No. 23-5273

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MATTHEW J. HIGHT,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, ET AL.,
Defendants-Appellees,

and

ST. LAWRENCE SEAWAY PILOTS ASSOCIATION,
Defendant-Intervenor-Cross-Appellee.

BRIEF OF AMICI CURIAE STATES OF WEST VIRGINIA, ARKANSAS, IDAHO, IOWA, KANSAS, MISSISSIPPI, MISSOURI, MONTANA, SOUTH CAROLINA, AND UTAH IN SUPPORT OF PLAINTIFF-APPELLANT

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INTERESTS OF *AMICI CURIAE*

This case considers which governmental or non-governmental decisionmaker should control certain core governmental functions. Separation-of-powers questions like that one matter a lot to the States and their citizens. The "ultimate purpose" of the Constitution's structural provisions, after all, "is to protect the liberty and security of the governed." *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991). Likewise, "federal action that violates the Constitution's separation of powers may also invade rights which are reserved by the Constitution to the several states." Bradford R. Clark, *Separation of Powers As A Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1324 (2001) (cleaned up). Concepts like the private non-delegation doctrine ensure that the separation of powers is respected, as "more serious separation of powers concerns arise with congressional delegations of authority outside the federal government than with delegations to independent agencies." Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 70 (1990). The district court's decision did not sufficiently respect these essential protections.

It's even more troubling when the federal government offends the separation of powers by seizing control over an area of the law that States might otherwise handle, only to pass it off to a private entity. This kind of "private preemption may present a greater threat to federalism than

traditional preemption by undermining [traditional] safeguards." Craig Konnoth, *Privatization's Preemptive Effects*, 134 HARV. L. REV. 1937, 1982 (2021). From all appearances, that's exactly what happened here: the federal government told States to keep their hands off regulating "pilotage on the Great Lakes," 46 U.S.C. § 9306, and the agency in charge then turned around and gave at least partial control to a group of private pilots, *see, e.g.*, 46 C.F.R. § 401.220(c). Meanwhile, States were left standing on the shore, even though States (and particularly the Great Lakes States) have a "primary interest in regulating the Lakes." A. Dan Tarlock, *How Well Can International Water Allocation Regimes Adapt to Global Climate Change?*, 15 J. LAND USE & ENV'T L. 423, 440 (2000); *see also Kotch v. Bd. of River Port Pilot Comm'rs for Port of New Orleans*, 330 U.S. 552, 559 (1947) ("The States have had full power to regulate pilotage of certain kinds of vessels since 1789 when the first Congress decided that then existing state pilot laws were satisfactory and made federal regulation unnecessary.").

The *amici* States of West Virginia, Arkansas, Idaho, Iowa, Kansas, Mississippi, Missouri, Montana, South Carolina, and Utah therefore write in the hopes that the Court will force the federal government to undo this upside-down system of regulation on the Great Lakes. Government powers should be exercised by the government.

INTRODUCTION

Piloting a vessel on the Great Lakes is hard enough without also having to navigate between the Scylla and Charybdis of public and private market

barriers just to get a license. But unfortunately for Captain Matthew Hight, our present system of regulation requires just that.

Having sailed for over 20 years, Captain Hight wanted to register as a pilot on Lake Ontario and the St. Lawrence River. He passed a written test, did the required training, and stood ready to pay hundreds of thousands of dollars to register. Yet the Coast Guard ultimately refused him. The big reason? The Saint Lawrence Seaway Pilots Association—a for-profit, private association of registered pilots—would not recommend him for full registration. After personal disputes between the captain and the Association, the Association claimed that Captain Hight did *not* complete the training and did not have the proper attitude to sail. The Coast Guard then just signed off on the Association's findings, insisting that it was compelled to "rely upon the local pilotage associations to thoroughly train and vet mariners," in part because the Coast Guard's own director was "not himself an expert mariner for any of these waters." JA-271. So Captain Hight was prevented from sailing because his future competitors wouldn't approve.

Anytime a government "empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest." *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 511 (2015). And at the federal level, the need for supervision isn't just good policy—it's a constitutional imperative. The Constitution prevents agencies from delegating their supervisory powers away to private entities, let alone private entities with such a personal stake in the relevant decision. To

be sure, private entities can play *some* role, but our system expects it will be a limited one—an advisory function, a ministerial function, or a function tightly constrained by clear-as-day standards that are then substantively double-checked by a public decisionmaker. Yet none of those protections are in place here. Instead, private pilotage associations act as masters for an entire industry, holding a veto over anyone who wants to sail. That setup doesn't just hurt the would-be pilots; it also hurts those who must pay higher rates for pilotage services on the Great Lakes when fewer pilots are available. *See also Am. Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 517 (D.C. Cir. 2020) (explaining how employing more pilots on the Great Lakes will reduce delays and increase safety).

The private non-delegation doctrine was meant to avoid problems like these. Whether it derives from the Constitution's Vesting Clause, structural separation of powers, or simple due process, the concept is plain enough: governmental functions must ultimately be exercised by governmental actors. Were it otherwise, our system of voter-accountability-based governance would break down. The district court thus erred in finding that a little handwaving from the Coast Guard here was enough. The Court should vacate, remand, and at least force the Coast Guard to make its *own* decision about whether Captain Hight is ready to sail.

SUMMARY OF THE ARGUMENT

I. The private non-delegation doctrine prevents private actors from wielding governmental power. The doctrine has served as both an important

aspect of the separation of powers and a central aspect of due process. Both the Supreme Court and this Court have embraced the doctrine with open arms. And to the extent anyone has expressed doubts about the doctrine, those doubts are unfounded. The cases on which it rests have continuing vitality, the fears of its use are overstated, and the harms from its breach are real. The States and others need the private non-delegation doctrine to mean something.

II. The arrangement here violates those essential principles. Without any express approval from Congress, private piloting associations have taken the steering oar on pilotage registration decisions for the Great Lakes. They make those decisions without any real standards to guide them. And the Coast Guard does not exercise independent oversight in any genuine sense. That's an especially dangerous setup given that the association consists of future competitors of Captain Hight, who have every incentive to keep him off the water. And it's especially troubling that the Coast Guard would turn over an essential government function like licensing.

ARGUMENT

I. The Constitution precludes governmental entities from delegating their powers to private ones.

A. The Court hardly needs to hear again the familiar recitation of the branches' powers: legislative to Congress, executive to the President, and judicial to the courts. U.S. CONST. art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1. Though familiar, this clean separation is necessary in part to make sure that

the relevant decisionmakers remain accountable to the public—otherwise, "the buck would stop somewhere else." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 514 (2010); *see also, e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (reiterating how the executive branch must take ownership for decisions). And dividing power among the branches—and between the federal government and the States, for that matter—provides a "simple" but elegant solution to fear that "power" might be "gradual[ly] concentrat[ed]" in a single set of hands. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2202 (2020). These two concepts of liberty and accountability are necessarily connected, as "[l]iberty requires accountability." *DOT v. Ass'n of Am. R.R.*, 575 U.S. 43, 57 (2015) ("*Amtrak II*") (Alito, J., concurring).

As part of this essential separation, the Constitution limits how one branch might delegate functions to another—or, worse still, delegate functions outside the government entirely. This latter form of delegation, usually called private delegation, is "delegation in its most obnoxious form." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). It is "utterly inconsistent with the constitutional prerogatives and duties of Congress." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935); *see also e.g.*, *Texas v. Comm'r*, 142 S. Ct. 1308, 1309 (2022) (Alito, J., respecting the denial of certiorari) ("To ensure the Government remains accountable to the public, it cannot delegate regulatory authority to a private entity." (cleaned up)). "[I]f people outside government could wield the government's power—then the government's promised accountability to the people would be an illusion." *Consumers' Rsch.*

v. FCC, 88 F.4th 917, 925 (11th Cir. 2023) (cleaned up). What's more, private actors are "not bound by any official duty, but are free to [act] for selfish reasons or arbitrarily and may subject [others] to their will or caprice." *State of Wash. ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 122 (1928). So unsurprisingly, courts have resisted broad delegations of governmental power to private enterprises.

Take the Supreme Court's decision in *Carter v. Carter Coal Co.* There, the Court confronted a law in which Congress delegated substantial power to private coal mine operators; certain majorities of the operators and miners within a district court could set minimum wages and maximum hours for *all* the operators within the district. 298 U.S. at 310-11. This "power conferred upon the majority … to regulate the affairs of an unwilling minority" was "not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." *Id.* at 311. The Court was unimpressed: the "delegation [wa]s so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it [wa]s unnecessary to do more than" cite a few decisions and move on. *Id.* Congress later revised the law to empower a federal agency to approve or reject the proposed rates and rules; with that real oversight, the law finally passed constitutional muster. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940). But the line was drawn, and it's now plain enough that a delegation of authority to write the rules for an industry to the industry itself

is "utterly inconsistent with the constitutional prerogatives and duties of Congress." *Schechter Poultry*, 295 U.S. at 537.

This Court has objected to broad delegations of power to private entities, too. In *Association of American Railroads v. DOT*, 721 F.3d 666, 668 (D.C. Cir. 2013) ("*Amtrak I*"), for example, the Court addressed a scheme in which Amtrak (which the Court perceived to be a private entity) "wield[ed] joint regulatory authority with a government agency."[*] It started from the premise that "difficulties … are even more prevalent in the context of agency delegations to private individuals." *Id.* at 670. "Even an intelligible principle cannot rescue a statute empowering private parties to wield regulatory authority." *Id.* at 671. Private parties can "help," but no more. *Id.* In short: "Federal lawmakers cannot delegate regulatory authority to a private entity." *Id.* at 670. Given all that, Amtrak's role in setting certain metrics and standards was an improper delegation because it did not "function subordinately" to any federal (public) authority. *Id.* at 674. Its role was like "giv[ing] to General Motors the power to coauthor, alongside the Department of Transportation, regulations that will govern all automobile manufacturers." *Id.* at 668. That won't do.

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[*] The Supreme Court later held that Amtrak was a governmental entity, *Amtrak II*, 575 U.S. at 55, so it vacated and remanded. But "seeing as the Supreme Court reversed on other grounds," this Court "st[oo]d by [its] analysis" that "detailed extensively why private entities cannot wield the coercive power of government." *Ass'n of Am. R.R. v. DOT*, 821 F.3d 19, 37 (D.C. Cir. 2016) ("*Amtrak III*").

Like this Court, other courts have stressed that private entities must play only a peripheral part in governing. They've used different language—some courts say that private entities can act as "aides and advisors," *Oklahoma v. United States*, 62 F.4th 221, 229 (6th Cir. 2023), while others speak of "advisory," "ministerial," or "administrative" functions, *Pittston Co. v. United States*, 368 F.3d 385, 395 (4th Cir. 2004); *United States v. Frame*, 885 F.2d 1119, 1128-29 (3rd Cir. 1989). But at bottom, all these descriptions reduce to the same basic principle: at an absolute minimum, "the [private] entity [must] function[] subordinately to the agency, and … the [federal] agency [must] retain[] authority and surveillance over the activities of the private entity." *Consumers' Rsch.*, 88 F.4th at 926 (cleaned up); *accord Amtrak I*, 721 F.3d at 673 ("[P]rivate parties must be limited to an advisory or subordinate role in the regulatory process."). Above this minimum, it may well be that agencies cannot delegate certain "inherently governmental activities" in *any* circumstances, such as activities "[s]ignificantly affecting the life, liberty, or property of private persons." Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 438 (2006) (quoting OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR NO. A-76, REVISED PERFORMANCE OF COMMERCIAL ACTIVITIES (2003), at A-2). And even an agency itself is constrained in what *it* can do on its own—it "may play the sorcerer's apprentice but not the sorcerer himself." *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001).

B. To be sure, courts have sometimes shied away from applying these concepts as scrupulously as they should have, perhaps out of a fear of the consequences or a mistaken belief that old law isn't good law.

The latter worry is easiest to reject. Even if the doctrine has been "largely dormant" at the Supreme Court "in the years since" it was described in *Carter Coal* and its 1930s-era brethren, "its continuing force is generally accepted." *Boerschig v. Trans-Pecos Pipeline, LLC*, 872 F.3d 701, 707 (5th Cir. 2017). *Amtrak I* is strong evidence of that. It may just be that the adverse decisions stopped flowing because "legislatures have so incorporated that principle into their own decision-making that the Private Delegation Doctrine has gone the way of the Third Amendment's ban on the quartering of soldiers in private homes—it has become a principle so thoroughly accepted that no one would consider violating it today." Paul J. Larkin, Jr., *The Private Delegation Doctrine*, 73 FLA. L. REV. 31, 52 (2021). But as this case shows, not everyone has kept these anchoring principles in mind.

As for fears that the Government's operations will grind to a halt if it can't foist its work back onto the private sphere, the States' experiences should provide some comfort. "The states are not virgins with respect to this issue." Calvin R. Massey, *The Non-Delegation Doctrine and Private Parties*, 17 GREEN BAG 2D 157, 165 (2014) (collecting authorities). States like Texas and Rhode Island have "exercise[d] more scrutiny over delegations to private parties on the basis that … more oversight [is needed] for nongovernmental officials exercising government power." Benjamin Silver, *Nondelegation in*

the States, 75 VAND. L. REV. 1211, 1245 (2022); *see also, e.g.*, *City of Lancaster v. Pa. Pub. Util. Comm'n*, 284 A.3d 522, 533 (Pa. Commw. Ct. 2022) (applying Pennsylvania's more muscular iteration of the private non-delegation doctrine); Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 965 (2014) (collecting many other examples of state private non-delegation doctrines). Those States have yet to see any discernible ill effects from showing fidelity to the separation of powers and due process.

In contrast, some very real ill effects flow from ignoring these nondelegation principles. When Congress makes decisions, it faces "localized accountability." MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 138 (1995). If States or their citizens have some issue with a decision that's about to be made, then they can call their Congressperson, vote them out of office, and take other measures to ensure their voices are heard. Agencies are one step removed from all that. That distance is uniquely bad for States because, "unlike Congress, administrative agencies are clearly not designed to represent the interests of States." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 908 (2000) (Stevens, J., dissenting). But even agencies usually allow for at least *some* outside involvement; notice-and-comment rulemaking is the classic model for that. Private entities, however, are *twice* removed from the ordinary accountability structure. Once they take the helm, all bets are off. States (and their citizens) might be left writing letters pleading for action, but elected officials can disclaim responsibility for an unfavorable outcome.

Yet States are supposed to regulate industry—not the other way around. *See* Konnoth, *supra*, at 1980-90 (detailing the harms to state interests that flow from this kind of privatized displacement).

In the end, though, "[t]here is no precedent that permits this kind of 'double delegation' from Congress to public bureaucrats to private parties." *Texas v. Rettig*, 993 F.3d 408, 410 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing en banc). So this Court won't be swimming against the tide—or the lake current, as the case may be—if it applies an earnest understanding of the private non-delegation doctrine.

II. The Coast Guard inappropriately delegated control over Captain Hight's registration to the private Saint Lawrence Seaway Pilots Association.

There's an interesting thing about the district court opinion: it never mentions the private non-delegation doctrine by name, even though Captain Hight raised it below. It alludes to the idea, JA-297, but it never engages with any of the authority above, and it seems to endorse the notion that a federal agency is in the clear so long as it purports to exercise even the most minimal amount to independent judgment, *see* JA-298. But the district court's conclusions don't square with either the facts or the law. For several reasons, the Coast Guard's delegation of authority over Captain Hight's license to the private-pilotage association here was improper.

First, nothing indicates that Congress intended pilotage pools like the St. Lawrence Seaway Pilots Association to have *any* involvement in

registration decisions for Great Lakes pilots. Congress authorized the Secretary of Transportation to form "a pool by a *voluntary* association of United States registered pilots to provide for efficient dispatching of vessels and rendering of pilotage services." 46 U.S.C. § 9304(a) (emphasis added). Note the word "voluntary," which hardly suggests that membership and approval from the pilotage pool would be a prerequisite for sailing. *But cf. Menkes v. U.S. Dep't of Homeland Sec.*, 637 F.3d 319, 333 (D.C. Cir. 2011) (invoking *Chevron* deference and refusing to disturb a Coast Guard interpretation that pilot associations have primary responsibility for dispatches and associations can refuse to dispatch non-members). "Dispatching" and "rendering of services" also do not hint at any involvement in initial registration. And that's further confirmed by the text of 46 U.S.C. § 9303(a), which outlines the requirements for registration but says nary a word about membership in or approval from a pilot association. The statute instead contemplates that the Secretary will remain firmly in charge of registration. *Id.*; *see also Halverson v. Slater*, 129 F.3d 180, 189 (D.C. Cir. 1997) (holding that Secretary did not have statutory authority to delegate his "powers and duties" under the Great Lakes Pilotage Act to a separate corporation).

It's especially wrong when, as here, an agency delegates a key function to a private entity without even a go-ahead from Congress. "At the very most, current precedent allows only Congress itself to involve private parties" in the regulatory process. *Rettig*, 993 F.3d at 412 (Ho, J., dissenting); *see also, e.g.*,

Davis v. United States, 306 A.3d 89, 106 n.12 (D.C. 2023) (applying federal non-delegation principles and explaining that "Congress or the Council [of the District of Columbia] would have had to affirmatively authorize [a] subdelegation" by a D.C. agency to a private entity); *accord* Brian D. Feinstein & Jennifer Nou, *Submerged Independent Agencies*, 171 U. PA. L. REV. 945, 1008-09 (2023) ("[W]hen statutes are otherwise silent, judges generally read such silence to permit internal subdelegation, but to prohibit redelegation to another entity."). Remember again that a double delegation is particularly unprecedented—and particularly dangerous. "[D]elegation to outside entities increases the risk that these parties will not share the agency's national vision and perspective, and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme." *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565-66 (D.C. Cir. 2004) (cleaned up). In other words, the arrangement "aggravates the risk of policy drift inherent in any principal-agent relationship." *Id.* So if our Constitution allows agencies to go down that road at all, *but see, e.g.*, *City of Dallas v. FCC*, 165 F.3d 341, 358 (5th Cir. 1999), then the legislative branch should at least be involved in the expedition. Here, Congress was not.

Second, the Coast Guard did not maintain meaningful oversight and control over the decision of whether to register Captain Hight. Although the district court repeatedly concluded that the Coast Guard exercised its own independent judgment, the record instead shows an overworked and understaffed Coast Guard division merely punting to Association time and

again. *See, e.g.*, JA-182 ("I am short staffed due to circumstances beyond my control."), JA-228 (referencing staffing issues). The Association insisted that its approval was a "separate condition" that would make or break Captain Hight's registration. JA-067. And whatever the regulations might say, the Coast Guard agreed with that view. *See, e.g.*, JA-126, JA-155. When Captain Hight also contested how the Association had logged his training, the Coast Guard largely refused to engage—insisting that it could not act until the Association said he was done. *See, e.g.*, JA-175, JA-187. If Captain Hight complained about how the process was being handled, the Coast Guard simply referred him back to the Association again. *See, e.g.*, JA-183 ("The issues with your employment status is [sic] between you and the Saint Lawrence Seaway Pilots Association."); JA-201 (similar). And even when Captain Hight tried to hold the Coast Guard to its own rules and regulations, the Coast Guard dismissively confirmed that the piloting association was really the final word. JA-209 ("The regulations you routinely quote and demand me to enforce, [sic] do not have a provision to allow an applicant to circumvent the pilot association.").

The substance of the Coast Guard's ultimate decision confirmed that it was the Association that was driving the boat. Training is a good example. Captain Hight signed sworn statements and other evidence that he completed all the required roundtrips, including on the "designated waters" of the St. Lawrence Seaway. *See* JA-241 to -42. But without addressing that evidence, the Coast Guard in the final appeal merely accepted the Association's contrary

account because it "relies upon pilotage associations to train the mariners." JA-269. According to Coast Guard, "it would not be effective or efficient for [the Great Lakes Pilotage Director] and the Coast Guard to directly provide training to each new pilot," so the Coast Guard "must rely" on the associations' decisions—blindly, apparently. JA-271. And in the end, in finding that Captain Hight had not completed the training (despite contrary evidence), the Coast Guard found it important that the Association was "resolute[ly]" against him. JA-271. The same story repeated itself when it came to the Association's recommendation against him; the Coast Guard simply insisted it was "standard industry practice" to accept such a recommendation. JA-272. And on the temperament issue, the Coast Guard merely relied on Association-relayed scuttlebutt without any suggestion of an independent investigation (despite substantial explanations for each incident). JA-274. Indeed, the Coast Guard could not have plausibly conducted any real investigation before first siding with the Association, as Coast Guard recommendation "concur[red] with [the Association's] recommendation" *just 95 minutes after receiving it*. JA-153 to -55.

The immaterial degree of control that the Coast Guard maintained over the registration process here just wasn't enough. An agency cannot "shift[] to another party almost the entire determination of whether a specific statutory requirement has been satisfied or … abdicate[] its final reviewing authority." *Cooling Water Intake Structure Coal. v. EPA*, 905 F.3d 49, 79 (2d Cir. 2018). That's merely impressible "rubber-stamp[ing]" "under the guise" of seeking

"advice." *U.S. Telecom*, 359 F.3d at 216. Our constitutional system instead contemplates "actual oversight" if a private party is to have some involvement in agency action. *Am. Horse Prot. Ass'n, Inc. v. Veneman*, No. CIV A 01-00028, 2002 WL 34471909, at *5 n.6 (D.D.C. July 9, 2002); *see also, e.g.*, *Consumers' Rsch.*, 88 F.4th at 937 (Newsom, J., concurring) (raising questions about how "meaningful" agency control over a private entity was when the agency maintained a "patina of control" but "effectively presumed" agency approval). In consistently deferring to the Association because of a perceived lack of time, money, and expertise, the Coast Guard did not maintain that essential degree of actual oversight. And ultimately, the Coast Guard believes it "has been commanded, without the benefit of any legislated standard by which to separate public sentiment grounded upon reasoned considerations substantially related to civic spirit from irrational public sentiment or whim, to act upon adverse public sentiment." *Geo-Tech Reclamation Indus., Inc. v. Hamrick*, 886 F.2d 662, 667 (4th Cir. 1989). That will not do.

Third, the members of the St. Lawrence Seaway Pilots Association have their own interests in deciding whether to register a given pilot, which raises questions about the Association's capacity for fair decisionmaking. The association is a for-profit, "private business organization composed of ship pilots who provide pilotage service on the waters of the Great Lakes." *Menkes v. Dep't of Homeland Sec.*, 486 F.3d 1307, 1308 (D.C. Cir. 2007). In other words, the association's members were Captain Hight's future competitors. The more registered pilots in the pool, the smaller each pilot's number of

dispatches—and the smaller their share in the takings. What's more, reducing the number of pilots helps raise the government-approved rates for their services, as the government sets rates in part by evaluating the perceived demand for these pilotage jobs. *Schultz*, 962 F.3d at 517. So association members have every incentive to pull up the ladder and keep new members from joining—especially when, like Captain Hight, those prospective members are prone to asking inconvenient questions for the association.

At many times, and in many contexts, courts have warned against arrangements that "confer[] the power on some property holders to virtually control and dispose of the property rights of others" while "creat[ing] no standard by which the power thus given is to be exercised." *Eubank v. City of Richmond*, 226 U.S. 137, 143-44 (1912). In such a situation, the "controlling" private actors may act "solely for their own interest, or even capriciously"—and it's especially bad when a public agency has no "discretion" to act without the private actor's approval. *Id.* So in *Eubank*, the Supreme Court struck down a city ordinance that allowed two-thirds of property owners on a street to designate a setback for every lot on that street. *Id.* The Supreme Court struck down a similar statute a few years later, stressing again that a binding decision by a private consortium of property owners, free from any guiding standards, was "repugnant" to the Constitution. *Roberge*, 278 U.S. at 122. And *Roberge* relied on *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), a case that had condemned the "idea that one man may be compelled to hold his life, or

the means of living, or any material right essential to the enjoyment of life, at the mere will of another."

The Supreme Court, it seems, has objected to the notion that the "mere will" of a *private* person should bind another's property interests—and the Court was right. Untethered from a public duty, private deciders can indulge bias, arbitrariness, or worse. *Cf. Gibson v. Berryhill*, 411 U.S. 564, 578 (1973) (affirming conclusion that a board of optometrists was "so biased by prejudgment and pecuniary interest that it could not constitutionally conduct hearings looking toward the revocation of appellees' licenses to practice optometry"); *see also, e.g.*, *Santa Fe Nat. Tobacco Co. v. Judge*, 963 F. Supp. 437, 441 (M.D. Pa. 1997) (finding that requirement that applicant for stamping agent's license get approval from two cigarette manufacturers violated principles from *Rorberge*). No wonder, then, that "[t]he power to self-interestedly regulate the business of a competitor" has been declared by this Court to be "anathema to the very nature of things, or rather, to the very nature of governmental function." *Amtrak III*, 821 F.3d at 29 (cleaned up). Given all that, the Court should not stand by while piloting associations defeat "constitutionally protected property interests in … licenses essential to pursuing an occupation or livelihood." *Cleveland v. United States*, 531 U.S. 12, 25 n.4 (2000).

Fourth, the Coast Guard has not provided any discernible standards for the pilot associations' exercise of their authority. *See Rice v. Vill. of Johnstown*, 30 F.4th 584, 590 (6th Cir. 2022) (noting how decisions addressing

successful delegation challenges "have often emphasized that the delegee acted with little or no guidance"). For instance, the regulation is silent on what the training will entail; it just says it will be "prescribed by the association." 46 C.F.R. § 401.220(b). The regulations have a minimum number of "trips" a pilot in training must complete, but that's a "separate[]" requirement from the association-imposed training (as the district court recognized in Captain Hight's prior suit). *Hight v. U.S. Dep't of Homeland Sec.*, 533 F. Supp. 3d 21, 29 (D.D.C. 2021) (describing 46 C.F.R. § 401.220(b)). So as things stand now, an association could pile on training requirements, make them last for years, make them so onerous that few can realistically complete them, or make them so vague that it's just unpredictably left to the association whether any given individual will "pass." Much the same goes for the association's recommendation. Neither the statutes nor the regulations say what an association should base that recommendation on; the recommendation must be documented in some way, but that's it. 46 C.F.R. § 401.220(c). Even if one assumes that the association targets its recommendation toward the qualifications defined by regulation, those are little help—they include amorphous things like "good moral character and temperate habits." 46 C.F.R. § 401.210(a)(3). These regulations just do not "impose[] a standard to guide." *Boerschig*, 872 F.3d at 708. And "[w]ithout supplying standards to guide the private parties' discretion. … administrative decision-making will be made potentially subservient to selfish or arbitrary motivations or the whims

of local taste." *Gen. Elec. Co. v. N.Y. State Dep't of Lab.*, 936 F.2d 1448, 1455 (2d Cir. 1991) (cleaned up).

And *fifth*, the decision against Captain Hight implicates indisputably governmental functions. Deciding who can and cannot pilot a vessel on the Great Lakes is a quintessential regulatory function. These registrations are licenses in everything but name. And "licenses—to drive cars, to operate radio stations, to sell liquor—are issued by governmental authorities." *Peel v. Att'y Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 103 (1990). So the pilot association exercises "regulatory power in granting" what are effectively "business licenses." *Griggs v. City of Gadsden Revenue Dep't*, 327 F. App'x 186, 187 (11th Cir. 2009); *see also, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984) (calling "a licensing veto authority" an "important governmental power"); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125 (1982) (describing a private party's "veto power over governmental licensing authority"); *Cafeteria & Rest. Workers Union, Loc. 473, AFL-CIO v. McElroy*, 367 U.S. 886, 896 (1961) (distinguishing "the governmental function" of "regulat[ing] or licens[ing], as lawmaker, an entire trade or profession"). Given that licensing is such a key part of government work, it's arguably "so intrinsically governmental in nature that [it] may not be entrusted to a non-governmental entity" in any circumstance. *Melcher v. Fed. Open Mkt. Comm.*, 644 F. Supp. 510, 523 (D.D.C. 1986). After all, telling someone that they cannot pursue their preferred profession "involve[s] coercive exercise of sovereign power." *Suss v. Am. Soc. for Prevention of Cruelty to Animals*, 823 F. Supp. 181, 189

(S.D.N.Y. 1993). But even assuming private entities can be involved in the process, the public agency must at least exercise more control than it did here.

In sum, the private delegation here raises a host of concerns. Any one of them might have been enough to justify reversal. But together, they compel one obvious outcome: the Court should vacate the decision and remand with instructions to the Coast Guard to take a different tack.

CONCLUSION

The Court should vacate and remand the decision denying Captain Hight's registration.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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