

No. \_\_\_\_\_

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**In The  
Supreme Court of the United States**

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THE PAINE COLLEGE, INC.,

*Petitioner,*

v.

THE SOUTHERN ASSOCIATION OF COLLEGES AND  
SCHOOLS COMMISSION ON COLLEGES, INC.,

*Respondent.*

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**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Eleventh Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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September 11, 2020

**QUESTION PRESENTED FOR REVIEW**

Whether under federal law a college's right of common law due process is violated in its accreditation removal proceeding when one-half of the members of the decision-making body are improperly appointed or conflicted.

## **PARTIES TO THE PROCEEDING**

The Paine College, Inc., petitioner on review, was the plaintiff-appellant below.

The Southern Association of Colleges and Schools Commission on Colleges, Inc., respondent on review, was the defendant-appellee below.

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Supreme Court Rule 29.6, Petitioner 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.

## **RELATED CASES**

The following proceedings are directly related to this petition:

*Paine Coll. v. S. Ass'n of Colleges & Sch. Comm'n on Colleges, Inc.*, No. 1:16-cv-3503-TWT (N.D. Ga. Oct. 11, 2018) (reported at 342 F. Supp. 3d 1321), aff'd No. 19-11088 (11th Cir. April 20, 2020) (reported at 810 Fed. Appx. 852, also available at 2020 U.S. App. LEXIS 12016).

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**PETITION FOR A WRIT OF CERTIORARI**

The Paine College, Inc. (“Paine”) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

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**INTRODUCTION**

Twenty-eight years ago, Justice Thomas recognized the unique role of historically black colleges and universities (“HBCUs”) in the United States, writing that he found it “indisputable that these institutions



have succeeded in part because of their distinctive histories and traditions.” See *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 the late author W.E.B. Du Bois, Justice Thomas’s concurrence rejected the idea that HBCUs had no place in a post-segregated America:

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)).

Today, the continued existence of one of those schools, The Paine College, Inc. (“Paine”), a historically black college in Augusta, Georgia with a rich history dating back more than 137 years, is in danger. 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”). Accreditation is the lifeblood for institutions of higher education, and without it, Paine will not be able to survive.

The Eleventh Circuit’s opinion was manifestly unjust and contrary to common sense. The Eleventh

Circuit held that there was no due process violation as a matter of law despite the fact that that *one-half of the members of the SACSCOC appeals committee, which upheld the removal of Paine's accreditation, were improperly serving on that body in violation of SACSCOC's own rules.* The violation of an accreditor's rules has been recognized by courts around the country as a violation of educational institutions' common law right to due process under federal law.

Accordingly, Paine petitions this Court for a writ of certiorari.



### **OPINIONS BELOW**

The District Court's opinion is reported at 342 F. Supp. 3d 1321, App. 26-88. The District Court's opinion altering and amending the judgment is not reported. App. 15-25. The Eleventh Circuit's opinion was unpublished and is reported at 810 Fed. Appx. 852 and is also available at 2020 U.S. App. LEXIS 12016. App. 1-14.



### **JURISDICTION**

The United States District Court for the Northern District of Georgia had exclusive subject-matter jurisdiction over the claims in this case pursuant to 20 U.S.C. § 1099b(f), which provides for exclusive federal jurisdiction for disputes between institutions of higher

education and recognized accrediting agencies. Additionally, the trial court had jurisdiction pursuant to 28 U.S.C. § 1331 in that this case arose under the laws of the United States. The Eleventh Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

The Eleventh Circuit entered judgment on April 16, 2020. 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. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).



## **CONSTITUTIONAL AND STATUTORY PROVISIONS**

There are no relevant constitutional or statutory provisions at issue in this case.



## **STATEMENT OF THE CASE**

### **A. Factual Background.**

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. Doc. No. 71-3, ¶ 5; Doc. 12, ¶ 1; Doc. 18, ¶ 1. Paine is one of the oldest historically black colleges and universities in the United States. Doc. 71-3, ¶ 8; Doc. 12, ¶ 14; Doc.

18, ¶ 14. Paine has been accredited by SACSCOC since 1931.

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. Paine showed improvement over this time period and was found in 2015 to be in compliance with all but four of the violations from prior years. Doc. 12, ¶ 45, 47, 54, 63; Doc. 18, ¶ 45. However, in 2016 SACSCOC removed Paine from its membership. Doc. 73-1 at 13 (52:21-22), 28-29 (110:10-22 and 112:4-113:5), 116 (Ex. 7 to Luthman Dep.).

Paine timely appealed the loss of its accreditation to the SACSCOC Appeals Committee, which has the responsibility of reviewing adverse accreditation decisions. Doc. 12, ¶ 110; Doc. 18, ¶ 110. Under the Appeals Procedures of the College Delegate Assembly (the "Appeals Procedures") as promulgated by SACSCOC, the Appeals Committee consists of 12 individuals who are elected by SACSCOC's College Delegate Assembly. App. 90; Doc. 73-1 at 103 (Ex. 1 to Luthman Dep. at II(A)). Under the Appeals Procedures, five members are required for a quorum of the Appeals Committee. *Id.* While there are 12 elected members of the Appeals Committee, a member cannot serve if he or she has a conflict of interest. App. 90. If necessary, to create a quorum, the Chair of the Board of Trustees of SACSCOC may appoint additional individuals to the Appeals Committee. App. 92.

Three of the six members of the Appeals Committee at Paine's hearing did not meet the criteria for serving on the Appeals Committee. One committee member, Dr. William Luckey, was an elected member of the appeals committee who had a conflict of interest as explicitly defined under the Appeals Procedures because he had voted to place Paine on a sanction in 2012 and 2013 for the same violations for which Paine was ultimately removed. App. 90-91; Doc. 73-5 at 40 (157:2-160:18). SACSCOC was aware of this conflict of interest but still invited Dr. Luckey to serve on the Appeals Committee. Doc. 73-1 at 51 (201:20-202:4). Two other committee members, Dr. Harold T. Martin, Sr., and Dr. W. Blaine Early, III, were not elected members of SACSCOC's appeals committee and were improperly appointed to the panel by SACSCOC's staff before it was clear that a quorum of elected members could not be established. App. 92; Doc. 73-10 at 13 (50:21-51:2); Doc. 73-6 at 33-34 (33:20 – 34:14).

In its brief before the Appeals Committee and at the Appeals Committee hearing, Paine vigorously argued that it was in compliance with SACSCOC's financial standards and presented new financial evidence as allowed by the Appeals Procedures.<sup>1</sup> Doc. 71-4 at 239-252 and 300-309. However, following the presentations by Paine and SACSCOC's counsel, the Appeals Committee deliberated for a short period of time before unanimously voting to affirm the removal of Paine as

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<sup>1</sup> Paine was prohibited from submitting all of its new financial evidence to the Appeals Committee by the hearing officer. Doc. 71-4 at 300-303.

a member of SACSCOC. Doc. 73-7 at 35 (138:24 – 139:4), 446 (Ex. 23 to Money Dep.). The record reflects that Dr. Early, the unelected appointee, played a vital role in the Appeals Committee’s deliberations. The Chair of the Appeals Committee testified that he viewed Dr. Early as the “financial expert” on the committee and that “all of us were interested in what he had to say.” Doc. 73-7 at 34 (134:17-25).

The Appeals Committee jointly drafted a letter to Paine’s President announcing its decision. Doc. 73-7 at 30 (118:5-25), 395 (Ex. 20 to Money Dep.), and 446 (Ex. 23 to Money Dep.). Dr. Early insisted on including language in the letter stating that the evidence Paine introduced at the hearing was not “material.” Doc. 73-6 at 108-109 (108:4 – 109:11). This lawsuit followed.

## **B. Procedural History.**

Paine initiated this action by filing 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. Doc. 1. Specifically, Paine argued that SACSCOC violated its common law right to due process in an accreditation proceeding because the Appeals Committee was improperly constituted in violation of SACSCOC’s own procedures. SACSCOC filed an answer and asserted defenses to the complaint. Doc. 9. 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. Doc. 5. 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.

Following discovery, SACSCOC filed a motion for summary judgment on Counts I to V (but not Count VI) of Paine's Complaint. Paine filed a motion for partial summary judgment on Counts I and IV of its complaint. The District Court granted SACSCOC's motion for summary judgment and denied Paine's motion for partial summary judgment and the clerk entered judgment in favor of SACSCOC. App. 26-88; Doc. 105, 110, 111. Paine timely moved to alter or amend the clerk's judgment because Count VI of the Complaint was not resolved by the District Court's order granting SACSCOC's motion for summary judgment. The District Court entered an order granting in part the motion to alter or amend and dismissing Count VI by declining to exercise supplemental jurisdiction over a state law claim. App. 15-23; Doc. 118. The clerk entered final judgment the same day. App. 24-25.

Paine timely filed a notice of appeal and appealed the District Court's order and judgment to the Eleventh Circuit, which affirmed the District Court on April 16, 2020. *Paine Coll. v. S. Ass'n of Colleges & Sch. Comm'n on Colleges, Inc.*, App. 1-14. Following remand

to the District Court, the injunction preserving Paine's accreditation was dissolved.



## **REASONS FOR GRANTING THE PETITION**

**THE ELEVENTH CIRCUIT ERRED IN FAILING TO FOLLOW THE LEAD OF ITS SISTER CIRCUITS BY CONCLUDING THAT AN ACCREDITOR'S FAILURE TO FOLLOW ITS OWN ESTABLISHED PROCEDURES DID NOT VIOLATE A COLLEGE'S RIGHT TO COMMON LAW DUE PROCESS.**

### **1. Introduction.**

All Paine seeks in this appeal is the right to present its case that it is in compliance with SACSCOC's accreditation principles to a quorum of properly elected and conflict-free members of the Appeals Committee. The Eleventh Circuit and the Trial Court wrongly denied Paine this relief.

The Eleventh Circuit panel incorrectly held that SACSCOC did not violate Paine's common law due process rights by failing to follow its own procedures in improperly appointing an Appeals Committee to hear Paine's appeal. The decision by SACSCOC to allow this Appeals Committee to hear this case was arbitrary and unreasonable and not based on substantial evidence. The decision was arbitrary and unreasonable because, as the Eleventh Circuit acknowledged, Dr. Luckey was conflicted under SACSCOC's own conflict



of interest policy and Dr. Martin and Dr. Early were improperly appointed.

## **2. The Established Law Of Common Law Due Process.**

Paine's claims in this case are based on the common law due process accreditors like SACSCOC are required to provide to their members.

Common law due process has been recognized by every United States Court of Appeals that has squarely addressed the issue. 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, 655-656 (D.C. Cir. 1970).

As the Fourth Circuit has noted, "there 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) (internal quotations omitted). 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. 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. *Id.* (“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”).

District courts across the country have also recognized common law due process claims. *See, e.g., Bennett Coll. v. Southern Ass’n of Colls. & Sch. Comm’n on Colls.*, 2020 U.S. Dist. LEXIS 131303 (N.D. Ga. July 23, 2020); *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).

In evaluating a claim against an accrediting agency, the Eleventh Circuit has applied (without following) the Sixth Circuit’s approach and 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). Additionally, 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) (emphasis added).

**3. Paine's Right To Common Law Due Process Was Violated Because SACSCOC Failed To Follow Its Own Procedures Resulting In A Failure To Have A Quorum Of Properly Appointed Appeals Committee Members.**

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 Coll.*, App. 8. However, the Eleventh Circuit panel, in not following their sister circuits, improperly conflated the analysis of whether a rules violation is a violation of common law due process with the separate issue of whether the violation causes injury to the institution. The Eleventh Circuit did not reach this second issue of injury. App. 14. However, in holding that a violation of the accreditor's rules is not a *per se* violation of due process, the Eleventh Circuit panel's decision flies in the face of numerous circuit and district court holdings around the country.

The Eleventh Circuit panel's decision concluded that there was no common law due process violation despite its assumption that SACSCOC failed to follow its own established procedures in constituting one-half of the Appeals Committee. The Eleventh Circuit made this holding despite the fact that if the improperly serving Appeals Committee members had not served (or if their votes did not count) the Appeals Committee would have lacked a quorum, which would have been yet another violation of SACSCOC's procedures. See *Paine Coll.*, App. 11-12. The panel concluded that it was not a violation of common law due process for

SACSCOC to fail to follow its own rules and allow Dr. Luckey to serve on the panel even though he had an established conflict of interest under the Appeals Procedures because he voted to place Paine on sanction in 2012 and 2013 for violating the same accreditation standards he was reviewing on the Appeals Committee. *Paine Coll.*, App. 11. While the panel stated that Dr. Luckey's conflict of interest "should merely be a factor for the district court to take into account when determining whether an administrator's decision was arbitrary and capricious," it found that this "does not automatically invalidate a decision." *Id.* (internal quotation and citation omitted).

Similarly, the panel concluded that it was not a violation of common law due process when SACSCOC violated its own rules again by "jump[ing] the gun, so to speak, in inviting two unelected members – Drs. Martin and Early – to serve on the Appeals Committee before all elected members had been contacted to determine if a quorum existed." *Paine Coll.*, App. 11. Again ignoring the lack of a quorum that this created, the panel further stated that "[e]ven if the rules did not permit these appointments, it is hard to see how Paine was harmed at all, let alone to such an extent that due process was violated." App. 12-13.

Even with its assumption that half the Appeals Committee was improperly appointed, the panel erroneously concluded "that the process used to remove Paine's accreditation would not offend common law due process." *Paine Coll.*, App. 8. The panel held that these rules violations were "minor errors" not resulting

in the denial of any due process to Paine and rejected Paine's argument that SACSCOC's failure to follow its own rules by allowing one-half of the six-person appeals panel to serve on the Appeals Committee results in a *per se* due process violation against Paine. *Paine Coll.*, App. 10.

The Eleventh Circuit panel incorrectly disregarded three well-reasoned district court decisions holding that there is a *per se* violation of common law due process when the members of an accrediting body panel have a conflict of interest or were otherwise improperly appointed or at a minimum the accreditor is not entitled to judgment at the summary judgment stage of the litigation. *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").

In *Escuela de Medicina San Juan Bautista, Inc.*, one of the three members of the appeals committee was also on the accreditor's board. The court found that

[t]he essence of due process is the opportunity to have a fair and impartial hearing. An appeals board that consists of members of the underlying association, whether they participated in the initial decision or not, does not demonstrate impartiality. While there is no evidence of improper conduct in this case, one can draw the inference that the decision to uphold LCME's decision was due to the LCME membership of one of the appeals panel members. This member *could have* tainted the decision process of the panel.

*Escuela de Medicina San Juan Bautista, Inc.*, 820 F. Supp. 2d at 319 (emphasis added). The court granted the school's motion for a preliminary injunction and vacated the appeals panel decision, ordering the accreditor to appoint a new appeals panel to review the college's appeal *ab initio*. *Id.* at 320. Unlike the Eleventh Circuit in this case, the court did not conclude that the presence of the appeals committee member was a "minor" error, instead finding that the mere possibility of a biased panel was enough to require a new hearing.

Similarly, in *Fine Mortuary Coll.*, the college contended that its re-accreditation process was biased because, among other things, one of the three members of the accreditor's evaluation team exchanged a series of emails about the college with the accreditor's executive director prior to the re-accreditation process which could be construed as evidence of bias. *Fine Mortuary Coll.*, 473 F. Supp. at 159. The court denied the accreditor's motion for summary judgment on the common law due process claim because this created a factual dispute about whether "the college was afforded an impartial re-accreditation evaluation" and noted that "[i]f proven, such bias would be troubling." *Id.* Notably, the Court did not require the college to prove that it was "injured" by the presence of a biased member on the evaluation team.

In the third case, *Wards Corner Beauty Acad.*, a district court in the Eastern District of Virginia cited to this Court's decision in *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016) to support its holding that a trial was necessary to determine whether the institution had been denied common law due process by the presence of a conflicted decisionmaker on the appeals panel. *Wards Corner Beauty Acad.*, 2017 U.S. Dist. LEXIS 193941, at \*17. The *Wards Corner* court analyzed whether the institution needed to show that the conflict affected the outcome of the appeal, concluding that it did not need to do so when the institution sought equitable relief in the form of a new hearing.



The court then set forth what the plaintiff would need to prove at trial:

As “the burden of establishing a disqualifying interest rests on the party making the assertion,” *Schweiker v. McClure*, 456 U.S. 188, 196, 102 S. Ct. 1665, 72 L. Ed. 2d 1 (1982), at trial, Plaintiff will have the opportunity to demonstrate that one of several individuals involved in the accreditation withdrawal process was actually biased, or that such individual had a “potential for bias [that] is impermissibly high” such that [the accreditor’s] own rules precluded him from participation in the withdrawal decision. *Prof’l Massage*, 781 F.3d at 178. If successful on such claim, remand is appropriate even in the absence of proof that the bias caused [the accreditor] to withdraw accreditation. See *Escuela de Medicina San Juan Bautista, Inc. v. Liaison Comm. on Med. Educ.*, 820 F. Supp. 2d 317, 319 (D.P.R. 2011) (recognizing that “the essence of due process is the opportunity to have a fair hearing,” and that even where there “is no evidence of improper conduct,” the biased member of the accreditation appeals panel “could have tainted the decision process,” rendering the proper remedy remand for an “*ab initio*” appeals proceeding). . . .

*Wards Corner Beauty Acad.*, 2017 U.S. Dist. LEXIS 193941, at \*17.

Most recently, in *Bennett Coll. v. Southern Ass’n of Colls. & Sch. Comm’n on Colls.*, 2020 U.S. Dist. LEXIS

131303 (N.D. Ga. July 23, 2020), the court held that there was a violation of common law due process when SACSCOC's Appeals Committee applied the wrong standard set forth in its own rules. *Bennett Coll.*, 2020 U.S. Dist. LEXIS 131303 at \*26 ("Since the Appeals Committee violated SACS's own rules, it thereby violated Bennett's due process rights.").

Multiple other courts have, even when ruling in favor of an accreditor, recognized that the violation of an accreditor's rules is a violation of due process. See *Prof'l Massage Training Ctr., Inc.*, 781 F.3d at 172 ("When adjudicating common law due process claims against accreditation agencies, courts should focus primarily on whether the accrediting body's internal rules provided a fair and impartial procedure *and whether it followed its rules in reaching its decision.*") (emphasis supplied); *Wilfred*, 957 F.2d at 214 ("courts 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.*") (emphasis added); *Hiwassee Coll., Inc. v. S. Ass'n of Colleges & Sch.*, 2007 U.S. Dist. LEXIS 8015 at \*4 (N.D. Ga. 2007) ("failure of SACS to follow its own rules would deny the institution due process"); *Auburn Univ. v. S. Ass'n of Colleges & Sch., Inc.*, 489 F. Supp. 2d 1362, 1375 (N.D. Ga. 2002) ("It now seems to the court that the use of that Committee would violate SACS's own rules and, therefore, deny due process to Auburn."). Even the district court in this case recognized that "the failure of an accrediting agency such as [SACSCOC] to follow its own rules . . . would deny an institution due

process.” *Paine Coll. v. S. Ass’n of Colleges & Sch. Comm’n on Colleges, Inc.*, App. 44.

No court in the United States has ever previously held that there was no violation of common law due process where *one-half of the members of the Appeals Committee should not have been on the appeals panel*. Similarly, no court in the United States has ever previously held that the failure to constitute an appeals committee with a quorum of properly appointed members was a “minor” error that does not result in a common law due process violation.

Here, just like in *Escuela de Medicina San Juan Bautista, Inc.*, an improperly appointed panel should result in a remand to a properly appointed Appeals Committee, or at a minimum like in *Fine Mortuary College* and *Wards Corner Beauty Academy*, Paine should be entitled to demonstrate at trial that it is entitled to equitable relief in the form of a new appeals proceeding. The evidence establishes that Paine’s removal from accreditation in SACSCOC was upheld by an improperly appointed Appeals Committee in which one-half of its members should not have been serving. If SACSCOC had followed its rules, three of the six members of the Appeals Committee who made the appellate decision should not have been on the committee and there would not have even been a quorum.<sup>2</sup> There is no way to determine conclusively as a matter of law

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<sup>2</sup> It is unknown if a quorum could have been established with the elected Appeals Committee or how many appointed members there should have been because SACSCOC failed to contact all conflict free Appeals Committee members to serve.

or fact whether the result of the appeal would have been different with the presence of properly elected or appointed additional committee members free of conflicts. SACSCOC was not entitled to summary judgment. In fact, Paine was entitled to summary judgment on its common law due process claim, or at a minimum was entitled to a trial to determine whether or not those violations are “minor,” as the Eleventh Circuit held, or far more consequential.

Paine’s common law due process rights were violated because it did not receive a fair hearing by the Appeals Committee. All Paine has asked is for SACSCOC to “play it straight” and provide it a fair shake – a fair hearing before a neutral, unconflicted panel. *Prof’l Massage Training Ctr.*, 781 F.3d at 170. What it received was a conflicted, cherry-picked Appeals Committee, in which half of the committee was improperly serving. The Eleventh Circuit should have followed its sister circuits and held that SACSCOC’s failure to follow its own rules in appointing the Appeals Committee in which one-half of the committee was improperly appointed was sufficient to show a violation of Paine’s due process rights. Alternatively, if there were disputed issues of material fact, the Eleventh Circuit should have ordered a trial to allow Paine to prove the facts to show a violation of common law due process. This Court would not hesitate to reverse a jury verdict if half of the members of a jury had undisclosed conflicts of interest or were otherwise improperly serving. The standard should not be different in the context of an appeals hearing before an

accreditation agency where half of its members were serving improperly in violation of the accrediting agency's own established rules.

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**CONCLUSION**

For the foregoing reasons, Paine respectfully requests that this Court grant its petition for a writ of certiorari.

Respectfully submitted this 11th day of September, 2020.

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