

**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 Act¹ (“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 obligations⁴ 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 races⁷ 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 arbitrators¹² 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

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 ineligibility¹⁵ 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

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’

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

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_commissi_on_order_partial_stay__0.pdf.

⁴⁰ Mot. Clarification and Extension (Sep. 23, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/614134.2025.09.2_3_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

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

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

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 Amendment⁷⁰ 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

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 government⁸⁴ 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

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

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.”

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

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

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.

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