PUBLIC

UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

FTC DOCKET NO. D-9455

ADMINISTRATIVE LAW JUDGE: HON. DANIA L. AYOUBI

IN THE MATTER OF:

JOSE CORRALES APPELLANT

Docket 9455

APPELLANT'S BOOK OF AUTHORITIES

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TAB 1

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

In the Matter of **Philip Serpe.**	**DOCKET NO. 9441**

DECISION OF THE COMMISSION ON REVIEW UNDER 15 U.S.C. § 3058(c)(1)

Philip Serpe has worked with racehorses for decades. He has had a successful career by many metrics, training horses that have won some of the sport's biggest races. But a post-race urine test showed that one of his horses had traces of a banned substance after a 2024 win. The private party tasked by Congress with regulating the sport, subject to Commission oversight, charged him accordingly. Following arbitration, Serpe's results were disqualified and he was suspended for two years, but he received no financial penalty. One of the Commission's administrative law judges reviewed the matter and affirmed those sanctions, adding a $25,000 fine on top. The Commission *sua sponte* granted review shortly thereafter.

Mr. Serpe believes that the process Congress, the Commission, and that regulator have developed to adjudicate his charges violates his constitutional rights. We hold that the administrative law judge was not authorized to impose a civil penalty itself, but that Mr. Serpe's constitutional rights were not violated.

We therefore affirm in part and reverse in part the administrative law judge's decision. Mr. Serpe's disqualification and suspension stand, but he need not pay the civil penalty imposed by the administrative law judge.

I.

The Horseracing Integrity and Safety Act[1] ("the Act") directs the Horseracing Integrity and Safety Authority ("the Authority"), a private entity,[2] to propose rules pertaining to horseracing ("HISA Rules") and to enforce those rules through either administrative proceedings or federal-court actions.[3] In 2023, the Authority fulfilled one of its statutory obligations[4] by proposing the Anti-Doping and Medication Control Rule ("ADMC Rule").[5] Among other things, the ADMC Rule prohibits the presence of banned substances in the bodies of covered horses and sets punishments for violations.[6] Covered horse trainers whose horses have tested positive for banned substances will have their horses disqualified from affected races[7] and may be suspended from participating in covered horse races for two years and fined unless they can show that they were neither at fault for, nor negligent in allowing, exposure to the substance.[8] The ADMC Rule also lays out the process for investigating, charging, and adjudicating Anti-Doping Rule Violations ("ADRVs"). Staff of the ADMC enforcement agency, the Horseracing Integrity and Welfare Unit ("HIWU"), have the authority to conduct interviews, issue document requests, inspect facilities, and access veterinary records as part of an investigation of possible rule violations.[9] HIWU also conducts post-race testing.[10] If a test produces a positive result for a banned substance, a covered person receives a notice and may request testing of a B sample. If that test is waived or comes back positive, HIWU may issue a Charge Letter.[11]

An arbitration panel consisting of either one or three impartial arbitrators[12] then conducts an arbitration in accordance with the procedures set forth in the ADMC Rule and determines whether a violation occurred. In these proceedings, HIWU has the burden of proving the ADRV "to the comfortable satisfaction of the hearing panel . . . . This standard of proof in all cases is

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[1] 15 U.S.C. ch. 57A.

[2] 15 U.S.C. § 3052(a) ("The private, independent, self-regulatory, nonprofit corporation, to be known as the 'Horseracing Integrity and Safety Authority,' is recognized for purposes of developing and implementing a horseracing anti-doping and medication control program and a racetrack safety program for covered horses, covered persons, and covered horseraces.").

[3] *Id.* §§ 3055, 3056, 3057(c)(1).

[4] See *Id.* § 3055(a) (requiring "horseracing anti-doping and medication control" rules).

[5] Fed. Trade Comm'n, Notice of HISA Anti-Doping and Medication Control Rule, 88 Fed. Reg. 5,070 (Jan. 26, 2023), https://www.federalregister.gov/documents/2023/01/26/2023-00957/hisa-anti-doping-and-medication-control-rule.

[6] See Fed. Trade Comm'n, Order Approving the Anti-Doping and Medication Control Rule Proposed by the Horseracing Integrity & Safety Authority (Mar. 27, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/P222100CommissionOrderAntiDopingMedication.pdf; see also 15 U.S.C. § 3055.

[7] HISA Rule 3220(a)(1).

[8] HISA Rules 3223–29.

[9] HISA Rules 3040(a)(2), 3040(b)(8); see also 15 U.S.C. §§ 3054(e)(1)(E), 3055(c)(4)(B).

[10] HISA Rule 3132, 3133(a).

[11] HISA Rule 3248.

[12] The arbitrators' impartiality must be "commensurate with the seriousness of the alleged" violations and resultant civil sanctions. 15 U.S.C. § 3057(c)(3).

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."[13]

ADMC violations that arise from a post-race sample, like here, automatically lead to the disqualification of the covered horse's results at the covered race and all purses or other prizes are forfeited.[14] In cases where a horse tested positive for a banned substance, the horse is also subject to a period of ineligibility[15] and the responsible person (in most cases, the trainer) is subject to a period of ineligibility commensurate with their level of fault.[16] The ineligibility period may, however, be eliminated or reduced if the covered person can demonstrate that they bear no or no significant fault or negligence.[17] The responsible person may also be required to pay a fine.[18] The final decision of the arbitration panel is subject to review by an Administrative Law Judge ("ALJ") and then, on a discretionary basis, by the Commission.[19] Consistent with the Act, the Federal Trade Commission exercises oversight of the Authority by approving, modifying, and adding to the HISA Rules.[20] The Commission also engages in oversight by reviewing the final sanctions imposed by the Authority through its arbitration proceedings.[21] When the Authority imposes sanctions, either the Commission or an aggrieved person can initiate de novo review before an ALJ.[22] The ALJ "may make any finding or conclusion that . . . is proper and based on the record," and "may affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the final civil sanction of the Authority."[23]

The Commission may then decide to review de novo the ALJ's decision, either on its own motion or on application for review by an aggrieved party, if (1) the proceedings before the ALJ contained a prejudicial error, (2) the decision involved an erroneous application of the HISA Rules, or (3) if "the decision involved an exercise of discretion or a decision of law or policy that warrants

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[13] HISA Rule 3121(a).
[14] HISA Rule 3221.
[15] HISA Rule 3229.
[16] HISA Rule 3223.
[17] HISA Rules 3223(b), 3224, and 3225.
[18] HISA Rule 3223(b).
[19] HISA Rules 3263, 3264; 15 U.S.C. § 3058. The Commission's procedures for review of final civil sanctions imposed under the Act are set forth in 16 C.F.R. Part 1, Subpart T.
[20] 15 U.S.C. § 3053(b)(2) ("A proposed rule, or a proposed modification to a rule, of the Authority shall not take effect unless the proposed rule or modification has been approved by the Commission."); *id.* § 3053(c)(2) ("The Commission shall approve a proposed rule or modification if the Commission finds that the proposed rule or modification is consistent with [the Act] and applicable rules approved by the Commission."); *id.* § 3053(e) ("The Commission . . . may abrogate, add to, and modify the rules of the Authority promulgated in accordance with [the Act] as the Commission finds necessary or appropriate[.]").
[21] *Id.* § 3058(b) (providing for "de novo review" of a sanction imposed by the Authority "by an administrative law judge" upon "application by the Commission or a person aggrieved"); *id.* § 3058(c) ("The Commission may, on its own motion, review any decision of an administrative law judge" or, in its discretion, grant "an application for review" submitted by "[t]he Authority or a person aggrieved by" an such decision).
[22] 15 U.S.C. § 3058. The Authority cannot seek review of its own decision. *Id.*
[23] *Id.* § 3058(b)(3).

review by the Commission."[24] We may likewise make any finding or conclusion that is proper and based on the record and "affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the decision of the" ALJ.[25]

II.

Appellant Philip Serpe is a horse trainer covered by the Act.[26] In September 2024, Mr. Serpe was notified that one of his horses, Fast Kimmie, had tested positive for clenbuterol.[27] The ADMC Rule bans clenbuterol because it is "typically used to improve the flow of air to the lungs in a horse" and can have "muscle-building effects in racehorses."[28] So, in October 2024, HIWU notified Mr. Serpe that it was charging him.[29]

Consistent with the HISA Rules,[30] that charge was litigated before a neutral arbitrator in June 2025.[31] Mr. Serpe provided letters from his veterinarians, who swore they did not prescribe or dispense clenbuterol to Mr. Serpe's horses, and he argued that any of a dozen or so individuals who came into contact with Fast Kimmie in the days leading up to the positive drug test could have been responsible.[32] But on July 9, 2025—ten months after Mr. Serpe was put on notice that Fast Kimmie tested positive for clenbuterol—the arbitrator determined that Mr. Serpe had violated the Rule and suspended him for two years.[33] The arbitrator did not levy a fine.

The Authority submitted the arbitrator's punishments to the Commission as the Authority's final civil sanctions, and Mr. Serpe timely sought ALJ review. He only nominally disputed liability. He instead argued that the Authority was *required* to fine him if it suspended him. In his view, a suspension sanction would not necessarily trigger his Seventh Amendment right to a jury because a suspension is akin to an injunction—an equitable remedy to which the Seventh Amendment jury-trial right does not ordinarily apply.[34] A fine, by contrast, resembles a remedy at law to which the Seventh Amendment jury-trial right ordinarily applies.[35] Mr. Serpe asked the ALJ to "'set aside'

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[24] *Id.* § 3058(c)(2)(A), (C).
[25] *Id.* § 3058(c)(3).
[26] ALJ Decision at 4.
[27] *Id.* at 6.
[28] *Id.*
[29] *Id.* at 7.
[30] See HISA Rules, Series 7000 (delegating the Authority's responsibility to adjudicate ADMC Rule violations to an independent arbitral body).
[31] ALJ Decision at 11–12.
[32] *Id.* at 8.
[33] Notice of Appeal to ALJ, Ex. A, https://www.ftc.gov/system/files/ftc_gov/pdf/613720.2025.07.15_notice_of_appeal_and_application_for_review_redacted.pdf.
[34] See *FCC v. AT&T*, 608 U.S. —, 146 S. Ct. 1418, 1430 (2026) (rejecting argument that "the Seventh Amendment applies . . . even where no money is at stake" because the Seventh Amendment "applies only to suits 'where the value in controversy shall exceed twenty dollars").
[35] *SEC v. Jarkesy*, 603 U.S. 109, 122–23 (2024). (discussing *Tull v. United States*, 481 U.S. 412, 422 (1987)).

the Arbitrator's decision as 'unlawful,'" and "remand with directions for HIWU not to initiate an arbitration against" him.[36]

On September 12, 2025, the ALJ held that HIWU had proved that Mr. Serpe violated the ADMC Rule and that Mr. Serpe did not disprove that the violations were attributable to him. On the other hand, the ALJ held that the Authority violated Mr. Serpe's statutory due-process right by interfering with HIWU's "prosecutorial independence" and that the arbitrator thus insufficiently considered whether to issue a fine. In the first instance, and without being asked to do so, the ALJ determined both that (1) a fine should have been included in the sanctions award and (2) under *Securities & Exchange Commission v. Jarkesy*,[37] the adjudication did not trigger Mr. Serpe's Seventh Amendment jury-trial right because the Act and HISA Rules concern a public right. The ALJ ultimately affirmed the Authority's sanctions and added a $25,000 fine on top.[38]

Three days later, the Commission, on its own motion, granted review of the matter.[39] Mr. Serpe later filed three separate motions concerning the scope of this review.[40]

On September 23, 2025, Mr. Serpe asked the Commission to clarify the issues being reviewed. He did not request nor did he propose that the Commission address any specific issues. The Commission ordered the parties to address: (1) whether the ALJ was authorized to impose a civil sanction not imposed by the arbitrator and not requested by any party to the proceeding; (2) whether, if authorized, the additional sanction, here the fine, was appropriate; and, (3) whether Mr. Serpe's Seventh Amendment jury-trial right was triggered.[41]

On December 10, nearly three months after the Commission granted review, Mr. Serpe filed his first motion for leave to brief additional issues. These issues were: (4) whether the Commission has the authority to adjudicate sanctions imposed pursuant to the Act; (5) whether enforcement under the Act violates the private-nondelegation doctrine; and (6) whether the Authority violated Mr. Serpe's due-process rights.[42] Before the Commission could resolve his motion, Mr. Serpe filed his opening brief, so we denied that motion as moot and notified the parties

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[36] ALJ Decision at 17–18, 22 (quoting Serpe's Opening Brief).

[37] 693 U.S. 109.

[38] See generally ALJ Decision.

[39] Order Partially Staying ALJ Decision, https://www.ftc.gov/system/files/ftc_gov/pdf/d9441_2025.09.15_commission_order_partial_stay__0.pdf.

[40] Mot. Clarification and Extension (Sep. 23, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/614134.2025.09.23_motion_for_clarification_and_extension_of_time.pdf; Mot. Leave to Br. Add'l Issues (Dec. 10, 2025), http://www.ftc.gov/system/files/ftc_gov/pdf/614420.2025.12.10_serpe_ftc_mot._to_expand_briefing.pdf; Combined Mot. Consider Add'l Evid. (Jan. 22, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/614722.2026.01.22_new_evidence_motion_and_exhibits.pdf.

[41] Order Granting Mot. Clarification (Sept. 30, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/d9441_2025.09.30_commission_order_regarding_clarification_.pdf.

[42] Mot. Leave to Br. Add'l Issues (Dec. 10, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/614420.2025.12.10_serpe_ftc_mot._to_expand_briefing.pdf.

that we would consider the brief in full.[43] Importantly, the Commission did so "without making a determination that such issues were preserved by Mr. Serpe or are otherwise appropriately addressed in this proceeding."[44] As discussed below, we now determine that Mr. Serpe preserved none of these three issues.[45]

And on January 22, 2026, Mr. Serpe filed his second motion for leave to brief additional issues. Therein he requested reconsideration of whether he was liable at all, in light of supposedly new evidence. The Commission denied the motion, ultimately declining to question the ALJ's decision to affirm the arbitrator's liability finding in light of an argument that was not presented to the ALJ.[46]

III.

The parties have briefed six issues for Commission review, but Mr. Serpe forfeited three of them.[47] The remaining three concern whether the Authority and the Act itself violate Mr. Serpe's Seventh Amendment right to a jury trial. The Seventh Amendment requires causes of action and remedies resembling those traditionally litigated in, and awarded by, courts of law to be tried before a jury in an Article III court (unless the party protected by the Seventh Amendment forgoes that right).[48] Because the Authority—including its delegees, HIWU and the arbitrator—is not a state actor, the Authority's adjudication did not trigger Mr. Serpe's Seventh Amendment right. And because the ALJ was not authorized to impose a civil penalty against Mr. Serpe, the ALJ's review of the Authority's decision did not trigger Mr. Serpe's right to a jury trial either.

(1) The Seventh Amendment and the *Jarkesy* Framework

The right to be tried by a jury of one's peers is as near to sacrosanct as any that exists in the American legal system. Two hundred and fifty years ago this week, Thomas Jefferson submitted to the world that Americans needed independence from King George III because, among other "abuses and usurpations," he was depriving Americans of jury trials.[49] When it came time to consider what rights were so important that the Constitution could not do without their codification, the jury trial was front and center.[50] Over the last 90 years, however, Congress has

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[43] Order Den. As Moot (Jan. 2, 2026), https://www.ftc.gov/system/files/ftc_gov/pdf/d9441_2026.01.02_order_denying_motion_regarding_additional_issues_.pdf.

[44] *Id.*

[45] See *infra* nn. 72, 92 & 93 and accompanying text.

[46] Order Den. In Part (Feb. 4, 2026), https://www.ftc.gov/system/files/ftc_gov/pdf/d9441_2026.02.04_commission_order_denying_in_part_appellant_motion_.pdf.

[47] See *infra* nn. 72, 92 & 93 and accompanying text. As communicated in our February 4, 2026, Order, we think it prudent to ensure that our review of an ALJ's decision is actually a review of the ALJ's decision, not a review of a case never presented to the ALJ. See Order Den. In Part. We thus routinely refuse to consider matters that were not brought before the ALJ absent compelling reasons to do so. See 16 C.F.R. § 1.147(b)(4), (c)(1).

[48] *Jarkesy*, 603 U.S. 109.

[49] The Declaration of Independence para. 2 (U.S. 1776).

[50] See *Jarkesy*, 603 U.S. at 121–22 (quoting The Federalist No. 83, p. 495 (C. Rossiter ed. 1961) (A. Hamilton)).

slowly disfavored the jury trial, moving adjudication of many federal-law disputes from Article III courts to administrative agencies. But the last decade has seen the right to a jury trial become a focus once again.

In *Securities & Exchange Commission v. Jarkesy*, the Supreme Court reconfirmed that Congress cannot give executive-branch agencies, rather than federal courts, the authority to adjudicate claims that are "quintessentially suits at common law."[51] "Even when an action 'originates in a newly fashioned regulatory scheme,' what matters is the substance of the action, not where Congress has assigned it."[52] In short, where the federal government brings "claims whose causes of action are modeled on common law [claims] and that provide a type of remedy available only in law courts," the claims "typically must be adjudicated in Article III courts."[53]

Cases that implicate the Seventh Amendment because of a common-law cause of action typically come with a common-law remedy.[54] As the Supreme Court has explained, the remedy often is "all but dispositive."[55] In *Jarkesy*, for example, the claim was securities fraud—closely related to the quintessentially common-law claim of fraud—and the remedy was a civil penalty—akin to the "prototypical common law remedy" of money damages.[56] The Court thus held that the claim belonged before a jury in an Article III court, rather than in an SEC hearing room. Similarly, in *Tull v. United States*, the United States sought to recover civil penalties for violations of the federal environmental laws, and civil penalties are "a type of remedy at common law that could only be enforced in courts of law," where the jury-trial right attached.[57] And in *Granfinanciera, S.A. v. Nordberg*, the Supreme Court held that an action to avoid a fraudulent transfer required a jury because, at common law, such an action was "traditionally provided by law courts or on the law side of courts having both legal and equitable dockets."[58] The upshot of *Jarkesy* and the Supreme Court's other Seventh Amendment cases is that if the cause of action sounds in the common law, and the remedy is a remedy that would have been available in a court of law rather than in chancery, the claim *must* be adjudicated before a jury in an Article III court.[59]

There is one exception to this rule. A claim that implicates a "public right" need not be litigated before a jury in an Article III court even if the cause of action sounded in the common law and the remedy were available only in a court of law. Thus, for example, the Supreme Court

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[51] *Id.* at 133 (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 56 (1989)).

[52] *Id.* at 134 (quoting *Granfinanciera*, 492 U.S. at 52).

[53] *Id.* at 136.

[54] *In re Express Scripts*, 176 F.4th 301, 309 n.6 (4th Cir. 2026) ("[W]hen courts today try to evaluate an equitable 'claim' separately from an equitable 'remedy,' they are often asking a question without any clear historical answer—at least insofar as that claim originated in equity's concurrent jurisdiction. This difficulty perhaps explains the Supreme Court's repeated statements that the remedial inquiry is 'more important.'").

[55] *Jarkesy*, 603 U.S. at 122–23 (discussing *Tull*, 481 U.S. at 422).

[56] *Id.* at 122–26.

[57] *Id.*; *Tull*, 481 U.S. at 422. *Tull*, of course, originated in federal court, but a jury trial was not afforded.

[58] 492 U.S. at 49.

[59] See *Express Scripts*, 176 F.4th at 309.

held in *Oil States Energy Services v. Greene's Energy Group* that the grant of a patent is a public right which may be adjudicated in an executive-branch agency rather than an Article III court notwithstanding that the validity of patents was ordinarily the subject of suits at common law.[60] Only claims that, at common law, had to be decided in a court of law by its "nature" triggered the Seventh Amendment.[61] This public-rights exception "has been applied in a handful of areas where such matters 'historically could have been determined exclusively by the executive and legislative branches' without Article III involvement."[62] Exactly what this means "is an 'area of frequently arcane distinctions and confusing precedents'"[63] because the "Court has not 'definitively explained' the distinction between public and private rights, and its precedents applying the public-rights doctrine have 'not been entirely consistent.'"[64] The doctrine at least includes revenue collection, immigration, foreign commerce, the administration of public lands,[65] and workplace safety regulation.[66] If a claim implicates a public right, Congress is free to assign the matter for adjudication as it sees fit.[67]

Throughout this matter, the parties seemed to agree that Mr. Serpe's right to a jury trial would be triggered only if he was facing a fine, because a fine is the sort of monetary remedy that typically would be available only in a court of law.[68] There was disagreement as to whether the relevant focus for that inquiry was the Authority's adjudication or the ALJ's review of the Authority's sanctions. And the parties disagreed over whether the Act and the HISA Rules concerned public or private rights. But Mr. Serpe repeatedly acknowledged that his right to a jury trial in federal court hinged on whether he faced a fine.[69]

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[60] 584 U.S. 325, 339–340 (2018).

[61] *Id.* at 340 (quoting *Stern v. Marshall*, 564 U.S. 462, 484 (2011)).

[62] *Ortega v. Off. of the Comptroller of the Currency*, 155 F.4th 394, 402 (5th Cir. 2025).

[63] *Id.* (quoting *Thomas v. Union Carbide Agric. Prods.*, 473 U.S. 568, 583 (1985)).

[64] *Oil States Energy Servs.*, 584 U.S. at 334 (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 (1982), and *Stern*, 564 U.S. at 488).

[65] *Id.* at 402–03 (collecting cases).

[66] *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442 (1977). Serious doubt has been cast as to the forcefulness of this precedent, but the Supreme Court, in *Jarkesy*, specifically recognized its continuing validity. Until the Supreme Court formally overrules it, we are bound to recognize this public-rights example.

[67] *Id.* at 455.

[68] See, e.g., Notice of Appeal to ALJ at 2–3 (arguing that the arbitrator was required to levy a fine and that such a fine would trigger Mr. Serpe's Seventh-Amendment jury-trial right).

[69] See Serpe Second Supp. Br. (May 19, 2026), https://www.ftc.gov/system/files/ftc_gov/pdf/615478.2026.05.19_2nd_notice_of_supp._auth.pdf ("[T]he availability of a civil money penalty remedy in Serpe's adjudication is 'virtually determinative in entitling [him] to a jury trial.'"). This is despite presenting what he believed to be analogous common-law causes of action to the Commission. See Opening Br. at 18–21. To be clear, Mr. Serpe's is not a case where a cause of action is so analogous that it outweighs the unavailability of a legal, rather than equitable, remedy. A strict-liability charge for the presence of illegal substances in a racehorse is not an action in debt; the Authority is not suing Mr. Serpe to collect owed money but to establish liability for an offense. See Opening Br. at 18. Nor is Mr. Serpe's case an action for fraud, breach of contract, or tortious interference. See *id.* at 19–21. Mr. Serpe is not being punished for lying to the Authority, for breaking "a promise to ride a fair race," or for "intentionally undermin[ing] the race's integrity." He is being punished because of the amount of a drug found in his horse's blood. His promises, state of mind, and intentions are irrelevant to that claim.

Now, for the first time, he argues that the entire enforcement action "must be adjudicated in federal court irrespective of whether the Seventh Amendment[70] applies because it does not concern public rights."[71] Mr. Serpe did not raise the argument before the ALJ and waited months before raising it to the Commission; he has thus forfeited the argument.[72] As we told him in our February 4, 2026, Order we will not, in reviewing the ALJ's decision, address new issues and new arguments that were not presented to the ALJ.[73] Even had Mr. Serpe timely raised this argument, however, the Commission is skeptical of its merits. One federal district court has rejected this argument outright.[74] And federal courts of appeal have recognized that "nothing in *Jarkesy* displaced an administrative agency's ability to impose equitable remedies, consistent with their statutory authority."[75] Only one court has extended *Jarkesy*'s reasoning beyond the Seventh Amendment to claims involving purely equitable relief, holding that the Commission's deceptive-advertising actions are so parallel to traditional common-law actions for deceit that Article III places them exclusively within the jurisdiction of the federal courts notwithstanding the equitable nature of the remedy.[76] The Fifth Circuit's decision in *Intuit* was, however, narrowly cabined and heavily reliant on historical records indicating that the Commission, in policing unfair methods of competition, was enforcing a common-law standard.[77] Nothing in that opinion or the history of the Act would suggest that Mr. Serpe would have been able to prevail on this argument had he raised it properly.[78]

(2) *Jarkesy* in Arbitration

The Act and rules provide Arbitrators with the power to issue fines.[79] Mr. Serpe was therefore subject, at least potentially, to the imposition of a remedy of the sort that ordinarily would have been imposed by a court of law rather than the chancery. If the Seventh Amendment applied in this context, Mr. Serpe would have been guaranteed a jury trial from the moment that he was

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[70] Mr. Serpe seeks to apply the *Jarkesy* framework outside of the Seventh Amendment context. Mot. Leave to Br. Add'l Issues at 3–4; Serpe Supp. Br. at 1. In his view, the *Jarkesy* framework is merely a "necessary part of the Seventh Amendment analysis," Mot. Leave to Br. Add'l Issues at 3–4, that applies regardless of whether legal or equitable remedies are ultimately sought. Serpe Supp. Br. at 1–2 (discussing *Intuit, Inc. v. FTC*, 170 F.4th 411 (5th Cir. 2026)); see also *Intuit*, 170 F.4th at 416–17 n.5.

[71] Opening Br. at 24.

[72] *In re Luis Jorge Perez*, 2024 WL 3824065, at *4 (F.T.C. Aug. 8, 2024); see also *In re Luis Jorge Perez* (Comm'r Ferguson, concurring), 2024 WL 3824062, at *2 (F.T.C. Aug. 7, 2024).

[73] Order Den. In Part at 4.

[74] *Scott v. HISA*, No. 2:25-cv-632, 2025 WL 2987598, at *9 (D.N.M. Oct. 22, 2025) ("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 . . . when the HIWU seeks exclusively equitable relief.").

[75] *NLRB v. Starbucks Corp.*, 159 F.4th 455, 474 (6th Cir. 2025); see also *NLRB v. N. Mtn. Foothills Apts.*, 157 F.4th 1089, 1199–1200 (9th Cir. 2025) (equitable monetary relief award does not implicate *Jarkesy*).

[76] *Intuit, Inc. v. FTC*, 170 F.4th 411, 420 (5th Cir. 2026).

[77] *Id.* (quoting *Sears, Roebuck & Co. v. FTC*, 258 F. 307, 311 (7th Cir. 1919), and then citing *FTC v. Gratz*, 253 U.S. 421, 427 (1920)).

[78] As discussed above, none of Mr. Serpe's claimed common-law analogues are actually analogous. See *supra* n. 69.

[79] HISA Rule 3223(b).

charged with violating the ADMC Rule. But the Seventh Amendment guarantees a jury trial only where sanctions are being levied and adjudicated by a "state" actor ("state" being used in the same sense as "government" rather than referring to one of the several States).[80] And the Authority is neither the state nor a state actor.

Mr. Serpe recognizes that the Authority is a private entity.[81] Indeed, his entire nondelegation argument turns on that proposition.[82] He further recognizes that the Seventh Amendment "protect[s] only against infringement by governments,"[83] but he argues that the Authority's adjudicative process is "fairly attributable" to the government[84] and can thus "be regarded as governmental action for constitutional purposes."[85] As relevant here, the Supreme Court has indicated a private entity's conduct may be state action if "the government acts jointly with the private entity."[86] But this requires more than the mere fact that an ALJ and the Commission review the Authority's enforcement determination.

Mr. Serpe largely relies on the Commission's role in rulemaking to satisfy the state-action doctrine's test. Congress has directed the Commission to take part in the rulemaking process.[87] The Commission approves, and may even set or modify, the rules that the Authority must follow in its horseracing regulation. But "unless the [Authority] is performing a traditional, exclusive public function," "[b]eing regulated by the State does not make one a state actor."[88] And, in *Manhattan Community Access Corp. v. Halleck*, the Supreme Court explicitly recognized that "running sports associations and leagues" is not such a function.[89]

What Mr. Serpe really needs to show is that enforcement of those rules is a joint enterprise. Unlike rulemaking, however, the Commission does not actively take part in the Authority's investigative and enforcement decisions. As Mr. Serpe recognizes, administrative enforcement of

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[80] See *Thomas v. Humboldt Cnty.*, 146 S. Ct. 27, 28 (2025) (statement of Gorsuch, J., respecting the denial of certiorari) ("When a federal agency accuses someone of fraud and seeks civil penalties, the Seventh Amendment guarantees that individual the right to have the case heard by a jury of his peers—not by other agency officials who work side by side with those bringing the charges. But thanks to *Bombolis*, state and local agencies pursuing similar charges and similar relief sometimes claim that they are free to dispense with the hassle of proving their case to a jury." (referencing *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211 (1916))); see also *Nguyen v. Wells Fargo Clearing Servs.*, No. 4:24-cv-1310, 2025 WL 436062, at *4 (E.D. Mo. Feb. 7, 2025) ("[W]hatever the [government] can (or, more accurately, cannot) do in the context of civil enforcement proceedings has no bearing on what private parties can (or in this case, must) do in the context of agreeing to arbitrate their private disputes.").

[81] Opening Br. at 13.

[82] *Id.* at 25–26.

[83] *Id.* at 13 (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982)).

[84] *Id.* (quoting *Lugar*, 457 U.S. at 937).

[85] *Id.* (quoting *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995)).

[86] *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 809 (2019) (listing the "few limited circumstances" in which "a private entity can qualify as a state actor").

[87] See 15 U.S.C. § 3053; see also *Walmsley v. FTC*, 117 F.4th 1032, 1038–39 (8th Cir. 2024) (vacated on other grounds).

[88] *Halleck*, 587 U.S. at 814, 816.

[89] *Id.* at 810.

the rules is "a multi-step process"[90] that begins with the Authority.[91] The Act and the HISA Rules require the Authority to bring administrative enforcement actions through its enforcement agency, HIWU, which in the case of ADRVs adjudicates charges before an arbitral body. In this way, the Authority makes its own initial determination whether covered persons violated the rules, whether sanctions are warranted, and which sanctions are warranted—all without Commission input or involvement.[92] Instead, we wait until the Authority's decision has been made and review it as Congress has directed, either *sua sponte* or on an aggrieved party's application.

Lugar v. Edmondson Oil Co., the precedent Mr. Serpe believes most parallel to his, is a good example of what a joint enterprise actually looks like. In *Lugar*, the government created a process by which one private party could apply for attachment of a second private party's property and government officials would seize that property themselves. In other words, *Lugar* involved the government acting with a private party. Compare that to what we have here: two private parties argue their case before an impartial hearing officer, as required by government-approved rules, and then the government reviews the impartial hearing officer's determination as part of the government's regulation of a private party.

Neither *Lugar* nor *Halleck* support treating the Authority as a state actor capable of violating Mr. Serpe's Seventh Amendment rights in considering whether to levy a civil penalty against him.[93]

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[90] Opening Br. at 14.

[91] The Authority's enforcement actions occur pursuant to HISA Rules the Commission has approved, and the Commission at all times maintains oversight over the Authority, even if the Commission does not conduct initial enforcement investigations and proceedings.

[92] Mr. Serpe argues, for the first time in this matter, that this scheme violates the Supreme Court's private non-delegation doctrine. Opening Br. at 25. He has forfeited this argument. See *In re Luis Jorge Perez*, 2024 WL 3824065, at *4 (F.T.C. Aug. 8, 2024); see also *In re Luis Jorge Perez* (Comm'r Ferguson, concurring), 2024 WL 3824062, at *2 (F.T.C. Aug. 7, 2024). In any event, his argument is contrary to the consistent position of this Commission across extensive litigation in the federal courts of appeals and the Supreme Court. See Brief for the Federal Respondents, *Walmsley v. FTC*, 145 S. Ct. 2870 (2025) (No. 24-420); Brief for the Federal Respondents in Opposition, *Oklahoma v. United States*, 145 S. Ct. 2836 (2025) (No. 32-402); Petition for a Writ of Certiorari, *FTC v. Nat'l Horsemen's Benevolent & Protective Ass'n*, 145 S. Ct. 2837 (2025) (No. 24-429); see also *Oklahoma v. United States*, 163 F.4th 294 (6th Cir. 2025). HIWU is "subject to the FTC's pervasive surveillance and authority" and any sanction it imposes is necessarily contingent on our approval. *Oklahoma*, 163 F.4th at 311 (6th Cir. 2025) (citing *FCC v. Consumers' Rsch.*, 606 U.S. 656, 695 (2025)); see also 15 U.S.C. § 3058(b), (c) (providing that the Commission, on its own motion, can review the Arbitrator's and the ALJ's decisions); but see *Nat'l Horsemen's Benevolent and Protective Ass'n v. Black*, — F.4th —, No. 23-10520, 2026 WL 1689717 (5th Cir. 2026). This satisfies the private non-delegation doctrine. And, as the Authority points out, it is especially ironic to make the argument in this case, where the Commission *sua sponte* granted review, demonstrating the active role the Commission has taken in overseeing the Authority. Answer Br. at 24.

[93] Mr. Serpe also argues for the first time that his Fifth Amendment rights have been violated. This argument has been forfeited. *In re Luis Jorge Perez*, 2024 WL 3824065, at *4 (F.T.C. Aug. 8, 2024); see also *In re Luis Jorge Perez* (Comm'r Ferguson, concurring), 2024 WL 3824062, at *2 (F.T.C. Aug. 7, 2024). Because the Authority is not a state actor, though, this argument would have failed regardless. See *Navarro v. U.S. Ctr. for SafeSport*, — F.4th —, 2026 WL 1129085, at *7–9 (4th Cir. 2026) (affirming district court's holding that sport regulatory organizations were "not state actors and thus [] not subject to the Due Process Clause of the Fifth Amendment"). Mr. Serpe has made no

(3) *Jarkesy* and the ALJ

Having determined that only ALJ or Commission proceedings under the Act may implicate the Seventh Amendment, and even then only when the covered person faces the prospect of a fine, we turn to whether the ALJ's review fits that bill. It does not because we hold that, if the Authority declines to impose a fine, neither the ALJ nor the Commission are authorized to impose one. Mr. Serpe therefore never faced the prospect of having a monetary penalty imposed by a government actor, which would have triggered his Seventh Amendment right to a jury trial.

Both the Act itself and longstanding common-law principles foreclose the ALJ or Commission from imposing a fine where the Authority declined to do so. *First*, Congress, by using the word "modify" authorized only incremental changes to sanctions actually imposed, rather than the imposition of new sanctions that were not imposed. Adding a fine where the Authority determined that only equitable relief was necessary would be a transformative change beyond the scope of that authorization. *Second*, background principles of American law counsel against allowing a reviewing body to punish a litigant for seeking review or reward a litigant that did not seek review. It would contravene these principles for an ALJ to add a fine that no party wanted.

a) Authority to Impose Fines

The question in which Mr. Serpe's Seventh Amendment claim turns is whether the ALJ had the authority to impose a fine *sua sponte* where the Authority forewent imposing a fine, such that Mr. Serpe was potentially subject to the imposition by a government actor of a sanction similar to those imposed by the law courts at common law. If not, then Mr. Serpe never faced the prospect of a fine by a government actor and his Seventh Amendment right, as recognized by *Jarkesy*, was never implicated. In seeking review, Mr. Serpe and the Authority were in agreement: the ALJ cannot impose a fine *sua sponte*. Mr. Serpe best presented the parties' agreement: "The ALJ may not . . . impose [a] fine on *de novo* review. The ALJ must instead 'set aside' the Decision and direct HISA, through HIWU, to enforce its charge against [Mr. Serpe] in an Article III court[.]"[94] Mr. Serpe now argues otherwise, but we agree with his original position.

Mr. Serpe argues that the Act "give[s] FTC ALJs authority to review cases and impose civil sanctions they deem appropriate regardless of the sanctions imposed by HIWU arbitrators."

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argument that the ALJ or the Commission itself has deprived him of constitutional due process, and so any Fifth Amendment claim would have failed.

Nor has Mr. Serpe argued that the Authority deprived him of statutory due process. The Act provides that HISA rules "shall provide for adequate due process, including impartial hearing officers or tribunals commensurate with the seriousness of the alleged . . . rule violation and the possible civil sanctions for such violation." 15 U.S.C. § 3057(c). Even had he argued that this statutory protection was violated, the Authority's conduct resulted in no additional consequences. The only "consequence" Mr. Serpe faced as a result was a guarantee that the process would *not* violate his constitutional rights.

[94] Notice of Appeal to ALJ at 3. At argument, Mr. Serpe clarified that this position was intended only to convey that the Seventh Amendment prevented the ALJ from levying a fine, not that the Act did. Oral Arg. Tr. at 12 ¶¶ 21–24.

Without further elaboration, he asserts that "[t]he phrase 'final civil sanction' refers to the set of sanctions that the Arbitrator imposed."[95] And, he argues, "adding an additional sanction is a modification of the total mix of sanctions that HISA allows to be 'modif[ied].'"[96] But to say that the imposition of a fine "modifies" a suspension is akin to saying "the French Revolution 'modified' the status of the French nobility."[97]

Reading a grant of authority to "modify" a decision as authorizing the fundamental transmutation of that decision betrays the word. "Modify" "connotes moderate change" and would lose its nuance if stretched to "mean both 'to change in some respects' and 'to change fundamentally.'"[98] Mr. Serpe nevertheless argues that "modify" means something different here than it does everywhere else for two reasons.[99] First, this case involves the word in an adjudicative context, not a rulemaking context.[100] We do not understand why the use of the word in a statute about rulemaking would carry an entirely different meaning than its use in a statute about adjudications, and Mr. Serpe fails to elaborate. The word's connotation does not change depending on what one is modifying. Whether one is modifying a rule or a sanction, "virtually every dictionary ... says that 'to modify' means to change moderately or in a minor fashion."[101] Mr. Serpe has no answer for this.

Second, he argues that the context in which the word "modify" appears in Section 1209 of the Act (the adjudication section)[102] makes clear that it means "to change" without the ordinary connotation of "limitation or increment"[103] because it "is grouped with the authority to 'affirm' and 'reverse' the sanction."[104] His argument fails. For one thing, he cannot explain why its appearance alongside "affirm" and "reverse" would fundamentally alter its ordinary meaning of minor or moderate change. Worse still, he commits the very sin he decries by ignoring statutory context. The adjudication section provides that the ALJ may "affirm, reverse, modify, set aside, or remand" the Authority's "final civil sanction."[105] Section 1204, however, which governs the Commission's supervision of the Authority's rulemaking, grants the Commission the power to "abrogate, add to, and modify the rules of the Authority."[106]

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[95] Opening Br. at 9.
[96] *Id.* (brackets in original).
[97] *MCI Telecomms. v. AT&T*, 512 U.S. 218, 227–28 (1994).
[98] See *id.* at 227–28; see also *Biden v. Nebraska*, 600 U.S. 477, 494–95 (2023).
[99] Opening Br. at 9 n.34 (citing *Biden v. Nebraska*, 600 U.S. at 494, and then citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).
[100] *Id.*
[101] *MCI Telecomms.*, 512 U.S. at 225.
[102] 15 U.S.C. § 3058(b)(3)(A)(ii), (c)(3)(A)(ii).
[103] *Ibid.*
[104] Opening Br. at 9 n.34 (citing *Brown & Williamson*, 529 U.S. at 133).
[105] 15 U.S.C. § 3058(b)(3)(A)(ii), (c)(3)(A)(ii).
[106] *Id.* § 3053(e).

"Add to" does the work in the rulemaking section that Mr. Serpe argues "modify" does in the adjudication section.[107] "Modify" in the rulemaking section therefore quite obviously carries the word's ordinary connotation of limitation or increment rather than wholesale change. If it did not, it would be mere surplus to "add to," which we cannot interpret it to be.[108] When Congress uses "'identical words [] in different parts of the same statute,'" the "usual presumption" is that the words "carry 'the same meaning.'"[109] In the presence of this presumption, Mr. Serpe would need an especially compelling explanation of why "modify" means one thing in the rulemaking section, and something entirely different in the adjudication section. And given that Congress's inclusion of language in one section of a statute but exclusion of that language in another section of the same statute is intentional,[110] and that we must give full effect to Congress's intentional inclusions and exclusions,[111] Mr. Serpe also would need an especially compelling explanation of what work "add to" is doing alongside "modify" in the rulemaking section given that he reads "modify" to mean "add to" in the adjudication section. But he offers no explanation for either incongruity. He therefore gives us no reason to read "modify" to bear anything other than its usual connotation of limited or moderate change.

Of course, this does not leave the Commission without recourse in conducting oversight of the Authority. Although "modify" does not allow *adding* a sanction, Congress gave the ALJ the ability to "set aside," "in whole or in part."[112] Congress has therefore given us the authority to change a sanction fundamentally by *removing* all or part of a sanction. And, as Mr. Serpe argued in seeking review, should the ALJ or Commission think imposed sanctions are too lenient, we are authorized to "remand" the matter to the Authority for further proceedings. But Congress withheld from the ALJ and the Commission the authority to add a species of sanction that the Authority declined to impose—a withholding that statutory context makes clear was intentional and to which we must give full effect.

b) Party Presentation Principles & Greenlaw

There is a second reason why it was improper for the ALJ to impose a fine in Mr. Serpe's case: It was beyond the scope of appellate review. The American legal system is built on the principle of party presentation; when it comes to what is best for each party in litigation, courts

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[107] *Walmsley*, 117 F.4th at 1040.

[108] *Polselli v. IRS*, 598 U.S. 432, 441 (2023) ("We ordinarily aim to give effect to every clause and word of a statute." (cleaned up)).

[109] Answer Br. at 10 (citing *Henson v. Santander Consumer USA*, 582 U.S. 79, 85 (2017) (quoting *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005)).

[110] *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (cleaned up)).

[111] *Mullin v. Al Otro Lado*, 609 U.S. — (2026), slip op. at 10 (June 25, 2026) ("We 'are required to give effect to Congress' express inclusions and exclusions.'" (quoting *Nat'l Ass'n of Manufacturers v. Dep't of Defense*, 583 U.S. 109, 126 (2018)).

[112] 15 U.S.C. § 3058(b)(3)(A)(ii).

assume that the parties know best and decide the case accordingly.[113] Of course, the Commission is not an Article III court. Our task is oversight of the Authority and, we, unlike the courts, can review the Authority's sanctions on our own motion. When we do so, we set the scope of review and have parties brief the questions we believe need answering. But, in the vast majority of cases, ALJ review is initiated by an aggrieved party, and the ALJ sits in the shoes of an appellate court.

When sitting as neutral arbiters judging what is proper under the Act and HISA Rules, the ALJ must take care to act accordingly and "decide only questions presented by the parties," absent good reason to abstain.[114] This also means that the ALJ must abide by the "longstanding rule" against "alter[ing] a judgment to benefit a nonappealing party."[115] In accordance with the scheme Congress set out in the Act, the ALJ may grant only the relief requested by the applicant for review, whether that be the aggrieved party or the Commission itself, absent the extraordinary circumstances that Article III courts have recognized necessary to justify departure from this longstanding rule.[116]

As a practical matter, we recognize that Congress has decided that the Authority cannot appeal its own final civil sanctions,[117] meaning that the ALJ must typically abstain from modifying those sanctions in the Authority's favor.[118] The ALJ's departure from this cardinal rule was error, and we reverse it.

c) Propriety of the Fine

Because Mr. Serpe's Seventh Amendment jury-trial right did not attach before the ALJ's review, and because the ALJ was not authorized to impose a civil penalty that would have triggered that right, we need not address whether imposition of the fine would have been appropriate nor whether the *Jarkesy* framework applies in this case.

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

[114] *Id.* (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987)); see also *id.* at 262–63 (Alito, J., dissenting) ("A reviewing court will generally address an argument *sua sponte* only to correct the most patent and serious errors," as required to prevent "grossly prejudicial errors of law that undermine confidence in our legal system").

[115] *Id.*at 244 (majority op.).

[116] See *In re M-A-S-*, 24 I. & N. Dec. 762, 767 n.2 (B.I.A. 2009) (rejecting respondent's argument that the immigration judge needed to impose a bond, so that he could pay it and be released, because "[t]he argument that the Immigration Judge should have placed additional conditions on" respondent "would normally come from the DHS, and the DHS has not advanced such an argument on appeal"); see also *In re Wendy Cabrera*, AXXX XX2 063, 2009 WL 2437127, at *2 n.4 (B.I.A. July 24, 2009) ("[T]he immigration judge erred . . . . [but] since the DHS has not appealed the decisions below, we will not disturb [them]."); *In re Jaime Humberto Garcia-Tavera*, AXXX XX8 019, 2009 WL 952489, at *2 (B.I.A. Mar. 19, 2009) ("[T]his Board may not rectify the Immigration Judge's mistake and order the respondent detained without bond" because DHS "has not appealed the Immigration Judge's erroneous order").

[117] See 15 U.S.C. § 3058(b)(1) (allowing for ALJ review only "on application by the Commission or a person aggrieved by the civil sanction").

[118] See *Greenlaw*, 554 U.S. at 245–46 ("Congress has eased our decision by specifying the instances in which the Government may seek appellate review of a sentence[.]").

* * *

For the above reasons, we **AFFIRM IN PART** the Administrative Law Judge's decision, and **REVERSE IN PART**. The final civil sanctions issued by the Authority are upheld but the $25,000 fine imposed by the ALJ was improper and cannot stand.

By the Commission.

April J. Tabor
Secretary

TAB 2

144 S.Ct. 2117 (2024)

SECURITIES AND EXCHANGE COMMISSION, Petitioner

v.

George R. JARKESY, Jr., et al.

No. 22-859.

Supreme Court of United States.

Argued November 29, 2023.
Decided June 27, 2024.

2120 *2120 ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Brian H. Fletcher, Principal Deputy Solicitor General, for Petitioner.

S. Michael McColloch, Dallas, TX, for Respondent.

Elizabeth B. Prelogar, Solicitor General Counsel of Record, Brian M. Boynton, Principal Deputy Assistant Attorney General, Malcolm L. Stewart, Deputy Solicitor General, Vivek Suri, Nicole Frazer Reaves, Assistants to the Solicitor General, Mark B. Stern, Joshua M. Salzman, Daniel Aguilar, Attorneys, Department of Justice, Washington, D.C., Megan Barbero, General Counsel, Michael A. Conley, Solicitor, Dominick v. Freda, Assistant General Counsel, Paul G. Alvarez, Senior Appellate Counsel, Securities and Exchange Commission, Washington, D.C., for Petitioner.

Syllabus[*]

In the aftermath of the Wall Street Crash of 1929, Congress passed a suite of laws designed to combat securities fraud and increase market transparency. Three such statutes are relevant: The Securities Act of 1933, the Securities
2121 Exchange Act of 1934, and the Investment Advisers Act *2121 of 1940. These Acts respectively govern the registration of securities, the trading of securities, and the activities of investment advisers. Although each regulates different aspects of the securities markets, their pertinent provisions—collectively referred to by regulators as "the antifraud provisions," App. to Pet. for Cert. 73a, 202a—target the same basic behavior: misrepresenting or concealing material facts.

To enforce these Acts, Congress created the Securities and Exchange Commission. The SEC may bring an enforcement action in one of two forums. It can file suit in federal court, or it can adjudicate the matter itself. The forum the SEC selects dictates certain aspects of the litigation. In federal court, a jury finds the facts, an Article III judge presides, and the Federal Rules of Evidence and the ordinary rules of discovery govern the litigation. But when the SEC adjudicates the matter in-house, there are no juries. The Commission presides while its Division of Enforcement prosecutes the case. The Commission or its delegee—typically an Administrative Law Judge—also finds facts and decides discovery disputes, and the SEC's Rules of Practice govern.

One remedy for securities violations is civil penalties. Originally, the SEC could only obtain civil penalties from unregistered investment advisers in federal court. Then, in 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act. The Act authorized the SEC to impose such penalties through its own in-house proceedings.

Shortly after passage of the Dodd-Frank Act, the SEC initiated an enforcement action for civil penalties against investment adviser George Jarkesy, Jr., and his firm, Patriot28, LLC for alleged violations of the "antifraud provisions" contained in the federal securities laws. The SEC opted to adjudicate the matter in-house. As relevant, the final order determined that Jarkesy and Patriot28 had committed securities violations and levied a civil penalty of $300,000. Jarkesy and Patriot28 petitioned for judicial review. The Fifth Circuit vacated the order on the ground that adjudicating the matter in-house violated the defendants' Seventh Amendment right to a jury trial.

Held: When the SEC seeks civil penalties against a defendant for securities fraud, the Seventh Amendment entitles the defendant to a jury trial. Pp. 2127-2139.

(a) The question presented by this case—whether the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties for securities fraud—is straightforward. Following the analysis set forth in *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26, and *Tull v. United States*, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 865, this action implicates the Seventh Amendment because the SEC's antifraud provisions replicate common law fraud. And the "public rights" exception to Article III jurisdiction does not apply, because the present action does not fall within any of the distinctive areas involving governmental prerogatives where the Court has concluded that a matter may be resolved outside of an Article III court, without a jury.

(b) The Court first explains why this action implicates the Seventh Amendment.

(1) The right to trial by jury is "of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right" has always been and "should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486, 55 S.Ct. 296, 79 L.Ed. 603. When the British attempted to evade American juries by siphoning
2122 adjudications to juryless admiralty, vice admiralty, and *2122 chancery courts, the Americans protested and eventually cited the British practice as a justification for declaring Independence. In the Revolution's aftermath, concerns that the proposed Constitution lacked a provision guaranteeing a jury trial right in civil cases was perhaps the "most success[ful]" critique leveled against the document during the ratification debates. The Federalist No. 83, p. 495. To fix that flaw, the Framers promptly adopted the Seventh Amendment. Ever since, "every encroachment upon [the jury trial right] has been watched with great jealousy." Parsons v. Bedford, 3 Pet. 433, 28 U.S. 433, 7 L.Ed. 732. Pp. 2127-2129.

(2) The Seventh Amendment guarantees that in "[s]uits at common law ... the right of trial by jury shall be preserved." The right itself is not limited to the "common-law forms of action recognized" when the Seventh Amendment was ratified. *Curtis v. Loether*, 415 U.S. 189, 193, 94 S.Ct. 1005, 39 L.Ed.2d 260. Rather, it "embrace[s] all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume." *Parsons*, 3 Pet. at 447. That includes statutory claims that are "legal in nature." *Granfinanciera*, 492 U.S. at 53, 109 S.Ct. 2782. To determine whether a suit is legal in nature, courts must consider whether the cause of action resembles common law causes of action, and whether the remedy is the sort that was traditionally obtained in a court of law. Of these factors, the remedy is the more important. And in this case, the remedy is all but dispositive. For respondents' alleged fraud, the SEC seeks civil penalties, a form of monetary relief. Such relief is legal in nature when it is designed to punish or deter the wrongdoer rather than solely to "restore the status quo." *Tull*, 481 U.S. at 422, 107 S.Ct. 1831. The Acts condition the availability and size of the civil penalties available to the SEC based on considerations such as culpability, deterrence, and recidivism. See §§ 77h-1; 78u-2, 80b-3. These factors go beyond restoring the status quo and so are legal in nature. The SEC is also not obligated to use civil penalties to compensate victims. SEC civil penalties are thus "a type of remedy at common law that could only be enforced in courts of law." *Tull*, 481 U.S. at 422, 107 S.Ct. 1831. This suit implicates the Seventh Amendment right and a defendant would be entitled to a jury on these claims.

The close relationship between federal securities fraud and common law fraud confirms that conclusion. Both target the same basic conduct: misrepresenting or concealing material facts. By using "fraud" and other common law terms of art when it drafted the federal securities laws, Congress incorporated common law fraud prohibitions into those laws. This Court therefore often considers common law fraud principles when interpreting federal securities law. See, *e.g.*, *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 343-344, 125 S.Ct. 1627, 161 L.Ed.2d 577. While federal securities fraud and common law fraud are not identical, the close relationship between the two confirms that this action is "legal in nature." *Granfinanciera*, 492 U.S. at 53, 109 S.Ct. 2782. Pp. 2128-2131.

(c) Because the claims at issue here implicate the Seventh Amendment, a jury trial is required unless the "public rights" exception applies. Under this exception, Congress may assign the matter for decision to an agency without a jury, consistent with the Seventh Amendment. For the reasons below, the exception does not apply. Pp. 2131-2139.

(1) The Constitution prevents Congress from "withdraw[ing] from judicial cognizance any matter which, from its nature,
2123 is the subject of a suit at the common law." *Murray's Lessee* v. *Hoboken Land &* *2123 *Improvement Co.*, 18 How. 272, 284, 15 L.Ed. 372. Once such a suit "is brought within the bounds of federal jurisdiction," an Article III court must decide it, with a jury if the Seventh Amendment applies. *Stern v. Marshall*, 564 U.S. 462, 484, 131 S.Ct. 2594, 180 L.Ed.2d 475.

On that basis, this Court has repeatedly explained that matters concerning private rights may not be removed from Article III courts. See, *e.g.*, *Murray's Lessee*, 18 How. at 284. If a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory. *Stern*, 564 U.S. at 484, 131 S.Ct. 2594.

The Court also recognizes a class of cases concerning "public rights." Such matters "historically could have been determined exclusively by [the executive and legislative] branches." *Id.*, at 493, 131 S.Ct. 2594 (internal quotation marks omitted). No involvement by an Article III court in the initial adjudication of public rights claims is necessary. Certain categories that have been recognized as falling within the exception include matters concerning: the collection of revenue; aspects of customs law; immigration law; relations with Indian tribes; the administration of public lands; and the granting of public benefits. The Court's opinions governing this exception have not always spoken in precise terms. But "even with respect to matters that arguably fall within the scope of the `public rights' doctrine, the presumption is in favor of Article III courts." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69, n. 23, 102 S.Ct. 2858, 73 L.Ed.2d 598 (plurality opinion). Pp. 2131-2134.

(2) In *Granfinanciera*, this Court previously considered whether the Seventh Amendment guarantees the right to a jury trial "in the face of Congress' decision to allow a non-Article III tribunal to adjudicate" a statutory "fraud claim." 492 U.S. at 37, 50, 109 S.Ct. 2782. There the issue was whether Congress's designation of fraudulent conveyance actions as "core [bankruptcy] proceedings" authorized non-Article III bankruptcy judges to hear them without juries. *Id.*, at 50, 109 S.Ct. 2782. The Court held that the designation was not permissible, even under the public rights exception. To determine whether the claim implicated the Seventh Amendment, the court applied the principles distilled in *Tull*. Surveying English cases and considering the remedy these suits provided, the Court concluded that fraudulent conveyance actions were "quintessentially suits at common law." *Granfinanciera*, 492 U.S. at 56, 109 S.Ct. 2782. Because these actions were akin to "suits at common law" and were not "closely intertwined" with the bankruptcy process, the Court held that the public rights exception did not apply, and a jury was required. *Id.*, at 54, 56, 109 S.Ct. 2782. Pp. 2134-2135.

(3) *Granfinanciera* effectively decides this case. The action here was brought under the "anti-fraud provisions" of the federal securities laws and provide civil penalties that can "only be enforced in courts of law." *Tull*, 481 U.S. at 422, 107 S.Ct. 1831. They target the same basic conduct as common law fraud, employ the same terms of art, and operate pursuant to similar legal principles. In short, this action involves a "matter[] of private rather than public right." *Granfinanciera*, 492 U.S. at 56, 109 S.Ct. 2782. Pp. 2135-2136.

(4) The SEC claims that the public rights exception applies because Congress created "new statutory obligations, impose[d] civil penalties for their violation, and then commit[ted] to an administrative agency the function of deciding whether a violation ha[d] in fact occurred." Brief for Petitioner 21. *Granfinanciera* does away with much of the SEC's
2124 argument. Congress cannot "conjure away the Seventh *2124 Amendment by mandating that traditional legal claims be ... taken to an administrative tribunal." 492 U.S. at 52, 109 S.Ct. 2782. The SEC's argument that *Granfinanciera* does not apply because the Government is the party bringing this action also fails. What matters is the substance of the suit, not where it is brought, who brings it, or how it is labeled. *Northern Pipeline Constr. Co.*, 458 U.S. at 69 n. 23, 102 S.Ct. 2858 (plurality opinion). Pp. 2135-2137.

(5) The Court's opinion in *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 97 S.Ct. 1261, 51 L.Ed.2d 464, is not to the contrary. The litigation in that case arose under the Occupational Health and Safety Act. Facing agency enforcement actions, two employers alleged that the agency's adjudicatory authority violated the Seventh Amendment. See *id.*, at 448-449, 97 S.Ct. 1261. The Court concluded that Congress could assign the OSH Act adjudications to an agency because the claims involved "a new cause of action, and remedies therefor, unknown to the common law." *Id.*, at 461, 97 S.Ct. 1261. The cases *Atlas Roofing* relied upon applied the "public rights" exception to actions that were "`not ... suit[s] at common law or in the nature of such ... suit[s].'" *Id.*, at 453, 97 S.Ct. 1261. *Atlas Roofing* therefore does not apply here, where the statutory claim is "`in the nature of'" a common law suit. *Id.*, at 453, 97 S.Ct. 1261. Later rulings also foreclose reading *Atlas Roofing* as the SEC does. This Court clarified in *Tull* that the Seventh Amendment does apply to novel statutory regimes, so long as the statutory claims are akin to common law claims. See 481 U.S. at 421-423, 107 S.Ct. 1831. And the Court has explained that the public rights exception does not apply automatically whenever Congress assigns a matter to an agency for adjudication. See *Granfinanciera*, 492 U.S. at 52, 109 S.Ct. 2782. Pp. 2136-2139.

The Court does not reach the remaining issues in this case. 34 F.4th 446, affirmed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, KAVANAUGH, and BARRETT, JJ., joined. GORSUCH, J., filed a concurring opinion, in which THOMAS, J., joined. SOTOMAYOR, J., filed a dissenting opinion, in which KAGAN and JACKSON, JJ., joined.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

In 2013, the Securities and Exchange Commission initiated an enforcement action against respondents George Jarkesy, Jr., and Patriot28, LLC, seeking civil penalties for alleged securities fraud. The SEC chose to adjudicate the matter in-
2125 house before one of its administrative law *2125 judges, rather than in federal court where respondents could have proceeded before a jury. We consider whether the Seventh Amendment permits the SEC to compel respondents to defend themselves before the agency rather than before a jury in federal court.

I

A

In the aftermath of the Wall Street Crash of 1929, Congress passed a suite of laws designed to combat securities fraud and increase market transparency. Three such statutes are relevant here: The Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940. 48 Stat. 74, 15 U.S.C. §§ 77a *et seq.*; 48 Stat. 881, 78a *et seq.*; 54 Stat. 847, 80b-1 *et seq.* These Acts respectively govern the registration of securities, the trading of securities, and the activities of investment advisers. Their protections are mutually reinforcing and often overlap. See *Lorenzo v. SEC*, 587 U.S. 71, 80, 139 S.Ct. 1094, 203 L.Ed.2d 484 (2019). Although each regulates different aspects of the securities markets, their pertinent provisions —collectively referred to by regulators as "the antifraud provisions," App. to Pet. for Cert. 73a, 202a—target the same basic behavior: misrepresenting or concealing material facts.

The three antifraud provisions are Section 17(a) of the Securities Act, Section 10(b) of the Securities Exchange Act, and Section 206 of the Investment Advisers Act. Section 17(a) prohibits regulated individuals from "obtain[ing] money or property by means of any untrue statement of a material fact," as well as causing certain omissions of material fact. 15 U.S.C. § 77q(a)(2). As implemented by Rule 10b-5, Section 10(b) prohibits using "any device, scheme, or artifice to defraud," making "untrue statement[s] of ... material fact," causing certain material omissions, and "engag[ing] in any act ... which operates or would operate as a fraud." 17 C.F.R. § 240.10b-5 (2023); see 15 U.S.C. § 78j(b). And finally, Section 206(b), as implemented by Rule 206(4)-8, prohibits investment advisers from making "any untrue statement of a material fact" or engaging in "fraudulent, deceptive, or manipulative" acts with respect to investors or prospective investors. 17 C.F.R. §§ 275.206(4)-8(a)(1), (2); see 15 U.S.C. § 80b-6(4).

To enforce these Acts, Congress created the SEC. The SEC may bring an enforcement action in one of two forums. First, the Commission can adjudicate the matter itself. See §§ 77h-1, 78u-2, 78u-3, 80b-3. Alternatively, it can file a suit in federal court. See §§ 77t, 78u, 80b-9. The SEC's choice of forum dictates two aspects of the litigation: The procedural protections enjoyed by the defendant, and the remedies available to the SEC.

Procedurally, these forums differ in who presides and makes legal determinations, what evidentiary and discovery rules apply, and who finds facts. Most pertinently, in federal court a jury finds the facts, depending on the nature of the claim. See U. S. Const., Amdt. 7. In addition, a life-tenured, salary-protected Article III judge presides, see Art. III, § 1, and the litigation is governed by the Federal Rules of Evidence and the ordinary rules of discovery.

Conversely, when the SEC adjudicates the matter in-house, there are no juries. Instead, the Commission presides and finds facts while its Division of Enforcement prosecutes the case. The Commission may also delegate its role as judge and factfinder to one of its members or to an administrative law judge (ALJ) that it employs. See 15 U.S.C. § 78d-1. In
2126 these *2126 proceedings, the Commission or its delegee decides discovery disputes, see, *e.g.*, 17 C.F.R. § 201.232(b), and the SEC's Rules of Practice govern, see 17 C.F.R. § 201.100 *et seq.* The Commission or its delegee also determines the scope and form of permissible evidence and may admit hearsay and other testimony that would be inadmissible in federal court. See §§ 201.320, 201.326.

When a Commission member or an ALJ presides, the full Commission can review that official's findings and conclusions, but it is not obligated to do so. See § 201.360; 15 U.S.C. § 78d-1. Judicial review is also available once the proceedings have concluded. See §§ 77i(a), 78y(a)(1), 80b-13(a). But such review is deferential. By law, a reviewing court must treat the agency's factual findings as "conclusive" if sufficiently supported by the record, *e.g.*, § 78y(a)(4); see *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971), even when they rest on evidence that could not have been admitted in federal court.

The remedy at issue in this case, civil penalties, also originally depended upon the forum chosen by the SEC. Except in cases against registered entities, the SEC could obtain civil penalties only in federal court. See Insider Trading Sanctions Act of 1984, § 2, 98 Stat. 1264; Securities Enforcement Remedies and Penny Stock Reform Act of 1990, §§ 101, 201-202, 104 Stat. 932-933, 935-938. That is no longer so. In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), 124 Stat. 1376. That Act "ma[de] the SEC's authority in administrative penalty proceedings coextensive with its authority to seek penalties in Federal court." H. R. Rep. No. 111-687, p. 78 (2010). In other words, the SEC may now seek civil penalties in federal court, or it may impose them through its own in-house proceedings. See Dodd-Frank Act, § 929P(a), 124 Stat. 1862-1864 (codified in relevant part as amended at 15 U.S.C. §§ 77h-1(g), 78u-2(a), 80b-3(i)(1)). Civil penalties rank among the SEC's most potent enforcement tools. These penalties consist of fines of up to $725,000 per violation. See §§ 77h-1(g), 78u-2, 80b-3(i). And the SEC may levy these penalties even when no investor has actually suffered financial loss. See *SEC v. Blavin*, 760 F.2d 706, 711 (CA6 1985) (*per curiam*).

B

Shortly after passage of the Dodd-Frank Act, the SEC began investigating Jarkesy and Patriot28 for securities fraud. Between 2007 and 2010, Jarkesy launched two investment funds, raising about $24 million from 120 "accredited" investors—a class of investors that includes, for example, financial institutions, certain investment professionals, and high net worth individuals. App. to Pet. for Cert. 72a-73a, 110a, n. 72; see 17 C.F.R. § 230.501. Patriot28, which Jarkesy managed, served as the funds' investment adviser. According to the SEC, Jarkesy and Patriot28 misled investors in at least three ways: (1) by misrepresenting the investment strategies that Jarkesy and Patriot28 employed, (2) by lying about the identity of the funds' auditor and prime broker, and (3) by inflating the funds' claimed value so that Jarkesy and Patriot28 could collect larger management fees. App. to Pet. for Cert. 80a-86a, 95a-105a. The SEC initiated an enforcement action, contending that these actions violated the antifraud provisions of the Securities Act, the Securities Exchange Act, and the Investment Advisers Act, and sought civil penalties and other remedies.

Relying on the new authority conferred by the Dodd-Frank Act, the SEC opted to adjudicate the matter itself rather than
2127 in *2127 federal court. In 2014, the presiding ALJ issued an initial decision. *Id.*, at 155a-225a. The SEC reviewed the decision and then released its final order in 2020. *Id.*, at 71a-154a. The final order levied a civil penalty of $300,000 against Jarkesy and Patriot28, directed them to cease and desist committing or causing violations of the antifraud provisions, ordered Patriot28 to disgorge earnings, and prohibited Jarkesy from participating in the securities industry and in offerings of penny stocks. *Id.*, at 152a-154a.

Jarkesy and Patriot28 petitioned for judicial review. 34 F.4th 446, 450 (CA5 2022). A divided panel of the Fifth Circuit granted their petition and vacated the final order. *Id.*, at 449-450. Applying a two-part test from *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989), the panel held that the agency's decision to adjudicate the matter in-house violated Jarkesy's and Patriot28's Seventh Amendment right to a jury trial. 34 F.4th at 451. First, the panel determined that because these SEC antifraud claims were "akin to [a] traditional action[ ] in debt," a jury trial would be required if this case were brought in an Article III court. *Id.*, at 454; see *id.*, at 453-455. It then considered whether the "public rights" exception applied. That exception permits Congress, under certain circumstances, to assign an action to an agency tribunal without a jury, consistent with the Seventh Amendment. See *id.*, at 455-459. The panel concluded that the exception did not apply, and that therefore the case should have been brought in federal court, where a jury could have found the facts pertinent to the defendants' fraud liability. Based on this Seventh Amendment violation, the panel vacated the final order. *Id.*, at 459.

It also identified two further constitutional problems. First, it determined that Congress had violated the nondelegation doctrine by authorizing the SEC, without adequate guidance, to choose whether to litigate this action in an Article III

court or to adjudicate the matter itself. See *id.*, at 459-463. The panel also found that the insulation of the SEC ALJs from executive supervision with two layers of for-cause removal protections violated the separation of powers. See *id.*, at 463-466. Judge Davis dissented. *Id.*, at 466-479. The Fifth Circuit denied rehearing en banc, 51 F.4th 644 (2022), and we granted certiorari, 600 U. S. ___, 143 S.Ct. 2688, 216 L.Ed.2d 1255 (2023).

II

This case poses 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. Our analysis of this question follows the approach set forth in *Granfinanciera* and *Tull v. United States*, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987). The threshold issue is whether this action implicates the Seventh Amendment. It does. The SEC's antifraud provisions replicate common law fraud, and it is well established that common law claims must be heard by a jury.

Since this case does implicate the Seventh Amendment, we next consider whether the "public rights" exception to Article III jurisdiction applies. This exception has been held to permit Congress to assign certain matters to agencies for adjudication even though such proceedings would not afford the right to a jury trial. The exception does not apply here because the present action does not fall within any of the distinctive areas involving governmental prerogatives where the Court has concluded that a matter may be resolved outside of an Article III court, without a jury. The Seventh
2128 Amendment therefore applies and a jury is required. Since the answer to *2128 the jury trial question resolves this case, we do not reach the nondelegation or removal issues.

A

We first explain why this action implicates the Seventh Amendment.

1

The right to trial by jury is "of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right" has always been and "should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486, 55 S.Ct. 296, 79 L.Ed. 603 (1935). Commentators recognized the right as "the glory of the English law," 3 W. Blackstone, Commentaries on the Laws of England 379 (8th ed. 1778) (Blackstone), and it was prized by the American colonists. When the English began evading American juries by siphoning adjudications to juryless admiralty, vice admiralty, and chancery courts, Americans condemned Parliament for "subvert[ing] the rights and liberties of the colonists." Resolutions of the Stamp Act Congress, Art. VIII (Oct. 19, 1765), reprinted in Sources of Our Liberties 270, 271 (R. Perry & J. Cooper eds. 1959). Representatives gathered at the First Continental Congress demanded that Parliament respect the "great and inestimable privilege of being tried by their peers of the vicinage, according to the [common] law." 1 Journals of the Continental Congress, 1774-1789, p. 69 (Oct. 14, 1774) (W. Ford ed. 1904). And when the English continued to try Americans without juries, the Founders cited the practice as a justification for severing our ties to England. See Declaration of Independence ¶20; see generally *Erlinger v. United States*, 602 U. S. ___, ___ - ___, 144 S.Ct. 1840, ___ L.Ed.2d ___ (2024).

In the Revolution's aftermath, perhaps the "most success[ful]" critique leveled against the proposed Constitution was its "want of a ... provision for the trial by jury in civil cases." The Federalist No. 83, p. 495 (C. Rossiter ed. 1961) (A. Hamilton) (emphasis deleted). The Framers promptly adopted the Seventh Amendment to fix that flaw. In so doing, they "embedded" the right in the Constitution, securing it "against the passing demands of expediency or convenience." *Reid v. Covert*, 354 U.S. 1, 10, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957) (plurality opinion). Since then, "every encroachment upon it has been watched with great jealousy." *Parsons v. Bedford*, 3 Pet. 433, 28 U.S. 433, 7 L.Ed. 732 (1830).

2

By its text, the Seventh Amendment guarantees that in "[s]uits at common law, ... the right of trial by jury shall be preserved." In construing this language, we have noted that the right is not limited to the "common-law forms of action

recognized" when the Seventh Amendment was ratified. *Curtis v. Loether*, 415 U.S. 189, 193, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974). As Justice Story explained, the Framers used the term "common law" in the Amendment "in contradistinction to equity, and admiralty, and maritime jurisprudence." *Parsons*, 3 Pet. at 446. The Amendment therefore "embrace[s] all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume." *Id.*, at 447.

The Seventh Amendment extends to a particular statutory claim if the claim is "legal in nature." *Granfinanciera*, 492 U.S. at 53, 109 S.Ct. 2782. As we made clear in *Tull*, whether that claim is statutory is immaterial to this analysis. See 481
2129 U.S. at 414-415, 417-425, 107 S.Ct. 1831, In that case, the Government sued a real *2129 estate developer for civil penalties in federal court. The developer responded by invoking his right to a jury trial. Although the cause of action arose under the Clean Water Act, the Court surveyed early cases to show that the statutory nature of the claim was not legally relevant. "Actions by the Government to recover civil penalties under statutory provisions," we explained, "historically ha[d] been viewed as [a] type of action in debt requiring trial by jury." *Id.*, at 418-419, 107 S.Ct. 1831. To determine whether a suit is legal in nature, we directed courts to consider the cause of action and the remedy it provides. Since some causes of action sound in both law and equity, we concluded that the remedy was the "more important" consideration. *Id.*, at 421, 107 S.Ct. 1831 (brackets and internal quotation marks omitted); see *id.*, at 418-421, 107 S.Ct. 1831.

In this case, the remedy is all but dispositive. For respondents' alleged fraud, the SEC seeks civil penalties, a form of monetary relief. While monetary relief can be legal or equitable, money damages are the prototypical common law remedy. See *Mertens v. Hewitt Associates*, 508 U.S. 248, 255, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993). 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." *Tull*, 481 U.S. at 422, 107 S.Ct. 1831. As we have previously explained, "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." *Austin v. United States*, 509 U.S. 602, 610, 118 S.Ct. 2801, 125 L.Ed.2d 488 (1993) (internal quotation marks omitted). And while courts of equity could order a defendant to return unjustly obtained funds, only courts of law issued monetary penalties to "punish culpable individuals." *Tull*, 481 U.S. at 422, 107 S.Ct. 1831. Applying these principles, we have recognized that "civil penalt[ies are] a type of remedy at common law that could only be enforced in courts of law." *Ibid.* The same is true here.

To start, the Securities Exchange Act and the Investment Advisers Act condition the availability of civil penalties on six statutory factors: (1) whether the alleged misconduct involved fraud, deceit, manipulation, or deliberate or reckless disregard for regulatory requirements, (2) whether it caused harm, (3) whether it resulted in unjust enrichment, accounting for any restitution made, (4) whether the defendant had previously violated securities laws or regulations, or had previously committed certain crimes, (5) the need for deterrence, and (6) other "matters as justice may require." §§ 78u-2(c), 80b-3(i)(3). Of these, several concern culpability, deterrence, and recidivism. Because they tie the availability of civil penalties to the perceived need to punish the defendant rather than to restore the victim, such considerations are legal rather than equitable.

The same is true of the criteria that determine the size of the available remedy. The Securities Act, the Securities Exchange Act, and the Investment Advisers Act establish three "tiers" of civil penalties. See §§ 77h-1(g)(2), 78u-2(b), 80b-3(i)(2). Violating a federal securities law or regulation exposes a defendant to a first tier penalty. A second tier penalty may be ordered if the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard for regulatory requirements. Finally, if those acts also resulted in substantial gains to the defendant or losses to another, or
2130 created a "significant risk" of the latter, the defendant is subject to a third tier penalty. Each successive tier *2130 authorizes a larger monetary sanction. See *ibid.*

Like the considerations that determine the availability of civil penalties in the first place, the criteria that divide these tiers are also legal in nature. Each tier conditions the available penalty on the culpability of the defendant and the need for deterrence, not the size of the harm that must be remedied. Indeed, showing that a victim suffered harm is not even required to advance a defendant from one tier to the next. Since nothing in this analysis turns on "restor[ing] the status quo," *Tull*, 481 U.S. at 422, 107 S.Ct. 1831, these factors show that these civil penalties are designed to be punitive.

The final proof that this remedy is punitive is that the SEC is not obligated to return any money to victims. See *id.*, at 422-423, 107 S.Ct. 1831. Although the SEC can choose to compensate injured shareholders from the civil penalties it

collects, see 15 U.S.C. § 7246(a), it admits that it is not required to do so, see App. to Pet. for Cert. 124a, n. 116 (citing 17 C.F.R. § 201.1100). Such a penalty by definition does not "restore the status quo" and can make no pretense of being equitable. *Tull*, 481 U.S. at 422, 107 S.Ct. 1831.

In sum, the civil penalties in this case are designed to punish and deter, not to compensate. They are therefore "a type of remedy at common law that could only be enforced in courts of law." *Ibid.* That conclusion effectively decides that this suit implicates the Seventh Amendment right, and that a defendant would be entitled to a jury on these claims. See *id.*, at 421-423, 107 S.Ct. 1831.

The close relationship between the causes of action in this case and common law fraud confirms that conclusion. Both target the same basic conduct: misrepresenting or concealing material facts. Compare 15 U.S.C. §§ 77q(a)(2), 78j(b), 80b-6(4); 17 C.F.R. §§ 240.10b-5(b), 275.206(4)-8(a)(1), with Restatement (Third) of Torts: Liability for Economic Harm, §§ 9, 13 (2018); see also, *e.g.*, *Pauwels v. Deloitte LLP*, 83 F.4th 171, 189-190 (CA2 2023) (identifying the elements of common law fraud under New York law); *Conroy v. Regents of Univ. of Cal.*, 45 Cal.4th 1244, 1254-1255, 91 Cal.Rptr.3d 532, 203 P.3d 1127, 1135 (2009) (same for California law); *Wesdem, L.L.C. v. Illinois Tool Works, Inc.*, 70 F.4th 285, 291 (CA5 2023) (same for Texas law). That is no accident. Congress deliberately used "fraud" and other common law terms of art in the Securities Act, the Securities Exchange Act, and the Investment Advisers Act. *E.g.*, 15 U.S.C. § 77q(a)(3) (prohibiting any practice "which operates ... as a fraud"). In so doing, Congress incorporated prohibitions from common law fraud into federal securities law. The SEC has followed suit in rulemakings. Rule 10b-5, for example, prohibits "any device, scheme, or artifice to defraud," and "engag[ing] in any act ... which operates or would operate as a fraud." 17 C.F.R. §§ 240.10b-5(a), (c).

Congress's decision to draw upon common law fraud created an enduring link between federal securities fraud and its common law "ancestor." *Foster v. Wilson*, 504 F.3d 1046, 1050 (CA9 2007). "[W]hen Congress transplants a common-law term, the old soil comes with it." *United States v. Hansen*, 599 U.S. 762, 778, 143 S.Ct. 1932, 216 L.Ed.2d 692 (2023) (internal quotation marks omitted). Our precedents therefore often consider common law fraud principles when interpreting federal securities law. *E.g.*, *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 343-344, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005) (evaluating pleading requirements in light of the "common-law roots of the securities fraud
2131 action"); *Schreiber v. Burlington* *2131 *Northern, Inc.*, 472 U.S. 1, 7, 105 S.Ct. 2458, 86 L.Ed.2d 1 (1985) ("The meaning the Court has given the term `manipulative' [in § 10b of the Securities Exchange Act] is consistent with the use of the term at common law...." (footnote omitted)); *Chiarella v. United States*, 445 U.S. 222, 227-229, 100 S.Ct. 1108, 63 L.Ed.2d 348 (1980) (explaining that insider trading liability under Rule 10b-5 is rooted in the common law duty of disclosure); *Basic Inc. v. Levinson*, 485 U.S. 224, 253, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988) (White, J., concurring in part and dissenting in part) ("In general, the case law developed in this Court with respect to § 10(b) and Rule 10b-5 has been based on doctrines with which we, as judges, are familiar: common-law doctrines of fraud and deceit.").

That is not to say that federal securities fraud and common law fraud are identical. In some respects, federal securities fraud is narrower. For example, federal securities law does not "convert every common-law fraud that happens to involve securities into a violation." *SEC v. Zandford*, 535 U.S. 813, 820, 122 S.Ct. 1899, 153 L.Ed.2d 1 (2002). It only targets certain subject matter and certain disclosures. In other respects, federal securities fraud is broader. For example, federal securities fraud employs the burden of proof typical in civil cases, while its common law analogue traditionally used a more stringent standard. See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-390, 103 S.Ct. 888, 74 L.Ed.2d 548 (1983). Courts have also not typically interpreted federal securities fraud to require a showing of harm to be actionable by the SEC. See, *e.g.*, *Blavin*, 760 F.2d. at 711; *SEC v. Life Partners Holdings, Inc.*, 854 F.3d 765, 779 (CA5 2017). Nevertheless, the close relationship between federal securities fraud and common law fraud confirms that this action is "legal in nature." *Granfinanciera*, 492 U.S. at 53, 109 S.Ct. 2782.

B

1

Although the claims at issue here implicate the Seventh Amendment, the Government and the dissent argue that a jury trial is not required because the "public rights" exception applies. Under this exception, Congress may assign the matter

for decision to an agency without a jury, consistent with the Seventh Amendment. But this case does not fall within the exception, so Congress may not avoid a jury trial by preventing the case from being heard before an Article III tribunal.

The Constitution prohibits Congress from "withdraw[ing] from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284, 15 L.Ed. 372 (1856). Once such a suit "is brought within the bounds of federal jurisdiction," an Article III court must decide it, with a jury if the Seventh Amendment applies. *Stern v. Marshall*, 564 U.S. 462, 484, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011). These propositions are critical to maintaining the proper role of the Judiciary in the Constitution: "Under `the basic concept of separation of powers ... that flow[s] from the scheme of a tripartite government' adopted in the Constitution, the judicial Power of the United States'" cannot be shared with the other branches. *Id.*, at 483, 131 S.Ct. 2594 (quoting *United States v. Nixon*, 418 U.S. 683, 704, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); alteration in original). Or, as Alexander Hamilton wrote in The Federalist Papers, "`there is no liberty if the power of judging be not separated
2132 from the legislative and executive powers.'" The Federalist No. 78, at *2132 466 (quoting 1 Montesquieu, The Spirit of Laws 181 (10th ed. 1773)).

On that basis, we have repeatedly explained that matters concerning private rights may not be removed from Article III courts. *Murray's Lessee*, 18 How. at 284; *Granfinanciera*, 492 U.S. at 51-52, 109 S.Ct. 2782; *Stern*, 564 U.S. at 484, 131 S.Ct. 2594. A hallmark that we have looked to in determining if a suit concerns private rights is whether it "is made of `the stuff of the traditional actions at common law tried by the courts at Westminster in 1789.'" *Id.*, at 484, 131 S.Ct. 2594 (quoting *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) (Rehnquist, J., concurring in judgment)). If a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory. *Stern*, 564 U.S. at 484, 131 S.Ct. 2594.

At the same time, our precedent has also recognized a class of cases concerning what we have called "public rights." Such matters "historically could have been determined exclusively by [the executive and legislative] branches," *id.*, at 493, 131 S.Ct. 2594 (internal quotation marks omitted), even when they were "presented in such form that the judicial power [wa]s capable of acting on them," *Murray's Lessee*, 18 How. at 284. In contrast to common law claims, no involvement by an Article III court in the initial adjudication is necessary in such a case.

The decision that first recognized the public rights exception was *Murray's Lessee*. In that case, a federal customs collector failed to deliver public funds to the Treasury, so the Government issued a "warrant of distress" to compel him to produce the withheld sum. 18 How. at 274-275. Pursuant to the warrant, the Government eventually seized and sold a plot of the collector's land. *Id.*, at 274. Plaintiffs later attacked the purchaser's title, arguing that the initial seizure was void because the Government had audited the collector's account and issued the warrant itself without judicial involvement. *Id.*, at 275.

The Court upheld the sale. It explained that pursuant to its power to collect revenue, the Government could rely on "summary proceedings" to compel its officers to "pay such balances of the public money" into the Treasury "as may be in their hands." *Id.*, at 281, 285. Indeed, the Court observed, there was an unbroken tradition—long predating the founding—of using these kinds of proceedings to "enforce payment of balances due from receivers of the revenue." *Id.*, at 278; see *id.*, at 281. In light of this historical practice, the Government could issue a valid warrant without intruding on the domain of the Judiciary. See *id.*, at 280-282. The challenge to the sale thus lacked merit.

This principle extends beyond cases involving the collection of revenue. In *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 29 S.Ct. 671, 53 L.Ed. 1013 (1909), we considered the imposition of a monetary penalty on a steamship company. Pursuant to its plenary power over immigration, Congress had excluded immigration by aliens afflicted with "loathsome or dangerous contagious diseases," and it authorized customs collectors to enforce the prohibition with fines. *Id.*, at 331-334, 29 S.Ct. 671. When a steamship company challenged the penalty under Article III, we upheld it. Congress's power over foreign commerce, we explained, was so total that no party had a "`vested right'" to import anything into the country. *Id.*, at 335, 29 S.Ct. 671 (quoting *Buttfield v. Stranahan*, 192 U.S. 470, 493, 24 S.Ct. 349, 48
2133 L.Ed. 525 (1904)). By the same token, Congress could also prohibit immigration *2133 by certain classes of persons and enforce those prohibitions with administrative penalties assessed without a jury. See *Oceanic Steam Navigation Co.*, 214 U.S. at 339-340, 29 S.Ct. 671.[1]

In *Ex parte Bakelite Corp.*, we upheld a law authorizing the President to impose tariffs on goods imported by "unfair methods of competition." 279 U.S. 438, 446, 49 S.Ct. 411, 73 L.Ed. 789 (1929). The law permitted him to set whatever tariff was necessary, subject to a statutory cap, to produce fair competition. If the President was "satisfied the unfairness [was] extreme," the law even authorized him to "exclude[]" foreign goods entirely. *Ibid.* Because the political branches had traditionally held exclusive power over this field and had exercised it, we explained that the assessment of tariffs did not implicate Article III. *Id.*, at 458, 460-461, 49 S.Ct. 411.

This Court has since held that certain other historic categories of adjudications fall within the exception, including relations with Indian tribes, see *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 174, 181 S.Ct. 2313, 180 L.Ed.2d 187 (2011), the administration of public lands, *Crowell v. Benson*, 285 U.S. 22, 51, 52 S.Ct. 285, 76 L.Ed. 598 (1932), and the granting of public benefits such as payments to veterans, *ibid.*, pensions, *ibid.*, and patent rights, *United States v. Duell*, 172 U.S. 576, 582-583, 19 S.Ct. 286, 43 L.Ed. 559 (1899).

Our opinions governing the public rights exception have not always spoken in precise terms. This is an "area of frequently arcane distinctions and confusing precedents." *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 583, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985) (internal quotation marks omitted). The Court "has not `definitively explained' the distinction between public and private rights," and we do not claim to do so today. *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 584 U.S. 325, 334, 138 S.Ct. 1365, 200 L.Ed.2d 671 (2018).

2134 Nevertheless, since *Murray's Lessee*, this Court has typically evaluated the legal *2134 basis for the assertion of the doctrine with care. The public rights exception is, after all, an *exception*. It has no textual basis in the Constitution and must therefore derive instead from background legal principles. *Murray's Lessee* itself, for example, took pains to justify the application of the exception in that particular instance by explaining that it flowed from centuries-old rules concerning revenue collection by a sovereign. See 18 How. at 281-285. Without such close attention to the basis for each asserted application of the doctrine, the exception would swallow the rule.[2]

From the beginning we have emphasized one point: "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can... withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Murray's Lessee*, 18 How. at 284. We have never embraced the proposition that "practical" considerations alone can justify extending the scope of the public rights exception to such matters. *Stern*, 564 U.S. at 501, 131 S.Ct. 2594. "[E]ven with respect to matters that arguably fall within the scope of the `public rights' doctrine, the presumption is in favor of Article III courts." *Northern Pipeline Constr. Co.*, 458 U.S. at 69, n. 23, 102 S.Ct. 2858 (plurality opinion) (citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 548-549, and n. 21, 82 S.Ct. 1459, 8 L.Ed.2d 671 (1962) (plurality opinion)). And for good reason: "Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's `judicial Power' on entities outside Article III." *Stern*, 564 U.S. at 484, 131 S.Ct. 2594.

2

This is not the first time we have considered whether the Seventh Amendment guarantees the right to a jury trial "in the face of Congress' decision to allow a non-Article III tribunal to adjudicate" a statutory "fraud claim." 492 U.S. at 37, 50, 109 S.Ct. 2782. We did so in *Granfinanciera*, and the principles identified in that case largely resolve this one.

Granfinanciera involved a statutory action for fraudulent conveyance. As codified in the Bankruptcy Code, the claim
2135 permitted *2135 a trustee to void a transfer or obligation made by the debtor before bankruptcy if the debtor "received less than a reasonably equivalent value in exchange for such transfer or obligation." 11 U.S.C. § 548(a)(2)(A) (1982 ed., Supp. V). Actions for fraudulent conveyance were well known at common law. 492 U.S. at 43, 109 S.Ct. 2782. Even when Congress added these claims to the Bankruptcy Code in 1978, see 92 Stat. 2600, it preserved parties' rights to a trial by jury, 492 U.S. at 49-50, 109 S.Ct. 2782. In 1984, however, Congress designated fraudulent conveyance actions "core [bankruptcy] proceedings" and authorized non-Article III bankruptcy judges to hear them without juries. *Id.*, at 50, 109 S.Ct. 2782.

The issue in *Granfinanciera* was whether this designation was permissible under the public rights exception. *Ibid.* We

explained that it was not. Although Congress had assigned fraudulent conveyance claims to bankruptcy courts, that assignment was not dispositive. See *id.,* at 52, 109 S.Ct. 2782. What mattered, we explained, was the substance of the suit. "[T]raditional legal claims" must be decided by courts, "whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forebears." *Ibid.* To determine whether the claim implicated the Seventh Amendment, the Court applied the principles distilled in *Tull.* We examined whether the matter was "from [its] nature subject to `a suit at common law.'" 492 U.S. at 56, 109 S.Ct. 2782 (some internal quotation marks omitted); see *id.,* at 43-50, 109 S.Ct. 2782. A survey of English cases showed that "actions to recover... fraudulent transfers were often brought at law in late 18th-century England." *Id.,* at 43, 109 S.Ct. 2782. The remedy the trustee sought was also one "traditionally provided by law courts." *Id.,* at 49, 109 S.Ct. 2782. Fraudulent conveyance actions were thus "quintessentially suits at common law." *Id.,* at 56, 109 S.Ct. 2782.

We also considered whether these actions were "closely intertwined" with the bankruptcy regime. *Id.,* at 54, 109 S.Ct. 2782. Some bankruptcy claims, such as "creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res," *id.,* at 56, 109 S.Ct. 2782, are highly interdependent and require coordination. Resolving such claims fairly is only possible if they are all submitted at once to a single adjudicator. Otherwise, parties with lower priority claims can rush to the courthouse to seek payment before higher priority claims exhaust the estate, and an orderly disposition of a bankruptcy is impossible. Other claims, though, can be brought in standalone suits, because they are neither prioritized nor subordinated to related claims. Since fraudulent conveyance actions fall into that latter category, we concluded that these actions were not "closely intertwined" with the bankruptcy process. *Id.,* at 54, 109 S.Ct. 2782. We also noted that Congress had already authorized jury trials for certain bankruptcy matters, demonstrating that jury trials were not generally "incompatible" with the overall regime. *Id.,* at 61-62, 109 S.Ct. 2782 (internal quotation marks omitted).

We accordingly concluded that fraudulent conveyance actions were akin to "suits at common law" and were not inseparable from the bankruptcy process. *Id.,* at 54, 56, 109 S.Ct. 2782. The public rights exception therefore did not apply, and a jury was required.

3

Granfinanciera effectively decides this case. Even when an action "originate[s] in a newly fashioned regulatory scheme," what matters is the substance of the action, not where Congress has assigned it. *Id.,* at 52, 109 S.Ct. 2782. And in
2136 *2136 this case, the substance points in only one direction.

According to the SEC, these are actions under the "antifraud provisions of the federal securities laws" for "fraudulent conduct." App. to Pet. for Cert. 72a-73a (opinion of the Commission). They provide civil penalties, a punitive remedy that we have recognized "could only be enforced in courts of law." *Tull,* 481 U.S. at 422, 107 S.Ct. 1831. And they target the same basic conduct as common law fraud, employ the same terms of art, and operate pursuant to similar legal principles. See *supra,* at 2129-2131. In short, this action involves a "matter[] of private rather than public right." *Granfinanciera,* 492 U.S. at 56, 109 S.Ct. 2782. Therefore, "Congress may not `withdraw'" it "`from judicial cognizance.'" *Stern,* 564 U.S. at 484, 131 S.Ct. 2594 (quoting *Murray's Lessee,* 18 How. at 284).

4

Notwithstanding *Granfinanciera,* the SEC contends the public rights exception still applies in this case because Congress created "new statutory obligations, impose[d] civil penalties for their violation, and then commit[ted] to an administrative agency the function of deciding whether a violation ha[d] in fact occurred." Brief for Petitioner 21 (internal quotation marks omitted).

The foregoing from *Granfinanciera* already does away with much of the SEC's argument. Congress cannot "conjure away the Seventh Amendment by mandating that traditional legal claims be... taken to an administrative tribunal." 492 U.S. at 52, 109 S.Ct. 2782. Nor does the fact that the SEC action "originate[d] in a newly fashioned regulatory scheme" permit Congress to siphon this action away from an Article III court. *Ibid.* The constructive fraud claim in *Granfinanciera* was also statutory, see *id.,* at 37, 109 S.Ct. 2782, but we nevertheless explained that the public rights exception did not apply. Again, if the action resembles a traditional legal claim, its statutory origins are not dispositive. See *id.,* at 52, 56,

109 S.Ct. 2782.

The SEC's sole remaining basis for distinguishing *Granfinanciera* is that the Government is the party prosecuting this action. See Brief for Petitioner 26-28; see also Tr. of Oral Arg. 25 (Principal Deputy Solicitor General) (the "critical distinction" in the public rights analysis is "enforcement by the executive"); *id.*, at 26 (identifying as "the constitutionally relevant distinction" that "this is something that has been assigned to a federal agency to enforce"). But we have never held that "the presence of the United States as a proper party to the proceeding is ... sufficient" by itself to trigger the exception. *Northern Pipeline Constr. Co.*, 458 U.S. at 69, n. 23, 102 S.Ct. 2858 (plurality opinion). Again, what matters is the substance of the suit, not where it is brought, who brings it, or how it is labeled. See *ibid.* The object of this SEC action is to regulate transactions between private individuals interacting in a pre-existing market. To do so, the Government has created claims whose causes of action are modeled on common law fraud and that provide a type of remedy available only in law courts. This is a common law suit in all but name. And such suits typically must be adjudicated in Article III courts.

5

The principal case on which the SEC and the dissent rely is *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442, 97 S.Ct. 1261, 51 L.Ed.2d 464 (1977). Because the public rights exception as
2137 construed in *Atlas* *2137 *Roofing* does not extend to these civil penalty suits for fraud, that case does not control. And for that same reason, we need not reach the suggestion made by Jarkesy and Patriot28 that *Tull* and *Granfinanciera* effectively overruled *Atlas Roofing* to the extent that case construed the public rights exception to allow the adjudication of civil penalty suits in administrative tribunals.[3]

The litigation in *Atlas Roofing* arose under the Occupational Safety and Health Act of 1970 (OSH Act), a federal regulatory regime created to promote safe working conditions. *Id.*, at 444-445, 97 S.Ct. 1261. The Act authorized the Secretary of Labor to promulgate safety regulations, and it empowered the Occupational Safety and Health Review Commission (OSHRC) to adjudicate alleged violations. *Id.*, at 445-446, 97 S.Ct. 1261. If a party violated the regulations, the agency could impose civil penalties. *Id.*, at 446, 97 S.Ct. 1261.

Unlike the claims in *Granfinanciera* and this action, the OSH Act did not borrow its cause of action from the common law. Rather, it simply commanded that "[e]ach employer ... shall comply with occupational safety and health standards promulgated under this chapter." 84 Stat. 1593, 29 U.S.C. § 654(a)(2) (1976 ed.). These standards bring no common law soil with them. Cf. *Hansen*, 599 U.S. at 778, 143 S.Ct. 1932. Rather than reiterate common law terms of art, they instead resembled a detailed building code. For example, the OSH Act regulations directed that a ground trench wall of "Solid Rock, Shale, or Cemented Sand and Gravels" could be constructed at a 90 degree angle to the ground. 29 C.F.R. § 1926.652, Table P-1 (1976); see *Atlas Roofing*, 430 U.S. at 447, 97 S.Ct. 1261 (discussing Table P-1). But a wall of "Compacted Angular Gravels" needed to be sloped at 63 degrees, and a wall of "Well Rounded Loose Sand" at 26 degrees. § 1926.652, Table P-1. The purpose of this regime was not to enable the Federal Government to bring or adjudicate claims that traced their ancestry to the common law. Rather, Congress stated that it intended the agency to "develop[] innovative methods, techniques, and approaches for dealing with occupational safety and health problems." 29 U.S.C. § 651(b)(5) (1976 ed.). In both concept and execution, the Act was self-consciously novel.

Facing enforcement actions, two employers alleged that the adjudicatory authority of the OSHRC violated the Seventh Amendment. See *Atlas Roofing*, 430 U.S. at 448-449, 97 S.Ct. 1261. The Court rejected the challenge, concluding that "when Congress creates new statutory `public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment[]." *Id.*, at 455, 97 S.Ct. 1261. As the Court explained, the case involved "a new cause of action, and remedies therefor, unknown to the common law." *Id.*, at 461, 97 S.Ct. 1261. The Seventh Amendment, the Court concluded, was accordingly "no bar to ... enforcement outside the regular courts of law." *Ibid.*

The cases that *Atlas Roofing* relied upon did not extend the public rights exception to "traditional legal claims."
2138 *Granfinanciera*, 492 U.S. at 52, 109 S.Ct. 2782. *2138 Instead, they applied the exception to actions that were "`not ... suit[s] at common law or in the nature of such ... suit[s].'" *Atlas Roofing*, 430 U.S. at 453, 97 S.Ct. 1261 (quoting *Jones & Laughlin Steel Corp.*, 301 U.S. at 48, 57 S.Ct. 615); see *Atlas Roofing*, 430 U.S. at 450-451, 97 S.Ct. 1261 (discussing,

e.g., *Murray's Lessee, Ex parte Bakelite Corp., Helvering v. Mitchell,* 303 U.S. 391, 58 S.Ct. 630, 82 L.Ed. 917 (1938), and *Oceanic Steam Navigation Co.*). Indeed, the Court recognized that if a case did involve a common law action or its equivalent, a jury was required. See 430 U.S. at 455, 97 S.Ct. 1261 ("`[W]here the action involves rights and remedies recognized at common law, it must preserve to parties their right to a jury trial.'" (quoting *Pernell v. Southall Realty,* 416 U.S. 363, 383, 94 S.Ct. 1723, 40 L.Ed.2d 198 (1974)); *Atlas Roofing,* 430 U.S. at 458-459, 97 S.Ct. 1261 (jury required when "courts of law supplied a cause of action and an adequate remedy to the litigant").

Atlas Roofing concluded that Congress could assign the OSH Act adjudications to an agency because the claims were "unknown to the common law." 430 U.S. at 461, 97 S.Ct. 1261. The case therefore does not control here, where the statutory claim is "`in the nature of" a common law suit. *Id.,* at 453, 97 S.Ct. 1261 (quoting *Jones & Laughlin,* 301 U.S. at 48, 57 S.Ct. 615). As we have explained, Jarkesy and Patriot28 were prosecuted for "fraudulent conduct," App. to Pet. for Cert. 72a, and the pertinent statutory provisions derive from, and are interpreted in light of, their common law counterparts, see 15 U.S.C. §§ 77q(a)(2), 78j(b), 80b-6(4); 17 C.F.R. §§ 240.10b-5(b), 275.206(4)-8(a)(1); *Basic Inc.,* 485 U.S. at 253, 108 S.Ct. 978 (opinion of White, J.).

The reasoning of *Atlas Roofing* cannot support any broader rule. The dissent chants "*Atlas Roofing*" like a mantra, but no matter how many times it repeats those words, it cannot give *Atlas Roofing*substance that it lacks.[4] Even as *Atlas*
2139 *Roofing* *2139 invoked the public rights exception, the definition it offered of the exception was circular. The exception applied, the Court said, "in cases in which `public rights' are being litigated—*e. g.,* cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes." 430 U.S. at 450, 97 S.Ct. 1261; see *id.,* at 458, 97 S.Ct. 1261.

After *Atlas Roofing,* this Court clarified in *Tull* that the Seventh Amendment does apply to novel statutory regimes, so long as the claims are akin to common law claims. See 481 U.S. at 421-423, 107 S.Ct. 1831. In addition, we have explained that the public rights exception does not apply automatically whenever Congress assigns a matter to an agency for adjudication. See *Granfinanciera,* 492 U.S. at 52, 109 S.Ct. 2782.

For its part, the dissent also seems to suggest that *Atlas Roofing* establishes that the public rights exception applies whenever a statute increases governmental efficiency. *Post,* at 2162-2163 (opinion of SOTOMAYOR, J.). Again, our precedents foreclose this argument. As *Stern* explained, effects like increasing efficiency and reducing public costs are not enough to trigger the exception. See 564 U.S. at 501, 131 S.Ct. 2594; *INS v. Chadha,* 462 U.S. 919, 944, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). Otherwise, evading the Seventh Amendment would become nothing more than a game, where the Government need only identify some slight advantage to the public from agency adjudication to strip its target of the protections of the Seventh Amendment.

The novel claims in *Atlas Roofing* had never been brought in an Article III court. By contrast, law courts have dealt with fraud actions since before the founding, and Congress had authorized the SEC to bring such actions in Article III courts and still authorizes the SEC to do so today. See 3 Blackstone 41-42; §§ 77t, 78u, 80b-9. Given the judiciary's long history of handling fraud claims, it cannot be argued that the courts lack the capacity needed to adjudicate such actions.

In short, *Atlas Roofing* does not conflict with our conclusion. When a matter "from its nature, is the subject of a suit at the common law," Congress may not "withdraw [it] from judicial cognizance." *Murray's Lessee,* 18 How. at 284.

* * *

A defendant facing a fraud suit has the right to be tried by a jury of his peers before a neutral adjudicator. Rather than recognize that right, the dissent would permit Congress to concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch. That is the very opposite of the separation of powers that the Constitution demands. Jarkesy and Patriot28 are entitled to a jury trial in an Article III court. We do not reach the remaining constitutional issues and affirm the ruling of the Fifth Circuit on the Seventh Amendment ground alone.

The judgment of the Court of Appeals for the Fifth Circuit is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice GORSUCH, with whom Justice THOMAS joins, concurring.

The Court decides a single issue: Whether the Securities and Exchange Commission's use of in-house hearings to
2140 *2140 seek civil penalties violates the Seventh Amendment right to a jury trial. It does. As the Court details, the government has historically litigated suits of this sort before juries, and the Seventh Amendment requires no less.

I write separately to highlight that other constitutional provisions reinforce the correctness of the Court's course. The Seventh Amendment's jury-trial right does not work alone. It operates together with Article III and the Due Process Clause of the Fifth Amendment to limit how the government may go about depriving an individual of life, liberty, or property. The Seventh Amendment guarantees the right to trial by jury. Article III entitles individuals to an independent judge who will preside over that trial. And due process promises any trial will be held in accord with time-honored principles. Taken together, all three provisions vindicate the Constitution's promise of a "fair trial in a fair tribunal." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955).

I

In March 2013, the SEC's Commissioners approved charges against Mr. Jarkesy. The charges were serious; the agency accused him of defrauding investors. The relief the agency sought was serious, too: millions of dollars in civil penalties. See SEC, Division of Enforcement's Post-Hearing Memorandum of Law in *In re John Thomas Capital Management Group, LLC,* Admin. Proc. File No. 3-15255, pp. 28-29 (SEC, Apr. 7, 2014). For most of the SEC's 90-year existence, the Commission had to go to federal court to secure that kind of relief against someone like Mr. Jarkesy. *Ante,* at 2125-2126. Proceeding that way in this case hardly would have promised him an easy ride. But it would have at least guaranteed Mr. Jarkesy a jury, an independent judge, and traditional procedures designed to ensure that anyone caught up in our judicial system receives due process.

In 2010, however, all that changed. With the passage of the Dodd Frank Act, Congress gave the SEC an alternative to court proceedings. Now, the agency could funnel cases like Mr. Jarkesy's through its own "adjudicatory" system. See 124 Stat. 1376, 1862-1865. That is the route the SEC chose when it filed charges against Mr. Jarkesy.

There is little mystery why. The new law gave the SEC's Commissioners—the same officials who authorized the suit against Mr. Jarkesy—the power to preside over his case themselves and issue judgment. To be sure, the Commissioners opted, as they often do, to send Mr. Jarkesy's case in the first instance to an "administrative law judge" (ALJ). See 17 C.F.R. § 201.110 (2023). But the title "judge" in this context is not quite what it might seem. Yes, ALJs enjoy some measure of independence as a matter of regulation and statute from the lawyers who pursue charges on behalf of the agency. But they remain servants of the same master—the very agency tasked with prosecuting individuals like Mr. Jarkesy. This close relationship, as others have long recognized, can make it "extremely difficult, if not impossible, for th[e ALJ] to convey the image of being an impartial fact finder." B. Segal, The Administrative Law Judge, 62 A. B. A. J. 1424, 1426 (1976). And with a jury out of the picture, the ALJ decides not just the law but the facts as well. [1]

2141 *2141 Going in, then, the odds were stacked against Mr. Jarkesy. The numbers confirm as much: According to one report, during the period under study the SEC won about 90% of its contested in-house proceedings compared to 69% of its cases in court. D. Thornley & J. Blount, SEC In-House Tribunals: A Call for Reform, 62 Vill. L. Rev. 261, 286 (2017) (Thornley). Reportedly, too, one of the SEC's handful of ALJs even warned individuals during settlement discussions that he had found defendants liable in every contested case and never once "'ruled against the agency's enforcement division.'" *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175, 213-214, 143 S.Ct. 890, 215 L.Ed.2d 151 (2023) (GORSUCH, J., concurring in judgment).

The shift from a court to an ALJ didn't just deprive Mr. Jarkesy of the right to an independent judge and a jury. He also lost many of the procedural protections our courts supply in cases where a person's life, liberty, or property is at stake. After an agency files a civil complaint in court, a defendant may obtain from the SEC a large swathe of documents relevant to the lawsuit. See Fed. Rule Civ. Proc. 26(b)(1). He may subpoena third parties for testimony and documents and take 10 oral depositions—more with the court's permission. Rule 45; Rule 30(a)(2)(A)(i). A court has flexibility, as well, to set deadlines for discovery and other matters to meet the needs of the case. See Rule 16. And come trial, the

Federal Rules of Evidence apply, meaning that hearsay is generally inadmissible and witnesses must usually testify in person, subject to cross-examination. See Fed. Rule Evid. 802.

Things look very different in agency proceedings. The SEC has a responsibility to provide "documents that contain material exculpatory evidence." 17 C.F.R. § 201.230(b)(3). But the defendant enjoys no general right to discovery. Though ALJs enjoy the power to issue subpoenas on the request of litigants like Mr. Jarkesy, § 201.232(a), they "often decline to issue [them] or choose to significantly narrow their scope," G. Mark, SEC and CFTC Administrative Proceedings, 19 U. Pa. J. Const. L. 45, 68 (2016). Oral depositions are capped at five, with another two if the ALJ grants permission. § 201.233(a). In some cases, an administrative trial must take place as soon as 1 month after service of the charges, and that hearing must follow within 10 months in even the most complex matters. § 201.360(a)(2)(ii). The rules of evidence, including their prohibition against hearsay, do not apply with the same rigor they do in court. § 201.235(a)(5); see § 201.230. For that reason, live testimony often gives way to "investigative testimony"—that is, a "sworn statement" taken outside the presence of the defendant or his counsel. § 201.235(b).

How did all this play out in Mr. Jarkesy's case? Accompanying its charges, the SEC disclosed 700 gigabytes of data—equivalent to between 15 and 25 million pages of information—it had collected during its investigation. App. to Pet. for Cert. 164a; Complaint in *Jarkesy* v. *U. S. SEC,* No. 1:14-cv-00114, 2014 WL 10916127 (DDC, Jan. 29, 2014), ECF Doc. 1, ¶49, pp. 12-13. Over Mr. Jarkesy's protest that it would take "two lawyers or paralegals working twelve-hour days over four decades to review," *ibid.,* the ALJ gave Mr. Jarkesy 10 months to prepare for his hearing, see App. to Pet. for Cert.
2142 156a. Then, after conducting that hearing, the ALJ turned around and obtained from the Commission *2142 "an extension of six months to file [her] initial decision." *In re John Thomas Capital Management Group LLC,* SEC Release No. 9631, p. 1 (Aug. 13, 2014). The reason? The "'size and complexity of the proceeding.'" *Id.,* at 2. When that decision eventually arrived seven months after the hearing, the ALJ agreed with the SEC on every charge. See App. to Pet. for Cert. 155a-156a, 212a.

Mr. Jarkesy had the right to appeal to the Commission, but appeals to that politically accountable body (again, the same body that approved the charges) tend to go about as one might expect. The Commission may decline to review the ALJ's decision. § 201.411(b)(2). If it chooses to hear the case, it may *increase* the penalty imposed on the defendant. Thornley 286. A defendant unhappy with the result can seek further review in court, though that process will take more time and money, too. Nor will he find a jury there, only a judge who must follow the agency's findings if they are supported by "'more than a mere scintilla.'" of evidence. *Biestek v. Berryhill,* 587 U.S. 97, 103, 139 S.Ct. 1148, 203 L.Ed.2d 504 (2019).

Mr. Jarkesy filed an appeal anyway. The Commission agreed to review the ALJ's decision. It then afforded itself the better part of six years to issue an opinion. And, after all that, it largely agreed with the ALJ. See App. to Pet. for Cert. 71a-74a. None of this likely came as a surprise to the SEC employees in the Division of Enforcement responsible for pressing the action against Mr. Jarkesy. While his appeal was pending, employees in that division— including an "'Enforcement Supervisor'" in the regional office prosecuting Mr. Jarkesy—accessed confidential memos by the Commissioners' advisors about his appeal. See SEC, Second Commission Statement Relating to Certain Administrative Adjudications 3 (June 2, 2023).

II

A

If administrative proceedings like Mr. Jarkesy's seem a thoroughly modern development, the British government and its agents engaged in a strikingly similar strategy in colonial America. Colonial administrators routinely steered enforcement actions out of local courts and into vice-admiralty tribunals where they thought they would win more often. These tribunals lacked juries. They lacked truly independent judges. And the procedures materially differed from those available in everyday common-law courts.

The vice-admiralty courts in the Colonies began as rough equivalents of English courts of admiralty. E. Surrency, The Courts in the American Colonies, 11 Am. J. Legal Hist. 347, 355 (1967). These courts generally concerned themselves with maritime matters arising on "the oceans and rivers and their immediate shores." C. Ubbelohde, The Vice-Admiralty

Courts and the American Revolution 19 (1960) (Ubbelohde). And the proceedings they used accorded more with civil law traditions than common law ones. Among other things, this meant officials could try cases against colonists without a jury. *Id.*, at 21.

Confined to admiralty disputes, perhaps the lack of a jury would have proven unexceptional (as juries were not usually required in such cases then, nor are they today). See, *e.g.*, Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 448, 121 S.Ct. 993, 148 L.Ed.2d 931 (2001). But Parliament deployed these juryless tribunals in the Colonies to new ends that, according to John Adams, could fill "'volumes.'" Ubbelohde vii. The creep away from the original province of those
2143 courts began with the grant of authority over violations of certain trade and customs laws. But in the decade *2143 before the Revolution, the drip, drip, drip of expanding power became a torrent, as Parliament allowed more and more actions to be brought in colonial vice-admiralty courts.

Many of the matters added to vice-admiralty jurisdiction in the Colonies would have required juries in England. *Id.*, at 112. But as the Massachusetts royal governor explained, colonial juries "'were not to be trusted.'" D. Lovejoy, Rights Imply Equality: The Case Against Admiralty Jurisdiction in America, 1764-1776, 16 Wm. & Mary Q. 459, 468 (1959). Even violations that did not implicate the jury right normally would have been heard in England "before a court in [one's] own neighborhood or county where [one] could count on traditional common-law procedure." *Id.*, at 471. But by expanding the reach of vice-admiralty jurisdiction in the Colonies, Parliament denied similar protections to Americans. See *Erlinger* v. *United States*, 602 U. S. ___, ___, 144 S.Ct. 1840, 1848, ___ L.Ed.2d ___ (2024).

Vice-admiralty court judges also lacked independence. While judges in England since the end of the seventeenth century generally enjoyed the protection of tenure during good behavior, colonial judges usually served at the pleasure of the royal administration. See *United States v. Will*, 449 U.S. 200, 218-219, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980). And, doing away with the pretense of impartiality entirely, some vice-admiralty judges held dual appointments —for instance, as colonial attorneys general and vice-admiralty judges. Ubbelohde 162-163.

Like the modern SEC, British colonial officials were not *required* to bring many of their cases before the vice-admiralty courts. Often, Parliament gave those officials the option to proceed in either the ordinary common-law courts or the vice-admiralty courts. Unsurprisingly, though, they sought to file where they were most likely to win. And "[i]n this contest, the vice-admiralty courts were usually the victors." *Id.*, at 21.

B

The abuses of these courts featured prominently in the calls for revolution. In the First Continental Congress, the assembled delegates condemned how Parliament "extend[ed] the jurisdiction of Courts of Admiralty," complained how colonial judges were "dependent on the Crown," and demanded the right to the "common law of England" and the "great and inestimable privilege" of a jury trial. Declaration and Resolves of the First Continental Congress, Oct. 14, 1774, in 1 Journals of the Continental Congress, 1774-1789, pp. 68-69 (W. Ford 1904 ed.). Two years later, the drafters of the Declaration of Independence repeated these concerns, admonishing the King for "ma[king] Judges dependent on his Will alone," ¶11, and "[f]or depriving [the colonists] in many cases, of the benefits of Trial by Jury," ¶20. By that point, however, the "musket fire at Lexington and Concord ... signaled the end not only of the vice-admiralty courts, but of all British rule in America." Ubbelohde 190.

When the smoke settled, the American people went to great lengths to prevent a backslide toward anything like the vice-admiralty courts. *Erlinger*, 602 U. S., at ___ - ___, 144 S.Ct. at 1848-1849. One product of these efforts was Article III of the Constitution. There, the Constitution provided that "[t]he judicial Power"—the power over "Cases" and "Controversies"— would lie with life-tenured, salary-protected judges. §§ 1-2; see *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 584 U.S. 325, 346, 138 S.Ct. 1365, 200 L.Ed.2d 671 (2018) (GORSUCH, J., dissenting).
2144 As the Court has recognized, this *2144 meant the Executive Branch could "exercise no part of th[e] judicial power." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 275, 5 L.Ed. 872 (1856), "no matter how court-like [its] decisionmaking process might appear," *Ortiz* v. *United States*, 585 U.S. 427, 465, 138 S.Ct. 2165, 201 L.Ed.2d 801 (2018) (ALITO, J., dissenting). Nor could Congress "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty"—the traditional scope of the "judicial Power." *Murray's Lessee*, 18 How. at 284; see Art. III, § 2.

Despite these guarantees, many at the founding thought Article III didn't go far enough. Yes, it promised a defendant an independent judge rather than one dependent on those who hold political power. But what would stop Congress from requiring litigants to navigate vice-admiralty's alien procedures in *all* federal cases? Or from making "federal processes" even *more* byzantine, so "as to [effectively] destroy [individual] rights?" Letter from a Federal Farmer (Jan. 20, 1788), in 2 The Complete Anti-Federalist 328 (H. Storing ed. 1981).

And what about civil juries? "[T]he jury trial," one prominent Anti-Federalist observed, "brings with it an open and public discussion of all causes, and excludes secret and arbitrary proceedings." Letter from a Federal Farmer (Jan. 18, 1788), in *id.*, at 320 (Federal Farmer 15). The participation of ordinary Americans "drawn from the body of the people" serves another function, too: "If the conduct of judges shall ... tend to subvert the laws, and change the forms of government, the jury may check them." *Ibid.* As originally composed, however, the Constitution promised a trial by jury for "all Crimes," but said nothing about civil cases. Art III, § 2, cl. 3. Some wondered, did this mean judges, not juries, would be "left masters as to facts" in civil disputes? Federal Farmer 15, at 322. If so, asked another, "what satisfaction can we expect from a lordly court of justice, always ready to protect the officers of government against the weak and helpless citizen"? Essay of a Democratic Federalist (Oct. 17, 1787), in 3 Complete Anti-Federalist 61.

The answer to these concerns was the Bill of Rights. *Erlinger,* 602 U. S., at ___, 144 S.Ct. at 1848. As the Court details, the Seventh Amendment promised the right to a jury trial in "`[s]uits at common law.'" *Ante,* at 2128 (quoting Amdt. 7). But because the Constitution was designed to "endure for ages to come," *McCulloch v. Maryland,* 4 Wheat. 316, 415, 4 L.Ed. 579 (1819), this did not mean only those "suits, which the common law recognized among its old and settled proceedings," *Parsons v. Bedford,* 3 Pet. 433, 28 U.S. 433, 7 L.Ed. 732 (1830). The founding generation anticipated the possibility Congress would introduce new causes of action and perhaps new remedies, too. See *ibid.* Accordingly, this Court has long understood the Seventh Amendment's protections to apply in "all [civil] suits which are not of equity [or] admiralty jurisdiction." *Ibid.*; accord, *ante,* at 2128. In this way, the Seventh Amendment seeks to ensure there will be no juryless vice-admiralty courts in the United States.

The Fifth Amendment's Due Process Clause addressed remaining concerns about the processes that would attend trials before independent judges and juries. It provided that the government may not deprive anyone of "life, liberty, or property, without due process of law." As originally understood, this provision prohibited the government from
2145 "depriv[ing] a person of those rights without affording him the benefit of (at least) those customary procedures *2145 to which freemen were entitled by the old law of England." *Sessions v. Dimaya,* 584 U.S. 148, 176, 138 S.Ct. 1204, 200 L.Ed.2d 549 (2018) (GORSUCH, J., concurring in part and concurring in judgment) (internal quotation marks omitted); see *Erlinger,* 602 U. S., at ___ - ___, 144 S.Ct. at 1848-1850.

More than that, because it was "the peculiar province of the judiciary" to safeguard life, liberty, and property, due process often meant *judicial* process. 1 St. George Tucker, Blackstone's Commentaries, Editor's App. 358 (1803). That is, if the government sought to interfere with those rights, nothing less than "the process and proceedings of the common law" had to be observed before any such deprivation could take place. 3 J. Story, Commentaries on the Constitution of the United States § 1783, p. 661 (1833) (Story). In other words, "`due process of law' generally implie[d] and include[d] ... *judex* [a judge], regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings." *Murray's Lessee,* 18 How. at 280. This constitutional baseline was designed to serve as "a restraint on the legislative" branch, preventing Congress from "mak[ing] any process `due process of law,' by its mere will." *Id.,* at 276.

C

These three constitutional provisions were meant to work together, and together they make quick work of this case. In fact, each provision requires the result the Court reaches today.

First, because the "`matter'" before us is one "which, from its nature, is the subject of a suit at the common law," *id.,* at 284, "the responsibility for deciding [it] rests with Article III judges in Article III courts." *Stern v. Marshall,* 564 U.S. 462, 484, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011). Nor does it make a difference whether we think of the SEC's action here as a civil-penalties suit or something akin to a traditional fraud claim: At the founding, both kinds of actions were tried in common-law courts. See *ante,* at 2129-2131 (discussing civil penalties); see also, *e.g., Pasley v. Freeman,* 3 T. R. 51,

100 Eng. Rep. 450 (K. B. 1789) (action for fraud); *Baily* v. *Merrell*, 3 Bulst. 94, 81 Eng. Rep. 81 (K. B. 1615) (same). And that tells us all we need to know that the SEC's in-house civil-penalty scheme violates Article III by "withdraw[ing]" the matter "from judicial cognizance" and handing it over to the Executive Branch for an in-house trial. *Murray's Lessee*, 18 How. at 284; see *supra*, at 2144.

Second, because the action the SEC seeks to pursue is not the stuff of equity or admiralty jurisdiction but the sort of suit historically adjudicated before common-law courts, the Seventh Amendment guarantees Mr. Jarkesy the right to have his case decided by a jury of his peers. In this regard, it is irrelevant that the SEC derived its power to sue under a "new statut[e]" or that the agency proceeded under "a new cause of action." Brief for Petitioner 18, 22 (internal quotation marks omitted). As we have seen, the government cannot evade the Seventh Amendment so easily. See *ante*, at 2129; *supra*, at 2143-2145.

Third, were there any doubt, the Due Process Clause confirms these conclusions. Cf. *Murray's Lessee*, 18 How. at 275 (explaining that the Article III challenge before the Court could "best be considered" as raising a due process question). Because the penalty the SEC seeks would "depriv[e]" Mr. Jarkesy of "property," Amdt. 5, due process demands nothing less than "the process and proceedings of the common law," 3 Story § 1783, at 661. That means the regular course of
2146 trial proceedings *2146 with their usual protections, see *Murray's Lessee*, 18 How. at 280, not the use of ad hoc adjudication procedures before the same agency responsible for prosecuting the law, subject only to hands-off judicial review, see *supra*, at 2145.

III

A

The government resists these conclusions. As the government sees it, this case implicates the so-called public rights exception. One that defeats not only Mr. Jarkesy's right to trial by jury, but also his right to proceed before an independent trial judge consistent with traditional judicial processes. That is, on the government's account, not only does the Seventh Amendment fall away; so does the usual operation of Article III and the Due Process Clause.

In the government's view, the public rights exception "*at a minimum* allows Congress to create new statutory obligations, impose civil penalties for their violation, and then commit to an administrative agency the function of deciding whether a violation has in fact occurred." Brief for Petitioner 21 (emphasis added; internal quotation marks omitted). Put plainly, all that need be done to dispense almost entirely with three separate constitutional provisions is an Act of Congress creating some new statutory obligation. And, the government continues, this case easily meets that standard because the proceeding against Mr. Jarkesy is one "brought by the government against a private party" under a statute designed "to remedy harm to the public at large." *Id.*, at 24 (internal quotation marks omitted).

The Court rightly rejects these arguments. See *ante*, at 2134-2136. No one denies that, under the public rights exception, Congress may allow the Executive Branch to resolve certain matters free from judicial involvement in the first instance. *Ante*, at 2127, 2131-2133. But, despite its misleading name, the exception does not refer to *all* matters brought by the government against an individual to remedy public harms, or even all those that spring from a statute. See *ante*, at 2133-2134. Instead, public rights are a narrow class defined and limited by history. As the Court explains, that class has traditionally included the collection of revenue, customs enforcement, immigration, and the grant of public benefits. *Ante*, at 2132-2134.

How did these matters find themselves categorized as public rights? Competing explanations abound. Some have pointed to ancient practical considerations. In *Murray's Lessee*, for example, the Court reasoned that the "[i]mperative necessity" of tax collection for a functional state had long caused governments to treat "claims for public taxes" differently from "all others." 18 How. at 282. Others have theorized that "the core of the judicial power" concerns the disposition of the "three `absolute' rights" "to life, liberty, and property." *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 713-714, 135 S.Ct. 1932, 191 L.Ed.2d 911 (2015) (THOMAS, J., dissenting). Public rights, the theory goes, involve matters originally understood to fall outside this core. *Id.*, at 714, 135 S.Ct. 1932. So, for example, "[a]lthough Congress could authorize executive agencies to dispose of *public* rights in land—often by means of adjudicating a claimant's qualifications for a land grant under a statute— the United States had to go to the courts if it wished to revoke" that

grant, which had become the owner's private property. *Id.*, at 715, 135 S.Ct. 1932. There are still other theories yet. See, *e.g.*, *Stern*, 564 U.S. at 489, 131 S.Ct. 2594.

2147 *2147 Whatever their roots, traditionally recognized public rights have at least one feature in common: a serious and unbroken historical pedigree. See *Culley v. Marshall*, 601 U.S. 377, 397-398, 144 S.Ct. 1142, ___ L.Ed.2d ___ (2024) (GORSUCH, J., concurring); *ante*, at 2131-2134. For good reason. If the Article III "judicial Power" encompasses "the stuff of the traditional actions at common law tried by the courts of Westminster in 1789," *ante*, at 2132 (internal quotation marks omitted), it follows that matters traditionally adjudicated outside those courts might *not* fall within Article III's ambit. See *Stern*, 564 U.S. at 504-505, 131 S.Ct. 2594 (Scalia, J., concurring) ("[A]n Article III judge is required in *all* federal adjudications, unless there is a firmly established historical practice to the contrary"). So too with the Due Process Clause. If that clause sets customary common-law practice as the ordinary procedural baseline, see Part II-B, *supra*, clear historical evidence of a different practice might warrant a departure from that baseline, see *Murray's Lessee*, 18 How. at 280. That's why this Court has said "`a process of law ... must be taken to be due process of law' if it enjoys `the sanction of settled usage both in England and in this country.'" *Culley*, 601 U.S. at 397, 144 S.Ct. 1142 (GORSUCH, J., concurring) (quoting *Hurtado v. California*, 110 U.S. 516, 528, 4 S.Ct. 292, 28 L.Ed. 232 (1884)).

With the public rights exception viewed in this light, the government's invocation of it in this case cannot succeed. Starting with a "`presumption ... in favor of Article III courts'" and their usual attendant processes, *ante*, at 2134, we look for some "deeply rooted" tradition of nonjudicial adjudication before permitting a case to be tried in a different forum under different procedures, *Culley*, 601 U.S. at 397, 144 S.Ct. 1142 (GORSUCH, J., concurring). We have upheld summary procedures for customs collection, for example, because they were consistent with both "the common and statute law of England prior to the emigration of our ancestors" and "the laws of many of the States at the time of the adoption of " the Constitution. *Murray's Lessee*, 18 How. at 280; see *ante*, at 2131-2133. But when it comes to the kind of civil-penalty suit before us, that same history points in the opposite direction, suggesting actions of this sort belong before an independent judge, a jury, and decided in a trial that accords with traditional judicial procedures. *Ante*, at 2129-2131; *supra*, at 2145-2146. Just as SEC practices themselves largely reflected as recently as 2010.

B

If all that's so, why might the government feel comfortable invoking the public rights exception? To be fair, much of it may have to do with this Court. Some of our past decisions have allowed the government to chip away at the courts' historically exclusive role in adjudicating private rights—and juries' accompanying role in that adjudication. This process began, of all places, in an admiralty case.

In *Crowell v. Benson*, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932), this Court faced a constitutional challenge to the Longshoremen's and Harbor Workers' Compensation Act of 1927. The Act directed employers to compensate employees for injuries occurring at sea. 44 Stat. 1426. The law further assigned primary responsibility for deciding liability disputes to an Executive Branch official, the deputy commissioner of the United States Employees' Compensation Commission. *Id.*, at 1435-1437; *Crowell*, 285 U.S. at 42-43, 52 S.Ct. 285. The Court acknowledged that this regime empowered the deputy commissioner to decide in the first instance the monetary "liability of one individual to
2148 another." *2148 *Id.*, at 51, 52 S.Ct. 285. The Court recognized that this amounted to a classic "private right" suit of the kind traditionally tried in court. *Ibid.* The Court even conceded that, under the law, the factual "findings of the deputy commissioner, supported by evidence and within the scope of his authority, shall be final": An Article III court could not review the facts anew. *Id.*, at 46, 52 S.Ct. 285. But the Court upheld the scheme and its limited judicial review anyway.

To get there took a dash of fiction and a pinch of surmise. From time to time, the Court observed, judges appoint their own special "masters and commissioners" to prepare reports on fact issues or damages. *Id.*, at 51, 52 S.Ct. 285. These reports are nonbinding and "essentially ... advisory." *Ibid.* Judges themselves remain the decisionmakers. In *Crowell*, the Court embraced the fiction that Executive Branch officials might similarly act as assistants or adjuncts to Article III courts. And because judges often adopt the proposed findings of their masters and commissioners, the Court surmised, Article III posed no bar to Congress taking a further step and *requiring* judges to treat the findings of Executive Branch officials as essentially "final." *Id.*, at 46, 52 S.Ct. 285. "To hold otherwise," the Court reasoned, "would be to defeat the obvious purpose of the legislation": "to furnish a prompt, continuous, expert, and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency

specially assigned to that task." *Ibid.*

Crowell itself only went so far, however. The case fell within federal courts' admiralty jurisdiction, and tribunals sitting in admiralty in England and America alike had long heard certain matters falling within the public rights exception. See *Culley,* 601 U.S. at 398, 144 S.Ct. 1142 (GORSUCH, J., concurring). In deciding those matters, courts had long tolerated some flexibility in procedures, had long restricted appellate review of factual findings, and had always proceeded without a jury. *Crowell,* 285 U.S. at 45, 53, 52 S.Ct. 285.

Soon, though, none of that mattered. Almost in a blink, the admiralty limitation was discarded, and more and more agencies began assuming adjudicatory functions previously reserved for judges and juries, employing novel procedures that sometimes bore faint resemblance to those observed in court. Along the way, prominent voices in and out of government expressed concern at this development. Consider just two typical examples. Were an agency endowed with the power to assess civil penalties, advised a committee overseen by Attorney General (soon-to-be Justice) Robert H. Jackson, "the aggrieved person" should at least "be permitted review de novo by a Federal district court." Final Report of Attorney General's Committee on Administrative Procedure 147 (1941). That was the only way, the committee opined, "to resolve any doubts concerning the constitutionality of the procedure." *Ibid.* Around the same time, a committee of the American Bar Association led by Roscoe Pound sounded a similar alarm. Administrative agencies, the committee warned, had a "tendency to mix up rule making, investigation, prosecution, the advocate's function, the judge's function, and the function of enforcing the judgment, so that the whole proceeding from end to end is one to give effect to a complaint." Report of the Special Committee on Administrative Law, 63 Ann. Rep. 331, 351 (1938).

The high-water mark of the movement toward agency adjudication may have come in 1977 in *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442, 97 S.Ct. 1261, 51 L.Ed.2d 464. Some have read that
2149 decision *2149 to suggest the category of public rights might encompass pretty much any case arising under any "`new statutory obligations,'" Brief for Petitioner 22 (quoting *Atlas Roofing,* 430 U.S. at 450, 97 S.Ct. 1261). It is a view the government essentially espouses in this case. But without reference to any constitutional text or history to guide what does or does not qualify as a public right, that view has (unsurprisingly) proven wholly unworkable.

It did not take long for this Court to realize as much. Just 12 years later, in *Granfinanciera, S. A. v. Nordberg,* 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989), this Court cabined *Atlas Roofing* so narrowly that the author of *Atlas Roofing* complained that the Court had "overrul[ed]" it. 492 U.S. at 71, n. 1, 109 S.Ct. 2782 (White, J., dissenting); see *ante,* at 2137, n. 3. Far from endorsing the notion that any new statutory obligation could qualify for treatment as a public right, for example, the Court in *Granfinanciera* read *Atlas Roofing* as having "left the term `public rights' undefined." 492 U.S. at 51, n. 8, 109 S.Ct. 2782. And since then this Court has, in one case after another, "adhere[d]" only to *Atlas Roofing's* "general teaching" that Congress may constitutionally adopt "new statut[es]" assigning matters that indeed qualify as "public rights... to an administrative agency." 492 U.S. at 51, 109 S.Ct. 2782 (internal quotation marks omitted); see, *e.g., Stern,* 564 U.S. at 489-490, 131 S.Ct. 2594; *Oil States,* 584 U.S. at 345, 138 S.Ct. 1365.

Yet, even after the Court moved away from *Atlas Roofing,* our public rights jurisprudence remained muddled. Since then, the Court has suggested that public rights might include those "involving statutory rights that are integral parts of a public regulatory scheme." *Granfinanciera,* 492 U.S. at 55, n. 10, 109 S.Ct. 2782. We have changed course and tried our hand at a five-factor balancing test. See *Stern,* 564 U.S. at 491, 131 S.Ct. 2594 (describing *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986)). We have replaced that test with one that considers "at least seven different" factors. 564 U.S. at 504, 131 S.Ct. 2594 (Scalia, J., concurring). And at one time or another, these factors have included the consideration of "the concerns that drove Congress to depart from the requirements of Article III." *Schor,* 478 U.S. at 851, 106 S.Ct. 3245. So, for example, we have asked whether insistence on "the institutional integrity of the Judicial Branch" would "unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers." *Ibid.*

Today, the Court does much to return us to a more traditional understanding of public rights. Adhering to *Granfinanciera,* the Court rejects the government's overbroad reading of *Atlas Roofing* and recognizes that the kind of atextual and ahistorical (not to mention confusing) tests it inspired do little more than ask policy questions the Constitution settled long ago. Yes, a limited category of public rights were originally and even long before understood to be susceptible to resolution without a court, jury, or the other usual protections an Article III court affords. But outside of those limited areas, we have no license to deprive the American people of their constitutional right to an independent judge, to a jury

of their peers, or to the procedural protections at trial that due process normally demands. Let alone do so whenever the government wishes to dispense with them.

This Court does not subject other constitutional rights to such shabby treatment. We have "reaffirm[ed]," many times and "emphatically[,] that the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley v.*
2150 *National* *2150 *Federation of Blind of N. C., Inc.*, 487 U.S. 781, 795, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). We have rejected a framework for Second Amendment challenges that would balance the right to bear arms against "`other important governmental interests.'" *District of Columbia v. Heller*, 554 U.S. 570, 634, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). It is hornbook Fourth Amendment law that "[a] generalized interest in expedient law enforcement cannot, without more, justify a warrantless search." *Georgia v. Randolph*, 547 U.S. 103, 115, n. 5, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006). And even though the Sixth Amendment's guarantee of a jury trial in criminal cases may have "`its weaknesses and the potential for misuse,'" *Duncan v. Louisiana*, 391 U.S. 145, 156, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), we continue to insist that it "be jealously preserved," *Patton v. United States*, 281 U.S. 276, 312, 50 S.Ct. 253, 74 L.Ed. 854 (1930); see *Ramos v. Louisiana*, 590 U.S. 83, 110-111, 140 S.Ct. 1390, 206 L.Ed.2d 583 (2020) (plurality opinion); *Erlinger*, 602 U. S., at ___, 144 S.Ct. at 1856 ("There is no efficiency exception to the ... Sixth Amendmen[t]").

Why should Article III, the Seventh Amendment, or the Fifth Amendment's promise of due process be any different? None of them exists to "protec[t] judicial authority for its own sake." *Oil States*, 584 U.S. at 356, 138 S.Ct. 1365 (GORSUCH, J., dissenting). They exist to "protect the individual." *Bond v. United States*, 564 U.S. 211, 222, 131 S.Ct. 2355, 180 L.Ed.2d 269 (2011). And their protections are no less vital than those afforded by other constitutional provisions. As American colonists learned under British rule, "the right of trial" means little "when the actual administration of justice is dependent upon caprice, or favour, [or] the will of rulers." 3 Story § 1568, at 426; *id.*, § 1783, at 661. In recognizing as much today, the Court essentially follows the advice of Justices Brennan and Marshall, "limit[ing] the judicial authority of non-Article III federal tribunals to th[o]se few, long-established exceptions" that bear the sanction of history, and "countenanc[ing] no further erosion." *Schor*, 478 U.S. at 859, 106 S.Ct. 3245 (Brennan, J., joined by Marshall, J., dissenting).

C

The dissent's competing account of public rights is astonishing. On its telling, the Constitution might impose some (undescribed) limits on the power of the government to send cases "involving the liability of one individual to another" to executive tribunals for resolution. *Post,* at 2166 (opinion of SOTOMAYOR, J.). But, thanks to public rights doctrine, the dissent insists, the Constitution imposes *no* limits on the government's power to seek civil penalties "outside the regular courts of law where there are no juries." *Post,* at 2155. In that field, the Constitution falls silent. The dissent does not even attempt to deploy any of the contrived balancing tests that emerged in *Atlas Roofing*'s aftermath to rein in the government's power. But where in Article III, the Seventh Amendment, and due process can the dissent find this new rule? What about founding-era practice or original meaning? And why would a Constitution drawn up to protect against arbitrary government action make it easier for the government than for private parties to escape its dictates? The dissent offers no answers.

To be sure, the dissent tries to appeal to precedent. It even asserts that our decisions support, "*without exception,*" its sweeping conception of public rights doctrine. *Post,* at 2161 (emphasis added). But the dissent's approach to our
2151 precedents is like a picky child at the dinner table. It selects only a small handful while leaving *2151 much else untouched. To start, the dissent lingers briefly on *Murray's Lessee*—but not long enough to explain the opinion's conception of Article III, due process, or the extended historical inquiry that led the Court to conclude the collection of revenue concerned a public right. See *post,* at 2159-2160; *supra,* at 2143-2144, 2145-2147.

The 19th century behind it (for it does not trouble with the founding era), the dissent turns to *Oceanic Steam Nav. Co. v. Stranahan*, 214 U.S. 320, 29 S.Ct. 671, 53 L.Ed. 1013 (1909). Drawing on that decision, the dissent contends that "Congress [has] routinely `impose[d] appropriate obligations'" by statute and given "`executive officers the power to enforce'" them "`without the necessity of invoking the judicial power.'" *Post,* at 2160 (quoting *Stranahan*, 214 U.S. at 339, 29 S.Ct. 671). Notably absent from the dissent's account, however, is the decision's discussion of Congress's long-recognized and extensive authority over the field of immigration, the area of law at issue there. See *id.,* at 339, 29 S.Ct. 671. Unmentioned, too, is *Stranahan*'s explanation that what links immigration to other public rights like "tariff[s],...

internal revenue, taxation," and "foreign commerce" is that, "`from the beginning[,] Congress has exercised a plenary power'" over them "because they all relate to subjects peculiarly within the authority of the legislative department." *Id.,* at 334, 339, 29 S.Ct. 671.

Really, one has to wonder: If the public rights exception is as broad and unqualified as the dissent asserts, why did our predecessors bother to discuss history or Congress's peculiar powers when it comes to revenue and immigration? Why didn't the Court simply announce the rule the dissent would have us announce today: that our Constitution does not stand in the way of "agency adjudications of statutory claims ... brought by the Government in its sovereign capacity"? *Post,* at 2156. The answer, of course, is that the Constitution has never countenanced the dissent's notion that the Executive is free to reassign virtually any civil case in which it is a party to its own tribunals where its own employees decide cases and inconvenient juries and traditional trial procedures go by the boards.

That my dissenting colleagues plow ahead anyway with their remarkable conception of public rights is all the more puzzling considering how regularly they have argued *against* that sort of sweeping concentration of governmental power. The dissenters have recognized that a "lack of standardized procedural safeguards" can leave government enforcement schemes "vulnerable to abuse" and individuals subject to coercive "pressure from unchecked prosecutors." *Culley,* 601 U.S. at 405, 407, 144 S.Ct. 1142 (SOTOMAYOR, J., joined by KAGAN and JACKSON, JJ., dissenting). They have contended that the Judiciary has an affirmative obligation to supply "meaningful remedies," trials before judges and juries included, even when "Congress or the Executive has [already] created a remedial process." *Egbert v. Boule,* 596 U.S. 482, 524-525, 142 S.Ct. 1793, 213 L.Ed.2d 54 (2022) (SOTOMAYOR, J., joined by, *inter alios,* KAGAN, J., dissenting) (internal quotation marks omitted; emphasis deleted). And like most every current Member of this Court at one time or another, they have acknowledged that the jury-trial right "stands as one of the Constitution's most vital protections against arbitrary government." *United States v. Haymond,* 588 U.S. 634, 637, 139 S.Ct. 2369, 204 L.Ed.2d 897 (2019) (plurality opinion).

The dissent's conception of public rights is so unqualified that it refuses to commit itself on the question whether even
2152 muted forms of judicial review—such as asking *2152 executive tribunals to muster "more than a mere scintilla" of evidence in support of their rulings—are constitutionally required in the essentially unbounded class of cases that fall within its conception of public rights. See Part I, *supra; post,* at 2159, n. 4. Gone, too, is any role for the jury—for why would the government ever go to court if it may more readily secure a win before its own employees? The only attempt to mitigate the havoc its rule would wreak comes when the dissent declares that "`[t]he public-rights doctrine does not extend to ... criminal matters.'" *Post,* at 2170, n. 9. But the dissent does not (and cannot) explain how that fits with all else it says. If, as the dissent insists, a public right is any "new right" that "belongs to the public and inheres in the Government in its sovereign capacity," *post,* at 2170, what could possibly better fit the description than the enforcement of new criminal laws? See *Shinn v. Martinez Ramirez,* 596 U.S. 366, 376, 142 S.Ct. 1718, 212 L.Ed.2d 713 (2022) ("The power to convict and punish criminals lies at the heart of the States' residuary and inviolable sovereignty" (internal quotation marks omitted)).[2]

All but admitting its view has no support in "historical practice dating back to the founding," the dissent chastises the Court for daring to rely on that practice to flesh out the scope of the public rights exception. *Post,* at 2164. It would be so much simpler, the dissent says, to adopt its rule permitting the government to skirt oversight by judge and jury alike whenever it enacts a new law. And, true enough, "a principle that the government always wins surely would be simple for judges to implement." *United States v. Rahimi,* 602 U. S. ___, ___, 144 S.Ct. 1889, 1909, ___ L.Ed.2d ___ (2024) (GORSUCH, J., concurring). But looking to original meaning and historical practice informing it is exactly how this Court proceeds in so many other contexts where we seek to honor the Constitution's demands—including, notably, when we seek to ascertain the scope of the *criminal* jury-trial right and the defendant's attendant right to confront his accusers. See *Erlinger,* 602 U. S., at ___ - ___, 144 S.Ct. at 1856-1857; *Crawford v. Washington,* 541 U.S. 36, 50, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). What's more, this approach has the virtue of "keep[ing] judges in their proper lane" by "seeking to honor the supreme law the people have ordained rather than substituting our will for theirs." *Rahimi,* 602 U. S., at ___, 144 S.Ct. at 1909 (GORSUCH, J., concurring); see *Crawford,* 541 U.S. at 67, 124 S.Ct. 1354.

It is hard, as well, to take seriously the dissent's charges of unworkability and unpredictability. At least until today, the dissenters supported procedural protections for those in the government's sights in civil as well as criminal cases. What kind of protections? Often, they have argued, it depends on a judicial balancing test. One that is "flexible," defies

2153 "technical conception," lacks "fixed content," and will "not always yield the same result" even when applied in similar circumstances. *Culley,* *2153 601 U.S. at 413, 144 S.Ct. 1142 (opinion of SOTOMAYOR, J.) (internal quotation marks omitted). As we have seen, that was essentially the course some pursued, too, when it came to the public rights exception in the fallout from *Atlas Roofing.* See Part III-B, *supra.* But that kind of "'we know it when we see it'" approach to constitutional rights, *post,* at 2166, can hardly claim any serious advantages when it comes to workability or predictability.

Failing all else, the dissent retreats to *Atlas Roofing.* At least that decision, it insists, supports its nearly boundless conception of public rights. The dissent goes so far as to accuse the Court of undermining "*stare decisis* and the rule of law," *post,* at 2162, and engaging in "a power grab," *post,* at 2175, by failing to give *Atlas Roofing* its broadest possible construction. It's a "disconcerting" accusation indeed, *post,* at 2174-2175, and a misdirected one at that. Construed as broadly as the dissent proposes, *Atlas Roofing*'s view of public rights stands as an outlier in our jurisprudence—with no apparent support in original meaning, at odds with prior precedent, and inconsistent with later precedent as well. See *ante,* at 2138-2139, n. 4; Part III-B, *supra.* Meanwhile, the Court's alternative construction of *Atlas Roofing* fits far more comfortably with all those legal sources. In that respect, the majority's approach is of a piece with *Granfinanciera*'s similar approach 25 years ago. And, more broadly, it is of a piece with our usual practice of construing "loose language" found in a prior judicial opinion in a way that better conforms it to the mainstream of our precedents. *Groff v. DeJoy,* 600 U. S. 447, 474, 143 S.Ct. 2279, 216 L.Ed.2d 1041 (2023) (SOTOMAYOR, J., concurring). As the dissenters have previously acknowledged, that course is neither unusual nor at odds with *stare decisis.* See *id.,* at 474-475, 143 S.Ct. 2279; see also *Brown v. Davenport,* 596 U.S. 118, 141, 142 S.Ct. 1510, 212 L.Ed.2d 463 (2022) ("We neither expect nor hope that our successors will comb these pages for stray comments and stretch them beyond their context—all to justify an outcome inconsistent with this Court's reasoning and judgments").

Were there any doubt about the propriety of the Court's treatment of *Atlas Roofing,* consider one more feature of the alternative the dissent proposes. In defending the broadest possible construction of *Atlas Roofing*'s public rights discussion, the dissent necessarily endorses that decision's exceptionally narrow conception of the Seventh Amendment. See *post,* at 2157-2158. After all, as public rights expand, so too the jury-trial right must contract. Yet *Atlas Roofing*'s discussion of the jury-trial right, no less than its discussion of public rights, is difficult to square with precedent and original meaning.

Recall that, from the start, the Seventh Amendment was understood to protect that right "not merely" in suits recognized at common law, but in "*all* suits which are" of legal, as opposed to "equity [or] admiralty[,] jurisdiction." *Parsons,* 3 Pet. at 447 (emphasis added); see Part II-B, *supra.* This Court repeated that understanding of the Amendment until well into the 1970s, noting, for example, that "the applicability of the constitutional right to jury trial in actions enforcing statutory rights" was "a matter too obvious to be doubted." *Curtis v. Loether,* 415 U.S. 189, 193, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974) (internal quotation marks omitted); accord, *Pernell v. Southall Realty,* 416 U.S. 363, 375, 94 S.Ct. 1723, 40 L.Ed.2d 198 (1974) (the Seventh "Amendment requires trial by jury in actions unheard of at common law"). And the Court rejected the notion that a statute must present "a close equivalent" to a common-law cause of action; the jury-trial
2154 right attached, we said, so long as the "action *2154 involve[d] rights and remedies of the sort traditionally enforced in an action at law." *Ibid.*

Atlas Roofing ignored all of that. Instead, it suggested, "[t]he phrase `Suits at common law' has been construed to refer to cases tried *prior* to the adoption of the Seventh Amendment in courts of law." 430 U.S. at 449, 97 S.Ct. 1261 (emphasis added). That cramped construction of the Seventh Amendment was, of course, a key move in *Atlas Roofing.* For without it, the Court would have been hard pressed to suggest the public rights doctrine permits Congress to route any "`new cause of action'" for adjudication before agencies where juries do not sit. *Post,* at 2162 (quoting *Atlas Roofing,* 430 U.S. at 461, 97 S.Ct. 1261).

Almost immediately, however, the Court rejected *Atlas Roofing*'s analysis, not just with respect to public rights doctrine but the Seventh Amendment, too. Returning to our mainstream precedents, the Court reaffirmed the applicability of the Seventh Amendment to new causes of action, first in *Tull v. United States,* 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987), and then in *Granfinanciera.* See *ante,* at 2128-2129. And by 1990, our case law had come full circle, announcing once again what has always been true: that "[t]he right to a jury trial includes more than the common-law forms of action recognized in 1791." *Teamsters v. Terry,* 494 U.S. 558, 564, 110 S.Ct. 1339, 108 L.Ed.2d 519.

Today, the Court respects and follows this longstanding message in our Seventh Amendment precedents. The dissent chooses another path entirely—adopting a reading of *Atlas Roofing* that leads not only to an implausibly broad construction of public rights, but to an implausibly narrow understanding of the jury-trial guarantee as well. One wholly at odds with precedents both old and new. Nor is the dissent shy about its real motivation—and it has nothing to do with respect for precedent but much more to do with a "power grab": Holding the government to the Constitution's promise of a jury trial, the dissent insists, would impose "constraints on what," in its view, "modern-day adaptable governance must look like." *Post,* at 2175. All of which, at bottom, amounts to little more than a complaint with the Constitution's revolutionary promise of popular oversight of government officials—and with those judges who would honor that promise.

*

People like Mr. Jarkesy may be unpopular. Perhaps even rightly so: The acts he allegedly committed may warrant serious sanctions. But that should not obscure what is at stake in his case or others like it. While incursions on old rights may begin in cases against the unpopular, they rarely end there. The authority the government seeks (and the dissent would award) in this case—to penalize citizens without a jury, without an independent judge, and under procedures foreign to our courts—certainly contains no such limits. That is why the Constitution built "high walls and clear distinctions" to safeguard individual liberty. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995). Ones that ensure even the least popular among us has an independent judge and a jury of his peers resolve his case under procedures designed to ensure a fair trial in a fair forum. In reaffirming all this today, the Court hardly leaves the SEC without ample powers and recourse. The agency is free to pursue all of its charges against Mr. Jarkesy. And it is free to pursue them exactly as it had always done until 2010: In a court, before a judge, and with a jury. With these observations, I am pleased to concur.

2155 *2155 Justice SOTOMAYOR, with whom Justice KAGAN and Justice JACKSON join, dissenting.

Throughout our Nation's history, Congress has authorized agency adjudicators to find violations of statutory obligations and award civil penalties to the Government as an injured sovereign. The Constitution, this Court has said, does not require these civil-penalty claims belonging to the Government to be tried before a jury in federal district court. Congress can instead assign them to an agency for initial adjudication, subject to judicial review. This Court has blessed that practice repeatedly, declaring it "the `settled judicial construction'" all along; indeed, "`from the beginning.'" *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 460, 97 S.Ct. 1261, 51 L.Ed.2d 464 (1977). Unsurprisingly, Congress has taken this Court's word at face value. It has enacted more than 200 statutes authorizing dozens of agencies to impose civil penalties for violations of statutory obligations. Congress had no reason to anticipate the chaos today's majority would unleash after all these years.

Today, for the very first time, this Court holds that Congress violated the Constitution by authorizing a federal agency to adjudicate a statutory right that inheres in the Government in its sovereign capacity, also known as a public right. According to the majority, the Constitution requires the Government to seek civil penalties for federal-securities fraud before a jury in federal court. The nature of the remedy is, in the majority's view, virtually dispositive. That is plainly wrong. This Court has held, without exception, that Congress has broad latitude to create statutory obligations that entitle the Government to civil penalties, and then to assign their enforcement outside the regular courts of law where there are no juries.

Beyond the majority's legal errors, its ruling reveals a far more fundamental problem: This Court's repeated failure to appreciate that its decisions can threaten the separation of powers. Here, that threat comes from the Court's mistaken conclusion that Congress cannot assign a certain public-rights matter for initial adjudication to the Executive because it must come only to the Judiciary.

The majority today upends longstanding precedent and the established practice of its coequal partners in our tripartite system of Government. Because the Court fails to act as a neutral umpire when it rewrites established rules in the manner it does today, I respectfully dissent.

I

The story of this case is straightforward. The Securities and Exchange Commission (SEC or Commission) investigated respondents George Jarkesy and his advisory firm Patriot28, LLC, for alleged violations of federal-securities laws in connection with the launch of two hedge funds.

In deciding how and where to enforce these laws, the SEC could have filed suit in federal court or adjudicated the matter in an administrative enforcement action subject to judicial review. See 15 U.S.C. §§ 77h-1, 77t, 78u, 78u-2, 78u-3, 80b-3, 80b-9. The SEC opted for the latter. In 2013, the SEC initiated an administrative enforcement action against respondents, alleging violations of the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940. Specifically, the SEC alleged that respondents falsely told brokers and investors that: (1) a prominent accounting firm would audit the hedge funds; (2) a prominent investment bank would serve as the funds'
2156 prime broker; and (3) one of the funds would invest 50% of its capital in certain life-insurance policies. In reality, *2156 the audit never took place, the bank never opened a prime brokerage account, and the hedge fund invested less than 20% of its capital in the life-insurance policies. In addition to misrepresenting the funds' investment strategies, respondents allegedly overvalued the funds' holdings to charge higher management fees.

The SEC assigned the action to one of its administrative law judges, who held an evidentiary hearing and issued a lengthy initial decision, concluding that respondents in fact had violated the three securities laws. The full Commission reviewed the initial decision and reached the same determination. The Commission also denied respondents' constitutional challenges to the order, including that the agency's in-house adjudication violated respondents' Seventh Amendment right to a jury trial in federal court. Ultimately, the SEC ordered respondents to pay a civil penalty of $300,000 and to cease and desist from violating the federal-securities laws. It also barred Jarkesy from doing certain things in the securities industry and ordered Patriot28 to disgorge $685,000 in illicit profits.

Respondents filed a petition for review in the Fifth Circuit. 34 F.4th 446, 466 (2022). A divided panel granted the petition and vacated the SEC's order. The panel held, over the dissent of Judge Davis, that respondents were entitled to a jury trial in federal court under the Seventh Amendment because the federal-securities antifraud provisions were similar to common-law fraud claims to which the jury-trial right would attach. See *id.*, at 451-459. Because the SEC forced respondents to proceed within the agency, the Court of Appeals held that the SEC violated respondents' Seventh Amendment rights and thus vacated the SEC's order. *Id.*, at 465-466.[1]

The majority affirms the Fifth Circuit's decision, notwithstanding the mountain of precedent against it. A faithful application of our precedent would have led, inexorably, to upholding the statutory scheme that Congress enacted for the SEC's in-house adjudication of federal-securities claims.

II

The majority did not need to break any new ground to resolve respondents' Seventh Amendment challenge. This Court's longstanding precedent and established government practice uniformly support the constitutionality of administrative schemes like the SEC's: agency adjudications of statutory claims for civil penalties brought by the Government in its sovereign capacity. See Part II-B (*infra*, at 2158-2162). In assessing the constitutionality of such adjudications, the political branches'" '[l]ong settled and established practice,'" which this Court has upheld and reaffirmed time and again, is entitled to "'great weight.'" *Chiafalo v. Washington*, 591 U.S. 578, 592-593, 140 S.Ct. 2316, 207 L.Ed.2d 761 (2020) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689, 49 S.Ct. 463, 73 L.Ed. 894 (1929)); accord, *Vidal v. Elster*, 602 U.S.
2157 286, 323, 144 S.Ct. 1507, ___ L.Ed.2d ___ (2024) (BARRETT, J., concurring in part); *id.*, at 330, 144 S.Ct. 1507 *2157 (SOTOMAYOR, J., concurring in judgment); *Consumer Financial Protection Bureau v. Community Financial Services Assn. of America, Ltd.*, 601 U.S. 416, 442, 144 S.Ct. 1474, ___ L.Ed.2d ___ (2024) (KAGAN, J., concurring).

A

There are two key constitutional provisions at issue here. One is the Seventh Amendment, which "preserve[s]" the "right of trial by jury" in "Suits at common law, where the value in controversy shall exceed twenty dollars." The other is Article III's Vesting Clause, which provides that the "judicial Power of the United States ... shall be vested" in federal Article III courts. This case presents the familiar interplay between these two provisions.

Although this case involves a Seventh Amendment challenge, the principal question at issue is one rooted in Article III and the separation of powers. That is because, as the majority rightly acknowledges, the Seventh Amendment's jury-trial right "applies" only in "an Article III court." *Ante,* at 2127. That conclusion follows from both the text of the Constitution and this Court's precedents.

As to the text, the Amendment is limited to "Suits at common law." That means two things. First, that the right applies only in judicial proceedings. The term "suit," after all, refers to "the prosecution of some demand in a Court of justice," *Cohens v. Virginia*, 6 Wheat. 264, 407, 5 L.Ed. 257 (1821) (Marshall, C. J.), or a "proceeding in a court of justice," *Weston v. City Council of Charleston*, 2 Pet. 449, 7 L.Ed. 481 (1829) (same) ("The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit"). Consistent with that understanding, this Court has held repeatedly that "the Seventh Amendment is not applicable to administrative proceedings." *Tull v. United States*, 481 U.S. 412, 418, n. 4, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987); accord, *Atlas Roofing*, 430 U.S. at 454-455, 97 S.Ct. 1261; *Curtis v. Loether*, 415 U.S. 189, 195, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974). Factfinding by a jury is "incompatible with the whole concept of administrative adjudication," which empowers executive officials to find the relevant facts and apply the law to those facts like juries do in a courtroom. *Pernell v. Southall Realty*, 416 U.S. 363, 383, 94 S.Ct. 1723, 40 L.Ed.2d 198 (1974) (collecting cases).

Second, the requirement that the "'[s]uit'" must be one "'at common law'" means that the claim at issue must be "'legal in nature.'" *Ante,* at 2128. So, whether a defendant is entitled to a jury under the Seventh Amendment depends on both the forum and the cause of action. If the claim is in an Article III proceeding, then the right to a jury attaches if the claim is "legal in nature" and the amount in controversy exceeds $20. *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 53, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989); *Atlas Roofing*, 430 U.S. at 454, n. 12, 461, n. 16, 97 S.Ct. 1261. Yet when, as here, the claim proceeds in a non-Article III forum, the relevant question becomes whether "Congress properly assign[ed the] matter" for decision to that forum consistent with Article III and the separation of powers. *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 584 U.S. 325, 345, 138 S.Ct. 1365, 200 L.Ed.2d 671 (2018). In other words, the question is whether Congress improperly bestowed federal judicial power on a non-Article III forum. See *id.,* at 334, 138
2158 S.Ct. 1365 (Congress cannot "'confer the Government's "judicial Power" on entities outside Article III'" (quoting *2158 *Stern v. Marshall*, 564 U.S. 462, 484, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011))).[2]

The conclusion that Congress properly assigned a matter to an agency for adjudication therefore necessarily "resolves [any] Seventh Amendment challenge." *Oil States*, 584 U.S. at 345, 138 S.Ct. 1365 (explaining that if non-Article III adjudication is permissible, then "'the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder'" (quoting *Granfinanciera*, 492 U.S. at 53-54, 109 S.Ct. 2782)); see W. Baude, Adjudication Outside Article III, 133 Harv. L. Rev. 1511, 1571 (2020) ("The Article III analysis should be conducted first, on its own. And then ... if the non-Article III adjudication is permissible, the Seventh Amendment should be ignored"). When executive power is at stake, Congress does not violate Article III or the Seventh Amendment by authorizing a nonjury factfinder to adjudicate the dispute.

So, the critical issue in this type of case is whether Congress can assign a particular matter to a non-Article III factfinder.

B

For more than a century and a half, this Court has answered that Article III question by pointing to the distinction between "private rights" and "public rights." See *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 284, 15 L.Ed. 372 (1856) (recognizing public-rights exception). The distinction is helpful because public rights always can be assigned outside of Article III. They "'do not require judicial determination'" under the Constitution, even if they "'are susceptible of it.'" *Crowell v. Benson*, 285 U.S. 22, 50, 52 S.Ct. 285, 76 L.Ed. 598 (1932) (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451, 49 S.Ct. 411, 73 L.Ed. 789 (1929)).

The majority says that aspects of the public-rights doctrine have been confusing. See *ante,* at 2133-2134. That might be true for cases involving wholly private disputes, but not for cases where the Government is a party.[3] It has long been settled and undisputed that, at a minimum, a matter of public rights arises "between the government and persons
2159 subject to its authority in connection with the performance *2159 of the constitutional functions of the executive or legislative departments." *Crowell*, 285 U.S. at 50, 52 S.Ct. 285; *Oil States*, 584 U.S. at 335, 138 S.Ct. 1365 (describing

the "Court's longstanding formulation of the public-rights doctrine"); accord, Granfinanciera, 492 U.S. at 51, and n. 8, 109 S.Ct. 2782; Atlas Roofing, 430 U.S. at 452, 457, 97 S.Ct. 1261; Ex parte Bakelite Corp., 279 U.S. at 451, 49 S.Ct. 411. Indeed, "from the time the doctrine of public rights was born, in 1856," everyone understood that public rights "`arise "between the government and others,"'" and refer to "rights *of the public*—that is, rights pertaining to claims brought by or against the United States." Granfinanciera, 492 U.S. at 68-69, 109 S.Ct. 2782 (Scalia, J., concurring in part and concurring in judgment); see *ibid.* (collecting sources). So, while this Court has recognized public rights in certain disputes between private parties, see *infra*, at 2165-2166, the doctrine's heartland consists of claims belonging to the Government.

When a claim belongs to the Government as sovereign, the Constitution permits Congress to enact new statutory obligations, prescribe consequences for the breach of those obligations, and then empower federal agencies to adjudicate such violations and impose the appropriate penalty. See Atlas Roofing, 430 U.S. at 450-455, 97 S.Ct. 1261 (collecting cases).[4] This Court has repeatedly emphasized these unifying principles through an unbroken series of cases over almost 200 years.

1

Start at the beginning, with *Murray's Lessee* in 1856. In that case, the Government issued a warrant to compel a federal customs collector to produce public funds that the Government determined the collector had unlawfully withheld. See 18 How. at 274-275. The Government executed the warrant to seize and sell a plot of the collector's land to make up for the withheld funds. See *id.*, at 274. In upholding the sale of the seized property, this Court concluded that the Government's in-house assessment and collection of taxes and penalties based on a federal official's adjudication of the facts did not violate Article III. The scheme was constitutional, the Court said, because "public rights" were at issue. *Id.*, at 284. In
2160 other words, *2160 the dispute arose between the Government and the customs collector in connection with the Government's exercise of its constitutional power to collect revenue. Congress could have brought such claims, if it wanted, "within the cognizance of the courts of the United States, as it may deem proper." *Ibid.* The Court thus endorsed that constitutional balance: Congress could decide whether to assign a public-rights dispute to the Executive for initial adjudication subject to judicial review or to an Article III federal court for resolution.

Fast forward half a century. In Oceanic Steam Nav. Co. v. Stranahan, 214 U.S. 320, 338-340, 29 S.Ct. 671, 53 L.Ed. 1013 (1909), the Court upheld a customs official's imposition of a penalty on a steamship company that violated immigration laws barring the entry of certain classes of people into the country. The customs official determined the facts, adjudicated the violation, and enforced the statutory prohibition on immigration through the assessment of a monetary penalty. See *id.*, at 329, 29 S.Ct. 671. The Court noted the breadth of Congress's immigration power and held that the civil-penalty statutory scheme at issue was "beyond all question constitutional." *Id.*, at 342, 29 S.Ct. 671. Yet, far from restricting the public-rights doctrine to this particular exercise of congressional power or to specific prerogatives, the *Stranahan* Court went out of its way to explain that the "settled judicial construction" that civil-penalty claims brought by the Government could be assigned to the Executive for initial adjudication extended "not only as to tariff, but as to internal revenue, taxation, and other subjects," including the regulation of foreign commerce. *Id.*, at 339, 29 S.Ct. 671; see also *id.*, at 334-335, 29 S.Ct. 671.

Importantly, *Stranahan* rejected the "proposition" that, in "cases of penalty or punishment, ... enforcement must depend upon the exertion of judicial power, either by civil or criminal process." *Id.*, at 338, 29 S.Ct. 671. In words that could have been written in response to today's ruling, the Court explained that such a "proposition magnifies the judicial to the detriment of all other departments of the Government, disregards many previous adjudications of this court, and ignores practices often manifested and hitherto deemed to be free from any possible constitutional question." *Ibid.* For that reason, the validity of legislation authorizing the non-Article III adjudication of civil-penalty claims does not turn on the Judiciary's assessment of whether it is necessary for executive officials "to enforce designated penalties without resort to the courts." *Id.*, at 339, 29 S.Ct. 671. Whether or not such legislation violates Article III depends on whether Congress acted pursuant to a "grant of power made by the Constitution," and not on whether it "relate[s] to subjects peculiarly within the authority of the legislative department of the Government" or on the circumstances that might have "caused Congress to exert a specified power." *Id.*, at 339-340, 29 S.Ct. 671.

By the time *Stranahan* was decided, Congress already routinely "impose[d] appropriate obligations and sanction[ed]

their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power." *Id.,* at 339, 29 S.Ct. 671. Far from limiting the public-rights doctrine to the particular context in *Stranahan* and prior cases, this Court has expressly rejected the notion that the public-rights doctrine is so confined. See *infra,* at 2164-2165. This Court has repeatedly approved Congress's assignment of public
2161 rights to agencies in diverse areas of the law, reflecting Congress's *2161 varied constitutional powers.[5] A nonexhaustive list includes "interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions, and payments to veterans," *Crowell,* 285 U.S. at 51, and n. 13, 52 S.Ct. 285 (collecting cases); see also, *e.g., Helvering v. Mitchell,* 303 U.S. 391, 401-404, 58 S.Ct. 630, 82 L.Ed. 917 (1938) (administrative penalty for underpayment of taxes); *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 22-24, 48-49, 57 S.Ct. 615, 81 L.Ed. 893 (1937) (reinstatement of dismissed employee and backpay in adjudication of unfair-labor-practices claim under the National Labor Relations Act); *Phillips v. Commissioner,* 283 U.S. 589, 591-592, 51 S.Ct. 608, 75 L.Ed. 1289 (1931) (deficiency assessments for unpaid taxes); *Lloyd Sabaudo Societa Anonima per Azioni v. Elting,* 287 U.S. 329, 334-335, 53 S.Ct. 167, 77 L.Ed. 341 (1932) (fines for violation of immigration law barring entry of certain classes of individuals); *Ex parte Bakelite Corp.,* 279 U.S. at 446-447, 451, 458, 49 S.Ct. 411 (adjudication of unfair-methods-of-competition and unfair-acts claims, and imposition of additional duties under customs law); *Passavant v. United States,* 148 U.S. 214, 215-216, 220, 13 S.Ct. 572, 37 L.Ed. 426 (1893) (penalty for undervaluation of imported merchandise).

The list could go on and on. That is because, in every case where the Government has acted in its sovereign capacity to enforce a new statutory obligation through the administrative imposition of civil penalties or fines, this Court, without exception, has sustained the statutory scheme authorizing that enforcement outside of Article III.

2

A unanimous Court made this exact point nearly half a century ago in *Atlas Roofing.* That was the last time this Court considered a public-rights case where the constitutionality of an in-house adjudication of statutory claims brought by the Government was at issue. That case presented the same question as this one: Whether the Seventh Amendment permits Congress to commit the adjudication of a new cause of action for civil penalties to an administrative agency. 430 U.S. at 444, 97 S.Ct. 1261. The Court said it did.

In *Atlas Roofing,* the Court explained how Congress identified a national problem, concluded that existing legal remedies were inadequate to address it, and then created a new statutory scheme that endorsed Executive in-house enforcement as a solution. Specifically, Congress found "that work-related deaths and injuries had become a `drastic' national problem," and that existing causes of action, including tort actions for negligence and wrongful death, did not adequately "protect the employee population from death and injury due to unsafe working conditions." *Id.,* at 444-445, 97 S.Ct. 1261. In response, Congress enacted the Occupational Safety and Health Act of 1970 (OSHA) to require employers "to avoid maintaining unsafe or unhealthy working conditions." *Id.,* at 445, 97 S.Ct. 1261. OSHA in turn "empower[ed] the Secretary of Labor to promulgate health and safety standards," and the Occupational Safety and Health Review Commission to impose civil penalties on employers maintaining unsafe working conditions, regardless of whether any worker was in fact injured or killed. *Id.,* at 445-446, 97 S.Ct. 1261.

2162 *2162 Two employers that had been assessed civil penalties for OSHA violations resulting in the death of employees challenged the constitutionality of the statute's enforcement procedures. They observed that "a suit in a federal court by the Government for civil penalties for violation of a statute is a suit for a money judgment[,] which is classically a suit at common law." *Id.,* at 449, 97 S.Ct. 1261. Therefore, the employers claimed, the Seventh Amendment right to a jury attached and Congress could not assign the matter to an agency for resolution. See *ibid.*

This Court upheld OSHA's statutory scheme. It relied on the long history of public-rights cases endorsing Congress's now-settled practice of assigning the Government's rights to civil penalties for violations of a statutory obligation to in-house adjudication in the first instance. See *id.,* at 450-455, 97 S.Ct. 1261. In light of this "history and our cases," the Court concluded that, where Congress "create[s] a new cause of action, and remedies therefor, unknown to the common law," it is free to "plac[e] their enforcement in a tribunal supplying speedy and expert resolutions of the issues involved." *Id.,* at 460-461, 97 S.Ct. 1261. "That is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law." *Id.,* at 455, 97 S.Ct. 1261; see *id.,* at 461, 97

S.Ct. 1261, n. 16.

The "new rule" and "legally unsound principle" that the majority accuses this dissent of "unfurl[ing]" today, *ante,* at 2134, n. 2, is the one that this Court declared "`settled judicial construction' ... `from the beginning'": "[T]he Government could commit the enforcement of statutes and the imposition and collection of fines... for administrative enforcement, without judicial trials," even if the same action would have required a jury trial if committed to an Article III court. *Atlas Roofing,* 430 U.S. at 460, 97 S.Ct. 1261 (collecting cases); accord, *Elting,* 287 U.S. at 334, 53 S.Ct. 167 (Congress "may lawfully impose appropriate obligations, sanction their enforcement by reasonable money penalties, and invest in administrative officials the power to impose and enforce them"); *Stranahan,* 214 U.S. at 339, 29 S.Ct. 671 (Congress may "impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power").

C

It should be obvious by now how this case should have been resolved under a faithful and straightforward application of *Atlas Roofing* and a long line of this Court's precedents. The constitutional question is indistinguishable. The majority instead wishes away *Atlas Roofing* by burying it at the end of its opinion and minimizing the unbroken line of cases on which *Atlas Roofing* relied. That approach to precedent significantly undermines this Court's commitment to *stare decisis* and the rule of law.

This case may involve a different statute from *Atlas Roofing,* but the schemes are remarkably similar. Here, just as in *Atlas Roofing,* Congress identified a problem; concluded that the existing remedies were inadequate; and enacted a new regulatory scheme as a solution. The problem was a lack of transparency and accountability in the securities market that contributed to the Great Depression of the 1930s. See *ante,* at 2124-2125. The inadequate remedies were the then-existing state statutory and common-law fraud causes of action. The solution was a comprehensive federal
2163 scheme of securities regulation consisting of the Securities Act of 1933, the Securities *2163 Exchange Act of 1934, and the Investment Advisers Act of 1940. See *ibid.* In particular, Congress enacted these securities laws to ensure "full disclosure" and promote ethical business practices "in the securities industry," *SEC v. Capital Gains Research Bureau, Inc.,* 375 U.S. 180, 186, 84 S.Ct. 275, 11 L.Ed.2d 237 (1963), as well as to "protect investors against manipulation of stock prices," *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 195, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976).

The prophylactic nature of the statutory regime also is virtually indistinguishable from the OSHA scheme at issue in *Atlas Roofing.* Among other things, these securities laws prohibit the misrepresentation or concealment of various material facts through the imposition of federal registration and disclosure requirements. See *ante,* at 2125. Critically, federal-securities laws do not require proof of actual reliance on an investor's misrepresentations or that an "investor has actually suffered financial loss." *Ante,* at 2126; see also *SEC v. Life Partners Holdings, Inc.* 854 F.3d 765, 779 (CA5 2017); *SEC v. Blavin,* 760 F.2d 706, 711 (CA6 1985) (*per curiam*). OSHA too prohibits conduct that could, but does not necessarily, injure a private person. *Atlas Roofing,* 430 U.S. at 445, 97 S.Ct. 1261 (OSHA remedies "exis[t] whether or not an employee is actually injured or killed as a result of the [unsafe or unhealthy working] condition"). The employer's failure to maintain safe and healthy working conditions violates OSHA even if there is no actionable harm to an employee, just as a misrepresentation to investors in connection with the buying or selling of securities violates federal-securities law even if there is no actual injury to the investors.

Moreover, both here and in *Atlas Roofing,* Congress empowered the Government to institute administrative enforcement proceedings to adjudicate potential violations of federal law and impose civil penalties on a private party for those violations, all while making the final agency decision subject to judicial review. In bringing a securities claim, the SEC seeks redress for a "violation" that "is committed against the United States rather than an aggrieved individual," which "is why, for example, a securities-enforcement action may proceed even if victims do not support or are not parties to the prosecution." *Kokesh v. SEC,* 581 U.S. 455, 463, 137 S.Ct. 1635, 198 L.Ed.2d 86 (2017). Put differently, the SEC seeks to "`remedy harm to the public at large'" for violation of the Government's rights. *Ibid.* The Government likewise seeks to remedy a public harm when it enforces OSHA's prohibition of unsafe working conditions.

Ultimately, both cases arise between the Government and others in connection with the performance of the Government's constitutional functions, and involve the Government acting in its sovereign capacity to bring a statutory

claim on behalf of the United States in order to vindicate the public interest. They both involve, as *Atlas Roofing* put it, "new cause[s] of action, and remedies therefor, unknown to the common law." 430 U.S. at 461, 97 S.Ct. 1261. Neither Article III nor the Seventh Amendment prohibits Congress from assigning the enforcement of these new "Governmen[t] rights to civil penalties" to non-Article III adjudicators, and thus "supplying speedy and expert resolutions of the issues involved." *Id.*, at 450, 461, 97 S.Ct. 1261. In a world where precedent means something, this should end the case. Yet here it does not.

III

The practice of assigning the Government's right to civil penalties for statutory violations to non-Article III adjudication
2164 had been so settled that it become an *2164 undisputable reality of how "our Government has actually worked." *Consumer Financial Protection Bureau*, 601 U.S. at 445, 144 S.Ct. 1474 (KAGAN, J., concurring). That is why the Court has had no cause to address this kind of constitutional challenge since its unanimous decision in *Atlas Roofing*. The majority takes a wrecking ball to this settled law and stable government practice. To do so, it misreads this Court's precedents, ignores those that do not suit its thesis, and advances distinctions created from whole cloth.

The majority's treatment of the public-rights doctrine is not only incomplete, but is gerrymandered to produce today's result. See Part III-A (*infra,* at 2163-2166). Unable to explain that doctrine, the majority effectively ignores the Article III threshold question to focus instead on two Seventh Amendment cases: *Tull v. United States*, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987), and *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989). Neither involved the in-house adjudication of statutory claims brought by the Government pursuant to its sovereign powers, which is the critical fact under this Court's precedent. See Part III-B-1 (*infra,* at 2166-2168) (discussing *Tull*); Part III-B-2 (*infra,* at 2167-2171) (discussing *Granfinanciera*). The majority and the concurrence then predictably fail to distinguish *Atlas Roofing,* which resolved the Seventh Amendment question for cases like this one implicating that critical fact. See Part III-C (*infra,* at 2170-2173).

A

To start, it is almost impossible to discern how the majority defines a public right and whether its view of the doctrine is consistent with this Court's public-rights cases. The majority at times seems to limit the public-rights exception to areas of its own choosing. It points out, for example, that some public-rights cases involved the collection of revenue, customs law, and immigration law, see *ante,* at 2131-2134, and that *Atlas Roofing* involved OSHA and not "civil penalty suits for fraud," *ante,* at 2137.[6] Other times, the majority highlights a particular practice predating the founding, such as the "unbroken tradition" in *Murray's Lessee* of executive officials issuing warrants of distress to collect revenue. *Ante,* at 2132-2133; see also *ante,* at 2146-2147 (GORSUCH, J., concurring). Needless to say, none of these explanations for the doctrine is satisfactory. What is the legal principle behind saying only these areas and no further? This Court has rejected that kind of arbitrary line-drawing in cases like *Stranahan* and *Atlas Roofing*. How does the requirement of a historical practice dating back to the founding, or "flow[ing] from centuries-old rules," *ante,* at 2134, account for the broad universe of public-rights cases in the United States Reporter? The majority does not say.

The majority's only other theory fares no better. The majority seems to suggest that a common thread underlying these cases is that "the political branches had traditionally held exclusive power over th[ese] field[s] and had exercised it." *Ante,* at 2133. To the extent the majority thinks this is a distinction, it fails for at least two reasons.

First, *Atlas Roofing* expressly rejected the argument that the public-rights doctrine is limited to particular exercises of
2165 congressional power. The employers in *Atlas Roofing* argued "that cases such as *2165 *Murray's Lessee, Elting,* [*Stranahan*], *Phillips,* and *Helvering* all deal with the exercise of sovereign powers that are inherently in the exclusive domain of the Federal Government and critical to its very existence—the power over immigration, the importation of goods, and taxation." 430 U.S. at 456, 97 S.Ct. 1261. Cabining the cases in that way, the employers argued that "[t]he theory of those cases is inapplicable where the Government exercises other powers that [they] regard[ed] as less fundamental, less exclusive, and less vital to the existence of the Nation, such as the power to regulate commerce among the several States, the latter being the power Congress sought to exercise in enacting [OSHA]." *Ibid.* The Court rejected the employers' argument, explaining that nothing in those cases turned on those particular exercises of the

Government's authority. See *id.*, at 456-457, 97 S.Ct. 1261; cf. *Crowell*, 285 U.S. at 51, 52 S.Ct. 285 (offering a list of "[f]amiliar illustrations of ... exercise[s]" of Congress's constitutional authority that have fallen within the public-rights exception to Article III).

Second, even if *Atlas Roofing* had not explicitly rejected the proposed distinction here, the majority cannot reconcile its restrictive view of the public-rights doctrine with *Atlas Roofing* and other precedents. For example, it is unclear how OSHA, or the National Labor Relations Act at issue in *Jones & Laughlin*, would fit the majority's view of the public-rights doctrine, or why the exercise of interstate-commerce power to enact those statutes would be any different from the exercise of that same power to enact the federal-securities laws at issue here. See *Atlas Roofing*, 430 U.S. at 457, 97 S.Ct. 1261 ("It is also apparent that *Jones & Laughlin, Pernell,* and *Curtis* are not amenable to the limitations suggested by [the employers]").

The majority's description of the doctrine also fails to account for public rights that do not belong to the Federal Government in its sovereign capacity. See *Granfinanciera*, 492 U.S. at 54, 109 S.Ct. 2782 ("[T]he Federal Government need not be a party for a case to revolve around `public rights'"). This Court, after all, has rejected the confinement of public rights to that heartland. See *ibid.* ("[W]e [have] rejected the view that `a matter of public rights must at a minimum arise "between the government and others"'"). Conspicuously absent from the majority's discussion are, for example, cases in which this Court held that Congress could assign a private federally created action that was "closely integrated into a public regulatory scheme" for adjudication in a non-Article III forum. *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 594, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985). These cases include, for example, an agency's adjudication of state-law counterclaims to an investor's federal action against its broker, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 835-836, 847-850, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986), and the arbitration of data-compensation disputes among participants in the Environmental Protection Agency's pesticide registration scheme, *Thomas*, 473 U.S. at 571, 589-592, 105 S.Ct. 3325. Both *Thomas* and *Schor* thus upheld the non-Article III adjudication of disputes between private parties, which naturally did not involve the Government in its sovereign capacity.

Even accepting the majority's public-rights-are-confusing defense, its "strategy for dealing with the confusion is not to offer a theory for rationalizing this body of law," but to provide an incomplete and unprincipled account of the doctrine. *Haaland v. Brackeen*, 599 U.S. 255, 279, 143 S.Ct. 1609, 216 L.Ed.2d 254 (2023). The majority references, but does
2166 not explain, "distinctions our cases have drawn," *ante,* *2166 at 2134, n. 2, also cherry-picking some cases and ignoring others. Indeed, in lieu of a coherent theory, all the majority has to offer is a list of five "historic categories of adjudications [that] fall within the exception," *ante,* at 2131-2134, and maybe (just maybe) OSHA, which the majority reluctantly adds to the mix at the end of its opinion for good measure, see *ante,* at 2136-2138. The majority ignores countless public-rights cases and entire strands of the doctrine, and fails to heed its own admonition that "close attention" must be paid "to the basis for each asserted application of the doctrine." *Ante,* at 2134.[7]

The majority also attacks a strawman when it asserts that "precedents foreclose th[e] argument" that the public-rights doctrine "applies whenever a statute increases governmental efficiency." *Ante,* at 2139; see also *ante,* at 2149-2150 (GORSUCH, J., concurring). No one has made that argument in this case; not the Government and certainly not this dissent. The fact that certain rights might be susceptible to speedy and expert resolution through non-Article III adjudication is not what makes them "rights *of the public*—that is, rights pertaining to claims brought by or against the United States." *Granfinanciera*, 492 U.S. at 68-69, 109 S.Ct. 2782 (Scalia, J., concurring in part and concurring in judgment).

It is not clear what else, if anything, might qualify as a public right, or what is even left of the doctrine after today's opinion. Rather than recognize the long-settled principle that a statutory right belonging to the Government in its sovereign capacity falls within the public-rights exception to Article III, the majority opts for a "we know it when we see it" formulation. This Court's precedents and our coequal branches of Government deserve better.

B

Rather than relying on *Atlas Roofing* or the relevant public-rights cases, the majority instead purports to follow *Tull* and *Granfinanciera*. The former involved a suit in federal court and the latter involved a dispute between private parties. So,

just like that, the majority ventures off on the wrong path. Indeed, as explained below, both the majority and the concurrence miss the critical distinction drawn in this Court's precedents between the non-Article III adjudication of public-rights matters involving the liability of one individual to another and those involving claims belonging to the Government in its sovereign capacity.

According to the majority, respondents are entitled to a jury trial in federal court because, as here, *Tull* involved a Government claim for civil penalties, and *Granfinanciera* looked to the common law to determine if a statutory cause of action was legal in nature. By focusing on the remedy in this case, and the perceived similarities between the statutory cause of action and a common-law analogue, the majority elides the critical distinction between those cases and this one: Whether Congress assigned the Government's sovereign rights to civil penalties to a non-Article III factfinder for adjudication.

1

The majority bafflingly proclaims that "the remedy is all but dispositive" in this case, *ante,* at 2129, ignoring that *Atlas*
2167 *Roofing* and countless precedents before it rejected that proposition. Not content to *2167 take just a page from the employers' challenge in *Atlas Roofing,* the majority has taken their whole brief, resuscitating yet another theory that this Court has long foreclosed. The employers in *Atlas Roofing* argued that the Seventh Amendment prohibited Congress from assigning to an agency the same remedy at issue here: civil penalties. See 430 U.S. at 450, 97 S.Ct. 1261 ("Petitioners ... claim that ... assign[ing] the function of adjudicating the Government's rights to civil penalties for [a statutory] violation ... deprive[s] a defendant of his Seventh Amendment jury right"). This Court rejected that argument outright, citing a long line of cases involving the Executive's adjudication of statutory claims for civil penalties brought by the Government in its sovereign capacity. *Id.,* at 450-455, 97 S.Ct. 1261 (collecting cases).

As discussed above, this Court has long endorsed statutory schemes authorizing agency adjudicators to find violations and award civil penalties to the Government. See *supra,* at 2159-2161. Long before *Atlas Roofing,* this Court held that the Constitution permits Congress to enact statutory obligations and then "sanction their enforcement by reasonable money penalties" by government officials "without the necessity of invoking the judicial power." *Stranahan,* 214 U.S. at 339, 29 S.Ct. 671; see *id.,* at 338-339, 29 S.Ct. 671 (collecting cases). That the SEC imposed civil penalties on respondents therefore has little, if any, bearing on the resolution of this case.

Again, even if over a century of precedent did not foreclose the majority's argument, it fails on its own terms. The majority relies almost entirely on *Tull,* which held that statutory claims for civil penalties were "a type of remedy at common law" that entitled a defendant to a jury trial. 481 U.S. at 422, 107 S.Ct. 1831; see *id.,* at 425, 107 S.Ct. 1831. Critically, however, the *Tull* Court's analysis took place in an entirely different context: federal court. See *ante,* at 2128-2129 ("In [*Tull*], the Government sued a real estate developer for civil penalties [under the Clean Water Act] *in federal court*" (emphasis added)). *Tull* did not present the question at issue in *Atlas Roofing* and other cases involving non-Article III adjudication of Government claims in the first instance. Rather, *Tull* stands for the unremarkable proposition that, when the Government sues an entity for civil penalties in federal district court, the Seventh Amendment entitles the defendant "to a jury trial to determine his liability on the legal claims." 481 U.S. at 425, 107 S.Ct. 1831.

That conclusion says nothing about the constitutionality of the SEC's in-house adjudicative scheme. *Atlas Roofing* and its predecessors could not have been clearer on this point: Congress can assign the enforcement of a statutory obligation for in-house adjudication to executive officials, "even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law instead of an administrative agency." 430 U.S. at 455, 97 S.Ct. 1261. Although "the Government could commit the enforcement of statutes and the imposition and collection of fines to the judiciary, in which event jury trial would be required," the Government "could also validly opt for administrative enforcement, without judicial trials." *Id.,* at 460, 97 S.Ct. 1261 (citing *Stranahan,* 214 U.S. at 339, 29 S.Ct. 671; *Hepner v. United States,* 213 U.S. 103, 29 S.Ct. 474, 53 L.Ed. 720 (1909); *United States v. Regan,* 232 U.S. 37, 34 S.Ct. 213, 58 L.Ed. 494 (1914); *Helvering,* 303 U.S. at 402-403, 58 S.Ct. 630; *Crowell,* 285 U.S. at 50-51, 52 S.Ct. 285); *Curtis,* 415 U.S. at 195, 94 S.Ct. 1005 (explaining that Congress can "entrust [the] enforcement of statutory rights to an
2168 administrative process ... free from the strictures of *2168 the Seventh Amendment," but must abide by the Amendment when it does so "in an ordinary civil action in the district courts").

It would have been quite remarkable for *Tull,* which involved a claim in federal court, to overrule silently more than a century of caselaw involving non-Article III adjudications of the Government's rights to civil penalties for statutory violations. Of course, *Tull* did no such thing. *Tull* even reaffirmed *Atlas Roofing* by emphasizing that the Seventh Amendment depends on the forum, not just the remedy, because it "is not applicable to administrative proceedings." 481 U.S. at 418, n. 4, 107 S.Ct. 1831 (citing *Atlas Roofing,* 430 U.S. at 454, 97 S.Ct. 1261; *Pernell,* 416 U.S. at 383, 94 S.Ct. 1723). For the majority to pretend otherwise is wishful thinking at best.

2

The majority next argues that the "close relationship" between the federal-securities laws and common-law fraud "confirms that this action is `legal in nature,'" and entitles respondents to a jury trial. *Ante,* at 2131. That argument does not fare any better than the argument on remedy. Again, the majority bends inapposite case law to an illogical thesis. *Granfinanciera,* on which the majority relies to make its cause-of-action argument, set forth the public-rights analysis only for "disputes to which the Federal Government is not a party in its sovereign capacity." 492 U.S. at 55, n. 10, 109 S.Ct. 2782. For cases that, as here, involve the Government in its sovereign capacity, the *Granfinanciera* Court plainly stated that "Congress may fashion causes of action that are closely *analogous* to common-law claims and [still] place them beyond the ambit of the Seventh Amendment by assigning their resolution to a [non-Article III] forum in which jury trials are unavailable." *Id.,* at 52, 109 S.Ct. 2782 (citing *Atlas Roofing,* 430 U.S. at 450-461, 97 S.Ct. 1261).[8]

The Court held in *Granfinanciera* that "a person who has not submitted a claim against a bankruptcy estate has a right to a jury trial when sued by the trustee in bankruptcy to recover an allegedly fraudulent monetary transfer." 492 U.S. at 36, 109 S.Ct. 2782. In doing so, the Court noted that actions to recover such transfers through a claim of fraudulent conveyance were traditionally available at common law. See *id.,* at 43-49, 109 S.Ct. 2782. That did not resolve the case,
2169 however. Unlike in *Tull,* the proceeding at issue in *Granfinanciera* was in a non-Article III *2169 forum (*i.e.,* a bankruptcy court). So, to answer whether Congress could assign the fraudulent-conveyance claim to a bankruptcy judge for decision, Congress needed to decide whether the "legal cause of action involve[d] `public rights.'" 492 U.S. at 53, 109 S.Ct. 2782.

Granfinanciera explains that there are two ways to identify a "public right." First, there are the matters in which Congress enacts a statutory cause of action that "inheres in, or lies against, the Federal Government in its sovereign capacity." *Id.,* at 53, 109 S.Ct. 2782 (citing *Atlas Roofing,* 430 U.S. at 458, 97 S.Ct. 1261). These matters necessarily arise between the Government and the people in connection with the Government's exercise of its constitutional authority. See *supra,* at 2158-2159. In these cases, the Court said, *Atlas Roofing* controls the public-rights analysis. See *Granfinanciera,* 492 U.S. at 51, 53, 109 S.Ct. 2782. The Court explained that "Congress may effectively supplant a common law cause of action carrying with it a right to a jury trial with a statutory cause of action shorn of a jury trial right if that statutory cause of action inheres in, or lies against, the Federal Government in its sovereign capacity." *Id.,* at 53, 109 S.Ct. 2782 (citing *Atlas Roofing,* 430 U.S. at 458, 97 S.Ct. 1261).

The second kind of public right that *Granfinanciera* recognized involves "disputes to which the Federal Government is not a party in its sovereign capacity," 492 U.S. at 55, n. 10, 109 S.Ct. 2782, that is, usually "[w]holly private" disputes, *id.,* at 51, 109 S.Ct. 2782. The public-rights analysis in these private-dispute cases looks different: "The crucial question, *in cases not involving the Federal Government,* is whether `Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, has created a seemingly "private" right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.'" *Id.,* at 54, 109 S.Ct. 2782 (quoting *Thomas,* 473 U.S. at 593-594, 105 S.Ct. 3325; emphasis added; alterations omitted).

These two approaches together stand for the proposition that "[i]f a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, *and* if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court." 492 U.S. at 54-55, 109 S.Ct. 2782 (emphasis added). Once in federal court, "[i]f the right is legal in nature, then it carries with it the Seventh Amendment's guarantee of a jury trial." *Id.,* at 55, 109 S.Ct. 2782.

Because *Granfinanciera* did not involve a statutory right that belonged to the Government in its sovereign capacity, *Atlas*

Roofing did not control the outcome. Instead, the Court applied the private-disputes test to determine whether fraudulent-conveyance "actions were `closely intertwined' with the bankruptcy regime." *Ante,* at 2135 (quoting *Granfinanciera,* 492 U.S. at 54, 109 S.Ct. 2782). The Court held that the fraudulent-conveyance actions "were not inseparable from the bankruptcy process," and thus the public-rights exception did not apply. *Ante,* at 2135 (citing *Granfinanciera,* 492 U.S. at 54, 56, 109 S.Ct. 2782).

The majority brushes aside this critical distinction between *Atlas Roofing* and *Granfinanciera* in one sentence. That "the Government is the party prosecuting this action," the majority writes, is meaningless because this Court has "never held that the `presence of the United States as a proper party to the proceeding is ... sufficient' by itself to trigger the
2170 exception." *Ante,* at 2136 (quoting *Northern Pipeline* *2170 *Constr. Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 69, n. 23, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) (plurality opinion)). Here, too, the majority attacks a strawman. The SEC does not claim that the mere presence of the United States as a proper party necessarily means that a public right is at issue. See Reply Brief 8, n. 2 (disclaiming this argument).[9] Of course "what matters is the substance" of the claim. *Ante,* at 2135.

By no means, though, does this case involve a "purely taxonomic change." *Granfinanciera,* 492 U.S. at 61, 109 S.Ct. 2782. Congress did not just repackage a common-law claim under a new label. It created new statutory obligations and an entire federal scheme. See *supra,* at 2162-2163.[10] Perhaps most importantly, Congress created a new right unknown to the common law that, unlike common-law fraud, belongs to the public and inheres in the Government in its sovereign capacity. That is why, when the SEC seeks to enforce the federal-securities laws, it does so to remedy the harm to the United States. See *supra,* at 2163. It seeks to protect the integrity of the securities market as a whole through the imposition of new and distinct remedies like civil penalties and orders barring violators from holding certain positions and performing certain activities in the industry. See 15 U.S.C. §§ 77h-1(f), and (g), 78u-2, 78u-3(f).

For these reasons, "[a]n action brought by an Executive Branch agency to enforce federal securities laws is not the same as an action brought by one individual against another for monetary or injunctive relief of the sort that law courts (with juries) in England or the States have traditionally heard." Brief for Professor John Golden et al. as *Amici Curiae* 3. Congress did not unlawfully "siphon" a traditional legal action "away from an Article III court" when it enacted the federal-securities laws and provided for their enforcement within the SEC. *Ante,* at 2136.

The majority asserts that "*Granfinanciera* effectively decides this case." *Ante,* at 2135. That can only be true, though, if
2171 one ignores what *Granfinanciera* actually *2171 says: Its public-rights analysis of whether an action is closely intertwined with a federal regulatory program only applies "in cases not involving the Federal Government." 492 U.S. at 54, 109 S.Ct. 2782. The analysis from *Atlas Roofing* controls where, as here, "`the Government is involved in its sovereign capacity under an otherwise valid statute.'" 492 U.S. at 51, 109 S.Ct. 2782 (quoting *Atlas Roofing,* 430 U.S. at 458, 97 S.Ct. 1261).

C

Both cases relied on by the majority, *Tull* and *Granfinanciera,* reaffirm that *Atlas Roofing* controls precisely in circumstances like the ones at issue in this case. That is why the majority's late-stage attempt to distinguish *Atlas Roofing* fails. The majority's principal argument that the OSHA scheme in *Atlas Roofing* "did not borrow its cause of action from the common law" and was instead a "self-consciously novel" scheme that "resembled a detailed building code," *ante,* at 2137, is flawed on multiple fronts.

First, OSHA's cause of action should be largely irrelevant under the majority's view that the remedy of civil penalties is effectively dispositive under *Tull. Atlas Roofing,* and many other cases involving non-Article III adjudications, also involved civil penalties designed to punish and deter, and yet the majority does not expressly disavow them. Logically, then, either *Atlas Roofing* and countless other cases were wrongly decided, or the majority's view on civil penalties is wrong.

Second, because the majority elides the critical distinction between *Atlas Roofing* and *Granfinanciera,* it fails to grapple with the fact that this case, like *Atlas Roofing* and unlike *Granfinanciera,* involves the Government acting in its sovereign capacity to enforce a statutory violation. That makes the right at issue a "public right" that Congress can take outside the

purview of Article III, even when the new cause of action is analogous to a common-law claim.

Third, the relationship between the federal-securities laws (including their antifraud provisions) and common-law fraud is materially indistinguishable from the relationship between OSHA and the common-law torts of wrongful death and negligence. Unlike their common-law comparators, neither statute requires actionable harm to an individual. See *supra,* at 2162-2163. In arguing that OSHA's scheme was "self-consciously" novel in ways unknown to the common law, the majority points to the granularity of OSHA standards. *Ante,* at 2137-2138. Yet lawyers and regulated parties in the securities industry would be surprised to hear that this could be a distinguishing feature. Anyone familiar with the industry knows securities laws are replete with specific and exceedingly detailed requirements implementing the statute's disclosure and antifraud provisions. See, *e.g.,* 17 C.F.R. § 275.206(4)-1(b) (2023) (prohibiting testimonials and endorsements that do not satisfy requirements without meeting complex disclosure requirements); § 275.206(4)-2(a) (prohibiting investment advisers from having custody of client funds or securities unless specific requirements are met, including qualifications, notices, and account statements).

The majority further rests on the notion that Congress drew inspiration from the common law in enacting the antifraud provisions of the federal-securities laws, whereas OSHA's new statutory duty did not bring any common-law soil with it. See *ante,* at 2137-2138. Yet both statutes share elements with claims at common law that Congress deemed
2172 inadequate to address the national problems that prompted it to legislate. See *supra,* at 2162-2163. *2172 Still, even accepting that federal-securities laws bring common-law soil with them and OSHA does not, the majority does not explain why that is a constitutionally relevant distinction.[11]

In sum, all avenues by which the majority attempts to distinguish *Atlas Roofing* fail. The majority cannot escape the entrenched principle that a "legal cause of action involves `public rights'" that can be taken outside of Article III if the "statutory right is ... closely intertwined with a federal regulatory program Congress has power to enact" *or* if it "belongs to [o]r exists against the Federal Government." *Granfinanciera,* 492 U.S. at 53-54, 109 S.Ct. 2782.[12] In both *Atlas Roofing* and this case, a public right exists. In both statutory schemes, regardless of any perceived resemblance to the common law, Congress enacted a new cause of action that created a statutory right belonging to the United States for the Government to enforce pursuant to its sovereign powers.

IV

A faithful and straightforward application of this Court's longstanding precedent should have resolved this case. Faithful "[a]dherence to precedent is `a foundation stone of the rule of law.'" *Kisor v. Wilkie,* 588 U.S. 558, 586, 139 S.Ct. 2400, 204 L.Ed.2d 841 (2019) (quoting *Michigan v. Bay Mills Indian Community,* 572 U.S. 782, 798, 134 S.Ct. 2024, 188 L.Ed.2d 1071 (2014)). It allows courts to function, and be perceived, as courts, and not as political entities. "`It promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" 588 U.S. at 586-587, 139 S.Ct. 2400 (quoting *Payne v. Tennessee,* 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991); alterations omitted). That is why, "even in constitutional cases, a departure from precedent `demands special justification.'" *Gamble v. United States,* 587 U.S. 678, 691, 139 S.Ct. 1960, 204 L.Ed.2d 322 (2019) (quoting *Arizona v. Rumsey,* 467 U.S. 203, 212, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984)).

2173 Today's decision disregards these foundational principles.[13] Time will tell what is *2173 left of the public-rights doctrine. Less uncertain, however, are the momentous consequences that flow from the majority's insistence that the Government's rights to civil penalties must now be tried before a jury in federal court. The majority's decision, which strikes down the SEC's in-house adjudication of civil-penalty claims on the ground that such claims are legal in nature and entitle respondents to a federal jury, effects a seismic shift in this Court's jurisprudence. Indeed, "[i]f you've never heard of a statute being struck down on that ground," and you recall having read countless cases approving of that arrangement, "you're not alone." *Seila Law LLC v. Consumer Financial Protection Bureau,* 591 U.S. 197, 294, 140 S.Ct. 2183, 207 L.Ed.2d 494 (2020) (KAGAN, J., concurring in judgment with respect to severability and dissenting in part).

The majority pulls a rug out from under Congress without even acknowledging that its decision upends over two centuries of settled Government practice. The United States, led by then-Solicitor General Robert Bork and then-Assistant Attorney General for the Civil Division Rex Lee, told this Court in *Atlas Roofing* that "during the whole of our

history, regulatory fines and penalties have been collected by non-jury procedures pursuant to ... legislative decisions," and that "[i]t would be most remarkable if, at this late date, the Seventh Amendment were construed to outlaw this consistent rule of government followed for two centuries." Brief for Respondents in *Atlas Roofing,* O. T. 1976, No. 75-746, etc., pp. 81-82. This Court agreed and upheld that practice, it seemed, once and for all.

Following this Court's precedents and the recommendation of the Administrative Conference of the United States, Congress has enacted countless new statutes in the past 50 years that have empowered federal agencies to impose civil penalties for statutory violations. See 2 P. Verkuil, D. Gifford, C. Koch, R. Pierce, & J. Lubbers, Administrative Conference of the United States, Recommendations and Reports, The Federal Administrative Judiciary 861, and nn. 350-351 (1992). These statutes are sometimes enacted in addition to, but often instead of, "the traditional civil enforcement statutes that permitted agencies to collect civil penalties only after federal district court trials." *Id.,* at 861. "By 1986, there were over 200 such statutes" and "[t]he trend has, if anything, accelerated" since then. *Id.,* at 861, and n. 351.

Similarly, there are, at the very least, more than two dozen agencies that can impose civil penalties in administrative proceedings. See Tr. of Oral Arg. 78-79 (Principal Deputy Solicitor General) (recognizing two dozen agencies with administrative civil-penalty authorities); see also, *e.g.,* 5 U.S.C. § 1215(a)(3)(A)(ii) (Merit Systems Protection Board); 7 U.S.C. §§ 9(10)(C), 13a (Commodity Futures Trading Commission); §§ 499c(a), 586, 2279e(a) (Department of Agriculture); 8 U.S.C. §§ 1324c, 1324d (Department of Justice); 12 U.S.C. §§ 5563(a)(2), (c), (Consumer Financial Protection Bureau); 16 U.S.C. § 823b(c) (Federal Energy Regulatory Commission); 20 U.S.C. § 1082(g) (Department of
2174 Education); 21 U.S.C. *2174 § 335b (Department of Health and Human Services/Food and Drug Administration); 29 U.S.C. § 666(j) (Occupational Safety and Health Review Commission); 30 U.S.C. §§ 820(a) and (b) (Federal Mine Safety and Health Review Commission); 31 U.S.C. § 5321(a)(2) (Department of the Treasury); 33 U.S.C. §§ 1319(d) and (g) (Environmental Protection Agency); 39 U.S.C. § 3018(c) (Postal Service); 42 U.S.C. § 3545(f) (Department of Housing and Urban Development); 46 U.S.C. § 41107(a) (Federal Maritime Commission); 47 U.S.C. § 503(b)(3) (Federal Communications Commission); 49 U.S.C. § 521 (Federal Railroad Administration); § 46301 (Department of Transportation).

Some agencies, like the Consumer Financial Protection Bureau, the Environmental Protection Agency, and the SEC, can pursue civil penalties in both administrative proceedings and federal court. See, *e.g.,* 12 U.S.C. §§ 5563(a), 5564(a), 5565(a)(1), (2)(H), and (c) (Consumer Financial Protection Bureau); 33 U.S.C. §§ 1319(a), (b), and (g) (Environmental Protection Agency); *supra,* at 2155 (SEC). Others do not have that choice. As the above-cited statutes confirm, the Occupational Safety and Health Review Commission, the Federal Energy Regulatory Commission, the Federal Mine Safety and Health Review Commission, the Department of Agriculture, and many others, can pursue civil penalties only in agency enforcement proceedings. For those and countless other agencies, all the majority can say is tough luck; get a new statute from Congress.

Against this backdrop, our coequal branches will be surprised to learn that the rule they thought long settled, and which remained unchallenged for half a century, is one that, according to the majority and the concurrence, my dissent just announced today. Unfortunately, that mistaken view means that the constitutionality of hundreds of statutes may now be in peril, and dozens of agencies could be stripped of their power to enforce laws enacted by Congress. Rather than acknowledge the earthshattering nature of its holding, the majority has tried to disguise it. The majority claims that its ruling is limited to "civil penalty suits for fraud" pursuant to a statute that is "barely over a decade old," *ante,* at 2134 n. 2, 2136-2137, an assurance that is in significant tension with other parts of its reasoning. That incredible assertion should fool no one. Today's decision is a massive sea change. Litigants seeking further dismantling of the "administrative state" have reason to rejoice in their win today, but those of us who cherish the rule of law have nothing to celebrate.

* * *

Today's ruling is part of a disconcerting trend: When it comes to the separation of powers, this Court tells the American public and its coordinate branches that it knows best. See, *e.g.,* Collins v. Yellen, 594 U. S. 220, 227, 141 S.Ct. 1761, 210 L.Ed.2d 432 (2021) (concluding that the Federal Housing Finance Agency's "structure violates the separation of powers" because the Agency was led by a single Director removable by the President only "'for cause'"); United States v. Arthrex, Inc., 594 U.S. 1, 6, 23, 141 S.Ct. 1970, 210 L.Ed.2d 268 (2021) (holding that "authority wielded by

[Administrative Patent Judges] during inter partes review is incompatible with their appointment by the Secretary to an inferior office"); *Seila Law*, 591 U.S. at 202-205, 140 S.Ct. 2183 (holding that "the structure of the [Consumer Financial Protection Bureau] violates the separation of powers" because it was led by a single Director removable by the
2175 President only "for cause"); *Free Enterprise Fund v. Public Company Accounting Oversight* *2175 *Bd.*, 561 U.S. 477, 483-484, 492, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010) (holding "that the dual for-cause limitations on the removal of [Public Company Accounting Oversight] Board members contravene the Constitution's separation of powers"). The Court tells Congress how best to structure agencies, vindicate harms to the public at large, and even provide for the enforcement of rights created for the Government. It does all of this despite the fact that, compared to its political counterparts, "the Judiciary possesses an inferior understanding of the realities of administration" and how "political power ... operates." *Free Enterprise Fund*, 561 U.S. at 523, 130 S.Ct. 3138 (Breyer, J., dissenting).

There are good reasons for Congress to set up a scheme like the SEC's. It may yield important benefits over jury trials in federal court, such as greater efficiency and expertise, transparency and reasoned decisionmaking, as well as uniformity, predictability, and greater political accountability. See, *e.g.*, Brief for Administrative Law Scholars as *Amici Curiae* 30-32. Others may believe those benefits are overstated, and that a federal jury is a better check on government overreach. See, *e.g.*, Brief for Cato Institute as *Amicus Curiae* 11-25. Those arguments take place against the backdrop of a philosophical (and perhaps ideological) debate on whether the number of agencies and authorities properly corresponds to the ever-increasing and evolving problems faced by our society.

This Court's job is not to decide who wins this debate. These are policy considerations for Congress in exercising its legislative judgment and constitutional authority to decide how to tackle today's problems. It is the electorate, and the Executive to some degree, not this Court, that can and should provide a check on the wisdom of those judgments.

Make no mistake: Today's decision is a power grab. Once again, "the majority arrogates Congress's policymaking role to itself." *Garland v. Cargill*, 602 U. S. 406, 442, 144 S.Ct. 1613, ___ L.Ed.2d ___ (2024) (SOTOMAYOR, J., dissenting). It prescribes artificial constraints on what modern-day adaptable governance must look like. In telling Congress that it cannot entrust certain public-rights matters to the Executive because it must bring them first into the Judiciary's province, the majority oversteps its role and encroaches on Congress's constitutional authority. Its decision offends the Framers' constitutional design so critical to the preservation of individual liberty: the division of our Government into three coordinate branches to avoid the concentration of power in the same hands. The Federalist No. 51, p. 349 (J. Cooke ed. 1961) (J. Madison). Judicial aggrandizement is as pernicious to the separation of powers as any aggrandizing action from either of the political branches.

Deeply entrenched in today's ruling is the erroneous belief that any "mistaken or wrongful exertion by the legislative department of its authority" can lead to "grave abuses" and "it behooves the judiciary to apply a corrective by exceeding its own authority" through requiring civil-penalty claims to proceed before a federal jury. *Stranahan*, 214 U.S. at 340, 29 S.Ct. 671. As this Court said over a century ago in this public-rights context, that belief "mistakenly assumes that the courts can alone be safely intrusted with power, and that hence it is their duty to unlawfully exercise prerogatives which they have no right to exert, upon the assumption that wrong must be done to prevent wrong being accomplished." *Ibid.*

By giving respondents a jury trial, even one that the Constitution does not require, the majority may think that it is
2176 protecting liberty. That belief, too, is deeply misguided. *2176 The American People should not mistake judicial hubris with the protection of individual rights. Our first President understood this well. In his parting words to the Nation, he reminded us that a branch of Government arrogating for itself the power of another based on perceptions of what, "in one instance, may be the instrument of good ... is the customary weapon by which free governments are destroyed." Farewell Address (1796), in 35 The Writings of George Washington 229 (J. Fitzpatrick ed. 1940) (footnote omitted). The majority today ignores that wisdom.

Because the Court disregards its own precedent and its coequal partners in our tripartite system of Government, I respectfully dissent.

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

[1] The dissent asserts that *Oceanic Steam Navigation* stands for the proposition that the public rights exception applies to any exercise of power granted to Congress. *Post*, at 2159-2161 (opinion of SOTOMAYOR, J). It must be reading from a different case than

we are. *Oceanic Steam Navigation* expressly confines its analysis to the exercise of Congress's power over *foreign* commerce. 214 U.S. at 339, 29 S.Ct. 671 ("It is insisted that the decisions just stated and the legislative practices referred to are inapposite here, because they all relate to subjects peculiarly within the authority of the legislative department of the Government, and which, from the necessity of things, required the concession that administrative officers should have the authority to enforce designated penalties without resort to the courts. But over no conceivable subject is the legislative power of Congress more complete than it is over that with which the act we are now considering deals."); *id.*, at 334, 29 S.Ct. 671 (explaining that the statute "rest[s] ... upon the authority of Congress over *foreign* commerce and its right to control the coming of aliens into the United States" (emphasis added)); *id.*, at 340, 29 S.Ct. 671 (citing "the authority of Congress over the right to bring aliens into the United States"); see *id.*, at 339, 29 S.Ct. 671 (discussing congressional power over "the valuation of imported merchandise," "'importers,'" and "tariff[s]" (quoting *Bartlett v. Kane*, 16 How. 263, 57 U.S. 263, 14 L.Ed. 931 (1854)); 214 U.S. at 334, 29 S.Ct. 671 (expressly acknowledging and avoiding comment on "'limitations'" of Congress's "'interstate commerce'" power because this case concerns instead Congress's exercise of its "'plenary power in respect to the exclusion of merchandise brought from *foreign* countries'" (quoting *Buttfield v. Stranahan*, 192 U.S. 470, 492, 24 S.Ct. 349, 48 L.Ed. 525 (1904); emphasis added). Nowhere does *Oceanic Steam Navigation* say that the public rights exception applies to cases concerning the securities markets or interstate commerce more broadly. The rules the dissent purports to locate in *Oceanic Steam Navigation* are therefore wholly inapposite.

[2] The dissent would brush away these careful distinctions and unfurl a new rule: that whenever Congress passes a statute "entitl[ing] the Government to civil penalties," the defendant's right to a jury and a neutral Article III adjudicator disappears. See *post,* at 2155 (opinion of SOTOMAYOR, J.). It bases this rule not in the constitutional text (where it would find no foothold), nor in the ratification history (where again it would find no support), nor in a careful, category-by-category analysis of underlying legal principles of the sort performed by *Murray's Lessee* (which it does not attempt), nor even in a case-specific functional analysis (also not attempted). Instead, the dissent extrapolates from the outcomes in cases concerning unrelated applications of the public rights exception and from one opinion, *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 97 S.Ct. 1261, 51 L.Ed.2d 464 (1977). The result is to blur the distinctions our cases have drawn in favor of the legally unsound principle that just because the Government may extract civil penalties in administrative tribunals in some contexts, it must always be able to do so in all contexts.

The dissent also appeals to practice, ignoring that the statute Jarkesy and Patriot28 have been prosecuted under is barely over a decade old. It is also unclear how practice could transmute a private right into a public one, or how the absence of legal challenges brought by one generation could waive the individual rights of the next. Practice may be probative when it reflects the settled institutional understandings of the branches. That case is far weaker when the rights of individuals are directly at stake.

[3] The dissent chides us for "leav[ing] open the possibility that *Granfinanciera* might have overruled *Atlas Roofing*." *Post,* at 2168, n. 8 (opinion of SOTOMAYOR, J.). But the author of *Atlas Roofing* certainly thought that *Granfinanciera* may have done so. See *Granfinanciera*, 492 U.S. at 79, 109 S.Ct. 2782 (White, J., dissenting) ("Perhaps ... *Atlas Roofing* is no longer good law after today's decision."); see also *id.*, at 71, n. 1, 109 S.Ct. 2782 (*Granfinanciera* "can be read as overruling or severely limiting" *Atlas Roofing*).

[4] Reading the dissent, one might also think that *Atlas Roofing* is among this Court's most celebrated cases. As the concurrence shows, *Atlas Roofing* represents a departure from our legal traditions. See *post,* at 2145-2150 (opinion of GORSUCH, J.).

This view is also reflected in the scholarship. Commentators writing comprehensively on Article III and agency adjudication have often simply ignored the case. See, *e.g.*, R. Fallon, Of Legislative Courts, Administrative Agencies, and Article III, 101 Harv. L. Rev. 915 (1988) (no citation to *Atlas Roofing*); J. Harrison, Public Rights, Private Privileges, and Article III, 54 Ga. L. Rev. 143 (2019) (same); W. Baude, Adjudication Outside Article III, 133 Harv. L. Rev. 1511 (2020) (same).

Others who have considered it have offered nothing but a variety of criticisms. See, *e.g.*, R. Kirst, Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment, 126 U. Pa. L. Rev. 1281, 1294 (1978) (through its "careless use of precedent," *Atlas Roofing* did "not recognize or [mis]understood" "careful distinctions developed by ... earlier judges"); G. Young, Federal Courts & Federal Rights, 45 Brooklyn L. Rev. 1145, 1153 (1979) ("The *Atlas* Court ... failed to offer an adequate justification for its interpretation of the seventh amendment, either in terms of precedent or the language and history of the amendment."); M. Redish & D. La Fave, Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory, 4 Wm. & Mary Bill of Right J. 407, 436 (1995) (criticizing *Atlas Roofing* for failing to "provid[e] a principled basis upon which to determine the proper scope of congressional power to remove the civil jury from federal adjudications"); V. Amar, Implementing an Historical Version of the Jury in an Age of Administrative Factfinding and Sentencing Guidelines, 47 S. Tex. L. Rev. 291, 298 (2005) (questioning *Atlas Roofing* for "invert[ing] and turn[ing] on its head the *Apprendi* doctrine's central insight that juries are most important to check the power of the state" (emphasis deleted)); C. Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 604-605, and n. 189 (2007) (describing *Atlas Roofing* as "misus[ing]" precedent to "deny the novelty of its holding" and "drive a wedge" into the traditional understanding of the public-private rights distinction). We express no opinion on these various criticisms.

[1] In many agencies, litigants are not even entitled to have ALJs, with their modicum of protections, decide their cases. These agencies use "administrative judges." Some agencies can replace these administrative judges if they don't like their decisions. And some of these judges may move in and out of prosecutorial and adjudicatory roles, or move in and out of the very industries their agencies regulate. See *United States v. Arthrex, Inc.*, 594 U.S. 1, 36-37, 141 S.Ct. 1970, 210 L.Ed.2d 268 (2021) (GORSUCH, J.,

concurring in part and dissenting in part).

[2] The best the dissent can do is to observe that "Article III itself prescribes that `[t]he trial of all Crimes ... shall be by Jury.'" *Post,* at 2170, n. 9 (quoting § 2, cl. 3). That response might be reassuring if the dissent's treatment of the Seventh Amendment didn't supply a roadmap for working around it. On the dissent's telling, the Seventh Amendment can be dispensed with at will: It applies "only in judicial proceedings," and not whenever the government chooses to assign a matter to its own in-house tribunals. *Post,* at 2157. And under that logic, there is no apparent reason why the government could not evade Article III's jury-trial right just as easily, simply by choosing to route criminal prosecutions through executive agencies.

[1] As the majority notes, respondents also prevailed on two other constitutional challenges in the Court of Appeals. See *ante,* at 2127. The divided panel concluded that: (1) the SEC's discretion to bring the case within the agency instead of federal court violated the nondelegation doctrine; and (2) a for-cause restriction on the Administrative Law Judge's removal violated Article II and the separation of powers. 34 F.4th 446, 459-465 (CA5 2022). I disagree with the ruling below on both points. Because the majority does not reach these issues, though, I address only the Seventh Amendment challenge discussed in the majority's opinion.

[2] Since the founding, Executive Branch officials have adjudicated certain matters, while others have required resolution in an Article III court. An executive official properly vested with the authority to find facts, apply the law to those facts, and impose the consequences prescribed by law exercises executive power under Article II, not judicial power under Article III. See *Arlington v. FCC,* 569 U.S. 290, 305, n. 4, 133 S.Ct. 1863, 185 L.Ed.2d 941 (2013) (explaining that agency rulemaking and adjudications may "take `legislative' and `judicial' forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the `executive Power'" (quoting Art. II, § 1, cl. 1)).

[3] Every case that has expressed consternation about the precise contours of the public-rights doctrine, including those cited by the majority, involve only private disputes—or, more precisely, "disputes to which the Federal Government is not a party in its sovereign capacity." *Granfinanciera, S. A. v. Nordberg,* 492 U.S. 33, 55, n. 10, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989) (involving dispute between private parties in bankruptcy court); see *ante,* at 2133-2134 (citing *Oil States Energy Services, LLC v. Greene's Energy Group, LLC,* 584 U.S. 325, 332-334, 138 S.Ct. 1365, 200 L.Ed.2d 671 (2018) (involving patent dispute between private parties before the U. S. Patent and Trademark Office); *Thomas v. Union Carbide Agricultural Products Co.,* 473 U.S. 568, 575, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985) (involving challenge to arbitration procedure for private parties disputing data compensation under federal pesticide registration program)); see also *Stern v. Marshall,* 564 U.S. 462, 469-470, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011) (involving dispute between private parties in bankruptcy court); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 56-57, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) (plurality opinion) (same).

[4] Judicial review of these agency decisions allows Congress to avoid any due process concerns that might arise from having executive officials deprive someone of their property without review in an Article III court. See *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442, 455, n. 13, 97 S.Ct. 1261, 51 L.Ed.2d 464 (1977) ("[T]hese cases do not present the question whether Congress may commit the adjudication of public rights and the imposition of fines for their violation to an administrative agency without any sort of intervention by a court at any stage of the proceedings"); accord, *Oil States,* 584 U.S. at 344, 138 S.Ct. 1365 (same); Tr. of Oral Arg. 29 (Principal Deputy Solicitor General) (stating that "the Court has emphasized that judicial review of agency action may well be required" and the Due Process Clause may "ha[ve] something to say" about that requirement). The concurrence reproaches this dissent for declining to address any potential deficiencies in this administrative scheme, as well as failing to specify which forms of judicial review may be constitutionally required, see *ante,* at 2151-2152 (opinion of GORSUCH, J.), even though respondents did not raise any due process challenge in this case. Deciding whether this statutory scheme is procedurally deficient and so circumscribes judicial review that it violates due process would be inconsistent with the "settled principles of party presentation and adversarial testing." *Vidal v. Elster,* 602 U.S. 286, 328, 144 S.Ct. 1507, ___ L.Ed.2d ___ (2024) (SOTOMAYOR, J., concurring in judgment) (citing *Maslenjak v. United States,* 582 U.S. 335, 354, 137 S.Ct. 1918, 198 L.Ed.2d 460 (2017) (GORSUCH, J., joined by THOMAS, J., concurring in part and concurring in judgment)).

[5] The majority's fixation on this dissent's discussion of *Stranahan,* see *ante,* at 2133, n. 1, misses the fact that *Stranahan* exists within a long line of cases recognizing the diverse areas of the law comprising the public-rights doctrine.

[6] The majority also cites cases involving "relations with Indian tribes, the administration of public lands, and the granting of public benefits such as payments to veterans, pensions, and patent rights." *Ante,* at 2133 (citations omitted).

[7] Among other things, the concurrence accuses this dissent of behaving like a "picky child at the dinner table." *Ante,* at 2150 (opinion of GORSUCH, J.). The precedents, though, speak for themselves. It is the majority and concurrence that pick and choose among public-rights cases, excluding broad strands of precedent constituting the doctrine.

[8] The majority leaves open the possibility that *Granfinanciera* might have overruled *Atlas Roofing.* See *ante,* at 2136-2137. That suggestion strains credulity. By my count, *Granfinanciera* favorably cites to *Atlas Roofing* at least 12 times. See 492 U.S. at 48, 51-54, 57, 60-61, 109 S.Ct. 2782; see also *id.,* at 65, 109 S.Ct. 2782 (Scalia, J., concurring in part and concurring in judgment). It even reaffirmed the definition of public rights from *Atlas Roofing,* declaring that the Court "adhere[d] to that general teaching ... in *Atlas Roofing.*" 492 U.S. at 51, 109 S.Ct. 2782. The majority's only response is to say that Justice White thought *Granfinanciera* may have

overruled *Atlas Roofing.* See *ante,* at 2137, n. 3; see also *ante,* at 2148-2149 (GORSUCH, J., concurring). That is misleading at best. When Justice White said in his *Granfinanciera* dissent that the Court's opinion in that case could be read as overruling or limiting portions of several cases, including *Atlas Roofing,* he was referring to his understanding that *Atlas Roofing* also extended to private disputes. See *Granfinanciera,* 492 U.S. at 79-83, 109 S.Ct. 2782; see also Tr. of Oral Arg. 58-59 (Principal Deputy Solicitor General explaining that Justice White understood "*Atlas Roofing* to speak [also] to the private parties cases," not just to cases involving the Government, which "is really a through line that the Court has never questioned"). With respect to claims involving the Government, such as those at issue here, *Granfinanciera* expressly reaffirmed *Atlas Roofing* and "adhere[d] to [its] general teaching." 492 U.S. at 51, 109 S.Ct. 2782.

[9] Indeed, "the public-rights doctrine does not extend to any criminal matters, although the Government is a proper party." *Northern Pipeline Constr. Co.,* 458 U.S. at 70, n. 24, 102 S.Ct. 2858 (plurality opinion) (citing *United States ex rel. Toth v. Quarles,* 350 U.S. 11, 76 S.Ct. 1, 100 L.Ed. 8 (1955)). That is so not only because this Court has held as much, but also because Article III itself prescribes that "[t]he trial of all Crimes, except in Cases of Impeachment, shall be by Jury." § 2, cl. 3. In other words, Article III requires criminal trials to take place before a jury in federal court, but says nothing about civil-penalty claims brought by the Government. Beyond criminal trials, the Solicitor General also concedes that, under this Court's precedents, the public-rights doctrine does not apply when the Government brings a common-law claim in a proprietary capacity. See Reply Brief 8, n. 2.

[10] The majority spills much ink on the perceived similarities between federal-securities fraud and common-law fraud, only to conclude that the causes of action are not identical. That conclusion was inevitable because of critical differences between the two. Even if Congress drew upon common-law fraud when it enacted federal-securities laws, see *ante,* at 2130-2131, this Court has repeatedly disclaimed any suggestion that Congress federalized a common-law fraud claim. See, *e.g., Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.,* 552 U.S. 148, 162, 128 S.Ct. 761, 169 L.Ed.2d 627 (2008) ("Section 10(b) does not incorporate common-law fraud into federal law"); *SEC v. Zandford,* 535 U.S. 813, 820, 122 S.Ct. 1899, 153 L.Ed.2d 1 (2002) ("[T]he statute must not be construed so broadly as to convert every common-law fraud that happens to involve securities into a violation of § 10(b)"); *Herman & MacLean v. Huddleston,* 459 U.S. 375, 388-389, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983) ("[T]he antifraud provisions of the securities laws are not coextensive with common-law doctrines of fraud").

[11] In *Tull v. United States,* 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987), for example, there was no common-law soil brought into that federal regulatory regime, and the Seventh Amendment still applied. Indeed, no one can argue that "[t]he purpose of [the Clean Water Act] was ... to enable the Federal Government to bring or adjudicate claims that traced their ancestry to the common law." *Ante,* at 2137.

[12] The concurrence's assertion that the majority is "follow[ing] the advice of Justices Brennan and Marshall" by "'limit[ing] the judicial authority of non-Article III federal tribunals'" is misleading. *Ante,* at 2150 (quoting *Schor,* 478 U.S. at 859, 106 S.Ct. 3245 (Brennan, J., joined by Marshall, J., dissenting)). Justice Brennan in his *Schor* dissent wrote that he would limit the authority of non-Article III tribunals to three recognized exceptions: (1) territorial courts; (2) courts-martial; and (3) forums adjudicating public-rights matters. As examples of the public-rights category, Justice Brennan cited *Murray's Lessee, Ex parte Bakelite, Crowell, Thomas,* and his plurality opinion in *Northern Pipeline.* See *Schor,* 478 U.S. at 859, 106 S.Ct. 3245. As those citations demonstrate, both Justices Brennan and Marshall certainly thought that public-rights matters extend to certain private disputes that do not involve the Government as a party, as well as disputes involving the Government in connection with different exercises of congressional power. Indeed, it was Justice Brennan who reaffirmed *Atlas Roofing* in his opinion for the *Granfinanciera* Court and explained that a public right includes, at a minimum, a statutory right that "belongs to [o]r exists against the Federal Government." 492 U.S. at 53-54, 109 S.Ct. 2782.

[13] Precedents should not be so easily discarded based on the views of some commentators, or on whether or not a particular case is "celebrated." *Ante,* at 2138-2139, n. 4. *Atlas Roofing* and the long line of cases before it are precedents from this Court entitled to *stare decisis* effect. Indeed, this Court has reaffirmed and repeatedly cited *Atlas Roofing* with approval. See, *e.g., Oil States,* 584 U.S. at 344-345, 138 S.Ct. 1365; *Stern,* 564 U.S. at 489-490, 131 S.Ct. 2594; *Granfinanciera,* 492 U.S. at 48, 51-54, 60-61, 109 S.Ct. 2782; *id.,* at 65-66, 109 S.Ct. 2782 (Scalia, J., concurring in part and concurring in judgment); *Tull,* 481 U.S. at 418, n. 4, 107 S.Ct. 1831; *Northern Pipeline Constr. Co.,* 458 U.S. at 67, n. 18, 69, n. 23, 70, 73, 77, 102 S.Ct. 2858 (plurality opinion).

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TAB 3

178 F.4th 224 (2026)

NATIONAL HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION; Arizona Horsemen's Benevolent and Protective Association; Arkansas Horsemen's Benevolent and Protective Association; Indiana Horsemen's Benevolent and Protective Association; Illinois Horsemen's Benevolent and Protective Association; Louisiana Horsemen's Benevolent and Protective Association; Mountaineer Park Horsemen's Benevolent and Protective Association; Nebraska Horsemen's Benevolent and Protective Association; Oklahoma Horsemen's Benevolent and Protective Association; Oregon Horsemen's Benevolent and Protective Association; Pennsylvania Horsemen's Benevolent and Protective Association; Washington Horsemen's Benevolent and Protective Association; Tampa Bay Horsemen's Benevolent and Protective Association; Gulf Coast Racing, L.L.C.; LRP Group, Limited; Valle de Los Tesoros, Limited; Global Gaming LSP, L.L.C.; Texas Horsemen's Partnership, L.L.P., Plaintiffs-Appellants,

State of Texas; Texas Racing Commission, Intervenor Plaintiffs-Appellants,

v.

Jerry BLACK; Katrina Adams; Leonard Coleman; MD Nancy Cox; Joseph Dunford; Frank Keating; Kenneth Schanzer; Horseracing Integrity and Safety Authority, Incorporated; Federal Trade Commission; Commissioner Noah Phillips; Commissioner Christine Wilson; Lisa Lazarus; Steve Beshear; Adolpho Birch; Ellen McClain; Charles Scheeler; Joseph DeFrancis;
225 **Susan Stover; Bill Thomason;** *225 **Lina Khan, Chair; Rebecca Slaughter, Commissioner; Alvaro Bedoya, Commissioner; D. G. Van Clief, Defendants-Appellees.**

No. 23-10520.

United States Court of Appeals, Fifth Circuit.

FILED June 11, 2026.

228 *228 Appeal from the United States District Court for the Northern District of Texas, USDC Nos. 5:21-CV-71, 5:23-CV-77.

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229 *229 Stewart Reeves Jordan, Maynard Nexsen, P.C., Birmingham, AL, Gregory Philip Sapire, Maynard Nexsen, Austin, TX, Ilan Wurman, Arizona State University Sandra Day O'Connor College of Law, Phoenix, AZ, for Plaintiffs-Appellants Gulf Coast Racing, L.L.C., LRP Group, Limited, Valle de Los Tesoros, Limited, Global Gaming LSP, L.L.C., Texas Horsemen's Partnership, L.L.P. Texas Horsemen's Partnership, L.L.P.

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Aaron Michael Streett, Elisabeth Catherine Butler, Beck Redden, L.L.P., Houston, TX, for Amicus Curiae Financial Industry Regulatory Authority, Incorporated.

Before King, Duncan, and Engelhardt, Circuit Judges.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Stuart Kyle Duncan, Circuit Judge:

Last year, the Supreme Court vacated our decision in *National Horsemen's Benevolent & Protective Association v. Black (Horsemen's II)*, 107 F.4th 415 (5th Cir. 2024), and remanded "for further consideration in light of *FCC v. Consumers' Research*, 606 U.S. [656, 145 S.Ct. 2482, 222 L.Ed.2d 800] (2025)." *Horseracing Integrity & Safety Auth., Inc. v. Nat'l*
230 *Horsemen's Benevolent & Protective Ass'n*, ___ *230 U.S. ___, 145 S. Ct. 2837, 222 L.Ed.2d 1125 (2025) (mem.). The parties have filed supplemental briefs helpfully addressing this question.

We conclude *Consumers' Research* does not affect our prior decision, which we reissue below.[1] In a new section, *infra* Part III(B)(6), we explain why *Consumers' Research* does not change our analysis of the private nondelegation question presented in this case.

INTRODUCTION

We again consider constitutional challenges to the Horseracing Integrity and Safety Act of 2020 ("HISA" or the "Act"). In HISA, Congress empowered a private corporation—the Horseracing Integrity and Safety Authority ("Authority")—to create and enforce nationwide rules for thoroughbred horseracing. In our first foray into HISA, we held the Act facially unconstitutional under the private nondelegation doctrine because the Authority's rulemaking was not subordinate to the Federal Trade Commission ("FTC"). *See Nat'l Horsemen's Benevolent & Protective Ass'n v. Black (Horsemen's I)*, 53

F.4th 869 (5th Cir. 2022). At the time, we did not consider a separate nondelegation challenge to the Authority's enforcement power. Congress responded to our decision by amending HISA, giving the FTC power to abrogate, add to, or modify the Authority's rules.

On remand, the district court held the amendment cured HISA's constitutional deficiencies because the FTC now has general rulemaking power over the Authority's activities. It also rejected claims raised by a new plaintiff, Gulf Coast Racing LLC ("Gulf Coast"), that HISA violates the Constitution's Appointments Clause because the Authority wields significant governmental authority. The plaintiffs all appealed, arguing HISA is still constitutionally deficient under the private nondelegation doctrine, the Due Process Clause, the Appointments Clause, and the Tenth Amendment.

Just as we concluded in our now-vacated *Horsemen's II* opinion, we agree with nearly all of the district court's well-crafted opinion. Specifically, we agree that the FTC's new rulemaking oversight means the agency is no longer bound by the Authority's policy choices. In other words, the amendment solved the nondelegation problem with the Authority's rulemaking power. We also agree that HISA does not violate the Due Process Clause by putting financially interested private individuals in charge of competitors. Further, we agree that, under current Supreme Court precedent, *see* *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995), the Authority does not qualify as a government entity subject to the Appointments Clause. Finally, we agree that plaintiff Gulf Coast lacks standing to bring its Tenth Amendment challenge.

After the Supreme Court's remand, we still disagree with the district court in one important respect, however: HISA's enforcement provisions violate the private nondelegation doctrine. The statute empowers the Authority to investigate, issue subpoenas, conduct searches, levy fines, and seek injunctions—all without the FTC's say-so. That is forbidden by the Constitution. We therefore DECLARE that HISA's enforcement provisions are facially unconstitutional on that ground. In doing so, we part ways with our esteemed colleagues on the Sixth Circuit. *See* *Oklahoma v. United States (Oklahoma I)*, 62 *231 F.4th 221 (6th Cir. 2023); *Oklahoma v. United States (Oklahoma II)*, 163 F.4th 294 (6th Cir. 2025) (both rejecting nondelegation challenge to HISA's enforcement provisions).

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Accordingly, the district court's judgment is AFFIRMED in part and REVERSED in part.

I. BACKGROUND

A. HISA Framework

In 2020, HISA created a framework for enacting and enforcing nationwide rules governing doping, medication control, and racetrack safety in the thoroughbred horseracing industry. *See* 15 U.S.C. § 3054(a). *See generally* *Horsemen's I*, 53 F.4th at 873-75. To "develop[] and implement[]" these rules, HISA empowers a "private, independent, self-regulatory, nonprofit corporation, to be known as the `Horseracing Integrity and Safety Authority,'" subject to the "oversight" of the FTC. §§ 3052(a), 3053.

Under HISA, the Authority writes all the rules—that is, rules fleshing out the substantive areas covered by HISA, as well as rules governing investigation, adjudication, and sanctions.[2] The Authority submits proposed rules to the FTC, which publishes them for public comment. § 3053(b)(1), (c)(1). Rules take effect only after FTC approval, which must occur within 60 days of publication. § 3053(c)(1). The FTC "shall approve" a proposed rule if it finds the rule "consistent" with the Act and with "applicable rules approved by the [FTC]." § 3053(c)(2). Originally, this "consistency review" did not allow the FTC to reject a proposed rule based on its disagreement with the Authority's policy choices. *Horsemen's I*, 53 F.4th at 884-87. In *Horsemen's I*, we held that this arrangement violated the private nondelegation doctrine by making a private entity superior to a government agency. *Ibid.* In response, Congress amended HISA to give the FTC power to "abrogate, add to, and modify" the Authority's rules. § 3053(e).

The Authority also has the power to enforce HISA. It does so by (1) exercising "subpoena and investigatory authority," § 3054(h); (2) imposing civil sanctions, §§ 3054(i), 3057; and (3) filing civil actions seeking injunctions or enforcement of sanctions, § 3054(j). The actual work of enforcing HISA involves a further delegation to other entities, however. For instance, HISA directs the Authority to contract enforcement of doping and medication rules to a private non-profit, the U.S. Anti-Doping Agency ("USADA"), or other comparable entity. § 3054(e)(1)(A), (B). The Authority's proposed

partnership with USADA ultimately did not pan out. Instead, the Authority partnered with Drug Free Sport International, which operates as the Horseracing Integrity and Welfare Unit ("HIWU").

HIWU then acts as "the independent... enforcement organization" for those rules, "implement[s]" HISA's anti-doping programs, and exercises related powers "including independent investigations, charging and adjudication of potential medication control rule violations, and the enforcement of any civil sanctions for such violations." § 3054(e)(1)(E)(i), (iii), (iv); § 3055(c)(4)(B).[3] HIWU's decisions on such *232 matters "shall be the final decision or civil sanction of the Authority," subject to *de novo* review by an administrative law judge ("ALJ") and the FTC. § 3055(c)(4)(B); § 3058.

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B. Procedural History

Horsemen's I concluded that HISA's delegation of rulemaking power was facially unconstitutional. HISA delegated rulemaking power to a private organization (the Authority) whose policy choices could not be second-guessed by the agency (FTC). The Authority's rulemaking powers were therefore not subordinate to the FTC, meaning HISA facially violated the private nondelegation doctrine. *Horsemen's I*, 53 F.4th at 872. We did not consider the plaintiffs' distinct nondelegation challenges to the Authority's investigative and enforcement powers nor their due process claims. *Id.* at 890 n.37. Finally, as noted, Congress responded to *Horsemen's I* by empowering the FTC to "abrogate, add to, and modify" the Authority's rules. § 3053(e).

On remand, the National Horsemen's Association ("Horsemen") and Texas continued to press their private nondelegation claims, arguing Congress's amendment did not actually subordinate Authority rulemaking to the FTC. They also continued to press their nondelegation challenge to the Authority's enforcement powers (as well as their due process claims). In addition, a new plaintiff, Gulf Coast Racing LLC ("Gulf Coast"), raised separate challenges to HISA in a different division of the same district. *See Nat'l Horsemen's Benevolent & Protective Ass'n v. Black (Black II)*, 672 F. Supp. 3d 220, 224-25 (N.D. Tex. 2023). Gulf Coast claimed (1) HISA's directors qualify as "officers of the United States" and are therefore subject to Article II's appointment and removal requirements; and (2) HISA commandeers Texas in violation of the Tenth Amendment. Gulf Coast's suit was consolidated with the remanded *Horsemen's I* case. *Id.* at 230-31. Following a one-day bench trial, the district court rejected all the plaintiffs' claims.

As to private nondelegation, the district court followed the Sixth Circuit's decision in *Oklahoma I*, 62 F.4th 221. The district court reasoned that Congress's amendment empowering the FTC to "abrogate, add to, and modify" proposed rules "cured the constitutional issues identified by [*Horsemen's I*]" by making the Authority's rulemaking power "subordinate" to the FTC. *Black II*, 672 F. Supp. 3d at 241, 243-44 (citing *Oklahoma I*, 62 F.4th at 230, 232). As to the separate challenge to the Authority's enforcement powers, the district court largely relied on its previous order rejecting the claim because those powers "comport with due process." *See id.* at 248 (quoting *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black (Black I)*, 596 F. Supp. 3d 691, 725 (N.D. Tex. 2022)). The court also relied on the fact that the FTC could review civil sanctions and control enforcement through rulemaking. *Id.* at 248-49 (citing *Black I*, 596 F. Supp. 3d at 725-26); *see also Oklahoma I*, 62 F.4th at 231. Finally, the court rejected the due process claims because the Horsemen failed to show the Authority's directors have financial interests in regulating competitors. *Black II*, 672 F. Supp. 3d at 252.

As to Gulf Coast's claims, the district court concluded that our *Horsemen's I* decision required it to reject them. Specifically, the court reasoned that *Horsemen's I* necessarily decided the Authority was a private entity, and so its directors were *233 not subject to the Appointments Clause. *Id.* at 234-37. Alternatively, the court reasoned that the Authority is private because "it is not government created, and its directors are not government appointed." *Id.* at 234 (citing *Lebron*, 513 U.S. 374, 115 S.Ct. 961). Finally, the court rejected the Tenth Amendment anti-commandeering argument for lack of standing. *Id.* at 249-50.

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Accordingly, the district court entered final judgment dismissing all claims. The Horsemen, Texas, and Gulf Coast timely appealed.

II. STANDARD OF REVIEW

We review the district court's legal conclusions following a bench trial *de novo*. Deloach Marine Servs., L.L.C. v. Marquette Transp. Co., L.L.C., 974 F.3d 601, 606 (5th Cir. 2020). To prevail on their facial challenge, the plaintiffs "must show that no set of circumstances exists under which [HISA] would be valid." *Horsemen's I*, 53 F.4th at 878 (cleaned up).

III. DISCUSSION

The various plaintiffs raise these issues on appeal:

(A) Did Congress's amendment to HISA cure the private nondelegation problem with the Authority's rulemaking powers?

(B) Do the Authority's enforcement powers separately violate the private nondelegation doctrine?

(C) Does HISA violate due process by permitting self-interested industry participants to regulate their competitors?

(D) Are the Authority's directors subject to the Appointments Clause?

(E) Does HISA violate the Tenth Amendment's anti-commandeering rule by forcing States to administer a federal program?

We consider each issue in turn.

A. Private Nondelegation Challenge to Authority's Rulemaking

We previously discussed the origins of the private nondelegation doctrine in *Horsemen's I*. *See id.* at 880-81. In essence, the doctrine teaches that "a private entity may wield government power only if it `functions subordinately' to an agency with `authority and surveillance' over it." *Id.* at 881 & n.21 (citing *Texas v. Rettig*, 987 F.3d 518, 532 (5th Cir. 2021)); *Pittston Co. v. United States*, 368 F.3d 385, 394 (4th Cir. 2004); *United States v. Frame*, 885 F.2d 1119, 1128 (3d Cir. 1989).[4] Or, as our sister circuit has explained: "Congress may formalize the role of private parties in proposing regulations so long as that role is merely as an aid to a government agency that retains the discretion to approve, disapprove, or modify them." *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp. (Amtrak I)*, 721 F.3d 666, 671 (D.C. Cir. 2013) (cleaned up) (quoting *Adkins*, 310 U.S. at 388, 60 S.Ct. 907), *vacated and remanded on other grounds*, *Dep't of Transp. v. Ass'n of Am. R.Rs. (Amtrak II)*, 575 U.S. 43, 135 S.Ct. 1225, 191 L.Ed.2d 153 (2015).

In *Horsemen's I*, we ruled the Authority's rulemaking power was an unconstitutional private delegation. Our analysis focused on the fact that the Authority's proposed rules were subject only to the FTC's limited "consistency review," which
234 *234 did not permit the agency to second-guess the Authority's policy choices. *See Horsemen's I*, 53 F.4th at 882-87. In response, Congress amended HISA to provide that:

> The [FTC], by rule in accordance with section 553 of Title 5, may abrogate, add to, and modify the rules of the Authority promulgated in accordance with this chapter as the Commission finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to requirements of this chapter and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this chapter.

15 U.S.C. § 3053(e). This new provision was borrowed from the Maloney Act, which allocates authority between the Securities and Exchange Commission ("SEC") and private, self-regulatory organizations (such as the Financial Industry Regulatory Authority ("FINRA")). *See Oklahoma I*, 62 F.4th at 231-32. Although HISA was originally modeled on the Maloney Act, it lacked this provision until the recent amendment. *See* Consolidated Appropriations Act, Pub. L. No. 117-328, div. O, tit. VII, § 701, 136 Stat. 4459, 5231-32 (2023). As noted, the district court followed the Sixth Circuit in ruling that the amendment cured the nondelegation problem with the Authority's rulemaking power. *See Black II*, 672 F. Supp. 3d at 241-45 (citing *Oklahoma I*, 62 F.4th at 230, 232).

We agree with the district court and the Sixth Circuit that the amendment cured the nondelegation defect identified in *Horsemen's I*. That defect lay in the agency's being at the mercy of the Authority's policy choices. *See Horsemen's I*, 53

F.4th at 872 ("[T]he FTC concedes it cannot review the Authority's policy choices."). For instance, when the Authority issued rules on the kinds of horseshoes permitted during races, the FTC told objecting commenters it lacked the power to question the Authority's views. *See id.* at 885 & n.29 (discussing FED. TRADE COMM'N, ORDER APPROVING THE ENFORCEMENT RULE PROPOSED BY THE HORSERACING INTEGRITY AND SAFETY AUTHORITY 26 (Mar. 25, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P222100HISAOrderRacetrackSafety.pdf [https://perma.cc/G3VQ-JPJR]). The amendment has corrected that imbalance. Now, the FTC may "abrogate, add to, and modify" the Authority's rules. § 3053(e). So, unlike before, if the FTC now disagrees with the policies reflected in the Authority's rules, it may change them. *See Oklahoma I*, 62 F.4th at 230 (noting recent rule explaining that FTC's "new `rulemaking power' allows it to `exercise its own policy choices'" (quoting FED. TRADE COMM'N, ORDER RATIFYING PREVIOUS COMMISSION ORDERS AS TO HORSERACING INTEGRITY AND SAFETY AUTHORITY'S RULES 3 (Jan. 3, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/HISA%20Order%20re%20Ratification%20of%20Previous%20Orders%20-%20Final%20not%20signed.pdf [https://perma.cc/44BK-37A9])). As the Sixth Circuit correctly observed, "§ 3053(e)'s amended text gives the FTC ultimate discretion over the content of the rules," which "makes the FTC the primary rule-maker, and leaves the Authority as the secondary, the inferior, the subordinate one." *Ibid.* (citing *Adkins*, 310 U.S. at 388, 60 S.Ct. 907).

Appellants' arguments to the contrary do not persuade us.

First, the Horsemen argue the Authority remains superior because it continues to write the rules in the first place and the agency must approve them if they hurdle the low bar of consistency review. We disagree. The problem was never that the private entity proposed the rules; the problem was that the agency lacked power to second-guess them once they
235 were proposed. *235 *See Horsemen's I*, 53 F.4th at 884 ("The FTC's oversight is too limited to ensure the Authority functions subordinately to the agency." (cleaned up) (quoting *Adkins*, 310 U.S. at 399, 60 S.Ct. 907)). Now the FTC has been given that power: it can "abrogate" or "modify" Authority rules it disagrees with. § 3053(e). And that new power gives consistency review new bite. Previously, consistency review "*exclude[d]*... the Authority's policy choices in formulating rules." *Horsemen's I*, 53 F.4th at 885. Now it implicitly includes review of those choices. The FTC must approve only those rules "consistent with... applicable rules approved by the [FTC]," and, thanks to the amendment, it is the FTC that has final word over what those rules are. § 3053(c)(2); *see also Oklahoma I*, 62 F.4th at 231 (explaining that "the FTC's later authority to modify *any* rules for any reason at all, including policy disagreements, ensures that the FTC retains ultimate[] authority over the implementation of the Horseracing Act").[5]

Next, the Horsemen argue the FTC's new review power creates a timing problem. Because the FTC may alter only rules "promulgated" by the Authority, § 3053(e), regulated entities may end up being subject to the Authority's rules until the FTC can intervene and fix them. We disagree. The FTC has 60 days to approve or disapprove a proposed rule. § 3053(c)(1). If the FTC is concerned about a proposed rule going into effect, then it can intervene and create safeguards to prevent that from happening. *See* § 3053(a) (requiring Authority to submit proposed rules to the FTC "in accordance with such rules as the [FTC] may prescribe"). For instance, the agency could adopt a rule postponing the effective date of a newly enacted rule. *See Oklahoma I*, 62 F.4th at 232 (suggesting this). Or the agency could engage in emergency rulemaking to delay the effective date of a rule. In any event, these are hypothetical problems that, if they arise, can be addressed in as-applied challenges. *See Hersh v. U.S. ex rel. Mukasey*, 553 F.3d 743, 762 (5th Cir. 2008) (holding that "as-applied challenges are preferred"). This is a facial challenge, however, and we cannot say that a potential timing gap in FTC's § 3053(e) review makes HISA unconstitutional in all its applications. *See United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (holding that a facial challenger "must establish that no set of circumstances exists under which the Act would be valid").[6]

Finally, the Horsemen point to the SEC's supervisory authority over private self-regulatory organizations like FINRA. They argue that, notwithstanding § 3053(e), the FTC still has less sway over the Authority than the SEC does over
236 FINRA. We again disagree. We previously *236 pointed out that the "key distinction" between the FTC and the SEC was the FTC's lack of general rulemaking power. *See Horsemen's I*, 53 F.4th at 887-88. "The SEC itself," we explained, "can make changes to FINRA rules, but the FTC can only recommend changes to the Authority's rules." *Id.* at 888 (citation omitted). But Congress has now amended HISA to give the FTC the same general rulemaking authority that the SEC has with respect to FINRA. *See Oklahoma I*, 62 F.4th at 225, 229 (reaching this conclusion).

In sum, we agree with the district court and the Sixth Circuit that, in light of Congress's amendment to HISA in §

3053(e), the Authority's rulemaking power is subordinate to the FTC's. Because the FTC has ultimate say on what the rules are, the Authority's power to propose horseracing rules does not violate the private nondelegation doctrine.

B. Private Nondelegation Challenge to Authority's Enforcement

Appellants next argue that, apart from its rulemaking powers, the Authority's enforcement powers violate the private nondelegation doctrine. Recall that the Authority enforces HISA by levying sanctions, which are ultimately subject to FTC review, and by bringing lawsuits. The Authority also has power to investigate potential violations, although the actual investigatory work is contracted to other private organizations, such as HIWU in the case of doping rules, or to state racing commissions in the case of racetrack safety rules. *See supra* Part I(A). Our *Horsemen's I* decision did not address this challenge to the Authority's enforcement powers, *see* 53 F.4th at 890 n.37, and on remand the district court treated it as a due process claim and rejected it, *see Black II*, 672 F. Supp. 3d at 248-49. Appellants now bring the claim to us, arguing that the Authority's enforcement power is not subordinate to FTC oversight.

1.

Before addressing the merits of this claim, we must address the Authority's argument that it is premature. Arguing both in terms of standing and ripeness, the Authority contends that it has not yet tried to enforce HISA against the Horsemen and that any challenge to the Authority's enforcement power can be raised if and when it does. We disagree for several reasons.

First, the Authority misunderstands the Horsemen's claim. They do not challenge some particular enforcement action undertaken by the Authority—claiming, for instance, that the Authority issued an overbroad subpoena for medical records or lacked probable cause to search a racetrack. Instead, the Horsemen argue that HISA, on its face, vests the Authority with enforcement power that is effectively unreviewable by the agency. When a regulated entity raises "a purely legal challenge" like this one, "it is unnecessary to wait for the Regulation to be applied in order to determine its legality." *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 267 (5th Cir. 2015) (cleaned up); *see also Nat'l Env't Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1008 (D.C. Cir. 2014) ("Petitioner's challenge in this case presents a purely legal question.... It is unnecessary to wait for the [statute] to be applied in order to determine its legality."); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 163, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014) ("Nothing in this Court's decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate that law.").

237 *237 Second, the Horsemen have a cognizable injury for standing purposes. Pursuant to HISA, they have already had to agree "to be subject to and comply with the [Authority's] rules, standards, and procedures" —including rules requiring they cooperate with investigations, consent to searches, and comply with subpoenas. *See* 15 U.S.C. § 3054(c)-(f). In other words, the Horsemen are themselves "objects of the Regulation," and so "there is ordinarily little question" that they have standing to challenge it. *Contender Farms*, 779 F.3d at 264-65 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561-62, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). And courts typically do not require a regulated party to "bet the farm" by violating a regulation before allowing it to test its validity. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 490, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010); *see also, e.g., Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 265 n.13, 111 S.Ct. 2298, 115 L.Ed.2d 236 (1991) (explaining that a separation-of-powers challenge to a board's veto powers was "ripe even if the veto power ha[d] not been exercised to respondents' detriment").

Finally, the record shows several instances in which the Authority has enforced HISA against the Horsemen. For example, the Authority has threatened one of the Horsemen's members with sanctions if it did not repair a racetrack railing. Additionally, the Authority has both threatened and actually barred member racetracks in Texas from broadcasting races out of state because they failed to register with the Authority. More generally, the Horsemen represent some 30,000 members and, when the parties filed their briefs, the Authority's website already listed hundreds of enforcement actions—and that number has now grown to over 3,000.[7] So, at a minimum, the Horsemen have shown a credible threat that the Authority will bring enforcement actions against their members in the future. *See Driehaus*, 573 U.S. at 164, 134 S.Ct. 2334.

In sum, the Horsemen have standing to challenge the Authority's enforcement powers and that challenge is ripe. We proceed to the merits.

2.

The Horsemen's (as well as Texas's) basic contention is that HISA grants the Authority enforcement power that is effectively unreviewable by the FTC. That claim turns on the same standard as the challenge to the Authority's rulemaking addressed in *Horsemen's I*: the delegation is constitutional if, when enforcing HISA, the Authority "`functions subordinately' to an agency with `authority and surveillance' over it." 53 F.4th at 881 (quoting *Rettig*, 987 F.3d at 532). In other words, the Authority may constitutionally enforce HISA only if it acts "as an aid" to the FTC, which "retains the discretion to approve, disapprove, or modify" the private entity's enforcement actions. *Ibid.* (cleaned up) (quoting *Amtrak I*, 721 F.3d at 671).[8]

238 *238 While the constitutional standard is the same, the nature of the delegated authority is different this time around. *Horsemen's I* addressed delegation of legislative authority—the power to make rules. *See Myers v. United States*, 272 U.S. 52, 186, 47 S.Ct. 21, 71 L.Ed. 160 (1926) (MCREYNOLDS, J., dissenting) ("The essence of the legislative authority is to ... prescribe rules for the regulation of the society[.]"). Logically, we focused on which actor—government agency or private entity? —had final say over the content of those rules. *See Horsemen's I*, 53 F.4th at 884-87 (analyzing FTC's lack of authority over the Authority's policy choices). Today, by contrast, we address delegation of executive authority. The power to launch an investigation, to search for evidence, to sanction, to sue—these are all quintessentially executive functions.[9] And they have been considered so from our Nation's founding.[10] As much as legislative power, the private nondelegation doctrine forbids unaccountable delegations of executive power. *See, e.g., Amtrak II*, 575 U.S.
239 at 62, 135 S.Ct. 1225 (ALITO, J., concurring) ("Private entities are not vested with `legislative *239 Powers.' Art. I, § 1. Nor are they vested with the `executive Power,' Art. II, § 1, cl. 1, which belongs to the President."). Accordingly, we must determine whether HISA delegates enforcement power to private entities and, if so, whether that power is subordinate to the FTC.

HISA divides enforcement authority among the FTC, the Authority, and HIWU, "each within the scope of their powers and responsibilities under this chapter." § 3054(a). Recall that HIWU is the private non-profit to whom the Authority must delegate anti-doping and medication enforcement. *See* § 3054(e)(1)(B).[11] So, the answer to the question before us turns on what "powers and responsibilities" each of these three entities has under HISA. Although HISA somewhat confusingly disperses the relevant provisions throughout the Act, we can discern the following division of labor.

First, the Authority has responsibility for (1) investigating potential violations, including by issuing subpoenas (§ 3054(h)); (2) levying sanctions (§§ 3054(j)(1), 3057, 3058(a)); and (3) bringing suit against violators for injunctive relief or to enforce sanctions (§ 3054(j)(1)-(2)). Second, actual enforcement of doping and medication rules is done by HIWU, which "implement[s]" those rules "on behalf of the Authority." § 3054(e)(1)(E)(i). In this regard, HIWU's responsibilities include "independent investigations, charging and adjudication of potential medication control rule violations, and the enforcement of any civil sanctions for such violations." § 3055(c)(4)(B); *see also* § 3054(e)(1)(E)(iv). Third, the FTC may ask an ALJ to review any sanction *de novo*, § 3058(b)(1), and the FTC may itself review the ALJ's decision *de novo*, either on its own motion or upon petition by an aggrieved party, § 3058(c).

The Act's plain terms permit only one conclusion: HISA is enforced by a private entity, the Authority. The Authority decides whether to investigate a covered entity for violating HISA's rules. The Authority decides whether to subpoena the entity's records or search its premises. The Authority decides whether to sanction it. And the Authority decides whether to sue the entity for an injunction or to enforce a sanction it has imposed. To be sure, the Authority does not perform these functions itself. Rather, HISA requires the Authority to contract with another private entity, HIWU, which undertakes enforcement "on behalf of the Authority." § 3054(e)(1)(E)(i). The bottom line, though, is that a private entity, not the agency, is in charge of enforcing HISA.

Consider also what HISA does not say. It does not empower the FTC to decide whether to investigate a covered entity, whether to subpoena its records, whether to search its premises, whether to charge it with a violation, or whether to sanction or sue it. Nor does the Act empower the FTC to countermand any of the Authority's investigatory or charging decisions (or, more precisely, HIWU's decisions). Nor does it require the Authority or HIWU to seek the FTC's approval

before investigating, searching, charging, sanctioning, or suing. All these actions are enforcement actions, and, by the plain terms of the Act, they can be done by the private entities without the FTC's involvement.

240 The inescapable conclusion is that the Authority does not "function subordinately" *240 to the FTC when enforcing HISA. *Horsemen's I*, 53 F.4th at 881. That is not permitted under the private nondelegation doctrine. A private entity that can investigate potential violations, issue subpoenas, conduct searches, levy fines, and seek injunctions —all without the say-so of the agency—does not operate under that agency's "authority and surveillance." *Ibid.* Put another way, with respect to enforcement, HISA's plain terms show that the Authority does not merely act "as an aid" to the FTC because the FTC does not "retain[] the discretion to approve, disapprove, or modify" the Authority's enforcement actions. *Ibid.* (cleaned up) (quoting *Amtrak I*, 721 F.3d at 671).

3.

One might counter, though, that the FTC at least partially supervises the Authority because it can review sanctions at the back end, after ALJ review. *See* §§ 3055(c)(4)(B), 3058(b)(3)-(c)(3). That is true, and it is the Authority's best argument for why its enforcement power is subordinate to the FTC.

The argument nonetheless fails. Suppose the Authority sanctions a horse owner for a doping violation, but the sanction is later reversed by the FTC. Does that make the Authority's enforcement power subordinate to the agency? No, it does not. Consider everything the Authority was permitted to do up to that point: launch an investigation into the owner, subpoena his records, search his facilities, charge him with a violation, adjudicate it, and fine him.[12] Each and every one of those actions is "enforcement" of HISA. Each can occur under HISA without any supervision by the FTC. Moreover, penalties imposed by the Authority are not automatically stayed pending appeal. *See* 16 C.F.R. § 1.148(a) (2022). So, any penalty goes into effect as soon as the Authority makes its decision, unless the ALJ or FTC exercises its discretion to implement a stay pending appeal. *See* § 3058(d).

241 It is no answer to say that the FTC can come in at the tail-end of this adversarial *241 process and review the sanction. As far as enforcement goes, the horse was already out of the barn. (You knew that was coming.) Besides, what if the sanctioned owner, instead of fighting the process, opts to settle for a lower fine? *See, e.g., In re Lynch,* 2024 WL 4298917 (F.T.C.), Dkt. No. 9423 (dismissing case due to settlement). In that case, according to the Authority's logic, *no one* has enforced HISA. That is obviously not true. To the contrary, the settlement scenario—which will likely happen often—only underscores that it is the private entity that acts as HISA's enforcer in any meaningful sense.

Consider a hypothetical. Suppose a city structures its speeding laws to let a group of private car enthusiasts monitor speeds with their own radar guns, pull speeders over, and ticket them. Fines are reviewed by the police department and, ultimately, the mayor. Who *enforces* the speeding laws? Anyone would say the private group. After all, consider how many cases we decide concerning whether the police have wrongly stopped someone or used excessive force during the stop. *See, e.g., Terrell v. Town of Woodworth,* No. 23-30510, 2024 WL 667690 (5th Cir. Feb. 19, 2024) (per curiam). All would agree that the police were "enforcing" the law when they stopped the person. The same goes for the private entity in the hypothetical.

The Authority's argument, moreover, does not work even on its own terms. In addition to levying fines, HISA empowers the Authority to sue people and racetracks to enjoin past, present, or impending violations. *See* § 3054(j)(1) (providing "the Authority may commence a civil action against a covered person or racetrack that has engaged, is engaged, or is about to engage, in acts or practices constituting a violation of this chapter ... to enjoin such acts or practices"); § 3054(j)(2) (allowing issuance of "a permanent or temporary injunction or restraining order ... without bond"). HISA gives the FTC no role in this process, either before or after the fact. So, even assuming the Authority is correct (and it is not) that the agency's after-the-fact supervision of sanctions makes the Authority subordinate, the Authority is demonstrably *not* subordinate when it comes to suing violators for injunctions. That is plainly an unsupervised delegation of executive power that the Constitution does not tolerate. *See Buckley,* 424 U.S. at 138, 96 S.Ct. 612 ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President ... that the Constitution entrusts [this] responsibility[.]").

4.

The Authority next argues that the FTC could use its new rulemaking authority to rein in the Authority's enforcement actions or even require the Authority to preclear lawsuits with the agency. *See* § 3053(e) (empowering FTC to "abrogate, add to, and modify" the Authority's rules). This argument persuaded the Sixth Circuit that at least a *facial* challenge to the Authority's enforcement powers should fail. *See* Oklahoma I, 62 F.4th at 231 (through § 3053(e) rulemaking, "the FTC *could* subordinate every aspect of the Authority's enforcement," which "suffices to defeat a facial challenge"). And we have already found that the FTC's rulemaking power has some purchase in turning back a facial challenge to the Authority's *rulemaking* power: as explained, the agency could ensure via rulemaking that no Authority rule could go into effect until the agency had time to review it. *See supra* Part III(A). With great respect to our colleagues on the Sixth Circuit, however, we are not convinced that this rulemaking argument can save the Authority's enforcement powers.

242 *242 The Authority's rulemaking argument would let the agency rewrite the statute. In HISA, Congress set out a definite enforcement scheme, dividing responsibilities among the FTC, the Authority, and HIWU. *See* § 3054(c)(1), (e). HISA is quite clear about this: it provides that those three entities "implement and enforce" the Act, "*each within the scope of their powers and responsibilities under this chapter.*" § 3054(a)(1) (emphasis added). A mere agency cannot alter that statutory division of labor. *See, e.g.*, Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv., 968 F.3d 454, 460 (5th Cir. 2020) ("We will not defer to `an agency interpretation that is inconsistent with the design and structure of the statute as a whole.'" (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 321, 134 S.Ct. 2427, 189 L.Ed.2d 372 (2014))); 5 U.S.C. § 706(2)(C) (authorizing courts to set aside agency action "in excess of statutory jurisdiction, authority, or limitations").[13] As the Supreme Court recently reiterated, even "statutory permission to `modify' does not authorize `basic and fundamental changes in the scheme' designed by Congress." Biden v. Nebraska, 600 U.S. 477, 494, 143 S.Ct. 2355, 216 L.Ed.2d 1063 (2023) (quoting MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 225, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994)). Yet that is just what the Authority says the FTC could do through rulemaking.

Take the Authority's power to seek injunctions. HISA empowers the Authority to file suit to enjoin violations, while saying nothing about FTC involvement in the process. *See* § 3054(j)(1). Yet the Authority suggests the FTC could, by rule, require the Authority to preclear any such action with the agency. We disagree. That would let the agency amend the enforcement scheme delineated by statute.[14] The same goes for investigatory and subpoena power: HISA unqualifiedly gives that power to the Authority, *see* § 3054(h), and then requires the Authority to delegate it to HIWU, *see* §§ 3054(e)(1)(E)(iv), 3055(c)(4)(B) (the Authority "shall" contract with HIWU to "conduct and oversee" anti-doping
243 and medication enforcement *243 "including independent investigations"). And the same goes for charging and adjudicating violations and levying sanctions. *See ibid.* (the Authority "shall" contract with HIWU to "conduct and oversee ... charging and adjudication of potential medication control rule violations, and the enforcement of any civil sanctions for such violations"); § 3054(j) (recognizing the Authority's power to impose "civil sanctions"). Congress enacted this reticulated scheme. The agency cannot amend it by promulgating a rule.

Furthermore, when Congress wanted to put the FTC in charge of enforcement, it knew how. Section 3059, for instance, is a separate part of HISA targeting certain "unfair or deceptive" practices in selling horses.[15] With respect to *that* section, the Authority can only "recommend" that the FTC "commence an enforcement action."[16] § 3054(c)(1)(B). In other words, only here did Congress limit the Authority's enforcement discretion to "recommending" agency enforcement. *Cf.* § 3054(j)(1) (providing "the Authority may commence a civil action" seeking an injunction). Yet the Authority contends that the agency could, by rulemaking, make *every* enforcement action subject to similar FTC approval. That would rewrite the enforcement scheme Congress enacted. *See* Russello v. United States, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (cleaned up)).[17]

Additionally, the Sixth Circuit believed the FTC could supervise the Authority through a slightly different kind of rulemaking —that is, by issuing rules governing *how* the Authority enforces HISA. *See* Oklahoma I, 62 F.4th at 231. For instance, the agency could issue rules against "overbroad subpoenas or onerous searches" or "provid[ing] a suspect with a full adversary proceeding and with free counsel." *Ibid.* Unhappily, we again disagree with our sister circuit.

The Horsemen are not complaining about *how* the Authority exercises its enforcement power. They are complaining about *where* the enforcement power is lodged: on its face, HISA empowers private entities to enforce it and permits

agency oversight only after the enforcement process is over and done with (and then only with respect to fines, not injunctions). If the Horsemen were objecting only to overbroad subpoenas, unwarranted searches, or lack of free counsel, perhaps those complaints could be addressed through rulemaking or as-applied challenges. But their complaint
244 is different. They contend that HISA facially delegates *244 unsupervised enforcement power to private actors. They are right. *See* Salerno, 481 U.S. at 745, 107 S.Ct. 2095 (recognizing challengers shoulder a "heavy burden" to demonstrate facial invalidity when they "establish that no set of circumstances exists under which the Act would be valid").[18]

In sum, HISA's clear delineation of enforcement power between the FTC, the Authority, and HIWU cannot be altered through rulemaking.

5.

Finally, the Authority defends its enforcement role by analogizing it to the role of self-regulatory organizations ("SROs") —specifically, FINRA—which assist the SEC in enforcing securities laws. The Authority seeks support in circuit cases concluding that FINRA's enforcement role presents no private nondelegation problem. *See, e.g., Oklahoma I*, 62 F.4th at 229, 232 (gathering cases).[19] For their part, the Horsemen argue that, for enforcement purposes, the FTC-Authority relationship is meaningfully different from the SEC-FINRA relationship. As we have before noted, HISA was modeled on the Maloney Act, which created FINRA. *See Horsemen's I*, 53 F.4th at 887; *supra* Part III(A). Moreover, we concluded in *Horsemen's I* that HISA lacked a key feature of the Maloney Act empowering the SEC to "abrogate, add to, and delete" rules proposed by FINRA. *Horsemen's I*, 53 F.4th at 887. As discussed, Congress added a similar provision to HISA, which remedied the nondelegation problem with the Authority's rulemaking powers. *Supra* Part III(A).

We agree with the Horsemen that, for enforcement purposes, HISA gives the Authority an enforcement role meaningfully different from FINRA's. Unlike the SEC-FINRA relationship, HISA does not give the FTC potent oversight power over the Authority's enforcement such as the power to enforce HISA itself, deregister the Authority as the enforcing entity, or remove its directors.

To begin with, Congress empowered the SEC to enforce FINRA's rules if needed. The SEC can "in its discretion, make
245 such investigations as it deems necessary to determine whether any person has violated, *245 is violating, or is about to violate" the Maloney Act. 15 U.S.C. § 78u(a)(1). The SEC can also, on its own accord, seek criminal sanctions, injunctive relief, or disgorgement. § 78u(c), (d), (d)(4). The FTC cannot. *See* § 3054(c)(1)(A)(iii) (granting the Authority investigatory power); § 3054(e) (granting the Authority and HIWU enforcement responsibility). The SEC has power to issue subpoenas, *see* §§ 77s(c), 78u(c), while HISA gives the Authority that power, § 3054(h), (c)(1)(A)(ii). The SEC can also revoke FINRA's ability to enforce its rules, § 78s(g)(2), and step in and enforce any written rule itself, § 78o(b)(4). HISA gives the FTC none of these tools.

Moreover, HISA diverges radically from the Maloney Act in empowering the Authority to sue. The SEC alone has the power to bring civil suits, §§ 78u-1(a)(1), 78u(d)(1), while HISA gives that power exclusively to the Authority, § 3054(j)(1). Giving a private entity the sole power to sue in federal court to enforce a statute cuts to the core of executive power. *See Buckley*, 424 U.S. at 138, 96 S.Ct. 612 ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President ... that the Constitution entrusts [this] responsibility[.]").[20]

Finally, the SEC "retains formidable oversight power to supervise, investigate, and discipline [FINRA] for any possible wrongdoing or regulatory missteps." *In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 101 (2d Cir. 2007). The FTC does not. This "formidable" power is manifest in the SEC's ability to derecognize FINRA's regulatory role entirely, § 78s(a)(3), (h)(1); remove FINRA board members for cause, § 78s(h)(4); remove any individual FINRA member, § 78s(h)(2); and bar any person from associating with FINRA, § 78*o*-3(g)(2). HISA, on the other hand, "recognize[s] for purposes of developing and implementing" the Act only "[t]he private, independent, self-regulatory, nonprofit corporation, to be known as the `Horseracing Integrity and Safety Authority.'" § 3052(a). And only the Authority's Board can remove members: directors by a two-thirds vote and committee members for any reason.[21]

6.

We now consider whether the Supreme Court's recent *Consumers' Research* decision impacts our private nondelegation analysis in this case.

Consumers' Research addressed challenges to a federal law tasking the Federal Communications Commission ("FCC")
246 with providing affordable communications services throughout the United States. The *246 law required telecom carriers to pay quarterly into a Universal Service Fund ("USF"), which would be distributed to underserved populations. A "contribution factor," devised by the FCC, would set each carrier's USF share. *See Consumers' Rsch.,* 606 U.S. at 664, 666-67, 668, 145 S.Ct. 2482; 47 U.S.C. §§ 151, 254.

Much of *Consumers' Research* addressed whether the law improperly delegated legislative power to the FCC (*i.e.,* a "public" nondelegation challenge). *See* 606 U.S. at 672-91, 145 S.Ct. 2482. The Supreme Court held it did not. In brief, the Court explained that Congress had placed sufficiently "intelligible" guardrails around the FCC's exercise of its assigned powers. *See id.* at 680-91, 145 S.Ct. 2482; *see generally* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409, 48 S.Ct. 348, 72 L.Ed. 624 (1928) (asking whether Congress enacted "intelligible principle[s]" to guide an agency's exercise of delegated authority).

The part of *Consumers' Research* relevant here concerned a separate challenge to the FCC's appointment of a private organization—the Universal Service Administrative Company (the "Administrator") —to manage the USF. *Consumers' Rsch.,* 606 U.S. at 669, 145 S.Ct. 2482. Among other tasks, the Administrator produced the financial projections the FCC used to determine carriers' quarterly USF contribution. *Id.* at 669-70, 145 S.Ct. 2482. The Administrator's role was challenged as the delegation of legislative power to a private organization. *Id.* at 692, 145 S.Ct. 2482. The Court rejected this challenge. *Id.* at 692-95, 145 S.Ct. 2482.

Drawing on its earlier precedents, the Court reaffirmed the basic idea that a federal agency can delegate power to a private organization only if it functions "subordinately" to the agency. *Ibid.* (first citing Carter Coal, 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160; and then citing Adkins, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263). The Court summarized the doctrine this way: "As long as an agency ... retains decision-making power, it may enlist private parties to give it recommendations." *Id.* at 692, 145 S.Ct. 2482.

Applying that standard, the Court held the Administrator's role was permissible. The Administrator was "broadly subordinate to the [FCC]" because (1) the FCC appointed the Administrator's board and approved its budget; (2) the Administrator engaged in "no policy-making" but was "just doing arithmetic"; (3) the Administrator had to carry out all tasks consistent with FCC directives; and (4) the FCC could review the Administrator's actions *de novo. Id.* at 693, 145 S.Ct. 2482. Critically, the FCC always had "a chance to review— and, if needed, to revise" the Administrator's projections before approving them. *Id.* at 694, 145 S.Ct. 2482; *see also id.* at 695, 145 S.Ct. 2482 (observing the Administrator's projections could not "go into effect without [the FCC's] say-so"). In sum, the FCC "alone" had decision-making authority, while the Administrator played only an "advisory role." *Id.* at 693, 145 S.Ct. 2482. Accordingly, the Court concluded the FCC's "transfer of accounting functions to the Administrator" was proper because "[i]n every way that matters to the constitutional inquiry, the [FCC], not the Administrator, is in control." *Id.* at 695, 145 S.Ct. 2482.

For the following reasons, we conclude the private nondelegation analysis in *Consumers' Research* does not change the outcome in this case.

a.

To begin with, *Consumers' Research* articulated the same private nondelegation doctrine we applied before (and now
247 reapply). An agency, the Court explained, may *247 "rely on advice and assistance from private actors," provided they remain "broadly subordinate" to the agency's "authority and surveillance." *Id.* at 692, 145 S.Ct. 2482. That doctrinal formulation is identical to our own: "[A] private entity may wield government power only if it functions subordinately to an agency with authority and surveillance over it." Horsemen's II, 107 F.4th at 423 (internal citations omitted). Indeed, the Court drew on the same precedents we did. *Compare Consumers' Rsch.,* 606 U.S. at 692, 145 S.Ct. 2482 (discussing Schechter Poultry, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570; Carter Coal, 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160; Adkins, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263), *with* Horsemen's II, 107 F.4th at 423 n.4 (citing same cases); *see also* Horsemen's I, 53 F.4th at 880-81 (same).

So, *Consumers' Research* did not alter the doctrine, whose touchstone remains the same it has always been—namely, whether the private organization is "subordinate" to a superintending agency.

b.

Nor does the Court's application of the doctrine to the USF Administrator change our conclusion in this case about the Authority's enforcement powers. As we held before and now reaffirm, in exercising those powers, the Authority does not function subordinately to the FTC.

To see why, just compare the private actors in the two cases. In *Consumers' Research,* the Administrator played merely an "advisory role," leaving the FCC "alone" with "decision-making authority." *Id.* at 693, 145 S.Ct. 2482. The Administrator only recommended how to calculate the contribution factor—but its advice could not go into effect until the FCC reviewed it, revised it if necessary, and gave the final "say-so." *Id.* at 693-95, 145 S.Ct. 2482. This arrangement meant "the [FCC], not the Administrator, [wa]s in control." *Id.* at 695, 145 S.Ct. 2482.

The Authority wields power of an entirely different color. HISA gives the Authority (and its secondary private partner) power to investigate, subpoena, sue, and sanction covered entities. *See Horsemen's II,* 107 F.4th at 429. The FTC is given no statutory authority to approve, review, or countermand any of the Authority's investigatory, prosectuory, or adjudicatory decisions. *Ibid.* All of that enforcement, according to HISA's "plain terms," "can be done by the private entities without the FTC's involvement." *Ibid.*; *see generally supra* Parts I(A), III(B)(2).

True, the FTC has some back-end review over the Authority's enforcement actions. *See supra* Part III(B)(3) (discussing §§ 3055(c)(4)(B), 3058(b)(3)-(c)(3)). So, one might ask: isn't that like the "*de novo* review" exercised over the Administrator by the FCC? *See Consumers' Rsch.,* 606 U.S. at 693. No, it is not. As the Supreme Court explained, nothing the USF Administrator does respecting the contribution factor has any "legal (or, indeed, practical) effect" until the agency "decides [it] should." *Id.* at 694, 145 S.Ct. 2482. Contrast that with the Authority, which is empowered to launch numerous intrusive enforcement actions—investigations, subpoenas, searches, charges, adjudications— all without any agency oversight.[22]

248 *248 All that is to say: *Consumers' Research* only reinforces our previous conclusion. By exercising a raft of unsupervised enforcement actions that go far beyond the USF Administrator's "recommendations," it is evident that "the [Authority], not the [FTC], is in control." *Id.* at 695, 145 S.Ct. 2482.[23]

* * *

In sum, we agree with the Horsemen that the FTC lacks adequate oversight and control over the Authority's enforcement power. HISA's explicit division of enforcement responsibility empowers the Authority with quintessential executive functions and gives the FTC scant oversight until enforcement has already occurred. Such back-end review by the FTC does not subordinate the Authority. And the FTC's general rulemaking power provides no answer because executive rulemaking cannot amend the plain division of enforcement power laid out in HISA's text. Such a radical delegation differs materially from the SEC-FINRA relationship because the FTC lacks any tools to ensure that the law is properly enforced. HISA's enforcement provisions thus facially violate the private nondelegation doctrine.

C. Due Process Challenge

We turn next to the Horsemen's challenge based on the Fifth Amendment's Due Process Clause. They argue that HISA, both facially and as-applied, deprives them of due process by permitting economically self-interested actors to regulate their competitors. *See Carter Coal,* 298 U.S. at 311, 56 S.Ct. 855 (government violates due process by allowing regulation by "private persons whose interests may be and often are adverse to the interests of others in the same business"). Specifically, the Horsemen contend that *Carter Coal* does not require proof of economic self-interest, only that the private person "may be" adverse to those he regulates. They then argue that several members of the Board and standing committees violate the conflict of interest provisions due to their professions and prior financial interests.

Finally, the Horsemen contend that the statute fails to properly protect against self-interested actors because it does not cover financial interests other than interests in a covered horse, as opposed to a racetrack or other facility.

The district court correctly rejected these claims. As to the Horsemen's facial challenge, the court concluded it was defeated by HISA's conflict-of-interest provisions. *See Black II*, 672 F. Supp. 3d at 252. Those provisions prohibit a range of individuals from serving as Board or independent committee members, including individuals with financial
249 interests in, *249 or who provide goods or services to, covered horses; officials, officers, or policy makers for an equine industry; and employees, contractors, or immediate family members of the prior individuals. § 3052(e)(1)-(4).

As to the as-applied challenge, the district court rejected it on the facts. Following a bench trial, the court found the Horsemen relied only on the committee members' biographical information but adduced no other evidence showing their adverse interests, financial or otherwise. *See Black II*, 672 F. Supp. 3d at 252 ("HISA affords sufficient protection through its conflicts-of-interest provisions, and the plaintiffs have not met their burden to show unconstitutional self-dealing by directors, committee members, or others associated with the Authority."). At most, the court observed that the biographical information may show the members do not qualify as "independent members." *Ibid.*; § 3052(b)(1)(A) ("[I]ndependent members [must be] selected from outside the equine industry."). But, as the court pointed out, even assuming that to be true, it says nothing about the members' financial interests. *Black II*, 672 F. Supp. 3d at 252. On appeal, the Horsemen fail to show any error by the district court here.

D. Appointments Clause Challenge

A separate plaintiff, Gulf Coast, challenges the Authority's structure under the Appointments Clause of Article II.[24] Recall that Gulf Coast raised this distinct challenge in a suit later consolidated with the Horsemen's. *See id.* at 230. Gulf Coast argues that, for constitutional purposes, the Authority is governmental, not private, and so is subject to the Appointments Clause. This means the Authority's directors, if they are principal officers, must be appointed by the President with Senate confirmation or, if they are inferior officers, by the President, courts, or department heads according to law. *See Free Enter. Fund*, 561 U.S. at 487-88, 130 S.Ct. 3138; *Cochran v. SEC*, 20 F.4th 194, 198 (5th Cir. 2021) (en banc). The Authority's directors are not appointed in any of these ways,[25] and so, if Gulf Coast is right, their appointment would violate Article II.

The Authority and the FTC first respond that we previously decided this question in *Horsemen's I*. By applying the *private* nondelegation doctrine to the Authority, they argue we necessarily determined the Authority is not governmental for constitutional purposes. The district court took this view as well. *See Black II*, 672 F. Supp. 3d at 234. That is understandable. Challenges based on private nondelegation, on the one hand, and the Appointments Clause, on the other, appear mutually exclusive. For constitutional purposes, an entity is either governmental or not. *See, e.g., Lebron*, 513 U.S. at 378-79, 115 S.Ct. 961; *Amtrak II*, 575 U.S. at 50-51, 135 S.Ct. 1225. That is why the Horsemen themselves call Gulf Coast's claim "fundamentally incompatible" with their private nondelegation challenge. Texas seems to agree,
250 noting that Gulf Coast's Appointments Clause theory would apply *250 only if "the Court disagree[s]" with its assumption that the Authority is private.

That said, however, we cannot agree that we decided this question in *Horsemen's I*. The Appointments Clause question was never posed. Party presentation is a fundamental constraint on appellate decision-making. *See United States v. Sineneng-Smith*, 590 U.S. 371, 376, 140 S.Ct. 1575, 206 L.Ed.2d 866 (2020) ("Courts ... wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties." (cleaned up)). The fact is that in *Horsemen's I*, all parties proceeded on the assumption that the Authority is private for constitutional purposes. *See Horsemen's I*, 53 F.4th at 875 n.11 ("The Horsemen also claimed HISA was unconstitutional under the ... Appointments Clause. The district court did not rule on those claims and so they are not before us."). No one suggested that the Authority might qualify as a government entity or that its directors were subject to the Appointments Clause. So, because we did not settle the question previously, we can address it now. *See Companion Prop. & Cas. Ins. Co. v. Palermo*, 723 F.3d 557, 561 (5th Cir. 2013) ("Appellate powers are limited to reviewing issues raised in, *and decided by*, the district court." (cleaned up)); *Alpha/Omega Ins. Servs., Inc. v. Prudential Ins. Co. of Am.*, 272 F.3d 276, 281 (5th Cir. 2001) ("[T]he law of the case doctrine only applies to issues we actually decided[.]").

The basic premise of Gulf Coast's argument is that the Authority is part of the federal government for Appointments

Clause purposes. *See Amtrak II,* 575 U.S. at 50-51, 135 S.Ct. 1225. We of course recognize that HISA calls the Authority private, as does the Authority's own charter. *See* § 3052(a) ("The private, independent, self-regulatory, nonprofit corporation, to be known as the 'Horseracing Integrity and Safety Authority,' is recognized for purposes of developing and implementing [HISA]."); HORSERACING INTEGRITY & SAFETY AUTH., INC., DEL. SEC'Y OF STATE, CERTIFICATE OF INCORPORATION 1 (2020) ("The Corporation is organized and shall be operated as a nonprofit business league[.]"). But deeming an entity "private" does not settle whether it is legally part of the federal government. Otherwise, the government could evade constitutional restrictions by mere labeling. *See Lebron,* 513 U.S. at 397, 115 S.Ct. 961 ("It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form."). So, we must determine whether the Authority qualifies as part of the federal government for constitutional purposes.

The analysis guiding that inquiry comes from *Lebron.* In that case, the Supreme Court examined "the long history of corporations created and participated in by the United States for the achievement of governmental objectives." *Id.* at 386, 115 S.Ct. 961.[26] The specific question before the Court was whether "Amtrak, though nominally a private corporation, must be regarded as a Government entity for First Amendment purposes." *Id.* at 383, 115 S.Ct. 961. The answer was yes. That was so, the Court held, because "the Government create[d] [the Amtrak] corporation by special
251 law, for the furtherance of governmental *251 objectives, and retain[ed] for itself permanent authority to appoint a majority of the directors of that corporation." *Id.* at 399, 115 S.Ct. 961. The Supreme Court and circuit courts have since used *Lebron*'s analysis to discern whether corporations are part of the government for constitutional purposes.[27] Applying *Lebron,* we conclude that the Authority is not a federal instrumentality for purposes of the Appointments Clause.

First, the Authority was not created by the federal government "by special law," *ibid.,* but was incorporated under Delaware law shortly before HISA's passage. Contrast this with Amtrak, which "Congress established" by enacting the Rail Passenger Service Act of 1970. *Id.* at 383-84, 115 S.Ct. 961; *see also Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.,* 470 U.S. 451, 454, 105 S.Ct. 1441, 84 L.Ed.2d 432 (1985) (observing "Congress established the National Railroad Passenger Corporation, a private, for-profit corporation that has come to be known as Amtrak").

Second, the Authority was not created to further "governmental objectives," *Lebron,* 513 U.S. at 399, 115 S.Ct. 961, but instead as a private association to address doping, medication, and safety issues in the thoroughbred racing industry. Again, contrast this with Amtrak, which Congress created "to avert the threatened extinction of passenger trains in the United States" and for other goals Congress itself "establish[ed]." *Id.* at 383-84, 115 S.Ct. 961.

Third, the federal government does not "control[] the operation of the [Authority]," nor has it "retain[ed] for itself permanent authority to appoint a majority of the [Authority's] directors." *Id.* at 399, 115 S.Ct. 961. To the contrary, the government has no role in appointing the Authority's Board. Once again, contrast this with Amtrak —where a majority of its directors was appointed by the President. *Id.* at 397-98, 115 S.Ct. 961; *see also Amtrak II,* 575 U.S. at 51, 135 S.Ct. 1225 (observing that seven of nine Amtrak board members "are appointed by the President and confirmed by the Senate"); *cf. Free Enter. Fund,* 561 U.S. at 484, 484-85, 130 S.Ct. 3138 (noting the PCAOB—despite being statutorily deemed "private"—is a "Government-created, Government-appointed entity," whose five members are "appointed... by the [SEC]").

Instead of engaging with *Lebron,* Gulf Coast argues that *Lebron*'s analysis is not "the *only* way" to tell whether a corporation is a government instrumentality. That takes too narrow a view of precedent, however. *Lebron* canvassed "the long history of corporations created and participated in by the United States" and set out a detailed analysis to
252 determine whether a particular corporation—despite its designation *252 as "private"—counts as a government instrument for constitutional purposes. *See* 513 U.S. at 386, 386-91, 115 S.Ct. 961. That is precisely the question we must answer with respect to the Authority. How can we, as an inferior court, simply bypass *Lebron*? We cannot.

Gulf Coast tries to offer us a way around *Lebron,* but it is a dead end. Gulf Coast argues that *Lebron* addressed only government-created corporations "that in no way exercised government power." But *Lebron* did not limit itself in that way —to the contrary, it relied on cases where Congress turned to private corporations to "accomplish purely governmental purposes." *Id.* at 395, 115 S.Ct. 961 (quoting *Cherry Cotton Mills, Inc. v. United States,* 327 U.S. 536, 539, 66 S.Ct. 729,

90 L.Ed. 835 (1946)).[28] Furthermore, the corporation actually addressed in *Lebron*—Amtrak— itself exercised regulatory power, as the Supreme Court, the D.C. Circuit, and our court have all recognized. *See Amtrak II,* 575 U.S. at 50, 135 S.Ct. 1225 ("Amtrak... cannot constitutionally be granted the regulatory power[.]" (citation and quotation omitted)); *Amtrak I,* 721 F.3d at 671 ("No case prefigures the unprecedented regulatory powers delegated to Amtrak."); *Horsemen's I,* 53 F.4th at 889 (discussing how Congress gave "regulatory power to the 'economically self-interested Amtrak'" (citation omitted)).

Gulf Coast also argues that, to determine whether directors of a private entity are "Officers of the United States," we should focus on their duration in office and the nature of the entity's power. We disagree. The two principal cases Gulf Coast relies on for this argument addressed whether individuals *already part* of the government should be considered "Officers." So, *Buckley* examined whether Federal Election Commission appointees wielded "significant authority pursuant to the laws of the United States." 424 U.S. at 126, 96 S.Ct. 612. And *Lucia v. SEC* applied this same test to SEC ALJs. 585 U.S. 237, 244-45, 138 S.Ct. 2044, 201 L.Ed.2d 464 (2018). Gulf Coast urges us to extend *Buckley* and *Lucia* well beyond their facts to analyze whether persons in a *private* entity are "Officers." Even if we were inclined to take that step, however, *Lebron* would remain an insuperable hurdle. As explained, *Lebron* addressed when a private entity qualifies as part of the government for constitutional purposes. That is precisely the question before us. Post-*Lebron,* no case has applied *Buckley* to private actors. Instead, the Supreme Court has repeatedly applied *Lebron* for three decades. *See supra* note 27. We are not at liberty to displace the Supreme Court's governing framework.[29]

Finally, Gulf Coast argues that if *Lebron* is the test, then the federal government can simply vest all executive power in a
253 private corporation and avoid the Appointments Clause. This argument ignores *253 the role of the private nondelegation doctrine. The government cannot delegate core governmental powers to unsupervised private parties. *Pittston,* 368 F.3d at 394. A private entity can only act "subordinately to an agency with authority and surveillance over it." *Horsemen's I,* 53 F.4th at 881 (quotations omitted). The private non-delegation doctrine thus corrals any attempts to evade *Lebron* by giving unaccountable governmental power to a pre-existing private entity.

In sum, *Lebron* is the governing test to determine whether an entity is private or public and, under that test, the Authority is a private entity not subject to Article II's Appointments Clause.

E. Anti-Commandeering Challenge

Finally, we turn to Gulf Coast's argument that HISA unconstitutionally commandeers state officials. The Constitution forbids Congress from "command[ing] the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz v. United States,* 521 U.S. 898, 935, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997); *see also New York v. United States,* 505 U.S. 144, 165, 188, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). Gulf Coast argues HISA violates that principle by coercing state racing commissions to remit fees to fund the Authority's operations. If state officials refuse, the Authority collects fees directly from covered persons—but, in that event, HISA prohibits the state from imposing taxes or fees to finance the state's own horseracing programs. *See* § 3052(f). This scheme, argues Gulf Coast, "puts a gun to the head of Texas" by coercing state officials to administer a federal program rather than a state program.

The problem with this claim, as the district court pointed out, is that Gulf Coast lacks standing to raise it. Specifically, Gulf Coast's alleged injury—that it prefers Texas's racetrack safety rules to HISA's—is "no injury at all." *Black II,* 672 F. Supp. 3d at 250. As the district court correctly reasoned, "[a] party cannot establish constitutional injury by suggesting that he may be subject to rules that he does not prefer." *Ibid.*; *see also, e.g., Consumers' Rsch. v. Consumer Prod. Safety Comm'n,* 91 F.4th 342, 350 (5th Cir. 2024) (holding that "merely being subject to ... regulations, in the abstract, does not create an injury").

On appeal, Gulf Coast fails to explain how the district court erred. It merely argues that the coercive pressure the funding scheme allegedly places on Texas will lead it to implement HISA's rules rather than the current Texas regulations, which makes Gulf Coast subject to "a new set of unwanted (federal) regulations." Again, though, this does not explain why Gulf Coast experiences an injury sufficient to assert an anti-commandeering challenge to HISA.

IV. CONCLUSION

In sum, we affirm the district court's judgment that (1) Congress's recent amendment to HISA cured the private nondelegation flaw in the Authority's rulemaking power; (2) HISA does not violate due process; (3) the Authority's directors are not subject to the Appointments Clause under *Lebron*; and (4) Gulf Coast lacks standing to challenge HISA on anti-commandeering grounds.

We reverse the district court's judgment in one respect. Insofar as HISA is enforced by private entities that are not subordinate to the FTC, we DECLARE that HISA violates the private nondelegation doctrine.

254 *254 Accordingly, the district court's judgment is AFFIRMED in part and REVERSED in part.

[1] We add a handful of footnotes to clarify a few matters and also to discuss sister-circuit decisions issued after *Horsemen's II*. *See infra* nn. 7, 12, 17, 19, 22, 23.

[2] *See* § 3057(a)(1), (c)(1) (power to establish substantive rules governing medication controls); § 3056(a)(1) (power to establish racetrack safety rules); §§ 3054(c), 3057(c) (power to "develop uniform procedures and rules" governing investigations and adjudications that afford due process); § 3057(d) (power to establish civil sanctions); § 3054(c), (h) (investigatory and subpoena powers).

[3] Similarly, the Authority may contract out enforcement of the racetrack safety program to "State racing commissions" or "other State regulatory agencies." § 3054(e)(2), (3); *see also* § 3056 (discussing racetrack safety program).

[4] *See also generally* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537, 55 S.Ct. 837, 79 L.Ed. 1570 (1935); Carter v. Carter Coal Co., 298 U.S. 238, 311, 56 S.Ct. 855, 80 L.Ed. 1160 (1936); Currin v. Wallace, 306 U.S. 1, 15-16, 59 S.Ct. 379, 83 L.Ed. 441 (1939); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 399, 60 S.Ct. 907, 84 L.Ed. 1263 (1940).

[5] Texas contends § 3053(e) does not solve the nondelegation problem because it gives the FTC only limited rulemaking authority—*i.e.*, "to ensure the fair administration of the Authority." Because the FTC lacks plenary rulemaking authority, Texas argues, the Authority still effectively calls the shots. We disagree. Section 3053(e) empowers the FTC to engage in rulemaking, not only for specified purposes, but also "otherwise in furtherance of the purposes of [HISA]." This language, borrowed from the Maloney Act, gives the agency "broad authority to oversee and to regulate the rules adopted by the [Authority] ..., including the power to mandate the adoption of any rules it deems necessary[.]" Shearson/Am. Express, Inc. v McMahon, 482 U.S. 220, 233-34, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987).

[6] The Horsemen also argue that the Authority can circumvent the FTC by issuing unreviewable guidance documents, such as dear colleague letters. We disagree. The Authority admits such guidance would not have the force of law and, even if it did, the FTC has authority to review guidance documents, § 3054(g)(2), and to promulgate a rule overruling guidance it disagrees with.

[7] *See generally Rulings,* HORSERACING INTEGRITY & SAFETY AUTH., https://portal.hisausapps.org/public-rulings [https://perma.cc/24TV-7NV3] (last visited June 3, 2026) (listing 3,307 enforcement rulings)

[8] As explained in *Horsemen's I,* the D.C. Circuit's *Amtrak I* decision was vacated only because the Supreme Court found Amtrak was a governmental, as opposed to private, entity. 53 F.4th at 881 n.22 (citing *Amtrak II,* 575 U.S. at 46, 50-55, 135 S.Ct. 1225). The D.C. Circuit's private nondelegation analysis, however, remains sound and has been approved by our court. *See id.* at 881 (explaining that *Amtrak I* "expressed the [private nondelegation doctrine] more precisely" than prior formulations).

[9] *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 733, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986) ("Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."); Morrison v. Olson, 487 U.S. 654, 696, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988) (reasoning "the power to initiate an investigation" is executive power that must be subject to the Attorney General's "unreviewable discretion"); Buckley v. Valeo, 424 U.S. 1, 138, 140, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam) (concluding the "discretionary power to seek judicial relief" and "conduct[] civil litigation in the courts of the United States for vindicating public rights" are exercises of Article II executive power); Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 225, 140 S.Ct. 2183, 207 L.Ed.2d 494 (2020) (holding the CFPB director unconstitutionally exercised "executive power" to "set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties"); *id.* at 219, 140 S.Ct. 2183 (holding the "power to seek daunting monetary penalties against private parties ... [is] a quintessentially executive power"); Free Enter. Fund, 561 U.S. at 504, 130 S.Ct. 3138 (holding the "power to start, stop, or alter individual Board investigations" is part of the executive power); Collins v. Yellen, 594 U.S. 220, 254, 141 S.Ct. 1761, 210 L.Ed.2d 432 (2021) (holding the power "to issue subpoenas" is an "executive power"); *id.* at 289, 141 S.Ct. 1761 (SOTOMAYOR, J., concurring in part and dissenting in part) (noting "the power to impose fines" is an "executive power"); *id.* at 287, 141 S.Ct. 1761 (arguing the FTC had significant executive power because it had "wide powers of investigation" and "broad authority to issue complaints and cease-and-desist orders" (quoting Humphrey's Ex'r v. United States, 295

U.S. 602, 620-21, 55 S.Ct. 869, 79 L.Ed. 1611 (1935))); *United States v. Grubbs*, 547 U.S. 90, 98, 126 S.Ct. 1494, 164 L.Ed.2d 195 (2006) (describing a search as an "exercise of executive power"); *California v. Acevedo*, 500 U.S. 565, 586, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991) (STEVENS, J., dissenting) ("The Fourth Amendment is a restraint on Executive power.").

[10] *See generally* Dina Mishra, *An Executive-Power Non-Delegation Doctrine for the Private Administration of Federal Law,* 68 VAND. L. REV. 1509, 1545 (2015) (discussing "[c]ertain types of tasks that seem quintessentially executive," including "the tasks of law enforcement —that is, of forcing compliance with the law"); *id.* at 1546 ("Ratification-era history further supports the understanding that law enforcement consists of forcing compliance or imposing sanctions on law violators." (citing THE FEDERALIST NO. 21, at 134-35 (Alexander Hamilton) (Clinton Rossiter ed., 1961))); Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal,* 136 HARV. L. REV. 1756, 1764 (2023) ("Law execution was the executive power's principal component."); Saikrishna Prakash, *The Essential Meaning of Executive Power,* 2003 U. ILL. L. REV. 701, 737 ("Executive officers investigate, apprehend, and prosecute potential lawbreakers. As the wielder of the executive power, the president is the chief of these law enforcement executives."); Ilan Wurman, *In Search of Prerogative,* 70 DUKE L.J. 93, 146-47 (2020) (arguing that law enforcement and prosecution powers have been considered core executive functions since the Founding).

[11] The Authority also "may enter into agreements" with State racing commissions to enforce the racetrack safety program. *See* § 3054(e)(2)(A)(i), (3); § 3056(c). The Authority remains in charge, however, and dictates the "scope of work, performance metrics, reporting obligations, budgets, and any other matter [it] considers appropriate." § 3054(e)(2)(B).

[12] Not only does HISA facially permit that, but it has already happened. For example, in one FTC appeal, it is uncontested that three private Authority investigators showed up at the appellant's residence and served her with a notice of an alleged doping violation (there is no personal service requirement under the statute). The investigators then "subjected [the appellant] to a coercive interrogation in a small room" and searched "her barn and ... her mother's car" for banned substances. Statement of Contested Facts and Specification of Additional Evidence, *In re Lynch,* 2024 WL 1111724 (F.T.C.), at *2, Dkt. No. 9423. She was then fined $55,000 and banned from racing for 48 months. *Id.* at *3. She later settled with the Authority, and the case was dismissed. Order of Withdrawal from Review by the Administrative Law Judge, *In re Lynch,* 2024 WL 4298917 (F.T.C.), Dkt. No. 9423. Authority investigators have also searched defendants' property and extracted fines under HISA's strict liability regime for possession of banned substances. For example, one veterinarian forgot to clean out his trailer and still had two buckets of a newly banned substance two weeks after the effective date. Private Authority investigators searched his trailer, found the buckets, fined him $5,000, and banned him from practice for 14 months. The ALJ affirmed on appeal. All this despite the fact that the Authority and the ALJ conceded that the appellant purchased the substance long before it was banned, forgot it was in his trailer, and did not even attempt to use it on a horse. The appellant petitioned the FTC to review the decision. That petition was denied. Decision of the Commission on Application for Review Under 15 U.S.C. § 3058, *In re Perez,* 2024 WL 3824065 (F.T.C.), Dkt. No. 9420; *see also* Administrative Law Judge Decision on Application for Review, *In re Poole,* 2023 WL 8435860 (F.T.C.), Dkt. No. 9417 (affirming an $18,000 fine and banning him from practice for 22 months for a similar inadvertent possession of a newly banned substance).

[13] *See also Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 473, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) (holding that agency rulemaking "has no bearing upon" whether a statutory delegation is constitutional); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,* 530 U.S. 1, 6-7, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000) ("Where a statute names the parties granted the right to invoke its provisions, such parties only may act." (cleaned up)); *Bayou Lawn & Landscape Servs. v. Sec'y of Lab.,* 713 F.3d 1080, 1084-85 (11th Cir. 2013) (holding it "axiomatic that an agency's power to promulgate legislative regulations is limited to the authority delegate[d] to it by Congress" and that courts cannot "locate ... power in one agency where it had been specifically and expressly delegated by Congress to a different agency"); *Union Pac. R.R. Co. v. Surface Transp. Bd.,* 863 F.3d 816, 823 (8th Cir. 2017) (finding express delegation to the Federal Railroad Administration precluded implied authority claimed by the private Board); *Perot v. FEC,* 97 F.3d 553, 559 (D.C. Cir. 1996) (per curiam) ("We agree with the general proposition that when Congress has specifically vested an agency with the authority to administer a statute, it may not shift that responsibility to a private actor[.]"); *EPA v. EME Homer City Generation, L.P.,* 572 U.S. 489, 509, 134 S.Ct. 1584, 188 L.Ed.2d 775 (2014) (relying on the statute's "plain text and structure [to] establish a clear chronology of federal and State responsibilities" (quotation omitted)).

[14] Nor could the Authority claim that the statute is merely silent about FTC pre-approval and that gap could be filled by rulemaking. Our circuit has repeatedly rejected this "nothing-equals-something argument" for conjuring agency authority out of thin air. *Gulf Fishermens,* 968 F.3d at 460-61 (citing *Texas v. United States,* 809 F.3d 134, 186 (5th Cir. 2015), *aff'd by an equally divided court,* 579 U.S. 547, 136 S.Ct. 2271, 195 L.Ed.2d 638 (2016) (per curiam)).

[15] *See* § 3059 (deeming it an unfair or deceptive practice under 15 U.S.C. § 45(a) to fail to disclose to a buyer that a horse was administered "a bisphosphonate" before its fourth birthday or any other prohibited substance).

[16] *See* § 3054(c)(1)(B) (providing the "Authority... with respect to an unfair or deceptive act or practice described in section 3059 of this title, may recommend that the Commission commence an enforcement action").

[17] Following our original *Horsemen's II* decision, a split panel of the Eighth Circuit disagreed with us on this point. *See Walmsley v. Fed. Trade Comm'n,* 117 F.4th 1032, 1039-40 (8th Cir. 2024). In partial dissent, Judge Gruender agreed with our view. *See id.* at

1041-44 (GRUENDER, J., concurring in part and dissenting in part). The Supreme Court subsequently vacated the Eighth Circuit's judgment and remanded for further consideration in light of *Consumers' Research*. *See* ___ U.S. ___, 145 S. Ct. 2870, 222 L.Ed.2d 1124 (2025) (mem.). The Eighth Circuit has not yet issued a decision on remand.

[18] Moreover, consider the revealing premise of this line of argument. Suppose the FTC issued a rule saying, "The Authority can search racetracks only if it has probable cause." Well and good, but that rule still presupposes *the Authority* is the one doing the search. Merely because the Authority would have to obey the Fourth Amendment does not change the fact that a private entity is searching your racetrack without agency say-so. And it is no answer to say that the agency could issue a rule saying, "The Authority can search racetracks only if the FTC approves the search." That rule, as explained, would amend the statute's division of authority. *See* § 3054(h) ("The Authority shall have subpoena and investigatory authority with respect to civil violations committed under its jurisdiction.").

[19] The Sixth Circuit relied on several cases upholding the constitutionality of FINRA to hold that "[i]n case after case, the courts have upheld [the Maloney Act's] arrangement, reasoning that the SEC's ultimate control over the rules and their enforcement makes the SROs permissible aides and advisors." *Oklahoma I*, 62 F.4th at 229. We do not read those cases quite so broadly. They relied largely on the grounds that the SEC ultimately approves any proposed rules and has its own generalized rulemaking power. *See, e.g.*, *R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 696 (2d Cir. 1952) (considering only whether the SEC abused its discretion); *Todd & Co. v. SEC*, 557 F.2d 1008, 1012 (3d Cir. 1977) (considering only a nondelegation challenge to the SEC's legislative rulemaking authority); *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979) (same); *Sorrell v. SEC*, 679 F.2d 1323, 1325-26 (9th Cir. 1982) (same). But none addressed a nondelegation challenge to executive power.

[20] One may reasonably ask whether HISA's delegation of enforcement authority is supported by an analogous delegation in qui tam statutes. We think not. The Horsemen note our decision in *Riley v. St. Luke's Episcopal Hospital*, 252 F.3d 749 (5th Cir. 2001) (en banc), where we held that the False Claims Act ("FCA") does not violate Article I's Take Care Clause. They argue that *Riley* does not support HISA's delegation because qui tam relators are episodic and do not have a continuing relationship with the government. That is true, but we see a more fundamental distinction between the two statutes: under the FCA, the executive branch has substantial power over qui tam relators that the FTC does not have over the Authority. For example, the United States can intervene in any qui tam litigation, take control of the litigation, veto settlement agreements, and dismiss the suit "notwithstanding the objections of the [relator]." *Id.* at 753-54. HISA gives the FTC none of those powers.

[21] In saying all this, we express no opinion on whether the SEC-FINRA relationship poses any constitutional issues under the private nondelegation doctrine (or any other doctrine). Such questions are not posed by this case.

[22] This is where we continue to differ with the Sixth Circuit. On remand, *see Oklahoma v. United States*, ___ U.S. ___, 145 S. Ct. 2836, 222 L.Ed.2d 1122 (2025) (mem.), our sister circuit reaffirmed its holding that the Authority's enforcement powers are subordinate to the FTC. *See Oklahoma II*, 163 F.4th 294. Specifically, *Oklahoma II* relied on the agency's *de novo* review of Authority sanctions. *Id.* at 311. But we have already explained why that review comes far too late to constitute genuine oversight of the Authority's wide-ranging enforcement powers—such as investigations and subpoenas. *See supra* Part III(B)(3). In addition, we have previously explained why the FTC's § 3053(e) rulemaking authority cannot amend the statutory allocation of power between the agency and the Authority, *see supra* Part III(B)(4), another point on which we part ways with our Sixth Circuit colleagues. *Cf. Oklahoma II*, 163 F.4th at 312 (concluding FTC could constrain the Authority's investigatory powers by rule).

[23] Although the point is not strongly contested by the parties on remand, we note that *Consumers' Research* also does not change our previous holding concerning the Authority's rulemaking. *See supra* Part III(A). Texas points out that, unlike in *Consumers' Research*, the FTC neither appoints the Authority's Board nor approves its budget. True, but that feature is outweighed by the far more critical point that the HISA amendments give the agency final say-so over the content of any rule before it ever takes effect. *See supra* Part III(A); *see also Walmsley*, 117 F.4th at 1039; *Oklahoma II*, 163 F.4th at 308 (agreeing with us on this point).

[24] The Appointments Clause reads "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... all other Officers of the United States, whose Appointments are not herein otherwise provided for" but provides "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. CONST. art. II; § 2, cl. 2.

[25] The directors are appointed by the Authority itself. *See* § 3052(d)(3) (Board members are selected by the Authority's nominating committee).

[26] *See also id.* at 386-91, 115 S.Ct. 961 (discussing corporations such as the first and second Banks of the United States, the Panama Railroad Company, the United States Grain Corporation, the Reconstruction Finance Corporation, the Federal Deposit Insurance Corporation, the Communications Satellite Corporation, the Corporation for Public Broadcasting, and the Legal Services Corporation).

[27] *See Nebraska*, 600 U.S. at 490-93, 143 S.Ct. 2355 (applying *Lebron* to conclude that the Missouri Higher Education Loan Authority is "an instrumentality of Missouri"); *Free Enter. Fund*, 561 U.S. at 486, 130 S.Ct. 3138 (citing *Lebron* when referencing parties'

agreement that the Public Company Accounting Oversight Board ("PCAOB") "is 'part of the Government' for constitutional purposes"); *Amtrak II,* 575 U.S. at 54-55, 135 S.Ct. 1225 (explaining *Lebron* "provides necessary instruction" and "teaches that, for purposes of Amtrak's status as a federal actor or instrumentality under the Constitution, the practical reality of federal control and supervision prevails over Congress'[s] disclaimer of Amtrak's governmental status"); *Kerpen v. Metro. Wash. Airports Auth.*, 907 F.3d 152, 158-59 (4th Cir. 2018) (applying *Lebron* to conclude that the Metropolitan Washington Airports Authority ("MWAA") is not "a federal entity" because "MWAA was not created by the federal government" and "is not controlled by the federal government"); *Montilla v. Fed. Nat'l Mortg. Ass'n*, 999 F.3d 751, 759-61 (1st Cir. 2021) (applying *Lebron* to conclude that Fannie Mae and Freddie Mac are not government actors).

[28] *See also Inland Waterways Corp. v. Young*, 309 U.S. 517, 524 n.4, 60 S.Ct. 646, 84 L.Ed. 901 (1940) ("The corporations, of course, perform `governmental' functions." (citation omitted)); *id.* at 522, 60 S.Ct. 646 ("The banking system which Congress thus established embodied a blend of governmental and private purposes.").

[29] That principle also answers Gulf Coast's reliance on a 2007 Office of Legal Counsel ("OLC") opinion. The opinion argued that the Appointments Clause applies to someone with significant and continuing government authority, whether he is a private or a government employee. Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 121-22 (2007). If the opinion was suggesting its analysis as an alternative to *Lebron* (a decision, it should be noted, the opinion cited, *see id.* at 121), that is a suggestion only the Supreme Court could act upon, not a circuit court bound by *Lebron.*

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TAB 4

No.

In The Supreme Court of the United States

HORSERACING INTEGRITY AND SAFETY AUTHORITY, INCORPORATED, ET AL.,

Petitioners,

v.

NATIONAL HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the enforcement provisions of the Horseracing Integrity and Safety Act are facially unconstitutional under the private-nondelegation doctrine.

PARTIES TO THE PROCEEDINGS

1. Petitioners (Defendants-Appellees below) are the Horseracing Integrity and Safety Authority, Inc., Charles Scheeler, Steve Beshear, Adolpho Birch, Leonard Coleman, Joseph De Francis, Susan Stover, Bill Thomason, D.G. Van Clief, Nancy Cox, Katrina Adams, Jerry Black, Joseph Dunford, Frank Keating, Kenneth Schanzer, Ellen McClain, and Lisa Lazarus.

2. Respondents (Plaintiffs-Appellants below) include the National Horsemen's Benevolent and Protective Association (NHBPA), Arizona Horsemen's Benevolent and Protective Association, Arkansas Horsemen's Benevolent and Protective Association, Indiana Horsemen's Benevolent and Protective Association, Illinois Horsemen's Benevolent and Protective Association, Louisiana Horsemen's Benevolent and Protective Association, Mountaineer Park Horsemen's Benevolent and Protective Association, Nebraska Horsemen's Benevolent and Protective Association, Oklahoma Horsemen's Benevolent and Protective Association, Oregon Horsemen's Benevolent and Protective Association, Pennsylvania Horsemen's Benevolent and Protective Association, Washington Horsemen's Benevolent and Protective Association, Tampa Bay Horsemen's Benevolent and Protective Association, Gulf Coast Racing LLC, LRP Group Ltd., Valle de Los Tesoros Ltd., Global Gaming LSP LLC, and Texas Horsemen's Partnership LLP.

3. Respondents (Intervenor Plaintiffs-Appellants below) also include the State of Texas and the Texas Racing Commission.

4. Respondents (Defendants-Appellees below) further include the Federal Trade Commission, Chair Andrew N. Ferguson, and Commissioner Mark R. Meador. Former Chair Lina Khan and former Commissioners Noah Phillips, Christine Wilson, Rebecca Slaughter, Alvaro Bedoya, and Melissa Holyoak are not parties to the proceeding because they no longer hold their former Commission titles. *See* Rule 35.3.

RULE 29.6 STATEMENT

Petitioner Horseracing Integrity and Safety Authority, Inc. is a nonstock, nonprofit corporation organized under the General Corporation Law of the State of Delaware. The Horseracing Integrity and Safety Authority, Inc. has no parent corporation, and no publicly held company has a 10% or greater ownership interest in it. No other Petitioner is a nongovernmental corporation.

STATEMENT OF RELATED PROCEEDINGS

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National Horsemen's Benevolent & Protective Ass'n v. Black, Nos. 5:21-cv-071, 5:23-cv-77 (May 4, 2023) (reproduced at App., *infra*, 54a-117a)

United States Court of Appeals (5th Cir.):

National Horsemen's Benevolent & Protective Ass'n v. Black, No. 23-10520 (June 11, 2026) (reproduced at App., *infra*, 1a-53a)

National Horsemen's Benevolent & Protective Ass'n v. Black, No. 23-10520 (July 5, 2024) (vacated) (reported at 107 F.4th 415, 420 (5th Cir. 2024))

United States Supreme Court (U.S.):

Horseracing Integrity & Safety Authority, Inc. v. National Horsemen's Benevolent & Protective Ass'n, No. 24-433 (June 30, 2025) (reproduced at App., *infra*, 120a-121a)

Horseracing Integrity & Safety Authority, Inc. v. National Horsemen's Benevolent & Protective Ass'n, No. 24A287 (Oct. 28, 2024) (reproduced at App., *infra*, 118a-119a)

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INTRODUCTION

Following a series of high-profile equine deaths and corruption scandals that threatened horseracing under the prior patchwork of state-by-state regulations, Congress enacted the Horseracing Integrity and Safety Act ("HISA") to save the sport. The Act protects athletes (equine and human), the betting public, and the integrity of horseracing through the development and uniform enforcement of racetrack-safety, medication-control, and anti-doping rules. HISA charges the Federal Trade Commission ("FTC") with its implementation, and the FTC in turn draws on the expertise and resources of the Horseracing Integrity and Safety Authority ("Authority"), a private nonprofit organization, subject to the FTC's "'pervasive' oversight and control." *Oklahoma v. United States (Oklahoma II)*, 163 F.4th 294, 312 (6th Cir. 2025) (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940)). That arrangement is modeled on the effective framework—uniformly upheld by the courts—that has governed the relationship between the Financial Industry Regulatory Authority ("FINRA") and the Securities and Exchange Commission ("SEC") for 85 years.

Two administrations have supported HISA. Two bipartisan Congresses have embraced it, including through an amendment in late 2022 that fortified the FTC's oversight. And all but one of the federal courts that have resolved an identical challenge to the amended statute have reached the same conclusion: HISA is constitutional.

The Fifth Circuit contradicted that consensus, holding that HISA's enforcement provisions facially violate the private-nondelegation doctrine. That decision—embracing the most extreme assumptions about the HISA regime, including hypothetical applications of provisions that have *never* been exercised—ignores this Court's caution against wiping out broad swaths of federal legislation on a facial basis. It also disregards the many ways Congress purposefully subordinated the Authority's implementation of HISA to the FTC's substantial oversight.

Moreover, the decision below brushes aside cautionary signals this Court already issued in this very case. After the Fifth Circuit first held in 2024 that HISA's enforcement provisions violate the private-nondelegation doctrine, this Court granted Petitioners' emergency motion to stay that mandate. The Court left the stay in place until it *rejected* a private-nondelegation challenge in *FCC v. Consumers' Research*, 606 U.S. 656 (2025)—and then granted the certiorari petitions in this case, vacated the Fifth Circuit's judgment, and remanded (along with cases from the Sixth and Eighth Circuits) "for further consideration in light of [*Consumers' Research*]."

Those intervening developments permit only one conclusion, as Chief Judge Sutton explained on remand on behalf of a unanimous Sixth Circuit: "In view of the guidance provided by [this] Court in *Consumers' Research* and other recent decisions," the facial challenge must fail "because the Act, as amended, gives the FTC, not the Horseracing

Authority, the final say over the Act's key rulemaking and enforcement provisions." *Oklahoma II*, 163 F.4th at 301. But the Fifth Circuit doubled down, "again disagree[ing] with [its] sister circuit." App., *infra*, 32a. The Fifth Circuit "reissue[d]" the 2024 opinion this Court had stayed and vacated, while tacking on a short section and "a handful of footnotes" contending that "*Consumers' Research* does not affect [its] prior decision[.]" *Id.* at 3a & n.1

All parties agree that the Fifth Circuit's outlier judgment warrants review. Given the intractable conflict over the facial constitutionality of HISA's enforcement provisions, only this Court can provide an authoritative nationwide ruling on that issue of legal and practical importance.

The Court should grant the petition.

OPINIONS BELOW

The opinion of the court of appeals is reported at 178 F.4th 224 (5th Cir. 2026) and reproduced at App., *infra*, 1a-53a. The opinion of the district court is reported at 672 F. Supp. 3d 220 (N.D. Tex. 2023) and reproduced at App., *infra*, 54a-117a.

JURISDICTION

The court of appeals entered judgment on June 11, 2026. App., *infra*, 1a-53a. On July 14, 2026, the court of appeals granted Petitioners' unopposed motion to stay the mandate pending the filing and disposition of this petition. *Id.* at 122a-124a.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced at App., *infra*, 125a-182a.

STATEMENT OF THE CASE

A. Legal Background

1. "[A] beloved tradition in the United States since the early days of the Republic," horseracing is a fixture of American culture and a "major source of jobs and economic opportunity." 166 CONG. REC. H4981-4982 (Sept. 29, 2020) (Rep. Barr). Over the last decade, however, "the joy of the races [wa]s marred by accidents that endanger[ed] both the horses and the riders." *Id.* at H4980 (Rep. Pallone). In 2019 alone, 441 Thoroughbreds died from race-related injuries—a fatality rate two-to-five times greater than in Europe or Asia. H.R. REP. NO. 116-554, at 17 (2020). These casualties sparked investigations by officials, concern within the industry, and "even call[s] for this sport to be abolished altogether." 166 CONG. REC. S5514 (Sept. 9, 2020) (Sen. McConnell). At the heart of these troubles was a "patchwork system" of state-by-state regulatory schemes that led to "wide disparit[ies]" in standards and enforcement and eroded the betting public's confidence. 166 CONG. REC. H4981 (Rep. Tonko).

The highly publicized equine fatalities and corruption scandals brought new urgency and support for action in Congress, which had considered various horseracing bills over the prior decade. *See* 166 CONG. REC. H4981-4982 (Rep. Barr). In 2020, a broad coalition of stakeholders rallied around "bipartisan,

bicameral progress" toward finally remedying the "tragedies on the track." 166 CONG. REC. S5514-5515 (Sen. McConnell). The congressional effort was not only cheered by animal-welfare proponents, but also hailed by "limited government conservative[s]" who sought "smarter, more effective, and streamlined regulation for the industry"—sorely needed given that the "lack of uniformity ha[d] impeded interstate commerce." 166 CONG. REC. H4982 (Rep. Barr).

Passage of the "landmark" legislation, with "almost 300 cosponsors in the House and Senate" and "broad support" from across the industry, was celebrated on both sides of the aisle for "usher[ing] in a new era in the sport." Press Release, *McConnell Leads Senate Passage of Horseracing Integrity and Safety Act* (Dec. 21, 2020);[1] Press Release, *Gillibrand Announces Passage Of Her Horseracing Integrity And Safety Act* (Dec. 22, 2020).[2] President Trump signed HISA into law in December 2020.

2. HISA's rulemaking and enforcement frameworks were "model[ed]" on and are "materially indistinguishable from the Maloney Act," which has governed the SEC's relationship with FINRA and other self-regulatory organizations ("SROs") for over eight decades. Amici Br. of Sen. McConnell et al. in Support of Stay Appl. 5, 10, *Horseracing Integrity & Safety Auth. v. National Horsemen's Benevolent & Protective Ass'n*, No. 24A287 (U.S. Sept. 24, 2024) ("McConnell Br."). HISA recognizes the Authority as

[1] http://tinyurl.com/59m9kywy.

[2] http://tinyurl.com/mry9t5pb.

a "private, independent, self-regulatory, nonprofit corporation" that will help to develop and implement "a horseracing anti-doping and medication control program and a racetrack safety program," subject always to "Federal Trade Commission oversight." 15 U.S.C. §§ 3052(a), 3053.

The Authority may submit to the FTC a "proposed rule, or proposed modification to a rule," relating to the content and implementation of the racetrack-safety, anti-doping, and medication-control programs. 15 U.S.C. §§ 3053(a), 3054(c), 3057. But the FTC alone may give those draft standards the force of law by independently approving them following notice-and-comment. *Id.* § 3053(b). To do so, the FTC must determine that each proposed standard is "consistent with" both the statute and the FTC's own rules. *Id.* § 3053(c). The agency must be satisfied, therefore, that any standard protects "the safety, welfare, and integrity of covered horses, covered persons, and covered horseraces." *Id.* § 3054(a). Beyond that overall purpose, Congress directly prescribed the content of some rules, *e.g.*, *id.* § 3055(g)(1)-(2), enumerated "[e]lements" and "[p]rohibition[s]" to be incorporated in others, *e.g.*, *id.* §§ 3055(d), 3056(b), 3057(a)(2), (c)(2), and provided various "[c]onsiderations" to constrain the development and implementation of the programs, *e.g.*, *id.* §§ 3055(b), 3056(b), 3057(d).

The Authority may enforce HISA's programs, including by investigating and disciplining violations by covered persons who register under the Act, pursuant only to those "uniform procedures and rules"

approved by the FTC. 15 U.S.C. §§ 3054(c), 3057. Although HISA authorizes the Authority to issue and enforce "subpoenas" and to "commence a civil action" in federal court, *id.* §§ 3054(c)(1)(A)(ii), (h), (j)(1), those provisions have never been invoked against anyone.

Any FTC-approved penalty imposed for violation of an FTC-approved rule must be consistent with "adequate due process, including impartial hearing officers or tribunals," and other factors "designed to ensure fair[ness] and transparen[cy]." 15 U.S.C. § 3057(c)-(d). The Authority "shall promptly submit" to the FTC notice of any sanction, *id.* § 3058(a), which "shall be subject to de novo review" by an FTC-appointed administrative law judge, *id.* § 3058(b). The administrative law judge's decision is subject to yet further review by the Commissioners themselves. *Id.* § 3058(c). At both stages, the parties may submit additional evidence to the agency. *Id.* § 3058(c)(3)(C); *see also* 16 C.F.R. § 1.146(c). The FTC will apply a *de novo* standard to "the factual findings and conclusions of law," may "affirm, reverse, modify, set aside, or remand for further proceedings," and may "make any finding or conclusion that, in the judgment of the [FTC], is proper and based on the record." 15 U.S.C. § 3058(c)(3). The administrative law judge or the Commissioners may stay any sanction pending the agency's review. *Id.* § 3058(d); 16 C.F.R. § 1.148(b).

3. Beyond those agency checks bookending any Authority enforcement action, an amendment Congress enacted during—and in response to—this litigation ensures additional, ongoing FTC oversight.

In November 2022, in a precursor appeal, the Fifth Circuit held that HISA (as originally enacted) violated the private-nondelegation doctrine. *National Horsemen's Benevolent & Protective Ass'n v. Black (Black I)*, 53 F.4th 869 (5th Cir. 2022). Under the version of the Act then considered, only the Authority "wr[o]te[] the regulations and the FTC c[ould] not modify them." *Id.* at 887. Because the FTC lacked "the final word," the Fifth Circuit held, the Authority did not "function subordinately to the agency." *Id.*

"Not so anymore." *Oklahoma v. United States (Oklahoma I)*, 62 F.4th 221, 231 (6th Cir. 2023). In direct response to the Fifth Circuit's ruling, in December 2022, Congress enacted (and President Biden signed into law) bipartisan legislation authorizing the FTC to "abrogate, add to, and modify" HISA rules as the FTC "finds necessary or appropriate" to (i) "ensure the fair administration of the Authority," (ii) "conform the rules of the Authority" to requirements of the Act and applicable rules, or (iii) otherwise "further[] *** the purposes" of the Act. 15 U.S.C. § 3053(e). That language, drawn directly from the Maloney Act, "eliminates" "the 'key distinction'" previously identified with the SEC-FINRA statute. *Oklahoma I*, 62 F.4th at 232 (quoting *Black I*, 53 F.4th at 887). Indeed, the Sixth Circuit had suggested this specific remedy at oral argument in a parallel challenge. Oral Arg. Rec. 33:00-33:13, *Oklahoma*, No. 22-5487 (6th Cir. Dec. 7, 2022) (Sutton, C.J.) ("Why not just say to [Congress,] this is easy, this was bipartisan, just put the modification power straight in, it'll be just like FINRA and the SEC, problem solved?").

B. Proceedings Below

1. HISA rules have been successfully implemented since July 2022, currently governing over 97,000 horses and 40,000 people competing across 41 racetracks in 19 states (all outside the Fifth Circuit). Although "the Thoroughbred industry overwhelmingly supported" HISA and "has adjusted to this regime," Amici Br. of Thoroughbred Industry Participants in Support of Stay Appl. 2, 9, *Horseracing Integrity & Safety Auth.*, No. 24A287 (U.S. Sept. 25, 2024) ("Thoroughbred Industry Br."), a faction long opposed to any reforms brought a series of challenges to the Act.

Those challengers include the lead Respondents, a national horsemen's association and several of its state chapters, whose members have now competed under HISA rules for over four years. In 2021, those Respondents brought suit in the Northern District of Texas to challenge HISA's constitutionality. App., *infra*, 62a-63a & n.2 (discussing "lead-case plaintiffs"). They named as defendants the Authority and its officials (Petitioners here), plus the FTC and its commissioners. *Id.* at 63a nn.5-6. The State of Texas and the Texas Racing Commission (collectively, "Texas") intervened to support the challenge. *Id.* at 63a n.4. In 2022, the district court rejected plaintiffs' constitutional challenge, holding that HISA, as originally enacted, did not "facially violate[] the private-nondelegation doctrine" because the Authority "function[ed] subordinately to the FTC, guided by Congressional standards." *National Horsemen's*

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Benevolent & Protective Ass'n v. Black, 596 F. Supp. 3d 691, 696 (N.D. Tex. 2022).

While an appeal from that initial decision was pending at the Fifth Circuit, a collection of racetracks in Texas and a partnership of horsemen who race there filed another facial challenge in the Northern District of Texas. App., *infra*, 62a & n.3 (listing "member-case plaintiffs"). They raised the same private-nondelegation claims as in the parallel case, but also a "mutually exclusive" Appointments Clause claim on the ground that the Authority was not private for constitutional purposes. *Id.* at 45a, 76a. The Texas racetracks have never been subject to HISA rules because Texas has essentially elected to avoid the Act's reach. Specifically, as Texas's counsel explained at trial, Texas "opted to stop" the transmission of in-state racing for out-of-state wagering, thereby negating the statutory interstate-commerce element necessary to trigger application of HISA to horseracing in the State. ROA.3086-3087.

2. On remand from the Fifth Circuit's 2022 decision declaring the original version of HISA unconstitutional, the two cases were consolidated. App., *infra*, 69a. The horsemen's association, Texas, and the Texas-based racetracks each filed amended complaints challenging the amended Act on several facial constitutional grounds. *Id.* at 69a-72a. Following full briefing and a bench trial on the merits, the district court rejected the consolidated challenges and granted final judgment in favor of the Authority and the FTC. *Id.* at 54a-117a. "Congress answered

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[the Fifth Circuit's] call," the district court concluded, and "cured the constitutional issues." *Id.* at 92a, 102a.

On appeal, the Fifth Circuit affirmed in part and reversed in part. It agreed that "the amendment solved the nondelegation problem with the Authority's rulemaking power," and that HISA does not offend the Due Process Clause or the Appointments Clause. *National Horsemen's Benevolent & Protective Ass'n v. Black (Black II)*, 107 F.4th 415, 420 (5th Cir. 2024). But the Fifth Circuit concluded, on a facial basis, that "HISA's enforcement provisions violate the private nondelegation doctrine." *Id.* at 421. That decision conflicted with decisions by the Sixth Circuit and Eighth Circuit, which held that "the statute is not unconstitutional on its face" because the FTC "has broad power to subordinate the Authority's enforcement activities" as well as its rulemaking activities. *Walmsley v. FTC*, 117 F.4th 1032, 1039-1040 (8th Cir. 2024); *Oklahoma I*, 62 F.4th at 229-231.

3. In October 2024, this Court granted Petitioners' emergency application (supported by the Solicitor General) for a stay of the Fifth Circuit's mandate. App., *infra*, 118a-119a. The Court left that stay in place until issuing its June 2025 opinion in *Consumers' Research*. That opinion rejected a private-nondelegation challenge and reaffirmed the private-nondelegation test and statutory-construction approach the Sixth and Eighth Circuits had applied to HISA. *Consumers' Rsch.*, 606 U.S. at 692-695. This Court subsequently granted the certiorari petitions in this case, vacated the Fifth Circuit's judgment, and remanded—while similarly "GVRing" the other two

judgments for each circuit to address the nondelegation challenges in light of *Consumers' Research*. App., *infra*, 120a-121a.

4. Taking a "second look at the Act" post-*Consumers' Research* after new briefing and oral argument, the Sixth Circuit again rejected the constitutional attacks on HISA. *Oklahoma II*, 163 F.4th at 301. In its view, the enforcement provisions are facially valid because "[n]o sanction *** goes into final effect without the FTC's 'say-so,'" given the FTC's "two layers of review, and the existence of [its] stay authority." *Id.* at 311 (quoting *Consumers' Rsch.*, 606 U.S. at 695). Further, the independent rulemaking power Congress conferred on the FTC supplies "tools to bring an overzealous Horseracing Authority to heel," particularly given that the Act should be construed "to comport with the Constitution, not to contradict it." *Id.* at 312-313 (quoting *Consumers' Rsch.*, 606 U.S. at 691).

The Fifth Circuit "continue[d] to differ with the Sixth Circuit." App., *infra*, 40a n.22. On its view, nothing in *Consumers' Research* "change[d] [its] analysis of the private nondelegation question presented in this case." *Id.* at 3a. The Fifth Circuit thus "reissue[d]" the prior decision that this Court had stayed and vacated. *Id.* It again held that the FTC's *de novo* review of any disciplinary decision "does not subordinate the Authority" because "enforcement has already occurred" at that point. *Id.* at 42a. And it maintained that "the FTC's general rulemaking power provides no answer" because applying it to enforcement activities would "amend the statutory

allocation of power between the agency and the Authority." *Id.* at 41a-42a & n.22.

5. Petitioners timely requested that the Fifth Circuit stay its mandate pending the filing and disposition of this petition. Because all the parties concur that this Court should review the judgment below, no party opposed that relief. The Fifth Circuit granted the motion, so its judgment remains stayed pending the disposition of this petition and any resulting grant of certiorari. App., *infra*, 122a-124a.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's holding that HISA's enforcement provisions facially violate the private-nondelegation doctrine squarely conflicts with the Sixth Circuit's contrary holding on an identical constitutional challenge. The Fifth Circuit's decision is wrong for at least two reasons. First, the facial ruling—resting on dramatic "[s]uppos[itions]," "hypothetical[s]," and "[c]ontested" allegations involving nonparties and nonoperative provisions, App., *infra*, 25a-27a—contradicts this Court's precedents in *Consumers' Research* and elsewhere eschewing such unmoored broadsides on federal legislation in favor of as-applied challenges. Second, the Fifth Circuit's decision discounts the meaningful ways Congress subordinated the Authority's enforcement activities to the FTC's approval, oversight, and independent power to ensure that the FTC ultimately "retains decision-making power." *Consumers' Rsch.*, 606 U.S. at 692. Given the exceptional legal and practical importance of the case,

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the Court should grant review—a result Petitioners expect all parties to support.

I. THE DECISION BELOW CREATES A CIRCUIT SPLIT

The decision below creates an acknowledged and entrenched circuit split on the constitutionality of HISA's enforcement provisions. The Sixth Circuit (like every other federal court to resolve the question) rejected an identical private-nondelegation claim, concluding "the Horseracing Authority is 'subject to the FTC's pervasive surveillance and authority,'" and that "capacity to control the Authority's enforcement activities" in "numerous applications" (if not all) dooms the parallel facial challenge. *Oklahoma II*, 163 F.4th at 308, 311-312 (alterations omitted). The Fifth Circuit stands alone in holding that "HISA's enforcement provisions are facially unconstitutional" because HISA requires enforcement by the Authority "without the FTC's involvement." App., *infra*, 4a, 24a. Specifically, the Fifth Circuit "part[ed] ways" with the Sixth Circuit in two key respects. *Id.* at 5a.

1. The decision below contradicts the Sixth Circuit's understanding as to the appropriateness of a facial versus as-applied challenge here. The Sixth Circuit reasoned that "challenges to enforcement provisions quintessentially lend themselves to as-applied challenges, not to overriding facial challenges" like this one asking 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." *Oklahoma II*, 163 F.4th at 311 (internal

quotation marks and citation omitted). When presented with a facial challenge, the Sixth Circuit explained, courts must consider only "'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." *Id.* at 314 (quoting *United States v. Rahimi*, 602 U.S. 680, 701 (2024)). In other words, "litigation by hypothetical is a one-way street when it comes to facial challenges[.]" *Id.* at 316.

Thus, the Sixth Circuit reviewed the claim against the background principle that if the Act may reasonably be read so that any of its enforcement provisions "could conceivably be implemented in a constitutional manner, that will prove fatal to [the] facial challenge." *Oklahoma II*, 163 F.4th at 312 (internal quotation marks omitted). That premise left only one conclusion: The "potential" that "the FTC *could* subordinate" at least certain of the Authority's activities through its "[s]erial layers of review" and plenary rulemaking power "suffices to defeat [the] facial challenge." *Id.* at 312-313. To the extent there is any doubt about "hypothetical applications that have yet to occur," such as the Authority's "*never*"-exercised "power to bring civil enforcement actions," the Sixth Circuit "save[d] resolution of [those] 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." *Id.* at 314-316.

By contrast, the Fifth Circuit blew past concern that resolution of the constitutionality of the enforcement provisions in their entirety is "premature." App., *infra*, 17a. It instead viewed the case as a "purely legal challenge" turning on "HISA's clear delineation of enforcement power." *Id.* at 17a, 33a. The facial nature of the claim had the opposite effect as in the Sixth Circuit: Identifying Respondents' decision to forgo "as-applied challenges" as a virtue, the Fifth Circuit confined its analysis to determining "*where* the enforcement power is lodged" to avoid considering "*how* the Authority exercises its enforcement power" or *how* the FTC exercises its oversight in any particular circumstance. *Id.* at 32a (citing *Oklahoma I*, 62 F.4th at 231). In doing so, the Fifth Circuit relied on certain HISA provisions that have never been invoked—like the one "empower[ing] the Authority to file suit to enjoin violations"—to determine that the FTC would "amend the enforcement scheme delineated by statute" if it exercised its rulemaking power to control *any* enforcement activities. *Id.* at 30a.

2. The Fifth Circuit also "continue[d] to differ" from the Sixth Circuit on the merits, rejecting several premises underlying the latter's "holding that the Authority's enforcement powers are subordinate to the FTC." App., *infra*, 40a n.22.

The Fifth Circuit set aside, for example, the significance the Sixth Circuit attached to the FTC's "full authority to review the Authority's enforcement actions with fresh eyes," including the power to stay the Authority's decision "[i]f the Authority tries to

implement a sanction before the FTC finally reviews it." *Oklahoma II*, 163 F.4th at 311. Such *de novo* review and factfinding "is no answer" to the private-nondelegation claim, according to the Fifth Circuit, because it "comes far too late to constitute genuine oversight of the Authority's wide-ranging enforcement powers[.]" App., *infra*, 26a, 41a n.22.

The Fifth Circuit was also "not convinced" that the independent rulemaking power the congressional amendment conferred on the FTC in response to private-nondelegation concerns "can save the Authority's enforcement powers." App., *infra*, 28a (citing *Oklahoma I*, 62 F.4th at 231). The Sixth Circuit construed HISA's text to "permit[] the FTC to employ its sweeping rulemaking powers to govern all aspects of the Authority's operations," including enforcement-related activities. *Oklahoma II*, 163 F.4th at 313. "With great respect to [its] colleagues on the Sixth Circuit," the Fifth Circuit reached the opposition conclusion, reasoning that allowing the FTC to "use its new rulemaking authority to rein in the Authority's enforcement actions" would "rewrite" the "statutory division of labor." App., *infra*, 28a; *see id.* at 40a n.22. Relatedly, the Fifth Circuit took issue with "[t]he Sixth Circuit['s] reli[ance] on several cases upholding the constitutionality of FINRA" and other SROs that "enforc[e] securities laws" pursuant to the same review and rulemaking framework. *Id.* at 33a & n.19 (citing *Oklahoma I*, 62 F.4th at 229, 232); *see Oklahoma II*, 163 F.4th at 307, 314.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS

A. The Fifth Circuit Contradicted This Court's Precedents On Facial Challenges

As a threshold matter, the Fifth Circuit's "maximalist approach" to declaring invalid all HISA enforcement provisions—even "novel, never-before-enforced" ones—improperly extends its holding far beyond the concrete facts and parties actually before it. *Moody v. NetChoice, LLC*, 603 U.S. 707, 758-761 (2024) (Thomas, J., concurring); *see id.* at 778 (Alito, J., concurring, joined by Thomas & Gorsuch, JJ.) ("Facial challenges *** strain the limits of the federal courts' constitutional authority to decide only actual 'Cases' and 'Controversies.'").

To the extent invalidating "every application of a statute—including ones that have nothing to do with [a plaintiff's] injury"—is ever within "a federal court's constitutional authority," *NetChoice*, 603 U.S. at 756 (Thomas, J., concurring), "the Fifth Circuit *** did not correctly apply [this Court's] precedents governing facial challenges," *Rahimi*, 602 U.S. at 701. This Court has "made facial challenges hard to win." *NetChoice*, 603 U.S. at 723. This case illustrates why: The Fifth Circuit's ruling about abstract enforcement activities "'rest[s] on speculation' about the law's coverage and its future enforcement" and "'short circuit[s] the democratic process' by preventing duly enacted laws from being implemented in constitutional ways." *Id.* (citations omitted).

The record on this facial challenge—developed through multiple rounds of briefing and trial—lacks evidence of specific enforcement activity against Respondents' members. Rather, the Fifth Circuit's conclusion that "the Authority does not 'function subordinately' to the FTC when enforcing HISA" is based on a smattering of "hypothetical[s]" and "[s]uppos[itions]" about activities the Authority might conduct in some future circumstances. App., *infra*, 24a-27a, 32a n.18; *contra Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449-450 (2008) ("In determining whether a law is facially invalid, [courts] must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases.").[3]

In forming that conjecture, the Fifth Circuit did not "consider the circumstances in which [HISA's enforcement] was most likely to be constitutional." *Rahimi*, 602 U.S. at 701. For example, a straightforward application of the FTC-approved crop rule—reflecting the "vast majority" of infractions since HISA's inception, ROA.3897—involves a steward's nondiscretionary assessment of the number of strikes to a horse in a public race, according to an FTC-approved limit and subject to the FTC's *de novo* review of the same video recording. As the Sixth Circuit

[3] The Fifth Circuit's attempts to bolster its assumptions with discussions of activities outside the record are littered with factual mistakes, underscoring this Court's caution against facial challenges. To list just two: no "Horsemen's members" are racetracks, App., *infra*, 18a; and the Authority has not "barred *** racetracks in Texas from broadcasting races out of state," *id.*—the State Racing Commission made that policy election.

noted, that action would "not involve any meaningful investigation or any use of subpoenas"; "all that will matter is the extent and amount of the sanction," which the FTC can "[f]ull[y] review * * * before it goes into effect." *Oklahoma II*, 163 F.4th at 311-312. Instead of focusing on those (or similar) illustrations, however, the Fifth Circuit embraced the most dramatic assumptions about the Authority's potential actions and the most constrained reading of the FTC's oversight. *See, e.g.*, App., *infra*, 25a-26a & n.12 (reciting "[c]ontested" allegations by nonparty regarding "coercive interrogation" and "search" of facilities, and assuming FTC will not exercise "its discretion to implement a stay pending appeal"); *compare, e.g.*, Order on Application for Review and Application for Stay, *In re Calhoun*, No. 9430, 2024 WL 2724039, at *3 (F.T.C. May 21, 2024) (granting stay allowing challenge "to be fully considered before enforcement").

Worse still, the Fifth Circuit relied heavily on enforcement provisions that have *never* been invoked against anyone. *See, e.g.*, App., *infra*, 27a (concluding that even if the FTC's review of sanctions "makes the Authority subordinate," HISA is nevertheless unconstitutional because "the Authority is demonstrably *not* subordinate when it comes to suing violators for injunctions"); *id.* at 34a-35a (concluding "the FTC-Authority relationship is meaningfully different from the SEC-FINRA relationship" based on "power to bring civil suits" and "power to issue subpoenas"). The Authority has not filed a single "suit to enjoin violations," nor has it issued a single "subpoena." *Id.* at 30a (citing 15 U.S.C. § 3054(h),

(j)(1)). The Fifth Circuit's focus on these inoperative (and easily severable, if ever invoked) provisions "left [it] slaying a straw man" to declare *all* HISA enforcement provisions—including perfectly mundane yet critical ones—facially invalid. *Rahimi*, 602 U.S. at 701; *see Oklahoma II*, 163 F.4th at 314-316.

B. The Fifth Circuit Trampled *Consumers' Research*'s Subordination Analysis

The Fifth Circuit's failure to exercise the required judicial restraint contributed to its erroneous ruling on the merits.

1. "All agree[d]" below on the governing private-nondelegation test: Congress's decision to confer on the Authority a role in HISA's enforcement is constitutional if "the private organization is 'subordinate' to a superintending agency." App., *infra*, 39a; *Black I*, 53 F.4th at 882 & n.24; *see Adkins*, 310 U.S. at 399. *Consumers' Research* reaffirmed that standard: What "matters to the constitutional inquiry" is that the governmental agency "is in control." 606 U.S. at 695.

The Authority's role in HISA's enforcement scheme is subordinate to the FTC in at least three critical respects. *First*, the Authority may not take any investigatory or disciplinary action that is not "authoriz[ed]" by "uniform procedures and rules" approved by the FTC. 15 U.S.C. § 3054(c)(1)(A), (2); *see also, e.g.*, *id.* §§ 3053(c), 3055(a)(1), 3056(b)(6)-(9), 3057(c)(1), (d). So any enforcement standards have "only the legal (or, indeed, practical) effect the [FTC] decides they should," and the Authority must "[w]ork[]

within those rules" to enforce the Act. *Consumers' Rsch.*, 606 U.S. at 693-694.

Second, "anyone aggrieved by an action of the [Authority] may seek *de novo* review by the Commission" (followed by Article III judicial review). *Consumers' Rsch.*, 606 U.S. at 693. The agency may stay any discipline pending its review; "affirm, reverse, modify, set aside, or remand for further proceedings"; and "make any finding or conclusion that, in the judgment of the [FTC], is proper and based on the record." 15 U.S.C. § 3058; 16 C.F.R. § 1.148(b). So there can be no doubt that the FTC ultimately "retains decision-making power" over any sanction. *Consumers' Rsch.*, 606 U.S. at 692.

Third, under the amendment Congress passed to strengthen the FTC's oversight, the FTC may wield plenary rulemaking power to further steer or restrict any of the Authority's enforcement activities, ensuring that "the Commission is, throughout, the final authority." *Consumers' Rsch.*, 606 U.S. at 694; *see* 15 U.S.C. § 3053(e). The Authority "must carry out all its tasks consistent with the [FTC's own] rules, orders, written directives, and other instructions." *Consumers' Rsch.*, 606 U.S. at 693 (internal quotation marks omitted).

2. That comprehensive oversight refutes the Fifth Circuit's conclusion that "the FTC lacks *any* tools to ensure that the law is properly enforced." App., *infra*, 42a (emphasis added). In construing HISA to exclude "the say-so of the agency" from all enforcement activities, *id.* at 24a, the Fifth Circuit embraced an "extravagant[]" view of purported constraints on the

FTC's powers that cannot be reconciled with the best interpretation of the Act or the best reading of *Consumers' Research*. 606 U.S. at 690.

a. To start, the Fifth Circuit erred in disregarding that the FTC's "full authority to review the Authority's enforcement actions with fresh eyes" means "[n]o sanction thus goes into final effect without the FTC's 'say-so.'" *Oklahoma II*, 163 F.4th at 311 (quoting *Consumers' Rsch.*, 606 U.S. at 695); *see* 15 U.S.C. §§ 3055(c)(4)(B), 3058; 16 C.F.R. §§ 1.147-1.148. Concrete examples of the FTC's exercise of that power leaves no doubt that the agency acts as the "final authority." *Consumers' Rsch.*, 606 U.S. at 694; *see, e.g.*, Order at 3, *In re Parram*, No. 9424 (F.T.C. May 1, 2024) ("review[ing] the record 'anew,' as though the issue had not been heard before, and no decision had previously been rendered," and reversing sanction Authority had imposed under Void Claim Rule);[4] Order at 6, *In re Peacock & Ceballos*, No. 9415 (F.T.C. Sept. 11, 2023) (reversing Authority's crop-violation decision based on *de novo* determination that "the evidence fails to prove that Ceballos struck Sheriff Brown more than the 6 times on the hindquarters that are permitted under HISA Rule 2280(b)(1)").[5] Those cases also illustrate that the FTC may stay any sanction pending the agency's review. *See* Order Granting Appellant's Request for Stay Pending Appeal, *In re Parram*, No. 9424, 2024 WL 168059 (F.T.C. Jan. 9, 2024); Order Granting Stay Application, *In re Peacock & Ceballos*, No. 9415 (F.T.C.

[4] https://tinyurl.com/f9afmxk3.

[5] https://tinyurl.com/zfy7xe4n.

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July 3, 2023);[6] *see also Oklahoma II*, 163 F.4th at 311 ("If the Authority tries to implement a sanction before the FTC finally reviews it, the FTC or the ALJ may stay the sanction.").

The FTC's review under section 3058 parallels the "*de novo* review by the [FCC]" in *Consumers' Research*, which this Court observed ensures that the private Universal Service Fund Administrator remains subordinate to the agency. 606 U.S. at 693. The Fifth Circuit discounted that feature by reasoning that "[t]he Authority wields power of an entirely different color" than the private Administrator in *Consumers' Research*. App., *infra*, 40a. But as even Respondent Texas recognized below, "the Administrator's enforcement authority" over billion-dollar programs under federal law includes the power to "conduct audits of carriers" (*i.e.*, investigate industry participants), "suspend their discounts if insufficient information is provided" (*i.e.*, render them ineligible to participate in the federal programs), and "assess administrative penalties—set by FCC rules—for delinquent payments" (*i.e.*, impose civil sanctions for noncompliance with federal law). Texas Supp. Br. 17 (Sept. 4, 2025), C.A. Doc. 277; *see, e.g.*, 47 C.F.R. §§ 54.705, 54.707(a), 54.711(a), 54.713(a).

The Fifth Circuit also minimized the FTC's review by saying it "comes far too late to constitute genuine oversight" because it occurs at the "tail-end of th[e] adversarial process." App., *infra*, 25a-27a, 40a & n.22. But under the parallel FCC scheme, the

[6] https://tinyurl.com/2yvb2t4k.

industry participant is necessarily "aggrieved" by the private Administrator's actions *prior to* the FCC's review. *Consumers' Rsch.*, 606 U.S. at 693; *see, e.g.*, *In re Request for Rev. of Decision of Universal Serv. Adm'r by Big Bend Tel. Co.*, No. WC 10-90, 2025 WL 1915924, at *1 & n.11 (F.C.C. June 6, 2025) (explaining Administrator had conducted an investigation to "audit[] [the industry participant's] compliance with the Commission's rules" and had made "findings" that "show[] evidence of noncompliance with FCC rules," resulting in Administrator's recovery of $5.5 million). And because the aggrieved person "must first seek review from the Administrator" before seeking "review from the [FCC]," 47 C.F.R. § 54.719(a)-(b), no agency review occurs if the aggrieved person, "instead of fighting the process, opts to settle," App., *infra*, 26a. In nevertheless concluding that the FCC "dominates" over the Administrator, this Court made clear that what matters is that the agency ultimately "retains decision-making power." *Consumers' Rsch.*, 606 U.S at 692-693.

That conclusion also tracks the longstanding body of case law blessing the Maloney Act's enforcement scheme, in which "the SEC applies fresh review to the SRO's decisions and actions." *Oklahoma II*, 163 F.4th at 307; *see* 15 U.S.C. § 78s(d)-(e). "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 aides and advisors." *Oklahoma II*, 163 F.4th at 307 (citing *Sorrell v. SEC*, 679 F.2d 1323, 1325-1326 (9th Cir. 1982); *First Jersey Secs., Inc. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979); *Todd & Co.*,

Inc. v. SEC, 557 F.2d 1008, 1012-1013 (3d Cir. 1977); *R. H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir. 1952)); *see also Alpine Secs. Corp. v. FINRA*, 121 F.4th 1314, 1328-1331 (D.C. Cir. 2024) (explaining that "lack of pre-enforcement government review is unlikely to violate the Constitution * * * because many types of sanctions imposed by FINRA, short of expulsion, can be undone later," even while preliminarily enjoining expulsion order because "expedited-hearing process" in "unique" circumstances of that case would preclude meaningful SEC review before "expelled member's business collapses").

"HISA is remarkably similar to the constitutional Maloney Act" in this material respect (among others). *Oklahoma I*, 62 F.4th at 240 (Cole, J., concurring). If anything, the FTC's independent review of Authority decisions "is even more substantial than the SEC's review of FINRA decisions," App., *infra*, 108a, as "HISA, unlike the Maloney Act, unambiguously empowers the FTC to obtain additional evidence not in the record below," *Oklahoma I*, 62 F.4th at 244 (Cole, J., concurring). Tellingly, FINRA itself urged affirmance of the district court judgment in this case. Br. of Financial Industry Regulatory, Inc. as *Amicus Curiae* in Support of Defendants-Appellees (Jan. 29, 2026), C.A. Doc. 329; *see also* FINRA Opp'n to Mot. for Inj. Pending Appeal 19, *Alpine Secs. Corp. v. FINRA*, No. 23-5129 (D.C. Cir. June 15, 2023) (HISA "put[s] the [Authority] on 'equal footing to FINRA in its role "in aid of" the federal agency'" (quoting App., *infra*, 102a)).

b. The Fifth Circuit also erred in brushing aside the reasonable conclusion that "the FTC's § 3053(e) rulemaking power provides it with an additional means to supervise the Authority's enforcement practices." *Oklahoma II*, 163 F.4th at 312. Every single federal court (including the Fifth Circuit)—and every single federal judge on those courts (without exception)—has held that HISA validly confers on the FTC power to "modify *any* rules for any reason at all" to "ensure[] that the FTC retains ultimate[] authority over the implementation of the Horseracing Act." App., *infra*, 14a (second alteration in original) (quoting *Oklahoma I*, 62 F.4th at 231). Such power necessarily encompasses oversight over the Act's enforcement.

Thus, beyond the requirement for the FTC to determine whether to approve (or not) every rule that dictates any investigatory and disciplinary activity on the front end, and beyond the FTC's power to "review sanctions at the back end," App., *infra*, 24a, Congress's amendment to HISA permits the agency to step in to further "control the Authority's enforcement activities" at any point, *Oklahoma II*, 163 F.4th at 312; *see* 15 U.S.C. § 3053(e). For example, in addition to a prospective rule "governing *how* the Authority" may exercise its (never utilized) subpoena power, App., *infra*, 32a, the FTC could issue a rule *barring* unapproved subpoenas or *quashing* particular ones, *contra id.* at 4a (Authority "issue[s] subpoenas *** without the FTC's say-so"). Or the FTC could wield the rule it promulgated that controls the Authority's budget—including by "modify[ing] any line item" or withholding necessary "approval," 88 Fed. Reg. 18,034, 18034-18,036 (Mar. 27, 2023)—to prevent a

civil action. *Contra* App., *infra*, 27a ("[T]he Authority is demonstrably *not* subordinate when it comes to suing violators for injunctions."). In these ways and others, "[s]ection 3053(e) gives the FTC the tools to bring an overzealous Horseracing Authority to heel" or to force the Authority to "pursue an enforcement action against a recalcitrant rule breaker." *Oklahoma II*, 163 F.4th at 312 (providing additional examples, such as rules requiring "the Authority drop a misguided investigation into a particular jockey").

In fact, the FTC *has* exercised its section 3053(e) power to promulgate rules facilitating "effective Commission oversight over the Authority," including with respect to any "investigations conducted," "sanctions imposed," "subpoenas issued," and "actions commenced" in federal court. 89 Fed. Reg. 66,546, 66,547, 66,550-66,551 (Aug. 16, 2024). And just months ago, the FTC approved rule modifications that "require the Authority to request and obtain the approval of the Commission before issuing a subpoena under 15 U.S.C. § 3054(h)" and "before initiating any civil action pursuant to Section 3054(j)." FTC, *Order Approving the Enforcement Rule Modification Proposed by the Horseracing Integrity and Safety Authority* 16-17 (Dec. 19, 2025) ("Enforcement Rule Modification Order");[7] *see Oklahoma II*, 163 F.4th at 312 (citing this rule as "proof of concept" that "the FTC could require the Horseracing Authority to seek its permission before pursuing *any* enforcement action" and could "micromanage every particularized decision the Authority makes in an investigation"). In the

[7] https://tinyurl.com/4v9p52jb.

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FTC's words, those rules "help safeguard against overreach and ensure that the Authority remains at all times subordinate to the Commission, including in the use of investigatory powers." Enforcement Rule Modification Order 19.

Those examples foreclose any suggestion of "a private entity 'running riot.'" *Oklahoma II*, 163 F.4th at 312 (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935)). In any event, the facial constitutionality of HISA "does not depend on *** [w]hether the FTC [acts as] a demanding taskmaster or a lenient one." *Id.* at 312. Instead, "the relevant legal question is not *how often* the [FTC] revises" or rejects the private entity's actions, but *whether* the agency "retains decision-making power" such that sanctions cannot escape the agency's "say-so." *Consumers' Research*, 606 U.S. at 692-695 (emphasis added). That is particularly true given that the FTC's formal rulemaking power exists in a real world where the agency, which oversees the Authority's budget, may act "behind the scenes" to further direct the Authority's enforcement decisions. *Id.* at 695. But the actual steps the FTC has already taken under its formal rulemaking (and review) power easily "suffice[]" to show in this facial challenge "the FTC's capacity to control the Authority's enforcement activities" in at least certain (if not all) applications. *Oklahoma II*, 163 F.4th at 312; *see NetChoice*, 603 U.S. at 723 (choice to litigate facially "comes at a cost").

The judgment below ignores those practical illustrations of FTC oversight. Instead, the Fifth Circuit held abstractly that allowing for FTC

supervision over enforcement activities would interfere with "HISA's clear delineation of enforcement power." App., *infra*, 33a. But as the Sixth Circuit explained, HISA was designed to "empower[] the agency to supervise the Horseracing Authority," and "[a]n agency does not exceed the scope of its power by faithfully exercising it." *Oklahoma II*, 163 F.4th at 313-314. After all, Congress enacted the amendment to reinforce "Federal Trade Commission oversight" over the Authority, 15 U.S.C. § 3053(e), in direct response to private-nondelegation challenges to HISA's rulemaking *and* enforcement provisions, *see* McConnell Br. 8-9. Congress did so by importing the independent rulemaking authority from the Maloney Act that this Court long ago recognized allows the SEC to "affect *application* of [SRO] rules in particular circumstances." *Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659, 685 (1975) (emphasis added) (considering precursor to 15 U.S.C. § 78s(b)-(c)).

That amendment confers plenary rulemaking power on the FTC not only "to conform the rules of the Authority" to statutory requirements, but also to "ensure the fair administration of the Authority" and take supervisory action "otherwise in furtherance of the [Act's] purposes." 15 U.S.C. § 3053(e). Those purposes include "implement[ing] and enforc[ing] the horseracing anti-doping and medication control program and the racetrack safety program." *Id.* § 3054(a). Congress's amendment allows the FTC to advance those purposes not only through "statutory permission to 'modify'" Authority rules, App., *infra*, 29a (quoting *Biden v. Nebraska*, 600 U.S. 477, 494

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(2023)), but also to "abrogate" and "add to" them, 15 U.S.C. § 3053(e).

That statutory text, enactment history, and context underscore the best reading of HISA: "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." *Oklahoma II*, 163 F.4th at 312 (quoting *Adkins*, 310 U.S. at 388). At a minimum, that construction—which avoids the constitutional problems raised by the Fifth Circuit's strict "division of enforcement" view (App., *infra*, 41a-42a)—is at least possible. And as *Consumers' Research* reiterated, "[s]tatutes (including regulatory statutes) should be read, if possible, to comport with the Constitution, not to contradict it." 606 U.S. at 691. The Fifth Circuit did the opposite here.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT

1. The judgment below declares that all enforcement provisions of a federal statute governing a nationwide industry are "facially unconstitutional." App., *infra*, 4a. That outcome alone triggers the "strong presumption in favor of granting writs of certiorari to review decisions of lower courts holding federal statutes unconstitutional." *Maricopa Cnty. v. Lopez-Valenzuela*, 574 U.S. 1006 (2014) (Thomas, J., respecting denial); *see, e.g.*, *Allen v. Cooper*, 589 U.S. 248, 254 (2020) ("Because the Court of Appeals held a federal statute invalid, this Court granted certiorari.").

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That presumption carries particular force here given the remarkable interplay among the branches—which prompted the unanimous Sixth Circuit to observe that "[s]ometimes government works." *Oklahoma II*, 163 F.4th at 300. In direct response to the Fifth Circuit's prior private-nondelegation ruling, a bipartisan Congress amended HISA by embracing the remedy a Sixth Circuit panel had recommended. "The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality," *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981)—and revised the Act accordingly. The Fifth Circuit's invalidation of HISA's enforcement provisions displaces that "productive dialogue," *Oklahoma II*, 163 F.4th at 300, and denies "proper respect for a coordinate branch of Government," *Consumers' Rsch.*, 606 U.S. at 691.

2. Alongside those separation-of-powers concerns, this case presents an important legal question concerning application of the private-nondelegation doctrine to SROs' role in the enforcement of federal programs. The answer will have broad ramifications as the "well-established model" on which HISA was based governs several "other important areas of our economy." McConnell Br. 4. Most obviously, Congress has repeatedly reaffirmed "its commitment" to a parallel agency-oversight framework in the financial sector based on "the SEC's review of disciplinary actions" by SROs like FINRA and around two dozen national securities exchanges like NASDAQ. *National Ass'n of Secs. Dealers v. SEC*, 431 F.3d 803, 807-808 (D.C. Cir. 2005);

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see, e.g., 15 U.S.C. § 78s(c)-(e). A similar model guides other industries, from the Commodity Futures Trading Commission's oversight of the private National Futures Association, 7 U.S.C. § 21(h)-(k), to the Federal Energy Regulatory Commission's oversight of the private North American Electric Reliability Corporation, 16 U.S.C. § 824*o*(d)-(f). The decision below calls into question these longstanding and effective governance relationships.

3. If allowed to stand, the Fifth Circuit's decision will also have devastating practical consequences on horseracing. Congress enacted (and amended) HISA because it was "[a]larmed" by the "spate of doping scandals and racetrack fatalities" jeopardizing the sport and endangering equine and human lives. *Black I*, 53 F.4th at 873; *see* McConnell Br. 5 ("Before HISA, horseracing was close to collapse."). "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 [the] oversight" the Act brings and the prior state-by-state landscape impeded. *Oklahoma II*, 163 F.4th at 301.

Even among those who believe the regime "has its flaws," "[t]here's no denying HISA's impact in making the industry safer." C.L. Brown, *Horse Racing Needs Unity, But Road To Getting There May Be Long As Battles Continue*, LOUISVILLE COURIER J. (July 9, 2024).[8] Over the past four-plus years of HISA's enforcement, the nationwide program has become

[8] https://tinyurl.com/37zssa9c.

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"firmly embedded into the Thoroughbred industry and is already yielding substantial benefits—racetrack conditions are improving, equine fatality rates are declining, and wagers from racing fans are increasing." Thoroughbred Industry Br. 2. Consistent with Congress's aim under the Act, "horses have never been safer racing in the U.S." Frank Angst, *HISA Believes Big Data Provides Path Forward on Safety*, BLOODHORSE (Feb. 4, 2025).[9]

The Fifth Circuit's judgment threatens to reverse that progress and jeopardize the sport. If the Authority and FTC cannot enforce HISA rules in certain jurisdictions or with respect to certain participants, it is unclear who (if anyone) will. *See* Stay Appl. 27-30, *Horseracing Integrity & Safety Auth.*, No. 24A287 (U.S. Sept. 19, 2024). At a minimum, "the need for a uniform rule" compels "grant[ing] certiorari to resolve the conflict," *Commissioner v. Bilder*, 369 U.S. 499, 501 (1962)—particularly given that "[t]he bedrock principle of [HISA] is the need for uniformity," FTC, *Order Disapproving the Anti-Doping and Medication Control Rule Proposed by the Horseracing Integrity and Safety Authority* 1-2 (Dec. 12, 2022).[10] Only this Court can provide the authoritative ruling and certainty the nationwide industry needs.

4. Although "[t]he Eighth Circuit has not yet issued a decision on remand" in *Walmsley*, App, *infra*, 31a n.17, there is no reason to await further

[9] https://tinyurl.com/jhuwftzh.

[10] https://tinyurl.com/y76468ta.

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percolation. The clean split between the Fifth and Sixth Circuits demonstrates the "differing conclusions on the constitutional question" squarely framing the Eighth Circuit's (and any other court's) binary choice in these parallel facial challenges. *Walmsley*, 117 F.4th at 1039. No obstacle prevents the Court from resolving that straightforward and clearly established conflict by granting certiorari in this case.

Assuming the Court considers this petition in conjunction with the pending certiorari petition in the Sixth Circuit case, *Oklahoma v. United States*, No. 25-1325, this Court should grant this petition and hold the other (in which Petitioners here are respondents). This petition properly limits the question presented to the only issue on which the courts of appeals are divided: whether HISA's *enforcement* provisions are facially unconstitutional under the private-nondelegation doctrine. Granting certiorari on that pressing question in this case would allow for direct review of the reasoning of the only court of appeals that has held the Act facially unconstitutional.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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August 10, 2026

TAB 5

Search documents in this case: Search

No. 26-199

Title:	**Horseracing Integrity and Safety Authority, Incorporated, et al., Petitioners v. National Horsemen's Benevolent and Protective Association, et al.**
Docketed:	August 17, 2026
Lower Ct:	United States Court of Appeals for the Fifth Circuit
Case Numbers:	(23-10520)
Decision Date:	June 11, 2026

Proceedings and Orders

Aug 10 2026	Petition for a writ of certiorari filed. (Response due September 16, 2026) **Petition** **Appendix** . **Certificate of Word Count** **Proof of Service**
Sep 11 2026	Response to petition from respondents National Horsemen's Benevolent and Protective Association, et al. filed. VIDED. **Main Document** **Other** **Proof of Service**
Sep 16 2026	Brief amici curiae of Alexander Volokh, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 16 2026	Response to petition from respondents Gulf Coast Racing L.L.C. et al. filed. VIDED. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 16 2026	Response to petition from respondents Texas, et al. filed. VIDED. **Main Document** **Other** **Proof of Service**

Sep 16 2026	Brief amicus curiae of Repole Stable, Inc. filed. VIDED. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 30 2026	Reply of petitioners Horseracing Integrity and Safety Authority, Incorporated, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 04 2026	DISTRIBUTED for Conference of 12/4/2026.

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TAB 6

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The Absolute Insurer Rule: An Unconstitutional and Ineffective Means of Mitigating Illegal Equine Drugging in the "Sport of Kings"

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Mounce, Green, Myers, Safi, Paxson & Galatzan, P.C.

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The Absolute Insurer Rule: An Unconstitutional and Ineffective Means of Mitigating Illegal Equine Drugging in the "Sport of Kings"

Brian Calhoun "Cal" Mundell*

INTRODUCTION

Competitive thoroughbred horse racing has long been referred to by enthusiasts and laymen alike as the "sport of kings."[1] However, as time has elapsed and as the American thoroughbred horse racing industry has evolved, the term "sport of kings" has been perceived by critics as paradoxical and perhaps, even contradictory in nature.[2] The negative criticism that currently plagues horse racing can largely be attributed to the staggering number of on-the-track equine fatalities that occur at American racetracks nationwide.[3] On average, an estimated twenty-four horses die every week at racetracks.[4] The Jockey Club recorded 493 fatal equine injuries in 2017, 483 fatal equine injuries in 2016, and 484 fatal equine injuries in 2015.[5] Many speculate that the illegal drugging of racehorses by their trainers may be the cause of the

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[1] *See* Michael Kilian, *The Evolution of the Sport of Kings*, CHICAGO TRIBUNE, (May 4, 1988), http://www.chicagotribune.com/news/ct-xpm-1988-05-04-8803140377-story.html [https://perma.cc/2Y77-PU89].

[2] *See* John Swenson, *The Sport of Kings is Full of Scum*, VICE (Dec. 25, 2013, 7:00 PM), https://www.vice.com/en_us/article/exmde7/the-sport-of-kings-is-full-of-scum-0000168-v20n12 [http://perma.cc/JDG6-CC4M] ("Cheating is deeply woven into the fabric of horse racing. The sport is a magnet for shady characters and below-the-table dealings.").

[3] *See, e.g*, Walt Bogdanich et al., *Mangled Horses, Maimed Jockeys*, N.Y. TIMES (Mar. 24, 2012), https://www.nytimes.com/2012/03/25/us/death-and-disarray-at-americas-racetracks.html [https://perma.cc/R6TA-TFU3].

[4] *Id.*

[5] JOCKEY CLUB, *Supplemental Tables of Equine Injury Database Statistics for Thoroughbreds*, http://jockeyclub.com/pdfs/eid_9_year_tables.pdf [https://perma.cc/G8XP-ZJ9A]; *see also* Press Release, Paulick Report, Despite Slight Uptick In Equine Injuries, Overall Trends Remain Positive, (Mar. 19, 2018, 11:31 AM) (on file with author).

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high number of fatal equine injuries stated above.[6] For example, in a study conducted by the New York Times, it was discovered that from 2009 to 2012, "trainers at United States tracks ha[d] been [found guilty of] illegally drugging horses 3,800 times."[7]

Fatal equine injuries afflict all classes of competitive racehorses, from the four-thousand dollar claimer running at Ruidoso Downs in Ruidoso, New Mexico to Kentucky Derby winners and those competing on racing's grandest stage.[8] Arguably, as of late, the two most infamous instances of in-competition injuries resulting in euthanasia and causing immense public uproar, belong to that of Barbaro[8] and Eight Belles.[9]

Barbaro was a three-year-old colt, trained by Michael Matz, who captured the 2006 running of the Kentucky Derby by a convincing six and one-half lengths at odds of six to one.[10] Just moments after the starting gates had opened in the Preakness Stakes—the second leg of horse racing's coveted Triple Crown—Barbaro was observed "struggling with his stride during the first eighth of a mile" and was subsequently "pulled up" by veteran jockey, Edgar Prado.[11] Barbaro was taken off of the track via equine ambulance, whereupon it was discovered that he "had sustained a broken cannon bone above the ankle, a broken sesamoid bone behind the ankle, a broken long pastern bone below the ankle, and a dislocation of the fetlock joint."[12] After months of treatment and the performance of many surgeries by top veterinarians, it became apparent that Barbaro would never recover; he was euthanized on January 29, 2007.[13]

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[6] *See* Bogdanich et al., supra note 3.

[7] *Id.*

[8] *See id.*

[9] ASSOCIATED PRESS, *Runner-up Eight Belles breaks front ankles, euthanized on track*, ESPN (May 3, 2008), http://www.espn.com/horse-racing/triplecrown08/news/story?id=3380100 [https://perma.cc/YES6-GY84].

[10] *Racing Chart of the 2006 Kentucky Derby Presented by Yum! Brands*, EQUIBASE (May 6, 2006), http://www.equibase.com/premium/chartEmb.cfm?track=CD&raceDate=05/06/2006&cy=USA&rn=10 [https://perma.cc/VJ8J-E87U].

[11] Joe Drape, *Barbaro Is Euthanized After Struggle With Injury*, N.Y. TIMES (Jan. 29, 2007), https://www.nytimes.com/2007/01/29/sports/29cnd-barbaro.html [https://perma.cc/YJY9-VKX9].

[12] See Drape, *supra* note 11.

[13] Barbaro was primarily treated by Dr. Dean Richardson. After Barbaro developed

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Just the next year, in 2008, Eight Belles, a three-year-old filly trained by J. Larry Jones, was entered to run in the Kentucky Derby—a race traditionally dominated by male horses.[14] Eight Belles was strategically held in fifth place for the majority of the race, making a determined surge down the stretch to finish an impressive second-place behind eventual Preakness winner Big Brown.[15] Just strides after crossing the finish line, while being celebrated by the second largest crowd in Kentucky Derby history,[16] Eight Belles collapsed, falling to the ground as a result of two broken ankles; she was immediately euthanized.[17]

The deaths of Barbaro and Eight Belles have caused horse racing regulatory organizations such as the National Thoroughbred Racing Association ("NTRA"), the Racing Medication and Testing Consortium ("RMTC"), the Association of Racing Commissioners International ("ARCI"), and a plethora of state racing commissions to review and amend horse racing's medication policies in an effort to make the sport safer for equine athletes and jockeys alike.[18] Today, amidst much criticism, the overwhelming majority of jurisdictions have implemented, and enforce, the "absolute insurer rule," which creates an irrebuttable presumption that a trainer is responsible for any drug positives detected in an equine athlete.[19]

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laminitis—an inflammatory condition—in his front feet, fought to recover from the injury, but it was ultimately insurmountable. *See* Drape, *supra* note 11.

[14] Press Release, CBS News, Eight Belles' Death Sparks Controversy (May 5, 2008) https://www.cbsnews.com/news/eight-belles-death-sparks-controversy/ [https://perma.cc/AQ2C-XCHP]; *see also* Christopher Klein, Horse Racing's Triple Crown: 10 Fast Facts (June 5, 2019), https://www.history.com/news/horse-racings-triple-crown-10-fast-facts [https://perma.cc/2S7W-82N5] (stating that only three fillies have won the Derby in 144 runnings).

[15] *Racing Chart of the 2008 Kentucky Derby Presented by Yum! Brands*, EQUIBASE: CHARTS (May 3, 2008) http://www.equibase.com/premium/chartEmb.cfm?track=CD&raceDate=05/03/2008&cy=USA&rn=10 https://perma.cc/R4D2-MR2D (last viewed Oct. 23, 2018).

[16] *See* Associated Press, *supra* note 99 (noting that the 2008 running of the Kentucky Derby was attended by 157,700 spectators, making the event "the second-largest crowd in [Kentucky] Derby history.").

[17] ASSOCIATED PRESS, *supra* note 9.

[18] W. Chapman Hopkins, *Procedural Due Process Implications of Kentucky's Thoroughbred Medication Regulations*, 2 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 27, 28 (2010).

[19] *See* Kjirsten Lee, *Transgressing Trainers and Enhanced Equines: Drug Use in Racehorses, Difficulty Assigning Responsibility and the Need for a National Racing*

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The statistics indicating the staggering number of fatal equine injuries in American horse racing allow for the following assertion to be confidently made: current rules and regulations designed to prevent and deter trainers from illegally drugging their equine athletes are not effectively mitigating the problem at issue.[20] This Article argues that the absolute insurer rule: (1) is unconstitutional in that it denies the accused trainer his or her constitutional right to substantive due process; (2) is irrational in that it is possible that a positive drug result could be the consequence of environmental contamination, rather than intentional drugging; and (3) is ineffective because the current punishment model does not effectively deter trainers from illegally drugging their equine athletes. This Article concludes by proposing that, in order to preserve the substantive due process rights of the accused, the trainer should be afforded an opportunity to rebut the presumption of guilt placed upon him or her by the positive test result, and that the horse, rather than the trainer, should be suspended if, after an opportunity for rebuttal, the presumption of guilt is not overcome.

I. UNDERSTANDING THE AMERICAN HORSE RACING INDUSTRY AND REGULATION

A. An Essential Trio: Owner, Trainer, and Veterinarian

In 2018, NBC reported that approximately fifteen million viewers tuned in to watch the 144th running of the Kentucky Derby,[21] with an additional 157,000 spectators in live attendance

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Commission, 11 J. ANIMAL & NAT. RESOURCES L. 23, 27–28 (2015).

[20] There is insufficient data to render the assertion absolute, because: (1) the absolute insurer rule has been implemented by jurisdictions for so long that there exists no data revealing the number of fatal equine injuries that occurred prior to the implementation of the rule; and (2) there is no current proper comparison group, because all American racing jurisdictions have adopted at least some form of the absolute insurer rule. However, now that Kentucky has declared the absolute insurer rule unconstitutional, it will be interesting to see if the jurisdiction's replacement rule decreases the number of fatal equine injuries.

[21] Justin Sayers, *Lousiville Tops All Markets as Kentucky Derby Ratings Reach 6-Year Low*, COURIER J. (May 8, 2018, 10:56 AM), https://www.courier-journal.com/story/sports/horses/triple/derby/2018/05/08/kentucky-derby-televisionratings-viewers-louisville/588094002/ [https://perma.cc/EYP3-MNDD] (stating "[i]n a press release,

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at Churchill Downs—the home of the Kentucky Derby.[22] However, despite the large numbers of both on-track and off-track viewers, it is safe to assume that the vast majority of said patrons merely view the Kentucky Derby—and horse racing in general—in a "social capacity," and do not truly understand the logistics and divisions of power required to successfully get a racehorse from his or her barn on the backstretch to the starting gate.[23] There are three critical actors essential to the success of any equine athlete: the owner, the trainer, and the veterinarian.[24] Their respective roles will be discussed in turn.

1. The Owner

"The classic owner-trainer relationship, in its simplest form, is a hierarchical relationship with the owner at the top."[25] If horse racing were to be compared to that of a professional football team, the role of the racehorse owner would closely mirror the role of an NFL general manager. That is, the typical racehorse owner is not the individual tasked with caring for the equine athlete on a daily basis and ensuring that the horse is in a suitable physical

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NBC Sports championed the numbers, saying they reached 15.0 million combined viewers on television and digital platforms for the sixth- consecutive year despite the head-to-head competition.").

[22] Gabe Hauari, *Over 157,000 people braved the elements at the 2018 Kentucky Derby*, COURIER J. (May 5, 2018),, 8:19 PM), www.courier-journal.com/story/sports/horses/triple/derby/2018/05/05/2018-kentucky-derby-attendance/584193002/ [https://perma.cc/D78U-AT9Q].

[23] *See* Martha Claussen, *Claussen: Behind the Scenes with the Starting Gate Crew*, PAULICK REPORT (Mar. 8, 2012, 8:10 AM.), https://www.paulickreport.com/news/people/claussen-behind-the-scenes-with-the-starting-gate-crew/ [https://perma.cc/F7AP-Y54B] (stating "[a]nyone who has ever watched a horserace has seen the familiar routine of horses preparing for competition....It looks so effortless that most spectators take it for granted, but the work of a starter and the starting gate crew is one of the most underrated roles in horseracing").

[24] Ed Kane, *Veterinarian, trainer, owner: Who's looking out for the racehorse's health?*, DVM 360 MAGAZINE (June 20, 2016), http://veterinarynews.dvm360.com/veterinarian-trainer-owner-who-s-looking-out-racehorse-s-health [https://perma.cc/L68Z-YT8H] (explaining that a jockey is an obvious "essential actor," but is not impacted by the absolute insurer rule).

[25] Tom LaMarra, *AAEP Examines Owner-Trainer-Vet Relationship*, BLOODHORSE (Dec. 15, 2011), https://www.bloodhorse.com/horse-racing/articles/132704/aaep-examines-owner-trainer-vet-relationship [https://perma.cc/9NCJ-A2MX].

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condition to perform competitively on race-day.[26] Instead, much like a coach, these duties are reserved for that of the racehorse's trainer.[27]

The owner or his delegated racing manager, on the other hand, is generally the individual in charge of the administrative aspect of the equine athlete's life.[28] Such tasks include: (1) selecting the best trainer for the horse based on the trainer's known strengths and weaknesses; (2) assessing the talent of the horse at the outset and analyzing the potential economic benefits of the investment; (3) conferring with the trainer to determine which type or class of race the horse should be entered in;[29] (4) analyzing trends and selecting a strong jockey; and (5) maintaining good communication with the trainer and the veterinarian of the horse.[30]

Interestingly, because of the owner's distant role in relation to the racehorse, in the majority of jurisdictions, "the owner is not necessarily the person ultimately held responsible for the horse's care, even when illegal drugs are found in the horse's system."[31] Escaping "ultimate responsibility," however, does not necessarily mean that the owner proceeds wholly unaffected.[32] For example, under New Mexico Racing Commission Rules, if the presence of a drug carrying a "Category A" penalty is found in a horse's system post-race, the trainer of said horse is subject to a "minimum one-year suspension" and a "minimum fine of $10,000.00 or ten percent

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[26] *See* Lee *supra* note 19, at 30 (explaining that owners are frequently absent from the horse's day-to-day life or ignorant as to the horse's physical condition and well-being).

[27] *See* LaMarra, *supra* note 25.

[28] *See The Role of the Racing Manager in a Thoroughbred Partnership*, WEST POINT THOROUGHBREDS (Jan. 18, 2012), https://www.westpointtb.com/the-role-of-the-racing-manager-in-a-thoroughbred-partnership/ [https://perma.cc/NW3V-DEB9].

[29] *See* Cindy Pierson Dulay, *Understanding the Types and Classes of Horse Races*, THOUGHT CO. (Oct. 13, 2017), https://www.thoughtco.com/understanding-the-types-and-classes-of-horse-races-1880414_[https://perma.cc/7VR4-2EPB] (explaining that a horse can be entered in a maiden, claiming, allowance, stakes, or graded stakes race depending on the level of skill in which the horse possesses with maiden races being restricted to horses that have never before won, and graded stakes being reserved for horse racing's most elite competitors).

[30] *Id.*

[31] Lee, *supra* note 19, at 30.

[32] *See* 15 N.M. Code R. § 15.2.6.9(B) (LexisNexis 2019) (detailing the different sanctions available for both owners and trainers whose horse has tested positive for a prohibited illegal drug post-race).

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of the total purse," whichever is greater.[33] On the contrary, the owner is only subject to "[d]isqualification and loss of purse."[34] Therefore, even though the owner is not apportioned a percentage of liability, he or she is still deprived of the purse he or she would have been entitled to if the horse has a prohibited substance in its system.[35] The key distinction between the punishment imposed on owners and trainers is that if the owner/trainer duo's horse is found to be in violation, the owner can continue racing the horse—perhaps by moving the horse to the care of a different trainer—whereas the trainer must remain inactive until the length of the imposed suspension has been served.[36]

2. The Trainer

Returning to the football team analogy, the role of the trainer of a racehorse is similar to the role of a professional football coach. The trainer is tasked with the day-to-day operations associated with the individual racehorse, such as scheduling morning workouts, ensuring that the horse is in top physical condition, grooming, feeding, and bathing.[37] In addition, the trainer also assumes administrative tasks such as examining the condition book,[38] selecting the appropriate race for his or her equine athlete,[39] and conferring with jockey agents to ensure that the racehorse is equipped with a top jockey.[40]

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[33] *Id.* at § 15.2.6.9(B)(1).

[34] *Id.* (discussing that winning purses usually are not released into an owner's account a drug test confirms a negative result).

[35] *See id.*

[36] *See id.*

[37] *See* Sarah Favot, *A Day in the Life of a Horse Racing Trainer at Santa Anita Park*, PASADENA STAR NEWS (Dec. 24, 2014, 5:58 PM), https://www.pasadenastarnews.com/2014/12/24/a-day-in-the-life-of-a-horse-racing-trainer-at-santa-anita-_[https://perma.cc/LJ2Q-WE2T].

[38] *See The Condition Book: How It Works and Types of Races for Thoroughbred Racehorses*, WEST POINT THOROUGHBREDS, (Dec. 19, 2016), https://www.westpointtb.com/the-condition-book-how-it-works-and-types-of-races-for-thoroughbred-racehorses/ [https://perma.cc/8LPS-MRDV].

[39] *See The Process of Entering Races for Racehorse Owners*, WEST POINT THOROUGHBREDS (Sept. 1, 2013), https://www.westpointtb.com/the-process-of-entering-races-for-racehorse-owners/ [https://perma.cc/DXG3-2NBA].

[40] Mary Hope Kramer, *What Does a Jockey Agent Do?*, THE BALANCE CAREERS, https://www.thebalancecareers.com/jockey-agent-125755 [https://perma.cc/D85B-SWUT].

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The typical trainer charges the owner a daily rate that is intended to cover the general care and upkeep costs associated with an individual racehorse.[38] Generally, "[t]rainer rates can range from fifty-dollars at smaller racetracks to as much as one-hundred-and twenty-dollars at major racing venues."[39] The determination of a trainer's fee is generally dependent on: (1) the level of experience and quality of reputation in which the trainer possesses; (2) the location where the horse is to be trained; and (3) the general purse structure at the circuit where the racehorse will compete.[40] In addition to charging a daily rate, in most owner-trainer relationships, it is generally agreed upon that the trainer is entitled to a certain percentage—usually ten percent—of any gross purse money that the racehorse collects.[41]

Transitioning into the topic of liability associated with drugging violations, the rule implemented in most American racing jurisdictions is as follows: trainers are ultimately responsible for the care of any racehorse in his or her possession and assume total and complete liability if such horse tests positive for a prohibited substance.[41] This rule is one of strict liability, supported by the underlying rationale that it is the trainer's absolute duty "to ensure that a horse that runs a race while in the care and custody of [himself or herself] is free from all prohibited drugs, chemicals, or other substance[s]."[42] Some jurisdictions have extended the rule so far as to impose liability on the named trainer of a horse even when the cause of the presence of the prohibited drug in the horse's system was due to an intentional or unintentional act of a third party, and not the trainer himself.[43]

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[41] *See* Richard v. Commonwealth, 499 A.2d 727, 729 (Pa. Commw. Ct. 1985); Equine Practitioner's Ass'n v. N.Y. St. Racing & Wagering Bd., 488 N.E.2d 831 (N.Y. 1985); *see also* Lee *supra* note 19.

[42] *See, e.g.*, 16 TEX. ADMIN. CODE § 311.104(b)(2) (2018).

[43] *See* IDAHO ADMIN. CODE r. 11.04.14.100 (2013) (stating "[t]he Trainer is the absolute insurer of, and responsible for, the condition of the horses entered in a race regardless of the acts of third parties."); CAL. CODE REGS. tit. 4, § 1887(a) (stating "[t]he trainer is the absolute insurer of and responsible for the condition of the horses entered in a race, regardless of the acts of third parties . . .").

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3. The Veterinarian

Deferring to the professional football team analogy one final time, the veterinarian serves a racehorse in a manner similar to how an athletic trainer serves a professional athlete. That is, the veterinarian is tasked with ensuring that the racehorse is physically sound both internally and externally.[44] Generally, on a day-to-day basis, racehorse veterinarians are primarily focused on two areas of health: respiratory issues and lameness.[45]

In regard to respiratory issues, the racehorse veterinarian is primarily concerned with ensuring that the equine athlete is free of any airway abnormalities, such to maximize his or her on-the-track performance.[46] Common airway abnormalities that racehorses most regularly suffer from are exercise-induced pulmonary hemorrhages ("EIPH") and dorsal displacements of the soft palate.[47] EIPH occurs when a racehorse is put under the stress of exercise and "the blood pressure leading from the artery on the right side of the heart to the lungs increases from about 25 mm of mercury pressure to about 100 mm of pressure."[48] This increase in pulmonary pressure can cause the small capillaries in the horse's lungs to rupture, and thus, cause internal bleeding.[49] It is for this reason that EIPH is most regularly referred to by those in the industry as "bleeding."[50] EIPH is commonly treated proactively by the intravenous administration of a Lasix (furosemide) injection.[51]

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[44] *See* Kane, *supra* note 24.

[45] *Id.*

[46] *Id.*

[47] *See* Daniel Ross, *Lasix: The Drug Debate which is Bleeding US Horse Racing Dry*, THE GUARDIAN (Aug. 31, 2014), https://www.theguardian.com/sport/2014/aug/31/lasix-drug-debate-bleeding-horse-racing [https://perma.cc/5Q9T-6ZHS]; Erica Larson, *Respiratory Problems and Poor Performance*, THE HORSE (Sept. 29, 2015), https://thehorse.com/113155/respiratory-problems-and-poor-performance/ [https://perma.cc/6BRZ-TAQS].

[48] Ross, *supra* note 47.

[49] *See id.*

[50] *See id.*

[51] *Id.*

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Dorsal displacement of the soft palate occurs "when the horse's palate becomes displaced on top of the epiglottis and partially obstructs the airway."[52] The obstructed airway causes the equine athlete's air intake to substantially decrease, rendering the horse exhausted prematurely.[53] A veterinarian can, in most circumstances, treat a dorsal displacement of the soft palate by performing what is known as "tieback surgery."[54] When a horse undergoes a "tieback surgery," the affected "cartilage is pulled to the side and is sutured to keep [the cartilage] from interfering with the flow of air."[55]

The racehorse veterinarian is also concerned with the prevention and correction of lameness in the equine athlete.[56] The veterinarian attempts to prevent lameness by identifying potential warning signs of injury, such as swelling, filling, or heat in a joint, and by conducting an examination on any potentially affected soft tissues; in addition, veterinarians often consult with the exercise rider and the trainer, to better diagnose the horse's individual condition.[57]

In the vast majority of states, the veterinarian will only become liable for the presence of a prohibited drug in a horse's system if the veterinarian was a party to, or a facilitator of, the administration of a banned substance to the equine athlete.[58]

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[52]Larson, *supra* note 47; *see Veterinary Spotlight: Breathing Pacemakers*, THOROUGHBRED TIMES (Sept. 4, 2010), https://mydigitalpublication.com/article/Veterinary+Spotlight%3A+Breathing+Pacemakers/486647/45903/article.html [https://perma.cc/99UV-5YUE].

[53] *See* Larson, *supra* note 47.

[54] *See id.*; *see also, New 'Toggle Technique' A Possible Alternative To Tie-Back Surgery*, PAULICK REPORT (May 17, 2018, 9:37 AM), https://www.paulickreport.com/horse-care-category/new-toggle-technique-a-possible-alternative-to-tie-back-surgery/ [https://perma.cc/RC4T-58MJ] (noting that the "tie-back" procedure can be ineffective because of its potential to "fail or lost some of [its] power" over time).

[55] Ky. Equine Research Staff, *Tie-Back Surgery in Horses*, EQUINEWS (Mar. 23, 2015), https://ker.com/equinews/tie-back-surgery-horses/ [https://perma.cc/KHJ2-S7KJ].

[56] *See* Kane, *supra* note 24.

[57] *Id.*

[58] *E.g.*, N.M. CODE R. § 16.47.1.16(B)(1) (LexisNexis 2019) (stating "[a]ll practicing veterinarians administering drugs, medications or other substances shall be responsible to see that the drugs, medications or other substances, and the veterinary treatment of horses are administered in accordance with [the required thresholds]."); 810 KY. ADMIN. REGS. 1:028 (stating "[a] veterinarian who administers, is a party to, facilitates, or is found to be responsible for any violation of KRS Chapter 230 or 810 KAR Chapter 1 shall be reported to the Kentucky Board of Veterinary Examiners and the state licensing Board of Veterinary

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Thus, liability is only extended to the veterinarian if he or she assumed a substantial level of direct involvement in the prohibited substance.[59] On the contrary, some racing jurisdictions hold veterinarians liable even when he or she did not administer the prohibited drug personally.[60] For example, in Pennsylvania, a veterinarian can be liable for the presence of a prohibited substance in a horse's system if the veterinarian was negligent in learning of the administration or presence of such prohibited substance.[61] This rule essentially prevents a veterinarian from escaping liability by simply instructing the trainer, or a member of his or her staff, on how to administer the potentially illegal substance.[62]

While each member of the essential trio is subject to at least some level of liability and/or negative consequence from the detection of a prohibited substance in a horse's system, it is readily apparent that the trainer of the equine athlete is generally affected in the harshest manner.[63] Now that the groundwork has been laid, and the application of the absolute insurer rule has been described as it relates to each member of the essential trio, this Article will continue by focusing on how the rule relates solely to the trainer specifically.

B. The Current Model of Administrative Regulation in Horse Racing

How does a state horse racing commission have the power to regulate itself and impose sanctions against those who violate

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Medicine by the stewards.").

[59] *E.g.*, 810 KY. ADMIN. REGS. 1:028 (stating "[a] veterinarian who administers, is a party to, facilitates, or is found to be responsible for any violation of KRS Chapter 230 or 810 KAR Chapter 1 shall be reported to the Kentucky Board of Veterinary Examiners and the state licensing Board of Veterinary Medicine by the stewards.")

[60] Lee, *supra* at 19.

[61] 58 PA. CODE § 183.356 (1977) (stating "[n]o veterinarian shall permit a horse in his care to be started if he knows or if by the exercise of reasonable care he might have known or have cause to believe, that the horse has received a drug, stimulant, sedative, depressant, medicine or other substance that could result in a positive test").

[62] *Id.*

[63] *See, e.g.*, Richard v. Commonwealth, 499 A.2d 727, 729 (Pa. Commw. Ct. 1985); Equine Practitioner's Ass'n v. N.Y. St. Racing & Wagering Bd., 488 N.E.2d 831 (N.Y. 1985); Lee *supra* note 19.

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its rules? Until 1951, the idea and implementation of a self-governing state horse racing commission was rare.[64] Prior to then, the sport of horse racing was primarily regulated under the central authority of the Jockey Club.[65] The Jockey Club assumed the role that most state racing commissions assume today, such as (1) licensing owners, trainers, jockeys, and the like; (2) testing horses for prohibited drugs to ensure a level playing field; and (3) maintaining the integrity of the thoroughbred breed as a whole.[66]

In 1951, Club's traditional role was dramatically altered as a result of the *Fink v. Cole* opinion issued by the New York Court of Appeals.[67] In *Fink*, the Court analyzed the constitutionality of a statute that gave the Jockey Club, rather than the State, the power to grant and revoke licenses, determine fee requirements for such licenses, and suspend and/or revoke licenses.[68] The Court ultimately held that any statute delegating a state's licensing power to "[t]he Jockey Club, a private corporation, is such an abdication as to be patently an unconstitutional relinquishment of legislative power in violation of Section 1 of Article III of the Constitution of this State which provides: '[t]he legislative power of this State shall be vested in the Senate and Assembly.'"[69]

The *Fink* holding, accordingly, caused many state horse racing commissions to form throughout the United States, and in turn, assume many of the functions that were traditionally held by the Jockey Club.[70] The newly formed state horse racing commissions were statutorily granted "broad delegations of power including licensing, rulemaking authority, determining civil penalties, and enforcing rules."[71] For example, the New Mexico Horse Racing Commission is statutorily given the power "to

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[64] Bradley S. Friedman, *Oats, Water, Hay, and Everything Else: The Regulation of Anabolic Steroids in Thoroughbred Horseracing*, 16 ANIMAL L. 123, 132 (2009).

[65] *Id.* at 131–32.

[66] *Id. (citing* John S. Howland & Michael J. Hannon, *A Legal Research Guide to American Thoroughbred Racing Law for Scholars, Practitioners and Participants* (William S. Hein & Co. 1998)).

[67] *See* Fink v. Cole, 97 N.E.2d 873, 874 (N.Y. 1951).

[68] *Id.* at 873–74.

[69] *Id.* at 876.

[70] Friedman, *supra* note 63, at 132 (noting that today, the state racing jurisdiction must be the body issuing licenses).

[71] Friedman, *supra* note 64.

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promulgate rules and regulations and carry out the duties of the Act to regulate horse racing" through the Horse Racing Act.[72] Similarly, the California Horse Racing Board is statutorily given the power by of the California Business and Professions Code to administer and enforce "all laws, rules, and regulations affecting horse racing."[73]

Though each state that hosts the sport of horse racing has its own administrative regulation agency, the Jockey Club still serves a fundamental function. Today, the Jockey Club assumes the important tasks of: (1) ensuring that prospective racehorses are properly registered to compete in races; (2) ensuring that each horse is named and that the names approved are not duplicative; and (3) recording vital statistics essential to the betterment of horse racing.[74]

C. Description of Common Prohibited Substances Detected in a Horse's System

Trainers are often held liable for a drug violation when a horse either is found to have a strictly prohibited drug in his or her system or when a permissible drug is detected in the horse's system at a level above a predetermined threshold.[75] The Association of Racing Commissioners International and the Racing Medication and Testing Consortium are the two bodies that have been instrumental in offering guidance to racing commissions on the issue of drug and medication regulation in horse racing.[76] The

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[72] N.M. CODE § 15.2.1.3 (stating "[s]ections 60-1A-1 through 60-1A-30 NMSA 1978 authorizes the New Mexico Racing Commission to promulgate rules and regulations and carry out the duties of the [Horse Racing] Act to regulate horse racing.").

[73] CAL. BUS. & PROF. CODE ANN. § 19440(a)(2).

[74] These statistics include the race results of horses, yearly statistics of individual owners and trainer, and the amount of money wagered at a racetrack, among others. *Company Brochure*, THE JOCKEY CLUB http://www.jockeyclub.com/pdfs/company_brochure_17_web.pdf [https://perma.cc/9VW9-455Z].

[75] *See* Richard v. Commonwealth, 499 A.2d 727, 729 (Pa. Commw. Ct. 1985); Equine Practitioner's Ass'n v. StateN.Y. St. Racing & Wagering Bd., 488 N.E.2d 831 (N.Y. 1985); *see also* Lee *supra* note 19.

[76] *Association of Racing Commissioner's International Resources*, ASS'N OF RACING COMM'RS INT'L , http://arci.com/about [https://perma.cc/3BDS-GKV7]; *Racing Medication &*

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ARCI, the RMTC, and the interworkings of the two organizations are discussed in further depth below.

1. The ARCI Develops Model Rules Implemented by Racing Commissions

The ARCI was originally formed in 1934 and currently "set[s] international standards for racing regulation, medication policy, drug testing laboratories, totalizator systems, racetrack operation and security, as well as off-track wagering entities."[77] The ARCI created, and continues to amend and supplement, Model Rules that are heavily relied on in racing jurisdiction across the United States.[78] "In some racing jurisdictions, the Model Rules have the force of law as they have been adopted by reference statutorily or through regulatory rule making.[79] In others, they form the basis upon which rules are written."[80]

Specifically related to drug regulation in horse racing, the ARCI created a Uniform Classification Guideline for Foreign Substances ("the Guideline").[81] The Guideline is "intended to assist stewards, hearing officers and racing commissioners in evaluating the seriousness of alleged violations of medication and prohibited substance rules in racing jurisdictions."[82] Essentially, the Guideline names a list of drugs that have been, or could potentially be, found in a racehorse and ranks that drug on a scale based on

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Testing Consortium FAQ, RMTC, https://rmtcnet.com/status-report-and-faq/ [https://perma.cc/33RE-V88E].

[77] *Welcome,* ASS'N OF RACING COMM'RS INT'L, https://www.arci.com [https://perma.cc/UY2U-ZF2Y].

[78] *See id.* (discussing the ARCI "Model Rules" of racing and wagering, which are recognized worldwide as a standard for the independent and impartial regulation of horse and greyhound racing as well as the conduct of pari-mutuel wagering).

[79] *Model Rules,* ASS'N OF RACING COMM'RS INT'L, http://www.arci.com/model-rules-standards/ [https://perma.cc/37ZY-YQDA].

[80] *Id.*

[81] *See* ASS'N OF RACING COMM'RS INT'L., UNIFORM CLASSIFICATION GUIDELINES FOR FOREIGN SUBSTANCES AND RECOMMENDED PENALTIES MODEL RULE V.13.4.1 (Aug. 2018), http://arci.com/wp-content/uploads/2018/10/2018-08-01-classification-program-v13.4.1.pdf [https://perma.cc/SCG9-UR4S].

[82] *Id.* at 2.

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severity, with a "Class 1" drug being the most severe and a "Class 5" drug being the least severe.[83]

Furthermore, the Guideline accompanies the class ranking of a drug with a penalty class that recommends a punishment to impose on a trainer whose horse has been detected with a prohibited substance in its system.[84] The penalty classes range from "Class A" to "Class C," with a "Class A" penalty being the harshest and a "Class C" penalty being the least harsh.[85]

2. Class 1 Drug Description

Class 1 drugs are reserved for stimulant and depressant drugs that have the greatest potential to affect performance, and that have no generally accepted medical use in racing horses such as "[o]piates, opium derivatives, synthetic opioids and psychoactive drugs, amphetamines and amphetamine-like drugs as well as related drugs, including but not limited to apomorphine, nikethamide, mazindol, pemoline, and pentylenetetrazol."[86] All Class 1 drug violations subject the violating trainer to Class A punishment, which for a first-time-offender carries a minimum one-year suspension and a minimum fine of $10 thousand or ten percent of the total purse earned by the horse, whichever is greater; however, mitigating circumstances are considered when determining a violating trainer's punishment.[87]

Common Class 1 drugs found in racehorses are those in which carry similar effects as that of morphine. In 2012, the horse racing industry was confronted with a drug that it had

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[83] *See id.* at 3–4 (stating "[t]he RCI Drug Classification Scheme is based on 1) pharmacology, 2) drug use patterns, and 3) the appropriateness of a drug for use in the racing horse.").

[84] *See* MODEL RULES OF RACING § ACRI-025-020 (ACRI 2019).

[85] *See id.* at 443, 445 (noting that a Class A penalty carries with it a minimum one-year suspension and a minimum $10,000.00 fine; whereas a Class C penalty carries only a maximum fine of $500.00).

[86] ASS'N OF RACING COMM'RS INT'L., *supra* note 76, at 4.

[87] MODEL RULES OF RACING § ACRI-025-020 (ACRI 2019) (explaining that the range of punishment increases for each subsequent time that a trainer is found to be in violation).

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traditionally never been exposed to in the past, dermorphin.[88] Dermorphin is "a relative of heroin that is [forty] times more powerful than morphine and is commonly referred to as 'frog juice.'"[89] The drug was assigned the shorthand name "frog juice" because it is found on the back of the South American monkey tree frog.[90] Dermorphin blocks pain while increasing feelings of excitation and euphoria, which causes equine athletes—especially those plagued with injuries—to run faster.[91] The drug is a peptide mu receptor antagonist, which means that it takes primary effect when the molecules interact with the mu receptors in the horse's brain.[92]

By interfering with mu receptors in the equine athlete's brain, the horse is neurologically relieved of any symptom of pain, but the physical injury itself remains intact and worsens when the horse continues to place stress on it.[93] In essence, the mu receptor is much like a warning bell that is turned off and/or ignored by the presence of dermorphin.[94] The inability to detect the body's natural warning of injury can cause a fracture—a fatal injury to a racehorse.[95]

For example, in 2012, Jess A Zoomin—a horse trained by Jeffrey Reed attempting to qualify for the two million dollar All

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[88] *See* Eliana Docketerman, *Frog Juice: Horse Racing's New Doping Scandal,* TIME (June 21, 2012), http://newsfeed.time.com/2012/06/21/frog-juice-horse-racings-new-doping-scandal/ [https://perma.cc/E69U-55DD].

[89] Natalie Voss, *Chasing the Frog: Keeping Up With Slippery Cheaters*, PAULICK REPORT (Nov. 14, 2013), https://www.paulickreport.com/news/ray-s-paddock/chasing-the-frog-keeping-up-with-slippery-cheaters/ [https://perma.cc/ZCK6-KQNT].

[90] Jeanna Bryner, *What is 'Frog Juice?',* LIVE SCIENCE (June 20, 2012), https://www.livescience.com/21064-frog-juice-racehorse-drugs.html [https://perma.cc/24KG-Q2GW].

[91] *See* Voss, *supra* note 89.

[92] Natalie Voss, *Detection Of New Synthetic Drug Disturbing But Less Problematic Than Dermorphin*, PAULICK REPORT (December 2, 2015), https://www.paulickreport.com/news/ray-s-paddock/detection-of-new-synthetic-drug-disturbing-but-less-problematic-than-dermorphin/ [https://perma.cc/GKB5-RL4N].

[93] *See* John K. Neubert, *Effects of Mu- and Kappa-2 opioid receptor Opioid Receptor Agonists on Pain and rearing Rearing Behaviors*, 3 BEHAV. & BRAIN FUNCTIONS J. 49, 4 (2007).

[94] *See id.* at 20.

[95] *See* Walt Bogdanich, *Horse Given Painkiller Breaks Down at New Mexico Racetrack*, N.Y. TIMES (Aug. 17, 2012), https://www.nytimes.com/2012/08/18/sports/horse-given-painkiller-breaks-down-at-new-mexico-racetrack.html [https://perma.cc/AW2M-S8DV].

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American Futurity at Ruidoso Downs—broke down while running in his qualifying race and, as a result, was euthanized on the track.[96] A post-mortem blood sample from Jess A Zoomin was collected for testing; the sample tested positive for dermorphin.[97] Along with Jess A Zoomin, four additional horses under trainer Jeffrey Reed's care tested positive for dermorphin; he was handed down a suspension of twenty-one years and a fine of $23 thousand.[98] This example illustrates the potential harmful consequences associated with the administration of a level one drug, and shows how harshly racing commissions punish trainers whose horses are detected carrying a Class 1 drug.

Other types of Class 1 drugs that have the same or similar effect on horses as dermorphin are cocaine, fentanyl, heroin, methamphetamine, morphine, various snake venoms, synthetic cannabis, and all DEA Schedule 1 drugs.[99]

3. Class 2 Drug Descriptions

Drugs assigned to the Class 2 category are those that: "1) are not generally accepted as therapeutic agents in racing horses, or 2) they are therapeutic agents that have a high potential for abuse."[100] Drugs in this class include: "psychotropic drugs, certain nervous system and cardiovascular system stimulants, depressants, neuromuscular blocking agents, and injectable local anesthetics."[101] The overwhelming majority of Class 2 designated drugs violations are, similar to Class 1 violations, assigned a Class A penalty if detected above the jurisdictional threshold; however, there are a handful of Class 2 drugs that are subject to punishment

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[96] *See id.* (explaining that the richest race run in the state of New Mexico is "The All-American Futurity).").

[97] *See id.*

[98] Ray Paulick, *Reed suspended 21 years for frog juice in New Mexico*, PAULICK REPORT (October 1, 2012), https://www.paulickreport.com/news/ray-s-paddock/reed-suspended-21-years-for-frog-juice-in-new-mexico/ [https://perma.cc/AW2M-S8DV].

[99] Uniform Classification Guidelines for Foreign Substances And Recommended Penalties Model Rule at 12.

[100] Uniform Classification Guidelines for Foreign Substances And Recommended Penalties Model Rule at 4.

[101] *Id.*

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under Class B.[102] Class B punishment, for a first time offender, carries the sanction of a minimum fifteen-day suspension and a minimum fine of $500; mitigating circumstances, however, are taken into account when determining the punishment of a violating trainer.[103]

Lidocaine is a Class 2 drug that subjects a violating trainer to Class B punishment.[104] Unlike dermorphin, the mere presence of lidocaine in a horse's system does not automatically subject a trainer to punishment; instead, a trainer is only in violation if his or her horse is found with an amount of lidocaine in its system that is above the racing jurisdiction's predetermined threshold.[105] The ARCI—based on the recommendation of the RMTC—states that a trainer is in violation for the use of lidocaine if there is more than 20 pg/mL found in the plasma or serum of the horse.[106]

Lidocaine is the type of drug that is generally accepted as a therapeutic agent in horse racing, but that also has a high potential for abuse.[107] Generally, the drug is used to repair lacerations, aid in the administration of sutures, and anesthetize the nerves in horses that are lame to prevent the feeling of pain, but the drug can also be used as an epidural to alleviate back issues.[108] Most notably, in 2008, high profile trainer Steven Asmussen was assessed a six-month suspension and a fine of

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[102] *Id.* (including examples such as Dibucaine, Ketamine, Levamisole, Mepivacaine, Nitroglycerin, and Resperine).

[103] Model Rules of Racing and Wagering, ASS'N OF RACING COMM'RS INT'L § ARCI-025-020(B) (explaining that the range of punishment increases for each subsequent time that a trainer is found to be in violation. A second lifetime offense carries a minimum punishment of a thirty-day suspension and fine of $1,000.00; a third lifetime offense carries a minimum punishment of a sixty-day suspension and fine of $2,500.00) [https://perma.cc/GP7E-H2YG].

[104] ASS'N OF RACING COMM'RS INT'L, UNIFORM CLASSIFICATION GUIDELINES FOR FOREIGN SUBSTANCES AND RECOMMENDED PENALTIES MODEL RULE, at 29 (Jan. 2019).

[105] *RMTC Approved Controlled Therapeutic Medications*, RACING MEDICATION & TESTING CONSORTIUM, http://rmtc.kinsta.com/wp-content/uploads/2016/02/CTS-List-2-25-2016.pdf [https://perma.cc/E2GK-F5K7].

[106] *Id.*

[107] ASS'N OF RACING COMM'RS INT'L, UNIFORM CLASSIFICATION GUIDELINES FOR FOREIGN SUBSTANCES AND RECOMMENDED PENALTIES MODEL RULE, at 4.

[108] Ray Paulick, *Asmussen, Dutrow Positives: Lidocaine, Clenbuterol Explained,* PAULICK REPORT (Nov. 17, 2020, 12:46 AM), https://www.paulickreport.com/news/ray-s-paddock/asmussen-dutrow-positives-lidocaine-clenbuterol-explained/ [https://perma.cc/CR8G-VSB3].

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$1,500 for racing a horse in his care that tested positive for lidocaine at Lone Star Park in Grand Prairie, Texas.[109] At the time, Texas employed a "zero-tolerance" policy on lidocaine; therefore, the mere presence of the drug would subject the violating trainer to liability.[110]

3. Class 3 Drug Descriptions

Encompassing Class 3 drugs are those "that may or may not have a generally accepted medical use in the racing horse, but the pharmacology of which suggests less potential to affect performance than drugs in Class 2."[111] Drugs in this class include "bronchodilators, anabolic steroids and other drugs with primary effects on the autonomic nervous system, procaine, antihistamines with sedative properties and the high-ceiling diuretics."[112] The vast majority of Class 3 drug violations carry a Class B punishment range; though, there are a handful of Class 3 drugs that still impose Class A punishment if the drug is used impermissibly.[113]

Clenbuterol is a Class 3 drug that is consistently and impermissibly used by trainers on their horses in racing commissions across the country.[114] The RMTC recommends that a trainer be liable for the use of Clenbuterol in his or her horse only when there is more than 140 pg/mL of the drug found in the horse's urine and/or plasma.[115] However many jurisdictions, such as New Mexico, have disallowed any level of Clenbuterol to be detected in

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[109] Karen Johnson, *Asmussen to Fight Six-Month Texas Suspension*, BLOODHORSE (July 17, 2009), https://www.bloodhorse.com/horse-racing/articles/147603/asmussen-to-fight-six-month-texas-suspension [https://perma.cc/N9DG-KZQG].

[110] *Id.*

[111] ASS'N OF RACING COMM'RS INT'L, UNIFORM CLASSIFICATION GUIDELINES FOR FOREIGN SUBSTANCES AND RECOMMENDED PENALTIES MODEL RULE, at 4.

[112] *Id.* (including various examples of other Class 3 designated drugs are Albuterol, Clonidine, Niflumic Acid, Pindolol, Sotalol, TCO2, Timolol, Tolmentin, Trenbolone, and Valernic acid).

[113] *See id.* at 14–15, 21, 29 (showing that an example of drugs as such are Arecoline, Bolasterone, Dimefline, and Lisinopril).

[114] *Id.* at 18.

[115] RACING MEDICATION & TESTING CONSORTIUM, *supra* note 105.

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a horse's system without his or her trainer being subject to liability.[116]

Clenbuterol is a "beta-2-adrenoceptor agonist and the only FDA-approved medication for horses with reversible bronchospasm, and is commonly used to treat horses with inflammatory airway disease and recurrent airway obstruction."[117] The drug primarily works "by relaxing the smooth muscles surrounding the airways, opening the [airway] passages" of the horse, and loosening excess mucus.[118] Thus, many trainers favor the use of Clenbuterol because of its ability to allow a horse with breathing difficulties to perform better on race day.[119] Other examples of Class 3 drugs include: flufenamic acid (an anthranilic acid derivative with analgesic, anti-inflammatory, and antipyretic properties), and stanozolol (an anabolic steroid).[120]

4. Class 4 and Class 5 Drug Descriptions

The Class 4 drug list is composed of therapeutic medications that would be expected to have less potential to affect performance than those drugs contained in Class 3, such as: "less potent diuretics, corticosteroids, antihistamines and skeletal muscle relaxants without prominent central nervous system ("CNS") effects, expectorants and mucolytics, hemostatics, cardiac glycosides and anti-arrhythmics, topical anesthetics, antidiarrheals and mild analgesics."[121] A trainer whose horse has been found to have a Class 4 drug in its system above the permissible jurisdictional threshold is subject to either a Class B or Class C punishment.[122] Class C punishment, for a first time

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[116] Frank Angst, *New Mexico Ramps Up Rules on Clenbuterol*, BLOODHORSE (June 29, 2018), https://www.bloodhorse.com/horse-racing/articles/228299/new-mexico-ramps-up-rules-on-clenbuterol [https://perma.cc/FZ98-G6US].

[117] Natalie DeFee Mendik, *Long-term Clenbuterol Use in Horses Studied*, THE HORSE (Sep. 5, 2012), https://thehorse.com/118086/long-term-clenbuterol-use-in-horses-studied/ [https://perma.cc/N2US-QUXX].

[118] *See id.*

[119] *See id.*

[120] ASS'N OF RACING COMM'RS INT'L, UNIFORM CLASSIFICATION GUIDELINES FOR FOREIGN SUBSTANCES AND RECOMMENDED PENALTIES MODEL RULE 26, 45 (JAN. 2018).

[121] *Id.* at 4.

[122] *See id.* at 57.

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offender, carries the minimum sanction of a written warning and the maximum sanction of a $500.00 fine; mitigating circumstances, however, are taken into account when determining the punishment to impose on a trainer found to be in violation.[123]

An example of a common Class 4 drug used by trainers is Dexamethasone.[124] Dexamethasone is "a synthetic corticosteroid hormone used to manage inflammation in diseases or conditions in which the immune system has a significant role."[125] "The anti-inflammatory effects of Dexamethasone are about twenty-five times stronger than those of natural cortisol."[126] The RMTC allows up to 5 pg/mL of the drug to be detected in the blood or serum of the horse before the presence of the drug become violable.[127] Other examples of Class 4 drugs include phenylbutazone ("Bute"), flunixin ("Banamine"), and methocarbamol.[128]

Only a brief explanation is needed to describe the Class 5 drug category set. Comprising drugs in the Class 5 category are "therapeutic medications that have very localized actions only, such as anti-ulcer drugs and certain anti-allergic drugs."[129] Anticoagulant drugs are also included.[130] "The recommended penalty for a violation involving a drug that carries a Category 'D' penalty is a written warning to the trainer and owner."[131] Examples of Class 5 drugs include Warfarin (an anticoagulant), Cimetidine (an acid reducer), and Lansoprazole (used to treat the symptoms of gastroesophageal reflux disease).[132]

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[123] ASS'N OF RACING COMM'RS INT'L MODEL RULES OF RACING § ARCI-011-020(2018).

[124] ASS'N OF RACING COMM'RS INT'L, UNIFORM CLASSIFICATION GUIDELINES FOR FOREIGN SUBSTANCES AND RECOMMENDED PENALTIES MODEL RULE at 20.

[125] Barbara Forney, *Dexamethasone for Horses*, https://www.wedgewoodpetrx.com/learning-center/medication-information-for-pet-and-horse-owners/dexameth [https://perma.cc/MNR3-VKXQ].

[126] *Id.*

[127] *Approve Controlled RMTC Approve Controlled Medications*, http://rmtc.kinsta.com/wp-content/uploads/2016/02/CTS-List-2-25-2016.pdf [https://perma.cc/PR97-XKRQ].

[128] *See id.*

[129] ASS'N OF RACING COMM'RS INT'L, *UNIFORM CLASSIFICATION GUIDELINES FOR FOREIGN SUBSTANCES AND RECOMMENDED PENALTIES MODEL RULE* at 4.

[130] *Id.*

[131] *Id.*

[132] *Id.*

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C. Racing Commissions and the ARCI Defer to the RMTC to Set Thresholds

In determining the threshold at which permissible drug becomes illegal, the majority of racing commissions in the United States, and even the ARCI, defer to the RMTC's Schedule of Controlled Therapeutic Substances[133] created by the RMTC Scientific Advisory Committee.[134] The RMTC is an organization that seeks to develop and promote "uniform rules, policies and testing standards" at the national level.[135] It is comprised of twenty- three member organizations that "represent horsemen's groups, breed registries, racetracks, racing regulators industry associations and veterinarians."[136] Various subcommittees of the RMTC joined forces to create what is known as the National Uniform Medication Program ("NUMP").[137] The NUMP is a program that essentially prescribes: (1) a schedule of controlled therapeutic substances; (2) a multiple medication violation ("MMV") program; and (3) an RMTC laboratory accreditation process.[138] The primary goal of the NUMP is to "develop a comprehensive uniform program for the regulation of medications in horseracing" that can be utilized by every horse racing commission across the United States.[139]

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[133] Press Release, *Three More Laboratories Receive RMTC Accreditation: 23 States Now Using RMTC-Accredited*, RACING MEDICATION & TESTING CONSORTIUM (Apr. 30, 2014) https://rmtcnet.com/three-more-laboratories-receive-rmtc-accreditation-23-states-now-using-rmtc-accredited-4302014/ [https://permaarchives.org/warc/20190921173826/https://www.ntra.com/three-more-laboratories-receive-rmtc-accreditation/].

[134] *National Uniform Medication Report: FAQ*, RACING MEDICATION & TESTING CONSORTIUM, https://rmtcnet.com/status-report-and-faq/ [https://perma.cc/7LSK-3ERQ] (stating "[t]he RMTC Scientific Advisory Committee (SAC) is a group of experienced and knowledgeable regulatory veterinarians, veterinary pharmacologists, private practice veterinarians, and analytical chemists").

[135] *Id.*

[136] *See id.*

[137] *Id.*

[138] *See id.* ("Each of these provisions is being used in numerous racing jurisdictions across the country. The goal is uniform implementation of all four aspects of the program in every racing state nationwide.").

[139] *Id.*

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The RMTC, and more specifically, the Scientific Advisory Committee both: choose which drugs are to be placed on the Schedule of Controlled and Therapeutic Substances; and determine at which threshold such drugs become illegal.[140] In deciphering which drugs to place on the Schedule of Controlled and Therapeutic Substances, the RMTC sent a survey to racetrack practitioners to first determine which types of drugs they felt were necessary to practice in a racing environment.[141] After receiving the results from the survey, the final list was created by the Scientific Advisory Committee "with further input from ...analytical chemists, veterinary pharmacologists, and regulatory veterinarians in conjunction with the [Association of Racing Commissioners International]."[142]

Once the list of drugs that were to be placed on the Schedule of Controlled and Therapeutic Substances was created, the RMTC was tasked with creating permissible threshold levels for each named drug.[143] Some threshold levels were simply developed by the utilization of historical data and research.[144] Other "thresholds, however, were developed using research studies funded by the RMTC."[145]

II. THE ABSOLUTE INSURER RULE: UNCONSTITUTIONAL, IRRATIONAL, AND INEFFECTIVE

A. Explanation of the Absolute Insurer Rule

As previously mentioned, the absolute insurer rule "holds a trainer strictly liable for the presence of any prohibited medication

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[140] RACING MEDICATION & TESTING CONSORTIUM, *supra* note 134.

[141] *See id.* (noting that the drugs placed on the RMTC's Schedule of Controlled Substances are those drugs that can be found in a horse's system at a predetermined threshold level. The SAC does not determine threshold levels for Level 1 drugs, because the mere presence of a Level 1 drug would subject the violating trainer to liability regardless of what level the drug was found.)

[142] *Id.*

[143] *See id.*

[144] *Id.* (suggesting phenylbutazone, flunixin meglumine, and furosemide are all drugs named on the Schedule of Controlled and Therapeutic Substances that had their permissible threshold levels determined by historical data and research.)

[145] *Id.*

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or drug in his or her horse's system."[146] Thus, liability "does not depend on fault, just the incidence of a violation."[147] Today, at least some form of the absolute insurer rule described above is implemented in each of the thirty-eight racing jurisdictions across the United States.[148]

1. Courts Have Found the Rule to be Unconstitutional in the Past

The constitutionality of the absolute insurer rule has long been a topic of debate amongst horse racing practitioners, officials, and legal scholars alike. The absolute insurer rule has been deemed unconstitutional in the past.[149] For example, in 1946, a Maryland Court of Appeals held that it was unconstitutional for a racing commission to "prevent one from making a defense to a charge brought against him by substituting an irrebuttable presumption for facts."[150] The court went so far as to call the enforcement of the absolute insurer rule as being "worse than applying a regularly adopted rule ex post facto."[151]

The constitutionality of the absolute insurer rule was again evaluated in 1969 by the Supreme Court of Illinois in *Brennan v. Illinois Racing Board*.[152] The opinion grossly exposed the rule's potential to punish an innocent trainer for the actions of a malicious third party.[153] In *Brennan*, a trainer's horse was detected with Ritalin, a jurisdictionally prohibited substance, in its urine

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[146] Matt Hegarty, *Motion ruling could impact absolute-insurer statute*, DRF, (Aug. 22, 2017), https://www.drf.com/news/motion-ruling-could-impact-absolute-insurer-statute [https://perma.cc/HG4J-RPLY].

[147] Motion v. Ky. Horse Racing Comm'n, No. 16-CI-1195, 2017 WL 6517732, at *7 (Ky. Cir. Ct. Aug. 18, 2017).

[148] Bob Heleringer, *An Abbreviated History of Absolute Insurer Rule*, BLOODHORSE (August 30, 2017), https://www.bloodhorse.com/horse-racing/articles/223352/an-abbreviated-history-of-absolute-insurer-rule. [https://perma.cc/AR5D-PXL3].

[149] *See, e.g.*, Mahoney v. Byers, 48 A.2d 600, 603 (Md. 1946) ("Such a law would be arbitrary, illegal, capricious and hence unconstitutional").

[150] *Id.*

[151] *Id.* at 604.

[152] Brennan v. Ill. Racing Bd., 247 N.E.2d 881, 881 (Ill. 1969).

[153] *See id.* at 882–84.

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after winning a race at Hawthorne Race Course.[154] Illinois's absolute insurer rule constrained the court to presume the trainer to be liable.[155] The trainer contended that another employee, fired ten-days prior to the race, actually administered the drug, and that "on the date preceding the race he saw that employee around the premises and told him to stay away from the barn."[156]

The Illinois Supreme Court held unconstitutional any application and/or enforcement of the absolute insurer rule, reasoning that: (1) it is a violation of due process to punish a trainer without at least some showing of fault; (2) it is a fundamental principle of Anglo-Saxon justice that responsibility is personal and that penalties may not be inflicted on one person because of another's acts; and (3) there has been no showing that the absolute insurer rule has a real and substantial relation to the protection of racetrack patrons against fraud or deceit.[157] Thus, the Court found the absolute insurer rule to be void in its entirety.[158]

2. The Majority of Jurisdictions Currently Find the Rule Constitutional

Though the absolute insurer rule has been held to be unconstitutional in the past, the majority of states today find the rule to be constitutional.[159] The Fifth Circuit Court of Appeals analyzed the constitutionality of the absolute insurer rule—via a Texas state case by way of federal question jurisdiction—as an

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[154] *See id.* at 882.

[155] *Id.* at 882–83 ("suggesting that a trainer would be the absolute insurer of and responsible for the horse's condition once it has been entered into a race by him/her despite the acts of a third party).

[156] *Id.* at 882.

[157] *Id.* at 882–84 (explaining that the court focuses on the well-being of patrons, rather than of the horse, because the focus of the constitutionality of the rule depended on whether the rule was the use of police powers).

[158] *Brennan*, 42 N.E.2d at 884.

[159] *See* Div. of Pari-Mutuel Wagering v. Caple, 362 So.2d 1350, 1354–55 (Fla. 1978); O'Daniel v. Ohio State Racing Comm'n, 307 N.E.2d 529, 532 (Ohio 1974); Jamison v. State Racing Comm'n, 507 P.2d 426, 428 (N.M. 1973); State v. W. Va. Racing Comm'n, 55 S.E.2d 263, 272 (W. Va. 1949); Sandstrom v. Cal. Horse Racing Bd., 189 P.2d 17, 19 (Cal. 1948); DeGroot v. Ariz. Racing Comm'n, 686 P.2d 1301, 1312 (Ariz. App. 1984); Briley v. La. State Racing Comm'n, 410 So.2d 802, 806 (La. App. 1982); Darev. State, 388 A.2d 984, 986 (N.J. Super. App. Div. 1978); Fioravanti v. State Racing Comm'n, 375 N.E.2d 722 (Mass. App. 1978).

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issue of first impression in 2006.[160] The primary issue before the court was whether the absolute insurer rule, both facially and as applied, violates a trainer's right to substantive due process.[161]

The Fifth Circuit went on to hold that the rule did not violate federal due process.[162] The Court rested its conclusion on the determination that the rule does not create an irrebuttable presumption of guilt, because "it does not assign fault, but instead, requires the trainer to bear the responsibility of the horse's condition, as a contingency to being licensed as a trainer by the state."[163] In addition, the Court held that the enforcement of the absolute insurer rule does not violate a trainer's substantive due process rights, because "due process does not require proof of guilty knowledge before punishment may be imposed" in areas of activity requiring strong police regulation to protect public interests.[164]

B. The Motion *Opinion: The Absolute Insurer Rule is Unconstitutional*

On August 15, 2017, Kentucky Circuit Court Judge Thomas D. Wingate sent shockwaves through the horse racing community by issuing an opinion that declared the absolute insurer rule unconstitutional for the first time since the Brennan opinion in 1969.[165] The opinion analyzed the constitutionality of trainer H. Graham Motion's suspension handed down by the Kentucky Horse Racing Commission as a result of a horse in his care testing positive for a prohibited substance post-race.[166]

On April 24, 2014, trainer H. Graham Motion's horse Kitten's Point captured the Bewitch Stakes at Keenland Racecourse, earning a purse of $90 thousand.[167] Following the race, a blood sample was taken from Kitten's Point and sent to a

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[160] *See* Hudson v. Texas Racing Comm'n, 455 F.3d 597, 598 (5th Cir. 2006).

[161] *See id.* at 599.

[162] *Id.* at 601. ("We agree with the majority of jurisdictions that the absolute insurer rule does not violate [substantive] due process.").

[163] *Id.* at 600.

[164] *Id.*

[165] *See Motion*, 2017 WL 6517732, No. 16-CI-1195 at *7–8.

[166] *See id.* at *1.

[167] *Id.*

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Kentucky testing laboratory, where it was revealed that the horse had 2.9 ng/mL of Methocarbamol[168] in her serum; Kentucky permits a maximum of only 1.0 ng/mL of Methocarbamol to be present in a horse's serum at the time of a race.[169] As a result of the positive test, the Kentucky Horse Racing Commission suspended H. Graham Motion from racing for five days, ordered that he pay a $500 fine, and ordered that the owner of Kitten's Point forfeit the $90 thousand purse money that had been won in the Bewitch Stakes.[170]

The order was appealed to the Franklin Circuit Court and reversed in its entirety on the grounds that the absolute insurer rule was unconstitutional, because: (1) the setting and formulation of the Methocarbamol threshold level was arbitrary and capricious; and (2) the absolute insurer rule denies the accused of substantive due process.[171] Accordingly, the *Motion* opinion provided trainers charged with drug violations in the future, with a groundbreaking and novel defense to attack their presumption of guilt.

1. Drug Thresholds are not Rooted in Scientific Evidence

The first means by which a trainer may now defend his or her drug violation charge is to argue that the specific drug threshold level adopted by a racing commission is arbitrary and capricious in that no link exists between the scientific validity of

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[168] Barbara Forney, *Dexamethasone For Horses*, https://www.wedgewoodpetrx.com/learning-center/medication-information-for-pet-and-horse-owners/dexameth [https://perma.cc/MNR3-VKXQ] ("Methocarbamol is a centrally acting muscle-relaxant that is chemically related to guaifenesin. Methocarbamol diminishes skeletal muscle hyperactivity without altering normal muscle tone." .") (suggesting that Methocarbamol interrupts the transmission of abnormal impulses from disturbed muscle but does not affect the contractile mechanism of skeletal muscle and is used to treat muscle spasms associated with back problems and exercise-related muscle problems such as exertional rhabdomyolysis).

[169] *See* Motion, 2017 WL 6517732, No. 16-CI-1195 at *1. (explaining that Kentucky is a jurisdiction that follows the RMTC permissible drug threshold recommendations, and thus, allows no more than 1.0 ng/mL of Methocarbamol to be detected in a horse's serum post-race).

[170] *Id.* at *1.

[171] *See id.* at *7.

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the effect of the drug and the threshold set by the jurisdiction.[172] Essentially, to overcome his or her charge, the trainer must be able to proficiently show that if the drug were to be allowed at a higher threshold level than what the racing jurisdiction in question allows, there would be no additional negative pharmacological effect on the equine athlete.[173] The various means by which to achieve this task are more fully described below.

(a) Provide Expert Testimony That Threshold Level is Low

In order for a racing commission to permissibly and constitutionally set a drug threshold regulation, the racing commission must be able to prove that the use of a drug at the set threshold level "would endanger the health or welfare of the horse or the safety of the rider."[174] Therefore, the primary and most effective means by which to challenge the constitutionality of the drug threshold at issue is to provide expert testimony supporting a finding that the use of the drug at the level in which was detected in the equine athlete post-race would pose no negative pharmacological effect on a horse.[175]

For example, in the Motion matter, expert testimony revealed that even though the Kentucky Horse Racing Commission set the threshold level for Methocarbamol at 1.0 ng/mL, the presence of the drug at a threshold level of 2.9 ng/mL—the amount detected in Kitten's Point post-race—or at levels even higher, would pose no negative pharmacological effect on a racehorse.[176] The defense team proffered the testimony of two respected veterinarians and the head of the Kentucky Horse Racing Commission's Testing Laboratory to support their argument.[177] Both veterinarians testified that the presence of 2.9 ng/mL of Methocarbamol in a horse's system "would cause no impact on the

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[172] *See id.* at *4.

[173] *See id.* at *5.

[174] Stewart v. Ky. Horse Racing Comm'n., No. 2010-CA-001929-MR, 2013 WL 1003534, at *6 (Ky. App. Mar. 15, 2013).

[175] *See id.*

[176] *See Motion*, 2017 WL 6517732, No. 16-CI-1195 at *5.

[177] *Id.* at *2.

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horse."[178] One veterinarian went so far as to testify that the presence of even 20 ng/mL of Methocarbamol in a horse's system would not cause a negative pharmacological effect on the horse.[179] To bolster the argument that the Methocarbamol drug threshold was set far too low, the defense offered, through the testimony of the head of the Kentucky Horse Racing Commission Testing Laboratory, that "he [had] previously recommended that the Ohio Racing Commission set the regulatory threshold for Methocarbamol at [a staggering] 1,000 ng/mL."[180]

The testimony of the aforementioned experts led the Court to hold that the record lacked "substantive evidence to show any rationale for the imposition of a threshold of 1.0 ng/mL of Methocarbamol."[181] Therefore, moving forward, in attacking and defending a drug violation charge brought by a racing commission, the defense should make the utmost effort to secure competent and reliable experts to testify that a current drug threshold is set so low such that use at the regulated level would not endanger the health or welfare of a horse.

(b) Argue Rulemaking Authority was Delegated to Outside Body

As mentioned earlier in the Article, the majority of racing jurisdictions defer to the RMTC's Uniform Drug Schedule to determine and set permissible drug threshold levels.[182] Accordingly, a second means by which an accused trainer can defend his or her drug charge is to argue that a racing commission, by relying on the RMTC's drug schedule, has impermissibly and unconstitutionally delegated its rulemaking authority to an outside body.[183]

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[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.* at *5.

[182] RACING MEDICATION & TESTING CONSORTIUM, *supra* note 134.

[183] *See* United States v. Mead Corp., 533 U.S. 218, 218 (2001) (holding that Congress can delegate rulemaking authority to an agency, but not going so far as to permit an agency to delegate rulemaking authority to an outside body).

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In *Motion*, it was revealed that the Kentucky Horse Racing Commission's Lab Director was also a member of the Scientific Advisory Committee for the RMTC, and that he had substantial involvement in the creation of the RMTC's Uniform Drug Schedule that recommended permissible threshold levels for a broad array of drugs.[184] In regard to the threshold level for Methocarbamol, the lab director recommended a regulatory level of 20 ng/mL; however, the RMTC rejected his proposal and adopted the implemented 1.0 ng/mL threshold level instead.[185]

The director, acting as the head of the Kentucky Horse Racing Commission's Testing Laboratories, recommended a higher threshold level for Methocarbamol than what was implemented.[186] The director raised the question as to whether the Kentucky Horse Racing Commission delegated rulemaking authority to an outside body by placing total and absolute deference on the RMTC's Uniform Drug Schedule and ignoring the opinion of their own laboratory director.[187] Ultimately, the Court held that the Commission had improperly delegated its rulemaking authority to the RMTC and thus, that the threshold level for Methocarbamol was not rooted in science, but rather, in the opinion of an outside agency.[188]

It is crucial to make clear that the court in *Motion* does not hold that the mere reliance on the RMTC's Uniform Drug Schedule is unconstitutional—that is simply not the case.[189] What the opinion does hold, however, is that racing commissions should investigate the RMTC's drug threshold recommendations and ensure that strong scientific data supports the threshold at issue, rather than blindly implementing the recommendations without independent research.[190] Accordingly, following the Motion opinion—in addition to arguing that the use of a given drug at a higher threshold than what the jurisdiction has adopted would not have a negative pharmacological effect on a racehorse—trainers

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[184] *See Motion*, 2017 WL 6517732, at *3.
[185] *Id.*
[186] *Id.*
[187] *Id.* at *4.
[188] *Id.* at *5–6.
[189] *See id.*
[190] *See Motion*, 2017 WL 6517732, at *5–6.

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are now able to defend their drug charges by arguing that the racing commission's drug threshold levels are not rooted in scientific evidence since the individual racing commission, itself, has failed to obtain and/or collect strong scientific data to support the threshold.[191]

2. The Rule Deprives the Accused of Substantive Due Process

The absolute insurer rule is unconstitutional because the drug thresholds assigned in the majority of jurisdictions are not rooted in scientific evidence. Additionally, the application of the rule denies the accused his or her constitutional right to substantive due process.[192] Generally, a racehorse trainer undertakes his or her trade as a means of earning a living.[193] Therefore, the loss of a trainer's license, or even a suspension of a trainer's license, can be considered the most severe and harshest possible sanction the trainer's ability to generate income, and thus, maintaining a living, will be rendered impossible.

In the context of criminal law, strict liability offenses are generally disfavored for crimes that carry with them a severe punishment.[194] Strict liability is generally associated with civil violations, which incur monetary penalties.[195] In fact, the greater the possible punishment, the more likely that the prosecuting body

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[191] *See id.* at *4–5 .

[192] *See id.* at *7.

[193] *See What is a Racehorse Trainer?*, CAREEREXPLORER, https://www.careerexplorer.com/careers/racehorse-trainer/ [https://perma.cc/6D7F-RMC5] (A racehorse trainer is able to earn a substantial amount of money depending on the level of competition and how much prize money is involved in each race, as they take a percentage of the horse's winnings.").

[194] *See* Aguirre v. State of Texas, 22 S.W.3d 463, 472 (Tex. Crim. App. 1999) ("Some commentators insist that strict liability has no place, or should have no place, in the law of crimes.").

[195] *See id.* ("Strict liability is frequently associated with torts, regulations, and 'civil offenses' which impose a penalty but that are not crimes");."); *see also* State of Texas v. Taylor, 322 S.W.3d 722, 728 (Tex. Ct. App.—. 2010) (finding that prohibitions against water pollution, driving while intoxicated, the sale of horsemeat for human consumption, and speeding are examples of strict liability offenses).

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will be required to prove the defendant's culpability in carrying out the crime or violation.[196]

A trainer whose horse has tested positive for a prohibited substance is almost always subject to at least some level of suspension as a means of punishment.[197] Similar to how a criminal defendant is deprived of his or her liberty by being incarcerated, a trainer is deprived of his or her liberty by the suspension of a license, and thus, a means of making a living. Accordingly, because of the potential punishment associated with drug violations in horse racing—especially those violations that carry with them "Class A" or "Class B" punishment—a trainer is deprived of substantive due process when his or her license is suspended without affording the trainer an opportunity to rebut the presumption of guilt placed upon him or her.

In *Motion*, the court held that in order to preserve the substantive due process rights of an accused trainer, horse racing commissions must afford the accused trainer the opportunity to "be able to present evidence to rebut their liability in an instance of violation" and "to be heard on the propriety of his actions to challenge liability for a dosing violation."[198] Therefore, just as a criminal defendant who is charged with a crime carrying a punishment that includes the possibility of incarceration is afforded the opportunity to rebut his charge, a trainer who is charged with a drug violation carrying a punishment that includes the possibility of suspension must be afforded the same; any rule that creates a strict responsibility for trainers in the care for horses must be rebuttable and cannot be absolute.[199]

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[196] *Aguirre*, 22 S.W.3d at 476–77.

[197] MODEL RULES OF RACING § ACRI-025-020(B) (ACRI 2018) (discussing that the only time that a trainer is not subject to suspension is for a violation of a drug class carrying with it "Class C" punishment).

[198] *See Motion*, 2017 WL 6517732, at *7.

[199] *Id.*

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C. Inaccurate Testing Methods Make the Adoption of the Rule Irrational

The absolute insurer rule should be abolished because it is unconstitutional, and because the current state of equine drug testing easily allows for a trainer to be heavily punished as a consequence of an inaccurate lab result. Currently, testing standards for equine athletes vary on a state-by-state basis.[200] This leads to a high degree of variance as to what prohibited substances are detected from jurisdiction to jurisdiction.[201] Furthermore, the cost in which a racing jurisdiction is willing to spend per test varies.[202] Thus, the possibility arises for trainers operating in jurisdictions that employ a "cheaper" form of testing to be subject to punishment as the result of an inaccurate and unreliable result.[203] In fact, even those jurisdictions that utilize the most expensive forms of testing risk the possibility of an inaccurate result as a consequence of environmental contamination from substances that are naturally found in nature or that are ingested by the horse as a result of human contamination.[204]

In total, the horse racing industry spends about forty-four million dollars per year on drug testing and related practices;[205] each drug test costs the racing jurisdiction anywhere between fifty-five dollars two-hundred-and-thirty dollars, depending on which type of test the racing jurisdiction wishes to utilize.[206] "There are

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[200] *See* Daniel Ross, *Standard Issue: Drug Testing Far From Uniform in American Horse Racing*, THE GUARDIAN (Sept. 16, 2015, 5:00 PM), https://www.theguardian.com/sport/2015/sep/16/standard-issue-drug-testing-far-from-uniform-in-american-horse-racing [https://perma.cc/WB7R-FTTB].

[201] Tom LaMarra, *Survey: Drug Testing System Has Serious Flaws*, BLOODHORSE, (Oct. 14, 2014), https://www.bloodhorse.com/horse-racing/articles/111316/survey-drug-testing-system-has-serious-flaws [perma.cc/R6G5-LT3X].

[202] Natalie Voss, *Testing, Testing: How Strong Are Racing's Drug Testing Programs?*, PAULICK REPORT, (Apr. 16, 2014, 8:47 AM), https://www.paulickreport.com/news/ray-s-paddock/testing-testing-how-strong-are-racings-drug-testing-lab [perma.cc/U2AQ-JX3R].

[203] *Id.*

[204] *See, e.g.*, Kentucky Equine Research Staff, *Molds: Possible Cause of Positive Equine Drug Tests*, EQUINEWS, (Aug. 18, 2016), https://ker.com/equinews/molds-possible-cause-positive-equine-drug-tests/ [perma.cc/5YRZ-CUXG].

[205] LaMarra, *supra* note201.

[206] *See id.*

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three primary types of testing methods mentioned in most contracts" between the testing laboratory and the racing jurisdiction: "thin-layer chromatography ("TLC"), enzyme-linked immunoassays ("ELISA kits"), and liquid or gas chromatography/mass spectronomy ("LCMS/GCMS")."[207] The various types of tests are each discussed more fully, in turn, below.

1. Types of Drug Testing Methods Used in American Horse Racing

Each method of testing analyzes a sample of either blood or urine taken from the racehorse.[208] The sample is usually taken from the equine athlete post-race but can also be taken randomly through a process known as "out-of-competition testing."[209]

(a) Thin-Layer Chromatography

TLC is a quick but relatively insensitive means of testing a sample, "and may only detect substances given to a horse within a few days."[210] The manner in which a TLC test functions is as follows: "TLC uses a [(1)] stationary phase, typically a silica gel bound to a plastic, glass or aluminum backing[;] and [(2)] a mobile phase, typically common organic solvents such as ethyl acetate or hexane, to separate components of a reaction or sample."[211] "Advantages of TLC include rapid analysis time, because many samples can be analyzed simultaneously, low solvent usage on a per-sample basis, a high degree of accuracy and precision for

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[207] Voss, *supra* note 202.

[208] PAGE BOUCHARD & JOSE CASTRO, UNIV. OF TENNESSEE COLL. OF VETERINARY MED., EQUINE DRUG TESTING (2015), https://vetmed.tennessee.edu/vmc/EquineHospital/Documents/FactSheet_LACS-EquineDrugTesting.pdf [https://perma.cc/WCX4-CGTE].

[209] MODEL RULES OF RACING § ACRI-011-022 (ARCI 2019) ("The commission may at a reasonable time on any date take blood, urine or other biologic samples as authorized by commission rules from a horse to enhance the ability of the commission to enforce its medication and anti-doping rules")..").

[210] *See* Voss, *supra* note 202.

[211] *Thin-Layer Chromatography (TLC)*, EAG LAB., https://www.eag.com/techniques/chromatography/thin-layer-chromatography-tlc/ [perma.cc/HYK4-RR8Q].

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instrumental TLC, and sensitivity in the nanogram or picogram range."[212] A disadvantage of TLC testing, however, is that the testing method can sometimes yield inaccurate results surrounding humidity and temperature.[213]

(b) Enzyme-Linked Immunoassays

ELISA kits are more expensive than TLC tests but generally, yield a more accurate result.[214] ELISA kits work by "rely[ing] on specific antibodies to bind the target antigen, and [utilizing] a detection system to indicate the presence and quantity of antigen binding."[215] The advantage of using an ELISA kit is that the test is highly sensitive, yields a very specific result, and is rather simple to perform.[216] The disadvantage, however, is that each kit can test for only a limited number of "closely-related drugs, making it expensive to test for a range of possible drugs using ELISA kits alone."[217]

(c) Liquid or Gas Chromatography/Mass Spectrometry

"LCMS/GCMS is a more recent development in drug testing and has the advantage of being both highly sensitive and efficient," but is also the most expensive of the testing options available to racing commissions.[218] LCMS/GCMS "combines two powerful techniques to provide the identification of compounds with low detection limits and the potential for quantitative analysis."[219] It

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[212] Joseph Sherma, ENCYCLOPEDIA OF ANALYTICAL CHEMISTRY: APPLICATIONS, THEORY & INSTRUMENTATION: THIN-LAYER CHROMATOGRAPHY 11485-86 (Robert A. Myers ed., 2011).

[213] *Id.* at 11489.

[214] Voss, *supra* note 202 (noting that one ELISA kit costs "between $50 and $100, [but] can test between 80 and 86 samples" at a single time).

[215] *ELISA Fundamental Principle, How ELISA Works—Immunoassays*, BOSTER, https://www.bosterbio.com/protocol-and-troubleshooting/elisa-principle [perma.cc/WW5U-C22U].

[216] *Id.*

[217] Voss, *supra* note 202.

[218] *Id.*

[219] *Gas Chromatography—Mass Spectrometry*, EAG LAB., https://www.eag.com/techniques/mass-spec/gas-chromatography-mass-spectrometry-gc-ms/ [https://perma.cc/4368-8MMC].

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is a means of testing that involves two distinct steps. The first phase is the liquid or gas chromatography phase, whereby "a sample is volatilized and carried by an inert gas through a coated glass capillary column."[220] The second phase is the mass spectrometry phase where "compounds leaving the [gas chromatography] column are fragmented by electron impact[; t]he charged fragments are detected, and the subsequent spectrum obtained can be used to identify the molecule."[221] The next subsection of this article discusses—despite this advanced model of testing—how a positive drug test result could yield an inaccurate result.

2. Environmental Contamination Can Yield False Positives

Holding a trainer strictly liable for the presence of a prohibited substance in his or her horse's system is irrational because it is possible that the result of the sample could yield a false positive and/or that the positive test result is a consequence of an environmental contaminant, rather than that of an affirmative act by the trainer. In instances as such, when there is even the slightest of possibilities that a trainer will be punished as the result of an inaccurate lab test, the trainer should be allowed to rebut his presumption of guilt and challenge the lab result prior to punishment being imposed.

The possibility that a lab result could yield a false positive is not a far-fetched idea, especially during the early 1990s.[222] For example, in 1991, the California Horse Racing Board revealed that a horse's post-race urine sample tested at California's primary testing laboratory came back positive for the presence of cocaine.[223] The accused trainer was afforded the opportunity to send a split

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[220] *Id.*

[221] *Id.* (noting that LCMS/GCMS is considered by those in the industry to be the most advanced method of testing that a jurisdiction could use in testing the samples obtained from their equine athletes).

[222] Bill Christine, *Second Opinion Disputes Positive Cocaine Test*, L.A. TIMES (Jan. 10, 1991), 12:00 AM), http://articles.latimes.com/1991-01-10/sports/sp-11189_1_positive-cocaine-test [https://perma.cc/2GFQ-3A4M].

[223] *Id.*

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sample of the urine to a laboratory of his choice for confirmation testing; the trainer chose to send the sample to Ohio State University.[224] After the sample was tested, Ohio State University issued a report indicating that no amount of cocaine was detected in the horse's system; due to the inconsistency in test results, the charge against the accused trainer was dropped.[225]

As time has progressed, so has the sophistication and reliability of testing methods utilized by racing commissions across the country.[226] Today, the concern is not so much that the test result will yield a *per se* false positive, but rather that—due to the increased sensitivity in testing methods—a positive result will be a consequence of environmental contamination, rather than the result of the intentional administration of a prohibited substance.[227] Environmental contamination can be caused by (1) moldy feed, or (2) a contaminant carried by a different horse, or (3) a contaminant carried by a human.[228]

(a) Moldy Feed Causing Environmental Contamination

It is not uncommon for a horse to inadvertently receive mold-contaminated feed.[229] Not only does mold potentially pose a health detriment to a horse, but it has also been linked to causing positive drug test results in samples.[230] Research shows that some types of molds commonly found in racehorse feed can produce "testosterone-like substances from plant-based steroids."[231] The

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[224] *Id.*

[225] *Id.*

[226] *See* Voss, *supra* note 202 (noting that many jurisdictions use liquid or gas Chromatography/Mass Spectronomy to test samples, whereas in the 1970's and 1980's the primary means of testing a sample was through the use of thin- layer chromatography).

[227] Peter Huntington, *Prohibited Substances, Feed, and the Performance Horse*, EQUINEWS (June 22, 2011), https://ker.com/equinews/prohibited-substances-feed-and-the-performance-horse/ [https://perma.cc/2AJE-9AJH] ("It is possible to inadvertently administer a forbidden substance via environmental contaminants of feed, supplements, or natural products.").

[228] *See* Kentucky Equine Research Staff, *supra* note204 204; *see also* Huntington, *supra* note 227.

[229] *See* Kentucky Equine Research Staff, *supra* note 204; *see also* Huntington, *supra* note 227.

[230] *See* Kentucky Equine Research Staff, *supra* note 204.

[231] *Id.*

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mold engages in a type of process called "biotransformation" that results in "the production of steroids or steroid precursors from plant products," and thus, can result in a positive drug test and subject the non-culpable trainer to liability.[232] This phenomenon is especially alarming considering that most racing jurisdictions have adopted a zero-tolerance policy for steroidal-like substances similar to what the mold produces.[233]

(b) Environmental Contaminant Contracted from a Different Horse

An additional means by which a test can yield a positive result as a consequence of environmental contamination is by the horse eating from a feed bin previously occupied by a different horse carrying a prohibited substance in its system.[234] Most commonly, competitive racehorses are kept in barns located on racetrack property; thus, it is possible that many different horses will rotate in and out of a single stall within a relatively short period, and without proper sanitation before the transition.[235] For example, in the Motion matter, the accused trainer argued that he had not affirmatively drugged his horse, but rather, that the horse "consume[d] hay that had trace amounts of Methocarbamol from another horse" who had previously occupied the same stall.[236] Because Methocarbamol is a stable drug, the trainer argued that it has the ability to linger in a feed bin for an extensive period of time, and thus, would remain active until it is ingested by a horse that subsequently occupies the same stall.[237] The Court noted that, because of the advances in modern scientific technology, it is now easier for environmental contaminants to cause inaccurate test

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[232] *Id.*

[233] *Id.*

[234] *See* Huntington, *supra* note 227 (finding in some cases, treatment of the previous stall occupant has led to a positive swab in a subsequent occupant, weeks after the first horse was treated).

[235] *See Keeneland Stable Area Quickly Transforms From Sales To Racing*, KEENELAND, (Sept. 26, 2016), https://www.keeneland.com/racing/keeneland-stable-area-quickly-transforms-sales-racing [https://perma.cc/UR8D-7LGW.].

[236] *See Motion*, 2017 WL 6517732, at *3.

[237] *See id.*

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results, and as such, absolute insurer rule should not apply in the horse racing context.[238]

(c) Environmental Contaminant Contracted from a Human

A final means by which an environmental contaminant in a horse's feed could lead to a positive drug test result is by contaminants being transferred from the hands of a human—usually the groom of a horse—to the feed prepared for the horse by said human.[239] In 2015, West Virginia's Charles Town Racetrack contracted with Industrial Laboratories, a laboratory with high-sensitivity testing capabilities, to test urine and blood samples for the presence of drugs from selected horses.[240] Shortly after Industrial Labs was retained, many samples tested positive for the drug Naproxen—a non-steroidal anti-inflammatory drug often used by humans under brand names like Aleve and Midol[241]—and usually regulated as a Class 4 drug subject to Class C punishment by racing jurisdictions that have adopted ARCI rules.[242] Interestingly, a majority of the horses that were yielding positive test results for Naproxen were those shipped in to race at Charles Town, and who were kept in a barn called the "receiving barn."[243]

The fact that mostly shipped-in horses were being detected with Naproxen in their system, despite the accused trainers claiming to have never administered the drug, led racing officials to speculate that the positive results may have been a result of environmental contamination rather than by an affirmative act of the trainer.[244] Accordingly, the West Virginia Racing Commission "swabbed the ship-in stalls and sent the samples to Industrial Laboratories for analysis."[245] The results not only revealed that the stalls were contaminated with Naproxen but also with drugs

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[238] *See id.* at *7.

[239] Clara Fenger, *An In-Depth Look at Stall Contamination*, NAT'L HORSEMEN'S BENEVOLENT & PROTECTIVE ASS'N, https://nationalhbpa.com/an-in-depth-look- at-stall-contamination/ [https://perma.cc/EQ2A-8SLP].

[240] *Id.*

[241] *Id.*

[242] KY. REV. STAT. ANN. § 218A.100 (LexisNexis 2019).

[243] *See*Fenger, *supra* note239 239.

[244] *Id.*

[245] *Id.*

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widely used by humans as recreational substances like cocaine, methamphetamine, and methylenedioxypyrovalerone ("MDPV") or "bath salts."[246] In fact, "a total of fourteen human prescription or over-the-counter medication identifications were found" in the receiving barn stalls tested by the racing commission.[247]

The study exposed the ease in which a horse could be detected with a prohibited drug in its system as the result of environmental contamination, rather than by intentional administration.[248] Analysts suggest that these findings could be the result of a groom—or any other person who comes into contact with a racehorse, for that matter—who (1) is currently using the detected drug urinating in the stall that the horse occupies; (2) is mixing feed with trace amounts of a drug on his hand; or (3) is handling equipment to be used by the horse with contaminated hands and/or body parts.[249] As a result of the study, the possibility arose that the Naproxen positives were the result of the contaminated barn; accordingly, the charges of the ship-in trainers were dropped.[250]

These examples illustrate the ease in which a trainer can be subject to liability as a consequence of an unreliable test result and how a positive test result is not always, in every instance, presumptive evidence of affirmative drugging by a trainer. Additionally, the aforementioned examples demonstrate that providing a trainer with the opportunity to rebut his or her presumption of guilt allows for a more veracious truth-finding process.

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[246] *Id.*

[247] *Id.*

[248] *Id.*

[249] *See* Fenger, *supra* note 239 ("["We have discussed possible transfer from human urine, traces of medication on hay nets, commingling of human prescriptions with tongue ties in pockets or even transferred from the hands of an assistant starter onto the horse's mucous membranes.").

[250] Frank Vespe, *WV Racing Commission Rescinds Seven Naproxen Rulings*, RACING BIZ (May 24, 2017), https://www.theracingbiz.com/2017/05/24/wv-racing-commission-rescinds-seven-naproxen-rulings/ [https://perma.cc/Z4LR-V95E].

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D. An Ineffective Rule: Instances of Obvious Circumvention

The majority of jurisdictions rationalize the enforcement and implementation of the absolute insurer rule under the theory that it is designed to protect the welfare of the equine athlete and to protect the public's gambling interest.[251] In reality, however, the rule achieves neither of its goals. In the event that the horse is detected with a prohibited drug in its system, the trainer, rather than the horse, is suspended.[252] Because only the trainer, and not the horse, is suspended in the event of a violation, suspended trainers are often observed maintaining their operations—and consequently, their profits—by naming a different individual, usually the trainer's assistant, as the trainer of the racehorse; the owner, however, remains the same.[253] The fictitious individual named as the trainer of the racehorse during the time in which the actual trainer of the racehorse is suspended is more commonly referred to as a "paper trainer."[254] Generally, the "paper trainer" will be named as the horse's trainer until the time in which the actual trainer's suspension has been served.[255]

For example, in 2014, Kentucky Derby winning and California based trainer, Doug O'Neill, was suspended as the result of a positive test by one of his horses.[256] Throughout the

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[251] *See, e.g.*, N.M. CODE R. § 15.2.6.6 (LexisNexis 2019) ("The objective of Part 6 of Chapter 2 is to describe requirements and procedures used to protect the integrity of horse racing, to ensure the health and welfare of race horses and to safeguard the interests of the public and the participants in racing.").

[252] *See, e.g.*, N.M. CODE R. § 15.2.6.9B(1) (LexisNexis 2019) (detailing the penalties for owners and trainers who have a horse testing positive for prohibited drugs).

[253] *See* Ray Paulick, *States Should Follow California's Crackdown On 'Program Trainers'*, PAULICK REPORT (Feb. 23, 2015, 12:06 PM), https://www.paulickreport.com/news/ray-s-paddock/states-should-follow-californias-crackdown-on-program-trainers/ [https://perma.cc/TXJ2-WW4G].

[254] *See, e.g.*, Ron Mitchell, *Details Offered in "Paper Trainer" Incident*, BLOODHORSE (August 17, 2012), https://www.bloodhorse.com/horse-racing/articles/127179/details-offered-in-paper-trainer-incident [https://perma.cc/ZD87-3PKX] ("It was soon revealed that Lay had not actually been training the filly prior to the race, but was listed as trainer on the program, meaning he was a '"paper trainer"' or '"program trainer."').

[255] *See id.* ("I've heard of my friends who have sent a horse to another track, it runs in another trainer's name, and then it comes back.").

[256] *Trainer Doug O'Neill suspended in California*, USA TODAY (October 9, 2014, 8:50 PM), https://www.usatoday.com/story/sports/horseracing/2014/10/09/trainer-doug-oneill-suspended-in-california-rac/17003365/ [https://perma.cc/T3KQ-UL9T].

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course of O'Neill's suspension, all of the horses that were originally recorded as being trained by him were transferred to the name of Leandro Mora—O'Neill's longtime assistant.[257] Prior to 2014, Leandro Mora had never been named as the trainer of any other racehorse other than in 2012 during a time in which O'Neill was serving a different suspension.[258] Equibase statistics indicate that horses running in Mora's name made $1.3 million in 2012 and $1.4 million in 2014.[259] All of the horses that were run in Mora's name were transferred back to Doug O'Neill's name at the conclusion of his suspension.[260]

This example illustrates that the absolute insurer rule is ineffective in mitigating the problem at issue because it allows a suspended trainer to hide behind the name of a "paper trainer" and continue to have their operations run as they were prior to the suspension. Thus, conceivably, the absolute insurer rule does not deter illegal drugging by trainers because, absent a fine, the only hardship that the suspended trainer endures is the inability to physically be present on racetrack premises; in spite of suspension, the aggrieved trainer is still able to instruct the assistant on how to manage his or her stable, bill owners a daily rate, and collect a commission on any winnings that the horse earns.

IV. CONCLUSION & PROPOSAL FOR A SUBSTANTIALLY MORE EFFECTIVE RULE

The absolute insurer rule is an improper vehicle for racing jurisdictions to utilize in deterring illegal equine drugging as it is

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[257] *Id.* ("O'Neill was not the trainer of record when four horses from his stable ran Thursday at Santa Anita. They ran in the name of his longtime assistant Leandro Mora. Among the four horses, two won and another finished second. Mora is scheduled to have six starters on Friday's card.").

[258] *Trainer O'Neill suspended by Calif. racing board*, THE COURIER (May 25, 2012), https://wcfcourier.com/sports/trainer-o-neill-suspended-by-calif-racing-board/article_1f0c60a0-a609-11e1-af2b-0019bb2963f4.html [https://perma.cc/CBM2-BB65].

[259] *Trainer Profile: Leandro Mora*, EQUIBASE, http:///www.equibase.com/profiles/Results.cfm?type=People&searchType=T&eID=1290 [https://perma.cc/A7NJ-BG2N].

[260] *Compare id.* (showing no statistics that prove Mora had any horses racing after the year 2014), *with Trainer Profile: Doug F. O'Neill*, EQUIBASE http://www.equibase.com/profiles/Results.cfm?type=People&searchType=T&eID=6363 [https://perma.cc/E4HR-A8EX].

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unconstitutional, irrational, and ineffective. The rule is unconstitutional in that it denies the accused substantive due process, because the drug thresholds which are recommended by the RMTC and consequently adopted by the majority of racing jurisdictions across the United States are not rooted in scientific evidence.[261] Furthermore, the majority of racing jurisdictions lack, or have never conducted, independent research to confirm that the RMTC's recommended threshold levels pose a negative pharmacological effect to the racehorse at the prescribed levels.[262] Such an omission constitutes an unconstitutional relinquishment and delegation of rulemaking authority to an outside body.[263]

Furthermore, the absolute insurer rule's imposition of strict liability on a trainer whose horse tests positive for a prohibited substance is irrational, because the positive test result could very easily be the consequence of environmental contamination, rather than from affirmative drugging by a trainer.[264] For example, it is possible that a horse could have ingested a prohibited substance inadvertently by eating feed contaminated with mold, by eating from a feed bin previously used by a horse contaminated with a prohibited substance, or by being exposed to a drug that lingered on the hands or body parts of a human who made contact with the horse.[265] Imposing strict liability on a trainer is irrational, because in instances as such, had a trainer been afforded an opportunity rebut the presumption of guilt placed on him or her by the positive drug test, the outcome of the charge would most certainly have differed.

Lastly, the absolute insurer rule is ineffective in truly mitigating illegal drugging in horse racing because, absent the nominal fine imposed by the racing jurisdiction, the trainer is deprived of no additional liberty other than a ban from being physically present on racetrack premises. By using a "paper trainer" the suspended trainer is still able to ensure that his normal operations are carried out properly, and thus, profit from the horses running under the "paper trainer's" name.[266]

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[261] *See, e.g.*, *Motion*, 2017 WL 6517732, at *4–5.
[262] *See, e.g.*, *id.*
[263] *See, e.g.*, *id.* at 7–8.
[264] *See, e.g.*, Huntington, supra 227; Kentucky Research Staff, *supra* note 204.
[265] *See, e.g.*, Huntington, supra227 227; Kentucky Research Staff, *supra* note 208.
[266] *See, e.g.*, Mitchell, *supra* note 254.

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Essentially, the absolute insurer rule creates a procedural penalty that looks pleasant to the eyes of the public but is grossly ineffective in practice.

It is evident, based on the aforementioned shortfalls of the absolute insurer rule, that racing's current model of illegal equine drugging regulation and prevention is in need of reform. First, the issue of constitutionality must be overcome. By holding a trainer strictly liable based solely on a positive drug test result, racing commissions are depriving the accused of his or her constitutional right to substantive due process.[267] Instead, a better practice would be to implement a "rebuttable presumption" rule that allows a trainer faced with a positive drug test to attack the evidence against him by offering proof that: (1) the test result was per se inaccurate; or (2) the test result was a consequence of environmental contamination; or (3) any other means that would aid in overcoming the trainer's presumption of guilt. Once the trainer is provided with an opportunity to rebut his presumption of guilt, his ability to enjoy his constitutional right to substantive due process will be restored.

Once the issue of constitutionality is overcome, the focus on creating a substantially more effective rule should turn on how to prevent illegal equine drugging in its entirety. Instead of suspending the trainer and allowing him or her to delegate a "paper trainer" in his or her absence, a more effective—but less economically favorable rule to racetracks—is to suspend the horse that provided a sample yielding a positive test and fine the trainer. By suspending the equine athlete, a trainer who is found guilty of illegally drugging a horse in his care is deprived of the opportunity to profit off of that individual horse for a given period of time.[268] During the time in which the horse is suspended, the horse will presumably be kept in training, so that when the suspension is concluded, he or she is prepared to race at the earliest possible date and, and thus, be able to collect earnings once more. The fear of having athletes sidelined due to the manifestation of a positive test

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[267] *See, e.g.*, *Motion*, 2017 WL 6517732, at *5–6.

[268] This article merely proposes the idea of suspending the horse and does not recommend a timeframe and/or punishment model in which the horse should be suspended in the event of testing positive for a prohibited substance.

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for a prohibited substance will undoubtedly deter trainers more powerfully from illegally drugging their equine athletes.

Therefore, in order to maintain the integrity of horse racing, while also restoring racehorse trainers accused with drug violations across the country with their constitutional right to substantive due process, racing jurisdictions should: (1) allow a trainer whose horse has tested positive for a prohibited substance with an opportunity to rebut his presumption of guilt; and, (2) if, after rebuttal, the trainer has not demonstrated a defect in the test that would have caused an inaccurate result to be rendered, the horse, rather than the trainer should be suspended, and the trainer should be fined heavily.

TAB 7

42 Ill.2d 352 (1969)
247 N.E.2d 881

JEAN BRENNAN, Appellee,

v.

ILLINOIS RACING BOARD et al., Appellants.

No. 41183.

Supreme Court of Illinois.

Opinion filed March 27, 1969.
Rehearing denied May 27, 1969.

353 *353 WILLIAM G. CLARK, Attorney General, of Springfield, (JOHN J. O'TOOLE, BERNARD GENIS, and A. ZOLA GROVES, of counsel,) for appellants.

COGHLAN AND JOYSE, of Chicago, (JAMES L. COGHLAN, of counsel,) for appellee.

Judgment affirmed.

Mr. JUSTICE KLINGBIEL delivered the opinion of the court:

The Illinois Racing Board revoked the race horse trainer's license of the plaintiff, Jean Brennan, for violation of its rules. In an administrative review action the plaintiff charged that the rule under which his license was revoked was arbitrary and unreasonable, and deprived him of due process of law. He also charged that the chairman of the Board was disqualified from acting in this matter, first, under the statute, because he was financially interested in the operation of the race tracks and, second, because he combined the functions of an investigator, prosecutor, and judge in this proceeding which was initiated by a private corporation of which the chairman was himself a salaried officer. The trial court found that the chairman of the Illinois Racing Board was not disqualified to act in this matter, but also found that the rule of the Board, for violation of which the plaintiff's license was revoked, was unconstitutional and void. The court therefore reversed the order of the Board and directed that the plaintiff's license be reinstated. The Board has appealed directly to this court.

The rule in question, which incorporates verbatim section 3.2 of the Horse Racing Act, reads as follows: "The trainer shall be the absolute insurer of and be responsible for the condition of horses entered by him in a race regardless of the
354 acts of a third party. Should chemical or other *354 analysis of saliva or urine samples, or other tests, show the presence of any drug of any kind or description, the Board may in its discretion suspend or revoke the license of the trainer, the stable foreman in charge of the horse, the groom, and any other person shown to have had the care or attendance of the horse." Ill. Rev. Stat. 1967, ch. 8, par. 37c-3.

The facts are undisputed. The plaintiff was the trainer of the horse, Unbested, which was the winner of the sixth race at Hawthorne Race Course on September 26, 1967. A urinalysis conducted immediately after the race revealed the presence in the horse's urine of Ritalin, a psychic stimulant prohibited by the Board's Rules of Racing. The plaintiff testified that he had fired an employee about 10 days before the race, and on the date preceding the race he saw that employee around the premises and told him to stay away from the barn. The plaintiff also testified that so far as he knew Ritalin had not been administered to his horse in the three or four-day period prior to the race in question. The findings of fact by the hearing officer designated by the Board did not include any finding that the plaintiff was, himself, guilty of any misconduct or that he had been negligent in guarding the horse.

The statutory provision embodied in the Board's rule authorizes the imposing of a penalty on the trainer without any act or omission on his part, for what amounts to the committing of a felony by someone else (see Ill. Rev. Stat. 1967, ch. 8, par. 37h1), and the question before us is whether such a measure can be upheld as a legitimate exercise of police power. We think it cannot.

Under the police power reasonable requirements may be imposed, of course, to protect the public against fraud and deceit, but they may not be arbitrary, and they must bear a real and substantial relation to the public welfare. Whether the means employed have such a relationship and are essentially reasonable is a question which is subject to review
355 *355 by the courts. (*Carolene Products Co. v. McLaughlin,* 365 Ill. 62.) In the case cited the Filled Milk Act of 1935, which prohibited any sale of filled milk, regardless of deception or fraud, was held invalid. This court observed that it denied to the vendor the right to offer proof with respect to adulteration and fraud, and that a statute creating a presumption which operates to deny a fair opportunity to rebut it contravenes due process of law.

In *Shoot v. Liquor Control Com.,* 30 Ill.2d 570, a rule of the Liquor Control Commission provided for a revocation or suspension of the liquor license of anyone who purchases a Federal occupational wagering stamp. Under the Criminal Code the license of any person is voided who knowingly permits his premises to be used as a gambling place. The license of one who had purchased the Federal stamp was suspended by the Commission, although there was no evidence of any gambling on his premises. It appeared that under Federal law the owner of a pinball machine was required to purchase the stamp whether or not the machine was used for gambling. In administrative review proceedings the Commission's order was reversed and its rule was found to be arbitrary and unconstitutional. This court agreed, saying that "Notwithstanding the fact that the State may impose regulations on the liquor traffic more stringent than would be permitted or allowable in other businesses, the imposition of such restraints must nevertheless be in keeping with constitutional restrictions." The court went on to say that licenses have a right to fair treatment in the revocation of their licenses, and that the Commission's rule "is subject to the vice that it unfairly penalizes licensees on the basis of improper, arbitrary and unreasonable presumptions." 30 Ill.2d at 575.

In *Mahoney v. Byers* (1946), 187 Md. 81, 48 A.2d 600, the stimulative drug benzedrine was found in a sample of saliva
356 taken from the winning horse in a steeplechase race. On the basis of this fact alone the Maryland Racing *356 Commission suspended the license of its trainer, pursuant to a rule purporting to authorize such a penalty "whether or not he administered the drug, or knowingly or carelessly permitted it to be administered." The rule further declared "The fact that the analysis shows the presence of a drug shall be conclusive evidence either that there was knowledge of the fact on the part of the trainer or that he was guilty of carelessness in permitting it to be administered." On review the superior court set aside the order after finding the irrebuttable presumption to be arbitrary and void. This the court of appeals affirmed, saying "The commission is a creature of the Legislature and the Legislature does not possess the power under the State Constitution to prevent one from making a defense to a charge brought against him by substituting an irrebuttable presumption for facts. Such a law would be arbitrary, illegal, capricious, and hence unconstitutional."

In the case at bar there is not even an evidentiary presumption. The licensee is penalized without showing any act or neglect on his part whatsoever. There is no proof that he even knew of the doping of his horse, much less that he actively participated in it. He loses his license solely because of someone else's conduct, of which he had no personal knowledge. It is a fundamental principle of Anglo-Saxon justice that responsibility is personal and that penalties may not be inflicted on one person because of another's acts. As the Maryland court in the *Mahoney* case observed, "This irrebuttable presumption destroyed the right of appellee to offer evidence to establish his innocence. If this is `just', then the term `unjust' is without meaning." 187 Md. at 86-7, 48 A.2d at 603.

In *State ex rel. Paoli v. Baldwin* (1947), 159 Fla. 165, 31 So.2d 627, a trainer's license was suspended under authority of a racing commission rule providing, in terms almost identical to those in the case at bar, that "The trainer shall be the
357 absolute insurer of and responsible for the condition *357 of the horses entered in a race, regardless of the acts of a third party * * *." The evidence disclosed that benzedrine was found in the urine of the winning horse immediately after the race. It was further revealed that the groomsman in charge of the horse had placed bets that day, that he went to cash his tickets immediately after the race and that when the trainer was suspended the groomsman left his employment without notice. The Florida Supreme Court held the commission's rule void, pointing out that possession of a trainer's license is a valuable property right, that under the commission's rule it would be no defense that the trainer may have exercised due care in looking after the condition of the horse or that the incident occurred by reason of circumstances over which he had no control, and that the rule which did not permit such legitimate defenses failed to accord with due process of law. We think a similar conclusion must follow in the case at bar. Before people can be penalized in this fashion they must first be shown to have somehow been at fault.

Even if we could accept the argument that dismisses as merely "unfortunate" the fact that innocent persons are made to

suffer, there is still no assurance that the rule in its operation offers any more protection than does one based upon fault, or that it has a real and substantial relation to the protection of race track patrons against fraud or deceit. The thought of these "absolute insurer" provisions is presumably to induce the trainer to take precautions against a tampering with the horse. But this is no more than he would do anyway, under penalty provisions based on traditional principles of fairness, since the consequences of failing to take precautions would be the same. It would seem that the only applications of the rule which would not be equally covered by one based on fault would be to situations which the trainer could not have prevented anyway. We see little if any tendency in penalty-without-fault provisions to reduce the frequency of the crime.

358 Indeed, it is not unlikely *358 that offenses may be committed which would not otherwise occur. Disgruntled former employees or others wishing to get back at the trainer may well find the rule to be a simple and effective means of causing him to lose his license. He could be penalized regardless of who it was that doped the horse.

No question is presented of the power to prohibit the administering of drugs or stimulants to horses, or to require reasonable measures to be taken for protection against such acts. But making the trainer an absolute insurer, at the peril of losing his license regardless of how innocent he may be, is arbitrary and unreasonable.

The Board claims it would be practically impossible to regulate horse racing "if every rule and regulation was dependent upon knowledge or motives of a person charged with a violation". But even if we assume the statement to be an accurate one, it is no answer to the plaintiff's arguments. Administrative convenience is not a constitutional substitute for the rights of individuals.

Under a rule based on traditional principles of culpability the circumstances prevailing in the horse racing business may be such as to require a showing of close supervision on the part of the trainer before he can be found to have been free of negligence. Indeed, there is virtually nothing a trainer is in a position to do that could not be required in a particular case, as having been necessary in the exercise of due care for the horse.

The circuit court of Cook County was correct in holding the rule void, and its judgment will be affirmed.

Judgment affirmed.

Mr. JUSTICE SCHAEFER, dissenting:

I cannot agree with the majority's limited view of the scope of the power of the State to protect the public from the

359 manipulations to which horse racing is particularly susceptible. That view seems to rest largely upon doubt as *359 to the wisdom of the legislative enactment and a feeling that there is "little if any tendency in penalty-without-fault provisions to reduce the frequency of the crime." It is hornbook law, however that considerations of this kind are for the legislature, and not for courts.

The statutory provision embodied in Rule 318 states a rule of substantive law which imposes on the horse trainer absolute liability for the condition of his horse, regardless of fault upon his part. The question, therefore, is not whether such a provision raises a conclusive presumption of misconduct or fault but whether the State lacks the power to impose absolute liability. Such legislation is not unusual. For example, in the course of holding the president and general manager of a corporation guilty of having violated the Federal Food, Drug and Cosmetic Act by shipping in interstate commerce misbranded or adulterated drugs, without any showing whatever of wrongdoing on his part, the Supreme Court pointed out that the prosecution "is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct — awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger. *United States* v. *Balint*, 258 U.S. 250, 66 L.ed. 604, 41 S.Ct. 301. * * * Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless." *United States* v. *Dotterweich*, 320 U.S. 277, 280-81, 284-85, 88 L.Ed. 48, 51, 53.

360 *360 The Liquor Control Act imposes a somewhat similar vicarious liability upon licensees under that Act. It provides: "Every act or omission of whatsoever nature constituting a violation of any of the provisions of this Act, by any officer, director, manager or other agent or employee of any licensee, shall be deemed and held to be the act of such employer

or licensee, and said employer or licensee shall be punishable in the same manner as if said act or omission had been done or omitted by him personally." (Ill. Rev. Stat. 1967, ch. 43, par. 185.) And a property owner who leases his property for tavern purposes is subject to liability under the Liquor Control Act to one who suffers injury as a result of the sale of liquor to an intoxicated person, even though the owner is entirely without knowledge of the transaction. Ill. Rev. Stat. 1967, chap. 43, par. 135; *Gibbons* v. *Cannaven,* 393 Ill. 376. See also, *Van Oster* v. *Kansas,* 272 U.S. 465, 71 L.Ed. 354.

The present statute goes further, and explicitly makes the trainer an insurer of the condition of his horse, "regardless of the acts of a third party." But, in my opinion it does not for that reason violate the constitutional rights of the plaintiff. Horse racing accompanied by legalized gambling is peculiarly susceptible to fraudulent manipulation. One of the major problems to be guarded against is the artificial stimulation or depression of the horse. The betting public cannot protect itself against this kind of fraud, nor can its adverse effect, so far as the public is concerned, be remedied, for the parimutuel bets must be paid off immediately after each race. These considerations, in my opinion, justified the General Assembly in imposing upon the trainer the duty to take whatever steps are necessary, during the brief but critical period immediately preceding a race, to insure that his horse is in proper condition. That duty is not discharged by a
361 retrospective recital of suspicions aroused before the race by the conduct of a discharged *361 employee. See, *Maryland Racing Com.* v. *McGee* (1957), 212 Md. 69, 128 A.2d 419.

The majority cites *Mahoney* v. *Byers* (1946), 187 Md. 81, 48 A.2d 600. The rule involved in that case, however, did not impose upon the trainer an insurer's responsibility. Instead, it provided that "the fact that the analysis shows the presence of a drug shall be conclusive evidence either that there was knowledge of the fact on the part of the trainer or that he was guilty of carelessness in permitting it to be administered." Under that rule the trainer's actual fault was the ultimate fact to be proved, and the court held that the conclusive presumption which required the finding of that ultimate fact from the fact that analysis showed the presence of a drug violated due process. (See, *Tot* v. *United States,* 319 U.S. 463, 87 L.Ed. 1519.) In *State ex rel. Paoli* v. *Baldwin,* 159 Fla. 165, 31 So.2d 627, a closely divided court applied, on rehearing, the reasoning of the *Mahoney* case to an insurer rule like the one before us. Some years later, the Maryland court distinguished the *Mahoney* case, and sustained the validity of a rule which imposed an absolute liability on the trainer to so guard his horses that no drug could be administered. *Maryland Racing Com.* v. *McGee* (1957), 212 Md. 69, 128 A.2d 419.

Other courts whose opinions, like the second Maryland case, are not mentioned by the majority, have considered and sustained legislation like that now before us. *Sandstrom* v. *California Horse Racing Board* (1948), 31 Cal.2d 401, 189 P.2d 17, *cert.* den. 335 U.S. 814, 93 L.Ed. 369; *State* v. *West Virginia Racing Com.* (1949), 133 W. Va. 179, 55 S.E.2d 263; *Fogt* v. *Ohio State Racing Com.* (1965), 3 Ohio App.2d 423, 210 N.E.2d 730.

UNDERWOOD and WARD, JJ., join in this dissent.

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