

Nos. 15-1044, 15-1045

In the Supreme Court of the United States

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY,
Petitioner,

v.

LEE PELE,
Respondent.

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY,
Petitioner,

v.

UNITED STATES OF AMERICA *EX REL.* JON H. OBERG,
Respondent.

*On Petitions for Writs of Certiorari to the
United States Court of Appeals for the Fourth Circuit*

**BRIEF OF TEMPLE UNIVERSITY, UNIVERSITY OF
PITTSBURGH, LINCOLN UNIVERSITY, PENNSYLVANIA
STATE UNIVERSITY, AND THE STATE SYSTEM OF
HIGHER EDUCATION AS *AMICUS CURIAE* IN SUPPORT
OF THE PETITIONS FOR WRITS OF CERTIORARI**

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QUESTIONS PRESENTED

With respect to each of the cases on petition for writ of certiorari, the question presented is the same:

Whether the Pennsylvania Higher Education Assistance Agency, an agency of state government expressly created by state statute, based in the state capital, which carries out a statutorily-mandated function traditionally performed by state governments, is an arm of the state for purposes of federal law.

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INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Temple University, University of Pittsburgh, Lincoln University, Pennsylvania State University, and the State System of Higher Education respectfully submit this brief in support of the Petitioner, Pennsylvania Higher Education Assistance Agency (“PHEAA”).¹ Temple University, University of Pittsburgh, Lincoln University, Pennsylvania State University, and the State System of Higher Education urge this Court to grant PHEAA’s petition for certiorari in order to review the decisions of the United States Court of Appeals for the Fourth Circuit, which held that PHEAA is not an arm of the Commonwealth of Pennsylvania and therefore is a “person” subject to liability under the False Claims Act, *United States ex rel. Oberg v. Pennsylvania Higher Education Assistance Agency*, 804 F.3d 646 (4th Cir. 2015) (“*Oberg III*”), and that PHEAA is not an arm of the Commonwealth of Pennsylvania for purposes of Eleventh Amendment

¹ Pursuant to this Court’s Rule 37.6, *amicus curiae* Temple University, The University of Pittsburgh, Lincoln University, Pennsylvania State University and the State System of Higher Education affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus curiae* Temple University, The University of Pittsburgh, Lincoln University, Pennsylvania State University, and the State System of Higher Education and their counsel made such a monetary contribution. Pursuant to this Court’s Rule 37.2, counsel of record for petitioners and respondents were timely notified of *amicus curiae* Temple University’s intent to file this brief. Petitioner and all respondents have filed letters with this Court consenting to the filing of *amicus* briefs.

sovereign immunity. *Pele v. Pennsylvania Higher Education Assistance Agency*, ___ Fed. Appx. ___ (4th Cir. 2015) (“*Pele*”).

Temple University, University of Pittsburgh, Lincoln University, and Pennsylvania State University are all state related universities located in the Commonwealth of Pennsylvania.

Temple University is a public, state related university located in Philadelphia, Pennsylvania.² Founded in 1884, Temple University is the 42nd largest university in the United States and the 5th largest provider of professional education in the nation. The university currently has over 38,000 students located throughout 17 schools and colleges and engaged in 404 academic degree programs. The average annual tuition for Temple University is approximately \$15,000 per year for in-state students and approximately \$25,000 per year for out-of-state students. Although reasonable in comparison to many private universities, many students and their families cannot afford to pay these expenses. To ease the burden, nearly 60% of Temple

² Temple University is a state-related university. 24 P.S. § 2510-2 (declaring as a matter of legislative finding that Temple University is “an instrumentality of the Commonwealth to serve as a State-related institution in the Commonwealth system of higher education.”). As such, it is governed, managed and controlled by a Board of Trustees consisting of thirty-six voting members, together with the Governor of the State, the Superintendent of the Department of Public Instruction, and the Mayor of the City of Philadelphia, each of whom serves as a non-voting, ex-officio member of the Board. *Id.* §§ 2510-4, 2510-5. The University is partially funded by sums appropriated by the Commonwealth. *Id.* § 2510-8.

University students receive need-based financial aid. This financial aid comes from many sources: federal financial assistance, institutional grants, scholarships, and—most important for the instant *amicus curiae* brief—state aid programs, including those operated by PHEAA. The programs offered by PHEAA allow Temple University to honor its commitment to: “[p]rovide students with access to a high-quality education.”³ Temple University strives to make it financially possible for every qualified applicant to enroll in its programs so that it can continue to build the talented and diverse community for which it known and respected both nationally and internationally.

The University of Pittsburgh is a state related university having a main campus in Pittsburgh and four regional campuses located throughout western Pennsylvania.⁴ Founded in 1787, the University of Pittsburgh is one of the oldest institutions of higher education in the United States. The university

³ Temple University, Tuition and Fees, <http://www.temple.edu/admissions/tuition-and-fees> (last visited March 17, 2016).

⁴ The University of Pittsburgh is a state-related university. 24 P.S. § 2510-202 (declaring as a matter of legislative finding that the University of Pittsburgh is “an instrumentality of the Commonwealth to serve as a State-related institution in the Commonwealth system of higher education.”). As such, it is governed, managed and controlled by a Board of Trustees consisting of thirty-six voting members, one of whom is the Chancellor of the University of Pittsburgh and the Governor of the State, the Superintendent of the Department of Public Instruction, and the Mayor of the City of Pittsburgh, each of whom serves as a non-voting, ex-officio member of the Board. *Id.* §§ 2510-204, 2510-205. The University is partially funded by sums appropriated by the Commonwealth. *Id.* § 2510-208.

currently has over 34,000 students located throughout 5 campuses, and 16 schools and colleges. The average annual tuition for the University of Pittsburgh is approximately \$18,000 per year for in-state students and approximately \$28,000 per year for out-of-state students. To ease the burden, nearly 58% of University of Pittsburgh undergraduate students receive need-based financial aid. This financial aid comes from many sources: federal financial assistance, institutional grants, scholarships, and—most important for the instant *amicus curiae* brief—state aid programs, including those operated by PHEAA. The University of Pittsburgh admits students with academic and personal promise without regard to ability to pay. The University of Pittsburgh works together with students and families to find a way to make a “Pitt” education financially feasible.

Lincoln University, also a state related institution, was founded in 1854 as the nation’s first degree-granting Historically Black College and University, or HBCU.⁵ The university currently has approximately 1,800 students on its main campus. The annual tuition for in-state students is \$7,340 and out-of-state students

⁵ Lincoln University is a state-related university. 24 P.S. § 2510-402 (declaring as a matter of legislative finding that the Lincoln University is “an instrumentality of the Commonwealth to serve as a State-related institution in the Commonwealth system of higher education.”). As such, it is governed, managed and controlled by a Board of Trustees consisting of thirty-nine voting members, together with the Governor of the State, the Secretary of Education, and the President of Lincoln University, each of whom serves as a non-voting, ex-officio member of the Board. *Id.* §§ 2510-404, 2510-405. The University is partially funded by sums appropriated by the Commonwealth. *Id.* § 2510-208.

is \$12,132. Financial aid resources comes from federal aid, grants, scholarships and state aid programs, including those operated by PHEAA. Lincoln students come first because they *are* first. They can arrive as first in their household to go to college or first in their class with honors. They come from a range of ethnic and cultural backgrounds and from across the United States and around the world. Lincoln University works together with students and families to assist them with ways to make their Lincoln education financially possible.

Originally founded in 1855 as the Farmers' High School, The Pennsylvania State University ("Penn State") is now the largest university in Pennsylvania. While its origins focused on the scientific principles of farming, Penn State currently offers studies in over 160 baccalaureate, 90 associate, 160 graduate (including master's and doctoral), and three professional degree programs throughout its 24 campuses, teaching hospital, and online world campus. For the 2014-2015 academic year, the average tuition for a Pennsylvania resident attending the University Park campus of Penn State was approximately \$17,500. Of the approximately 105,000 students enrolled in Penn State that year, 71% received some form of financial aid from resources such as federal and state aid, grants, loans, and scholarships. Penn State believes that a college education is an investment in the student's future and works with students and their families to find ways to make Penn State their school of choice.

The State System of Higher Education ("State System") was statutorily created by Act 188 of 1982 as

a “body corporate and politic constituting a public corporation and government instrumentality” which consists of fourteen (14) public universities across the Commonwealth of Pennsylvania. 24 P.S. § 20-2002-A. The State System’s purpose is “to provide high quality education at the lowest possible cost to the students.” 24 P.S. § 20-2003-A. The State System has more than 107,000 students throughout its 14 state-owned universities. The average annual tuition for the State System is \$7,160.00 per year for in-state undergraduate students and \$15,250 for out-of-state undergraduate students. To ease the burden, nearly 87% of first-time, full-time, degree-seeking undergraduate students attending State System universities receive financial aid. This financial aid comes from many sources: federal financial assistance, institutional grants, scholarships, and—most important for the instant Petition—state aid programs, including those operated by PHEAA.

PHEAA has petitioned this Court to review the United States Court of Appeals for the Fourth Circuit’s decisions in *Oberg III* and *Pele* which, if upheld, would have disastrous consequences for Temple University, University of Pittsburgh, Lincoln University, Pennsylvania State University and State System universities’ abilities to provide these critical educational opportunities to well-deserving students. The liability to which PHEAA would be exposed is vital not only to these universities’ communities, but to the financial stability of the higher education system in the Commonwealth of Pennsylvania as a whole. Temple University, University of Pittsburgh, Lincoln University, Pennsylvania State University, and the State System of Higher Education submit this *amicus*

curiae brief to bring the Court's attention to the importance of the various financial aid programs provided by PHEAA, which are critical not only to the students of these universities, but to the Commonwealth's higher education system as a whole.

SUMMARY OF ARGUMENT

The question presented in the two petitions presently pending before the Court is whether PHEAA, a statewide agency located in the capital and unambiguously treated as an arm of the state by the Commonwealth of Pennsylvania, is an arm of the Commonwealth of Pennsylvania for purposes of federal law in the context of the False Claims Act and the Eleventh Amendment. Given that PHEAA's petitions more than adequately address the legal merits of this issue, Temple University, University of Pittsburgh, Lincoln University, Pennsylvania State University, and the State System of Higher Education, for purposes of the instant *amicus curiae* brief, focus on separate, yet crucial, arguments in support of certiorari.

Specifically, from the perspective of Temple University, University of Pittsburgh, Lincoln University, Pennsylvania State University, and the State System of Higher Education, PHEAA is performing an essential, vitally important government function in Pennsylvania as a state agency. Acting as a state agency, PHEAA advances its statutory mission of improving the higher educational opportunities of Pennsylvania citizens by funding and administering various financial aid programs, including scholarships, grants, student employment and loan forgiveness programs, which total in the hundreds of millions of dollars each year. These programs are critically

important to the students applying for and attending these universities.

Undeniably, the Court of Appeals for the Fourth Circuit's decisions in *Oberg III* and *Pele* endanger PHEAA's ability to provide these critical funds to Temple University, University of Pittsburgh, Lincoln University, Pennsylvania State University, and State System university students. Indeed, if the Court allows *Oberg III* and *Pele* to stand, the district court may ultimately enter judgment against PHEAA in a sum nearing \$300 million. Such a judgment would undoubtedly impede PHEAA's ability to provide state-funded financial aid for Pennsylvania students, including those attending these universities, who depend upon these funds to provide them access to a college education and, in turn, the opportunity to develop and mature intellectually, professionally, and socially.

Accordingly, and for the reasons set forth at length below, Temple University, University of Pittsburgh, Lincoln University, Pennsylvania State University, and the State System of Higher Education respectfully urge the Court to hear PHEAA's appeals.

ARGUMENT**1. Temple University, University of Pittsburgh, Lincoln University, Pennsylvania State University, and the State System of Higher Education Interact with PHEAA as a State Agency Which Performs the Essential Government Function of Improving Higher Educational Opportunities of Pennsylvania Citizens by Funding and Administering Financial Aid Programs.**

At all times, Temple University, University of Pittsburgh, Lincoln University, Pennsylvania State University, and the State System of Higher Education interact with PHEAA as a state agency or, stated differently, a direct arm of the Commonwealth government. This is consistent with the fact that Pennsylvania unambiguously considers PHEAA an arm of the Commonwealth. Through enabling legislation, the Pennsylvania legislature created PHEAA as a “government instrumentality” to “improve higher educational opportunities of” Pennsylvanians “by assisting them in meeting their expenses of higher education . . . and by enabling the agency, lenders and postsecondary institutions to make loans available to students and parents for postsecondary education purposes.” 24 P.S. §§ 5101-5102. Courts in the Commonwealth have similarly upheld this classification. *See, e.g., PHEAA v. Barksdale*, 449 A.2d 688, 689 (Pa. Super. Ct. 1982) (PHEAA “is undeniably an agency of the Commonwealth.”); *PHEAA v. Xed*, 456 A.2d 725, 726 (Pa. Commw. Ct. 1983); *Richmond v. PHEAA*, 297 A.2d 544, 546-47 (Pa. Commw. Ct. 1972).

Temple University, University of Pittsburgh, Lincoln University, Pennsylvania State University, and the State System of Higher Education see it no differently. From their perspective, PHEAA is a state agency performing the essential government function of funding and administering financial aid programs for students and parents at these respective universities. PHEAA was created in 1963 to improve Pennsylvania's citizens' access to higher education. PHEAA annually administers nearly half a billion dollars in legislative appropriations as grants to Pennsylvania students. These universities have worked with PHEAA for approximately 50 years, and throughout that time period, have facilitated use of PHEAA funds and/or grants to pay for their education by students who are Pennsylvania residents.

As far as these universities are concerned, PHEAA's main function is its administration of Pennsylvania's State Grant Program, the Commonwealth's principal publicly supported postsecondary financial aid program. *See* 24 P.S. § 5151-52. Through this program, the Pennsylvania Legislature appropriates Commonwealth funds which are then distributed by PHEAA to "qualifying students." For the current fiscal year, Pennsylvania appropriated over \$300 million in taxpayer funds to support the State Grant Program. In academic year 2015-2016, Temple University disbursed nearly \$28,000,000.00 of these PHEAA administered funds to "qualifying students." The University of Pittsburgh disbursed approximately \$18,600,000.00 of these PHEAA administered funds. Additionally, Lincoln University disbursed approximately \$1,275,000.00 PHEAA funds. In the academic year 2014-2015, qualifying Penn State students received

over \$54,000,000 from the Pennsylvania State Grant program. Clearly, these funds go a long way towards providing higher education to students of the Commonwealth, specifically those at these universities, who otherwise could not afford it.

From Temple University, University of Pittsburgh, Lincoln University, Pennsylvania State University and the State System of Higher Education's perspectives, PHEAA acts as a state agency in administering these funds. For example, these universities use PHEAA State Grants and funding solely to support students domiciled in the Commonwealth of Pennsylvania. Moreover, PHEAA is located in the state capital—Harrisburg, Pennsylvania. There, 17 of 20 seats on PHEAA's governing board are held by elected state officials. These universities interact with PHEAA's State Grant Agency on a regular basis, including technical support and customer service staff. Any and all communications by and between them and PHEAA are routinely directed to PHEAA's offices in the state capital. Similarly, any and all communications by and between university students utilizing PHEAA funds or grants and PHEAA are similarly directed to PHEAA's offices in the state capital.

At all times during which PHEAA has been in existence, therefore, Temple University, University of Pittsburgh, Lincoln University, Pennsylvania State University, and the State System of Higher Education have interacted with PHEAA and had dealings with it as a state agency in performing the vitally important governmental function of lowering barriers to higher education opportunities for citizens of Pennsylvania.

2. The Decisions of the Fourth Circuit in *Oberg III* and *Pele* Endanger PHEAA's Ability to Provide Critical Benefits to Students Attending Temple University, University of Pittsburgh, Lincoln University, Pennsylvania State University, and Universities in the State System of Higher Education.

If upheld, the Fourth Circuit's decisions in *Oberg III* and *Pele* would undoubtedly interfere with Temple University, University of Pittsburgh, Lincoln University, Pennsylvania State University, and State System universities' students' access to higher education, to the detriment not only of the universities, but to the Commonwealth and the nation as a whole.

In *Oberg III*, the Fourth Circuit held that PHEAA is not an arm of the Commonwealth of Pennsylvania and therefore is a "person" subject to liability under the False Claims Act. The Fourth Circuit, reversing the grant of summary judgment in favor of PHEAA, remanded the case to be tried on relator's claim for damages against PHEAA. The alleged damages, according to relator, pertain to allegations that, from 2002 through 2006, PHEAA "fraudulently claimed hundreds of millions of dollars in federal student-loan interest-subsidy payments to which [it was] not entitled." *Oberg III*, 804 F.3d at 650. Should relator be successful on the merits of his claim before a jury, Pennsylvania taxpayers could be liable for damages nearing \$300 million dollars.

Such a huge monetary judgment would severely impair, if not obliterate, PHEAA's ability to carry out its statutory mission of providing access to higher education by funding and administering various

financial aid programs. Any impairment to PHEAA's available funds, certainly one of this magnitude, will substantially restrict access to education for students in Pennsylvania attending Temple University, University of Pittsburgh, Lincoln University, Pennsylvania State University, and State System universities. The majority of the students at these universities currently utilizing these funds cannot afford a college education without this support and, in turn, would be precluded from attending college altogether. This would be a detriment not only to their own lives and well-being, but to the nation's economy as a whole.

CONCLUSION

For the reasons set forth at length herein, *Amicus Curiae* Temple University, University of Pittsburgh, Lincoln University, Pennsylvania State University, and the State System of Higher Education support PHEAA's petitions for writ of certiorari. The Fourth Circuit's decisions in *Oberg III* and *Pele* cannot stand as they would create a barrier to the accessibility and affordability of higher education for hundreds of thousands of well-deserving students in the Commonwealth of Pennsylvania—a barrier that this Court can break down before it is in place.

Respectfully submitted,

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