NO. _____

In the
Supreme Court of the United States

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY,
Petitioner,

v.

LEE PELE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Pennsylvania Higher Education Assistance Agency (PHEAA) was created by the Commonwealth of Pennsylvania as a state-level agency to carry out the essential governmental function of providing Pennsylvanians with financial aid for higher education. Like other state agencies, PHEAA is treated as an arm of Pennsylvania by Pennsylvania law, entitled to sovereign immunity in Pennsylvania courts, governed by Pennsylvania elected officials and appointees, based in the state capital, staffed entirely by state employees, and is inextricably intertwined with the Pennsylvania treasury. Nonetheless, relying on a decision in which it applied a multifactor balancing test to conclude that PHEAA is not an arm of the Commonwealth of Pennsylvania but rather an "independent political subdivision," the Fourth Circuit held that PHEAA can be haled into federal court despite Pennsylvania's Eleventh Amendment immunity.

The question presented is:

Whether the Pennsylvania Higher Education Assistance Agency, a statewide agency located in the capital and unambiguously treated as an arm of the state by Pennsylvania, is an arm of Pennsylvania for purposes of federal law, or is instead an "independent political subdivision" as determined by the Fourth Circuit and its multifactor balancing test.

PARTIES TO THE PROCEEDING

Petitioner Pennsylvania Higher Education Assistance Agency was the defendant in the district court and the appellee in the court of appeals. It was created and is controlled by the Commonwealth of Pennsylvania.

Respondent Lee Pele is an individual and was the plaintiff in the district court and appellant in the court of appeals.

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PETITION FOR WRIT OF CERTIORARI

Since its creation in 1963, the Pennsylvania Higher Education Assistance Agency (PHEAA) has occupied an inherently sovereign role as a "government instrumentality" of the Commonwealth of Pennsylvania. 24 P.S. §5101. PHEAA's purpose is, and always has been, to "improve the higher educational opportunities" of Pennsylvania citizens by assisting them in financing the costs of higher education. *Id.* §5102. To that end, from its headquarters in the state capital, PHEAA administers nearly half a billion dollars annually in financial aid to Pennsylvania students on behalf of the Commonwealth. Furthermore, by exercising powers expressly granted to it by the Pennsylvania legislature, PHEAA has generated additional revenues that it uses both to cover its administrative costs and to supplement financial aid to Pennsylvania students by hundreds of millions of dollars. As a result, PHEAA has helped make higher education possible for literally millions of Pennsylvanians.

Not surprisingly in light of its important sovereign function, Pennsylvania law uniformly and unambiguously treats PHEAA as an arm of the Commonwealth. Like other Pennsylvania agencies, PHEAA enjoys sovereign immunity in the Pennsylvania courts. It is exempt from state taxation. It promulgates regulations and possesses subpoena power. The Pennsylvania Attorney General must approve all of its material contracts and must represent it in litigation unless she delegates that authority. PHEAA's governing board is composed entirely of Pennsylvania state officials, a majority of

whom are sitting legislators. PHEAA must deposit all revenues into the Pennsylvania treasury, it cannot spend anything without first obtaining the Pennsylvania Treasurer's approval, and all expenses are paid by checks drawn on the Pennsylvania treasury. Its employees use Pennsylvania's retirement and healthcare plans, are paid from the Pennsylvania treasury according to terms negotiated between the state employees' union and the Governor, and wear badges clearly stating: "Commonwealth of Pennsylvania State Employee." PHEAA's sovereign role is so well established that an unbroken line of Pennsylvania precedent holds that PHEAA is an agency of the Commonwealth.

Given these uncontested facts, it would seem clear that PHEAA is an arm of Pennsylvania entitled to the immunity conferred upon sovereigns in federal court. The Fourth Circuit, however, unfamiliar with Pennsylvania agencies and Pennsylvania law, concluded otherwise. The court reached this remarkable result in an opinion that relied entirely on a case argued and decided alongside this case, *United States ex rel. Oberg v. PHEAA*, 804 F.3d 646 (4th Cir. 2015). In that case, applying a multifactor balancing test fashioned for differentiating local school boards and multistate entities from statewide agencies, the Fourth Circuit reached the remarkable conclusion that PHEAA is nothing more than an "independent political subdivision," akin to a local school board or county sheriff's office. Thus, while Pennsylvania regards PHEAA as a sovereign arm of Pennsylvania entitled to immunity in Pennsylvania courts, would-be plaintiffs can cross the border to West Virginia or

Maryland and file suit in federal court, where PHEAA will be treated like any other private party.

PHEAA has filed a petition for certiorari in *Oberg* alongside this petition. There is only one relevant difference between this case and *Oberg*. This case involves whether PHEAA can be involuntarily haled into federal court notwithstanding Pennsylvania's Eleventh Amendment immunity. *Oberg* involves whether PHEAA is a "person" that can be sued under the False Claims Act (FCA), 31 U.S.C. §3729 *et seq.*; *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787-88 (2000) (holding that States and state agencies are not "persons" subject to FCA liability). Both cases, however, turn on the exact same question: whether PHEAA is an arm of Pennsylvania for federal-law purposes. That is because "every circuit that has confronted the question" has concluded that determining whether an entity is a "person" under the FCA uses "the same test as that used for determining whether an entity is an arm of the state entitled to share in Eleventh Amendment immunity." *United States ex rel. Willette v. Univ. of Mass., Worcester*, ___ F.3d ___, 2016 WL 325026, at *2 (1st Cir. Jan. 27, 2016). Indeed, the Fourth Circuit held the same in the *Oberg* litigation. *See United States ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.*, 681 F.3d 575, 579-81 (4th Cir. 2012).

Because the Fourth Circuit treated *Oberg* as the "lead case" and provided a lengthy opinion in *Oberg*, with only a brief follow-on opinion here, and the arm-of-the-state question in this case is "governed by the same factors … and [is] otherwise materially identical to the arm-of-state question presented" in *Oberg*,

App.4, should the Court be inclined to grant certiorari, *Oberg* provides an appropriate vehicle for doing so. Nonetheless, deciding the arm-of-the-state question in the FCA rather than Eleventh Amendment context could require the Court to address the antecedent question of whether the arm-of-the-state inquiry in fact governs whether an entity is a "person" under the FCA. The circuits have uniformly held that there is a single federal-law test for whether a state agency is an arm of the State for federal-law purposes, whether that federal-law purpose is Eleventh Amendment immunity or the scope of the word "person" in the FCA. And the possibility of having different tests for the two materially identical contexts has nothing to recommend it. But to the extent the Court would prefer to address the arm-of-the-state issue in the Eleventh Amendment context, this petition provides an appropriate vehicle.

The decisions here and in *Oberg* are egregiously wrong, demean Pennsylvania's sovereign dignity, and threaten both Pennsylvania's fiscal integrity and its citizens' access to higher education. They also implicate a deeply entrenched circuit split over the proper test for identifying an arm of the state and dramatically illustrate the need for this Court to provide guidance in a case involving a statewide agency, rather than a political subdivision or multistate entity. This Court has not squarely addressed the arm-of-the-state question in cases involving a statewide agency, but rather has addressed local school boards and multistate entities. As a result, the courts of appeals have been left to fashion balancing tests based on precedents addressing outlier situations and have splintered and

created disparate two-, three-, four-, five-, and even six-factor balancing tests.

The differences in those tests can be outcome-determinative. Since these multifactor tests were crafted based on Supreme Court case law addressing only outlier situations, they have produced both confusion and anomalous results in the straightforward context of statewide entities serving statewide functions, as exemplified by the decisions here and in *Oberg*. In numerous other circuits, substantial deference would have been given to Pennsylvania's treatment of PHEAA as an arm of the state, and PHEAA would rightly have been deemed an arm of Pennsylvania for federal law purposes as well. But here and in *Oberg*, the Fourth Circuit's amorphous, four-factor balancing test led it to miss the forest for the trees. What should have been a straightforward case involving a statewide agency based in the state capital that a sovereign State has deemed an arm of the state became a sophistic exercise akin to comparing the length of a line to the weight of a rock. And while there are profound conflicts in the circuits over the means for determining arm-of-the-state status, in some respects the most important conflict is that Pennsylvania believes that PHEAA is an arm of the state, as reconfirmed by recent legislation, and the Fourth Circuit does not. That direct conflict between state officials in Harrisburg and federal judges in Richmond is untenable and reflects the utter confusion in the doctrine and the need for the Court's review on this important issue.

OPINIONS BELOW

The Fourth Circuit's opinion is reported at ___ F. App'x ___, 2015 WL 6162942 (4th Cir. 2015). App.1-4. The district court's opinion is reported at 53 F. Supp. 3d 857 (E.D. Va. 2014). App.5-30.

JURISDICTION

The Fourth Circuit issued its opinion on October 21, 2015. It denied PHEAA's petition for rehearing on November 17, 2015. App.31. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment is reproduced in the appendix.

STATEMENT OF THE CASE

A. PHEAA's Creation, Governance, and Operation[1]

1. In 1963, the Pennsylvania legislature created PHEAA as a "government instrumentality" to "improve the higher educational opportunities of" Pennsylvanians "by assisting them in meeting their expenses of higher education … 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; *Oberg*, 804 F.3d at 654. PHEAA was created "*in all respects* for the benefit of the people of the Commonwealth, for the improvement of their health

[1] The facts in this section are identical to the facts in the *Oberg* petition. While citations to "JA" here refer to the Fourth Circuit joint appendix filed in this case (not *Oberg*), the relevant facts regarding PHEAA are the same in both cases.

and welfare, and for the promotion of the economy." 24 P.S. §5105.6 (emphasis added). "[S]uch purposes," the legislature continued, "are public purposes and the agency will be performing an essential governmental function in the exercise of the powers conferred upon it." *Id.*

PHEAA's enabling legislation provided that it would take effect only "upon the adoption by the electorate of an amendment to the Constitution of Pennsylvania authorizing grants or loans for higher educational purposes." *Id.* §5112. The people of Pennsylvania immediately adopted such an amendment, *see* Pa. Const. art. III, §29, thereby resulting in PHEAA's creation.

PHEAA's chief function is the administration of Pennsylvania's State Grant Program. *Oberg*, 804 F.3d at 655; 24 P.S. §§5151-52. In response to annual budget requests, the Pennsylvania legislature appropriates funds for the Grant Program, and PHEAA "distributes every penny … to qualifying students." *Oberg*, 804 F.3d at 675. In the last five years alone, PHEAA has administered more than $1.5 billion in Grant Program funds for the benefit of hundreds of thousands of Pennsylvania students. *See* JA58.

To carry out its "essential governmental function," 24 P.S. §5105.6, PHEAA is also statutorily empowered to lend, purchase, service, and guarantee loans, *see id.* §5104; *see also Oberg*, 804 F.3d at 655. PHEAA may service and guarantee "loans funded, guaranteed or reinsured under Federal laws," 24 P.S. §5104(1), and to guarantee loans under the Federal Higher Education Act, *id.* §5104(1.2). And it has

authority to "make, service, invest in, purchase, make commitments to purchase, take assignments of or administer loans." *Id.* §5104(1.1)(iii).

These activities have generated substantial revenues that benefit Pennsylvania and its citizens. *See Oberg*, 804 F.3d at 655. First, these revenues fully fund PHEAA's operations. Indeed, PHEAA has carried out its government responsibilities so effectively that the legislature has not had to appropriate any taxpayer funds for PHEAA's operational expenses since 1988. *Id.* Second, PHEAA has disbursed much of this generated revenue as additional financial aid to Pennsylvanians; since 2011 alone, it has contributed more than $310 million to the Commonwealth's financial aid programs. *See* JA58-59, 61, 65-66.

2. PHEAA is governed and functions precisely as one would expect of a sovereign Pennsylvania agency. Based in the state capital, Harrisburg, it is controlled by a twenty-member board of directors, a majority of whom—sixteen out of twenty—are sitting members of the Pennsylvania legislature and the rest of whom are gubernatorial appointees. *Oberg*, 804 F.3d at 654.[2]

Like other Pennsylvania agencies, PHEAA has authority to issue binding regulations, which must receive approval from Pennsylvania's Regulatory Review Commission and Attorney General and are "accorded great weight" in Pennsylvania courts. *Cherry v. PHEAA*, 642 A.2d 463, 464 (Pa. 1994);

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[2] The legislature amended the relevant statute in 2010, but as the Fourth Circuit acknowledged, that change is "not relevant to the disposition of" this case. *Oberg*, 804 F.3d at 654 n.3.

Oberg, 804 F.3d at 657. PHEAA has statewide subpoena power, and it can enter judgments of defaults valid statewide. 24 P.S. §5104(10)(iii), (11). The Pennsylvania Attorney General represents PHEAA in all civil litigation unless she delegates that authority. *Oberg*, 804 F.3d at 656.[3] The Attorney General must also review and approve all PHEAA contracts over $20,000, in part to ensure that the contract does not waive Pennsylvania's sovereign immunity. *Id.*; JA138. Like other state agencies, PHEAA can solicit opinions from the Attorney General, and it is bound to follow those opinions. *Oberg*, 804 F.3d at 656; *see* 71 P.S. §§732-102, -204.

PHEAA's property, income, and activities are all exempt from state taxation. *See* 24 P.S. §§5105.6, 5106, 5107. As with other Pennsylvania agencies, all PHEAA revenues must be deposited in the Pennsylvania state treasury. *Oberg*, 804 F.3d at 655. Although nominally earmarked for the "Educational Loan Assistance Fund," *see* 24 P.S. §5105.10, the funds are in fact commingled with the Commonwealth's general investment fund and invested by the Pennsylvania Treasurer, not PHEAA, *Oberg*, 804 F.3d at 655-56. PHEAA may borrow money, but only with the Governor's approval and only up to a legislatively dictated limit. *See* 24 P.S. §§5104(3), 5105.1(a.1).

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[3] Thus, for example, the Attorney General approved PHEAA's request for delegation in this case, JA238-43, but recently denied PHEAA's request for delegation in another federal lawsuit. *See* Br. in Supp. of Mot. for Summ. J. 24, *Lang v. PHEAA*, No. 12-1247 (M.D. Pa. Feb. 13, 2016) (Dkt. 135); Ex. 2 to Mot., at ¶65 & Ex. G, *Lang* (Dkt. 133-3).

Like other Pennsylvania agencies, PHEAA may use its revenues only for the "purposes of the agency," 24 P.S. §5104(3), and only with the approval of the Treasury Department. *See Oberg*, 804 F.3d at 656; 72 P.S. §307. All PHEAA expenses are paid by the Pennsylvania Treasurer; checks are drawn on the Pennsylvania treasury and signed by the Pennsylvania Treasurer. *Oberg*, 804 F.3d at 656. PHEAA must report its financial condition to the Governor and Legislature annually. *Id*. at 657. Its financial information is included in Pennsylvania's annual financial report. *Id*. It is subject to—and has undergone—auditing by Pennsylvania's Auditor General. *Id*.

Like all other Pennsylvania agency employees, PHEAA's employees are paid by the Pennsylvania Treasurer, must participate in the Pennsylvania state retirement system, and must use the Pennsylvania healthcare fund. *Id*.; 71 P.S. §§5102, 5301. All but one work in Pennsylvania. JA52, 359. PHEAA employee badges state: "Commonwealth of Pennsylvania State Employee." App.29. PHEAA's union employees are represented by a public-sector union—the American Federation of State, County and Municipal Employees—and their compensation is governed by a contract negotiated by the Governor's office. JA72; *see also United States ex rel. Oberg v. PHEAA*, 77 F. Supp. 3d 493, 500 (E.D. Va. 2015). PHEAA's officers, managers, and board members are "public officials" subject to the Pennsylvania Public Official and Employee Ethics Act, the state's anti-corruption law. App.29; 65 P.S. §1102.

In light of the foregoing, an unbroken line of Pennsylvania court decisions treats PHEAA as a Pennsylvania agency. *See, e.g.*, *PHEAA v. Barksdale*, 449 A.2d 688, 689 (Pa. Super. Ct. 1982) (holding that 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).

B. Procedural History

Respondent brought claims against PHEAA under the Fair Credit Reporting Act. 15 U.S.C. §§1681-1681x. Although respondent's action was filed in the same federal judicial district as *Oberg*, it was assigned to a different judge, namely, the Honorable James Cacheris. After discovery, PHEAA moved for summary judgment, contending that it is an arm of Pennsylvania entitled to sovereign immunity. The district court looked to the Fourth Circuit's four-factor test for determining arm-of-the-state status: (1) "whether any judgment against the entity as Defendant will be paid by the State" or whether any recovery by the entity as plaintiff will inure to the benefit of the State; (2) "the degree of autonomy exercised by the entity"; (3) "whether the entity is involved with state concerns as distinct from non-state concerns, including local concerns"; and (4) "how the entity is treated under state law." App.11, 19, 23, 27. Applying that test, the court (like the *Oberg* district court) concluded that PHEAA is an arm of Pennsylvania and granted summary judgment for PHEAA. App.30.

The Fourth Circuit reversed. The court's brief opinion contained no analysis, instead relying entirely on its opinion issued the same day in *Oberg*. App.3-4.

In *Oberg*, the Fourth Circuit held that PHEAA is not an arm of Pennsylvania under federal law. In so holding, the Fourth Circuit relied on its four-factor balancing test. On the first factor, the Fourth Circuit held that Pennsylvania was not "functionally liable" for judgments against PHEAA because "PHEAA's control over [its] wealth" made it unlikely that Pennsylvania's "help would be required to satisfy [a] hypothetical judgment." *Oberg*, 804 F.3d at 665, 667 & n.15. On the second factor, the court held that PHEAA "operates autonomously"; the fact that PHEAA's board is comprised exclusively of state officials and appointees only "suggests some level of state control," and the many restrictions that Pennsylvania law places on PHEAA operate "at the administrative edges rather than the discretionary heart of PHEAA's authority." *Id.* at 669, 672, 673. On the third factor, the court conceded that PHEAA's work involves "an essential governmental function," is "clearly of legitimate state concern," "provide[s] significant services to the citizens of Pennsylvania," and "inure[s] to the benefit of Pennsylvania citizens." *Id.* at 675 (quotation marks omitted). The court nevertheless discounted all of this because "'the majority of PHEAA's revenue and income was derived from out-of-state activity,'" *i.e.*, PHEAA's servicing and guaranteeing loans for non-Pennsylvanians. *Id.* Thus, this factor "just barely" favored PHEAA. *Id.* On the fourth factor, the Fourth Circuit conceded that "PHEAA is generally treated as a state agency under state law." *Id.* at 676. Nonetheless, it concluded that

this factor only "tip[ped]" in PHEAA's favor because of a few isolated practices unconnected to any Pennsylvania statute, regulation, or decision. *Id.*

The *Oberg* court then "balance[d]" the four factors and concluded that PHEAA is "an independent political subdivision" of Pennsylvania, not an arm of Pennsylvania. *Id.* at 676, 677.

The sovereign government of Pennsylvania responded swiftly. The Legislature enacted, and the Governor signed, legislation declaring that PHEAA "is an integral part and arm of the Commonwealth" and "is directly controlled by the Commonwealth." H.B. 1460, 2015-16 Gen. Assemb., Reg. Sess. §107 (Pa. 2015). The legislation also reiterated that PHEAA simply "maintained" Commonwealth funds, and it underscored PHEAA's "essential state governmental function of providing Commonwealth students with access to higher education opportunities and providing essential higher education programs for the benefit of Commonwealth students." *Id.*

REASONS FOR GRANTING THE PETITION

The Commonwealth of Pennsylvania plainly considers PHEAA to be an arm of the state; the Fourth Circuit just as plainly does not. The decisions in this case and *Oberg* are not just egregiously wrong and an affront to Pennsylvania's sovereign dignity; they also implicate a thicket of conflicting lower court balancing tests—ranging from two to six factors—obscuring what should be a straightforward determination of whether a statewide agency treated as an arm of the state under state law is also an arm of the state for federal-law purposes. There is no question that PHEAA would be classified as an arm of the state

under the tests of several circuits that give more deference to States and less weight to extraneous factors. But the problem with the conflicting circuit precedent runs even deeper. This Court has squarely confronted the arm-of-the-state question only in the context of county school boards and multistate agencies. The lower courts have extrapolated multifactor balancing tests from those cases and applied them to heartland cases like this—a statewide agency located in the state capital, staffed with state-government employees discharging statewide functions, and unambiguously considered an arm of the state under state law—with anomalous results, as demonstrated here and in *Oberg*.

Under any coherent approach to determining arm-of-the-state status, the Fourth Circuit's decision here, relying on *Oberg*, is incorrect. Pennsylvania's statutes, decisions, and practices overwhelmingly demonstrate that PHEAA is a state agency, and PHEAA's mission, governance, and operations bear this characterization out—as does Pennsylvania's unambiguous declaration in response to the decision below that PHEAA is an arm of the state. Pennsylvania's considered judgment that PHEAA is an arm of its government should carry the day and prevent PHEAA from being haled into federal court. Yet the Fourth Circuit, relying on *Oberg*, subordinated this sovereign interest to a hodgepodge of irrelevant facts and dubious reasoning under its multifactor balancing test. Time and again, this Court has emphasized the importance of respecting state sovereignty. State sovereignty is too important and too consequential to have the answer to a question as basic as whether a state agency like PHEAA is in fact

an arm of the state for federal-law purposes turn on the vagaries of which two- to six-factor balancing test a court applies and how the court does the balancing. In short, there is a conflict in the circuits, a conflict between state officials in Harrisburg and federal judges in Richmond, and an acute need for this Court to substitute clarity for a thicket of conflicting balancing tests.

I. This Court's Precedents Have Left The Circuits Conflicted Over The Proper Test For Determining Whether An Entity Is An Arm Of The State.

The federal courts of appeals have hopelessly splintered over how to determine whether a particular entity is an arm of the state. The disarray stems from this Court's having addressed that question only at the margins in cases involving either multistate entities or local bodies, instead of state-level entities. The resulting assortment of all-purpose tests in the lower courts has produced both confusion and, as this case and *Oberg* demonstrate, anomalous results.

A. The Circuits Apply Vastly Different Arm-of-the-State Tests, Under Many of Which PHEAA Would Rightly Have Been Deemed an Arm of Pennsylvania.

1. Courts and commentators agree: "The jurisprudence over how to apply the arm-of-the-state doctrine is, at best, confused." *Mancuso v. N.Y. State Thruway Auth.*, 86 F.3d 289, 293 (2d Cir. 1996); *accord* Erwin Chemerinsky, Federal Jurisdiction §7.4, at 444 (6th ed. 2012) ("[T]he law concerning the immunity of state agencies, boards, and other entities from suit in federal courts is quite inconsistent."). As more fully

set forth in the *Oberg* petition, *see* Pet. 14-18, to answer the seemingly straightforward question of whether a particular entity is an arm of the state, the courts of appeals have adopted two-, three-, four-, five, and six-factor tests. Even circuits that apply the same number of factors, moreover, define those factors differently.

The First, Seventh, and Eighth Circuits have created two-factor tests, no two of which are alike. *Irizarry-Mora v. Univ. of P.R.*, 647 F.3d 9, 12 (1st Cir. 2011); *Burrus v. State Lottery Comm'n of Ind.*, 546 F.3d 417, 420 (7th Cir. 2008); *Thomas v. St. Louis Bd. of Police Comm'rs*, 447 F.3d 1082, 1084 (8th Cir. 2006). The Third, Tenth, and District of Columbia Circuits, meanwhile, employ different three-factor tests. *Haybarger v. Lawrence Cty. Adult Prob. & Parole*, 551 F.3d 193, 198 (3d Cir. 2008); *P.R. Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 873 (D.C. Cir. 2008); *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 718 (10th Cir. 2006). The law becomes even less clear from there. The Sixth Circuit applies a remarkably different four-factor test from the one applied by the Fourth Circuit in *Oberg*, *see Ernst v. Rising*, 427 F.3d 351, 359 (6th Cir. 2005), and the Eleventh Circuit's is different still, *see United States ex rel. Lesinski v. S. Fla. Water Mgmt. Dist.*, 739 F.3d 598, 602 (11th Cir. 2014). Meanwhile, the Ninth Circuit employs a five-factor test, *see Beentjes v. Placer Cty. Air Pollution Control Dist.*, 397 F.3d 775, 778 (9th Cir. 2005), and the Fifth Circuit employs a convoluted six-factor test, *see Richardson v. S. Univ.*, 118 F.3d 450, 452 (5th Cir. 1997). Finally, and perhaps most emblematic of the utter confusion in the lower courts, the Second Circuit has variously employed a two-

factor test, *see, e.g.*, *Clissuras v. City Univ. of N.Y.*, 359 F.3d 79, 82 (2d Cir. 2004), and a separate six-factor test, *see, e.g.*, *Gorton v. Gettel*, 554 F.3d 60, 62 (2d Cir. 2009). In a recent case acknowledging the "lack of clarity" pervading this area of the law, it applied *both* tests simultaneously. *Leitner v. Westchester Cmty. Coll.*, 779 F.3d 130, 136-37 (2d Cir. 2015).

2. These disparate tests are not simply varying formulations of the same underlying principles. They demonstrate a real conflict in the circuits' approaches to determining whether an entity is an arm of the state, especially concerning the degree to which the State's own explicit treatment of the agency is informative or controlling. And these differences can be outcome-determinative. As explained in the *Oberg* petition, PHEAA would plainly be an arm of Pennsylvania under the law of the First, Sixth, and Eleventh Circuits. *See* Pet. 18-21. The same is also true under the law of the D.C. Circuit. The D.C. Circuit assesses "(1) the State's intent as to the status of the entity, including the functions performed by the entity; (2) the State's control over the entity; and (3) the entity's overall effects on the state treasury." *P.R. Ports Auth.*, 531 F.3d at 873. *Puerto Rico Ports Authority* involved whether a Puerto Rico entity (PRPA) enjoyed arm-of-the-state status. The D.C. Circuit held that the first factor "strongly support[ed]" that status, given "Puerto Rico law's characterization of PRPA as a government instrumentality, PRPA's functions under Puerto Rico law, [and] the fact that PRPA is treated like other Commonwealth agencies for purposes of other Puerto Rico laws." *Id.* at 876-77. Each of these points likewise "strongly support[s]" PHEAA's status as an arm of Pennsylvania.

The D.C. Circuit held that the second factor "look[s] primarily at how the directors and officers of PRPA are appointed." *Id.* at 877. Because PRPA's board was composed entirely of Puerto Rico officials or appointees, Puerto Rico "directly controls PRPA," and thus "[t]his 'control' factor also weighs heavily in the direction of" sovereign immunity. *Id.* The same holds true for PHEAA's board, so this factor would "also weigh[] heavily" in favor of PHEAA's sovereign immunity. Finally, in concluding that a judgment against PRPA could have "effects on the state treasury," the D.C. Circuit refused to consider only whether Puerto Rico would "be responsible to pay a judgment *in the particular case at issue*"; furthermore, it rejected the notion that this factor weighed against arm-of-state status because PRPA was independently funded by user fees and its own debt, its debts were not the obligation of Puerto Rico, and Puerto Rico law gave the entity "complete control and supervision of any undertaking." *Id.* at 878-79. Yet these are precisely the reasons the Fourth Circuit gave in rejecting PHEAA's arm-of-the-state status in *Oberg* (and, thus, here). *See Oberg*, 804 F.3d at 667 & n.15.

The conflicts between the decision below and other circuits' decisions are not simply the product of applying multifactor tests to different circumstances. Rather, they result from the fact that different circuits employ substantially different tests, with substantially different approaches to the sovereign's treatment of the entity under state law. While all courts recognize that the arm-of-the-state question is ultimately one of federal law, some circuits, such as the First and Eleventh Circuits, accord near-dispositive weight to a state's characterization of an

entity, presumptively conferring arm-of-the-state status under federal law to an entity that would share the state's sovereign immunity under state law. The First Circuit, for example, applies a two-factor test that asks first "whether the state has indicated an intention—either explicitly by statute or implicitly through the structure of the entity—that the entity share the state's sovereign immunity." *Irizarry-Mora v. Univ. of P.R.*, 647 F.3d 9, 12 (1st Cir. 2011). Only if the results of this first stage are inconclusive does the court "proceed to the second stage and consider whether the state's treasury would be at risk in the event of an adverse judgment." *Id.* The Eleventh Circuit's emphasis on the state courts' treatment of an entity for state-law purposes is well-illustrated by *Versiglio v. Board of Dental Examiners of Alabama*, 686 F.3d 1290 (11th Cir. 2012). There, after initially concluding that the Board of Dental Examiners of Alabama was not an arm of the State, relying in part on lower state-court cases, the Eleventh Circuit granted rehearing and changed its holding in light of an Alabama Supreme Court decision holding that the Board was, in fact, an arm of Alabama. *Id.* at 1292-93.

Other circuits, by contrast, consider state-law treatment of the entity to be one factor among several, entitled to no particular emphasis. The decisions in this case and *Oberg* exemplify this approach. The State's treatment of the entity for state-law purposes is the fourth of four factors in the Fourth Circuit's balancing test and, judging from the decisions below, the least important. Although the Fourth Circuit pointed to extraneous considerations, such as that "governors *ask* PHEAA to return appropriated funds

when times are tight but *direct* other agencies to do so," App.59,[4] it nonetheless concluded that PHEAA is an arm of the State for state-law purposes and so the fourth factor supported immunity. Even so, the Fourth Circuit still concluded that the other factors outweighed this and supported treating PHEAA differently for federal-law purposes. The Fourth Circuit is not alone is considering state-law treatment to be only one factor among many. For example, in the Third Circuit, state treatment is just one of three factors, *see Haybarger*, 551 F.3d at 198, and in the Fifth Circuit, it is one of six, *see Richardson*, 118 F.3d at 452.[5] Quite remarkably, in the Eighth, Ninth, and Tenth Circuits, the State's own treatment of an entity as an arm of the State does not even make the list.

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[4] This statement also betrays a fundamental misunderstanding of Pennsylvania law. Pennsylvania defines "Commonwealth agency" to mean "[a]ny executive agency or independent agency." 41 P.S. §102. The former is directly under the Governor's jurisdiction, and thus the Governor can direct it to undertake certain actions (like returning appropriated funds). The latter is not directly under the Governor's jurisdiction but is governed by a board comprised of other state officials——like the majority-legislator board of PHEAA, an independent agency, *see* 71 P.S. §732-102—and thus the Governor cannot directly order it to take certain actions. Both entities, however, are indisputably "Commonwealth agencies" under Pennsylvania law.

[5] Applying the Third Circuit's three-factor test, a district court found PHEAA to be an arm of Pennsylvania and granted PHEAA's motion to dismiss on Eleventh Amendment immunity grounds. The Third Circuit remanded for further development of the record, *see Lang v. PHEAA*, 610 F. App'x 158 (3d Cir. 2015), and PHEAA recently moved for summary judgment on Eleventh Amendment immunity grounds. *See* Mot. for Sum. J., *Lang v. PHEAA*, No. 12-1247 (M.D. Pa. Feb. 13, 2016) (Dkt. 133); n.3, *supra*.

Finally, it bears emphasizing that while courts of appeals have, on occasion, held that a statewide entity—rather than a local or multistate entity—is not an arm of the state, *see, e.g.*, *Mancuso*, 86 F.3d at 296, we are aware of no case where a court of appeals has done so by disregarding an out-of-circuit sovereign's own view of that entity. That conflict—between state officials in Harrisburg and federal judges in Richmond—is unprecedentedly stark.

B. The Circuit Conflict Results From this Court's Lack of Guidance Regarding Treatment of Statewide Entities That the State Itself Considers to Be an Arm of the State.

As described at length in the *Oberg* petition, *see* Pet. 22-28, the disarray in the circuits is the direct product of a lack of clear guidance from this Court on this important question. The Court has addressed arm-of-the-state status only in peripheral cases involving either local bodies or multistate entities created by interstate compacts. The Court's first case addressing immunity of an "arm of the state," *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), involved a local school board. *See also Moor v. Alameda County*, 411 U.S. 693, 717-20 (1973) (holding that California county was not arm of California and was therefore California citizen for purposes of federal diversity statute). Its second case, *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), involved a bistate entity jointly created by two states and approved by Congress pursuant to the Compact Clause, U.S. Const. art. I, §10, cl.3. 440 U.S. at 394-

95. Its third and most recent case addressing whether an entity is an arm of the state, *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30 (1994), also involved a bistate entity created pursuant to the Compact Clause.[6]

Thus, the Court has never actually addressed the arm-of-the-state status of a statewide entity, much less a statewide entity that state law emphatically treats as a core agency of the state. Instead, its arm-of-the-state cases have involved a local school board and two multistate entities. The former context is uniquely ill-suited for deference to state-law judgments because of the federal-law need to distinguish between States and local governments. But there is no comparable need for federal law to second-guess a State's determination of which state-level government entities share the State's immunity. And the latter context demands consideration of multiple subtle factors because of the distinct concerns inherent in multistate entities. For example, two States may be addressing shared local concerns in border communities. Likewise, there is a distinct concern with a bistate entity that neither State will view a judgment against the entity as a claim on its treasury. None of those considerations arises in the

[6] A case decided not long after *Hess*, *Regents of the University of California v. Doe*, 519 U.S. 425 (1997), did not involve whether an entity was, in fact, an arm of the state. The case came to the Court on the premise that petitioner was an arm of California, and the issue was whether an indemnification agreement shielding an arm of the state from the costs of adverse judgments divested it of Eleventh Amendment immunity. *Id.* at 431-32.

context of a statewide entity discharging statewide functions from the state capital.

Because the circuits have been left to formulate all-purpose multifactor tests from precedents that did not purport to set them out and that emphasize factors useful for dealing with multistate entities and school boards—but far less helpful in dealing with more common statewide agencies—massive confusion has followed each of the Court's decisions. That was the case after *Mt. Healthy*. *See, e.g.*, *Mackey v. Stanton*, 586 F.2d 1126, 1130 (7th Cir. 1978) (noting that "the Court did not express its reasons for reaching th[e] result" in *Mt. Healthy*). That was the case after *Lake Country Estates*. *See Hess*, 513 U.S. at 59 (O'Connor, J., dissenting) (observing that after *Lake Country Estates*, "the Courts of Appeals have struggled" with the arm-of-the-state analysis, "variously adding factors, distilling factors, and deeming certain factors dispositive" (citations omitted)). And that is plainly still the case after *Hess*. *See, e.g.*, *Duke v. Grady Mun. Sch.*, 127 F.3d 972, 974 n.4 (10th Cir. 1997) (noting "the difficulties and uncertainties in trying to apply the Eleventh Amendment analysis, particularly after *Hess*"); *Gray v. Laws*, 51 F.3d 426, 431 (4th Cir. 1995) (describing *Hess* as "an opinion that is certain to generate confusion"). Indeed, before *Hess*, a commentator could observe that, "in the guise of conducting a single inquiry" into arm-of-state status, courts of appeals had "craft[ed] disparate tests and rel[ied] upon vague factors, thereby generating conflicting results." Alex E. Rogers, Note, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 Colum. L. Rev. 1243, 1269

(1992). As the circuits' post-*Hess* tests demonstrate, things are no different today.[7]

In addition, the distinctions between States and multistate entities have become even more relevant given this Court's recent recognition that, notwithstanding *Hess*'s belief that "the vulnerability of the State's purse [is] the most salient factor in Eleventh Amendment determinations," 513 U.S. at 48, the "'primary function of sovereign immunity'" is "'not to protect state treasuries, but to afford the States the dignity and respect due sovereign entities,'" *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 266-67 (2011) (quoting *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 769 (2002)); *see also id.* (observing that the "'preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities'" (quoting *Fed. Mar. Comm'n*, 535 U.S. at 760)); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997) (noting that sovereign immunity is "designed to protect" "the dignity and respect afforded a State").

While multistate entities have treasuries, they do not possess the dignity interests of States. Multistate

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[7] Moreover, while *Regents* did not address an entity's arm-of-the-state status, that case only compounded the doctrinal confusion. In those circuits factoring a state's liability for judgment into arm-of-the-state status, some believe that *Regents* refers to "legal liability," *see Holz v. Nenana City Pub. Sch. Dist.*, 347 F.3d 1176, 1182 (9th Cir. 2003); *Duke*, 127 F.3d at 981, while others believe it refers merely to a "practical effect" on the state treasury, *see McGinty v. New York*, 251 F.3d 84, 99 (2d Cir. 2001); *Manders v. Lee*, 338 F.3d 1304, 1327-28 (11th Cir. 2003) (en banc).

entities have only the powers conferred by the States and no inherent residual sovereignty. Indeed, *Hess* emphasized that multistate entities "occupy a significantly different position in our federal system than do the States themselves." 513 U.S. at 40. The "political accountability" of such entities is "diffuse," for they "lack the tight tie to the people of one State that an instrument of a single State has." *Id.* at 42. Thus, it is not "disrespectful to one State to call upon [a multistate] entity to answer complaints in federal court." *Id.* at 47.

As a result, cases involving multistate entities are unhelpful if not irrelevant when determining arm-of-the-state status of components of a single State's government. In cases like this one and *Oberg*, a proper respect for the State's dignity interests demands deference to the State's determination that a component of state government shares the State's immunity. As this case and *Oberg* amply demonstrate, circuit courts applying multifactor tests based on considerations that were relevant in the unique contexts of *Doyle*, *Lake Country Estates*, and *Hess* can produce absurd results in what should be straightforward cases.

II. The Decision Below Is Incorrect.

Under any coherent approach to determining arm-of-the-state status, neither this nor *Oberg* is a difficult case. As explained at length in the *Oberg* petition, *see* Pet. 28-31, PHEAA is a "government instrumentality" of Pennsylvania, based in the state capital, executing the "essential governmental function" of providing higher education financial aid for Pennsylvanians across the state. 24 P.S. §§5101,

5102, 5105.6. Its very existence depended on an amendment to the Pennsylvania Constitution by the citizens of Pennsylvania. In the last five years alone, it has disbursed more than $1.5 billion appropriated by the legislature to hundreds of thousands of Pennsylvanians, supplementing that grant money with hundreds of millions of dollars generated by its other statutorily authorized activities.

Most important, as the undisputed facts in this case and *Oberg* demonstrate, *see* pp. 6-9, *supra*, Pennsylvania law indisputably treats PHEAA as a state agency and deems it an arm of the state. An unbroken line of Pennsylvania precedent holds that PHEAA "is undeniably an agency of the Commonwealth" for state-law purposes. *Barksdale*, 449 A.2d at 689; *see also Xed*, 456 A.2d at 726; *Richmond*, 297 A.2d at 546-47. As an "agency of the Commonwealth," PHEAA is entitled to sovereign immunity in Pennsylvania courts. *See Snead v. Soc'y for Prevention of Cruelty to Animals of Pa.*, 985 A.2d 909, 913 (Pa. 2009); 42 P.S. §102; 71 P.S. §732-102; *see also Marshall v. Port Auth. of Allegheny Cty.*, 568 A.2d 931, 933-34 (Pa. 1990) (holding that an "agency of the Commonwealth" is "plainly … entitled to immunity"). The Pennsylvania Attorney General has asserted PHEAA's sovereign immunity. *See* Answer 13, *Chambers v. PHEAA*, No. 15-73 (M.D. Pa. May 8, 2015). She also reviews PHEAA's contracts to ensure PHEAA has not waived sovereign immunity. PHEAA provides interpretations of Pennsylvania statutes, which receive significant deference in Pennsylvania courts.

Pennsylvania—by its statutes, judicial decisions, and practice—thus *overwhelmingly* and *unequivocally* considers PHEAA a state agency and an arm of the state, and has structured it to be one. It certainly does not consider it to be a "political subdivision," as the Fourth Circuit deemed PHEAA; under Pennsylvania law, "political subdivision" means a "county, city, borough, incorporated town, township, school district, vocational school district [or] county institution district," 1 P.S. §1991, none of which remotely describes PHEAA. And if there were any remaining doubt, one need look no further than Pennsylvania's swift response to the Fourth Circuit's decision reiterating its view that PHEAA is an arm of the state. *See* p. 12, *supra*.

For reasons set forth in the *Oberg* petition, the Fourth Circuit's holding in *Oberg*—and, relying on *Oberg*, in this case—that PHEAA is *not* an arm of Pennsylvania is a classic exercise in losing the forest for the trees and a case study for why this Court's guidance regarding the arm-of-the-state doctrine is desperately needed. *See* Pet. 31-35. The *Oberg* decision is poorly reasoned and manifestly wrong, but also emblematic of the current state of the doctrine, which permits courts assessing arm-of-the-state status to run roughshod over state dignity interests in the course of applying the subprongs of multifactor tests. More fundamentally, the Fourth Circuit's decision fails to give proper deference to a State's own treatment of its statewide entities. This Court's review is urgently needed to replace a surfeit of balancing tests with an approach to statewide entities that is focused on the State's own treatment of the agency. *Cf.*, *e.g.*, *Irizarry-Mora*, 647 F.3d at 12.

III. This Question Is Exceptionally Important And Merits Plenary Review In This Case or in *Oberg*.

Whether a statewide entity deemed an arm of the state by a sovereign is in fact an arm of that sovereign for federal-law purposes—the question presented in both *Oberg* and in this case—is a question of fundamental importance to our constitutional union. Sovereign States need clear guidance to be able to know whether entities they consider to be state agencies can nonetheless be haled into federal court, thereby subjecting the sovereign to the indignity of suits prohibited in state court and the risk of diminishment of the state fisc. At the very least, if States' sovereign immunity is going to be determined by multifactor balancing tests, States must be able to ensure some predictability by knowing that their own characterization of a statewide agency will be the focal point of the inquiry, as opposed to one factor among many that can be balanced away by a foreign Circuit's conception of the degree of state control or some other equally amorphous factor.

Subjecting an unconsenting State to federal-court suit runs directly counter to the Eleventh Amendment, the "'preeminent purpose'" of which is "'to accord States the dignity that is consistent with their status as sovereign entities.'" *Va. Office for Prot. & Advocacy*, 563 U.S. at 266-67 (quoting *Fed. Mar. Comm'n*, 535 U.S. at 760); *see also id.* at 267 (noting that the "'primary function of sovereign immunity'" is "to afford the States the dignity and respect due sovereign entities'" (quoting *Fed. Mar. Comm'n*, 535 U.S. at 769)); *Sossamon v. Texas*, 563 U.S. 277, 283

(2011) ("Immunity from private suits has long been considered central to sovereign dignity." (quotation marks omitted)); *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 268 (noting that sovereign immunity is "designed to protect" "the dignity and respect afforded a State"). Without this immunity, states would be subjected to "the indignity of … the coercive process of judicial tribunals at the instance of private parties." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996) (quotation marks omitted). Sovereign immunity also "serves the important function of shielding state treasuries." *Fed. Mar. Comm'n*, 535 U.S. at 765.

The decisions in *Oberg* and here implicate all these concerns by exposing Pennsylvania, which unambiguously considers PHEAA an arm of the state, to the "insult … of being haled into court without its consent." *Va. Office for Prot. & Advocacy*, 563 U.S. at 258. And it poses a massive threat to Pennsylvania's treasury and to Pennsylvania students: In *Oberg*, this case, and every other case going forward, every dollar paid to satisfy a judgment, as well as every dollar spent defending against litigation, is a dollar not spent on higher education for Pennsylvanians. It is no exaggeration to say that exposing PHEAA to damages in federal court will mean that fewer Pennsylvanians will be able to afford and obtain a higher education. Accordingly, the decision in *Oberg*, the decision below, and other decisions disregarding a state's conception of its own sovereign entities impose "substantial costs" on "the autonomy, the decisionmaking ability, and the sovereign capacity" of the state when it comes to activities the state has deemed essential government functions. *Alden v. Maine*, 527 U.S. 706, 750 (1999).

And they interfere with the sovereign's authority "to govern in accordance with the will of [its] citizens" with regard to how public resources will be expended. *Id.* at 750-51.

Perhaps most perniciously of all, the Fourth Circuit's decisions in *Oberg* and this case, as well as current arm-of-the-state law prevailing in many of the circuits, leave Pennsylvania with no realistic options for protecting its sovereignty. Indeed, these cases are exemplary of the serious bind in which States can find themselves if they earnestly believe that a particular entity is a sovereign arm of the state—and treat it as such through law and practice—but a federal court disagrees. Shortly after the Fourth Circuit's decisions in *Oberg* and this case, the Pennsylvania legislature passed, and the Governor signed, a law unambiguously declaring that PHEAA "is an integral part and arm of the Commonwealth," is "directly controlled by the Commonwealth," and performs the "essential state governmental function of providing Commonwealth students with access to higher education opportunities and providing essential higher educational programs for the benefit of Commonwealth students." H.B. 1460, §107.

This legislation highlights the unmistakable conflict between state officials in Harrisburg and federal judges in Richmond. But that dramatic reaffirmation of PHEAA's status would carry almost no weight in Richmond. The Fourth Circuit already acknowledged that PHEAA is "treated as a state agency under state law"; that fact, however, was overwhelmed by the other prongs of the Fourth Circuit's balancing test. *Oberg*, 804 F.3d at 676. But

there is little else that Pennsylvania could do to respond to the affront to its dignity inherent in the Fourth Circuit's decisions. Attempting to restructure PHEAA to satisfy the various prongs of the Fourth Circuit's test would do PHEAA little good in other circuits that apply different factors and weigh those factors differently. In short, the state of the law across the circuits is so confused that it is very difficult for a State to ensure that its decision to treat a statewide agency as an arm of the State for state-law purposes will be respected in federal court for federal-law purposes.

More fundamentally, the Fourth Circuit's disregard of Pennsylvania's own views—leaving Pennsylvania no option but to restructure PHEAA in the hope of satisfying a federal court of appeals—sanctions an unconscionable intrusion into the Commonwealth's sovereign affairs, and works a grievous injury to "Our Federalism." A key feature of the federalist design is that each state, as a separate sovereign, is free to "try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Part and parcel of this sovereignty is the power to structure its government and decide "[h]ow power shall be distributed … among its governmental organs." *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937); *see also Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.").

PHEAA, including its structural design, is an exemplary federalist experiment. It has ably distributed billions of dollars of grants to Pennsylvania students, while also generating further revenue to both cover its expenses and provide hundreds of millions of dollars in additional financial aid for Pennsylvanians. But the Fourth Circuit's blinkered application of a multifactor arm-of-the-state test, to the exclusion of the deference owed a sovereign State's determination of its own affairs, wholly disrupts this experiment. It perversely turns PHEAA's success against it, holding that the wherewithal achieved through the efficient execution of its governmental mandate sets it apart from the government. And it denies to Pennsylvanians the sovereign authority to structure their government so as to include this successful experiment by withholding from it one of the key protections afforded to governments—immunity from unconsented suit. The power of a state to order its sovereign affairs and structure its government as it sees fit is illusory if the exercise of such power risks relinquishing the very protections of sovereignty.

Pennsylvania insists that PHEAA is an arm of the state. The Fourth Circuit says it is not. Whoever is right, the federalism question implicated by this untenable conflict is too fundamental to our constitutional republic to leave unreviewed. The Court's intervention is urgently needed.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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February 16, 2016

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-2202

LEE PELE,

Plaintiff-Appellant,

v.

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY, d/b/a American Education Services,

Defendant-Appellee,

JON H. OBERG,

Amicus Supporting Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
James C. Cacheris, Senior District Judge.
No. 1:13-cv-01531-JCC-TRJ

Argued: May 12, 2015
Decided: October 21, 2015

Before TRAXLER, Chief Judge,
and GREGORY and KEENAN, Circuit Judges.

Vacated and remanded by unpublished per curiam opinion.

OPINION

PER CURIAM:

Plaintiff Lee Pele filed suit against the Pennsylvania Higher Education Assistance Agency ("PHEAA") under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* Concluding that PHEAA was an arm of the Commonwealth of Pennsylvania entitled to share in the Commonwealth's Eleventh-Amendment immunity from suit, the district court granted PHEAA's motion for summary judgment and dismissed the action. We vacate the district court's judgment and remand.

I.

Absent consent by the state or valid Congressional abrogation, the Eleventh Amendment bars an action in federal court seeking money damages against a state. *See, e.g., Bland v. Roberts*, 730 F.3d 368, 389-90 (4th Cir. 2013); *Lee-Thomas v. Prince George's Cty. Pub. Sch.*, 666 F.3d 244, 248 (4th Cir. 2012). "This immunity also protects state agents and state instrumentalities, meaning that it protects arms of the State and State officials." *Bland*, 730 F.3d at 389-90 (citations and internal quotation marks omitted)).

PHEAA was created by the Commonwealth in 1963 as a "body corporate and politic constituting a public corporation and government instrumentality," 24 Pa. Stat. § 5101, for the purpose of "improv[ing] access to higher education by originating, financing, and guaranteeing student loans," *United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency* ("*Oberg II*"), 745 F.3d 131, 135 (4th Cir. 2014). After discovery focusing on the nature of PHEAA's relationship to the

Commonwealth, PHEAA moved for summary judgment, arguing that it is an "arm" of the Commonwealth and therefore protected from Pele's lawsuit by the Eleventh Amendment.

Considering the evidence developed through discovery in light of the factors this court has identified as relevant to the arm-of-state question, *see, e.g.*, *Md. Stadium Auth. v. Ellerbe Becket Inc.*, 407 F.3d 255, 261 (4th Cir. 2005), the district court concluded that PHEAA had carried its burden of proving that it is an arm of the Commonwealth, *see Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 543 (4th Cir. 2014) (holding that in the Eleventh-Amendment context, whether a state-created entity is an arm of its creating state is an affirmative defense that must be proven by the entity asserting immunity).

Pele appeals. Pele argues that the evidence and relevant state statutes do not support the district court's conclusion but instead establish that PHEAA is not an arm of the Commonwealth.

II.

Whether a state-created entity is an arm of its creating state and therefore entitled to assert the state's sovereign immunity is a question of law reviewed *de novo*. *Hutto*, 773 F.3d at 542.

In an opinion also filed today, we addressed PHEAA's status as an arm of the Commonwealth in connection with claims asserted against PHEAA under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-33. *See United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency* ("*Oberg III*"), No. 15-1093 (4th Cir. filed Oct. 21, 2015). In *Oberg III*, we concluded that PHEAA is *not* an arm of the

Commonwealth because: PHEAA is financially independent from the Commonwealth and supports itself with revenues generated through PHEAA's commercial financial-services activities; PHEAA is statutorily vested with and in fact exercises control over its commercially generated revenues, notwithstanding the deposit of these revenues in the Pennsylvania Treasury; and PHEAA, through its board of directors, sets policy and makes the substantive fiscal and operational decisions for the corporation.

Although there are some procedural differences between this case and *Oberg*, the arm-of-state question in Oberg was governed by the same factors applicable here and was otherwise materially identical to the arm-of-state question presented in this case.[*] Because the district court's analysis is inconsistent with our decision in *Oberg III*, we hereby vacate the district court's order and remand for further proceedings on the merits of Pele's claims against PHEAA.

VACATED AND REMANDED

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[*] The FCA imposes civil liability on "any person" who makes or presents a false claim for payment to the federal government, 31 U.S.C. § 3729(a)(1), a term that does not include states or state agencies, *see Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787-88 (2000). In *Oberg II*, we held that because "personhood" is an element of an FCA plaintiff's case, the FCA plaintiff bears the burden of proving that a state-created entity is not an arm of the state. *See Oberg II*, 745 F.3d at 136.

Appendix B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

No. 1:13cv1531 (JCC/TRJ)

LEE PELE,

Plaintiff,

v.

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY, d/b/a American Education Services,

Defendant.

Filed: October 7, 2014

MEMORANDUM OPINION

The Court must decide whether the Pennsylvania Higher Education Assistance Agency ("Defendant" or "PHEAA") is an "arm of the state" of Pennsylvania, such that it would enjoy immunity from suit under the Eleventh Amendment to the Constitution. Now before the Court is PHEAA's Motion for Summary Judgment on that affirmative defense of immunity, [Dkt. 57], and Plaintiff Lee Pele's ("Plaintiff" or "Pele") cross-motion for Partial Summary Judgment, [Dkt. 68]. For the following reasons, the Court holds that PHEAA is an arm of the state of Pennsylvania and entitled to immunity under the Eleventh Amendment. Therefore, the Court will grant PHEAA's Motion for Summary Judgment.

I. Background

A. Factual Background

This case arises out of alleged violations of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq*. Pele, a resident and citizen of Virginia, alleges that he received federal student loans that were serviced by PHEAA, a company that furnishes information to consumer reporting agencies as contemplated by FCRA. (Am. Compl. [Dkt. 8] ¶¶ 1-3.) Pele claims that PHEAA listed defaulted student loans on his credit file that "he never authorized, initiated, received the proceeds [from] or guaranteed." (*Id.* ¶¶ 5, 6.) Consequently, Pele received phone calls from debt collector Windham Professionals ("Windham") seeking over $137,000 in defaulted student loans. (*Id.* ¶ 7.) Pele maintained that he "did not initiate, guaranty, or receive any benefit" from these loans. (*Id.*) Pele sent credit dispute letters to credit reporting agencies TransUnion, Equifax, and Experian. (*Id.* ¶ 14.) In response, the credit reporting agencies sent four Automated Credit Dispute Verifications ("ACDV") to PHEAA. (*Id.* ¶¶ 21-23.) PHEAA responded to all four ACDVs "by modifying, but not deleting, the information from Mr. Pele's credit file." (*Id.* ¶ 24.) Pele alleges that as a result, "PHEAA continued to attribute debts to Mr. Pele to the credit reporting agencies." (*Id.*)

B. Procedural Background

Pele filed the original complaint in this matter on December 13, 2013, [Dkt. 1], and filed an amended complaint as a matter of right under the federal rules on February 3, 2014 [Dkt. 8]. PHEAA moved to dismiss the amended complaint, arguing that PHEAA

is an arm of the Commonwealth of Pennsylvania ("Commonwealth" or "State") and entitled to immunity under the Eleventh Amendment. [Dkt. 12] The Court addressed this question by applying the Fourth Circuit's nonexclusive four-factor test. (Mem. Op. [Dkt. 18] at 8-21 (citing *Md. Stadium Auth. v. Ellerbe Becket Inc.*, 407 F.3d 255 (4th Cir. 2005)); *see also U.S. ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 745 F.3d 131 (4th Cir. 2014) ("*Oberg II*").) This Court concluded that PHEAA did not meet its burden of showing an entitlement to Eleventh Amendment immunity "at this stage," (Mem. Op. at 21.), and denied the motion to dismiss, (Order Denying Mot. to Dismiss [Dkt. 19]).

On August 21, 2014, PHEAA filed its Motion for Summary Judgment [Dkt. 57] and accompanying brief in support [Dkt. 58]. Before filing an opposition brief, Pele filed his own cross-motion for Partial Summary Judgment [Dkt. 68] on PHEAA's sovereign immunity affirmative defense, and on five other affirmative defenses asserted by PHEAA, with an accompanying brief in support [Dkt. 69] on September 4, 2014. Both parties timely filed opposition [Dkts. 77, 86] and reply briefs [Dkt. 84, 89]. The Court entertained oral argument on September 25, 2014. Having been fully briefed and argued, the motions are now before the Court.

II. Standard of Review

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

247-48 (1986); *Evans v. Techs. Applications & Serv., Co.*, 80 F.3d 954, 958-59 (4th Cir. 1996) (citations omitted). When moving for summary judgment on an affirmative defense, such as sovereign immunity under the Eleventh Amendment, the defendant "must conclusively establish all essential elements of that defense." *Ray Commc'ns, Inc. v. Clear Channel Commc'ns, Inc.*, 673 F.3d 294, 299 (4th Cir. 2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986)). If the affirmative defense is supported by sufficient evidence, the burden then shifts to the plaintiff, who must "come forward with specific facts showing that there is a genuine issue for trial." *Ray Commc'ns, Inc.*, 673 F.3d at 299 (citations and quotation marks omitted).

The absence or presence of a genuine dispute as to any material fact must be supported either by "citing to particular parts of materials in the record . . . or showing that the materials cited do not establish the absence or presence of a genuine dispute." Fed. R. Civ. P. 56(c)(1)(A)-(B). While the Court "must draw any inferences in the light most favorable to the non-movant," *Brock v. Entre Computer Ctrs.*, 933 F.2d 1253, 1259 (4th Cir. 1991) (citations omitted), the non-movant "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985); *see also Anderson*, 477 U.S. at 248-52 (finding the very existence of a scintilla of evidence or of unsubstantiated conclusory allegations insufficient to avoid summary judgment). Rather, a genuine issue exists when there is sufficient evidence on which a

reasonable jury could return a verdict in favor of the non-moving party. *Id.*

Specifically in this Court, on summary judgment, the parties are required to list the undisputed material facts. E.D. Va. Local Civil Rule 56(B). "In determining a motion for summary judgment, the Court may assume that facts identified by the moving party in its listing of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion." *Id.* Similarly, "[i]f a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may consider the fact undisputed for purposes of the motion." Fed. R. Civ. P. 56(e)(2). Where there is conflicting evidence, the court must credit the evidence of both sides and acknowledge that there is a genuine issue of material fact that cannot be resolved by summary judgment. *See Tolan v. Cotton*, 134 S. Ct. 1861, 1868-69 (2014) ("By weighing the evidence and reaching factual inferences contrary to [the non-movant's] competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.")

III. Analysis

PHEAA argues that it is entitled to judgment as a matter of law because Pele's claims are barred by Eleventh Amendment immunity. The analysis begins just as it did for PHEAA's motion to dismiss. The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the

United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Accordingly, a state is only subject to suit in federal court if (1) the state unambiguously consents to that suit or (2) Congress, acting under powers granted to it in section five of the Fourteenth Amendment, has clearly abrogated the state's immunity. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54-55 (1996). Relevant to this matter, "it is well settled that this protection extends also to 'state agents and state instrumentalities' . . . or stated otherwise to 'arm[s] of the State.'" *Cash v. Granville Cnty. Bd. of Educ.*, 242 F.3d 219, 222 (4th Cir. 2001) (citations omitted).

It is undisputed that PHEAA has not waived sovereign immunity and that Congress has not abrogated the state's immunity. Rather, PHEAA contends that after discovery, the evidence shows that there is no genuine issue as to any material fact, and that PHEAA is entitled to judgment as a matter of law because it is an arm of the state of Pennsylvania and entitled to Eleventh Amendment immunity. In his opposition, Pele relies heavily on this Court's Memorandum Opinion regarding the motion to dismiss and the Fourth Circuit's opinion in *Oberg II*. However, both opinions addressed motions to dismiss. And in *Oberg II*, the Fourth Circuit remanded the case to this Court for limited discovery on the precise issue now before the Court: whether PHEAA is "truly subject to sufficient state control to render [it] a part of the state." 735 F.3d at 141.

Now that discovery has closed in this matter, with a more complete record, the Court again turns to the nonexclusive four-factor test used by the Fourth Circuit to determine whether PHEAA, a governmental entity, is an "arm of the state" under the Eleventh Amendment and entitled to immunity. *Md. Stadium Auth. v. Ellerbe Becket Inc.*, 407 F.3d 255, 261 (4th Cir. 2005) (citing *Ram Ditta v. Md. Nat'l Capital Park & Planning Comm'n*, 822 F.2d 456 (4th Cir. 1987)).

A. State Treasury

When the entity is a defendant, like PHEAA is here, the first arm-of-the-state factor is "whether any judgment against the entity as defendant will be paid by the State." *Oberg II*, 745 F.3d at 136-37 (citations omitted). This includes functional liability, "even if the state is not legally liable." *Id.* at 137 (quoting *Stoner v. Santa Clara Cnty. Office of Educ.*, 502 F.3d 1116, 1122 (9th Cir. 2007); *see also Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 50 (1994) ("Where an agency is so structured that, as a practical matter, if the agency is to survive, a judgment must expend itself against state treasuries, common sense and the rationale of the eleventh amendment require that sovereign immunity attach to the agency.")). While the state treasury factor no longer deserves "dispositive preeminence . . . [it still] remains of considerable importance." *Oberg II*, 745 F.3d at 137 n.4 (citations and quotation marks omitted).

In *Oberg II*, the Fourth Circuit held that "because state law instructs that PHEAA would pay any judgment in this case with its own moneys from its segregated fund . . . the first factor weighs heavily against holding that PHEAA is an arm of the state."

745 F.3d at 139 (citing 24 Pa. Stat. § 5104(3)). The Fourth Circuit primarily relied on the statutory directives of 24 Pa. Stat. § 5104(3) ("[N]o obligation of the agency shall be a debt of the State . . . ."), and 24 Pa. Stat. § 5105.10 (establishing the Educational Loan Assistance Fund ("ELAF")), to conclude that the first factor weighs heavily against sovereign immunity.

In reviewing *de novo* the district court's dismissal under Rule 12(b)(6), however, the record before the court was not fully developed, as it is now.

Therefore, even in light of the statutory directive that "no obligation of the agency shall be a debt of the State," the Court finds with the benefit of discovery, that Pennsylvania would be functionally liable for a judgment against PHEAA. *See Oberg II*, 745 F.3d at 137 (citing *Hess*, 513 U.S. at 50). Accordingly, the first factor weighs in favor of holding that PHEAA is an arm of the state.

In the record now before the Court, it is undisputed that a judgment against PHEAA would be paid with the Commonwealth's money from the Pennsylvania Treasury Department ("State Treasury"). (Def.'s Br. in Supp. of Mot. for Summ. J. ("Def.'s Br."), Ex. 1 [Dkt. 58-2] ("Adolph Decl.") ¶ 11 ("A monetary judgment against PHEAA would be paid with the Commonwealth's money."); Pl.'s Mem. in Opp'n to Def.'s Mot. for Summ. J. ("Pl.'s Opp'n"), Ex. A [Dkt. 77-1] ("Guenther Depo.") at 70-72 (answering in the affirmative that the judgment in this case will be paid by the State Treasurer out of the PHEAA Discretionary Fund, which is the money that PHEAA initially put into that account).) Pele argued in his opposition to the motion to dismiss that PHEAA would

pay a judgment in this case out of a separate operating account and not the State Treasury, (Mem. Op. at 11.), and he persists in this argument in opposition to summary judgment, but without the requisite factual support in the record. (*See* Pl.'s Opp'n at 15-19.) The undisputed facts in the record, mainly supported by the deposition and declaration of Mr. Timothy Guenther, PHEAA's Chief Financial Officer, establish that any judgment against PHEAA would be paid with state funds from the State Treasury.

First, all of PHEAA's revenues or earnings are deposited into the State Treasury. (Def.'s Br. at 24, Statement of Fact ("Stmt. Fact") ¶ 22 (citing 24 Pa. Stat. § 5104(3); Guenther Dep. at 71).) Pele unsuccessfully attempts to dispute this fact by stating it is "not supported by the record," and by arguing that PHEAA's funds are separately stored in banks and not comingled with tax revenues. (Pl.'s Opp'n at 6 (citing to various portions of Mr. Guenther's deposition).) However, Mr. Guenther's testimony regarding PHEAA's funds and the State Treasury can be summarized as follows: PHEAA maintains seven separate bank accounts, six with M&T Bank and one with Metro Bank.[1] (Guenther Dep. at 41.) The M&T accounts generally assist the State Treasury in "handling items,"[2] while the Metro Bank account

[1] In addition to the operations account, PHEAA maintains an advance account, a "COMPASS" account, a reimbursement account, a loan origination account, and a dormant account, all with specific purposes. (*Id.* at 43-45.)

[2] PHEAA uses the bank accounts to route payments into and out of the State Treasury. For instance, any money that gets deposited into the M&T accounts, like a client paying servicing fees, once cleared, "goes to the State Treasury." (*Id.* at 42, 43, 45.)

contains separate federal funds. (*Id.*) PHEAA's revenues are eventually routed through the bank accounts to the State Treasury, which then invests the money in various funds, including PHEAA's Discretionary Fund, from which any settlements or judgments would be paid. (*Id.* at 51-55.)

In fact, Pele admits that all revenues into, or payments out of, PHEAA's separate bank accounts are eventually accounted for by the State Treasury. (Pl.'s Opp'n at 6-7 (admitting Stmt. Fact ¶ 25 while contesting PHEAA's annual financial reports); *but see* Def.'s Reply at 13 (breaking down annual financial report).) It is undisputed that

> [t]he money that PHEAA receives from borrowers for the loans it services does not go immediately into the Treasury. Instead, the borrowers pay PHEAA, which deposits the funds into bank accounts from which it makes payments to actual lenders. PHEAA then deposits its servicing fees into the Treasury. [And pursuant to federal regulation,] PHEAA manages a reserve fund that belongs to the Federal Government for the defaulted loans that are guaranteed by the Federal Government, but which PHEAA collects. The Government pays PHEAA a fee for its service,

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Conversely, any money PHEAA needs to pay out, like a vendor's bill, will be paid out through one of the M&T accounts, with the State Treasury later transferring the requisite funds into the account. (*Id.* at 42 (discussing "backfunding").) Use of M&T accounts are "[p]urely a convenience to the State Treasurer," to facilitate operational transactions. (*Id.*)

> and PHEAA deposits the fees into the Commonwealth Treasury.

(Def.'s Br. at 15, Stmt. Fact ¶ 25 (citing Ex. 3 [Dkt. 58-4, corrected at Dkt. 78] ("Guenther Decl.") ¶¶ 28-29; Guenther Dep. at 41-45).)[3] In sum, the undisputed evidence in the record shows that PHEAA utilizes separate bank accounts, just like other State agencies, to facilitate day-to-day operations, but ultimately, the funds are routed into and out of the State Treasury. By failing to cite evidence other than Mr. Guenther's deposition, Pele fails to raise a genuine issue as to this material fact, and therefore it is undisputed. Fed. R. Civ. P. 56(e)(2).

Second, even though a portion of PHEAA funds are earmarked for the ELAF, PHEAA's revenues are comingled within the State Treasury's general fund and the State Treasurer invests this money as part of the State's funds. (Def.'s Br. at 14, Stmt. Fact ¶ 22 (citing Ex. 4 [Dkt. 58-5] ("Craig Decl.") ¶ 5; Guenther Decl. ¶ 25).) In *Oberg II*, the Fourth Circuit found that "PHEAA's funds are held in a *segregated* account apart from general state funds." 745 F.3d at 138-39 (citing 24 Pa. Stat. § 5105.10 ("There is hereby created

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[3] *Compare* Stmt. Fact ¶ 27 (discussing PHEAA's requisition process with the State Treasury) *and* Stmt. Fact ¶ 28 (discussing the State Treasury "backfunding" process), *with* Pl.'s Opp'n at 7 ("[As to Stmt. Fact ¶ 27 a]dmit that the witness did say that is the way that funds held within the state treasury need to be handled. . . . [As to Stmt. Fact ¶ 28 d]enied as phrased. Mr. Guenther will use the operating account to pay a PHEAA Invoice: 'To assist the State Treasury in handling a payment quicker than the State Treasury was prepared to handle it.'"). Pele fails to raise a genuine dispute regarding the processing of PHEAA revenues and payments into and out of the State Treasury.

a fund within the State Treasury to be known as the Educational Loan Assistance Fund.") (emphasis in original)). The evidence now in the record illustrates with greater detail how the State Treasury holds and invests state funds, including those attributable to PHEAA.

> [M]onies that PHEAA receives through lending, loan servicing, loan guaranteeing and debt issuances are deposited into the Treasury of the Commonwealth, designated as Commonwealth Fund 79—the Education Loan Assistance Fund ("ELAF"). Like other state agencies, PHEAA's funds are pooled for investment purposes with other funds, including the Commonwealth's General Fund. The Treasurer invests PHEAA's funds in short-term, liquid assets (Investment Pool 99) and long term investments (Investment Pool 198).

(Craig Decl. ¶ 5.) In other words, even though ELAF money is "segregated 'on paper' as earmarked funds . . . [t]he money itself is mingled with the Commonwealth's general funds; the Treasurer includes the funds in the money he or she invests on behalf of the Commonwealth." (Guenther Decl. ¶ 25.) The undisputed[4] evidence before the Court shows that while PHEAA revenues are earmarked for the ELAF

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[4] Pele does not dispute this fact, but questions the amount of money held in ELAF, as compared to PHEAA's Annual Financial Report. (*See* Pl.'s Opp'n at 6.) Pele does not cite to another portion of the record to raise a genuine issue as to whether PHEAA's revenues are comingled and invested within the Treasury's general fund; thus it is undisputed. Fed. R. Civ. P. 56(e)(2).

fund, the money itself is still comingled and invested along with other general state funds in the State Treasury. *Cf. Oberg II*, 745 F.3d at 139 (quoting *Blake v. Kline*, 612 F.2d 718, 723 (3d Cir. 1979) (remanding for further consideration because the entity's fund was "set apart in the state treasury from general state funds and . . . administered by the State Treasurer at the discretion of the Board.")).

Moreover, while PHEAA's revenues "shall be deposited in the State Treasury and may be utilized at the discretion of the board of directors for carrying out any of the corporate purposes of the agency," 24 Pa. Stat. § 5104(3), PHEAA must first receive approval from the State Treasurer before PHEAA can spend money, just like every other state agency. (Def.'s Br. at 15, Stmt. Fact ¶ 26 (citing Craig Decl. ¶ 6 ("The Treasurer treats PHEAA like any other Commonwealth agency. Specifically, before PHEAA can spend any of the money that is deposited into the Treasury, it must first receive approval from the Treasurer or his/her staff."); Guenther Dep. at 68, 71 ("I believe all of our revenues must be deposited to State Treasury. The State Treasurer decides what gets disbursed. If PHEAA is dissolved, the money goes to the Commonwealth of Pennsylvania. These are Commonwealth assets.")); *see also* Guenther Decl. Ex. B. [Dkt. 78] at 36 (Fiscal Examiner from State Treasury asking PHEAA for itemized receipt from restaurant to ensure alcohol was not ordered, and to prevent improper use of state funds).) Pele denies this material fact, but in support, baldly asserts that "PHEAA does not need approval to spend the money that is not in the state treasury," and cites only to the same lines of Mr. Guenther's deposition. (Pl.'s Opp'n

at 7 ("The corporate representative on this topic and the CFO can only say that he 'believes' the money has to be deposited into the state treasury.").) But Pele does not offer any evidence to contradict, or genuinely dispute, the evidence in the record. Thus, it is also undisputed that PHEAA must first receive approval from the State Treasurer before PHEAA can spend money, just like any other state agency in Pennsylvania. Fed. R. Civ. P. 56(e)(2) ("If a party fails . . . to properly address another party's assertion of fact as required by Rule 56(c), the court may consider the fact undisputed for purposes of the motion.").

Third, upon PHEAA's dissolution, "all the property and moneys . . . shall become the property of the Commonwealth." (Def.'s Br. at 15, Stmt. Fact ¶ 24 (citing 24 Pa. Stat. § 5109; Guenther Dep. at 71 ("If PHEAA is dissolved, the money goes to the Commonwealth of Pennsylvania. These are Commonwealth assets.")).) Pele does not contest this material fact and therefore it is undisputed. (Pl.'s Opp'n at 6.).

Lastly, the Court finds that any judgment against PHEAA "would directly interfere with the state's fiscal autonomy." *Md. Stadium Auth.*, 407 F.3d at 264 (citation omitted). Pennsylvania State Representative William Adolph, Jr., the Chairman of PHEAA's Board of Directors and the Chairman of the House of Representatives Appropriations Committee, succinctly stated the effect of a monetary judgment against PHEAA, and the choice the Pennsylvania state government would then face.

> A monetary judgment against PHEAA would be paid with the Commonwealth[']s money. It

> would also impact the amount of money that PHEAA would be paid with the Commonwealth's grant programs and its ability to administer those programs, as well as impact the amount of revenue it uses for all the other public service programs it offers. Specifically, if a significant judgment were entered against PHEAA, the General Assembly would have no choice but to appropriate money (as it has done in the past) to PHEAA to allow for its continued operation or substantially reduce or do away with its grant programs.

(Def.'s Br. Ex. 1 [Dkt. 58-2] ("Adolph Decl.") ¶ 11.); *cf. S. Carolina Dep't of Disabilities & Special Needs v. Hoover Universal, Inc.*, 535 F.3d 300, 306 (4th Cir. 2008) (holding district courts must focus on the "broader inquiry [of] . . . whether recovery here would inure *to the benefit* of the State," and not celebrate form over substance by looking at whether those funds are segregated from the general treasury) (emphasis in original). In light of the undisputed facts regarding PHEAA's revenues and funds as discussed above, the Court finds that the State would be functionally liable for a judgment against PHEAA. *Oberg II*, 745 F.3d at 136-37 (citations omitted). Therefore, because this factor still "remains of considerable importance," *id.* at 137 n.4, the Court finds that the first arm-of-the-state factor weighs in PHEAA's favor.

B. Degree of Autonomy

Second, the Court considers "the degree of autonomy exercised by the entity, including such circumstances as who appoints the entity's directors

or officers, who funds the entity, and whether the State retains a veto over the entity's actions." *Id.* at 137 (quoting *U.S. ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.*, 681 F.3d 575, 580 (4th Cir. 2012) ("*Oberg I*") (additional citation omitted)). Also relevant to this factor "is the determination whether an entity has the ability to contract, sue and be sued, and purchase and sell property . . . and whether it is represented in legal matters by the state attorney general." *Oberg II*, 745 F.3d at 137 (citations omitted).

Several undisputed facts suggest that PHEAA maintains autonomy from the State. Most notably, it is undisputed that PHEAA has been financially independent from the State since 1988. The Pennsylvania General Assembly has not appropriated any tax dollars for PHEAA's operating expenses, and thus PHEAA is entirely self-sufficient. (Def.'s Br. at 14, Stmt. Fact ¶ 19 (citing Guenther Decl. ¶ 22; Adolph Decl. ¶ 10); *see also* Pl.'s Opp'n at 5, 19.) This "strongly suggest[s] that PHEAA is not an arm of the state." *Oberg II*, 745 F.3d at 139. Moreover, it is undisputed that PHEAA has the power to sue, 24 Pa. Stat. § 5104.3, which it has done in this Court to collect amounts owed, (Pl.'s Opp'n Ex. F. [Dkt. 77-6].), the power to purchase and sell property, 24 Pa. Stat. § 5104(3), and the power to enter into contracts, 24 Pa. Stat. § 5104(4). (Def.'s Br. at 10-11, Stmt. Fact ¶¶ 5-6; Pl.'s Opp'n at 3.) All of this suggests operational autonomy, *see Oberg II*, 745 F.3d at 139 (citations omitted), even though the powers are statutory. And while the Pennsylvania Attorney General can represent PHEAA as an agency of the Commonwealth, the Attorney General is also authorized to hire outside counsel for litigation, as was done for this litigation.

(Def.'s Br. at 18, Stmt. Fact ¶ 35 (citing Ex.6 [Dkt.58-7] ("Forney Decl.") ¶¶ 5-8).[5] This also suggests operational autonomy. *Md. Stadium Auth.*, 407 F.3d at 264-65 (citing *Cash v. Granville Cnty. Bd. of Educ.*, 242 F.3d 219, 225 (4th Cir. 2001) (noting lack of control indicated by the fact that local school board was represented by private counsel instead of the Attorney General)) (additional citation omitted).

Conversely, there also are indicia of State control over PHEAA. First, the Pennsylvania General Assembly confers certain powers on PHEAA, as discussed above. (Def.'s Br. at 10, Stmt. Fact ¶ 5; Pl.'s Opp'n at 3.) This weighs against autonomy and in favor of immunity. *See College Sav. Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 948 F. Supp. 400, 412 (D.N.J. 1996) (finding the second factor weighed in favor of immunity in part because the agency had "only those powers specifically granted to them by the legislature."). Second, it is undisputed[6] that PHEAA's Board of Directors consists of sixteen state legislators, three gubernatorial appointees, and the Secretary of Education, who is also appointed by the Governor. All gubernatorial appointees are

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[5] Pele "[n]either [a]dmits nor den[ies]" this assertion of fact, without citing to another portion of the record. (Pl.'s Opp'n at 8.) Because this assertion of fact is not properly disputed with factual support from the record, it is undisputed. Fed. R. Civ. P. 56(e)(2).

[6] Pele disputes this fact, arguing that two of the current board members are not "state-level officials." (Pl.'s Opp'n at 4.) But that is not responsive to the material fact asserted. While the two individuals cited by Pele are not "elected" state-level officials, by statute they were appointed by the Governor and confirmed by the State Senate.

confirmed by the State Senate. (Def.'s Br. at 11, Stmt. Fact ¶ 8 (citing Adolph Decl. ¶ 12).) This also "indicates state control." *Oberg II*, 745 F.3d at 139 (citing *Md. Stadium Auth.*, 407 F.3d at 264).[7] Moreover, because PHEAA is an agency of the Commonwealth, the General Assembly imposed significant limitations on PHEAA's autonomy. Specifically, it is undisputed that the Department of the Auditor General may conduct audits of PHEAA activities, (Def.'s Br. at 18, Stmt. Fact ¶ 38 (citing 24 Pa. Stat. §§ 5104(1.1), 5108); Pl.'s Opp'n at 8.), the Governor must approve PHEAA debts, or the issuance of notes and bonds, (Def.'s Br. at 14, Stmt. Fact ¶ 20 (citing 24 Pa. Stat. §§ 5104(3), 5105.1(a)); Pl.'s Opp'n at 5.), and PHEAA must report on its condition to the legislature and the Governor at the end of each fiscal year. (Def.'s Br. at 18, Stmt. Fact ¶ 37 (citing 24 Pa. Stat. § 5108); Pl.'s Opp'n at 8.) "These factors may mean, as PHEAA contends, that it is simply a tool of the state." *Oberg II*, 745 F.3d at 139.

In all, the Court finds that PHEAA does have some intimate connections to the Commonwealth of Pennsylvania and the state government. Ultimately, however, this factor weighs against holding that PHEAA is an arm of the state due to its high degree of operational autonomy and independence. *See id.* ("Although the facts relevant to this second factor cut both ways, when we consider 'all reasonable

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[7] In 2010, however, the law was changed so that eventually four private citizens will assume board positions vacated by state legislators. (Def.'s Br. at 12, Stmt. Fact ¶ 9; Pl.'s Opp'n at 4.) No legislative Board member has stepped down yet, however, and there are still sixteens legislators on the Board.

inferences in favor of plaintiff' as we must at this stage . . . [on a Rule 12(b)(6) motion], we conclude that this factor also counsels against holding that PHEAA is an arm of the state.") (citation omitted); *see also Brock*, 933 F.2d at 1259 ("[On] summary judgment, we must draw any inferences in the light most favorable to the non-movant.") (citations omitted). Therefore, the second factor suggests PHEAA is not an arm of the state and counsels against immunity.

C. Local Versus Statewide Concerns

Third, the Court examines "whether the entity is involved with state concerns as distinct from non-state concerns, including local concerns." *Oberg II*, 745 F.3d at 137 (quoting *Oberg I*, 681 F.3d at 580). "Non-state concerns, however, do not mean *only* local concerns, but rather also encompass other non-state interests like out-of-state operations." *Id.* (internal quotation marks omitted) (emphasis in original). Here, the ultimate issue appears to be a conflict between PHEAA's original statutory purpose and the expansion of PHEAA's nationwide operation in recent years. The parties agree that PHEAA was originally created "for the benefit of the people of the Commonwealth, for the improvement of their health and welfare, and for the promotion of the economy," 24 Pa. Stat. § 5105.6, specifically to perform the government function of improving the higher educational opportunities for Pennsylvania residents, by assisting them with the expenses of higher education, and by enabling lenders and post-secondary institutions to do the same. (Def.'s Br. at 9-10, Stmt. Fact ¶ 1 (citing 24 Pa. Stat. §§ 5102, 5105.6); Pl.'s Opp'n at 1.) Pele does not dispute the original

purpose of PHEAA, but instead argues that it has "expanded well beyond those purposes and headed in a different direction as a national student loan servicer." (Pl.'s Opp'n at 1 (citing Guenther Dep. at 15-16 (stating that PHEAA stopped making direct loans to students in March of 2008 because of the financial crisis)).)

The Fourth Circuit found this factor weighed in favor of arm-of-the-state status for PHEAA for two reasons. First, PHEAA was created to financially assist Pennsylvanians' access to higher education, "an area of quintessential state concern," *Oberg II*, 745 F.3d at 140 (citing *Md. Stadium Auth.*, 407 F.3d at 265). Second, the level of PHEAA's out-of-state earnings in 2005 did not equate to a primary out-of-state-focus. *Id.* In examining the three agencies at issue in *Oberg II*, the Fourth Circuit emphasized that the focus of the third factor is whether the agency is *primarily* involved with in-state concerns. *Oberg II*, 745 F.3d at 140 ("[I]t does not seem plausible that by 2006 . . . PHEAA's operations focused *primarily* out of state."); *id.* at 142 ("But these assertions do not equate to an allegation that [the defendant's] operations centered *primarily* outside [the state] at any point in time."); *id.* at 145 ("The operative question, however, is whether [the defendant] is *primarily* involved with state concerns.") (emphasis in original and additional citations omitted). In the record now before the Court, even if PHEAA is a national loan servicer, and even if PHEAA "only gave back one-third of the profits to the students of Pennsylvania and retained the rest for PHEAA reserves," (Pl.'s Opp'n at 3.), it is undisputed that PHEAA "lends, purchases, services and guarantees loans for the sole purpose of funding its

operations and contributions to state grant programs. In other words, PHEAA generates earnings to return to Pennsylvania students." (Def.'s Br. at 11, Stmt. Fact ¶ 7; Pl.'s Opp'n at 3.) Accordingly, this primary focus on in-state concerns suggests PHEAA is an arm of the state.

Pele "denied" this assertion of fact without support in the record, as required by Rule 56(c). (*See* Pl.'s Opp'n at 3 ("Denied. Mr. Guenther did say that it was a 'major focus of PHEAA,' but the fact that it only gave back one-third of the profits to the students of Pennsylvania and retained the rest for PHEAA reserves, proves which one is more important to PHEAA.").) This unsupported argument does not establish a genuine issue as to this material fact. In short, while it is undisputed that PHEAA services loans at the national level, including guaranteeing loans in the states of Delaware, Pennsylvania, Virginia, West Virginia, and Georgia, it is also undisputed that PHEAA ultimately earns revenues from its national activities and brings those revenues into the Commonwealth of Pennsylvania and its Treasury for the primary purpose of "funding its operations and contributions to state grant programs." (Def.'s Br. at 11, Stmt. Fact ¶ 7; Pl.'s Opp'n at 3.) The Fourth Circuit made clear in *Oberg II* that even if PHEAA's reach is nationwide, the "operative question" under the third factor is whether PHEAA is primarily involved with state concerns. *Oberg II*, 745 F.3d at 140. The Court must answer this question in the affirmative based on the evidence in the record.

It is undisputed that PHEAA has been servicing loans for students outside Pennsylvania since 1974, so

this aspect of PHEAA's operation is not new. (Def.'s Br. at 11, Stmt. Fact ¶ 6; Pl.'s Opp'n at 3.) Indeed, PHEAA is authorized by state statute to enter into contracts with "schools, lenders, individuals, corporations . . . other states and the Federal government to make, service, invest in, purchase, make commitments to purchase, take assignments of or administer loans." (*Id.* (citing 24 Pa. Stat. § 5104(1.1)(iii)).) But most notably, PHEAA generates revenues from all of its operations "to return to Pennsylvania's students." (Def.'s Br. at 11, Stmt. Fact ¶ 6 (citing Guenther Decl. ¶ 13); Pl.'s Opp'n at 3 ("Admit that PHEAA can enter into contracts and guarantee loans. However, it has taken that authority to new heights in the past few years when it began guaranteeing loans for other states . . . that have nothing to do with its core mission to help Pennsylvania students.").)

Pele attempts to dispute this material fact by arguing that PHEAA does not contribute enough of its revenues to Pennsylvania students. (Pl.'s Opp'n at 24 ("PHEAA only contributes $75 million to the state grant program a year, which means that only a small fraction of that income ever went to the object of PHEAA's alleged mission: the students.").) But the outcome of the Court's analysis under the third factor is not solely dependent on or limited to how the state agency budgets its revenues. Rather, the Court must look to the broader picture of the agency's primary concern. As this Court noted on the motion to dismiss, the Fourth Circuit "gave significant consideration to where a state agency's operations 'centered,' *Oberg II*, [745 F.3d at 142]; the [Fourth Circuit] did not suggest that the use of funds for in-state residents is entirely

determinative." (Mem. Op. at 19.) It is undisputed that "[a]ll of PHEAA's lending, guaranteeing and servicing activities are performed by employees who work in Pennsylvania." (Def.'s Br. at 19, Stmt. Fact ¶ 43; Pl.'s Opp'n at 9.)[8] Any nationwide expansion of PHEAA's operation did not alter its primary purpose under the enabling statute to "benefit . . . the people of the Commonwealth, for the improvement of their health and welfare, and for the promotion of the economy." 24 Pa. Stat. § 5105.6.

And PHEAA generates revenues that, at least in part, go directly to improving the higher educational opportunities for Pennsylvanian residents, "an area of quintessential state concern." *Md. Stadium Auth.*, 407 F.3d at 265 (citations omitted). Stated differently, PHEAA's expansive out-of-state business ultimately benefits Pennsylvania and its citizens.[9] Therefore, the Court finds that the third factor suggests PHEAA is an arm of the state because PHEAA is primarily involved with in-state concerns.

D. State Law

Fourth, the Court considers "how the entity is treated under state law, such as whether the entity's relationship with the State is sufficiently close to make the entity an arm of the State." *Oberg II*, 745

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[8] PHEAA employs one individual in the Washington, DC area, but that employee "does not perform lending, servicing and guaranteeing work"—PHEAA's primary concern. (Def.'s Reply at 23.)

[9] Moreover, if PHEAA were dissolved today, all of its funds and property would revert to the Commonwealth of Pennsylvania. (Def.'s Br. at 15, Stmt. Fact ¶ 24 (citing 24 Pa. Stat. § 5109); Pl.'s Opp'n at 6 ("Admit.").)

F.3d at 138 (quoting *Oberg I*, 681 F.3d at 580). "Although the question of whether an entity is an alter ego of the state is a question of federal, not state, law, the manner in which state law addresses the entity remains important, and potentially controlling." *Md. Stadium Auth.*, 407 F.3d at 264 (stating the court may consider "the relevant state statutes, regulations, and constitutional provisions which characterize the entity, and the holdings of state courts on the question.") (citations omitted). The treatment of PHEAA under relevant state law and the undisputed evidence in the record clearly supports a finding as a matter of law that PHEAA is an arm of the state.

The Fourth Circuit held in *Oberg II* that state law "supports PHEAA's contention that it is an arm of Pennsylvania." 745 F.3d at 140. Specifically, the enabling statute states that PHEAA was created "for the benefit of the people . . . and the agency [performs] an essential governmental function." 24 Pa. Stat. § 5105.6. "PHEAA's enabling legislation was made effective by 'amendment to the Constitution of Pennsylvania authorizing grants or loans for higher education,' [24 Pa. Stat.] § 5112, and Pennsylvania state courts have concluded that PHEAA is a state agency for jurisdictional purposes." *Oberg II*, 745 F.3d at 140 (citing *Richmond v. Penn. Higher Educ. Assistance Agency*, 297 A.2d 544, 546 (Pa. Commw. Ct. 1972); *Penn. Higher Educ. Assistance Agency v. Barksdale*, 449 A.2d 688, 689-90 (Pa. Super. Ct. 1982)). Pele's attempt to create a genuine issue of material fact under this fourth factor is unavailing. The Pennsylvania Commonwealth Attorneys Act explicitly defines PHEAA as an "independent agency." 71 Pa. Stat. § 732-102. But this only serves to

distinguish PHEAA from executive agencies. This does nothing to dispute the fact that PHEAA, an independent agency as defined by state law, is an arm of the Pennsylvania state government.

Similarly, Pele does not dispute other material facts that show PHEAA's relationship to Pennsylvania under state law is sufficiently close to make it an arm of the state. The following facts in the record before the Court are undisputed. PHEAA's property, income, and activities are exempt from taxation, as is the income from the bonds and notes that PHEAA issues. (Def.'s Br. at 14, Stmt. Fact ¶ 21 (citing 24 Pa. Stat. §§ 5105.6, 5107); Pl.'s Opp'n at 5 ("Admit.").) PHEAA's officers and management employees are "public officials" subject to the Pennsylvania Public Official and Employee Ethics Act, which applies to "any agency performing a governmental function." (Def.'s Br. at 19, Stmt. Fact ¶ 42 (citing 65 Pa. C.S.A. § 1102); Pl.'s Opp'n at 8 ("Neither [a]dmit nor deny.").) Furthermore, several incidents of working at PHEAA suggest state control: PHEAA's employees are paid from the Commonwealth Treasury; all employees must participate in the State Employee Retirement System; all employees must be covered by the Pennsylvania Employees Benefit Trust for healthcare; and PHEAA's employee badges state, "Commonwealth of Pennsylvania State Employee." (Def.'s Br. at 18, Stmt. Facts ¶ 40; Pl's Opp'n at 8 ("PHEAA employees are paid from PHEAA's funds. Mr. Craig in his Declaration simply says that the payments are run through the Treasury each month.").) Accordingly, it is clear under Pennsylvania law and from the undisputed material facts in the record that PHEAA is treated as a state agency.

Therefore, the fourth factor also weighs in favor of finding PHEAA is an arm of the state and entitled to immunity.

IV. Conclusion

With the benefit of a more complete record after discovery, factors one, three, and four support a finding that PHEAA is an arm of Pennsylvania's state government entitled to Eleventh Amendment immunity. Only the second factor suggests otherwise, and even then, this factor is not overwhelming. Weighing all four factors, the Court finds that PHEAA has met its burden as a matter of law to establish that it is "truly subject to sufficient state control to render [it] a part of the state." *Oberg II*, 745 F.3d at 136 (quoting *Oberg I*, 681 F.3d at 579.). In response, Pele did not sufficiently raise a genuine issue as to any material fact that demonstrates a need for trial. Therefore, PHEAA is entitled to judgment as a matter of law and immunity under the Eleventh Amendment.

For the foregoing reasons, the Court will grant PHEAA's motion for summary judgment and deny Pele's cross-motion for partial summary judgment. An appropriate Order shall issue.

/s/
James C. Cacheris
United States District Court Judge

October 7, 2014
Alexandria, Virginia

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-2202

LEE PELE,

Plaintiff-Appellant,

v.

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY, d/b/a American Education Services,

Defendant-Appellee,

JON H. OBERG,

Amicus Supporting Appellant.

Filed: November 17, 2015

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

s/Patricia S. Conner, Clerk

Appendix D

U.S. Const. amend. XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.