PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of JASON SCOTT, DVM, Appellant, vs. THE HORSERACING INTEGRITY & SAFETY AUTHORITY, a federal administrative agency. Appellee.	))))))))))	**Docket No. 9449**

APPELLANT'S BRIEF IN SUPPORT OF PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, RULINGS ON OBJECTIONS, AND ORDER

Appellant Dr. Jason Scott, pursuant to this Court's Order Directing Briefing on the Review, respectfully submits his brief in support of his Proposed Findings of Fact, Conclusions of Law, and Order.

Respectfully submitted,

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Record Citations

AB_____	Appeal Book. Full pages are abbreviated as, e.g., AB5750. Specific line numbers on transcript pages are abbreviated as, e.g., AB5751:1 (being line 1 of AB5751)
JSFoF, ¶__	Jason Scott's Proposed Findings of Fact, Conclusions of Law, Rulings on Objections, and Order.
Pickard, ¶__	Stipulation as to the Testimony of Tony Pickard, DVM, attached as "Exhibit A" to the parties' Joint Status Report (May 14, 2026).
Trejo Letter	HISA Exhibit E; *see* AB6509

Entities and Case Terms

AMP	Adenosine Monophosphate
ARCI	The Association of Racing Commissioners International
Authority	The Horseracing Integrity and Safety Authority and HIWU, collectively.
FEI	International Equine Federation
GFI#256	FDA Guidance for Industry No.256
HIWU	The Horseracing Integrity and Welfare Unit
IFHA	International Federation of Horseracing Authorities
NMRC	New Mexico Racing Commission
Sarapin	Pitcher Plant Extract
WADA	World Anti-Doping Agency
WADA Code	The World Anti-Doping Code

Legal Authorities

Act	The Horseracing Integrity and Safety Act, 15 U.S.C. § 3051 *et seq*.
ADMC Protocol	The HISA Anti-Doping and Medication Control Protocol, collectively referencing HISA Rule Series 1000, 3000, 4000, 5000, and 7000.
NMAC	New Mexico Administrative Code
NMSA	New Mexico Statutes Annotated

Witnesses

Bennett	Brian Bennett, HIWU investigator.
Benson	Dr. Dionne Benson, DVM
Fenger	Dr. Clara Fenger, DVM
Pickard	Dr. Tony Pickard, DVM
Scott	Dr. Jason Scott, DVM
Trejo	Ismael Trejo, Executive Director, NMRC

Prior FTC Decisions (Chronological)

Perez ALJ Decision	*In the matter of Luis Jorge Perez, DVM*, Docket No. 9420, Administrative Law Judge Decision on Application for Review (February 7, 2024)
Perez FTC Decision	*In the matter of Luis Jorge Perez, DVM*, Docket No. 9420, Decision of the Commission on Application for Review Under 15 U.S.C. § 3058 (August 8, 2024)
Shell II	*In the matter of Dr. Scott Shell, DVM*, Docket No. 9439, Administrative Law Judge Decision on Application for Review (March 6, 2025)
Overly	*In the matter of Dr. Larry Overly, DVM*, Docket No. 9439, Administrative Law Judge Decision on Application for Review (January 27, 2026)

PRELIMINARY STATEMENT

¶1. The Authority does not dispute that Dr. Scott possessed AMP and Sarapin for the specific purpose of treating eight non-Covered Quarter Horses at the racetrack on the day of the search. As Dr. Mary Scollay originally said: the Authority and HIWU "don't have control over those horses," "don't have the *authority* to control the medications [veterinarians] administer or carry for Non-Covered Horses," and "*can't ban them from possessing them*."[1] That should be the end of it.

¶2. Yet the matter endures. Why? The Authority claims a "compelling justification" requires a showing that the treatment to Non-Covered Horses was both "legal" and "legitimate." Per the Authority, that means that Dr. Scott must *disprove* all alleged non-compliance with state law, even though, if the matter had been brought by a state entity, the burden would be the opposite. To achieve that end, the Authority attempts to convert a novel interpretation of state law into a federal anti-doping violation — even though the state agency itself is fully aware of the situation and has taken no action. That is an overreach, and the charge must be dismissed.

ARGUMENT

I. The Authority Did Not Meet Its Burden to Prove Jurisdiction

¶3. The Authority bears the burden to prove a Possession violation.[2] But the Authority can sanction conduct only if it falls within its jurisdiction.[3] Because the Authority and the FTC are creatures of statute, they have only those powers the Act gives them,[4] and there is a "presumption

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[1] *Shell II* at 21.

[2] 15 U.S.C. §3058(b)(2)(A); 16 C.F.R. §1.146(c)(6)(i).

[3] *FCC v. Am. Broad. Co.*, 347 U.S. 284, 290 (1954) ("the Commission's power in this respect is limited by the scope of the statute"). *Accord* 5 U.S.C. §706 (agency action unlawful if "in excess of statutory jurisdiction").

[4] *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109, 117 (2022).

against" jurisdiction."[5] A Covered Person can challenge jurisdiction by coming forward with evidence tending to negate jurisdiction.[6] As the party with the burden of proof, the Authority must then "come forward with sufficient evidence to create a genuine question of material fact on the issue,"[7] meaning it must produce "affirmative" proof that contradicts the proffered evidence, not merely question its credibility.[8] Otherwise, the charge must be dismissed.

¶4. The question is whether the Authority can punish Possession when it is undisputed that the Possessed medications were intended to be used on non-Covered Horses at the racetrack that day. It cannot.

¶5. The Act creates a regulatory regime to govern the care, treatment, training, and racing of Covered Horses.[9] The Act's purpose is to protect Covered Horses, and *only* Covered Horses. A Covered Horse is normally a Thoroughbred.[10] By its terms, the Act's coverage cannot extend to other breeds unless the state specifically elects such coverage.[11] Because New Mexico has not elected expanded coverage, the Authority cannot regulate conduct directed at the care, treatment, racing, and training of Quarter Horses.

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[5] *Marcus v. Kan. Dep't of Revenue,* 170 F.3d 1305, 1309 (10th Cir.1999).

[6] *See Res. Assocs. Grant Writing & Evaluation Servs., Inc. v. Southampton Union Free Sch. Dist.*, 193 F. Supp. 3d 1200, 1220 (D.N.M. 2016) (citing *Doe v. Nat'l Med. Servs.*, 974 F.2d 143, 145 (10th Cir.1992)).

[7] *Id.* (note that this framework simply restates the test for avoiding summary judgment on any issue for which a party bears the burden of proof).

[8] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256–57 (1986).

[9] 15 U.S.C. §3054(a); *Accord* 15 U.S.C. §3051(6) (defining Covered Person as a person who is "engaged in the care, training, or racing of covered horses.").

[10] 15 U.S.C. §3051(4)

[11] 15 U.S.C. §3054(l)(1).

¶6. Dr. Scott came forward with records, witness testimony, expert testimony, evidence of routine, and circumstantial inference all tending to establish that he possessed the medications for use on eight Quarter Horses stabled at the racetrack on February 13, 2025.

¶7. As has been repeatedly acknowledged, "evidence of a routine practice is highly probative, and persuasive"[12] evidence that a person acted in conformity with that routine.[13] Dr. Scott produced a billing record documenting routine treatments of AMP and Sarapin to forty-nine Quarter Horses twenty-four and forty-hours before their respective races in the weeks before February 13.[14] He explained that these treatments were part of a routine, pre-race protocol intended exclusively for Quarter Horses.[15] He identified eight Quarter Horses by name who were stabled at the racetrack and scheduled to race in the next twenty-four and forty-eight hours and, thus, would have received this routine treatment.[16]

¶8. Dr. Scott corroborated the existence of this protocol with the testimony of two practicing racetrack veterinarians: Dr. Pickard and Dr. Fenger.[17] Of particular note, Dr. Pickard was a racetrack veterinarian for over forty years in New Mexico. He explained that pre-race Sarapin and AMP had been considered the standard of care for Quarter Horses in New Mexico for decades to prevent known dangerous conditions including rhabdomyolysis, which both Dr. Scott and Dr. Fenger corroborated.[18] He further explained the widespread and longstanding belief that both

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[12] *Mobil Expl. & Producing U.S., Inc. v. Cajun Const. Servs., Inc.*, 45 F.3d 96, 99 (5th Cir. 1995); *Loughan v. Firestone Tire & Rubber Co.,* 749 F.2d 1519, 1524 (11th Cir.1985).

[13] *Accord* Fed. R. Ev. 406.

[14] JSFoF, ¶¶2–5.

[15] JSFoF, ¶5.

[16] JSFoF, ¶2.

[17] JSFoF, ¶3.

[18] JSFoF, ¶¶6–12, 15

medications were permitted for use in Quarter Horses in New Mexico.[19] Both opinions were based upon Dr. Pickard's personal knowledge and corroborated Dr. Scott's explanation that AMP and Sarapin were *actually part* of a pre-race treatment protocol for Quarter Horses.

¶9. Finally, circumstantial inference "is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence."[20] Quarter Horses were not racing on February 13, but were racing the following two days.[21] Like Thoroughbreds, Quarter Horses cannot receive treatments on the day of a race. Thus, February 13 was a day one would expect Quarter Horses stabled at the racetrack to receive routine pre-race treatments. Dr. Scott immediately explained that the medications were intended exclusively for Quarter Horses and has maintained that explanation to this day.[22] He promptly reached out to NMRC advisors for guidance and, upon receiving advice that his possession of the medications was not prohibited, immediately asked HIWU's investigator to return the medications *so he could complete the treatments*.[23] All these circumstances and conduct are consistent with Dr. Scott's explanation and, thus, provide additional probative proof tending to establish its truth.

¶10. The Authority never contradicted any of these facts or inferences with contrary proof. The Authority never even asked Dr. Scott for a single record. The Authority produced no document, treatment record, admission, or testimony that the Possessed medications (1) had ever been used on a Covered Horse or (2) were *not* intended for Quarter Horses at the racetrack that day. The Authority produced no testimony on the standard of care, community practice, or historic

[19] JSFoF, ¶¶15–16.

[20] *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (citation omitted).

[21] JSFoF, ¶¶2–3.

[22] JSFoF, ¶19.

[23] JSFoF, ¶20.

understanding of veterinary treatment of Quarter Horses in New Mexico. The Authority produced no example of a veterinarian (or anyone) in New Mexico being penalized for the use or possession of AMP or Sarapin. Ultimately, the Authority presented no *affirmative proof* tending to disprove the fact that the medications were intended for Quarter Horses at the racetrack that day.

¶11. Instead, the Authority's witnesses and counsel repeatedly conceded the truth of Dr. Scott's explanation. The Authority's own expert, Dr. Dionne Benson, agreed that Dr. Scott's records were reliable evidence[24] and that she could discern that the medications were part of a routine, pre-race treatment regimen.[25] When cross-examining Dr. Scott, HIWU's counsel acknowledged that it "goes without saying" that the medications were for Quarter Horses.[26] At most, the Authority splits hairs on how to characterize the records, complains of clerical errors in irrelevant portions of the record, and speculates that "mistakes can happen." But bare attacks on credibility and counsel's "mere speculation, conjecture, or surmise" do not create a question of fact.[27]

¶12. This posture is the opposite of *Perez*, *Shell II*, and *Overly*, and clarifies why those veterinarians failed to defend against their charges. Producing evidence tending to negate jurisdiction means producing evidence that the medications were *actually part* of a non-covered practice at the racetrack that day. All three veterinarians either denied or never asserted this fact.[28] If medication is possessed for no purpose at the relevant location, by definition it is not part of a

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[24] JSFoF, ¶3; AB5903–04(Benson)

[25] JSFoF, ¶3; AB5908(Benson) ("[T]hat tells me you gave it as a pre-race medication.").

[26] AB6313

[27] *Anderson*, 477 U.S. at 256–57; *Alcala v. Ortega*, 128 F.4th 1298, 1306 (10th Cir. 2025).

[28] *Perez* ALJ Decision at 6 (no evidence of use "on any horse"); *Perez* FTC Decision at 1 (admission, "completely forgot it was there") and 4 ("rested on mere assertion that his practice includes treating non-covered horses"); *Shell II* at 17–19 (evidence that Banned Substances were given to Covered Horses in West Virginia) and 20–35 (farm practice); *Overly* at 27 (testosterone for off-track horse, no same-day treatment), 28–29 (withdrew "personal use" explanation), and 41 (isoxsuprine not used at racetrack).

non-Covered practice at that location. Thus, merely claiming that a non-Covered practice exists in the abstract does nothing to explain why the challenged conduct falls outside the Act's coverage.

¶13. Dr. Scott asks only that this Court interpret the Possession Rule to contain the same limits the Authority has already described. If Possession is for some affirmative purpose unrelated to the care, treatment, racing, or training of covered horses, the Authority consistently describes the Possession rule as *inapplicable*.

¶14. For example, HISA's Regulatory Veterinarian Handbook describes the ADMC Protocol as a "horse-centric approach to regulation" with "a set of rules that follow the Covered Horse," as opposed to a set of rules that applies "to people and horses when they arrive[] at the racetrack grounds."[29] The ADMC Protocol itself disclaims application to "the use of drugs or medications by human participants in Covered Horseraces."[30] For Possession, Dr. Scollay explained that the Authority "can't ban [veterinarians] from possessing" medications if "they are practicing also on a population of non-Covered horses."[31] Each instance describes the ADMC rules' applicability by reference to the *reason* the medication is possessed, not its mere presence on a racetrack.

¶15. In short, the Act does not confer the power to regulate medications a veterinarian possesses for same-day treatment to non-Covered horses stabled at the racetrack. As Dr. Scollay said, the Authority had the power "to investigate" that possession, but it "can't penalize people for something that [the Authority doesn't] have control over."[32] Dr. Scott undisputedly possessed the

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[29] AB7292.

[30] Rule 3010(c).

[31] *Shell II* at 21.

[32] *Id.*

medications for use on non-Covered horses at the racetrack that day. The Authority has no power to regulate the challenged conduct, so the charge must be dismissed.

II. Dr. Scott's Explanation Is a Compelling Justification

¶16. The same reasoning applies under the "compelling justification" test.

¶17. When the term "justification" is defined by reference to a *legal defense*, it means that a person "has acted in a way that the law does not seek to prevent."[33] The Act does not seek to restrict or otherwise regulate veterinary care provided to Quarter Horses at racetracks. Sensibly, then, the FTC has previously identified the treatment of non-covered horses at the racetrack "that day" as a compelling justification.[34]

¶18. The Authority does not dispute that Dr. Scott exclusively intended to use the medication on non-Covered horses at the racetrack that day in a manner consistent with the standard of care at the time, so Dr. Scott has proven a compelling justification.

¶19. The attempt to litigate the merits of that treatment — i.e., whether it is "legal" or legitimate" — is a step too far for two reasons.

¶20. First, as applied here, even if the Authority prevails on those questions, they have no tendency to disprove Dr. Scott's explanation that the medications were intended for same-day routine treatment of Quarter Horses at the racetrack, and the Authority has never argued that point.

¶21. Second, the Authority certainly cannot *directly* charge Dr. Scott with using Banned Substances on Quarter Horses or force him to justify his medical reasoning as to Quarter Horses.

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[33] JUSTIFICATION DEFENSE, Black's Law Dictionary (12th ed. 2024).

[34] *Perez* FTC Decision at 4 ("Dr. Perez submitted no evidence that he in fact needed the substance to, for example, treat noncovered horses at Belmont Park that day or because of some other compelling justification.").

When the Authority attempts to import the "legality" and "legitimacy" of use as *necessary elements* of "compelling justification," it simply attempts *indirect* regulation of subject matters beyond its direct control. A cardinal rule of jurisdiction is "what cannot be done directly from defect of power, cannot be done indirectly."[35] Because the Possession Rule cannot be interpreted to enlarge the Authority's or FTC's statutory powers, that construction is beyond the Act's scope and must fail.

III. The Result is the Same Under the Authority's Framing of the Applicable Rule; Objections to the Authority's Evidence

¶22. But Dr. Scott still wins under the Authority's framework.

¶23. As discussed, his protocol had been used for decades and was considered the standard of care for the prevention of post-race conditions, including life-threatening conditions. That point is not disputed.

¶24. As for legality, this Court previously explained that the pre-existing ARCI framework — which New Mexico has adopted[36] — typically regulates medication through drug testing only.[37] The Authority's expanded prohibition on Possession to include veterinarians was a major — and controversial — change from state law. New Mexico's possession rules, for instance, expressly exclude veterinarians from its coverage.[38] Since Dr. Scott is a veterinarian, NMRC does not regulate his possession of medications.

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[35] *Wayman v. Southard*, 23 U.S. 1, 50 (1825).

[36] N.M.S.A. §60-1A-11(D)–(E)

[37] *Overly* at 76 ("For example, under prior rules, for 'many horsemen... only drug testing... determined [whether] a banned substance or a violation occurred.'") (quoting Dr. Mary Scollay).

[38] NMAC 15.2.6.8(B)(4) ("No person *other than a veterinarian...*") (emphasis added); NMAC 15.2.6.9(H)(1) ("No person... *excluding veterinarians...*") (emphasis added).

¶25. Likewise, NMRC's rules regarding "use" are restricted by statute[39] and regulation[40] to "prohibited substances," which NMRC defines as substances that "can create a change in the normal physiological performance of the horse's racing ability."[41] It is undisputed that neither AMP nor Sarapin "can create a change in the normal physiological performance of the horse's racing ability" and therefore do not satisfy the NMRC's definition of "prohibited substances." The Authority's own expert, Dr. Dionne Benson, admitted that AMP is "obviously not" a substance that is "prohibited in a horse on a race day."[42] She further admitted that Sarapin (Pitcher Plant) is not a substance that can affect the performance of a racehorse.[43] These characteristics are why AMP and Sarapin (like vitamins, etc.) are excluded from the ARCI classification schedule.[44]

¶26. The Authority has no *legitimate* answer to this point. The Authority has not produced a single precedent that condemns Dr. Scott's use of AMP and Sarapin. No such precedent exists.[45] The Authority's efforts to manufacture a claim of illegality or illegitimacy do not even pass the threshold standards of admissibility,[46] as follows:

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[39] NMSA §60-1A-11(E) (authorizing "penalties for the use of prohibited substances").

[40] NMAC 15.2.6.9(H)(1) ("No person... excluding veterinarians..." shall possess a "substance *that is prohibited in a horse on race day* unless the product is labeled…").

[41] NMAC 15.2.1.7(P)(16).

[42] JSFoF, ¶12.

[43] JSFOF, ¶12.

[44] JSFoF, ¶14.

[45] JSFoF, ¶16.

[46] 16 C.F.R. §1.146(c)(6)(ii) ("[o]nly relevant, material, and reliable evidence will be admitted.").

A. Trejo's Letter and Testimony[47]

¶27. After Dr. Scott stated his justification, the Authority produced a letter plastered on NMRC letterhead; dated August 1, 2025; and signed by NMRC Executive Director Trejo declaring that AMP and Sarapin were prohibited under a novel reading of NMRC regulations.[48] The Trejo Letter was styled, in every material way, as an agency declaratory ruling regarding the applicability of NMRC regulations to Sarapin and AMP.[49] Indeed, the Authority *twice* represented the Trejo Letter in federal court as the NMRC's official position on the matter.[50]

¶28. Dr. Scott quickly exposed the Trejo Letter as a sham. An open-records request returned a verbatim draft of the Trejo Letter which HIWU prosecutor Allison Farrell drafted and submitted ex parte with instructions to "PUT ON NMRC LETTERHEAD."[51] Farrell had dictated the substance of the legal opinion to Trejo by phone without involving Dr. Scott, and Trejo immediately agreed to "help" in furtherance of a purported "partnership" with HIWU.[52] HIWU's counsel plainly leveraged this "partnership" to influence an agency official and thereby obtain an ex parte ruling *about this case* for litigation advantage.

¶29. This deceptive attempt to manufacture *Auer* deference must fail. That deference does not apply to interpretations obtained solely for litigation advantage.[53] It applies only if the

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[47] JSFoF, ¶¶21, 23. Objection preserved: AB5746–50(hearing); AB7171–73(briefing).

[48] AB6509.

[49] NMSA §12-8-9 (authorizing declaratory rulings about "the applicability of any statutory provision, rule, decision or order"); NMAC 15.2.1.10(C).

[50] *Scott v. HISA et al*, No.2:25-cv-632-SMD-GJF, ECF No.37 at 20 ("the New Mexico Racing Commission… says otherwise…"); *id.* at 46, n.15 ("the New Mexico Racing Commission… refutes...").

[51] AB7398-99.

[52] AB5734:9–12 (Trejo)

[53] *Kisor*, 588 U.S. at 579.

interpretation "emanate[d] from those actors, *using those vehicles*, understood to make authoritative policy in the relevant context."[54] A declaratory ruling regarding a regulation's application, however, is an agency adjudication,[55] which means that requirements like notice to interested parties,[56] bans on ex parte influence,[57] and ratification in an open meeting all apply.[58] None of that was followed. Even it had been, Dr. Scott almost certainly could have leveraged NMRC's decades-long, knowing tolerance of both medications to defeat any regulatory action against him in state proceedings[59] — something, notably, NMRC has declined to do.

¶30. When this egregious and prejudicial conduct was exposed, HIWU reversed course and recast the Trejo Letter as a mere "witness statement" that (contrary to its prior representations in federal court) was *not* attributable to the NMRC.[60]

¶31. This tactical reversal to call Trejo to regurgitate legal opinions as a *lay* "witness" rendered his letter and testimony inadmissible. It is axiomatic that a witness "may not state legal conclusions drawn by applying the law to the facts."[61] Trejo offered no helpful background. HIWU's counsel admitted that Trejo is "not an expert."[62] Trejo himself admitted *on direct* that he was only

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[54] *Kisor v. Wilkie*, 588 U.S. 558, 577 (2019) (emphasis added).

[55] NMSA §12-8-9.

[56] N.M.S.A. §12-8-2(E) (defining "party" as a person entitled "as of right" to intervene).

[57] N.M.S.A. §12-8-13.

[58] NMSA §10-15-1(H)(3) ("any final action taken as a result of the proceeding shall occur in an open meeting")

[59] *Hobbs Gas Co. v. New Mexico Pub. Serv. Comm'n*, 858 P.2d 54, 60 (N.M. 1993) (agency cannot "abruptly depart from past practice on which the regulatee has relied").

[60] JSFoF, ¶21

[61] *United States v. Bindues*, 741 F. Supp. 3d 967, 982 (D.N.M. 2024) (quoting *A.E. by and Through Evans v. Indep. Sch. Dist. No. 25, of Adair Cty.*, 936 F.2d 472, 476 (10th Cir. 1991)).

[62] AB5748 (Attorney Lipes).

"*somewhat*" familiar with the rules.[63] There was no evidence that Trejo was familiar with the relevant dealings of his own agency. Indeed, Trejo testified — *falsely* — that AMP had never been submitted for classification. When confronted with contrary proof that AMP was submitted for classification in 2014,[64] Trejo simply lamented that he never goes "surfing" the NMRC minutes.[65] That excuse, however, was nothing more than an admission that he had no personal knowledge of the pertinent regulatory history.

B. Dr. Dionne Benson[66]

¶32. Dr. Benson's legal and medical opinions are inadmissible for the same reasons. Virtually all of her opinions and testimony related exclusively to applying law to facts. The section of her report directed at Dr. Scott's explanation is even entitled "New Mexico Law."[67]

¶33. Dr. Benson offers no unique insight into the law's "regulatory framework, terminology, purposes, and background" that would convert her legal argument into helpful testimony. [68] Nor could she. Dr. Benson has *never* treated a racehorse in training and, therefore, has no experience complying with NMRC rules in any clinical pre-race setting.[69] She has never been in any position where she has had to comply with NMRC's rules regarding possession or compounded medication.[70] In her entire career, she has never even billed a client or generated a billing record.[71]

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[63] AB5731:6–11 (Trejo).

[64] AB7223, ¶ 15 (Scott); AB7227 (Ex. 1.1).

[65] AB5786 (Trejo).

[66] JSFoF, ¶¶24–25. Objection preserved: AB5830–32(hearing); AB7173-75(briefing).

[67] AB6647.

[68] *Tang Cap. Partners, LP v. BRC Inc.*, 757 F. Supp. 3d 363, 392 (S.D.N.Y. 2024).

[69] AB5894–95 (Benson)

[70] AB6005:16-6006:19 (Benson)

[71] AB5895:18-5896:10 (Benson)

She has never developed[72] a routine, pre-race treatment protocol or even provided[73] *any* prophylactic treatment to a racehorse and, thus, has no experience "taking over for another veterinarian" who documented such treatments.

¶34. Instead, the entire basis for her opinion about the meaning and application of the rules was that she "*just read them*."[74] An otherwise unqualified person does not become an expert simply by reading rules or articles.[75] Dr. Benson has, at most, "the type of experience that any attorney would receive representing clients in the area," which does not qualify her as an expert.[76] Her general experience as a veterinarian and limited experience pulling blood for post-race tests does not provide any special insight that converts her novel interpretation of the law into anything more than what Dr. Benson wishes the law to be.[77] Unsurprisingly, then, she ultimately withdrew most of her opinions.[78]

IV. The Possession Rule is Void for Rulemaking Violations and as Arbitrary and Capricious

¶35. Reversal is also required because the Authority never lawfully promulgated Rule 3214(a), and the rule is arbitrary and capricious.

¶36. In October 2022, the Authority proposed the Possession Rule as part of bulk proposal for the entire ADMC Protocol, which was later re-submitted via a Federal Register Notice[79] together

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[72] AB5890:9-5891:11 (Benson)

[73] AB5900:1-13 (Benson)

[74] AB5940

[75] *United States v. Paul*, 175 F.3d 906, 912 (11th Cir. 1999).

[76] *Broadcort Cap. Corp. v. Summa Med. Corp.*, 972 F.2d 1183, 1195 (10th Cir. 1992).

[77] *Vigil v. Burlington N. & Santa Fe Ry. Co.*, 521 F. Supp. 2d 1185, 1204 (D.N.M. 2007).

[78] AB6011–12(Benson - labelling); JSFoF, ¶7(alternatives).

[79] AB2795.

with the sources the Authority considered when promulgating the Protocol,[80] the public's comments,[81] and the Authority's responses to those comments.[82] All rules were approved in bulk in an FTC Order dated March 27, 2023.[83]

¶37. But mere approval is not enough. An administrative body must show, on the contemporaneous record, that it "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[84] If not, the rule is arbitrary, capricious, and therefore void.[85] The Act and FTC regulations codify this requirement.[86] To prove compliance, a *detailed* explanation is required; conclusory statements and mere assertions are "insufficient."[87]

¶38. Despite a voluminous rulemaking record, the sum total of the Authority's discussion of the Possession Rule was this:

> "The violations prohibit use, possession, trafficking, and administration to a Covered Horse of Banned Substances or Banned Methods (Rules 3213 and 3214)."[88]

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[80] AB2928.

[81] AB4391.

[82] AB5008.

[83] AB2727

[84] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (hereinafter "*State Farm*") (internal citation omitted).

[85] *Id.* at 43–44.

[86] 15 U.S.C. §3053(a),(b); 16 C.F.R. §1.142(a).

[87] 16 C.F.R. §1.142(e)

[88] AB2800.

¶39. This terse acknowledgement of the rule's existence does not satisfy the Act's or FTC's rulemaking requirements. Indeed, the Authority did not comply with a single requirement of 16 C.F.R. §1.142(a).

¶40. The Authority never describes the reasons it adopted a rule that prohibits "possession" unless the veterinarian presents a "compelling justification."[89] The Authority does not once articulate a single problem a ban on "possession" was intended to address.[90] Because of that failure, the Authority never explained how its formulation of "Possession" addresses any (unidentified) problems.[91] Indeed, the Authority made no finding that mere possession by a veterinarian was detrimental to the health, safety, welfare, or integrity of Covered Horses, or even that it was a problem in need of a solution.

¶41. The Authority failed to explain how an expansive prohibition on "possession" absent a "compelling justification" is consistent with the Act,[92] or how it considered the factors in 15 U.S.C. §3055 in reaching that conclusion.[93] And despite claiming to "scrutinize" the "anti-doping and medication control standards" of the IFHA and the Principles of Veterinary Medical Ethics of the American Veterinary Medical Association (15 U.S.C. §3055(b)(4)), the Authority included neither document in its list of sources "on which [it] relied in developing proposed rule."[94]

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[89] 16 C.F.R. §1.142(a)(1).

[90] 16 C.F.R. §1.142(a)(2).

[91] *Id.*

[92] 16 C.F.R. §1.142(a)(4)

[93] 16 C.F.R. §1.142(a)(5)(B)

[94] AB2930–31.

¶42. The Authority never discussed any consideration of alternatives, how its choice would better achieve its (un)stated objectives, or why the Authority chose the verbiage it did.[95] The Authority claims that the rules were "substantively modeled on World Anti-Doping Code ('WADA Code') violations."[96] To accept this assertion as a basis for the rule, the FTC erroneously concluded that the WADA Code "is one of the sources of the baseline ADMC rules identified in the Act."[97] That conclusion misreads the Act – the WADA Code is *not* a baseline for anti-doping *violations*.[98] But even if it were, the Authority's deceptive use of the word "substantively" concealed its near-total rejection of the WADA Code Possession rule,[99] including:

- the "acceptable justification" standard;
- the distinction between "in-competition" and "out-of-competition" possession for *support personnel* (e.g., medical professionals);
- the requirement that "out-of-competition" possession have a "connection with an Athlete, Competition, or training."
- the procedure to obtain exemptions for "therapeutic use."

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[95] 16 C.F.R. §1.142(a)(3).

[96] AB2800

[97] AB2750–51.

[98] The Act references WADA only as to:

- the "International Standard for Laboratories" (15 U.S.C. §3055(g)(2)(A)(ii)) and
- an opportunity to reduce penalties (15 U.S.C. §3057(d)(3)(B)), which the Authority adopted as the "No Fault or Negligence" or "No Significant Fault or Negligence" defenses [*see* AB2828–29].

The "International Standard for Laboratories" referenced in the Act was adopted as the Rule Series 6000 (laboratory testing standards). It is *not* the WADA Anti-Doping Code. The Authority knows this. In fact, it attached the laboratory standards WADA Code as *separate* exhibits. [AB2930–31, attachments B.5 and B.31.]

[99] AB3578(Rule 2.6.2.)

¶43. The "compelling justification" standard was actually drawn from the International Equine Federation code ("FEI Code"), which the Act never mentions.[100] The Authority does not explain or justify this departure from its alleged "baseline."[101] The Authority simply states that "any deviations from the baseline standards have been approved by the Authority" without identifying or explaining those "deviations."[102] That conclusory statement is not enough.[103]

¶44. The Authority exploits these failures to imagine a scope of Possession (i.e., "at a racetrack") that fits the needs of this case. But in doing so, the Authority gives the Possession rule a reach far beyond its WADA counterpart's grasp. The WADA Code has never been used to regulate or second-guess a doctor's non-covered work because its "Possession" rule specifically requires a connection to a *covered* athlete, competition, or training[104] — the facts undisputedly absent here.

¶45. Having never realized the Authority's duplicity, the FTC offers no explanation for how the FEI Code's possession rule is consistent with the Act, and the Authority never met its burden to justify the material departures from an alleged statutory baseline.[105] The failure to consider or to explain the rejection of clear alternatives that exist "within the ambit of the existing standard" or

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[100] AB3452

[101] 16 C.F.R. §1.142(a)(5)(C).

[102] AB2799

[103] 16 C.F.R. §1.142(e).

[104] AB3578(Rule 2.6.2.)

[105] 15 U.S.C. §3055(g)(3); 16 C.F.R. §1.142(a)(5). Note that these *unexplained* rejections of the WADA Code standard also undercut the only reason the Authority (arguably) offered for adopting any ADMC rule: that the WADA and FEI Codes are "robust" and "well-developed." [AB2799.]. This Court found that this "well-developed body of precedent" had not once addressed "compelling justification" for Possession. *See Shell II* at 15 ("[T]hese sports world decisions, arising in a different factual context, offer only limited guidance.").

that are expressly identified in the record is a per se violation of the FTC's rulemaking requirements and voids the is arbitrary and capricious under *State Farm*.[106]

¶46. Finally, but perhaps most importantly, the Authority never addressed "how the proposed rule or modification will affect covered persons" — particularly, covered veterinarians who treat both Covered and Non-Covered horses at Covered Racetracks.[107] The Act specifically requires the Authority to consider the "unique aspects of horseracing" when adopting a rule.[108] Veterinarians are regularly called upon to treat Covered and Non-Covered Horses on the same day, often at the *same racetrack* during multi-breed race meetings called "Mixed Meets." The Authority's silence has created a regulatory landmine under which the risk of non-compliance is placed entirely on the veterinarian who must hope that the Authority will accept, on an ad hoc basis, that their conduct is a "compelling justification."

¶47. In short, though the Authority described the purposes of the ADMC program as a whole, it never answered a single question as to Possession. The terse and unexplained acknowledgement of Possession is plainly insufficient to constitute a submission under 16 C.F.R. §1.142. Not having discussed or considered any problems, alternatives, or statutory criteria, the Authority "submitted no reasons at all," and the Possession Rule is therefore arbitrary.[109]

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[106] 16 C.F.R. §1.142(a)(3); *State Farm.* 371 U.S. at 51.

[107] 16 C.F.R. §1.142(a)(4).

[108] 15 U.S.C. §3057(d)(2)(A)

[109] *State Farm*, 463 U.S. at 50.

V. The Act Unconstitutionally Delegates Legislative Power

¶48. Finally, the Possession Rule is void because 15 U.S.C. Sections 3055(a) and 3057(a) vest the FTC and Authority with unbridled discretion to describe an "anti-doping code" among "countless alternatives,"[110] which is an unconstitutional delegation of legislative power.

¶49. The assignment of legislative powers to Congress is a bar to its further delegation.[111] Congress may "seek[ ] assistance" from its coordinate branches, but only by vesting "discretion" in executive agencies to implement and apply the laws it has enacted.[112] "[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."[113] The "'guidance' needed is greater . . . when an agency action will 'affect the entire national economy' than when it addresses a narrow, technical issue (*e.g.*, the definition of 'country [grain] elevators')."[114]

¶50. The pertinent test is whether Congress has set out an "intelligible principle."[115] Congress must make clear both "the general policy" that the agency must pursue and "the boundaries of [its] delegated authority."[116] The key inquiries are "whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; [and] whether the Congress has required any finding by the President in the exercise of the authority to

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[110] AB2797.

[111] *Whitman v. American Trucking Assns.*, Inc., 531 U.S. 457, 472 (2001).

[112] *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928).

[113] *Whitman*, 531 U.S. at 475.

[114] *FCC v. Consumers' Research*, 606 U.S. 656, 673 (2025) (quoting *Whitman*, 531 U.S. at 475).

[115] *J.W. Hampton*, 276 U.S. at 409.

[116] *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).

enact the prohibition."[117] When these features are present, Congress has "legislated on the subject as far as was reasonably practicable."[118] But if the statute "involves a discretion as to what [the law] shall be," then that is an impermissible delegation to make law and is therefore void.[119]

¶51. The Supreme Court has twice stricken statutes as unconstitutional delegations of legislative power. In *A.L.A. Schechter Poultry Corp. v. United States*,[120] a statute empowered an agency to establish a "code of fair competition" for the entire economy without endeavoring to supply the standards itself.[121] "Instead of prescribing rules of conduct, it authorizes *the making of codes* to prescribe them. For that legislative undertaking, [the statute] sets up no standards, aside from the statement of the general aims of rehabilitation, correction, and expansion."[122] Because the scope of discretion was "virtually unfettered," "the *code-making authority* thus conferred [was] an unconstitutional delegation of legislative power."[123]

¶52. Though *A.L.A. Schecter Poultry* concerned a delegation to regulate the entire economy, its sister case clarified that the pertinent inquiry is the range of discretion — not the range of subject matters.[124] In *Panama Refining*, the Court declared a discreet authorization to prohibit the transportation of hot oil[125] unconstitutional because the statute "established no criterion" and

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[117] *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 415 (1935). (Note: The "President" interchangeably refers to the President and agencies.)

[118] *Id.* at 427.

[119] *J.W. Hampton*, 276 U.S. at 407.

[120] 295 U.S. 495 (1935).

[121] *Id.* at 541.

[122] *Id.* (Emphasis added.)

[123] *Id.* at 541–42 (emphasis added).

[124] *Consumers' Rsch.*, 606 U.S. at 702 (Justice Kavanaugh, concurring) ("Congress likewise cannot merely assign the President to take over the legislative role as to a particular subject matter.").

[125] *Panama Ref.*, 293 U.S. at 406.

"declared no policy" for whether, when, or how the agency should do so.[126] As to Possession, the Act's constitutional infirmities are identical.

¶53. Begin with the task at hand. The Authority and FTC must promulgate an "anti-doping *code*"[127] by which they exercise "independent and exclusive authority" over "anti-doping and medication control matters" for Thoroughbred racehorses.[128] The Act delegates "code-making authority," which was the type of delegation stricken in *A.L.A. Schecter Poultry*.

¶54. That development of a "code" is not "technical" in nature. Medication-control regulations dictate the day-to-day lives and decisions of participants in this multi-billion-dollar industry, with life-altering consequences[129] on regulated persons. Yet the "guidance" Congress offered is minimal-to-none.

¶55. Indeed, simply adapting the Supreme Court's analysis in *Panama Refining* to the Act's "Possession" provision (Section 3057(a)(2)(C)) proves that the scope of discretion is virtually unfettered.

¶56. Section 3057(a)(2)(C) is a "brief" section that "does not state whether or in what circumstances or under what conditions the President is to prohibit [possession]."[130] As to Possession, Section 3057(a)(2) "establishes no cr[i]terion to govern the President's course."[131] "It

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[126] *Id.* at 415.

[127] 15 U.S.C. §3055(a).

[128] 15 U.S.C. §3054(a)(2)

[129] *Cf. Baffert v. California Horse Racing Bd.*, 332 F.3d 613, 618 (9th Cir. 2003) (Licensure sanctions in horseracing are "quasi-criminal" sanctions).

[130] *Panama Ref.*, 293 U.S. at 415.

[131] *Id.*

does not require any finding by the President as a condition of" prohibiting possession.[132] Section 3057(a)(1) simply authorizes the Authority to *describe* anti-doping violations. That "description" "*may* include," among other categories of conduct, "Possession of any prohibited substance or method."[133] Section 3057(a)(2) plainly includes the discretion *not* to prohibit possession. After all, the Authority "may" also prohibit "*attempted* possession,"[134] and it chose not to do so.[135] "So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit."[136]

¶57. Finding no restriction in Section 3057, the Court must turn to the "declaration of policy" in Section 3055. Section 3055(b) is framed in the broadest possible terms[137] to state lofty but non-specific ideals like "uniformity," "free[dom] from the influence of medications," "minimum necessary" treatments.[138] But this "general outline of policy contains nothing as to the circumstances or conditions in which [possession] should be prohibited."[139]

¶58. True, broad phrases such as "public interest" can suffice, but only if the "broader statutory contexts" "inform[] their interpretation and suppl[y] the content necessary to satisfy the intelligible-principle test."[140] But the remainder of the statute supplies no such boundaries.

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[132] *Id.*

[133] 15 U.S.C.§3057(a)(2)(C).

[134] 15 U.S.C. §3057(a)(2)(D)

[135] *Compare* Rule 3214(a) (no attempt) *with* Rules 3213 and 3214(b)–(c) (prohibiting attempt).

[136] *Panama Ref.*, 293 U.S. at 415.

[137] *Id.* at 416–17.

[138] 15 U.S.C. § 3055(b).

[139] *Panama Ref.*, 293 U.S. at 417.

[140] *Consumers' Research*, 606 U.S. at 684.

¶59. Could the Authority prohibit all "possession" of any banned substance anywhere, anytime, or for whatever reason, even unknowing possession? Yes. Under Section 3055(b) framework, the Authority could determine that prohibiting possession at all times protects a Covered Horse from even accidental administrations that may influence its performance or mask pain.[141] Simply passing the rule makes it uniform.[142] Neither the IFHA nor veterinary ethics address possession.[143] And the Commission could determine that the "integrity" of horseracing demands a strict separation between a covered person and any "banned" substance—even unknowing possession or possession for personal use at home.[144] But the restrictions need not end there. Nothing in the Act would prevent the Authority from requiring a veterinarian who treats Covered Horses, for example, to cease their practice as to Non-Covered Horses.

¶60. On the opposite end, could the Authority or the FTC adopt a blanket permission to "possess" any substance? Yes again. The Act does not *require* the Authority to prohibit possession.[145] Just as the Authority omitted "attempted possession," it could choose not to prohibit possession. Absent use, the mere act of possession cannot "influence" a Covered Horse's Performance or mask or deaden that horse's pain.[146] The rule is uniform.[147] Neither the IFHA nor

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[141] 15 U.S.C. §3055(b)(1), (2).

[142] 15 U.S.C. §3055(b)(3).

[143] 15 U.S.C. §3055(b)(4).

[144] 15 U.S.C. §3055(b)(5)–(7).

[145] 15 U.S.C. §3055(a)(2) ("The description of rule violations established under paragraph (1) *may* include the following . . .") (emphasis added).

[146] 15 U.S.C. § 3055(b)(1), (2).

[147] 15 U.S.C. § 3055(b)(3).

veterinary ethics address possession.[148] And if the possessed medication is not administered, none of the remaining concerns regarding diagnosis, treatment, or disclosure apply.[149]

¶61. From this standpoint, "[i]t is manifest that this broad outline [in Section 3055(b)] is simply an introduction of the act, leaving the legislative policy as to particular subjects" like possession "to be declared and defined, if at all, by the subsequent sections."[150] But "[t]he Congress did not prohibit [possession]."[151] "The Congress did not undertake to say that the [possession of banned substances] was injurious."[152] "The Congress did not say" that possession was detrimental to health, safety, or welfare, or to the integrity of horseraces.[153] "The Congress did not declare in what circumstances that [possession] should be forbidden, or require the President to make any determination as to any facts or circumstances."[154] "The President was not required to ascertain and proclaim the conditions prevailing in the industry which made the prohibition necessary."[155] "The Congress left the matter to the President without standard or rule, to be dealt with as he pleased." [156] In sum, there is "nothing in section [3055(b)] which limits or controls the authority conferred by section [3057(a)(2)(C)]."[157]

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[148] 15 U.S.C. § 3055(b)(4).

[149] 15 U.S.C. § 3055(b)(5)–(7).

[150] *Panama Ref.*, 293 U.S. at 418.

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.* at 419.

¶62. The Authority even tacitly conceded the point:

> In considering reasonable alternatives to the proposed rule or modification that may accomplish the stated objective, it is important to underline that the Authority and the development of the Protocol is unprecedented. As a consequence, there are of course ***countless "alternatives"*** on various issues, but the Authority has sought to combine the best practice elements from various sources....[158]

¶63. If the Act vests the Authority and FTC with the discretion to choose among "*countless*" alternatives, the it "lay[s] no policy of limitation" and therefore suffers the exact problem in *Panama Refining*.[159] In the words of Justice Cardozo, the range of the Authority's and FTC's discretion to establish a "code is not canalized within banks that keep it from overflowing."[160] Rather, the Act establishes a "roving commission to inquire into evils and then, upon discovering them, do anything [it] pleases."[161]

¶64. The result the Authority seeks here was made possible only because the Act vests the Authority and FTC to define a "anti-doping code" as they see fit. The Authority is not filling gaps; it is choosing ends. Because that is quintessentially making law, the Possession rule was the product of an unconstitutional delegation of legislative power and, thus, is void.

CONCLUSION

¶65. The jurisdictional question and compelling justification may be avoiding by construing the Possession Rule's "compelling justification" test as Dr. Scott has described. The charges are meritless and should be dismissed.

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[158] AB2797.

[159] *Id.* at 418.

[160] *A.L.A. Schechter Poultry*, 295 U.S. at 551 (Justice Cardozo, concurring).

[161] *Id.*

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to this Court's Order enlarging the word limitation to 8,250 words, I certify that the foregoing contains **6,618 words**. Together with the proposed findings of fact, conclusions of law, and order, which contain 1580 words, the aggregate filings contain **8,198 words**. The wordcount was calculated using word processing software.

I further certify that no portion of the filing was drafted by generative artificial intelligence ("AI") (such as ChatGPT, Perplexity, Microsoft Copilot, Harvey.AI, or Google Gemini)

/s/ Joseph C. DeAngelis

CERTIFICATE OF SERVICE

Pursuant to 16 CFR 1.146(a) and 16 CFR 4.4(b), a copy of the foregoing is being served this 12th day of June, 2026, via First Class mail, e-filing, and/or email upon the following:

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