14-1086, 14-1136

United States Court of Appeals

for the

Fourth Circuit

PROFESSIONAL MASSAGE TRAINING CENTER

Plaintiff-Appellee/Cross-Appellant,

- v. -

ACCREDITATION ALLIANCE OF CAREER SCHOOLS AND COLLEGES

Defendant-Appellant/Cross-Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
No. 12-CV-00911 (HON. LIAM O'GRADY)

BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL OF TRUSTEES AND ALUMNI, THE JOHN WILLIAM POPE CENTER FOR HIGHER EDUCATION POLICY, AND JUDICIAL EDUCATION PROJECT IN SUPPORT OF PLAINTIFF-APPELLEE

Shannen W. Coffin
Jeffrey M. Theodore
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
(202) 429-3000

Attorneys for Amici Curiae

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

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No. 14-1086 Caption: Prof Massage Training Ctr v Accreditation Alliance Career Schs & Univs

Pursuant to FRAP 26.1 and Local Rule 26.1,

Judicial Education Project
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Shannen W. Coffin Date: 7/17/14

Counsel for: Judicial Education Project

CERTIFICATE OF SERVICE

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I certify that on 7/17/14 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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No. 14-1086 Caption: Prof Massage Training Ctr v Accreditation Alliance Career Schs & Univs

Pursuant to FRAP 26.1 and Local Rule 26.1,

John William Pope Center for Higher Education Policy
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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Counsel for: John William Pope Center

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No. 14-1086 Caption: Prof Massage Training Ctr v Accreditation Alliance Career Schs & Univs

Pursuant to FRAP 26.1 and Local Rule 26.1,

American Council of Trustees and Alumni
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ Shannen W. Coffin Date: 7/17/14

Counsel for: Am. Council of Trustees and Alumni

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INTEREST OF THE AMICI

Amici curiae are non-profit organizations concerned about the power brandished by largely unaccountable accrediting agencies in our nation's higher education system. Federal law delegates to these private, non-governmental accreditation bodies enormous authority to decide whether institutions of postsecondary and higher education and their students can receive federal educational funding. Because they act as the "gatekeepers" to federal funds, accreditors have the power to decide whether these schools live or die. Yet the standards applied by accreditors and their resulting accreditation decisions are virtually free from independent oversight. Accreditors can and do wield their authority in an increasingly arbitrary manner, often using their *de facto* control over federal funding to micromanage the affairs of educational institutions. As a result, they often obstruct, rather than encourage, effective governance and educational innovation.

Similar concerns have led courts to frown on delegations of governmental authority to private actors. Those decisions suggest that delegating control of the flow of federal educational benefits to private organizations composed largely of education industry stakeholders creates substantial constitutional problems. Accrediting agencies are membership organizations composed of administrators and faculty who work for competing participants in the education industry and

whose institutions benefit from the federal dollars that the accreditors control. The very structure of the system creates the potential for unfair and unreasonable decision-making.

Amici do not suggest that enhanced oversight by federal education officials is the solution to this dilemma. Other possible legislative approaches – such as breaking the link between accreditation and federal funding, requiring audited disclosure of key financial and productivity metrics, and demanding greater transparency of universities and schools that receive federal funding – would address the serious constitutional concerns raised by the current scheme, while offering more flexibility to the educational marketplace.[1] That policy question is better addressed, of course, in the legislative forum. For present purposes, the problems with the accreditation system will only be magnified if the Defendant

[1] *See, e.g.*, Hank Brown, *Protecting Students and Taxpayers: The Federal Government's Failed Regulatory Approach and Steps for Reform* 8-9 (September 2013), *available at* http://www.aei.org/files/2013/09/27/-protecting-students-and-taxpayers_164758132385.pdf; *Alternative to the NACIQI Final Draft Report*, National Advisory Committee on Institutional Quality and Integrity (NACIQI) Report to the Secretary of Education 11-15 (2012), *available at* http://www2.ed.gov/about/bdscomm/list/naciqi-dir/2012-spring/teleconference-2012/naciqi-final-report.pdf; Testimony of Anne D. Neal before the House Subcommittee on Education and the Workforce (June 13, 2013), *available at* http://www.goacta.org/images/download/NealTestimony6-13-13.pdf; J. Schalin, *Time to Decouple Accreditation from Federal Funding* (Nov. 21, 2013), http://www.popecenter.org/commentaries/article.html?id=2934#.U71ExVXD_5o.

and its *amici* succeed in obtaining the extraordinarily deferential standard of judicial review they seek.

Amicus curiae the American Council of Trustees and Alumni (ACTA) is an independent, non-profit organization committed to academic freedom, excellence, and accountability at America's colleges and universities. ACTA works with alumni, donors, trustees, and education leaders across the United States to support liberal arts education, uphold high academic standards, safeguard the free exchange of ideas on campus, and ensure that the next generation receives an intellectually rich, high-quality college education at an affordable price. ACTA has a long history of advocacy for accreditation reform in light of the failure of the higher education accreditation system to accomplish its intended purpose of ensuring academic quality.

Amicus curiae the John William Pope Center for Higher Education Policy ("Pope Center") is a 501(c)(3) non-profit institute located in Raleigh, North Carolina and dedicated to improving higher education in North Carolina and across the nation. The Pope Center believes that higher education in the United States has strayed from its chief goals of scholarly inquiry and responsible teaching. To address these concerns, the Pope Center conducts studies in areas such as governance, curriculum, financing, access, accountability, faculty research, and administrative policies. It explores ways to increase the accountability of trustees,

administrators, faculty, and students. And it engages in the broader dialogue about how to improve higher education around the nation.

Amicus curiae the Judicial Education Project ("JEP") is dedicated to strengthening liberty and justice in America by defending the Constitution as envisioned by its Framers – creating a federal government of defined and limited power, dedicated to the rule of law, and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as the judiciary's role in our democracy, how judges construe the Constitution, and the impact of the judiciary on the nation. JEP's education efforts are conducted through various outlets, including print, broadcast, and internet media.[2]

ARGUMENT

I. ACCREDITATION DECISIONS ARE SUBJECT TO LITTLE MEANINGFUL GOVERNMENT OVERSIGHT

A. The Higher Education Act Permits Very Limited Regulatory Oversight of Accrediting Agencies' Standards and Decisions

As the gatekeepers to federal funding under the Higher Education Act ("HEA"), private, independent accrediting agencies wield enormous power over

[2] No party to this case or its counsel authored any part of this brief or contributed money that was intended to fund the preparation or submission of this brief. No person, other than *amici*, their members, and their counsel, contributed money that was intended to fund the preparation or submission of this brief.

educational institutions. No institution can participate in federal student assistance, loan, or work-study programs without current accreditation by an accrediting agency. *See* 20 U.S.C. § 1099b(j). Given the significant role that federal funding plays in higher education, loss of accreditation is tantamount to a death sentence for an educational institution.

Yet, contrary to the claims made by the *amici* accreditation agencies, the accreditation standards used by these agencies and their resulting accreditation decisions are subject to little meaningful oversight or supervision. The Secretary of Education's (the "Secretary") role is limited to accrediting the accreditors – he or she recognizes private accreditation agencies as "reliable authorit[ies] as to the quality of education or training offered for the purposes" of the Act's federal financial aid provisions. 20 U.S.C. § 1099b(a).

Accrediting agencies, in turn, are given broad leeway to establish and apply accreditation standards with minimal Secretarial oversight. An accreditation agency must establish and maintain accreditation standards that assess the institution based on ten statutory criteria, such as success with respect to student achievement, curricula, facilities, equipment, recruiting, and admission practices. 20 U.S.C. § 1099b(a)(5). The Secretary's authority with respect to those standards is severely circumscribed by the statute. The Secretary may not "promulgate any regulation with respect to the standards of an accreditation agency or association

described in subsection (a)(5)." *Id*. § 1099b(o); *see also id*. §1099b(g) (prohibiting the Secretary from "establish[ing] any criteria that specifies, defines, or prescribes the standards that accrediting agencies or associations shall use to assess any institution's success with respect to student achievement"). Nor may the Secretary "establish criteria for accrediting agencies or associations that are not required" by the statute. *Id.* §1099b(g). Thus, the Department of Education's regulations simply require, as a condition of recognition, that the accrediting agency "effectively address the quality" of the institution with respect to the statutory criteria established by Congress. 34 C.F.R. § 602.16(a)(1).

Critically, as long as it addresses the minimum criteria established by Congress, an accreditation agency can maintain and apply *any other standard* that it chooses, free from oversight or review by the Secretary. The HEA shall not be "construed to prohibit or limit any accrediting agency or association from adopting additional standards not provided for in this section." 20 U.S.C. § 1099b(g). Those additional, extra-statutory accreditation standards are then used by the accreditation agency to approve or deny an educational institution's accreditation, and the Act prohibits the Secretary from reviewing or addressing the content of those standards. *See id*. The Secretary may not revoke an accreditation agency's recognition as a result of its promulgation or application of any extra-statutory accreditation standards. *See id.* § 1099b(n)(3) (the "Secretary shall not, under any

circumstances, base decisions on the recognition or denial of recognition of accreditation agencies or associations on criteria other than those contained in this section").

In addition, the statute allows no Secretarial review of an accreditation agency's *application* of its standards to an individual educational institution. The only direct appellate process contemplated by the statute for an institution whose accreditation is denied, revoked or suspended by an accreditation agency is an appeal to an appeals board established by the accreditation agency itself. *See id.* § 1099b(a)(6)(C). Department of Education regulations provide that, in terminating an institution's eligibility for federal funding as a result of the loss of accreditation, the Secretary "has no authority to consider challenges to the action of the accreditation agency." 34 C.F.R. § 600.41(e)(2). Instead, "the sole issue is whether the institution, location, or program has the requisite accreditation or preaccreditation." *Id.* Thus, an accreditor's adverse determination *requires* the Secretary to terminate an institution's eligibility for federal funding, 20 U.S.C. §1099b(j), and the Secretary is powerless to review or change the accreditation decision.

B. Eliminating Accreditor Accountability Promotes a Dysfunctional Accreditation System

The HEA's accreditation structure fosters a lack of public and political accountability. Accrediting agencies, largely private member associations, wield enormous authority under the HEA, yet are insulated from accountability to the public. And the Act's limitations on federal oversight allow the Secretary of Education, when confronted with complaints about accreditation decisions, to fall back on the Department's powerlessness over accreditors under federal law. The result is an insular, privileged culture in which accreditors develop and apply vague and overreaching standards, often to the detriment of educational outcomes.

Accreditation exists to ensure that educational institutions meet basic standards of quality.[3] But accreditors often lose sight of that simple goal. Rather than focus on educational outcomes, accrediting agencies focus a great deal of attention on the structure and processes of educational institutions' management.[4] And they do so with often vague, extra-statutory "institutional governance" standards addressing matters such as the authority of the governing board and its

[3] *See* 20 U.S.C. § 1099b; *see also* About the National Advisory Committee on Institutional Quality and Integrity, http://www2.ed.gov/about/bdscomm/list/naciqi.html.

[4] *See* Hank Brown, *The Rise of the Accreditor as Big Man on Campus*, Wall Street Journal (Jan. 14, 2013), *available at* http://goo.gl/j2SXPy (former U.S. Senator and university president, observing that accreditors "focus[] on process and resources rather than on educational excellence").

relationship with administrators and faculty.[5] This system has led one prominent university president to complain that accreditation agencies "have adopted a stance that too often places them in an adversarial posture vis-à-vis their member colleges and universities, inserting their own judgments into decisions of how best to achieve the enormously diverse academic missions of their membership."[6]

More often than not, the accreditation process strays from its foundation of assuring excellence in educational outcomes. In a recent study, the Institute for Higher Education Policy examined the accreditation standards of thirty-seven recognized accrediting bodies – including those of Defendant and many of its

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[5] *See, e.g.*, Southern Association of Colleges and Schools Commission on Colleges, *The Principles of Accreditation: Foundations for Quality Enhancement* Part 3: Institutional Mission, Governance and Effectiveness (5th ed. 2012), *available at* http://www.sacscoc.org/pdf/2012PrinciplesOfAcreditation.pdf; Western Association of Schools and Colleges, *2013 Handbook of Accreditation* Standard 3.9 (July 1, 2013), *available at* http://www.wascsenior.org/content/2013-handbook-accreditation; New England Association of Schools and Colleges, *Standards for Accreditation* Standard 3 (Organization and Governance) (July 1, 2011), *available at* http://cihe.neasc.org/standard-policies/standards-accreditation/standards-effective-july-1-2011#standard_three; Middle States Commission on Higher Education, *Characteristics of Excellence in Higher Education-Requirements of Affiliation and Standards for Accreditation* Standard 4 (Leadership and Governance) (12th ed. 2008), *available at* http://www.msche.org/publications/CHX-2011-WEB.pdf; Higher Learning Commission, North Central Association, *Criteria for Accreditation* Criterion 5.B, *available at* http://policy.ncahlc.org/Policies/criteria-for-accreditation.html.

[6] Shirley M. Tilghman, *The Uses and Misuses of Accreditation, Address to the Reinvention Center Conference*, Princeton University (Nov. 9, 2012), *available at* http://www.princeton.edu/president/tilghman/speeches/20121109/.

amici. Of the forty-seven sets of standards reviewed, IHEP found that only eighteen "made any attempt to deal directly with student learning outcomes."[7] Meanwhile, the National Adult Literacy Survey and the National Assessment of Adult Literacy have found a decrease in mathematical and verbal literacy rates among all degree levels. *See* Brown, *supra* n.1.

Much of the problem in the accreditation system stems from the inherent bias in the makeup of accreditation agencies. In most instances, especially with the major regional accreditors, the majority of accreditation board members are administrators at member colleges and institutions.[8] The result is that accreditation reviews are often done by stakeholders at competing institutions. As such, accreditors use their power to "effectively guard[] the status quo, focusing on

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[7] IHEP submission to NACIQI (May 20, 2014), *available at* http://www2.ed.gov/about/bdscomm/list/naciqi-dir/policy-initiatives-2014.pdf (at pdf pages 49-59).

[8] The names and affiliations of agency staff and commissioners for the six main regional accreditors are available on their websites. *See, e.g.*, List of Members of the Commission, NEASC, http://cihe.neasc.org/about-us/commission (last visited July 15, 2014); Commission Organization, SACSCOC, http://www.sacscoc.org/commorg1.asp (last visited July 15 2014); List of Commissioners, Middle States Commission on Higher Education, http://www.msche.org/about_commissioners.asp (last visited July 15, 2014); HLC Board of Trustees, NCAHLC, https://www.ncahlc.org/About-the-Commission/hlc-board-of-trustees.html (last visited July 15, 2014); List of Commissioners, WASC, http://www.wascsenior.org/commission/commissioners (last visited July 15, 2014); List of Commissioners, NWCCU, http://www.nwccu.org/About/Commissioners/NWCCU%20Commissioners.htm (last visited July 15 2014).

process and resources" in a way that protects their interests and those of their institutions. *See* Brown, *supra* n.4. For instance, when the University of California sought to restrain growth in administrative costs through changes to administrator salaries and benefits, the accreditor visiting team objected that the trustees had been "unnecessarily harsh" *with the administrators*. *Id.*[9]

But there are even more immediate examples of the unaccountable power exercised by accreditors. Here in this Circuit, the Southern Association of Colleges and Schools Commission on Colleges ("SACSCOC") placed the prestigious University of Virginia on "warning" status – a first step toward loss of accreditation – after a failed effort by the University's governing board to remove the school's president. The accreditor did so not because of any concern for educational outcomes, but because it disapproved of the process by which the school's decision was made. SACSCOC found that the University was out of compliance with its standards relating to the independence of the University's Board of Visitors. It did so notwithstanding that the composition of the Board is entirely a function of state law – with each member appointed by the Governor and confirmed by the state legislature. *See* Va. Code Ann. § 23-70. The accreditor

[9] *See also* John T. Casteen III et al., *Report of the WASC Special Visit Team to the University of California Office of the President and Regents* (October 23-24, 2007), *available at* http://goo.gl/JNhTP9.

further found that the University lacked what the accreditor considered to be sufficiently clear standards regarding the role of the faculty in governance.[10]

In response to the accreditor's formal warning, *amicus curiae* ACTA filed a complaint with the Department of Education. ACTA argued that the accreditor acted without authority in reprimanding the University of Virginia for what amounted to a disagreement with the manner in which the University Board chose to administer the school's business. The Department responded by letter from an Assistant Secretary of Education, who noted that the "Department is expressly barred from dictating agency accrediting standards."[11] The Assistant Secretary concluded that the accreditor's action was based on institutional governance standards, which are beyond the Department's reach, and noted that "the Department does not have authority to find an agency out of compliance with respect to accreditation standards not required by [the Higher Education Act]." *Id.*

More recently, a decision by the Accrediting Commission for Community and Junior Colleges (ACCJC) has led to a public outcry. ACCJC decided to

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[10] *See* Jan. 15, 2013 Letter from Belle S. Wheelan to Teresa A. Sullivan, *available at* http://www.virginia.edu/keyissues/documents/20130123-recent-letter.pdf.

[11] *See* Feb. 11, 2013 Letter from Assistant Secretary David A. Bergeron to Anne Neal, *available at* http://www.goacta.org/images/download/DOE_response_to_ACTA_February_11_2013.pdf.

revoke the City College of San Francisco's (CCSF) accreditation effective July 31, 2014.[12] The accreditor did not do so on the basis of failed educational outcomes. Instead, sounding an increasingly familiar note, it cited several failures by the school to address various recommended reforms, mostly relating to governance and administrative matters.[13]

The accreditation decision came amid CCSF's efforts to respond to budget cuts resulting from the financial crisis.[14] ACCJC highlighted the disagreement among the school's constituents and noted "active protests against the direction the college is taking, expressed at governing board meetings, and against the college leadership, indicate that not all constituencies are ready to follow college

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[12] *See* July 3, 2013 Letter from Barbara A. Beno to Thelma Scott-Skillman, *available at* http://ccsfforward.com/accrediting-commission-decision-letter/.

[13] *See* Accreditation Evaluation Report of CCSF by ACCJC, *available at* http://ccsfforward.com/accreditation-evaluation-report-of-ccsf-by-accjc/ (e.g., "the team recommends that the college establish a prescribed process and timeline to regularly review the mission statement and revise it as necessary;" "the team recommends the college to develop a strategy for fully implementing its existing planning process;" "the team recommends that college leaders from all constituencies evaluate and improve the college's governance structure and consequent processes used to inform decision making").

[14] *See* Hank Reichman, *What Happened at City College of San Francisco?*, Academe Blog, July 8, 2013, http://academeblog.org/2013/07/08/what-happened-at-city-college-of-san-francisco; *see also* American Association of University Professors, Statement on the Accreditation of City College of San Francisco, http://aaup.org/news/aaup-issues-statement-accreditation-city-college-san-francisco ("In this context, CCSF reportedly chose to protect as much as possible its instructional budget, cutting back instead on administration.").

leadership to make needed changes in a timely manner."[15] This has led more than one commentator to suggest that the real reason for the accreditor's decision was its disagreement with cuts to administrative costs by the public university. *See* Reichman, *supra*, n.14.

The accreditor's ruling also prompted several parties to note the arbitrary nature of decision-making common among unaccountable accrediting agencies.[16] In response to the sanctions against CCSF, a California State Auditor investigation found "inconsistent application of the accreditation process and a lack of transparency in that process."[17] The Report identified a lack of "fair and consistent interpretation of [accreditation] standards across [reviewing] teams" and the existence of "bias in the team's evaluation," including by "making comparisons to their own institutions and having preconceived ideas of how certain processes should work."[18]

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[15] July 3, 2013 Letter from Barbara A. Beno to Thelma Scott-Skillman, *available at* http://ccsfforward.com/accrediting-commission-decision-letter/.

[16] *Amici* do not highlight the CCSF case or any particular accreditation decision to cast doubt on the substance of the accreditor's decision but simply to illustrate the accountability concerns inherent in the accreditation system.

[17] California State Auditor, *Report on California Community College Accreditation* (June 2014), https://www.auditor.ca.gov/pdfs/reports/2013-123.pdf.

[18] *Id.* A California court has stayed the CCSF accreditation sanction pending a trial scheduled for October. Recent news stories report that, in response to significant public pressure, the accreditor has proposed changing its rules to permit

II. ACCREDITATION DECISIONS SHOULD NOT BE PLACED BEYOND JUDICIAL REVIEW

Amici curiae have long been concerned about the significant authority exercised by unaccountable accrediting agencies under federal law. As the gatekeepers to federal funding, these accrediting agencies have the power to decide whether colleges, universities, and trade schools live or die. While recognizing that the issue is not squarely presented in this case, *amici* respectfully suggest that, in deciding the scope of judicial review here, the court should take into consideration the serious constitutional questions raised by delegation of such unchecked power to private organizations, especially those controlled by competing institutions.

Because federal law prevents the Department of Education from taking action, the limited judicial review conducted by the district court here presents the only real opportunity for any independent review of a particular accreditation decision. The court should be wary of efforts by the defendant and its *amici* to hamper that review.

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the college two years to come into compliance. *See* Lee Gardner, *City College of San Francisco Could Get 2-Year Reprieve on Accreditation*, The Chronicle of Higher Education (June 12, 2014), http://chronicle.com/article/City-College-of-San-Francisco/147055/.

A. The Gatekeeping Role of Accreditation Agencies Raises Serious Constitutional Questions Regarding the Delegation of Unchecked Lawmaking Power to Private Entities

It has long been understood that uncontrolled delegations of federal legislative power to private entities violate the Constitution. Nearly 80 years ago, the Supreme Court held that it is unconstitutional to delegate to private individuals or organizations the power to promulgate regulations governing the conduct of other private parties. *See Carter v. Carter Coal Co*., 298 U.S. 238, 311 (1936); *see also Schechter Poultry v. United States*, 295 U.S. 495, 541 (1935).

Carter Coal held invalid a federal law empowering a private coal board composed of industry participants to set rules governing the conduct of others in the industry. The Court held that vesting rulemaking power in a private party is "delegation in its most obnoxious form." 298 U.S. at 311. These private delegations offend the Constitution because they are not "to an official or an official body, presumptively disinterested, but to a private person whose interests may be and often are adverse to others in the same business." *Id.* Private delegations not only place governmental authority in the hands of potentially interested parties, they also jeopardize the political accountability that the constitutional separation-of-powers is designed to ensure.[19]

[19] *Cf. Printz v. United States*, 521 U.S. 898, 922-923 (1997) ("The insistence of the Framers upon unity in the Federal Executive – to insure both vigor and accountability – is well known. That unity would be shattered, and the power of

Subsequent decisions permit private actors to play some limited role in a federal administrative scheme without violating this non-delegation principle. Shortly after *Carter Coal* was decided, the Supreme Court upheld a legislative scheme that required the Secretary of Agriculture to submit certain tobacco industry regulation to a referendum of growers in the geographic area governed by the rules. *See Currin v. Wallace*, 306 U.S. 1, 15 (1939). The Court reasoned that because the Secretary determined the regulations' content and the growers decided whether to accept them, "Congress has merely placed a restriction upon its own regulation." *Id*. Similarly, in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940), the Supreme Court held that the role private coal producers played in recommending minimum prices to a federal coal commission did not constitute an unlawful delegation to private individuals. The Court approved the delegation

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the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.") (citations omitted); *see also* Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 Rutgers L. Rev. 331, 377 (1998) ("The *Printz* dictum . . . applies equally to assignments to private actors, foreign governments, and international organizations."); *Association of American Railroads v. U.S. Department of Transportation*, 721 F.3d 666, 675 (D.C. Cir. 2013) ("[D]elegating the government's powers to private parties saps our political system of democratic accountability."), *cert. granted*, No. 13-1080 (U.S. June 23, 2014); *Pittston Co. v. United States*, 368 F.3d 385, 394 (4th Cir. 2004) (explaining that the non-delegation doctrine ensures "that delegation does not frustrate the constitutional design").

because the private members "function[ed] subordinately to the Commission. It, not the [private producers], determines the prices." *Id*. at 399.

This Court has harmonized the rulings of these cases by explaining that "Congress may employ private entities for ministerial or advisory roles, but it may not give these entities governmental power over others." *Pittston*, 368 F.3d at 395. "Any delegation of regulatory authority 'to private persons whose interests may be and often are adverse to the interests of others in the same business' is disfavored." *Id.* at 394 (quoting *Carter Coal*, 298 U.S. at 311); *see also Association of American Railroads*, 721 F.3d at 673 ("private parties must be limited to an advisory or subordinate role in the regulatory process").[20] "[C]ore governmental power must be exercised by the Department on which it is conferred and must not be delegated to others in a manner that frustrates the constitutional design." *Pittston*, 368 F.3d at 394.

[20] In *Association of American Railroads*, the D.C. Circuit invalidated the delegation of joint rulemaking authority to Amtrak and the Department of Transportation. The court held that Amtrak was a private organization for purposes of the delegation principle and that Congress's grant of rulemaking authority to Amtrak on equal footing with a government agency violated the separation of powers. *See* 721 F.3d at 670-74. The Supreme Court recently granted *certiorari* to review both the proper status of Amtrak (as a governmental or non-governmental entity) and the private delegation question. *See Association of American Railroads v. U.S. Department of Transportation*, No. 13-1080 (U.S. June 23, 2014) (petition granted).

The gatekeeping role played by accrediting agencies more closely resembles the unchecked legislative authority invalidated in cases like *Carter Coal* than the subordinate or advisory private roles upheld in subsequent decisions. Under 20 U.S.C. § 1099b(a)(5), accreditors have the power to establish standards for institutional curricula, faculty, facilities, programs, services, practices, and more – all of which a school must meet to retain its accreditation and its eligibility for federal financial aid. And accrediting agencies are free to establish any additional standards that they choose, free from Departmental oversight. 20 U.S.C. § 1099b(g). Indeed, as illustrated by the Department's letter to ACTA with respect to its University of Virginia complaint, the Secretary is powerless to address any extra-statutory accreditation standards (such as institutional governance standards) adopted by accreditation agencies.

As a result of the explicit link between accreditation and federal funding, the accreditation decision is central to the question of whether an educational institution and its students can participate in federally funded programs. But far from playing a subordinate role in the process, the accreditor is the central player in the federal funding scheme. The Secretary not only lacks the authority to establish or regulate the standards to be applied by the accrediting agencies, 20 U.S.C. § 1099b(g), (o), & (p), he also can play no role in reviewing the application of those standards to deny or revoke a particular school's accreditation. *See*

discussion, *supra*, Section I.A. Despite the centrality of accreditation to the federal funding scheme, the Department of Education is powerless to review any particular accreditation decision and must revoke federal funding where accreditation is denied or withdrawn.

Such a scheme raises serious constitutional separation-of-powers questions. The statutory scheme vests significant governmental authority in private organizations by hinging billions of taxpayer dollars on the decisions of educational stakeholders wholly unaccountable to the electorate. It encourages a "hands off" approach by the executive branch officials charged with enforcement of the statute.

At the same time, the structure of accreditation raises significant due process concerns arising from interested decision-making. Before upholding private delegations, the Supreme Court has insisted that "law-making is not entrusted to the industry." *Sunshine Anthracite Coal*, 310 U.S. at 399. Yet, accreditor review teams are largely made up of the very individuals – faculty and administrators from competing institutions – who benefit from accreditation. When accreditors establish standards that other institutions must meet, those higher education stakeholders in control of the accrediting agencies "make the law and force it upon" others. *Currin*, 306 U.S. at 15-16; *Carter Coal*, 298 U.S. at 311.

Amici do not suggest that a greater role for federal education officials in making funding decisions would promote greater innovation in the educational marketplace. Far from it. But breaking the link between private accreditation and federal funding would be a step in the right direction, as it would remove a wholly unaccountable and increasingly meddlesome bureaucracy from the funding process and offer an important check upon the expansion of federal regulation. *See* Brown, *supra* n.1; Schalin, *supra* n.1. These larger policy questions, of course, are not the concern of this Court here. But *amici* respectfully suggest that this Court should consider the questions before it in light of the serious constitutional issues presented by the link between ostensibly private accreditation decisions and federal education funding.

B. The Review Standard Proposed by the Accreditors Is Ineffective and Would Allow Private Institutions to Control Government Benefits without Accountability

Especially in light of these constitutional concerns, the review standard proposed by the Defendant accrediting agency and its *amici* should be met with skepticism. Defendant and its *amici* propose an "extremely deferential standard of review" which asks only whether an accrediting agency's rules provide an "impartial procedure" and whether the agency "has followed its rules." Agency Amicus Br. at 4, 11; ACCSC Br. at 34. This standard – particularly in the manner

the accreditation agencies would have it applied – would make their decisions effectively unreviewable.

First, the agencies' approach would eliminate any consideration of the substance of their decisions or of the rules applied. When other accreditation decisions have been challenged courts have at a minimum asked "whether the decisions were 'arbitrary and unreasonable' and whether they were supported by 'substantial evidence.'" *Wilfred Academy v. Southern Association of Colleges and Schools*, 957 F.2d 210, 214 (5th Cir. 1992) (citations omitted); *see also Thomas M. Cooley Law School v. American Bar Association*, 459 F.3d 705, 712 (6th Cir. 2006). Applying this standard, the Eighth Circuit has required accrediting agencies to "conform [their] actions to fundamental principles of fairness" and noted that "[t]hese principles are flexible and involve weighing the nature of the controversy and the competing interests of the parties on a case by case basis." *Medical Institute of Minnesota v. National Association of Trade and Technical Schools*, 817 F.2d 1310, 1314 (8th Cir. 1987) (citations and quotation marks omitted).

These cases recognize the importance of imposing some judicial oversight over accrediting agencies while still granting latitude to accreditors' decision-making. As the Sixth Circuit has observed, there must be some "check on organizations that exercise significant authority in areas of public concern such as accreditation and professional licensing." *Cooley*, 459 F.3d at 712. Thus, "courts

have scrutinized the standards and procedures employed by the association notwithstanding" the "specialized competence" of the agencies. *Marjorie Webster Jr. College v. Middle States Ass'n of Colleges & Secondary Schools*, 432 F.2d 650, 655 (D.C. Cir. 1970). "The standards set must be reasonable, applied with an even hand, and not in conflict with the public policy of the jurisdiction." *Id.*

Here, the District Court found that the evidence does not support the denial of accreditation even after applying "great deference" and showing "great respect to the expertise of the commissioners at ACCSC." Decision at 7. It found that ACCSC "incorrectly characterized" the evidence and that "the record does not support their conclusion[s]." Decision at 13. It also found that ACCSC's standards themselves are "internally inconsistent." Decision at 12.

Seeking to evade these factual findings, the accreditors argue that the District Court improperly applied a "more stringent, less deferential" standard, Agency Amicus Br. at 12, even though the court treated the agency's decision with "great deference" and the arbitrary and unreasonable standard as a "high bar." Decision at 7. Applying the accrediting agencies' preferred approach would leave no room for district courts even to consider the evidence or the substance behind the accreditation decision under review.

The agencies pay lip service to the requirement that accreditation decisions be made without prejudice or unfairness, but they still would not allow meaningful

review of the fairness or impartiality of their decision-making process. Here, the district court found that "[d]eeply negative staff bias" against the Plaintiff "completely infected the record" of the accreditor's review. Decision at 13-14. Seeking to justify reversal nonetheless, ACCSC argues that a District Court should review an agency's own assertion that it is not biased only for clear error. AACSC Br. at 53. Significant deference is plainly inappropriate with respect to such self-serving findings by the accreditor.

The accreditors' approach would go beyond deference to insulate their decisions from meaningful judicial review. Their conception of deference would prevent District Courts from inspecting the evidence underlying their decisions and from making their own evaluation of the fairness and impartiality of the application of the accreditation standards. That is at odds with even the highly deferential standard of review applied below and would leave even the most arbitrary of accreditation decisions wholly unchecked and beyond the reach of applicable law.

C. The Same High Degree of Deference Afforded to Government Decisions Should Not Apply to Review of Private Actors' Decisions

These concerns about delegation of federal power to private actors counsel in favor of meaningful judicial scrutiny. "[J]udicial review is a factor weighing in favor of upholding a statute against a non-delegation challenge." *United States v.*

Garfinkel, 29 F.3d 451, 459 (8th Cir. 1994) (citations and quotation marks omitted); *see also United States v. Bozarov*, 974 F.2d 1037, 1042 (9th Cir. 1992) ("availability of judicial review" is "a factor weighing in favor of upholding a statute against a non-delegation challenge"). The Supreme Court has identified the availability of judicial review as a reason to conclude that an act does not violate the non-delegation doctrine. *See Touby v. United States*, 500 U.S. 160, 168 (1991); *accord Amalgamated Meat Cutters & Butcher Workmen of North America v. Connally*, 337 F. Supp. 737, 759 (D.D.C. 1971) ("[t]he safeguarding of meaningful judicial review" is "one of the primary functions" of the non-delegation doctrine).

The accrediting agency *amici* contend that they should be subject to *less* scrutiny because they "are not federal actors and thus are not governed by the procedures in the Administrative Procedure Act." Agency Amicus Br. at 10. But given the substantial role the accreditors' decisions play in the federal scheme, this logic is backwards. Federal courts are the only check on the virtually unbounded discretion accrediting agencies exercise. The essence of *Carter Coal* and its progeny is that private actors deserve less deference when exercising public authority because they are less trustworthy and more prone to exercise power in a manner that advantages their own interests at the expense of competitors. For these reasons, commentators have argued that regulatory decisions involving private actors should be scrutinized more, not less, intensely. *See, e.g.*, Aaron R.

Cooper, *Note, Sidestepping Chevron: Reframing Agency Deference for an Era of Private Governance*, 99 Georgetown L.J. 1431 (2011).

Chevron itself rested its deference to agency statutory interpretations on the notion that executive agencies are more democratically accountable and responsive than judges so that courts should respect their policy choices. *See Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 865-66 (1984). As the Court explained, "federal judges – who have no constituency – have a duty to respect legitimate policy choices made by those who do." *Id*. at 866. The Executive is "directly accountable to the people" and "it is entirely appropriate for this political branch of the Government to make . . . policy choices." *Id*. at 865.

That justification, however, does not apply to rule-making and adjudication by unaccountable, private bodies affecting substantive rights under federal law. Careful, albeit deferential, scrutiny by the courts is essential to fill the gap and alleviate, at least to the degree possible in this particular controversy, the significant private delegation concerns that result from this scheme.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be affirmed.

Dated: July 17, 2014

Respectfully Submitted,

/s/ Shannen W. Coffin

Shannen W. Coffin
Jeffrey M. Theodore
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, D.C. 20036
Tel: (202) 429-3000
Fax: (202) 429-3902

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 5,765 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced type face using Word 2010 in Times New Roman 14 point font.

/s/ Shannen W. Coffin
Shannen W. Coffin
Steptoe & Johnson LLP

Attorney for *Amici Curiae*

CERTIFICATE OF SERVICE

I certify that I filed the foregoing brief with the Clerk of the United States Court of Appeals for the Fourth Circuit via the CM/ECF system, thereby electronically serving all counsel of record, on July 17, 2014.

/s/ Shannen W. Coffin
Shannen W. Coffin
Steptoe & Johnson LLP

Attorney for *Amici Curiae*