UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

LINCOLN MEMORIAL UNIVERSITY, Plaintiff, v. AMERICAN VETERINARY MEDICAL ASSOCIATION, Defendant.	No. 25-cv-00282 Hon. Thomas A. Varlan

STATEMENT OF INTEREST OF THE UNITED STATES

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INTEREST OF THE UNITED STATES

The United States submits this Statement of Interest under the authority of 28 U.S.C. § 517, which permits the Attorney General to direct any officer of the Department of Justice to attend to the interests of the United States in any case pending in a federal or state court. The United States enforces the federal antitrust laws, which embody "fundamental national values of free enterprise and economic competition." *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013).

Antitrust law has long recognized that trade associations and professional societies often have incentives and opportunities to restrain competition. *See, e.g.*, *N. Carolina State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 505 (2015); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 781–83 (1975); *United States v. Nat'l Ass'n of Real Est. Bds.*, 339 U.S. 485, 488–89 (1950). When trade associations act as accreditors and occupational and professional licensors, they become gatekeepers with the power to exclude others from entering their profession. Indeed, "in any accreditation program where market participants wield the power to exclude, there is an inherent conflict of interest and a risk of anticompetitive abuse." Marina Lao, *Discrediting Accreditation?: Antitrust and Legal Education*, 79 Wash. U. L.Q. 1035, 1036–37 (2001) (footnote omitted). By imposing exclusionary restrictions, accreditors and occupational and professional licensors can artificially limit the supply of service providers, thus reducing output, competition, and incentives for innovation. *See* Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. Pa. L. Rev. 1093, 1112 (2014). This ultimately harms consumers, who face higher costs and fewer choices in service providers.

The United States has an interest in safeguarding free-market competition, especially in markets that directly affect the pocketbooks of American families. Rising costs for pet care burden household budgets, and many pet owners struggle to afford the care their pets need. The United States also has an interest in the correct application of the antitrust laws and has brought enforcement actions against anticompetitive practices by accreditors and private trade associations regulating educational and vocational advancement. *See United States v. Am. Bar Ass'n*, Complaint, No. 95-1211 (D.D.C. 1995) (accreditation); *see also United States v. Nat'l Ass'n for Coll. Admission Counseling*, Complaint, No. 19-cv-03706 (D.D.C. Dec. 19, 2019) (admissions).

The United States submits this Statement of Interest to explain that, when a private professional association like the American Veterinary Medical Association promulgates and enforces accreditation criteria, it is not exempt from the antitrust laws merely because states often require practitioners to graduate from an accredited school. Nor does the Department of Education's recognition process for accreditors bar claims challenging accreditation standards or enforcement procedures.

STATEMENT OF FACTS

As a private trade association, the American Veterinary Medical Association (AVMA) seeks to "make veterinary medicine a more profitable endeavor."[1] *See* Complaint ("Compl."), ECF No. 1, ¶¶ 60–62. It also operates the sole accreditor of veterinary schools in the United States, the Council on Education. *Id.* ¶ 57. AVMA's Council on Education

[1] This Statement of Interest, as required on a motion to dismiss, "construe[s] the complaint in the light most favorable to the plaintiff, accept[s] all well-pleaded factual allegations in the complaint as true, and draw[s] all reasonable inferences in favor of the plaintiff." *Courtright v. City of Battle Creek*, 839 F.3d 513, 518 (6th Cir. 2016). The United States takes no position on the veracity of LMU's allegations.

includes eight members appointed by the AVMA and eight appointed by another trade association representing the interests of accredited veterinary programs, the American Association of Veterinary Medical Colleges (AAVMC). *Id.* ¶ 58.d; COE Pols. & Pros. § 1.3.1.[2] Both the AVMA and AAVMC fund their respective appointees' participation on AVMA's Council on Education. COE Pols. & Pros. §§ 1.2.3, 1.3.4. AVMA's Council on Education allegedly sits within the same building as the AVMA, uses AVMA email addresses, and relies heavily on the AVMA for staff, who report to the AVMA. Compl. ¶¶ 58.b, c.

Approximately 67% of U.S. households own pets, and the number of pet-owning households is increasing 1.5% annually. *Id.* ¶ 87. Yet only 34 accredited veterinary colleges exist in the United States. *Id.* ¶¶ 3, 153. This number of veterinary schools has remained relatively constant for the past 45 years, despite growing demand for veterinary services and shortages of veterinary providers. *Id.* ¶¶ 86, 90–94. Nevertheless, the AVMA has issued several statements over the past year raising alarm that "the growth rate for the supply of veterinarians" as measured by student places at veterinarian colleges may jeopardize "the economic health of the veterinary profession." *Id.* ¶¶ 16–19. In one press release, the AVMA warned that "[i]f 13 new schools come onstream in the near future as proposed, it will require a significant increase in demand for veterinary services above current trends to absorb the additional supply without downward economic pressure" on the veterinary profession. *Id.* ¶ 18.

[2] By citing AVMA COE's Policies and Procedures ("COE Pol. & Pros."), LMU's Complaint incorporates them by reference. *See* Compl. at 16 n.21; *Amini v. Oberlin Coll.*, 259 F.3d 493, 502 (6th Cir. 2001). AVMA's Council on Education selects the three remaining "public" members. COE Pols. & Pros. § 1.3.1.

In the United States, the federal government plays no direct role in accrediting post-secondary institutions, including veterinarian colleges. Instead, under the Higher Education Act, the Department of Education "recognize[s]" accreditors, which in turn accredit schools. 20 U.S.C. § 1099b. Neither the Higher Education Act nor its implementing regulations establish specific accreditation standards that accreditors must apply. *See id.*; 34 C.F.R. §§ 602.10 *et seq*. Likewise, state laws and regulations generally require veterinarians to have graduated from an accredited school. *See, e.g.*, Ky. Rev. Stat. Ann. § 321.193(4); 18 Va. Admin. Code 150-20-110. But states do not define appropriate accreditation standards or procedures. *See id.*

Lincoln Memorial University (LMU) is a non-profit university based in Harrogate, Tennessee. Compl. ¶ 32. It currently operates the largest veterinary school in the United States, with a class size of 225 students—or 4% of all veterinarian students enrolled in the United States. *Id.* ¶ 117. LMU's graduates, many of whom hail from economically disadvantaged Appalachia, achieve a 90% passage rate on the veterinary professional exam, a rate that matches or exceeds that of several better-funded state universities, such as Michigan State, Ohio State, and the University of Tennessee. *Id.* ¶¶ 119, 122–23. Its "distributive" model of veterinary education "emphasizes practical, hands-on clinical experience, requiring students to spend significant amounts of time working with licensed veterinarians at off-campus sites" rather than research work through an affiliated animal teaching hospital. *Id.* ¶ 127.

In this lawsuit, LMU challenges the AVMA Council on Education's promulgation and enforcement of its accreditation standard requiring veterinary colleges to "maintain substantial research activities." *Id.* ¶ 156. According to LMU, AVMA's interpretation and enforcement of this standard have "shifted from focusing on how students are exposed to

research as a component for career development to insisting on faculty research as a stand-alone activity." *Id.* ¶ 166. This reinterpretation effectively "demand[s] that every veterinary school 'look like' the elite, high-cost, high research activity institutions with on-site teaching hospitals." *Id.* ¶ 165. LMU alleges that this shift harms existing and potential market entrants in veterinary education with more limited financial resources, particularly those seeking to utilize a distributive model program that allocates fewer resources to expensive lab research initiatives at teaching hospitals. *Id.* ¶¶ 14, 25, 137. The AVMA shifted course, LMU alleges, around the time that LMU announced that it was seeking to open a second campus that would more than double its total student body. *Id.* ¶ 203.

DISCUSSION

When professional associations regulate admission into their trade, "established . . . standards may blend with private anticompetitive motives in a way difficult even for market participants to discern." *N. Carolina State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 505 (2015). As a result, "prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy." *Id.*; *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 323 F.3d 366, 373 (6th Cir. 2003) ("The Supreme Court has held that the activities of professional associations may require careful antitrust scrutiny given the unique potential of such organizations to exclude competition.").

Even though "private standard-setting associations have traditionally been objects of antitrust scrutiny," *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988), the AVMA moves to dismiss on the ground, among others, that the potential loss of accreditation supposedly cannot constitute "antitrust injury." Brief in Support of

Defendant's Motion to Dismiss ("MTD"), ECF No. 27-1, at 2–3, 23; Reply in Support of Defendant's Motion to Dismiss ("Reply"), ECF. No. 39, at 11–12. While the AVMA couches its argument under *Parker*'s state-action exemption, its Reply clarifies that "the AMVA does not argue that it, as a private actor, is immunized under the *Parker* doctrine." *Compare* MTD at 23 (citing *Parker v. Brown*, 317 U.S. 341, 352 (1943)), *with* Reply at 11–12 & n.3. Rather, the AVMA argues that its promulgation and enforcement of accreditation standards fall outside the antitrust laws because the alleged "harm to competition is . . . attributable to the alleged anticompetitive effects of state law"—namely, states' requirement that veterinarians graduate from an accredited school. MTD at 19. This argument could be understood as invoking *Parker*'s corollary, the *Noerr-Pennington* doctrine. Relatedly, AVMA implies that the Department of Education's approval process for accreditors somehow limits antitrust review. *See, e.g.*, MTD at 1–2; Reply at 1–2.

AVMA's arguments fail. AVMA concedes that neither its organization nor its decision-making fall within *Parker*, and *Parker* does not broadly exempt all activity enabled by state action. Nor does the *Noerr-Pennington* doctrine reach private, voluntary development of standards by market participants. Likewise, the Department of Education's accreditor approval process does not impliedly displace antitrust scrutiny. As such, the antitrust laws apply fully to AVMA's establishment and enforcement of accreditation criteria.

I. The Antitrust Laws Apply to Private Entities' Promulgation and Enforcement of Accreditation Rules

Despite the antitrust laws' "comprehensive" sweep, *NCAA v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 104 n.27 (1984), the Supreme Court has recognized two

related exemptions from their ambit: the *Parker* state-action doctrine and the *Noerr-Pennington* doctrine excluding certain petitioning for state redress. These doctrines frequently, as here, "present two faces of the same coin." *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 383 (1991). Neither exemption applies to private organizations' promulgation and enforcement of accreditation standards where, as here, no state has affirmatively expressed an intent to displace competition.

A. *Parker* Does Not Broadly Encompass Voluntary Private Conduct Arising from State Action

In *Parker*, the Supreme Court interpreted the Sherman Act to exclude from its coverage restraints "imposed . . . as an act of government" by a state acting "as sovereign." *Parker v. Brown*, 317 U.S. 341, 352 (1943). But this "state-action immunity is disfavored, much as are repeals by implication." *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013) (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992)). From the outset, the Supreme Court cautioned that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Parker*, 317 U.S. at 352. And in subsequent decisions, the Supreme Court has declined to apply the doctrine to "nonsovereign actor[s] controlled by active market participants" unless the state "clearly articulate[s] and affirmatively expresse[s]" a policy to displace competition and "actively supervise[s]" the challenged restraint. *N. Carolina State Bd. of Dental Exam'rs*, 574 U.S. at 503–04 (citation omitted).

Here, the AVMA disclaims that its accreditation activities fall within *Parker*—and with good reason: No state has "clearly articulated and affirmatively expressed as state policy" or "actively supervised" AVMA's specific accreditation standards or review process challenged by LMU. *N. Carolina State Bd. of Dental Exam'rs*, 574 U.S. at 504.

Nevertheless, AVMA claims that "the extent to which accreditation affects the supply of veterinarians is attributable not to the actions of the AVMA, but instead to state law." Reply at 12. This argument stretches *Parker* well beyond its narrow limits.

Parker does not protect private action unless "the State . . . *affirmatively contemplated* the displacement of competition such that the challenged anticompetitive effects can be attributed to the 'state itself.'" *Phoebe Putney Health Sys.*, 568 U.S. at 229 (quoting *Parker*, 317 U.S. at 352) (emphasis added). Under this standard, a state cannot have "contemplated" anticompetitive actions if its regulation reflects "mere *neutrality*." *Id.* at 228 (quoting *Cmty. Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 55 (1982)). This principle limits *Parker*'s reach to voluntary conduct by private parties, even if that conduct was enabled or facilitated by state action. For example, in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the state bar of Virginia claimed that its fee schedules and ethical opinions "merely implement[ed]" state ethical rules promulgated by the Virginia Supreme Court. *Id.* at 789–90. In rejecting *Parker*'s applicability, the Supreme Court held that "[i]t is not enough that . . . anticompetitive conduct is '*prompted' by state action*." *Goldfarb*, 421 U.S. at 791 (emphasis added). Even where state law somehow enables anticompetitive conduct, "*Parker* immunity is available only when the challenged activity is undertaken pursuant to a clearly articulated policy of the *State itself*" "to displace competition." *S. Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 60, 63 (1985) (clarifying *Goldfarb*'s holding) (emphasis added); *see also Phoebe Putney Health Sys.*, 568 U.S. at 235 (citing *Goldfarb* approvingly).

Apart from contradicting precedent, AVMA's argument proves too much. In a regulated society, conduct frequently "involves a mixture of private and public decisionmaking," *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 593 (1976), such that state

laws often could be characterized as a "but-for" cause of anticompetitive schemes. State law may, for instance, mandate that lawyers join a state bar association or establish ethical rules that are used to justify and enforce its anticompetitive price-fixing scheme. *See Goldfarb*, 421 U.S. at 775, 790–91. Or a state regulator may accept a utility tariff that incorporates an allegedly anticompetitive practice, effectively requiring the defendant to continue its anticompetitive conduct until the regulator approves a modification. *See Cantor*, 428 U.S. at 579 (rejecting *Parker* defense); *see also Phoebe Putney Health Sys.*, 568 U.S. at 235 (citing *Cantor* approvingly). Or a state may imbue a local hospital authority with powers that it uses to effect an anticompetitive merger. *See Phoebe Putney Health Sys.*, 568 U.S. at 231. In each instance, the state regulates "*against the backdrop of* federal antitrust law," rather than intending to displace it. *Id.* (emphasis added). That a "reasonable legislature" could "anticipate" that private entities "may . . . exercis[e] their general powers in anticompetitive ways" "falls well short of clearly articulating an affirmative state policy to displace competition with a regulatory alternative." *Id.*

Here, states' acceptance of AVMA's accreditation decisions does not affirmatively contemplate AVMA's independent decisions around the composition of its accrediting body or its adoption, interpretation, and enforcement of particular accreditation standards. *See Phoebe Putney Health Sys.*, 568 U.S. at 229. Laws requiring that veterinarians graduate from accredited schools—without endorsing any accreditation standards or procedures—reflect "mere neutrality." *Id.* at 228 (emphasis omitted) (citation omitted). And but for AVMA's independent decisions, LMU allegedly would not have suffered its professed injury. Given AVMA's private and independent role in LMU's alleged injury, it is beside the point that state law may have also "prompted" or otherwise

contributed to LMU's injury. *See Goldfarb*, 421 U.S. at 791. The *Parker* doctrine has no bearing here.

B. The *Noerr-Pennington* Doctrine Does Not Shield Private Trade Associations' Accreditation Procedures or Promulgation and Enforcement of Standards

In "a corollary to *Parker*," *Omni Outdoor Advert.*, 499 U.S. at 366, the Supreme Court has exempted "mere solicitation of governmental action with respect to the passage and enforcement of laws" in two titular decisions, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657, 669–70 (1965). The *Noerr-Pennington* doctrine protects direct petitioning of governmental officials for state action and some "incidental" conduct. *Allied Tube & Conduit Corp.*, 486 U.S. at 499. If conduct falls within the *Noerr-Pennington* doctrine, antitrust liability cannot attach—no matter the purpose or effect—unless the "sham" exception applies. *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 59 (1993).

But, as the Supreme Court has repeatedly emphasized, the "*Noerr* doctrine does not extend to 'every concerted effort that is genuinely intended to influence governmental action.'" *FTC v. Superior Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 425 (1990) (quoting *Allied Tube & Conduit Corp.*, 486 U.S. at 503). Otherwise, firms could fix prices or output as long as they "genuinely intended to influence the government to agree to the conspirators' terms" or "intended to dramatize the plight of their industry and spur legislative action." *Id.* Rather, *Noerr-Pennington*'s applicability "depends not only on [the challenged conduct's] impact, but also on the context and nature of the activity." *Allied Tube & Conduit Corp.*, 486 U.S. at 504. This inquiry considers the forum of the challenged

conduct, the economic incentives of the participants, the nature of the restraint, and the degree of public accountability. *See id.* at 502–03.

Applying these principles, the Supreme Court held in *Allied Tube & Conduit Corporation v. Indian Head, Inc.*, 486 U.S. 492 (1988), that the *Noerr-Pennington* doctrine did not preclude antitrust scrutiny of a standards-development organization's promulgation of an electrical code, even though state and local governments "routinely" adopted it. *Id.* at 501. Standard-development organizations, the Court observed, typically comprise "members having horizontal and vertical business relations" that "have economic incentives to restrain competition" and are "unaccountable to the public and without official authority." *Id.* at 500, 502. Their resulting "[a]greement on a product standard is . . . implicitly an agreement not to manufacture, distribute, or purchase certain types of products." *Id.* at 500. These circumstances create "a serious potential for anticompetitive harm." *Id.* Such private development of standards, the Supreme Court explained, "is permitted . . . under the antitrust laws only on the understanding that it will be conducted in a nonpartisan manner" with meaningful safeguards to achieve genuine "procompetitive benefits." *Id.* at 501, 506–07; *see Am. Soc. of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 572 (1982). Under these circumstances, the Supreme Court held that the organization's practices fell outside of *Noerr-Pennington*'s limits even though the Supreme Court accepted that, "given the widespread adoption of the Code into law, any effect the [electrical code] had in the marketplace of its own force was, in the main, *incidental* to [the defendant's] genuine effort to influence governmental action." *Allied Tube & Conduit Corp.*, 486 U.S. at 502–03 (emphasis added).

Following *Allied Tube*, the Ninth Circuit concluded that *Noerr-Pennington* did not immunize "a private body with no public accountability" even though the entity was

"charged by the Department of Commerce with selecting and entering into" the challenged contracts. *Coal. For ICANN Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495, 500, 507 (9th Cir. 2010). Likening the nonprofit to the "private standards-setting body" in *Allied Tube*, the Ninth Circuit held that *Noerr-Pennington* did not bar antitrust scrutiny of "improper coercion of [the nonprofit] and attempts to control [the nonprofit's] operations in its own favor." *Id.* at 507; *see Amphastar Pharms. Inc. v. Momenta Pharms., Inc.*, 850 F.3d 52, 56 (1st Cir. 2017) ("[T]he Supreme Court has held that petitioning of a private [standard-setting organization] . . . generally does not trigger *Noerr-Pennington* protection.").

Allied Tube controls. Here, as there, the accreditation promulgation and enforcement occur "within the confines of a private standard-setting process," where "members . . . have economic incentives to restrain competition." *Allied Tube & Conduit Corp.*, 486 U.S. at 500, 506. AVMA's accreditation standards, like other product standards, reflect "in part an implicit agreement not to trade" in services outside those standards. *Id.* at 500, 507. In this "context and nature," the Supreme Court has held, "[t]he validity of conduct . . . has long been defined and circumscribed by the antitrust laws without regard to whether the private standards are likely to be adopted into law." *Id.* at 506, 507. Which is to say, *Noerr-Pennington* does not attend AVMA's accreditation standards even if "any effect [the accreditation standards] had in the marketplace of its own force was, in the main, incidental to petitioner's genuine effort to influence governmental action." *Id.* at 503. Indeed, this presents an *a fortiori* case considering, unlike in *Allied Tube*, states have not adopted AVMA's accreditation criteria as law. Thus, the *Noerr-Pennington* doctrine, like *Parker*, does not bar LMU's antitrust claim.

C. AVMA's Authorities Do Not Hold Otherwise

AVMA's cited authorities do not hold otherwise. AVMA principally relies on *Foundation for Interior Design Education Research v. Savannah College of Art & Design*, 244 F.3d 521 (6th Cir. 2001)—which in turn relies on *Massachusetts School of Law at Andover, Inc. v. American Bar Association*, 107 F.3d 1026 (3d Cir. 1997)—to assert that that "[t]he Sixth Circuit has rejected the notion that the mere loss of accreditation constitutes an antitrust injury." MTD. at 17. Neither decision had the benefit of the Supreme Court's subsequent decisions in *Phoebe Putney* and *North Carolina State Board of Dental Examiners*, which disapproved of "loose[]" applications of *Parker*. *Phoebe Putney Health Sys., Inc.*, 568 U.S. at 229; *see N. Carolina State Bd. of Dental Exam'rs*, 574 U.S. at 504–05.

Even on their own terms, *Foundation for Interior Design Education Research* and *Andover* do not establish a blanket rule deeming all accreditation-related injuries inactionable under *Parker* or *Noerr-Pennington*. But judicial opinions "must be read with a careful eye to context." *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 374 (2023); *see Herr v. U.S. Forest Serv.*, 803 F.3d 809, 819 (6th Cir. 2015). In the same paragraph of *Foundation for Interior Design Education Research* quoted by the AVMA, the Sixth Circuit recounted and applied the Third Circuit's reasoning in *Andover*, which did not adopt a blanket rule discounting accreditation injuries. *See Found. for Interior Design Educ. Rsch.*, 244 F.3d at 531–32. Instead, the Third Circuit declined to extend *Noerr-Pennington* to the accreditation "*process itself*"—including the promulgation and enforcement of particular accreditation rules—even while accepting that *Noerr-Pennington* covered the accreditor's lobbying of states to require bar candidates to graduate from an accredited school. *Andover*, 107 F.3d at 1038–39 (emphasis added).

"Extending *Noerr* immunity to this type of private activity," the Third Circuit observed, "would run counter to *Allied Tube*." *Id.* at 1039. After holding that *Noerr-Pennington* did not apply, the Third Circuit concluded that the plaintiff proffered insufficient evidence at summary judgment that the challenged practices harmed the school. *Id.* at 1041.

The Sixth Circuit's decision in *Geomatrix, LLC v. NSF International*, 82 F.4th 466 (6th Cir. 2023), which the AVMA cites in a section of its motion addressing justiciability, offers no support either. MTD at 13. In *Geomatrix*, the Sixth Circuit deemed much of a suit moot because the challenger declined to seek recertification by the standards-development organization. *Geomatrix*, 82 F.4th at 476–77. The remaining antitrust allegations, in the Sixth Circuit's view, essentially alleged that certain members of the organization made supposedly defamatory statements *outside* of the certification process that caused state regulators *not to accept* the standards-development organization's certification as sufficient. *Id.* at 481–82. As the court stressed, the standards-development organization had "taken no independent action *in the certification process*, and [the plaintiff] is as eligible for [the] certification today as it was a decade ago." *Id.* at 482 (emphasis added). *Geomatrix* therefore offers no basis for discounting accreditation injuries. [3]

[3] The remaining decisions cited in passing by the AVMA, which consist mostly of district court decisions from outside the Sixth Circuit, employ unclear (and potentially dubious) reasoning, *see Zavaletta v. Am. Bar Ass'n*, 721 F. Supp. 96, 98 (E.D. Va. 1989), rest on independent pleading deficiencies, *Haswood v. Am. Polygraph Ass'n*, No. CV-14-00253-PHX-GMS, 2015 WL 846420, at *6 (D. Ariz. Feb. 26, 2015) ("Plaintiffs make only generalized assertions as to the anticompetitive effect of the APA's conduct, which may include their strict membership rules, on their ability to compete for employment in the field of polygraph technologies."), or simply do not mention *Parker* (or *Noerr-Pennington*) at all, *see Am. Bd. of Opticianry & Nat'l Contact Lens Exam'rs, Inc. v. Inst. for Credentialing Excellence*, No. 1:15-cv-1169-GBL-TCB, 2016 WL 11668712, at *6 (E.D. Va. Mar. 4, 2016); *K & S Assocs., Inc. v. Am. Ass'n of Physicists in Med.*, No. 3:09-1108, 2013 WL 2177938, at *18 (M.D. Tenn. May 20, 2013).

D. Recognizing the Antitrust Laws' Applicability Would Not Unduly Interfere with Accreditation Procedures or Overburden Courts

Recognizing that the antitrust laws apply to accreditation would not enmesh courts in the everyday affairs of accreditors, as AVMA suggests. *See* MTD at 2. The promulgation and enforcement of accreditation standards, like other "product standard-setting by private associations," are generally subject to "rule-of-reason analysis." *Allied Tube & Conduit Corp.*, 486 U.S. at 501. To make out a prima facie case under the rule of reason, challengers must offer direct evidence of anticompetitive effect or "market power plus some evidence that the challenged restraint harms competition." *Ohio v. Am. Express Co.*, 585 U.S. 529, 542 (2018). Where many accreditation options exist or a standard carries no meaningful competitive effect, the rule of reason can "be applied in the twinkling of an eye." *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 203 (2010) (quoting *NCAA v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 110, n.39 (1984)). Other doctrines may limit private plaintiffs' ability to recover damages, as opposed to injunctive relief, for anticompetitive accreditation decisions. *See Allied Tube & Conduit Corp.*, 486 U.S. at 498 n.2 (noting plaintiff did not recover damages "for any injury arising from the adoption of the [Code] by the various governments"). And policymakers can exempt accreditation from antitrust scrutiny where they see fit by assuming direct responsibility for such decision-making. *See id.* at 510.

Conversely, exempting accreditors from antitrust scrutiny under *Parker* and *Noerr-Pennington*—no matter how egregiously anticompetitive their conduct—would engender serious costs. Without proper safeguards, the development of standards by interested market participants poses "a serious potential for anticompetitive harm." *Allied Tube & Conduit Corp.*, 486 U.S. at 500; *see Am. Soc. of Mech. Eng'rs, Inc.*, 456 U.S.

at 571–72. Casually abandoning the "'essential national policies' embodied in the antitrust laws" would "poorly serve[]" the principles of federalism and sovereignty animating *Parker*: By "attach[ing] significant unintended consequences" to state policies "intended to achieve more limited ends," "loose application" of *Parker* would "effectively requir[e] States to disclaim any intent to displace competition to avoid inadvertently authorizing anticompetitive conduct." *Phoebe Putney Health Sys.*, 568 U.S. at 236.

II. The Department of Education's Recognition of Accreditors Does Not Preclude Antitrust Scrutiny

Separately, the AVMA repeatedly faults LMU for "overlook[ing]" that the Department of Education "has reviewed all of the [Council on Education's] Standards, including the Research Programs Standard, and has not found fault with any of them." Reply at 1–2; *see* MTD at 1–3. This assertion misapprehends the Department of Education's role in the accreditation process and wrongly suggests it displaces the antitrust laws.[4]

Arguments supposing "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored." *Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 129 (1991) (quoting *United States v. Phila. Nat. Bank*, 374 U.S. 321, 350 (1963)). The Department of Education's accrediting agency recognition process focuses on whether an applicant has satisfied the Department of Education's recognition criteria in 34 C.F.R. § 602.16; it does not prohibit an accreditor meeting those criteria from "establish[ing] any additional accreditation standards it deems appropriate," 34 C.F.R. § 602.16(f). The same regulations provide that the Department of

[4] The Department of Justice has consulted with the Department of Education in the preparation of this brief to ensure that it reflects the interests of the United States.

Education "may view as a negative factor . . . among other factors," evidence that the accreditor "was part of a concerted effort to unnecessarily restrict the qualifications necessary for a student to sit for a licensure or certification examination or otherwise be eligible for entry into a profession." 34 C.F.R. § 602.32(e). But the Department of Education's discretionary authority does not substitute for antitrust scrutiny, and in practice, the Department of Education might not discover allegations outside of an accreditor's application.

Moreover, the Department's 2019 final rule amending the accreditation recognition criteria under 34 C.F.R. Part 602 was designed to "to focus on education quality and allow competition [among accreditors]." *The Secretary's Recognition of Accrediting Agencies Rule*, 84 Fed. Reg. 58,834, 58,834 (Nov. 1, 2019) (codified at 34 C.F.R. Part 602). But nowhere in the final rule does the Department suggest that it will monitor competition among agencies or that the rule is intended to displace the antitrust laws. *Id.* Rather, the rule was intended to eliminate regulatory distinctions between regional and national accreditation agencies that may have foreclosed competition. *Id.* at 58,850. Indeed, the Department stated that "we believe the greater effect of this regulation is to allow for additional entrants or enhanced competition in the postsecondary accreditation market and to promote innovation in higher education." *Id.* at 58,890.

Under these circumstances, the AVMA cannot muster the "convincing showing of clear repugnancy between the antitrust laws and the [Department of Education's] regulatory system" necessary to establish a repeal by implication. *Cantor*, 428 U.S. at 579 n.37 (citation omitted).

CONCLUSION

For the foregoing reasons, neither state laws nor the Department of Education's accreditation certification process exempts AVMA's procedures or promulgation and enforcement of accreditation standards from antitrust scrutiny.

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