UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MATTHEW J. HIGHT, Plaintiff, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al., Defendants, ST. LAWRENCE SEAWAY PILOTS ASS'N, Defendant-Intervenor.	Case No.: 1:19-cv-02094-APM

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

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INTRODUCTION

Plaintiff Matthew J. Hight ("Captain Hight") just wants to go to work. But because of an unconstitutional system allowing private actors to use arbitrary governmental power for their own ends, he cannot. This action, brought under the Administrative Procedure Act and the Declaratory Judgment Act, is his last and only recourse against that system.

Imagine you are a lawyer who wants to work in a city where you do not yet have a license. Imagine further that that city has, by law, one law firm and, by law, you must receive that law firm's permission to take the relevant bar exam. Also imagine that if the law firm—for whatever arbitrary reason—does not like you and refuses to give you permission to work, then you cannot work, even by starting your *own* firm. Finally imagine that the law firm's decision is final with no appeal.

Imagine no longer, because other than involving pilots and not lawyers, and a waterway not a city, this is exactly the system Captain Hight finds himself in.

Defendants United States Department of Homeland Security, United States Coast Guard, and Admiral Karl L. Schultz, Commandant (collectively "Coast Guard"), through their regulations and policies, written and unwritten, have turned what is supposed to be a regulated process, where the government ensures that international shipping is safe while constitutional liberties are protected, into an arbitrary reign of lawlessness at the hands of the for-profit Intervenor-Defendant St. Lawrence Seaway Pilots Association ("Association"). The Coast Guard denied Captain Hight's request to take the exam he needs to become a registered pilot and denied his request to be placed on the "tour de role"—the list of pilots who rotate onto the international shipping of the Great Lakes. It is that decision that is under review in this case, and it violates the Coast Guard's own regulations, the Great Lakes Pilotage Act, and the U.S. Constitution's nondelegation doctrine, Due Process Clause, and First Amendment.

Captain Hight here moves for summary judgment setting aside the Coast Guard's final decision, compelling the Coast Guard to administer the exam to Captain Hight, and, upon his passing the exam, compelling the Coast Guard to place Captain Hight on the tour de role so that he may practice his profession.

STATEMENT OF FACTS

Summary of Captain Hight's experience and training

When he applied to work as a pilot on the Great Lakes, Captain Hight already had 20 years of experience as a professional mariner, including eight years serving as a master (*i.e.* captain) of international vessels. Administrative Record ("R") 58; Declaration of Captain Matthew Hight in Support of Plaintiff's Motion for Summary Judgment ¶ 3 [hereinafter "Hight Decl."] (attached to Plaintiffs' concurrently filed Motion for Leave to File Declaration in Support of Motion for Summary Judgment, Dkt. 58). To work as a Great Lakes pilot, however, he needed to become a "registered pilot," in accordance with Coast Guard regulations. *See* 46 C.F.R. §§ 401.100 *et seq.* He applied to the Coast Guard on July 2, 2015, R.58, but once he submitted this initial paperwork, his interview and training were all with a private, for-profit, entity, the Association, and he had very little further contact with the Coast Guard during training. Hight Decl. ¶¶ 6–8. Captain Hight began training with the Association on August 17, 2015. R.9. The Association steadily moved him up through its training program, so that by May 2016 he was piloting ships on Lake Ontario, without any other pilot observing him. He could do this under what is called a "temporary registration," which only lasts for a year instead of the five-year registration that fully registered pilots hold. R.9; 46 C.F.R. § 401.220(d); *see also* R.60 (renewing his temporary registration the next year). This continued until early 2018, when he believed he was set to join the Association as a member and take the exam to become a fully registered pilot. R.112-13.

But then on March 6, 2018, the Association suddenly informed the Coast Guard that it recommended not renewing Captain Hight's temporary registration. R.62–63. A month later, after ignoring Captain Hight's requests for information, R.137 ("I have attempted to contact SLSPA President John Boyce five times to no avail"), the Association expelled him from its training program. R.134. Captain Hight protested this in a series of email exchanges to Coast Guard officials and requested that, notwithstanding the Association's sudden actions, he (1) be allowed to take the exam to become a fully registered pilot, and (2) be placed on the tour de role for Lake Ontario, the list of pilots who are rotated onto international shipping for the lake he had worked on since May 2016. R.124; R.134; R.35-36 (discussing the Lake Ontario tour de role).

After a further series of emails between Captain Hight and various Coast Guard officials, the Coast Guard sent him a formal denial on July 18, 2018. R.6. Captain Hight appealed to the Commandant under 46 C.F.R. § 1.03-15. R.404. The Coast Guard then denied his appeal with a final agency action in a letter dated October 19, 2018. R.1. This lawsuit challenges that decision. The Coast Guard never addressed Captain Hight's request to be placed on the tour de role in its formal denials. In other correspondence, however, it stated that the question was "between you and your pilot association," meaning there was nothing the Coast Guard would do to help him. R.149. As for his request to take the exam, the final denial letter stated the Coast Guard was denying him the chance to take it because, and only because, (1) he did not meet the regulatory "minimum trips requirement" and (2) the Association had not recommended him for registration. R.3–4. The Coast Guard did not give Captain Hight any opportunity to challenge the merits of the Association's refusal to recommend him and allow him to take the exam and, if he passed, become registered. R.3–4. Thus, under the Coast Guard's reasoning, the Association had a final, unreviewable, veto over his chance to become a registered pilot.

Federal Regulation of pilotage on the Great Lakes

A pilot is a mariner with knowledge of, and training within, an area, who takes control of a vessel when it enters or leaves port or goes through other coastal waters. *See generally* Pilot, Black's Law Dictionary (11th ed. 2019). On the Great Lakes (which includes the St. Lawrence River), the regulation of pilots is made under federal law, specifically the Great Lakes Pilotage Act of 1960, 74 Stat. 259, 46 U.S.C. §§ 9301, *et seq*. ("Act") and its implementing regulations.[1] Under the Act, U.S. vessels engaged in foreign trade and non-Canadian foreign vessels must engage a "registered pilot" to direct the navigation of the vessel in waters of the Great Lakes designated by the President, commonly called "designated waters." Great Lakes Pilotage Rates – 2020 Annual Review and Revisions to Methodology, 85 Fed. Reg. 20088, 20089–90 (Apr. 9, 2020). The St. Lawrence River has been designated by the President, so only registered pilots may direct the navigation of foreign vessels on the river. *Id.* at 20090. In undesignated waters of the Great Lakes, covered vessels must engage a registered pilot to "'be on board and available to direct the navigation of the vessel at the discretion of'" the vessel's master. *Id.* (quoting 46 U.S.C. 9302(a)(1)(B)). Lake Ontario is an undesignated waterway. *Id.* Together, the St. Lawrence River and Lake Ontario are "District One" of the Great Lakes. *Id.*

There are two kinds of pilot credentials that the Coast Guard administers, both of which are necessary to work as a Great Lakes pilot. One is the federal pilot "license." 46 C.F.R.

[1] Though not relevant to this dispute, Great Lakes pilotage is also regulated under Canadian law and agreements between the U.S. and Canada. *See, e.g.*, Memorandum of Understanding, Great Lakes Pilotage, Between the United States Coast Guard and The Great Lakes Pilotage Authority, Sept. 19 2013, *available at* https://www.dco.uscg.mil/Portals/9/DCO%20Documents/Office%20of%20Waterways%20and%20Ocean%20Policy/2013%20MOU%20English.pdf?ver=2017-06-08-082809-150.

§§11.701, *et seq.* The other is pilot "registration." Captain Hight is already *licensed* to pilot on the St. Lawrence River and Lake Ontario. Hight Decl. ¶¶ 20, 108. This case concerns only *registration*.

The Act allows the Coast Guard to "authorize the formation of a pool by a voluntary association of United States registered pilots to provide for efficient dispatching of vessels and rendering of pilotage services" and to regulate those pools. 46 U.S.C. § 9304(a)–(b). For District One the Coast Guard has recognized the Association as the only "voluntary association of United States registered pilots." 85 Fed. Reg. 20089. The Coast Guard interprets the term "voluntary association" to mean that one must be a member of such an association in order to work as a pilot on the Great Lakes. *Menkes v. Dep't of Homeland Sec.*, 637 F.3d 319, 331 (D.C. Cir. 2011). The Association therefore has a legal monopoly.

Most pilot registration requirements are not at issue in this case. Plaintiff does not challenge requirements such as holding a merchant mariner credential, being younger than 70 years old, being a U.S. citizen, meeting certain fitness standards, and having twenty-four months service as a licensed officer on certain classes of vessels. 46 C.F.R. § 401.210(a). The only two criteria that are at issue are (1) whether Captain Hight has completed a minimum number of trips over the waters for which application is made "in company with a Registered Pilot, within 1 year of date of application," 46 C.F.R. § 401.220(b), 402.220(a), and (2) whether he must obtain a recommendation from the Association that he should become a registered pilot, 46 C.F.R. § 401.220(c), and if yes, whether that requirement is constitutional. A third criterion is relevant, but both sides agree Captain Hight has not yet obtained it: completing a written exam. 46 C.F.R. § 401.220(b). Through this action Captain Hight asks this Court to order the Coast Guard to administer the exam to him. (Dkt. 1; Complaint, Prayer for Relief.) And separately from the

exam, he also asks the Coast Guard to ensure he is placed on the tour de role so that he may actually work. *Id.*

The St. Lawrence Seaway Pilots Association

The Association, along with the corporation it is associated with, Seaway Pilots, Inc., is a private, for-profit, business. R.20 (Articles of Association referencing the purchase of "one (1) share of stock in the corporation related to the Association"); R.140–41; R.159 (referencing "Seaway Pilots, Inc." and members of the Association buying shares). It has approximately 17 pilot members (85 Fed. Reg. 20100 (stating there are to be 17 working pilots in District 1)), and has sole authority to decide who may become a member. R.194. To join the Association, a new member must "buy in" by purchasing one share of stock in Seaway Pilots, Inc. R.20. This costs a pro rata share of the corporation's value. R.20. Captain Hight's buy-in price was going to be approximately $200,000. Hight Decl. ¶ 61; R.410. Part of the reason the share price is so high is that in 2016 the Association purchased an expensive lake house in Cape Vincent, New York, to replace the double-wide trailer it had previously used for its headquarters. Hight Decl. ¶ 57.

The Association also manages District One's tour de role for Lake Ontario and the St. Lawrence River—the list of pilots who are allowed to work in District One. R.35; R.47. As a practical matter a pilot cannot work in District One unless his name is listed on the tour de role, even if he is registered. The Coast Guard has explicitly disavowed any role in managing who is placed on the tour de role. R.149 (stating that whether Captain Hight is on the tour de role is "between you and your pilot association").[2] The Coast Guard also has affirmatively stated that it

[2] The Coast Guard *has* this authority under statute, but it refuses to use it. *See* 46 U.S.C. § 9304(b)(2) ("For pilotage pools, the Secretary may . . . prescribe regulations for their operation and administration"). As the Coast Guard has made clear in prior litigation, the only time it exercises its authority to override a pilot association's decision on who is placed on a tour de role is when the "association is not providing adequate pilotage service." *Menkes*, 637 F.3d at 340

cannot force the Association to take any applicant as a member. R.194 ("[T]he Coast Guard does not have the authority to force a voluntary association of U.S. registered pilots, in this case the St. Lawrence Pilot Association, to bring on board a member with whom they are not willing to serve."). Thus, if the Association does not want an otherwise qualified individual to work as a pilot in District One, the Coast Guard, under its understanding of the law, cannot help that person become a member *or* be placed on the tour de role. Even if the reason the Association bars the applicant is purely arbitrary and capricious, including for purposes of revenge, the applicant has no recourse. So, under the policy the Coast Guard follows, the Association, a private for-profit company, holds the keys for any American who wants to work as a pilot in the waters of District One.

A mariner who wants to become a registered pilot in District One first submits an application to the Coast Guard, then interviews with the Association. Hight Decl. ¶¶ 5–7. The Association decides whether to accept the applicant into its training plan. R.10–16. The training plan is essentially an apprenticeship designed to take several years to complete. *Id.* The first phase of the training plan involves work as an "Applicant Pilot." As an Applicant Pilot, the individual must, among other things, "work towards completion of the training requirements found in 46 CFR 401.211 and meet the registration requirements found in 46 CFR 401.210 402.210 and 402.220." R.12 (underlining in original). This includes the minimum trips requirement of 46 C.F.R. § 402.220(a), requiring for a master such as Captain Hight "five round trips . . . over the waters for which registration is required." After meeting these requirements the

(D.C. Cir. 2011) (Appendix, Agency Decision on Remand). The court upheld this position in *Menkes* as a matter of agency deference, but the court did not address the constitutional arguments Captain Hight raises here. What is present here, but was not present in *Menkes*, is the argument that the Coast Guard's refusal to oversee the Association's arbitrary decisions over the tour de role is unconstitutional.

Applicant Pilot can be moved to a "Deputy Pilot." R.14. A Deputy Pilot is then issued a "temporary registration" by the Coast Guard and "will usually work alone in the undesignated waters," i.e. Lake Ontario. *Id.* Captain Hight became a Deputy Pilot on May 3, 2016, under the president of the Association's recommendation, and was thereafter issued a temporary registration. R.9. The move to "Deputy Pilot" status indicates that he had fulfilled the Applicant Pilot requirements. His temporary registration was then renewed in subsequent years.[3] R.60, 478. Indeed, the Coast Guard renewed his temporary registration on April 10, 2018, *even though* the Association had recommended against the Coast Guard's doing so a month prior.[4] R.62–63. As will be seen later, the record indicates this appears to have been purely for tactical reasons, to deny him an administrative hearing. *See infra* at 33.

Part of the pilot training the Association provides includes taking training trips alongside registered pilots navigating up and down the St. Lawrence River and Lake Ontario. R.12. After his application date of July 2, 2015, as the record demonstrates, and as his move to Deputy Pilot status implies, Captain Hight took numerous trips up and down the St. Lawrence River from August 2015 through the next few months. R.412–61 (summary of trips and copies of signed trip record slips from pilots who accompanied Captain Hight). In December 2015, the Coast Guard wrote to Captain Hight and told him that he had been made an "Applicant Pilot in Training" and

[3] Captain Hight also applied for a renewal of his temporary registration in 2019, but received no response from the Coast Guard. Hight Decl. ¶ 135.

[4] It should be noted, the lawfulness of a "temporary registration" for someone who was not already a registered pilot under applicable regulations is questionable, but that issue is not before this Court. Indeed, Director Haviland admitted in the Great Lakes Pilotage Advisory Committee's annual meeting of September 10, 2018 that the policy of issuing temporary registrations at the Association's request for the deputy pilot stage "doesn't really align with the regulations." *See* Complaint, Exhibit C, p. 222. This practice was extensively used, however, by the Coast Guard and Association while Captain Hight was in training for several prospective registered pilots. Hight Decl. ¶¶ 24, 96.

received Great Lakes Pilot Number 170. R.8. After the seaway was closed for the winter and then reopened, Captain Hight again took training trips in April 2016. R.412.

At the same time as Captain Hight was working as a pilot and completing the Association's training program, he took two exams to become a licensed pilot (again, not a *registered* pilot). Captain Hight passed both of these exams. Hight Decl. ¶¶ 20, 108.

In January 2018, Captain Hight was listed on an Association ballot measure that would authorize him, along with other prospective registered pilots, to "buy in" to Association membership. R.113; Hight Decl. ¶ 30. This was consistent with an understanding that he was completing the Deputy Pilot phase of his training, would be taking the exam soon, and had long since completed the various requirements to become a registered pilot, including the minimum trips requirement. Then, on March 6, 2018, he was informed that because of two incidents that had occurred while he was piloting vessels in 2017, he was not being recommended by the Association to renew his temporary registration; a month later he was expelled from the Association.[5] R.134.

Again, after the Association turned on him, Captain Hight sought the help of the Coast Guard and asked to take the written exam. But after continued delays, the Coast Guard sent him the formal denial of his request, and after his administrative appeal under 46 C.F.R. § 1.03-15, it

[5] Captain Hight maintains that these incidents were not worthy of such a sanction, if any. It is important to understand, however, that his culpability in these incidents is not at issue in this action. One was due to the failure to report damage to a tug boat that was involved in the undocking of a ship he piloted, where he did not know that the tug was even damaged at the time. R.65-66. The other involved him raising his voice in an attempt to keep a ship's bridge silent during an intense docking manouver, and the use of profanity when he and the ship's master afterward discussed what happened. R.66. In other words, he was ostensibly denied his right to work as a sailor for swearing like a sailor. The truth of these incidents does not matter for purposes of this case. What does matter is that the Coast Guard misapplied the minimum trips requirement and violated the Constitution and Great Lakes Pilotage Act.

issued the final decision. He had no opportunity for a hearing (and thus discovery), and the Coast Guard explicitly denied him a request to have one. R.393. Again, but during this same period, it mysteriously *did* renew his temporary registration. R.283. However, this grant turned out to be meaningless in allowing him to work. Because his temporary registration allowed him to pilot ships on Lake Ontario, he also asked to be added to the tour de role, but the Association refused to do so. The Coast Guard said in an email that whether or not he was on the tour de role was "between you and your pilot association," R.149, but did not address the request in either formal denial. Had he been denied his temporary registration he would have had the right to an administrative hearing under 46 C.F.R. § 401.600.

The Minimum Trips Requirement

The trips Captain Hight took on the St. Lawrence River from August 2015 to 2017, with almost all being before May 2016, totaled to 12.5 round trips, far beyond the minimum of five he needed under the regulations. R.178; R.412. After May 2016, the Association gave Captain Hight less time to take trips observing registered pilots on the river because he began working as an unsupervised pilot on Lake Ontario, which makes sense given that under the training plan he was required to have completed his minimum trips requirement *before* working as a Deputy Pilot on Lake Ontario. R.9, 12–13; *supra* at 7.

It is fundamentally important to understand that Captain Hight's actual raw number of trips is not before this Court. What is before this Court is the legal question of *when* Captain Hight could have taken his trips in order to satisfy the requirement. R.3–4. In its final decision, the Coast Guard accepted Captain Hight's records as accurate; that is, that he had taken 27 river trips starting in August 2015, on the dates and for the distances he provided, and that most of them were within a year of his application date of July 2, 2015. R.4 ("Even though the SLSPA

disputes that these eight trips should receive credit as they do not show the necessary evaluation required by their training plan [which Captain Hight disputes], I do not have to resolve that issue because your own exhibits demonstrate that you have not completed the minimum number of trips for Area 1."). Even so, the Coast Guard said he had not completed five trips because under its interpretation of the regulations he could not count trips taken before he became an "Applicant Pilot" under 46 C.F.R. § 401.110(12). R.2–4. Instead, he was only an "Applicant Trainee" under 46 C.F.R. § 401.110(13). *Id.* (Note: Although the term "Applicant Pilot" is identical to the one used by the *Association* in its training plan, the meaning in the Coast Guard's regulations is slightly different, and is what is relevant to the Coast Guard's counting of trips.)

The distinction between the two classifications is that an applicant with ocean experience, but not Great Lakes experience, such as Captain Hight, does not become an "Applicant Pilot" until he receives six months' experience on the Great Lakes. *Compare* 46 C.F.R. § 401.110(12) ("Applicant Pilot means a person who holds a license or merchant mariner credential endorsed as a master . . . and has acquired at least twenty-four months licensed service . . . Those persons qualifying with ocean service must have obtained at least six months of licensed service . . . on the Great Lakes"), *with* 46 C.F.R. § 401.110(13) ("Applicant Trainee means a person who is in training to become an Applicant Pilot with an organization authorized to provide pilotage services."). According to the Coast Guard this did not occur until December 22, 2015, when Director Todd Haviland stated that Captain Hight was an "Applicant Pilot." R.2, 8. Thus, this Court is reviewing the Coast Guard's position that trips cannot count toward the "minimum trips requirement" until an applicant has obtained the six months Great Lakes experience.[6] In Captain

[6] The Association's position is that virtually none of the trips Captain Hight took, at any time, count toward the minimum trips requirement—even though Captain Hight was training at the

Hight's situation, that means trips taken after his date of application of July 2, 2015, but before December 22, 2015.

The Coast Guard adopted its current interpretation of the "minimum trips" requirement during the pendency of Captain Hight's requests to become a registered pilot. On May 15, 2018, a Coast Guard official, Rajiv Khandpur, stated that "[y]our requirements are to complete 5 round trips on the river in the company of a Great Lakes Registered pilot, from the time you became an applicant pilot (Aug 17, 2015), before you can be considered for full registration." R.173. This directly contradicts the later assertion that the correct starting date was December 22, 2015. R.3. This new interpretation is also inconsistent with the Coast Guard's prior practice. For instance, one of Captain Hight's colleagues, Chris Weigler, started the Association's training program at almost the exact same time as Captain Hight, and they proceeded through the program at the same pace. Weigler was permitted to take the test and become a registered pilot, notwithstanding that he had not satisfied the new version of the minimum trips requirement. Hight Decl. ¶¶ 103–128. When Captain Hight asked Director Haviland about this inconsistency, Haviland simply said that he would not "discuss the status of another mariner." R.119.

Captain Hight Questions the Association's Management and Finances

Captain Hight believes that the Association turned on him for reasons entirely unrelated to his performance and training as a pilot. Hight Decl. ¶ 52. The real reason, he believes, is because he spoke out against Association and Coast Guard practices that he believed to be unethical, particularly those involving Association President Boyce and Director Haviland. Hight Decl. ¶¶ 52–63; R.138–39, R.142. This included: the lending of the Association's expensive lake

Association's direction during all of those trips—but that question is not before this Court in its review of the Coast Guard's final decision. R.259-61.

house to Haviland for him and his family to use on their vacation, Boyce using the Association's pilot boat to take his and Haviland's families on a pleasure trip (while disabling the Automatic Identification System in order to hide the activity), Boyce's refusal to allow any members, including the treasurer, to access the Association's accounting records, and a culture of hazing directed towards pilots in training. R.410; Hight Decl. ¶¶ 53–60.

Captain Hight believed that Boyce retaliated against him because he has seen it happen before. In 2016, an Applicant Pilot named Robert Reese had also been outspoken about improving the Association's management and finances. At that time, Boyce reached out to a number of pilots, including Captain Hight, to ask if they thought that Reese should be registered. Captain Hight warned Reese about Boyce's questions, after which Reese stopped questioning Boyce's policies, and he was ultimately registered. Hight Decl. ¶¶ 64–72.

STANDARD OF REVIEW

The Administrative Procedure Act requires this Court to "compel agency action unlawfully withheld or unreasonably delayed; and hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law; [and] contrary to constitutional right." 5 U.S.C. § 706. This Court reviews constitutional claims *de novo*, *All. for Nat. Health U.S. v. Sebelius*, 786 F. Supp. 2d 1, 12 n.11 (D.D.C. 2011), and although an agency's reasonable interpretation of genuinely ambiguous statutes and regulations is entitled to judicial deference, as explained in more detail below, no such deference is warranted in this case. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019).

SUMMARY OF ARGUMENT

In the decision below, the Coast Guard concluded that: (1) Captain Hight had not completed the required number of training trips to become a federally registered pilot on the waters of District One of the Great Lakes and (2) that Captain Hight could not work as a pilot on

those waters without the consent of the Association, which the Association would not give. These conclusions are contrary to the Coast Guard's regulations, the Great Lakes Pilotage Act, and several provision of the U.S. Constitution.

Captain Hight has completed the minimum trips requirement in accordance with the plain text of the regulation. The Coast Guard's novel interpretation of that regulation is contrary to its plain meaning as well as historical practice, and it was sprung on Captain Hight at the last minute, after he had completed his training in reliance on the prior interpretation.

The Coast Guard is also incorrect in concluding that the Association has an unreviewable veto over the registration of new pilots. To begin with, the regulations say no such thing, and the Great Lakes Pilotage Act does not permit the Coast Guard to require membership in a private organization in order to work as a pilot. Indeed the Act specifically states that any such organization must be "voluntary."

More fundamentally, the nondelegation doctrine and due process clause both prohibit the Coast Guard from granting the Association direct regulatory authority over other private individuals, such as Captain Hight. And requiring Captain Hight to join the Association in order to work is a violation of the First Amendment.

ARGUMENT

I. The Coast Guard incorrectly interpreted the Minimum Trips Requirement when wrongly denying Captain Hight's request to take the Written Exam.

Captain Hight has satisfied the minimum trips required for pilot licensure under 46 C.F.R. § 401.220(b)(1) & 402.220(a)(1) (together requiring five round trips for the holder of a master's license). But the Coast Guard disputes this by applying a novel interpretation of its regulations, inconsistent with the regulation's plain text.

Judicial review of an agency interpretation of its own regulation is a two-step analysis. First, the court engages in a rigorous interpretive analysis employing all the tools of interpretation to determine if a regulation is "genuinely ambiguous." *Kisor*, 139 S. Ct at 2415. Second, even if a regulation is "genuinely ambiguous" the Court must assess if the agency's interpretation still does not deserve deference. *Id.* at 2416.

The Supreme Court has recently made clear that courts may only defer to agency interpretations of "genuinely ambiguous" regulations. *Id*. at 2415. And to determine if genuine ambiguity exists, the court must first exhaust all of the "standard tools of interpretation." *Id.* at 2414. Even "hard interpretive conundrums relating to complex rules can often be solved" without turning to deference. *Id.* at 2415. Only after the court conducts its own thorough interpretive analysis, as "it would if it had no agency to fall back on," can it consider deferring to the agency's interpretation. *Id.* at 2415.

Here, the Court need not move beyond step one. The text of 46 C.F.R. § 401.220(b)(1) is unambiguous, it "just means what it means—and the court must give it effect, as the court would any law." *Kisor*, 139 S. Ct. at 2415*; see also Continental Res., Inc. v. Gould*, 410 F. Supp. 3d 30, 35 (D.D.C. 2019) (holding "deference is cabined by the plain language of the regulation."). This plain meaning is underscored when, as here, the agency's history, or past practice under a regulation, confirms that plain reading.

A. The plain language of 46 C.F.R. § 401.220(b)(1) controls, and Captain Hight satisfies the requirement under it.

46 C.F.R. § 401.220(b)(1) states that an Applicant Pilot can be registered once he has "completed the minimum number of trips prescribed by the Commandant over the waters for which application is made on oceangoing vessels, in company with a Registered Pilot, *within 1 year of date of application*." (emphasis added). This language is unambiguous. For applicants

holding a master's license or endorsement, like Captain Hight, the "minimum number of trips prescribed by the Commandant" is five. 46 C.F.R. § 402.220(a)(1). Then, if those trips are (1) "over the waters for which application is made," in this case the St. Lawrence River, (2) on an oceangoing vessel ("of 4,000 gross tons or over"), (3) in company with a registered pilot, and (4) within one year of date of application, the trip counts towards the required minimum. 46 C.F.R. § 401.220(b)(1); *see also* 46 C.F.R § 402.220(a). And most importantly for this case, the regulation plainly counts trips from the "date of application" for pilot registration, not from date of acceptance as an "Applicant Pilot." There is no dispute that "application" in 46 C.F.R. § 401.220(b)(1) means an "Application for Registration as United States Registered Pilot," and it is from that application date that the regulation begins counting trips. R.58 (Captain Hight's Application, dated July 2, 2015); R.2 (Coast Guard using "application" to refer to July 2, 2015).

Captain Hight satisfied this requirement. He applied to become a registered pilot on July 2, 2015. R.58. Between August 2015 and December 2015, he completed "eighteen" "one-way River trips" or nine round trips over the designated waters of District One, i.e., the St. Lawrence River. R.3; R.412. No one disputes that these trips occurred on oceangoing vessels in company with registered pilots. As a result, these trips satisfy the requirements of 46 C.F.R § 401.220(b)(1). Captain Hight even completed four additional trips in April 2016. Hight Decl. ¶ 22; R.412.[7] This more than satisfied the minimum trips requirement within one year of his application.

[7] This brought his total to 12 round trips. The Coast Guard accepted these trips for purposes of the Federal First-Class Pilot Exam for the St. Lawrence River. 46 C.F.R. § 11.705. This is a separate license from the pilot registration at issue here, but it shows that another branch of the Coast Guard accepted these trips as valid for their pilots' exam for the same body of water based on their regulation's plain language. *Id.* Later, however, the Coast Guard would not accept these same trips for pilot registration, even though the regulation's plain language counts these trips.

The plain language of the regulation counts trips from the date of application. Nevertheless, the Coast Guard concluded this language means something different. In its October 19, 2018 final decision letter, the Coast Guard claimed "trips predating [the Director's] December 22, 2015, letter approving [Captain Hight] as an Applicant Pilot in Training cannot be counted" to satisfy 46 C.F.R. §§ 402.220(a)(1) & 401.220(b)(1). R.3. Defendants justify this by labeling Captain Hight an "Applicant Trainee, as defined in 46 C.F.R 401.110(13)" because he did not then "have the statutory minimum of six months experience on the Great Lakes" to be an "Applicant Pilot." R.2; *see also* 46 U.S.C. § 9303(a)(2) (six-month requirement for applicant qualifying with ocean service); 46 C.F.R. § 401.110(12) (defining "Applicant Pilot" to include six months of experience on the Great Lakes). So the Coast Guard argues all trips predating December 22, 2015, counted towards Captain Hight's six months' experience but not towards his five minimum trips. R.2–3.

But this interpretation is grafted onto the text, running contrary to its plain language. The "Applicant Trainee" designation is mentioned only in the regulations' definitions section (46 C.F.R § 401.110), and nowhere in the actual regulations, let alone in the regulations covering the registration process. The distinction between "Applicant Trainees" and "Applicant Pilot" is immaterial as it pertains to acquiring trips. The regulations do not state that trips satisfying the six-months requirement cannot count toward registration if someone is an "Applicant Trainee" and not yet an "Applicant Pilot" when they took the trips. Nor do they say that a trip taken as an Applicant Trainee cannot count toward the six-months requirement *and* the five round trips requirement, or any other requirement. There simply is no bar to this.

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46 C.F.R. § 401.220(b)(1). And other pilots were allowed to count such trips before the Coast Guard changed its interpretation. Hight Decl. ¶ 93.

In addition, a plain reading of the requirements for registration in 46 C.F.R. § 401.210 confirms that the Applicant Trainee designation does not limit acquiring minimum trips. Section 401.210(a) begins "No person shall be registered as a United States Registered Pilot unless. . . ." and a list of requirements and qualifications follow. On that list is (1) the six-month requirement, and (8) the minimum trips requirement. 46 C.F.R. § 401.210(a)(1), (8). Both are requirements for registration. And nothing indicates that while obtaining (1) an applicant cannot also be satisfying (8). The plain meaning allows a pilot to acquire six months of experience and the minimum trips within one year of the date of application.

Likewise, the section relating to approval of an applicant for training confirms this reading. Applicants must satisfy six month's experience before being "selected for training." 46 C.F.R § 401.211(a)(1). But being "selected for training" is by its terms different than the "date of application" (in this case July 2, 2015) when the minimum trips begin to count. Although an applicant cannot be "selected for training" until he obtains six-months experience, 46 C.F.R. § 401.211(a)(1), there is no bar to obtaining minimum trips before and after being "selected for training." In fact, the regulations plainly contemplate, and pilots' experiences discussed below confirm, that applicants begin to acquire the minimum trips under Sections 401.210(8) and 401.220(b)(1) during the six months' experience period, so long as the trips are acquired "within 1 year of date of application."

To be sure, agencies have historically "interpreted" their regulations in ways that have effectively rewritten them, but that practice is now quite clearly foreclosed by *Kisor*. Indeed, the clarity of the Coast Guard's regulation here contrasts sharply with the examples of genuine ambiguity that the Supreme Court flagged for us in *Kisor*. For instance, the Court pointed to a TSA regulation requiring that travelers pack liquids, gels, and aerosols in certain containers in

carry-on baggage. The Court noted it was unclear whether such a regulation applied to a "jar of truffle pâté." *Kisor*, 139 S. Ct. at 2410 (discussing *Laba v. Copeland*, No. 3:15-CV-00316-RJC-DSC, 2016 WL 5958241, *1 (W.D.N.C., Oct. 13, 2016)). A regulation requiring Captain Hight to complete the minimum trips within one year of the date of application for registration could hardly be clearer. But the Coast Guard proposes this ambiguity: Do trips count if they are made within one year of the date of application or do they count from the date the Coast Guard officially acknowledges a pilot is approved as an applicant pilot? The regulation's text answers plainly—one year from the date of application.

B. Captain Hight and his fellow pilots' history in the pilot registration process confirm the plain reading of 46 C.F.R § 220(b)(1)'s minimum trips requirement.

The regulation's plain meaning is confirmed by the history of its application. Prior to denying Captain Hight's registration, the Coast Guard and Association counted trips from an applicant's first six months of training. But the changed interpretation used to deny Captain Hight contradicts this plain language and history.

Captain Hight applied for pilot registration on July 2, 2015. 46 C.F.R. § 401.200(a); R.58. He immediately went to work with the Association, beginning training on August 17, 2015, and followed the Association's direction to acquire the necessary minimum trips within one year of applying. R.9 (the Association acknowledging "Captain Hight started his training August 17, 2015."); R.412; R.3 (Coast Guard acknowledging that at least "eighteen" of Captain Hight's "one-way River trips" (or nine round trips) occurred within one year of the date of application). The minimum-trips requirement is carried out through a "course of instruction," which in this case is the Association's training plan. 46 C.F.R. § 401.220(b)(2); R.10–16. An applicant completes this course over a period of years and then takes the written exam administered by the

Coast Guard. 46 C.F.R. § 401.220(b)(3). After completing the minimum trips, course of instruction, and written exam, an applicant buys into the Association and is registered.

Captain Hight spent well over two years in the training plan, completing the requirements, and the Association then passed a ballot measure restructuring the buy-in process with Captain Hight's name on it. Hight Decl. ¶ 30. This, of course, indicated he was soon to buy into the Association. Then, to his great shock and surprise, and despite completing the pilot requirements, he was denied registration. R.113 (Captain Hight explaining "[o]n the 31st of January [the ballot measure] was approved, twenty-two days later I was allowed to select my days off schedule and then twelve days later, completely out of nowhere, I receive notification I am not being recommended for registration renewal."). Captain Hight's history under the regulation, up to the point the Association recommended against him, confirms the text's plain reading and reveals the sudden change in interpretation.

Moreover, many of the pilots who were registered before Captain Hight also went through this process, having trips counted from their first year of training, including trips from their first six months of experience. Registered pilots Tom Sellers (pilot #166), Patrick Broderick (pilot #165), and Ryan Sullivan (pilot #164) all received their pilot registration under the old interpretation. And registered pilots Grant Begley (pilot #171), Ian Sherwood (pilot #172), and Steven Pellegrino (pilot #173) can attest to this old interpretation. Hight Decl. ¶¶ 93–94; *see also* R.192 (writing to the Coast Guard "[y]ou are attempting to apply unprecedented standards to me. I suggest you exam[ine] pilot training records from pilot 164 to pilot 173 in order to gain some validity to the history of training by the SLSPA.").

Another pilot's experience confirms this plain reading and change of interpretation. Christopher Weigler, an Applicant Pilot who began training at approximately the same time as

Captain Hight, was permitted by the Coast Guard to take the written exam without having satisfied the new interpretation of the minimum trips requirement. Hight Decl. ¶¶ 103–128. This is because he could count trips from his first six months under the old interpretation consistent with the plain language. Then, after taking the exam, because the Coast Guard and Association were in the process of developing a new interpretation of the regulations, Weigler was required to take more trips, ostensibly to comply with this new interpretation. Hight Decl. ¶ 126.

But Weigler's experience cannot be squared with the history or text of the regulation. Weigler's post-exam five trips would not be "within 1 year of the date of application" and thus counting them would be contrary to the regulation's plain language. Hight Decl. ¶¶ 127–128. Also, his trips would not be within one year of the date of being accepted for training and thus counting these trips would be contrary to the Coast Guard's interpretation. Moreover, if he took the written exam before satisfying the minimum trips requirement, his experience is at odds with the Coast Guard's position that Captain Hight could not take the written exam until he satisfied that requirement. R.6 (stating "[w]e will not administer the written examination unless these two requirements are satisfied," one of which is the minimum trips requirement). Weigler's experience underscores the Coast Guard and Association's shifting interpretations of their regulations.[8]

[8] The Coast Guard attempted to justify its interpretation by arguing that a pilot in training cannot touch the controls of a ship until he has been made an "Applicant Pilot" as that term is defined in the regulations, so there was no way to accrue trips beforehand. R.2 ("Because you were sailing as an observer for waterways familiarity, and additionally documenting transits for a First Class Pilot's endorsement, you were not evaluated by a Registered Pilot on any of these trips."). This statement reveals the Coast Guard's ignorance of the Association's training procedures because the Association's standard practice was to allow only full, registered pilots (not even temporary registered pilots) to touch the controls of a ship on the St. Lawrence River. Hight Decl. ¶¶ 94-95. At the time that Captain Hight was proceeding through the training program, no pilots in training (*i.e.*, pilots who had not yet become full registered pilots) were permitted to do anything but simply observe during river trips. *Id.* The only exceptions were applicant pilots Telecki and

In the end, Captain Hight completed more than enough qualifying trips between his application date, July 2, 2015, and the 1-year mark, July 2, 2016. Therefore, the plain reading of 46 C.F.R. § 401.220(b)(1) is confirmed by the Coast Guard's past practice under the regulation and Captain Hight more than satisfies the provision's minimum trips requirement.

C. Even if 46 C.F.R § 401.220(b)(1) is determined to be genuinely ambiguous, the agency's interpretation is not entitled to deference.

46 C.F.R § 401.220(b)(1) is clear on which kinds of trips count and from what date. But if the Court finds the regulation genuinely ambiguous, the Coast Guard's interpretation still cannot be given deference under *Kisor*.

In *Kisor*, the Court identified other requirements that must be satisfied before deference is given to an agency interpretation of a genuinely ambiguous regulation. First, the interpretation must be made by the agency—it must be its "authoritative" or "official position." *Kisor*, 139 S. Ct. at 2416. This excludes "any more ad hoc statement not reflecting the agency's views" and must at least originate "from those actors, using those vehicles, understood to make authoritative policy in the relevant context." *Id.* Second, the interpretation must reflect the agency's "fair and considered judgment." This means the court should not defer to a "convenient litigating position" or a "post hoc rationalization advanced to defend past agency action against attack." *Id.* (cleaned up). And, crucially, deference is inappropriate to an interpretation, "whether or not introduced in litigation," that results in "unfair surprise" to the regulated party. *Id.* at 2417–18.

This is precisely the kind of "unfair surprise" that the *Kisor* Court was talking about. Here, the Coast Guard applied a novel interpretation of its regulations to deny Captain Hight's

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Reese who were allowed to take control on the river before registration due to a pilot shortage. *Id.* ¶ 95. Otherwise only registered pilots touched the controls on river trips.

registration. Contrary to plain text and past practice, this sudden about-face unfairly surprised Captain Hight, disrupting his reasonable expectations under the regulation. *Cf. id.* at 2418; *see, e.g.*, R.192 ("You are attempting to apply unprecedented standards to me. I suggest you exam[ine] pilot training records from pilot 164 to pilot 173 in order to gain some validity to the history of training by the SLSPA."). This unexpected breach of reasonable reliance interests is enough to set the agency's interpretation aside. But the record also reveals how this novel interpretation was formulated.

It did not "emanate from those actors . . . understood to make authoritative policy in the relevant context." *Kisor*, 139 S. Ct. at 2416. It was the President of the Association, John Boyce, who first proposed the interpretation to deny Captain Hight's registration. R.181. Before that, Rajiv Khandpur, Chief at the Office of Waterways and Ocean Policy, proposed the plain reading that trips start counting from the date "you became an applicant pilot (Aug 17, 2015)," which was the date Captain Hight took his first trip within one year of his date of application. R.173. It is Khandpur at the Coast Guard, not Boyce, who should make official interpretations. And the Coast Guard has not produced documents detailing an official position (implying they don't exist), accounting for the ad hoc fashion in which the new position was formulated. (Dkt. 51 at 2) (representing that it is irrelevant whether a document exists verifying the Coast Guard's interpretation of the regulation). This interpretation was developed through a series of ad hoc statements rather than reflecting the "official position" emanating from the agency's policymakers. Such an interpretation should be set aside.

Without an official position, the Coast Guard, in conversation with the Association, changed its interpretation of the regulation mid-stream. R.173–82. The first interpretation was consistent with the plain meaning. R.173–76. The changed interpretation is unsurprisingly

consistent with the agency's actions against Captain Hight's registration. In sum, the Coast Guard's novel interpretation of the regulation materialized as a "convenient litigating position" developed through ad hoc statements,formulating a "post hoc rationalization" for denying Captain Hight's registration. *Kisor*, 139 S. Ct. at 2417 (brackets omitted).

Captain Hight followed the Association's direction and course of instruction throughout his over two years in training and was informed he would soon be made a registered pilot. The disruption of these reasonable expectations was rationalized by a novel interpretation of the regulations, contrary to the plain meaning of the text and past practice, and formulated through an ad hoc conversation between the Coast Guard and Association. An interpretation, made under these circumstances, is not entitled to deference.

II. The Coast Guard violated the private non-delegation doctrine by allowing private parties to exercise governmental authority over other private parties.

A. The Federal Government Cannot Delegate Regulatory Power to Private Parties.

Article I, Section 1 of the United States Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States," and the Supreme Court has held that these legislative powers cannot be delegated. *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019) ("The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government."). Nevertheless, the Court has granted Congress considerable leeway to seek "assistance" from other branches. *Id.* at 2123. The non-delegation doctrine is not violated, therefore, so long as Congress lays down an "intelligible principle" for the authorized party to follow in implementing the law. *Id.*

The standard is not so relaxed, however, when the issue is the delegation of governmental power to *private* entities, particularly if those delegees are granted the power to bind other

private parties. The Supreme Court has called that "delegation in its most obnoxious form; for it is 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." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *see also Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1143 (D.C. Cir. 1984) ("*NARUC*") (stating that "the [constitutional] difficulties sparked by such allocations are even more prevalent in the context of agency delegations to private individuals").

In *Carter Coal*, the U.S. Supreme Court struck down a law that gave coal producers and miners the power to set minimum wages and maximum hours in their industry. The Court explained that the law gave the majority "the power to regulate the affairs of an unwilling minority." 298 U.S. at 311. For over 70 years this has remained the touchstone of the private nondelegation doctrine: whether private parties are granted legal authority over other private parties. The D.C. Circuit has likewise "caution[ed]" the government "that it cannot, of course, cede to private parties . . . the right to decide contests between themselves and their opponents." *NARUC*, 737 F.2d at 1143; *see also Pittston Co. v. United States*, 368 F.3d 385, 395 (4th Cir. 2004) ("Congress . . . may not give [private] entities governmental power over others."); *City of Dallas. v. FCC*, 165 F.3d 341, 357–58 (5th Cir. 1999) (rejecting the "delegation of regulatory authority [to one regulated party] to impose a cost on another regulated entity"); *cf. McManus v. Civil Aeronautics Bd.*, 286 F.2d 414, 419 (2d Cir. 1961) (finding no unlawful delegation because the legislatively authorized agreements "bind only the parties to them, and impose no restriction on carriers who are not parties").

To be sure, the private non-delegation doctrine does not prohibit all uses of private parties by the government. For instance, private parties can be given "ministerial and advisory"

roles. *See Pittston*, 368 F.3d at 397 (finding no unlawful delegation where private party was merely "doing calculations and collecting funds"). And private contractors can carry out certain governmental functions so long as the functions do not involve the exercise of "core governmental power." *Kerpen v. Metro. Washington Airports Auth.*, 907 F.3d 152, 162 (4th Cir. 2018). But courts have never retreated from the firm rule that private parties cannot exercise regulatory power over other private parties.

Moreover, the non-delegation doctrine is not limited to explicit, statutory delegations of governmental power; the doctrine also prohibits the executive branch from re-delegating the powers that Congress has given it. For instance, in *General Electric Co. v. New York State Department of Labor*, the Second Circuit held that even if a statute did not violate the non-delegation doctrine *on its face*, the plaintiff could prevail if it proved that, in practice, the agency entrusted with executing the statute had essentially outsourced that function to private parties. 936 F.2d 1448, 1458 (2d Cir. 1991) ("GE insists . . . that in fact the Department does not exercise its discretion. Its failure to do so constitutes, according to GE, an unconstitutional delegation of legislative authority. We agree."); *see also Sierra Club v. Sigler*, 695 F.2d 957, 962 n.3 (5th Cir. 1983) (noting that the Army Corps of Engineers cannot simply "rubberstamp" an Environmental Impact Statement prepared by a private party).

Indeed, the executive non-delegation principle applies even when agencies are attempting to delegate authority to state and local government entities rather than to private parties. For example, the D.C. Circuit invalidated the FCC's attempt to let state utility commissions decide which local telephone services were required to be "unbundled." *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 568 (D.C. Cir. 2004). The court explained that "a federal agency may turn to an outside entity for advice and policy recommendations, provided the agency makes the final

decisions itself. . . . An agency may not, however, merely 'rubber-stamp' decisions made by others under the guise of seeking their 'advice,' . . . nor will vague or inadequate assertions of final reviewing authority save an unlawful subdelegation." *Id.* (internal citations omitted); *see also Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775, 783–84 (D.C. Cir. 1998) ("[W]e still do not think that the Control Board can *redelegate* its 207(d) power to an outside body.").

B. The Coast Guard has Unconstitutionally Delegated Regulatory Power to the Association.

Although non-delegation questions frequently turn on disputed issues of fact, *see e.g., Gen. Elec. Co.*, 936 F.2d at 1458 (Second Circuit remanding to district court for further discovery to determine whether unlawful delegation was occurring), the record in this case could hardly be clearer. *First*, the Coast Guard explicitly and repeatedly stated that the Association gets to determine who can become a pilot on the Great Lakes. The Coast Guard refused to consider any factual disputes between the Association and Captain Hight, treating them as irrelevant, and refused to place him on the Lake Ontario tour de role even after it renewed his temporary registration. *Second*, the Coast Guard gave conclusive deference to the Association's interpretation of the minimum trips requirement, notwithstanding that the Association's interpretation was novel, pretextual, and contrary to the plain meaning of the regulation (as explained in more detail above).

There can be no dispute that the Coast Guard allows the Association to determine who can become a pilot. Indeed, the final decision in this case explicitly states that Captain Hight cannot be registered because "[t]here is no dispute that you have not received a recommendation for full registation from the SLSPA." R.4. Thus, the Association exercises regulatory authority over other private individuals, violating the cardinal rule of the non-delegation doctrine.

Nor is this a situation where the Coast Guard simply considers the Association's recommendation, while retaining and exercising ultimate discretion itself. To the contrary, when Captain Hight tried to explain why the Association was not justified in witholding its recommendation, the Coast Guard repeatedly emphasized that the reasons were irrelevant and that the Association was the entity in charge. For instance:

- Michael Emerson, counsel for the Coast Guard, stated that he had "limited authority to influence individual pilot employment decisions." R.186.
- When Captain Hight asked Director Todd Haviland why the Coast Guard had administered the pilots' exam to another pilot-in-training, Christopher Weigler, despite Weigler's having completed the same training as Captain Hight, Haviland responded: "Please direct your question to the Saint Lawrence Seaway Pilots Association Training Committee," and he said he would not "discuss the status of another mariner." R.119; R.121.
- Haviland stated that "[t]he issues with your employment status is between you and the Saint Lawrence Seaway Pilots Association." R.136.
- Rajiv Khandpur stated that "[r]egarding being included in the tour-de-role, that is between you and your pilot association. We will only step in if there is a vessel delay due to pilot unavailability." R.149.
- Haviland stated that "the Saint Lawrence Seaway Pilot's Association offered you an opportunity to join its training program with no guarantee of future employment/partnership." R.183.
- Khandpur stated "the Coast Guard does not have the authority to force a voluntary association of U.S. registered pilots, in this case the St. Lawrence Pilot Association, to bring on board a member with whom they are not willing to serve." R.194.

In short, the Coast Guard allows the Association to exercise total discretion to decide who may and may not serve as a federally registered pilot in the waters of District One.[9] That is

[9] Again, the Coast Guard *could* properly police the tour de role under 46 U.S.C. § 9304(b). Its refusal to do so constitutes an unconstitutional delegation to a private party.

"delegation in its most obnoxious form," and it is unconstitutional under *Carter Coal*. 298 U.S. at 311.

The requirements that an Applicant Pilot receive the Association's positive recommendation before becoming registered and that the Association has complete control over the tour de role are not the only violations of the non-delegation doctrine. In denying Captain Hight the right to sit for the exam, the Coast Guard impermissibly deferred to the Association's interpretation of the minimum trips requirement, rather than exercising its independent judgment. *Cf. Pittston*, 368 F.3d at 397 (rejecting non-delegation in part because private party's statutory interpretation was not entitled to any weight). The administrative record bears this out:

- On May 15, 2018, Rajiv Khandpur stated that the minimum trips requirement was "5 round trips on the river in the company of a Great Lakes Registered pilot, from the time you became an applicant pilot (Aug 17, 2015), before you can be considered for full registration." Khandpur requested documentation of these trips, and Captain Hight provided documentation of 12.5 round trips. R.173-76. ***There is no question that this documentation showed that Captain Hight had satisfied the minimum trips requirement as Khandpur had just interpreted it.***

- Khandpur then asked Coast Guard officer Vincent Berg to confirm the accuracy of Captain Hight's records. Berg forwarded the records to John Boyce, requesting confirmation. R.181–82.

- Boyce, instead of checking to see if the Captain Hight's records matched the Association's, simply reinterpreted the minimum trips requirement as applying only to trips completed after an applicant pilot is *approved* (which in Captain Hight's case was December 22, 2015), rather than after the pilot *applies*. R.181. Todd Haviland then echoed this interpretation. R.180.

The email exchange indicates that the Coast Guard's prior interpretation was consistent with the plain meaning of the regulation and that the interpretation changed at the suggestion of John Boyce. Further discovery would likely have confirmed that (1) the prior interpretation had been of long standing, (2) the new interpretation originated with the Association, (3) the new

interpretation was adopted specifically to deny Captain Hight the right to become a registered pilot, and (4) the Coast Guard deferred to the Association's interpretation. In any event, the record is sufficient to establish that the Coast Guard violated the non-delegation doctrine by allowing the Association to authoritatively interpret regulations.

III. The Coast Guard's decision violated due process

The decision below violated due process in two distinct ways. First, the Coast Guard's delegation of regulatory authority to the Association is a due process violation, in addition to a separation of powers violation, as explained above. Second, Captain Hight was not provided with notice or a meaningful opportunity to address either the Coast Guard's changed interpretation of its own regulations or the allegations against him by the Association.

A. The Coast Guard violated due process by delegating to the Association the authority to determine who may work as a pilot on the Great Lakes.

As explained above, the delegation of regulatory authority to the Association is unlawful under the Vesting Clauses, but it is also unlawful under the Due Process Clause of the Fifth Amendment. In *Association of American Railroads v. United States Department of Transportation* (*American Railroads III*), the D.C. Circuit held that due process does not allow an "economically self-interested entity" to "exercise regulatory authority over its rivals." 821 F.3d 19, 27 (D.C. Cir. 2016) (citing *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936)). Yet that is precisely what is happening in this case.

American Railroads III concerned Amtrak's statutory authority to develop "metrics and standards" governing the entire rail industry, specifically with respect to Amtrak having priority access to the rails, ahead of the freight train operators that actually owned the rails. *Id.* at 23–24. Amtrak was statutorily authorized to develop these metrics and standards in cooperation with the Federal Railroad Administration. In the event that Amtrak and the Administration could not

agree, the Surface Transportation Board would appoint an arbitrator to settle the issue. The resulting metrics and standards would become mandatory on the industry, except when impracticable. *Id.*

The freight operators argued that this delegation violated due process because Amtrak was competing with them over scarce resources (tracks) and because Amtrak was economically self-interested. The court agreed. First, the court found that Amtrak was economically self-interested because, even though it was a government agency, it was organized as a business, and it operates under a statutory directive to "be operated and managed as a for-profit corporation." *Id.* at 32. Second, the court found that Amtrak was exercising regulatory authority over its competitors because Amtrak could create new rules for the freight operators through the arbitration process from which the freight operators were excluded. *Id.* at 33–34. That was enough to establish a due process violation.

The present case is even easier. There is no question that the Association is an economically self-interested entity. *See Menkes v. Dep't of Homeland Sec.*, 486 F.3d 1307, 1308 (D.C. Cir. 2007) (recognizing that the Association is "a private business organization"). The Association has an economic incentive not to approve new pilots because, although pilotage rates are regulated by the Coast Guard, the Coast Guard increases rates when the number of pilots is low. *See Am. Great Lakes Ports Ass'n v. Zukunft*, 296 F. Supp. 3d 27, 38 (D.D.C. 2017) ("[T]he Coast Guard concluded that increased pilot rates were the best and quickest way to attract and retain more qualified pilots.") (cleaned up). And the fact that Association members also have a duty to provide safe and efficient pilotage service on the Great Lakes does not change that. As the D.C. Circuit in *American Railroads III* noted, "many corporations are obligated to

compromise profit-seeking ambitions pursuant to statutory goals aimed at public goods," but that "does not somehow negate economic self-interest." 821 F.3d. at 32.

The Association also has regulatory authority over its competitors in the form of unreviewable discretion to determine who may be a pilot on the Great Lakes.[10] This is far more power than was at issue in *American Railroads III*, where Amtrak could only regulate its competitors indirectly via an arbitration process. Due process is offended by this conflict of interest, regardless of whether the Association was actually motivated by economic self-interest in this particular instance. (The *American Railroads III* court did not bother to ask whether Amtrak had actually behaved self-interestedly; it was enough that the incentive to do so existed.)

B. The Coast Guard's adjudication of Captain Hight's request to take the pilots' exam did not provide him a meaningful opportunity to by heard.

Due Process requires, at minimum "the opportunity to be heard at a meaningful time and in a meaningful manner," *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 318 (D.C. Cir. 2014), and "[e]xcluding parties from directly accessing the evidence against them is strongly disfavored," *Fares v. Smith*, 901 F.3d 315, 324 (D.C. Cir. 2018); *see also Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (articulating three-factor balancing test for due process: (1) the private interests at stake, (2) the risk of erroneous deprivation, (3) and the government's interest in not providing more process.). The Coast Guard violated due process by denying Captain Hight the opportunity to see and respond to the arguments and evidence that the Association levied against him.

[10] Not to mention the hazing culture cultivated by the Association, which is also likely to decrease the number of new pilots. Hight Decl. ¶¶ 56, 94.

First, with regard to the minimum trips requirement, the Coast Guard's decision contains no reasoning to justify its novel interpretation of the regulation. It simply states that "[a]ccording to the Director, any trips predating his December 22, 2015, letter approving [Captain Hight] as an Applicant Pilot in Training cannot be counted." R.3. This final decision was the first time Captain Hight was even told about the Coast Guard's new interpretation of the regulation. The Director's interpretation was never provided to Captain Hight and does not appear in the record. When Captain Hight asked the Director why Chris Weigler had been permitted to take the Pilot's test—despite Weigler's training having proceeded in parallel to Captain Hight's—the Director responded "I am not going to discuss the status of another mariner." R.119. That simply will not do. *See NLRB v. Washington Star Co.*, 732 F.2d 974, 977 (D.C. Cir. 1984) (holding that unexplained and inconsistent application of regulations is arbitrary and capricious).

Captain Hight was entitled to know that the Coast Guard was considering adopting a new interpretation of its regulation, and he was entitled to know why. Because he was never informed, he did not have an opportunity to rebut the Coast Guard's reasoning. For instance, Captain Hight would have emphasized that the Coast Guard's interpretation was contrary to historical practice and that it was being sprung on him after he had completed his training in reliance on prior practice.[11]

Second, although the Coast Guard emphasized that it was not passing judgment on the reasons that the Association withheld its recommendation for Captain Hight, if the Coast Guard now attempts to rehabilitate its decision by arguing that it agreed with the Association's

[11] Although discovery of historical training records would have demonstrated that the Coast Guard's interpretation is novel, Captain Hight's declaration does so as well. Admitting the declaration will alleviate some of the due process infirmities created by the Coast Guard's process.

recommendation, that too would constitute a denial of due process. Captain Hight never had the opportunity to review the evidence and communications regarding the two alleged "incidents" from his training. He provided reasonable and apparently unrebutted explanations for both incidents. Nothing in the record provides a reasoned basis for choosing to find the Association's account of these incidents more credible than Captain Hight's. And if the Coast Guard had ever communicated to Captain Hight that the truth about these incidents was material to its decision, then Captain Hight would certainly have been able to provide further evidence and witnesses to support himself. Of course, if the Coast Guard stands by its earlier position that the reasons for the Association's withholding a recommendation are irrelevant, then the Court need not address this specific issue.

Finally, it is curious that the Coast Guard mysteriously renewed his temporary registration after the Association affirmatively recommended *against* doing so. If the Coast Guard *had* denied that request it would have had to give Captain Hight a hearing. *See* 46 C.F.R. § 401.600. Renewing his temporary registration, in the face of the Association's recommendation, while following the Association's dictates on taking the exam and being placed on the tour de role (thus making the temporary registration useless) seems to serve no purpose other than to deny Captain Hight a hearing. That too denies him due process.

IV. The Coast Guard has violated the First Amendment by requiring Captain Hight to join the Association as a prerequisite to working as a pilot on the Great Lakes.

Not only does the Coast Guard require Captain Hight to obtain approval from the Association to become registered as a pilot, it also requires him to become an Association member in order to go to work. The Association refused to put him on the tour de role even when his temporary registration was renewed, and there is no reason to think he would be placed on any tour de role it controls even after passing the exam and obtaining a full registration. Yet, due

to his experiences, Captain Hight objects to joining the Association. And the First Amendment protects that choice. Requiring membership in the Association in order to work as a pilot is unconstitutional. This Court should enter summary judgment in his favor on Count VIII of his Complaint.

Captain Hight witnessed what he believed to be corruption within the Association and between it and the Coast Guard. He noticed that only the Association's president John Boyce had control over its finances, and that the nominal treasurer did not even have access to its bank account records. Hight Decl. ¶ 54; *see also* R.362 (Captain Hight stating "Mr. Boyce's unilaterally controlling all executive committee positions without any transparency and the lack of oversight by the USCG Pilotage Office"); R.390 (Hight stating "[o]ne registered pilot, Thomas Sellers [the treasurer], has been threatened, his five year registration will not be renewed if he does anything that displeases Mr. Boyce . . . . Mr. Boyce can only make these claims because he has Director Haviland in his pocket."). He also saw that Mr. Boyce had allowed the Coast Guard official most involved in overseeing pilot activities, Director Haviland, to stay along with his family at the Association's lake-front property in Capt Vincent, New York. Hight Decl. ¶¶ 57–60. Captain Hight thought these actions were unethical, and raised them to various fellow pilots and trainee pilots. *See* R.362 ("I am personally aware of potential campaign finance conflicts as well as gifts of lodging, transportation, & meals provided to Director Haviland & his family."); Hight Decl. ¶¶ 52–64.

Yet Captain Hight believes that when Mr. Boyce heard about Captain Hight's questioning of what he believed were unethical practices he booted Captain Hight from the Association's training program and barred him from membership. R.362 ("Mr Haviland and Mr Boyce have conspired to make all efforts to deny me the opportunity to achieve permanent

registration as a District 1 Great Lakes Pilot, as a result of my ongoing questioning of the business practices of Mr. Boyce."). As detailed above, the Association also recommended to the Coast Guard that it deny him temporary registration, expelled him from the Association, and refused to recommend him for full registration. These actions then led the Coast Guard to refuse to allow him to take the registration exam and to not force the Association to place him on the tour de role. Under official Coast Guard policy, Captain Hight cannot work as a pilot unless he becomes an approved member of the Association, with a membership buy-in cost of approximately $200,000. Hight Decl. ¶ 61; *see also* R.410 ("The cost to buy in to the SLSPA is currently tens of thousands of dollars. That money can be used by the SLSPA for activities that I find objectionable; for instance, to fund the maintenance of the lake house that I believe is improperly lent to the Director of Great Lakes Pilotage.").

The Coast Guard's refusal to allow Captain Hight to sit for the exam and to not place him on the tour de role violated the First Amendment. In *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), the Supreme Court examined a very similar example of forcing an employee to associate in order to earn a living. Under *Janus*, any arrangement that compels individuals "to subsidize private speech on matters of substantial public concern" is subject to (at least) exacting scrutiny. 138 S. Ct. at 2460, 2465. Here, the Coast Guard's policy of deferring to the Association on registration and of allowing the Association to control the tour de role means that Captain Hight cannot work as a pilot without joining the Association's ranks. The Association "is an independent business and is the sole provider of pilotage services in the district in which it operates." Great Lakes Pilotage Rates – 2019 Annual Review and Revisions to Methodology, 84 Fed. Reg. 20-551, 20553 (May 10, 2019). The Association is also heavily involved in the Coast Guard's ratemaking for the pilotage system, which is crucial to Great Lakes shipping. The policy requiring Captain

Hight to become a member in order to work forces him to subsidize speech on an issue of public concern with which he disagrees. Following *Janus*, this violates his free speech and free association rights under the First Amendment.

Janus overruled *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Under *Janus*, public employees cannot be compelled to pay "agency fees" to public employee unions without their consent. 138 S. Ct. at 2486. Illinois law required non-union state employees to pay "agency fees," a certain percentage of union dues considered approximate to the union's work on collective bargaining, to the exclusion of the union's political activities. *Id.* at 2460–61. Mark Janus objected to the union's policy positions, and therefore argued that the agency fees amounted to compelled speech. *Id.* at 2461. *Abood* permitted compulsory agency fees, but Mr. Janus argued that *Abood* was wrongly decided. *Id.* at 2462.

The Supreme Court declared that "a compelled subsidy must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Id.* at 2465 (quoting *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 310 (2012) (invalidating agency fees paid to support union political activity)). It then applied the policy to this standard and found that it failed. The state argued it had an interest in "labor peace." *Janus*, 138 S. Ct. at 2465. But, the Court said, having a single representative for employees and having agency fees are separate issues. *Id.* The government also argued that avoiding "free riding"—non-union employees benefiting from the union's collective bargaining without paying for the union's resultant expenses—was a legitimate state interest. *Id.* at 2466. The Court bluntly stated that "avoiding free riders is not a compelling interest." *Id.* The First Amendment precludes the government from forcing a person to pay for someone else's speech simply because the government thinks that the speech helps "the person who does not want to

pay." *Id.* For those reasons, the agency fee arrangement did not pass "exacting scrutiny" and thus violated the First Amendment. *Id.* at 2478.

The Court also rejected the union's argument that its speech dealt with a matter of only private concern: the wages and benefits of the employees. *See id.* at 2474–75. Mr. Janus specifically objected to the union's unwillingness to accept pay and benefit cuts to alleviate Illinois's fiscal crisis, and that this was the "political" speech he was forced to subsidize. *Id.* at 2461. The Supreme Court agreed with him, finding it "'impossible to argue that the level of . . . state spending for employee benefits . . . is not a matter of great public concern.'" *Id.* at 2474 (quoting *Harris v. Quinn*, 573 U.S. 616, 654 (2014)). Moreover, to deny that the union's speech on public spending was "not of great public concern—or that it is not directed at the 'public square'—is to deny reality." *Id.* at 2475 (internal citation omitted). Thus, the agency fee arrangement was compelled private speech on a matter of public concern, which "seriously impinge[d] on First Amendment rights." *Id.* at 2464.

A potentially corrupt relationship between the Coast Guard and the St. Lawrence Seaway Pilots Association is also a matter of great public concern. Further, what Captain Hight would be expected to part with in order to subsidize that speech is not a mere percentage of union dues but a payment of approximately $200,000. Captain Hight's burdens are greater than Mr. Janus's on two counts. He cannot even work unless he joins the Association (Mr. Janus merely had to pay fees), and he would have to contribute an enormous sum if he did.

The Association is intimately involved in setting pilotage rates. The Coast Guard sets the rates shippers pay pilots; these rates are periodically reviewed and revised. 46 C.F.R. § 404.1. Once the proposed rates are announced, the various pilot associations engage in regulatory comment alongside other stakeholders in the pilotage system. U.S. Gov't Accountability Office,

GAO-19-493, Coast Guard: Stakeholders' Views on Issues and Options for Managing the Great Lakes Pilotage Program 11 (2019) [hereinafter GAO]. In the latest round of ratemaking, the Association indeed did so. *See* St. Lawrence Seaway Pilots Association, Comment Letter on Proposed Rule: Great Lakes Pilotage Rates (Nov. 16, 2018), https://www.regulations.gov/document?D=USCG-2018-0665-0009. Beyond the ratemaking process, the government recognizes the pilot associations as key stakeholders in the Great Lakes Pilotage Program, alongside the shipping industry, ports, and representatives of the Canadian pilotage system. GAO at 3. The pilot associations are a regulated monopoly, GAO at 25, but nonetheless remain private businesses, 84 Fed. Reg. at 20553. Like public unions engaged in collective bargaining, the pilot associations are clearly engaged in speech. See *Janus*, 138 S. Ct. at 2474 ("[T]he union speaks for the *employees*, not the employer.").

The Association speaks to an issue of great public concern. Shipping on the Great Lakes and St. Lawrence Seaway is no small matter; each year, more than 200 million net tons of commodities pass through it, including iron ore and grain. *The Great Lakes-St. Lawrence Seaway System*, Saint Lawrence Seaway Dev. Corp., https://www.seaway.dot.gov/about/great-lakes-st-lawrence-seaway-system (last updated Mar. 24, 2020). Clearly, the "region's maritime sector is a critical economic driver and [the Seaway] provides an important transportation route to the manufacturing and agricultural heartland of North America." GAO at 1. Because Great Lakes pilots are onboard ships the entire length of the Seaway, unlike most maritime pilots who work only in harbors, pilotage costs for Great Lakes shipping are proportionately higher than in other places. GAO at 6–7. The Coast Guard acknowledges that the most recent rate increases "will add new costs to shippers in the form of higher payments to pilots." 84 Fed. Reg. at 20574. To deny that the pilot associations are speaking to matters of great public concern "is to deny reality."

Janus, 138 S. Ct. at 2475. Subsidizing the Association—including protecting it from the competition of non-Association pilots—thus subsidizes private speech on a matter of public concern—exactly what *Janus* forbids. *Id.* at 2460.

Just as in the case of Mr. Janus, there are measures available that are less restrictive of associational freedoms. Most importantly, the Coast Guard could assess Captain Hight's qualifications without blindly adhering to the Association's recommendation. Further, once Captain Hight becomes a registered pilot it could require he be placed on the tour de role even though he is not an Association member, and also do so if it continues to allow for temporary registrations of pilots who have not yet obtained the necessary qualifications for full registration. This would be vastly superior to washing its hands and simply stating that whether or not he is on the tour de role, and thus able to work, is between him and the Association. It could also run the tour de role itself—a list of who gets to actually earn a living—instead of delegating it to a private, for profit company. *See* 46 U.S.C. § 9304(b). In short, there are many things the Coast Guard could do far short of deferring to a private group's efforts to sabotage the career of a dissenter and his wish to no longer associate with it.

Defendants will undoubtably draw this Court attention to *Menkes v. United States Department of Homeland Security*, 637 F.3d 319 (D.C. Cir. 2011). *Menkes*'s First Amendment analysis does not apply because it explicitly relied on *Abood*, and in any case was dicta. Mr. Menkes, a registered pilot who also did not want to be a member of Defendant Association, brought a lawsuit against the same Association in the Second Circuit. *Menkes v. St. Lawrence Seaway Pilots' Ass'n*, 269 F. App'x 54, 56 (2d Cir. 2008). There, the Second Circuit held that the government could "compel an individual to join a professional association as a condition of

employment" *id.*, and relied on *Keller v. State Bar of California*, 496 U.S. 1 (1990), which in turn heavily relied on *Abood*.

In *Menkes*'s later opinion in 2011 involving the Coast Guard in this Circuit, the court found that the earlier Second Circuit judgment precluded the First Amendment claim here. 637 F.3d at 334. In dicta, the court said that Menkes's First Amendment claim would fail on the merits based on *Abood*. *Id.* The court analogized the required Association membership with an agency shop agreement. *Id.* Any interference with Mr. Menkes's First Amendment rights was "justified by the government's interest in regulating pilotage on the Great Lakes." *Id.* The government's "need for maritime safety, the need for coordination between the United States and Canada, and Congress's push for the equitable participation of American nationals in Great Lakes pilotage" were all "sufficient to satisfy *Abood*." *Id.* at 334–35. Mr. Menkes did not allege that the St. Lawrence Association "used . . . any of his funds for political or ideological activities unrelated to pilotage, which could run afoul of *Abood*." *Id.* at 335.

With *Abood* no longer good law, neither are the court's statements in *Menkes*. This Court should grant Captain Hight's motion for summary judgment on Count VIII, order the Coast Guard to allow him to take his pilot registration exam, declare that the Coast Guard violated the First Amendment in not ensuring that he was placed on the tour de role after the Coast Guard granted him a temporary registration, and order the Coast Guard to ensure that he is placed on the tour de role once he secures his pilot registration.

V. The Coast Guard misinterpreted the Great Lakes Pilotage Act to require Captain Hight to join the Association as a prerequisite to working as a pilot on the Great Lakes.

Menkes addressed, not in dicta but on the merits, the meaning of the term "voluntary association" in 46 U.S.C. § 9304. *Menkes*, 637 F.3d at 330-33 ("The Secretary may authorize the formation of a pool by a voluntary association of United States registered pilots to provide for

efficient dispatching of vessels and rendering of pilotage services."). The court ruled that the meaning of "voluntary association" was subject to *Chevron* deference, *Chevron, USA, Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), and that the Coast Guard was reasonable to interpret "voluntary association" to mean an association in which membership was mandatory.

Captain Hight recognizes that this Court is bound by this interpretation of the statute (although this does not preclude a ruling that the statute, as interpreted, violates the Constitution, as Captain Hight's constitutional claims were not at issue in *Menkes*). However, in order to preserve Count IV of his Complaint for appeal, he asks this Court to declare that the statute protects the choice to not join a pilot association in order to be a registered pilot and work as a pilot on the Great Lakes. Further, also to preserve for appeal, Captain Hight argues that *Chevron* was wrongly decided and is a violation of the Administrative Procedure Act ("APA") and the Constitution. Courts should not defer to an agency's interpretation of a statute. Doing so is a violation of the separation of powers. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

VI. The Coast Guard regulations do not give the Association a Veto on Whether Captain Hight can Become a Registered Pilot.

Finally, as pleaded in Count III of his Complaint, Captain Hight asks this Court to declare that the Association does not have an absolute veto on whether he can become a registered pilot, as the Coast Guard claimed in its final decision. R.4. This is an error of law. The regulation in question, 46 C.F.R. § 401.220, does not require a recommendation from the relevant pilot association.

The Coast Guard relied on a prior version of that regulation, from when the Department of Commerce oversaw the pilot registration process. R.4. Whatever the merits of the

interpretation of this prior regulation, it is not what the current § 401.220 says. Section 401.220(b) states:

> Registration of pilots shall be made from among those Applicant Pilots who have (1) completed the minimum number of trips prescribed by the Commandant over the waters for which application is made on oceangoing vessels, in company with a Registered Pilot, within 1 year of date of application, (2) completed a course of instruction for Applicant Pilots prescribed by the association authorized to establish the pilotage pool, (3) satisfactorily completed a written examination prescribed by the Commandant, evidencing his knowledge and understanding of the [relevant regulations and working rules].

Separately, § 401.220(c) states "The Pilot Association authorized to establish a pool in which an Applicant Pilot has qualified for registration under paragraph (b) of this section shall submit to the Director in writing its recommendations together with its reasons for the registration of the Applicant." *Then* § 401.220(d) states "Subject to the provisions of paragraphs (a) [which are not at issue here], (b), and (c) of this section, a pilot found to be qualified under this subpart shall be issued a Certificate of Registration . . . ."

This does not say that the Association's recommendation of (c) is mandatory. Unlike the criteria of (b) which *are* mandatory ("shall be made from among . . ."), (c) is a mandate for the Association to submit "its recommendations" and "reasons." Then, under (d), the Coast Guard is to consider those recommendations and reasons in deciding whether to issue a Certificate of Registration.

Not only is this a more natural reading of this language, which purposely does not place the Association's recommendation among the "shall" criteria of (c), but this reading affords applicants like Captain Hight much more due process. The drafters of this language obviously knew there might be situations where an applicant was worthy of registration but where his association wanted to prevent that for unfair and arbitrary reasons. Reading the recommendation as not required avoids giving the Association this arbitrary power.

Therefore, this Court should declare that the Coast Guard's denial of Captain Hight's request to take the exam was unlawful. However, it does not avoid the above constitutional issues because the Coast Guard's position that the Association has absolute control over its tour de roles means that the Association can still, and will, block Captain Hight from working.

CONCLUSION

This Court should set aside the Coast Guard's final decision, order the Coast Guard to administer the pilot registration exam to Captain Hight, and order the Coast Guard to, upon Captain Hight's satisfactory completion of the test, ensure (by whatever means it finds expedient) that Captain Hight is included on the tour de role for District One.

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Respectfully submitted,

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