NO. A_____

In The Supreme Court of The United States

***The Paine College, Inc.*, Applicant.**

v.

***The Southern Association of Colleges and Schools Commission on Colleges, Inc.*, Respondent.**

On Application for Stay

EMERGENCY APPLICATION FOR STAY OF ENFORCEMENT OF ELEVENTH CIRCUIT'S JUDGMENT AND DISTRICT COURT'S IMPENDING ORDER TERMINATING INJUNCTION PENDING DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

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June 1, 2020

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To the Honorable Clarence Thomas, Associate Justice of the United States Supreme Court and Circuit Justice for the Eleventh Circuit:

> We must rally to the defense of our schools. We must repudiate this unbearable assumption of the right to kill institutions unless they conform to one narrow standard.

United States v. Fordice, 505 U.S. 717, 745, 112 S. Ct. 2727, 2743, 120 L. Ed. 2d 575, 603 (1992) (Thomas, J., concurring) (quoting Du Bois, Schools, 13 The Crisis 111, 112 (1917)).

The Paine College, Inc. ("Paine"), a historically black college in Augusta, Georgia with a rich history dating back more than 137 years, files this application for a stay to prevent irreparable harm that could lead to its demise prior to this Court's resolution of significant legal issues in Paine's forthcoming petition for a writ of certiorari.

After years of litigation over whether to revoke Paine's accreditation, the Eleventh Circuit has affirmed the United States District Court for the Northern District of Georgia's judgment in favor of Paine's regional accreditor, the Southern Association of Colleges and Schools Commission on Colleges ("SACSCOC"). The Eleventh Circuit declined to stay its mandate, and the District Court, on Friday May 29, 2020 during a status conference, indicated its intent to terminate the preliminary injunction that restored Paine's accreditation while the underlying case and appeal were pending. Paine currently has candidacy status with another institutional accreditor, but candidacy status alone will not allow Paine's summer or fall students to transfer their credit hours to another institution. If the Eleventh Circuit's

judgment and the District Court's imminent order terminating the preliminary injunction are not stayed, Paine faces the prospect of being unaccredited. Accreditation is the lifeblood for institutions of higher education. The absence of full accreditation, combined with financial pressures from the COVID-19 pandemic that are affecting all institutions of higher education, mean that Paine may be forced to close its doors before its petition for a writ certiorari can be filed with this Court by September 14, 2020.[1]

Accordingly, Paine files this motion asking the Court to stay the Eleventh Circuit's judgment and the District Court's impending order terminating the injunction until disposition of its petition for a writ certiorari.

OPINIONS BELOW

On October 12, 2018, the District Court entered an opinion and order granting partial summary judgment to SACSCOC. *Paine College v. S. Ass'n of Colleges & Sch. Comm'n on Coll.*, 342 F. Supp. 3d 1321 (N.D. Ga. 2018). The Eleventh Circuit Court of Appeals affirmed. *Paine College v. S. Ass'n of Colleges & Sch. Comm'n on Coll.*, 2020 U.S. App. LEXIS 12016 (11th Cir., April 16, 2020). A copy of the Eleventh Circuit's Opinion is attached as Exhibit A. Paine moved for a stay of the issuance of the mandate, which was denied. A copy of the Order denying the stay of the issuance of the mandate is attached as Exhibit B. The mandate issued on May 28, 2020. A

[1] The Eleventh Circuit's decision was issued on April 16, 2020 and under this Court's order dated March 19, 2020, the deadline for filing petitions for a writ of certiorari under Rule 13 of the Supreme Court is extended until 150 days from the date of the Court of Appeals decision.

copy of the mandate is attached as Exhibit C. On May 29, 2020, during a status conference with counsel, the District Court indicated its intent to enter an order terminating the consent preliminary injunction that restored Paine's accreditation during the pendency of Paine's appeal to this Court. A copy of the preliminary injunction is attached as Exhibit D. A copy of the docket entry for the status conference is attached hereto as Exhibit E.

JURISDICTION

This Court has jurisdiction to issue a stay of the lower courts' judgments pursuant to 28 U.S.C. § 2101(f), which provides that in any case in which the final judgment is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. This Court has jurisdiction to hear the forthcoming petition for a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Relevant Factual History

Paine is a four-year, private, undergraduate, historically black college located in Augusta, Georgia. Paine is affiliated with The United Methodist Church and the Christian Methodist Episcopal Church. Paine is one of the oldest historically black colleges and universities in the United States. Paine has been accredited by SACSCOC since 1931. In 2016 SACSCOC revoked Paine's accreditation as a result of Paine's failure to meet certain financial criteria of the accreditor.

The survival of a small, private college like Paine is contingent on both (1) its eligibility to receive federal funding, including financial aid for students, under the Federal Higher Education Act of 1965, as amended, 20 U.S.C. § 1001 *et seq* ("HEA") and (2) the ability of its students to receive credit for their courses if they transfer to another educational institution. The former of these is contingent on the college's either continued membership or candidacy status in an accreditation association. But the latter is only available to a college if it is fully accredited by the accreditation association. Thus, while Paine continues to be eligible for federal funding and student aid because of its candidacy status with another accreditor, the loss of accreditation by SACSCOC may sound its death knell.

From 2012 until 2016 SACSCOC reviewed Paine's accreditation yearly and kept Paine on sanctions, initially on warning for two years and then on probation for two years. In doing so, SACSCOC applied the same stringent financial requirements which it did and continues to apply to large public and multi-billion dollar endowed colleges and universities. In 2016, SACSCOC removed Paine from its membership. Paine appealed the loss of its accreditation to the SACSCOC appeals committee which affirmed the decision to remove Paine from membership.

The Eleventh Circuit assumed for the purposes of its opinion that the service of three of the six members of the appeals committee selected for Paine's hearing violated SACSCOC's rules because they had conflicts of interest or were improperly appointed. *Paine College*, 2020 U.S. App. LEXIS 12016 at *11. One individual who was an elected member of the appeals committee had voted to place Paine on a

sanction in 2012 and 2013 for the same violations for which Paine was ultimately removed, and served in violation of SACSCOC's conflict of interest policy. *Id.* Two other individuals who sat on the Paine appeals committee were not elected members of SACSCOC's appeals committee and were improperly appointed to the panel. *Id.*

B. Relevant Procedural History

Paine filed a complaint against SACSCOC seeking *inter alia* equitable relief from the District Court in the form of a permanent injunction restoring the accreditation of Paine, or, in the alternative, ordering that Paine's case be remanded to SACSCOC for reconsideration pursuant to a fair process and procedure. On the day the complaint was filed, the District Court entered a consent preliminary injunction restoring Paine as a member on probation in SACSCOC and restraining SACSCOC from taking certain actions pending further order from the court. Since under the preliminary injunction Paine maintained its membership in SACSCOC, Paine was eligible for federal funding and financial aid for its students and the accreditation of the courses it offered to its students. SACSCOC filed an answer and asserted defenses to the complaint.

Following discovery, SACSCOC filed a motion for summary judgment on counts I to V of Paine's complaint. Paine filed a motion for partial summary judgment on counts I and IV of its complaint.

On October 12, 2018, the District Court entered an order granting SACSCOC's motion for summary judgment and denying Paine's motion for partial summary judgment. On February 8, 2019, the District Court entered an order disposing of the

entire case and continuing the preliminary injunction during the pendency of Paine's appeal. Paine timely filed a notice of appeal and appealed the District Court's order to the Eleventh Circuit, which affirmed the District Court on April 16, 2020. *Paine College v. S. Ass'n of Colleges & Sch. Comm'n on Coll.*, 2020 U.S. App. LEXIS 12016 at *1. Paine moved the Eleventh Circuit for a stay of the issuance of the mandate while it sought review by this Court via a petition for a writ of certiorari, which motion was denied. The mandate issued on May 28, 2020. On May 29, 2020, during a status conference, the District Court orally ruled that the preliminary injunction would be terminated and would not remain in effect until the disposition of Paine's petition for a writ of certiorari.

As of the date of this Emergency Application, the District Court has not entered a written order terminating the preliminary injunction and Paine has moved the District Court to reconsider the timing of the termination of the preliminary injunction so that it will not expire prior to a ruling on this Emergency Application.

REASONS FOR GRANTING THE STAY

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases, the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and the respondent." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

Additionally, Rule 23.3 requires an applicant for a stay to "set out with particularity why the relief sought is "not available from any other Court or judge."

These standards are all satisfied in this case.

I. There is both a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant a writ of certiorari and a fair prospect that a majority of the Court will vote to reverse the judgment below.

The Eleventh Circuit panel erred by holding that there was not a violation of common law due process in accreditation removal proceedings when half of the members of the six-person appeals committee reviewing Paine's removal from membership in SACSCOC were improperly appointed.

Paine's claims in this case are based on the common law due process of law accreditors are required to provide to their members. "[T]here exists a 'common law duty on the part of "quasi-public" private professional organizations or accreditation associations to employ fair procedures when making decisions affecting their members.'" *Prof'l Massage Training Ctr. v. Accreditation All. of Career Sch. & Colls.*, 781 F.3d 161, 169 (4th Cir. 2015) (quoting *McKeesport Hosp. v. Accreditation Council for Graduate Med. Educ.*, 24 F.3d 519, 534-35 (3d Cir. 1994)). This duty arises because the accreditation agency acts as powerful gatekeepers for the access to federal Title IV funding under the Higher Education Act (20 U.S.C. § 1001 *et seq.*) for financial aid for their students. *Id.* at 170. *See also, Auburn Univ.,* 489 F. Supp. 2d 1362, 1370 (N.D. Ga. 2002). Additionally, the concept of federal common law in this area is derived by the fact that Congress provides United States District Courts with exclusive federal jurisdiction over civil actions regarding accreditation decisions.

Prof'l Massage Training Ctr. 781 F.3d at 170 ("it is hard to imagine that Congress intended federal courts to adjudicate only state law claims at the same time it prohibited state courts from participating").

In evaluating a claim against an accrediting agency, the court reviews "whether the decision of [the] accrediting agency . . . is arbitrary and unreasonable or an abuse of discretion and whether the decision is based on substantial evidence." *Thomas M. Cooley Law Sch. v. Am. Bar Ass'n*, 459 F.3d 705, 712 (6th Cir. 2006). As the Fourth Circuit has noted:

> An institution denied accreditation is likely to "promptly [go] out of business…." So the accreditors wield enormous power over institutions – life and death power, some might say – which argues against allowing such agencies free reign to pursue personal agendas or go off on some ideological toot. *Their duty, put simply, is to play it straight.*

Prof'l Massage Training Ctr., 781 F.3d at 170 (emphasis added).

Courts reviewing an accreditation agency's decision for compliance with common law due process focus "primarily on whether the accrediting body's internal rules provide a fair and impartial procedure and whether it has followed its rules in reaching its decision." *Wilfred Acad. Of Hair Beauty Culture, Houston, Tex. v. S. Ass'n of Colleges & Sch.*, 957 F.2d 210, 214 (5th Cir. 1992). When courts review the decisions of accrediting agencies, "[t]he question is one of process." *St. Andrews Presbyterian College v. S. Ass'n Colleges & Sch., Inc.*, 679 F. Supp.2d 1320, 1331 (N.D. Ga. 2009).

The Eleventh Circuit decided this case without explicitly recognizing a right of common law due process, but it assumed for the sake of its opinion that such a right

exists. *Paine College*, 2020 U.S. App. LEXIS 12016 at *8. Common law due process has been recognized by numerous District Courts and by every United States Court of Appeals to rule on the issue.[2]

Additionally, the panel's decision in this case assumed the service of three of the six members of the appeals committee were violations of SACSCOC's rules because they either had conflicts of interest or were improperly appointed. *See Paine College*, 2020 U.S. App. LEXIS 12016 at *11.

Based on those assumptions, the panel concluded "that the process used to remove Paine's accreditation would not offend common law due process." *Paine College v. S. Ass'n of Colleges & Sch. Comm'n on Coll.*, 2020 U.S. App. LEXIS 12016 at *8. The panel rejected Paine's argument that the presence of one conflicted member and two improperly appointed members on the six-person appeals panel were *per se* due process violations, instead holding that they were "minor errors" that

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[2] The Fourth Circuit, Fifth Circuit, Sixth Circuit, Seventh Circuit, Eighth Circuit, and D.C. Circuit have all recognized common law due process claims in the accreditation context. *See Prof'l Massage Training Ctr., Inc. v. Accreditation All. of Career Sch. & Colleges*, 781 F.3d 161, 171 (4th Cir. 2015); *Thomas M. Cooley Law Sch. v. The Am. Bar Ass'n*, 459 F.3d 705, 711 (6th Cir. 2006); *Chicago Sch. of Automatic Transmissions, Inc. v. Accreditation All. of Career Sch. & Colleges*, 44 F.3d 447, 450 (7th Cir. 1994); *Wilfred Acad. of Hair & Beauty Culture, Houston, Tex. v. S. Ass'n of Colleges & Sch.*, 957 F.2d 210, 214 (5th Cir. 1992); *Med. Inst. of Minn. v. Nat'l Ass'n of Trade & Tech. Sch.*, 817 F.2d 1310, 1314 (8th Cir. 1987); *Marjorie Webster Jr. Coll., Inc. v. Middle States Ass'n of Colleges & Secondary Sch.*, 432 F.2d 650, 655-56 (D.C. Cir. 1970). District Courts across the country have also recognized common law due process claims. *See e.g. Wards Corner Beauty Acad. v. Nat'l Accrediting Comm'n of Career Arts & Scis.*, No. 2:16cv639, 2017 U.S. Dist. LEXIS 193941, at *27-28 (E.D. Va. Nov. 24, 2017); *Escuela de Medicina San Juan Bautista, Inc. v. Liaison Comm. on Med. Educ.*, 820 F. Supp.2d 317 (D.P.R. 2011); *Fine Mortuary Coll., LLC v. Am. Bd. Of Funeral Serv. Educ., Inc.*, 473 F. Supp.2d 153, 157-158 (D. Mass. 2006).

did not violate Paine's due process rights. *Paine College v. S. Ass'n of Colleges & Sch. Comm'n on Coll.*, 2020 U.S. App. LEXIS 12016 at *10-11.

The legal issue in this case is an issue of first impression in the Supreme Court, which has never addressed whether there is a federal common law right of due process in accreditation removal proceedings or the scope of due process protections to which a school is entitled. This fact, alone, presents a substantial question in Paine's certiorari petition.

There is also a substantial basis to believe that a majority of the Court will disagree with the panel's conclusion that "personal bias or prejudice is not enough, on its own, to trigger the common law concept of a violation of due process," *Paine College v. S. Ass'n of Colleges & Sch. Comm'n on Coll.*, 2020 U.S. App. LEXIS 12016 at *11, especially in light of the panel's assumption that three of the six appeals committee members were improperly appointed. The panel incorrectly supported its conclusion that this did not violate common law due process by citing to *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876-77 (2009), an inapposite case which involved *constitutional* due process, not common law due process in an accreditation setting.

Additionally, the panel incorrectly determined that the improper service of half of the appeals committee members is not a *per se* violation of common law due process. At least three district courts have held that there is a *per se* violation of a school's due process rights when the members of an accrediting body panel have a conflict of interest or were otherwise improperly appointed. *See Wards Corner Beauty Acad. v. Nat'l Accrediting Comm'n of Career Arts & Scis.*, No. 2:16cv639, 2017 U.S. Dist.

LEXIS 193941, at *17 (E.D. Va. Nov. 24, 2017) (holding that institution asserting a common law due process claim was entitled to a trial to determine whether the institution had been denied due process by the presence on the appeals panel of a conflicted decisionmaker); *Escuela de Medicina San Juan Bautista, Inc. v. Liaison Comm. on Med. Educ.*, 820 F.Supp.2d 317, 318-319 (D.P.R. 2011) (vacating accreditor appeals panel decision and ordering the accreditor to appoint a new appeals panel to review the college's appeal *ab initio* because improperly appointed appeals committee member could have tainted panel's decision process.); *Fine Mortuary Coll. v. Am. Bd. Of Funeral Serv.*, 473 F. Supp. 153, 159 (D. Mass 2006), (denying accreditor's motion for summary judgment on the college's common law due process claim due to factual dispute about whether "the college was afforded an impartial re-accreditation evaluation"). The rationale from those cases is especially persuasive here where, without the conflicted and improperly appointed committee members, SACSCOC did not even have a quorum present on the appeals committee.

II. There is a likelihood that irreparable harm will result from the denial of a stay.

A short stay of the Eleventh Circuit's judgment and the District Court's impending order terminating the injunction while Paine pursues certiorari review will not cause any prejudice to SACSCOC but, if not granted, will cause irreparable harm to Paine and its currently enrolled students attending summer classes.

Paine's accreditation with SACSCOC – which is the subject of this lawsuit – had been restored pursuant to a consent preliminary injunction entered by the District Court on September 19, 2016. Pursuant to the District Court's February 8,

2019 order, if Paine appealed the District Court's summary judgment order, the injunction will remain in place "during the pendency of that appeal." However, during a May 29, 2020 status conference the District Court indicated that it would enter an order terminating the injunction prior to the exhaustion of Paine's appellate remedies.

Accreditation allows an institution's students who transfer to another institution to receive credit for the courses they took. While Paine has candidacy status at another accreditation agency, the Transnational Association of Christian Colleges and Schools ("TRACS"), which allows its students to qualify for federal financial aid even without SACSCOC accreditation,[3] the candidacy status at TRACS alone would not allow Paine's students to transfer credit hours to another institution. Accordingly, if this Court does not issue a stay pending a decision on Paine's certiorari petition, Paine faces the prospect of students transferring and declining to re-enroll this fall due to the loss of its accreditation status and the possible inability to transfer credit hours to another institution. Additionally, students who enrolled at Paine for the summer semester and are unable to transfer their class credits would be harmed by not maintaining the *status quo*.

These concerns are magnified by the COVID-19 pandemic, which has caused significant issues among institutions of higher education, including at Paine, which terminated in-person instruction and closed its residential housing in the middle of

[3] Paine will not be considered for full membership in TRACS until sometime in the fall of 2020.

its spring semester. Like numerous other colleges and universities, Paine is preparing for in-person instruction in the fall semester but planning for remote delivery of instruction in the event it becomes necessary. In this challenging operational environment, the early termination of the injunction and loss of SACSCOC accreditation could prove a "tipping point" for Paine, jeopardizing the very survival of an institution that was founded on November 1, 1882. In short, the certiorari petition could be moot before it can be decided.

On the other hand, there would be no prejudice to SACSCOC if the Eleventh Circuit's judgment was stayed and the status quo between the parties maintained pending a decision on the petition for a writ of certiorari by this Court. There would also be no delay to the proceedings below, which are effectively concluded since the District Court has granted summary judgment to SACSCOC and dismissed all of Plaintiff's claims.

However, under these circumstances, Paine would suffer irreparable harm without a stay of the Eleventh Circuit's judgment and the District Court's impending order terminating the injunction until this Court rules on Paine's forthcoming petition for a writ of certiorari.

III. The relief sought from this Court is not available from any other Court or judge.

Rule 23.3 requires an applicant for a stay to "set out with particularity why the relief sought is "not available from any other Court or judge." The Eleventh Circuit has already denied Paine's motion to stay the issuance of its mandate, which was based, in part, on the irreparable harm Paine would suffer if the injunction were

to be terminated. Subsequently, the District Court indicted that it will terminate the preliminary injunction despite Paine's request at the May 29, 2020 status conference to keep the preliminary injunction in place until disposition of the petition for a writ of certiorari. Accordingly, Paine has no recourse other than to ask this Court to stay the judgment of the Eleventh Circuit and the District Court's impending order terminating the injunction.

CONCLUSION

Without this Court's prompt grant of a stay, Paine will be unaccredited and may have to cease operations, irreparable harm that cannot be easily undone if this Court were to later grant the petition for a writ of certiorari. Accordingly, for the foregoing reasons, this Court should issue a stay of the Eleventh Circuit's judgment and the District Court's impending order terminating the injunction pending the timely filing and disposition of a petition for a writ of certiorari pursuant to Rule 23 and 28 U.S.C. 2101(f).

Respectfully submitted this 1st day of June, 2020.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Applicant The Paine College, Inc., a Georgia nonprofit corporation, states that there is no parent or publicly held company that owns 10% or more of its stock.

By: /s/ Brent W. Herrin
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CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing by e-mail and FedEx Overnight delivery, to the following:

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This 1st day of June, 2020.

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4843-6679-5198, v. 3