



# DENIED INJUNCTION IN *SERPE V. FTC, ET AL.*:

## IRREPARABLE HARM IN A SEVENTH AMENDMENT CHALLENGE

**V**eteran Thoroughbred trainer Phil Serpe was charged by the Horseracing Integrity and Welfare Unit (HIWU) after his horse Fast Kimmie tested positive for clenbuterol following a race in August 2024.

After a confirmatory test and Serpe's decision to contest the charge, HIWU imposed a provisional suspension in October 2024, though that suspension

was later lifted while proceedings continued. Serpe filed suit in federal court, challenging the enforcement structure of the Horseracing Integrity and Safety Authority (HISA) as unconstitutional under the Seventh Amendment. He also sought a preliminary injunction to halt the administrative proceedings and block further enforcement by HISA or the Federal Trade Commission (FTC).<sup>1</sup>

PHIL SERPE (FAR LEFT), THE WINNER OF MORE THAN 1,000 RACES IN A TRAINING CAREER DATING TO 1984, CONTINUES HIS LEGAL FIGHT AGAINST HIWU AND HISA FOR A TWO-YEAR SUSPENSION OVER AN ALLEGED CLENBUTEROL POSITIVE IN 2024.

By Peter J. Sacopulos

## SEVENTH AMENDMENT CHALLENGE AND PUBLIC RIGHTS DOCTRINE

Serpe's primary constitutional claim at this stage was that HISA's adjudicatory scheme violates his Seventh Amendment right to a jury trial in civil cases. The Seventh Amendment preserves the right to a jury in suits at common law in which legal rights and remedies are at stake.

Serpe argued that despite HISA's label of an administrative proceeding, the enforcement action against him is essentially a legal dispute seeking to impose civil penalties—the kind of relief that historically could only be imposed in a court of law before a jury. In support, Serpe leaned heavily on the recent case *SEC v. Jarkesy*,<sup>2</sup> in which the Supreme Court held that the Securities and Exchange Commission's in-house imposition of monetary penalties violated the Seventh Amendment.

HISA argued that Serpe's Seventh Amendment claim fails under the public rights doctrine, which permits Congress to assign adjudication of certain regulatory matters to non-Article III bodies<sup>3</sup> without a jury. Citing *Atlas Roofing Co. v. OSHA*,<sup>4</sup> both HISA and the FTC maintained that HISA's enforcement scheme (like historical horse racing regulation) falls within that exception.

For decades, entities like The Jockey Club and, later, state commissions imposed penalties through administrative mechanisms without jury involvement. Regulation of doping in horse racing, HISA and the FTC emphasized, is a public policy function distinct from private-law claims like fraud or breach of contract. Because HISA's structure channels enforcement through statutorily created rights overseen by the FTC, they contended the process is constitutionally sound and does not trigger the Seventh Amendment's jury guarantee.

## HIWU'S FINE WAIVER AND THE COURT'S MOOTNESS ANALYSIS

After the April 2025 hearing on Serpe's motion, HIWU submitted a declaration<sup>5</sup> stating it would not pursue any monetary penalty against Serpe at arbitration. HISA quickly argued that this mooted the Seventh Amendment claim since only non-monetary sanctions remained and jury rights attach only to legal (not equitable) relief.<sup>6</sup> But U.S. District Judge David Leibowitz rejected that argument under the voluntary cessation doctrine, which requires defendants to prove it is "absolutely clear" the challenged conduct will not recur. Because HIWU is a quasi-private entity, it did not benefit from the usual presumption of good faith afforded to government actors. The court found that HIWU's strategic posturing mid-litigation failed to carry the "heavy burden" needed to establish mootness.

Specifically, the court found that:

- HIWU's promise not to impose a fine was too vague and informal to constitute a clear termination of the challenged conduct, especially since it was unsupported by any binding rule change and left open the possibility that an arbitrator might still issue a penalty.
- Because HIWU made its no-fine declaration immediately after the court suggested it might moot the case, the court viewed it as a reactive strategic maneuver rather than a deliberate policy decision.

- HIWU's position applied only to Serpe and lacked any evidence of broader application or enduring policy, signaling to the court that this was a one-off exception rather than a consistent or reliable change in enforcement practice. This holding kept Serpe's motion for a preliminary injunction alive and allowed the court to address the merits of the claim.

## THE COURT'S RATIONALE: AN UNRIPE CLAIM (FTC) AND NO IRREPARABLE HARM (HISA)

Despite the earlier win, Serpe's request for an injunction against the FTC failed on ripeness grounds, finding that Serpe's claims were not "ripe" or ready to be heard by the court because the FTC had not yet taken any action against him.

Under HISA's structure, the FTC only becomes involved after arbitration concludes, and at the time of Serpe's motion, it was still uncertain whether he would be sanctioned at all.

Leibowitz emphasized that courts do not issue rulings based on hypotheticals, and Serpe's claim relied on a chain of future events that might never happen. While the court acknowledged that Serpe might later have a stronger case for irreparable harm (since sovereign immunity would bar him from recovering monetary damages against the FTC), such harm was purely speculative at this stage.

The court denied the injunction "without prejudice," explicitly leaving the door open for Serpe to raise his Seventh Amendment challenge again if the FTC were to impose a fine. As the court put it, "While the merits of Mr. Serpe's Seventh Amendment claim may ultimately win the race, this Court will not grant extraordinary relief before the starter's gate has even opened."<sup>7</sup>

To prevail on his motion for a preliminary injunction, Serpe had to satisfy four elements: (1) a substantial likelihood of success on the merits; (2) a likelihood of irreparable harm; (3) that the balance of harms favors the plaintiff; and (4) that the public interest would be served.

Leibowitz found he failed to do so, particularly with respect to the showing of irreparable harm. Serpe's suspension had already been lifted and was not currently harming his ability to train or race, undercutting claims of ongoing injury. His allegations of reputational harm and lost business were deemed too speculative and unsupported by specific evidence. And although he argued that being forced into an unconstitutional adjudication process caused irreparable harm, the court rejected this framing under 11th Circuit precedent that limits irreparable harm presumptions to certain fundamental rights, not procedural or forum-based claims.<sup>8</sup>



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The court emphasized that subjection to an unlawful administrative process (even one that might violate the Seventh Amendment) is not itself irreparable harm under federal injunction standards. Courts have repeatedly held that litigation in an unconstitutional forum, standing alone, does not justify extraordinary relief, such as an injunction, since any resulting sanction can later be vacated and monetary harm compensated.

Citing *Offolter, et al. v. HISA, et al.*<sup>9</sup> and *Leachco, Inc. v. Consumer Product Safety Commission*,<sup>10</sup> Leibowitz joined other courts in declining to treat constitutional litigation burdens as per se irreparable. Because Serpe could challenge any final outcome through normal channels, the harm was neither certain nor irreparable.

Moreover, the court stressed that even if Serpe prevails on his constitutional claims, he will have an avenue for full legal redress. HISA's own arguments characterize itself as performing a quasi-governmental role in tandem with the FTC, opening the door for Serpe to sue under constitutional tort theories. HISA conceded it was not immune from damages, and the court noted that its actions, if unlawful, could be corrected by later monetary or equitable relief. In the court's words, "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date" strongly undermines a finding of irreparable harm.<sup>11</sup>

## LOOKING AHEAD: OVERCOMING IRREPARABLE HARM HURDLE

Leibowitz's ruling leaves a road map (and some warnings) for future HISA challengers or, generally, anyone seeking to enjoin an administrative proceeding on constitutional grounds.

A plaintiff in Serpe's shoes may ultimately win on the merits (indeed, the court hinted that his Seventh Amendment claim *could* have merit once ripe), but to obtain relief before the court addresses the merits, the irreparable harm requirement must be met with evidence and strategic framing. How might a plaintiff better show irreparable harm in a similar case? A few considerations and approaches emerge:

- **Emphasize intangible and unquantifiable harms.** A trainer seeking injunctive relief can improve their showing of irreparable harm by submitting specific evidence that the HISA charge is causing actual, non-compensable damage. For instance, if owners begin removing horses from the trainer's care in response to the pending enforcement action or if the trainer loses exclusive breeding contracts or high-value sales opportunities that cannot be reclaimed later, those losses may qualify. Courts have held that reputational harm or the loss of goodwill can be irreparable when it threatens the survival or trajectory of a professional career.<sup>12</sup> In support, a plaintiff might offer affidavits from clients, owners or industry experts attesting that the damage goes beyond lost prize money and reaches the trainer's long-term prospects or standing in the racing community. Missing a high-profile event like the Kentucky Derby or Breeders' Cup due to suspension also could be cited as a unique and irreversible loss of prestige that a later damages award would not cure.
- **Argue irreparable harm from sovereign immunity (if applicable).** If the injunction targets a government entity like the FTC or a state racing commission, plaintiffs should emphasize that any monetary losses are unrecoverable due to sovereign immunity. Courts, including the 11th Circuit, have held that this kind of loss qualifies as irreparable harm. In Serpe's case, the court acknowledged this principle but found the claim premature because the FTC had not yet acted. A future plaintiff could time their challenge to coincide with imminent agency enforcement, avoiding the ripeness issue and highlighting the irreversibility of the financial harm. For example, if an FTC administrative law judge imposed a fine, a plaintiff could immediately seek an injunction on the ground that each day the fine

remains enforceable inflicts irreparable economic injury.

- **Frame the constitutional injury in a rights-based manner.** Although the 11th Circuit does not presume irreparable harm for most constitutional violations, plaintiffs might still try to analogize their situation to categories in which such harm is presumed. If HISA's procedures involve compelled disclosure of private data or impose sanctions that chill speech (such as a gag order or public branding as a cheater), courts may view the case through a First Amendment or privacy lens. These constitutional categories are often treated differently, and violations often support injunctive relief without a showing of additional harm. One creative approach might be to argue that being subjected to an unconstitutional forum is a present injury and that the choice between compliance and violating one's rights creates a legal dilemma that courts have recognized in other constitutional contexts.
- **Demonstrate imminence and severity.** To satisfy the "actual and imminent" requirement, a plaintiff should file for injunction at a point when the harm is about to occur or is ongoing, not too far in advance. In Serpe's case, one reason the court was unconvinced is that, after the suspension was lifted, Serpe was essentially in a holding pattern with no active harm except the looming arbitration. If instead a plaintiff is in the middle of serving a suspension or is days away from a sanction taking effect, the urgency is clearer.
- **Leverage immunity concessions wisely.** In Serpe's case, HISA's concession that it could be sued for damages actually weakened Serpe's irreparable harm argument. A future plaintiff might not seek such a concession or might argue that, even if damages are theoretically available, they are inadequate. For example, one could contend that monetary damages from HISA wouldn't fully restore one's reputation or lost opportunities or that the litigation process to obtain those damages would itself be lengthy and burdensome.
- **Cite supporting precedents from other contexts.** Drawing on analogous cases may strengthen the argument for injunctive relief. Courts have enjoined universities and sports bodies from suspending athletes when doing so would prevent participation in time-sensitive events, recognizing that such lost opportunities are irreparable.<sup>13</sup> Cases involving Olympic eligibility, NCAA competition or pro sports suspensions often emphasize that missing a singular event cannot be remedied later.<sup>14</sup> By analogy, a trainer losing a season or a horse missing its prime racing window faces a similar loss that money cannot restore. Framing the harm as the permanent forfeiture of a unique competitive opportunity may persuade courts to intervene.

In sum, to clear the irreparable harm bar in a case like Serpe's, a plaintiff needs to do more than identify a constitutional issue; they must make a compelling factual showing that without an injunction, they will suffer a profound harm that cannot be later remedied. This might involve waiting until the harm is more concrete (ripe), accumulating evidence of intangible damages and perhaps tailoring the target of the injunction (for example, focusing on the immune government actor). It's a strategic tightrope.

As the Serpe case demonstrates, courts are cautious about intervening in ongoing administrative proceedings, but they leave open a possibility: If a plaintiff can substantially illustrate an injury that money cannot fix and that is about to occur, the courts may step in. Until then, as Judge Leibowitz implied, challengers must bide their time at the gate, waiting for the right moment to make a break.<sup>15</sup>

## NOTES

1. *Philip Serpe v. Federal Trade Commission, et al.*, No. 0:24-cv-61939 (S.D. Fla. May 28, 2025).

2. 603 U.S. 109 (2024).

3. A non-Article III body refers to an entity that is not part of the federal judiciary established under Article III of the U.S. Constitution. In the public rights context, this means that Congress may assign adjudication of certain matters—such as administrative enforcement proceedings or regulatory sanctions—to agencies or tribunals that do not have Article III judges (i.e., judges with life tenure and salary protections), so long as those matters involve public rights rather than private common-law claims. This allows bodies like the FTC's or HISA's arbitral panels, which are not part of the formal judicial branch, to conduct proceedings without violating the Seventh Amendment or separation of powers, because they are enforcing statutory rights created by Congress within a public regulatory scheme.

4. *Atlas Roofing Co. v. OSHA*, 430 U.S. 442 (1977) upheld an OSHA scheme imposing civil fines via an agency adjudication, holding that Congress may create new causes of action enforceable by an administrative agency without a jury, so long as the proceedings involve public rights as opposed to private rights. HISA and FTC argued HISA fits squarely within this principle.

5. In this context, the declaration was the functional equivalent of an affidavit.

6. Legal relief is that which seeks monetary damages, while equitable relief asks the court for another remedy, such as an injunction or a declaratory judgment.

7. *Philip Serpe v. Federal Trade Commission, et al.*, No. 0:24-cv-61939, 2-3 (S.D. Fla. May 28, 2025).

8. Notably, the 11th Circuit's strict view contrasts with some other courts. In certain jurisdictions, constitutional violations have been held to inherently cause irreparable harm (on the theory that one should not be forced to endure a violation of constitutional rights). (See *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *Doe v. Mundy*, 514 F.2d 1179, 1183 (D.C. Cir. 1975)). The 11th Circuit, however, demands a more concrete, non-monetary injury unless the case involves free speech or privacy. This poses a high hurdle for plaintiffs like Serpe.

As the Serpe case demonstrates, courts are cautious about intervening in ongoing administrative proceedings, but they leave open a possibility: If a plaintiff can substantially illustrate an injury that money cannot fix and that is about to occur, the courts may step in.

9. No. CIV-24-749-D, 2024 U.S. Dist. LEXIS 141046 (W.D. Okla. Aug. 8, 2024).

10. 103 F.4th 748 (10th Cir. 2024).

11. *Philip Serpe v. Federal Trade Commission, et al.*, No. 0:24-cv-61939, 14 (S.D. Fla. May 28, 2025).

12. *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004).

13. *Ohio v. NCAA*, 706 F. Supp. 3d 583 (N.D. W.Va. 2023).

14. *Braham v. NCAA*, No. 3:25-cv-00253-MMD-CSD, 2025 LX 296037 (D. Nev. July 18, 2025).

15. It's worth noting that after the court initially denied Serpe's request for a preliminary injunction on the ground that he had not shown irreparable harm, the matter proceeded to arbitration. On July 9, 2025, the arbitrator ruled against Serpe, imposing a two-year suspension, disgorgement of the purse, disqualification of the results and a public disclosure of liability. Following the court's previous hints, Serpe filed a renewed motion for preliminary injunction arguing that the arbitration decision and the initiation of FTC review had transformed his situation from speculative to concrete harm. He contends that the penalties imposed by the FTC create irreparable harm because sovereign immunity prevents him from recovering economic harm later, even if the process is ultimately found unconstitutional. He also asserts that the continuation of the enforcement process (now before a federal agency) forces him to defend against the penalties in a non-jury forum, which he characterizes as an ongoing violation of his Seventh Amendment rights that cannot be remedied after the fact. The court has yet to rule on the motion. **HJ**

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PHIL SERPE'S BARN ON THE SARATOGA RACE COURSE BACKSTRETCH IN 2023.