, Oklahoma took a different path. That choice comes at a cost. If the enforcement provisions of the Act “ ‘could conceivably be’ implemented in a constitutional manner,” that will prove “fatal” to Oklahoma's facial challenge. *Warshak*, 532 F.3d at 530 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 456–57, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008)). Several such enforcement actions would be permissible.

Begin with the Horseracing Authority's main enforcement tool and the only one used to date: an internal enforcement action. In that setting, the Authority may investigate a violation of the rules and propose a sanction. But it may not impose a sanction without oversight. Any aggrieved entity may obtain review from an Administrative Law Judge over any sanction proposed by the Horseracing Authority. 15 U.S.C. § 3058(b). After that, the FTC has full authority to review the Authority's enforcement actions with fresh eyes. *Id.* § 3058(c)(1)–(2). Through this independent review, the FTC may reverse any sanction by the Authority. *Id.* § 3058(c)(3)(A)(1).

As with rulemaking, so with adjudication when it comes to finality. The Authority's adjudication decisions do not become final until the FTC has the opportunity to review them. *See Consumers' Rsch.*, 606 U.S. at 693, 145 S.Ct. 2482 (private entity subordinate to FCC because “anyone aggrieved by an action of the [private entity] may seek *de novo* review by the Commission”); *Cospito*, 742 F.2d at 88; *Todd & Co.*, 557 F.2d at 1012–14. No sanction thus goes into final effect without the FTC's “say-so.” *Consumers' Rsch.*, 606 U.S. at 695, 145 S.Ct. 2482. In this way, the Horseracing Authority is “subject

to [the FTC's] pervasive surveillance and authority,” making the Authority “an aid” to the FTC, not its choreographer. *Adkins*, 310 U.S. at 388, 60 S.Ct. 907. If the Authority tries to implement a sanction before the FTC finally reviews it, the FTC or the ALJ may stay the sanction. 15 U.S.C. § 3058(d).

These two layers of review, and the existence of this stay authority, by themselves insulate the Act from a successful facial challenge. In-house adjudications serve as the Horseracing Authority's primary tool, and the sole tool during the first several years of enforcing the Act, for sanctioning rulebreakers. Surely there will be plenty of sanctions that do not involve **\*312** any meaningful investigation or any use of subpoenas—say, an instance of excessive horse cropping by a jockey fully captured on film. In that setting, all that will matter is the extent and amount of the sanction. Full review of such a proposed sanction by the FTC before it goes into effect does not violate public or private non-delegation principles.

Keep in mind, too, that the FTC's § 3053(e) rulemaking power provides it with an additional means to supervise the Authority's enforcement practices. Take an example to illustrate the point. Imagine the FTC initially adopted a laissez-faire mindset toward thoroughbred horseracing, and the Horseracing Authority ran heedlessly with that authority. Section 3053(e) gives the FTC tools to bring an overzealous Horseracing Authority to heel. The FTC could begin with rules constraining the Authority's investigations and increasing the procedural rights of suspected rulebreakers. The FTC could abrogate rules that lead to petty violations. The FTC could promulgate rules that change the elements of a rule violation by, say, increasing the burden of proof, imposing a state-of-mind requirement, or shortening any limitations periods. The FTC could require that the Authority seek its authority before investigating an incident. The FTC could require that the Authority provide a suspect with a full adversary proceeding and with free counsel. The FTC could modify rules to decrease the penalties for rule violations. And the FTC could require that the Authority meet a burden of production before bringing a lawsuit.

**\*\*12** The FTC need not stop at procedural rules governing “*how* the Authority enforces [the Act].” *Black II*, 107 F.4th at 433 (emphasis in original). Section 3053(e) also empowers the FTC to determine *who* the Authority investigates in the first place. The FTC could promulgate rules requiring, for instance, that the Authority drop a misguided investigation into a particular jockey or, conversely, that the Authority

pursue an enforcement action against a recalcitrant rule breaker.

Still further, the FTC could require the Horseracing Authority to seek its permission before pursuing *any* enforcement action. Recent developments offer a proof of concept. The Authority itself recently proposed a rule that would require the FTC's approval before the Authority may issue a subpoena or bring a civil enforcement action. 90 Fed. Reg. 43,431, 43,443–45 (Sep. 9, 2025). That is hardly evidence of a private entity “running riot.” *Schechter*, 295 U.S. at 553, 55 S.Ct. 837 (Cardozo, J., concurring). The FTC is free to beef up that rule and micromanage every particularized decision the Authority makes in an investigation. Or the FTC could decide to take a more hands-off approach. No matter which way it goes, the FTC's capacity to control the Authority's enforcement activities ensures that the FTC, not the Horseracing Authority, is the agency of ultimate resort that decides how the federal government enforces the Act. Serial layers of review of any proposed sanctions, together with the FTC's rulemaking powers over enforcement actions, give it “pervasive” oversight and control of the Authority's enforcement activities, just as in the rulemaking context. *Adkins*, 310 U.S. at 388, 60 S.Ct. 907.

This conclusion by the way does not depend on how the FTC employs its power—by action or inaction. Whether the FTC becomes a demanding taskmaster or a lenient one, the FTC *could* subordinate every aspect of the Authority's enforcement “to ensure the fair administration of the Authority ... or otherwise in furtherance of the purposes of [the Act].” 15 U.S.C. § 3053(e) (as amended). That potential suffices to defeat a facial challenge, \*313 where Oklahoma must show that no feature of the enforcement provisions of the Act should be left standing.

Oklahoma persists that this interpretation of § 3053(e) contradicts other provisions of the Act. It points to the Act's prefatory language, which says that the FTC and the Authority shall implement the Act “each within the scope of their powers and responsibilities under this chapter.” 15 U.S.C. § 3054(a). Oklahoma maintains that our reading of the FTC's rulemaking powers makes a hash of this division of labor. But this argument, too, sees shadows instead of silver linings. Under the Act, one of the FTC's key responsibilities is to “abrogate, add to, and modify the rules of the Authority ... as the [FTC] finds necessary or appropriate” to further “the purposes of” the Act. *Id.* § 3053(e). Section 3053(e) permits the FTC to employ its sweeping rulemaking powers to govern

all aspects of the Authority's operations. An agency does not exceed the scope of its power by faithfully exercising it.

Section 3059 doesn't help Oklahoma either. That provision targets certain “unfair or deceptive” practices in selling horses. *Id.* § 3059. While the Horseracing Authority may, subject to the FTC's supervision, initiate enforcement of other provisions of the Act, it may only “recommend that the [FTC] commence an enforcement action” to enforce § 3059. *Id.* § 3054(c)(1)(B). That makes sense. Unfair trade practices fit comfortably within the FTC's bailiwick. Unlike other aspects of the Act involving the minutiae of horseracing, this is an area where Congress determined that the FTC did not need help. Far from suggesting that Congress intended to limit the FTC's supervisory power, this provision speaks to the inherent limits of the Authority's expertise as “an aid” to the FTC. *Adkins*, 310 U.S. at 388, 60 S.Ct. 907.

**\*\*13** These arguments suffer from another defect. Statutes should not be read “extravagantly, the better to create a constitutional problem.” *Consumers' Rsch.*, 606 U.S. at 690, 145 S.Ct. 2482. They “should be read, if possible, to comport with the Constitution, not to contradict it.” *Id.* at 691, 145 S.Ct. 2482. That is particularly so where an inter-branch dialogue led to amendments designed to conform the Act to the Constitution's requirements. The Act never grants the Authority exclusive enforcement power. The statute uses the word “exclusive” only once, declaring that the FTC *and* the Authority together “exercise independent and exclusive national authority” to regulate horseracing. 15 U.S.C. § 3054(a)(2). By urging us to read the Act to vest exclusive enforcement power in the Horseracing Authority, Oklahoma proposes an interpretation that maximizes constitutional risks rather than minimizing them. Where fairly possible, however, we should harmonize statutes with the Constitution, not create chasms between them.

Oklahoma points out that an agency may not “cure an unlawful delegation ... by adopting in its discretion a limiting construction of the statute.” *Whitman*, 531 U.S. at 472, 121 S.Ct. 903. That is true in a traditional non-delegation case. An agency may not fix a statute that lacks an “intelligible principle” by supplying intelligible principles itself or by otherwise denying itself the power Congress unduly gave it. But that's not what's going on today. In this private non-delegation dispute, the issue is whether Congress gave final enforcement and rulemaking authority to the relevant agency, the FTC. If it did and if the FTC exercises that authority to subordinate the Horseracing Authority to its

policy preferences, that is not an end run around the non-delegation doctrine. It is proof that no improper delegation to a \*314 private entity occurred in the first place. The broad rulemaking authority that Congress delegated to the FTC demonstrates that Congress empowered the agency to supervise the Horseracing Authority and act on its “advice and assistance” as it wishes. *Consumers’ Rsch.*, 606 U.S. at 692, 145 S.Ct. 2482.

Oklahoma’s reliance on *Alpine Securities Corp. v. FINRA* likewise comes up short and in the end proves our point. 121 F.4th 1314 (D.C. Cir. 2024). In that as-applied challenge to an enforcement action, the D.C. Circuit held that the private non-delegation doctrine barred an SRO under the Maloney Act from summarily expelling a company from the securities industry without prior SEC review. *Id.* at 1326, 1331; *see id.* at 1343 (Walker, J., concurring in the judgment in part and dissenting in part). The decision illustrates the difference between facial and as-applied challenges and the wisdom of using as-applied challenges to restrict unduly zealous enforcement actions. If the Horseracing Authority ever forces a company to “shut down,” making “any later review” by the agency no more than an “academic exercise,” *id.* at 1326, 1331 (majority opinion), as happened in *Alpine Securities*, an as-applied challenge to that enforcement action would be waiting in the wings. And the federal courts in this circuit will be open to hear it. But today, the parties presented us with a facial challenge, in which we must “consider the circumstances in which” the Act is “most likely to be constitutional” instead of imagining hypothetical worst-case scenarios in which the Act might cross constitutional lines. *Rahimi*, 602 U.S. at 701, 144 S.Ct. 1889.

Oklahoma falls back on the proposition that, at the very least, the Horseracing Authority’s power to bring civil enforcement actions on its own initiative in federal court under § 3054(j) must violate the private non-delegation doctrine. The power to enforce the law through civil lawsuits, Oklahoma contends, may not reside outside the executive branch.

\*\*14 “Difficult and fundamental questions,” we appreciate, arise when private entities enforce federal law. *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 197, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (Kennedy, J., concurring). In one direction, it appears to cut against the grain to permit private entities to make such discretionary decisions, whether to bring an enforcement action or whether to engage in narrow or broad investigations of alleged violations of the law. In the other direction, “[p]rivate

citizens [have been] actively involved in government work,” including investigations and prosecutions, throughout our country’s history. *Filarsky v. Delia*, 566 U.S. 377, 385, 132 S.Ct. 1657, 182 L.Ed.2d 662 (2012). “Private detectives and privately employed patrol personnel” have served “as special policemen,” *id.* at 387, 132 S.Ct. 1657 (quotation omitted), and at times in our history “private lawyers were regularly engaged to conduct criminal prosecutions,” *id.* at 385, 132 S.Ct. 1657.

The question, then, is not whether a private entity performs what looks like an enforcement function. It is whether the private entity is subject to the agency’s supervision. *See Consumers’ Rsch.*, 606 U.S. at 695, 145 S.Ct. 2482. An agency is free to enlist a private entity to serve “as an aid” even in carrying out executive functions. *See Adkins*, 310 U.S. at 388, 60 S.Ct. 907. The test is whether the private entity remains “subject to [the agency’s] pervasive surveillance and authority” when it matters. *Id.*

It is premature and inappropriate to finally resolve the validity of § 3054(j) in today’s case. In the first place, Oklahoma chose to bring a facial challenge to the \*315 “Act’s delegation of law-enforcement power to the Authority” in general, not to any one enforcement provision. Appellants’ Second Suppl. Br. 58–59; *see* R.53 ¶ 11 (amended complaint). Having litigated the case as a broad facial challenge to the enforcement provisions, Oklahoma may not now leverage one provision to invalidate all of them. Nor did Oklahoma, by the way, argue below or in its written submissions on appeal that, if this one provision is invalid and if it is unseverable, then all of the Act’s enforcement provisions must fall.

In the second place, serious standing, ripeness, and mootness questions would arise if Oklahoma brought a single-shot challenge to § 3054(j). Keep in mind that the Authority has *never* filed a civil enforcement action under § 3054(j) since Congress passed the law. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014). And keep in mind that the Authority has proposed a rule for the FTC to approve that would require the FTC, under the Act’s delegated powers, to approve any such action before it is filed. That rule might moot this very concern. Oklahoma cannot smuggle a truly hypothetical, likely unripe, perhaps soon-to-be moot, preenforcement challenge to a single provision under the cover of a broad facial challenge.

In the third place, a challenge to this enforcement provision brings into play two salient and unbriefed issues, one set of

which overlaps with the other enforcement provisions and the other of which does not. As for the overlapping question, it remains unclear whether any investigations and enforcement actions conducted by the Authority count as governmental action. Put another way, do the Fourth Amendment (*e.g.*, no unreasonable searches and seizures) and Fifth Amendment (*e.g.*, no compelled testimony, no due process violations) limit the Authority's power to investigate alleged violations and enforce its rules? We are not prepared to hazard a guess and see no need to do so in the context of a facial challenge in which no party examined the issue.

As for the non-overlapping question, the Act appears to require regulated entities to waive challenges to the Authority's general enforcement authority, 15 U.S.C. § 3054(d), though not its power to initiate an action under § 3054(j). Here is what the Act says in relevant part: “As a condition of participating in covered races and in the care, ownership, treatment, and training of covered horses, a covered person shall register with the Authority[.] [That registration] shall include an agreement by the covered person to be subject to and comply with the rules, standards, and procedures developed and approved under [§ 3054(c)].” *Id.* § 3054(d)(1)–(2). SROs under the Maloney Act impose a similar requirement. *Id.* § 78o(b)(8); *see, e.g.*, FINRA Bylaws, art. IV, § 1(a) (FINRA members must “agree[ ] to comply with” FINRA's rules and enforcement decisions). Because the parties did not brief this issue, it remains unclear how broadly this waiver applies and whether, if it applies broadly, the waiver amounts to an unconstitutional condition. *See Rust v. Sullivan*, 500 U.S. 173, 197–98, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991). Sorting out all of these issues ought to wait until the Authority invokes these enforcement provisions against a regulated entity in a way that implicates these potential concerns—still a figment in the public's imagination—at which time the meaning and enforceability of the relevant provisions can be discerned. Else, we would be forced to address the “gritty who/what/when details of enforcement” before they “have been worked out” in an actual or threatened enforcement action. *Saginaw County v. STAT Emergency Med. Servs., Inc.*, 946 F.3d 951, 958 (6th Cir. 2020).

**\*316 \*\*15** As this case illustrates, litigation by hypothetical is a one-way street when it comes to facial challenges to a statute. A reviewing court may reject a challenge based on potential applications of the statute that avoid constitutional shoals. But it may not invalidate a statute based on hypothetical applications that have yet to occur. Like

the D.C. Circuit when it comes to the Maloney Act, *see Alpine Sec.*, 121 F.4th at 1322–24, we will wait for an as-applied challenge to the Act before handling some of the enforcement issues raised by Oklahoma. Having resolved this challenge in the facial context in which it comes to us, we will save resolution of other enforcement questions, if such questions there be, for a day when the Authority's actions and the FTC's oversight appear in concrete detail, presumably in the context of an actual enforcement action.

#### IV.

Oklahoma separately claims that two provisions of the Horseracing Act, § 3060(b) and § 3052(f), violate the anti-commandeering guarantee of the Tenth Amendment. Oklahoma lacks standing to challenge the first provision, and the second one does not count as a cognizable form of commandeering.

#### A.

Oklahoma initially sets its sights on § 3060(b), which requires state authorities to “cooperate and share information” with the Horseracing Authority or federal agencies. Right or wrong about whether this requirement amounts to commandeering, Oklahoma and the other State plaintiffs lack standing to challenge it.

Standing arises from the Constitution's mandate that federal courts decide only “Cases” or “Controversies.” U.S. Const. art. III, § 2, cl. 1. A plaintiff must establish standing for each claim it presses and each statutory provision it challenges. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431, 141 S.Ct. 2190, 210 L.Ed.2d 568 (2021). To do that, it must point to an injury that is traceable to the defendant's conduct and that a judicial decision can redress. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). In a pre-enforcement challenge like this one, a plaintiff must also allege a “credible threat” of future enforcement. *Driehaus*, 573 U.S. at 167, 134 S.Ct. 2334.

Oklahoma has not carried this burden. Even if Oklahoma is correct that § 3060(b) unlawfully orders the States to cooperate, the provision does not contain a penalty or enforcement mechanism. And Oklahoma does not point to any actual or threatened enforcement actions. An unenforceable statutory duty does not give rise to Article III

standing, *California v. Texas*, 593 U.S. 659, 669–70, 141 S.Ct. 2104, 210 L.Ed.2d 230 (2021), and “mere conjecture” about possible enforcement is not any better, *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 420, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013).

Oklahoma asserts in response that wrongdoing will “frequently” implicate both federal and state law and thus trigger the duty to cooperate. R.86 at 10. But the question is not how often the opportunity for cooperation may arise; it is whether the defendants can or will mandate cooperation when that time comes. Even so, Oklahoma notes, the Horseracing Authority may penalize States that refuse to cooperate. But the Authority’s sanction power extends only to covered persons, a term that does not include States. 15 U.S.C. §§ 3051(6), 3054(d), 3057(a)(1); see *Gregory v. Ashcroft*, 501 U.S. 452, 464, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). The same is \*317 true of the Authority’s ability to initiate civil lawsuits. 15 U.S.C. § 3054(j).

Absent a credible allegation that the Horseracing Authority or the FTC can or will enforce § 3060(b), Oklahoma lacks standing to challenge it. *California*, 593 U.S. at 671–72, 141 S.Ct. 2104.

#### B.

Oklahoma separately claims that § 3052(f) puts the States to an unconstitutionally coercive choice. While § 3052(f)’s threat of preemption gives Oklahoma standing, *Kentucky v. Biden*, 23 F.4th 585, 598–601 (6th Cir. 2022), the provision does not commandeer the States.

As separate sovereigns, Congress may not require the States to implement federal programs. *Printz v. United States*, 521 U.S. 898, 925, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997). Nor may the federal government issue “orders directly to the States” to carry out this or that federal program. *Murphy v. NCAA*, 584 U.S. 453, 470, 138 S.Ct. 1461, 200 L.Ed.2d 854 (2018). At the same time, Congress may “encourage a State to regulate” or “hold out incentives” in hopes of “influencing a State’s policy choices.” *New York v. United States*, 505 U.S. 144, 166, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992).

\*\*16 One option in this last respect is that Congress may encourage the States through conditional preemption. *Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 290, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981). Instead of

preempting state law altogether, Congress may offer States a regulatory role contingent on following federal standards. *New York*, 505 U.S. at 167–68, 112 S.Ct. 2408. The choice brings consequences. If a State participates, it often has discretion in how it implements the program. See *Hodel*, 452 U.S. at 289, 101 S.Ct. 2352. If a State decides not to participate, the State’s activities are preempted. By offering States such a non-coercive choice—regulate or be preempted—Congress has not violated any constitutional imperatives. *Murphy*, 584 U.S. at 476, 138 S.Ct. 1461; *New York*, 505 U.S. at 167, 112 S.Ct. 2408; *Hodel*, 452 U.S. at 288–91, 101 S.Ct. 2352; *FERC v. Mississippi*, 456 U.S. 742, 769, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982).

That’s how § 3052(f) operates. It presents States with a choice, not a command. States may elect to collect fees from the industry and remit the money to the Horseracing Authority or States may refuse. That’s their call. If a State participates, it gains discretion over how the fees are collected. 15 U.S.C. § 3052(f)(2)(D). If a State refuses, the Authority collects the fees itself, and the State “shall not impose or collect from any person a fee or tax relating to anti-doping and medication control or racetrack safety matters.”*Id.* § 3052(f)(2)(D), (3)(D).

This scheme fits comfortably within the conditional preemption framework. Section 3052(f) “simply establish[es] requirements for continued state activity in an otherwise pre-emptible field.” *FERC*, 456 U.S. at 769, 102 S.Ct. 2126; see *Printz*, 521 U.S. at 925–26, 117 S.Ct. 2365. And because Congress may regulate horseracing under its commerce power, there is nothing unconstitutional about Congress “offer[ing] States the choice of regulating that activity according to federal standards or having state law preempted.” *New York*, 505 U.S. at 173–74, 112 S.Ct. 2408.

Section 3052(f) also lacks the hallmark of commandeering: a “direct” order to the States. *Murphy*, 584 U.S. at 471, 138 S.Ct. 1461. Section 3052(f)’s statement that a State “shall not impose or collect” certain fees may sound like a command, true enough. 15 U.S.C. § 3052(f)(3)(D). But preemption often carries that tone, as similar \*318 language in other statutes confirms. See, e.g., 42 U.S.C. § 7543(a) (1988) (“No State ... shall adopt or attempt to enforce any standard relating to the control of emissions ....”); 49 U.S.C. § 40116(b) (“A State ... may not levy or ... collect a tax [or] fee ... on an individual traveling in air commerce.”). Because Congress often speaks in this manner, “it is a mistake to be confused” by preemption provisions that “appear to operate directly on the

States.” *Murphy*, 584 U.S. at 478, 138 S.Ct. 1461. Congress in this instance offers the States a choice, as Oklahoma all but concedes. Reply Br. 2, 25, 26, 27 (referring to § 3052(f) as a “threat of preemption”). A choice is not a command. *See Printz*, 521 U.S. at 925–26, 117 S.Ct. 2365.

All of this is not to say “that the choice put to the States—that of either abandoning regulation” or assisting the Authority—is an easy one or a good one as a matter of policy. *FERC*, 456 U.S. at 766, 102 S.Ct. 2126. Fraught though this decision may be, Congress has not commandeered the States by putting them to the choice.

Oklahoma's principal counterargument is that a choice between collecting fees and losing fee-collecting authority is illegitimate, coercive, or punitive. We don't think so.

Oklahoma begins by arguing that § 3052(f)'s choice—collect fees for the Horseracing Authority or stop collecting entirely—commandeers the States because Congress may not force the States to adopt either alternative. *See New York*, 505 U.S. at 175–76, 112 S.Ct. 2408. Congress may not force a State to collect fees, true. *See Printz*, 521 U.S. at 933, 117 S.Ct. 2365. But Congress may use its commerce power to preempt the field of horseracing, preventing States from imposing fees. *See FERC*, 456 U.S. at 764, 102 S.Ct. 2126; *Gonzales v. Raich*, 545 U.S. 1, 22, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). Threatening to do so, it follows, is a “conditional exercise of [a] congressional power.” *New York*, 505 U.S. at 176, 112 S.Ct. 2408.

**\*\*17** Oklahoma's response that a “threat of preemption,” Reply Br. 25, is coercive runs aground on contrary precedent. The Court has rejected the argument “that the threat of federal usurpation of their regulatory roles coerces the States.” *Hodel*, 452 U.S. at 289, 101 S.Ct. 2352.

Even so, Oklahoma continues, threatening a State's taxing authority is especially coercive. We fail to see how. The validity of conditional preemption does not fluctuate with the power that is threatened. *See id.* at 290–91, 101 S.Ct. 2352. This would not be the first time a State's taxing power was preempted. *See Aloha Airlines, Inc. v. Dir. of Tax'n*, 464 U.S. 7, 14 n.10, 104 S.Ct. 291, 78 L.Ed.2d 10 (1983); *Exxon Corp. v. Hunt*, 475 U.S. 355, 360–63, 106 S.Ct. 1103, 89 L.Ed.2d 364 (1986).

Oklahoma presses the point that Congress's financial incentives may become so overwhelming that a State

effectively cannot refuse. *See South Dakota v. Dole*, 483 U.S. 203, 211–12, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987). Grafting this principle on conditional preemption raises legal and factual problems. Legally, it is bereft of support; no case evaluates conditional preemption by looking to a State's monetary incentives. Factually, Oklahoma falters because it does not quantify its expected loss. *See NFIB v. Sebelius*, 567 U.S. 519, 580–82, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012) (opinion of Roberts, C.J.) (comparing an incentive to a State's budget). Without knowing how much money is at stake, how are we to say the sum is too high?

Oklahoma adds that the threat is punitive because it serves no purpose other than to obtain compliance. Conditional **\*319** preemption, however, amounts to a “permissible method of encouraging a State to conform to federal policy.” *New York*, 505 U.S. at 168, 112 S.Ct. 2408; *see FERC*, 456 U.S. at 766, 102 S.Ct. 2126. And a State that sees itself as a sovereign sometimes must act like one. Another reason is not difficult to find anyway. The fee provisions ensure that a single entity—whether a State or the Authority—imposes fees on the horseracing industry for all anti-doping and racetrack safety matters. Eliminating “double taxation” and fostering uniformity are adequate grounds to preempt parallel collection regimes. *Aloha Airlines*, 464 U.S. at 9–10, 104 S.Ct. 291; *see Coventry Health Care of Mo., Inc. v. Nevils*, 581 U.S. 87, 97–99, 137 S.Ct. 1190, 197 L.Ed.2d 572 (2017); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 99, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992) (plurality opinion).

Oklahoma next argues that Congress failed to “appropriate the funds needed to administer the program” by forcing States to pay for collecting fees even if they refuse to act as the Authority's fee collector. *Murphy*, 584 U.S. at 474, 138 S.Ct. 1461. Not so. Private parties pay for the Authority's operations. 15 U.S.C. § 3052(f)(2)(D), (3)(B). And if a State does not collect fees under the Act, the Authority incurs the cost of doing so. Even if States suffer a pocketbook loss from preemption, that does not force them to pay for the program. *See Hodel*, 452 U.S. at 288, 101 S.Ct. 2352.

Oklahoma also worries that the scheme blurs accountability. Conditional preemption, however, leaves a State and its citizens with “the ultimate decision as to whether or not the State will comply.” *New York*, 505 U.S. at 168, 112 S.Ct. 2408. The ability to choose ensures that state and federal entities are accountable for their roles. *See id.*

We affirm.

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