Nos. 15-1044, 15-1045

In the Supreme Court of the United States

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY,
Petitioner,

v.

LEE PELE,
Respondent.

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY,
Petitioner,

v.

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

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

BRIEF OF *AMICUS CURIAE*, THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 13, AFL-CIO IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI

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QUESTION PRESENTED

For both petitions, the question presented is as follows:

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

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Curiae, the American Federation of State, County and Municipal Employees, Council 13, AFL-CIO ("AFSCME"), is the exclusive bargaining agent for collective bargaining purposes for tens of thousands of employees working for the Commonwealth, its departments, agencies, and commissions. These bargaining unit employees include over 1,900 clerical, administrative and general services employees working for Petitioner, PHEAA. AFSCME also is the bargaining agent for a bargaining unit of employees working for the fourteen universities within the Pennsylvania State System of Higher Education as well as Lincoln University, in Chester County, Pennsylvania.

Over several decades, AFSCME has negotiated a series of collective bargaining agreements with the Commonwealth that establish the terms and conditions of employment for all AFSCME-represented Commonwealth employees, including those working for PHEAA. The collective bargaining agreement, known as the Master Agreement, establishes rates of pay, hours of work, and other terms and conditions of

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part; that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and that no person other than *amicus* and its counsel made such a monetary contribution. Pursuant to Rule 37.2, counsel of record for petitioners and respondents were timely notified of *amicus*' intent to file this brief. Petitioner and respondents in both cases (Nos. 15-1044 and 15-1045) have filed letters with the Court consenting to the filing of *amicus* briefs.

employment for full-time, part-time, and temporary employees covered by its terms.

In light of its representation of employees working for PHEAA, AFSCME has an intimate knowledge of this state agency, including its legislative purposes and goals, sources of financing, authority to enter into contracts, ability to pay judgments against it, governing structure, and autonomy or lack thereof with respect to the Commonwealth. AFSCME's interest also arises from its representation of more than 65,000 employees of various employers across Pennsylvania, including those (1) working for universities within the Commonwealth whose students receive loans or grants from PHEAA; (2) who attended or are attending post-secondary programs through the assistance of PHEAA; and/or (3) whose children paid, are paying, or will pay for university and college degrees made possible, in part, through grants and loans provided by PHEAA.

If the Fourth Circuit's adverse decision on the issue of PHEAA's sovereign immunity stands, it will threaten all of these interests by undermining PHEAA's ability to provide the necessary services to Pennsylvania residents which it was created to perform. The implications of the decision reach beyond these two cases alone. Without sovereign immunity, PHEAA will be subject to future suits asserting a variety of federal claims against it as putative plaintiffs realize the financial windfall to be obtained from a state agency with a deep pocket. Such litigation will not only threaten PHEAA's financial health, but also require countless hours of work by agency administrators involved in and preparing for litigation.

Indeed, the unsettled state of the law in this area is diverting PHEAA's resources to litigation. At least three lawsuits have been filed in federal district courts against PHEAA in two circuits of the United States Courts of Appeal—the Third and Fourth Circuits. As the record in these cases reveals, untold time and treasure have already been lost to extensive discovery and multiple appeals, just to determine whether or not PHEAA is an "arm of the State." If PHEAA loses the argument regarding its sovereign immunity, any monetary damages sought in these cases, as well as the resources expended in defense of future cases, pose a threat to the viability of the agency, the thousands of jobs that agency provides, and the ability of AFSCME members and other residents of Pennsylvania to obtain a post-secondary education and to achieve the economic opportunity that education brings. This Court's intervention is necessary to settle PHEAA's status as an arm of the State, and to afford it the protection of the sovereign immunity which our Legislature bestowed upon it.

Additionally, AFSCME submits this brief in order to demonstrate the need for a resolution of the current conflict among the United States Courts of Appeal concerning the proper method for determining which state agencies enjoy Eleventh Amendment immunity. Presently, there exist a multitude of conflicting legal standards, developed across all the circuits of the courts of appeal, for determining whether a state agency is an arm of one of the several States and therefore is immune from suit under the Eleventh Amendment. These conflicts must be resolved by establishing a single, clear legal standard for making such determinations, in order to avoid the absurd

result whereby a state-created agency, such as PHEAA, with a statutory grant of sovereign immunity, may be subject to inconsistent rulings from different federal appellate courts on the fundamental question of whether or not it is immune from suit.

For these reasons, AFSCME supports the petitions and urges this Court to hear these cases and resolve the issue.

SUMMARY OF ARGUMENT

Our nation was founded on the principle of "dual sovereignty," under which both the federal and state governments retain sovereignty within their respective domains. With state sovereignty comes immunity from private suit, except where the State has consented to suit or Congress has validly abrogated its immunity.

This Court has recognized that immunity extends to an entity that constitutes an "arm of the State." *Alden v. Maine*, 527 U.S. 706, 756 (1999). However, it has not yet had occasion to rule upon the question of what test should be applied to determine whether a state agency constitutes an "arm of the State" such that Eleventh Amendment immunity attaches.

The courts of appeal, all of which have been presented with this issue, have developed various multi-factored balancing tests to determine whether a state agency constitutes an arm of the State. These legal standards differ in both the number and nature of factors to be considered. Their focus ranges from the state agency's legal status, purpose and functions, responsibility over its legal liabilities, to its autonomy from the State. Furthermore, each circuit weighs these factors differently, resulting in wide-ranging results.

Due to these divergent standards, there exists the possibility of inconsistent results for a single agency. In fact, PHEAA has been subject to suits filed in two different circuits and, when asserting its defense of sovereign immunity, faced two separate, court-promulgated tests to determine the issue.

In the instant cases, the Fourth Circuit effectively abrogated the sovereign immunity expressly conferred by the Commonwealth's General Assembly upon PHEAA when it created the agency. The Fourth Circuit's application of its four-pronged balancing test, if not corrected by this Court, will have the bizarre result of undermining the purpose of PHEAA and the legislatively-chosen methods to achieve those goals. Rather than allowing States to choose their means to achieve constitutionally-permitted aims, the Fourth Circuit's arm-of-the-state test creates hurdles in realizing them.

Worse, a successful legal assault on PHEAA's sovereign immunity will imperil the agency's financial health, its statutory goal of providing grants and loans for post-secondary education, and its ability to provide strong, middle-class employment opportunities to AFSCME members. Without a reversal of the Fourth Circuit decision, the very purposes prompting the General Assembly to create this agency will be placed in danger, to the detriment of all of AFSCME's members and their families.

For all these reasons, as explained in more detail below, this Court should grant the petitions and review the decisions of the Fourth Circuit in this matter.

ARGUMENT

I. A Circuit Split Exists in Our Courts of Appeal Regarding the Appropriate Legal Standard for Determining Whether a State Agency Is an Arm of the State for Purposes of Eleventh Amendment Immunity.

A bedrock principal of our republic is that our nation is comprised of "dual sovereignty" in which both the federal union and the several States exercise sovereignty within their constitutionally-designated spheres of influence. *Federal Maritime Comm'n v. South Carolina Ports Authority*, 535 U.S. 743, 751 (2002). While the U.S. Constitution established a federal government, the several States entered the Union "with their sovereignty intact." *Id*.

One critical aspect of this dual sovereignty is that States maintain immunity from private suits. U.S. CONST. amend. XI (declaring that federal jurisdiction does not extend "to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State"); *Alden*, 527 U.S. at 715 ("[I]mmunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today.") This Court has long established that "federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'" *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (quoting *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)).

In cases in which a private citizen sues a State, the Eleventh Amendment bars such a suit unless the State

has consented to be sued or Congress has abrogated the immunity. *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 204 (1990). In contrast, in cases in which a private citizen sues a state agency, as in the case in this matter, the Eleventh Amendment analysis is more complex.

While this Court recognizes that immunity extends to "state agents and state instrumentalities," *Regents of the Univ. of Calif. v. Doe*, 519 U.S. 425, 428 (1997), as well as an "arm of the State," *Alden*, 527 U.S. at 756, its focus has been on whether a county, municipality or an interstate compact constitutes "an arm of the State." *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Moor v. Alameda Cty.*, 411 U.S. 693, 717-20 (1973); *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391 (1979); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 59 (1994). This Court has not yet had occasion to address how a court should analyze the applicability of Eleventh Amendment immunity to a state agency.

The absence of this Court's voice in establishing a clear legal standard for determining whether a state agency is an arm of the State has resulted in a multitude of varying and incongruent tests in our circuits. *Leitner v. Westchester Comm. Col.*, 779 F.3d 130, 134 (2d Cir. 2015) (Because this Court "has not articulated a clear standard for determining whether a state entity is an 'arm of the state' entitled to sovereign immunity," our courts of appeal "have applied different tests for establishing sovereign immunity."); *Mancuso v. N.Y.State Thruway Auth.*, 86 F.3d 289, 293 (2d Cir. 1996) ("The jurisprudence over how to apply the arm-of-the-state doctrine is, at best, confused."). Currently,

our courts of appeal have adopted tests that range from two to six factors. Even circuits that have the same tests or whose tests employ the same factors apply those tests or factors differently.

The First, Seventh, and Eighth Circuits all employ a two-factor test. The First Circuit's inquiry begins with determining if "the state has indicated an intention—either explicitly by statute or implicitly through the structure of the entity—that the entity shares the state's sovereign immunity." *Irizarry-Mora v. Univ. of P.R.,* 647 F.3d 9, 12 (1st Cir. 2011) In the event this factor is nondeterminative, the court then "proceed[s] to the second stage and consider[s] whether the state's treasury would be at risk in the event of an adverse judgment." *Id*.

The Seventh and Eighth Circuits also adopted a two-pronged test, but it considers different factors. While the Seventh Circuit considers "the 'general legal status' of the entity," it also examines "the extent of the entity's financial autonomy from the state." *Burrus v. State Lottery Comm'n of Ind.*, 546 F.3d 417, 420 (7th Cir. 2008). The Eighth Circuit does not include consideration of the agency's legal status but focuses instead on its autonomy from the state and "whether a money judgment against the agency will be paid with state funds." *Thomas v. St. Louis Bd. of Police Comm'rs*, 447 F.3d 1082, 1084 (8th Cir. 2006).

The Third, Tenth, and the District of Columbia Circuits employ a three-factor test. The Third Circuit examines "(1) [w]hether the money that would pay the judgment would come from the state," "(2) [t]he status of the agency under state law," and "(3) [w]hat degree of autonomy the agency has." *Fitchik v. New Jersey*

Transit Rail Operations, Inc., 873 F.2d 655, 659 (3d Cir. 1989); *see also Haybarger v. Lawrence Cty. Adult Prob. & Parole*, 551 F.3d 193, 198 (3d Cir. 2008).

The Tenth Circuit considers "(1) the state's legal liability for a judgment; (2) the degree of autonomy from the state—both as a matter of law and the amount of guidance and control exercised by the state; and (3) the extent of financing the agency receives independent of the state treasury and its ability to provide for its own financing." *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 718 (10th Cir. 2006).

The District of Columbia Circuit reviews "(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. v. Fed. Mar. Comm'n*, 531 F.3d 868, 873 (D.C. Cir. 2008).

The Fourth, Sixth, and Eleventh Circuits have adopted a four-pronged test. The Fourth Circuit asks:

> (1) whether any judgment against the entity as defendant will be paid by the State . . . ;
>
> (2) 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;
>
> (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, such as whether the entity's relationship with the State is sufficiently close to make the entity an arm of the State.

App. 4[2] (quoting *S.C. Dep't of Disabilities & Special Needs v. Hoover Universal, Inc.*, 535 F.3d 300, 303 (4th Cir. 2008)).

The Sixth Circuit employs a four-factor test but they are significantly different from the Fourth Circuit. The Sixth Circuit examines "(1) the State's potential liability for a judgment against the entity; (2) the language by which the state statutes and state courts refer to the entity and the degree of state control and veto power over the entity's actions; (3) whether state or local officials appoint the board members of the entity; and (4) whether the entity's functions fall within the traditional purview of state or local government." *Ernst v. Rising*, 427 F.3d 351, 359 (6th Cir. 2005).

The Eleventh Circuit considers "(1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity." *United States ex rel. Lesinski v. S. Fla. Water Mgmt. Dist.*, 739 F.3d 598, 602 (11th Cir. 2014).

The Ninth and Fifth Circuits employ five- and six-pronged tests, respectively. The Ninth Circuit's five-factor test reviews "[1] whether a money judgment

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[2] Citations to Appendices refer to those attached to Petitioner PHEAA's Petition for Writ of Certiorari in *PHEAA v. Oberg*, Case No. 15-1045.

would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has the power to take property in its own name or only the name of the state, and [5] the corporate status of the entity." *Beentjes v. Placer Cty. Air Pollution Control Dist.*, 397 F.3d 775, 778 (9th Cir. 2005).

The Fifth Circuit's six-factor test considers: "(1) whether the state statutes and case law characterize the agency as an arm of the state; (2) the source of the funds for the entity; (3) the degree of local autonomy the entity enjoys; (4) whether the entity is concerned primarily with local, as opposed to state-wide problems; (5) whether the entity has authority to sue or be sued in its own name; and (6) whether the entity has the right to hold and use property." *Richardson v. S. Univ.*, 118 F.3d 450, 452 (5th Cir. 1997) (brackets omitted).

Finally, the Second Circuit has used two separate tests—one with two factors and the other with six. Its two-factor test asks whether the state would be responsible for a judgment against it and what degree of supervision does the State exercise over the entity. *Clissuras v. City Univ. of N.Y.*, 359 F.3d 79, 82 (2d Cir. 2004). Its six-factor test examines "(1) how the entity is referred to in its documents of origin; (2) how the governing members of the entity are appointed; (3) how the entity is funded; (4) whether the entity's function is traditionally one of local or state government; (5) whether the state has a veto power over the entity's actions; and (6) whether the entity's financial

obligations are binding upon the state." *Gorton v. Gettel*, 554 F.3d 60, 62 (2d Cir. 2009).

Clearly, there is absolutely no consistency in the legal standards brought to bear in this one important area of constitutional law. Such divergent legal approaches alone constitute more than sufficient grounds for this Court to grant review of this matter.

II. Based on the Facts of Record and Those Publicly Available, PHEAA Meets Several of the Key Factors Outlined By the Courts of Appeal.

It is clear from reviewing the various tests adopted by the courts of appeal that there exist certain recurring factors for determining whether or not a statewide agency is an arm of the State. These include (1) whether the state agency performs a state, as opposed to a local, governmental function; (2) whether the State by law and practice has recognized and treats the state agency as one entitled to sovereign immunity; (3) the degree of political and financial autonomy the state agency has vis-à-vis the State and, conversely, the degree of control or supervision the State has over it; and (4) the degree to which judgments against the state agency would be paid by the State. A review of PHEAA under these factors demonstrates it is an arm of the State under the factors most commonly considered by our courts of appeal. However, in light of the current conflict among the circuits regarding the appropriate test, the outcome is uncertain and highly dependent upon the circuit in which the litigation is initiated.

First, it is clear that PHEAA performs a state, rather than a local, function. The enabling statute that created PHEAA in 1963 provides that its purpose was to "improve the higher educational opportunities of" Pennsylvanians "by assisting them in meeting their expenses of higher education … and by enabling the agency, lenders and post-secondary institutions to make loans available to students and parents for postsecondary education purposes." 24 P.S. §§ 5101-5102. The statute declares that PHEAA was established "in all respects for the benefit of the people of the Commonwealth, for the improvement of their health and welfare, and for the promotion of the economy." *Id*. § 5105.6. These goals, the statute states, "are public purposes and the agency will be performing an essential governmental function in the exercise of the powers conferred upon it." *Id*. Importantly, the authority to enact the enabling statute arises from Article III, Section 29 of the Pennsylvania Constitution that specifically empowers the General Assembly to appropriate funds "in the form of scholarship grants or loans for higher educational purposes to residents of the Commonwealth enrolled in institutions of higher learning … ." PA. CONST. art. III, § 29.

Consistent with these legislative purposes, PHEAA has provided $9.4 billion in need-based grants to Pennsylvania residents since 1965, representing approximately 6.4 million separate awards. In the 2013-14 academic year, PHEAA distributed $444 million in grants in the form of approximately 179,000 separate awards. Additionally, as of June 30, 2014, PHEAA was servicing a grand total of $327.1 billion in loans, including (1) $185.2 billion in federally-owned

loans, (2) $53.5 billion in third-party and PHEAA-owned loans, (3) $48.3 billion in remote and not-for-profit loans using PHEAA systems; and (4) $40.1 billion in guaranty loans (active guarantees and defaulted inventory).[3] Thus, countless millions of Pennsylvania residents have received grants and loans from PHEAA to secure their post-secondary educations, including AFSCME bargaining unit employees and their family members.

Second, it is indisputable that Pennsylvania law has long recognized that PHEAA is an arm of the State entitled to sovereign immunity. The Pennsylvania Supreme Court declared that "sovereign immunity is available to a Commonwealth party, which is 'a Commonwealth agency and any employee thereof." *Snead v. Soc'y for Prevention of Cruelty to Animals of Pa.*, 985 A.2d 909, 913 (Pa. 2009) (quoting 42 Pa.C.S. § 8501). Numerous Pennsylvania statutes define a "Commonwealth agency" to include independent agencies like PHEAA. For example, the Judicial Code defines a "Commonwealth agency" as "[a]ny executive agency or independent agency," and then defines "independent agency" to include Commonwealth entities in the executive branch which are not subject to the policy supervision and control of Governor. *See* 42 Pa.C.S. § 102. Other statutes follow suit. *See, e.g.,* 2 Pa.C.S. § 101 (Administrative Agency Law); 35 P.S. § 6022.103 (Hazardous Material Emergency Planning and Response Act); 53 P.S. § 752.2 (Confidence in Law Enforcement Act); 65 P.S. § 67.102 (Right to Know Law). In the Administrative Code, the General

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[3] 2014-15 Annual Report, PHEAA, available at http://www.pheaa.org/about/reports-statistics/index.shtml.

Assembly expressly lists PHEAA as an "independent agency" and includes all "independent agencies" in the definition of a "Commonwealth agency." *See* 71 P.S. § 732-102.

Pennsylvania courts repeatedly have held that PHEAA is "an agency of the Commonwealth." *See PHEAA v. Barksdale*, 449 A.2d 688, 689 (Pa. Super. Ct. 1982); *PHEAA v. Xed*, 456 A.2d 725, 726 (Pa. Commw. Ct. 1983); *Richmond v. PHEAA*, 297 A.2d 544, 546-57 (Pa. Commw. Ct. 1972). Most recently, in December, 2015, the General Assembly enacted a bill, later signed by the Governor, explicitly stating 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).

Apart from the express statutory recognition that PHEAA is a Commonwealth agency, the Commonwealth under its laws and practice treats it as such. PHEAA is headquartered in Harrisburg, PA, the state capital. It is governed by a twenty-member board of governors, sixteen of whom are members of the General Assembly and another four appointed by the Governor. App.11. PHEAA may promulgate binding regulations, which are subject to the approval of the Pennsylvania Independent Regulatory Review Commission and the Pennsylvania Attorney General and "accorded great weight" in Pennsylvania courts. *Cherry v. PHEAA*, 642 A.2d 463, 464 (Pa. 1994); App.17. PHEAA has statewide subpoena power, and it can enter judgments of defaults valid statewide. 24 P.S. § 5104(10)-(11).

As with other statewide agencies, the Pennsylvania Attorney General represents PHEAA in all civil

litigation unless she delegates that authority. App.17. She is authorized to review and approve all PHEAA contracts over $20,000. Her review in part ensures that the agency does not waive its sovereign immunity. App.16; JA713, 2837, 2841.[4] PHEAA may solicit legal opinions from the Attorney General and is bound by those opinions. App.16; 71 P.S. §§ 732-102, 732-204.

For purposes of taxation and revenues, PHEAA is treated like all other statewide agencies. Its property, income, and activities are exempt from taxation. *See* 24 P.S. §§ 5105.6, 5106, 5107. PHEAA deposits its revenue in the Pennsylvania state treasury. App.14-15. Although these funds are earmarked for the "Educational Loan Assistance Fund," they are commingled with the Commonwealth's general investment fund and invested by the Pennsylvania Treasurer. App.15; 24 P.S. § 5105.10. PHEAA's ability to borrow is constrained by the Governor's authority to approve such activity and subject to limitations established by the General Assembly. *See* 24 P.S. §§ 5104(3), 5105.1(a.1).

As is the case with other statewide agencies, PHEAA is statutorily permitted to use its revenues only for "purposes of the agency," *id*., § 5104(3), and only with the approval of the Treasury Department. *See* App.15; 72 P.S. § 307. The Pennsylvania Treasurer pays all PHEAA expenses, which are drawn on the Pennsylvania treasury and signed by him. App.15-16. PHEAA must provide an annual report of its financial condition to the Governor and General Assembly. App.18. Its financial condition is included in

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[4] "JA" refers to the Fourth Circuit's joint appendix.

Pennsylvania's annual financial report. *Id*. PHEAA is subject to regular audits by the Pennsylvania's Auditor General and has in fact been so audited. App.17.

Like other Commonwealth employees, employees of PHEAA are state employees covered by Pennsylvania's public sector collective bargaining statute, the Public Employe Relations Act, 43 P.S. § 1101.101 *et seq*. AFSCME represents all unionized employees working at PHEAA, who comprise a majority of those employed by the agency. AFSCME negotiates with the Governor (or his designee) on behalf of PHEAA and other Commonwealth employees most terms and conditions of their employment, which are set forth in the Master Agreement. App.73.[5]

Since its inception as the bargaining representative for PHEAA employees, those employees have been and continue to be paid from the Commonwealth Treasury, participate in the Pennsylvania State Employees' Retirement System, and receive health care benefits through the Pennsylvania state employee healthcare fund—the Pennsylvania Employees Benefit Trust Fund. App.18; 71 Pa.C.S. §§ 5102, 5301. PHEAA has no discretion to offer different pension or health benefit plans, and its unionized workforce has no choice but to contribute to SERS. 71 Pa.C.S. §§ 5102, 5301. Employee identification badges for PHEAA employees have for many years stated "Commonwealth of Pennsylvania State Employee." App.73.

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[5] As it does with other independent agencies, AFSCME negotiates with PHEAA an appendix to the Master Agreement addressing certain terms and conditions of employment that are unique to PHEAA.

Third, as explained *supra*, the Commonwealth exercises considerable supervision and control over PHEAA. It is governed by a Board of Governors consisting of sixteen members of the General Assembly and four gubernatorial appointments. The Governor negotiates with AFSCME the terms of the Master Agreement that governs the agency's unionized workforce. Pennsylvania's Attorney General reviews the agency's regulations, serves as its counsel in civil litigation, and approves contracts in excess of $20,000. The Pennsylvania Treasurer pays PHEAA's expenses from the Pennsylvania treasury, which is the depository of the agency's revenues. No funds may be spent without his approval and only for legislatively-approved purposes of the agency. Finally, the Pennsylvania Auditor General has authority to audit PHEAA and, in fact, has done so.

These three factors overwhelmingly support the conclusion that PHEAA is a state agency that is protected by the Commonwealth's sovereign immunity. In fact, as explained by Petitioners, at least two circuits—the First and Sixth Circuits—would find under their tests that PHEAA is an arm of the Commonwealth. Petitioner PHEAA's Petition for Writ of Certiorari, *PHEAA v. Oberg*, Case No. 15-1045, at 18-20.

The fourth factor common to many of the tests in use, considers the degree to which judgments against the state agency would be paid by the State. The difficulty in applying this factor is that it implicitly assumes that the state agency is not the State. If, for example, PHEAA is an arm of the State, then its funds are necessarily funds of the State. The mere fact that

they are accounted for separately from other state funds does not mean that they are not funds of the State. They are part of the Commonwealth's public fisc, earmarked for the purposes set forth in the statute that created PHEAA.

Nonetheless, the Fourth Circuit concluded otherwise, relying in large measure on the fact that the Commonwealth, in its view, was neither legally nor functionally liable for any judgment entered against PHEAA. App.18-20. There is no dispute that, under state law, the Commonwealth itself is not legally liable to pay judgments entered against PHEAA. 24 P.S. § 5104(3). Initially, Petitioners argued that the Commonwealth was functionally liable for a judgment against PHEAA "because Pennsylvania statutes require PHEAA to deposit its commercially generated revenues with the state Treasury and require the Treasurer's approval of any payment from state Treasury funds." App.7. The Fourth Circuit rejected that argument because "the statute requiring the deposit also explicitly granted control over those funds to PHEAA, not the Treasurer, and the funds were held in a segregated account within the Treasury." App.7. The appellate court remanded the matter for further discovery and, for similar reasons, found the Commonwealth not functionally liable for judgments entered against PHEAA. App.41.

As an initial matter, this reasoning improperly characterized PHEAA's finances as something other than state funds merely because the Legislature has restricted the purpose for which these funds may be spent. Regardless of the merits of this conclusion, however, the other three factors discussed *supra* would

lead unmistakably to the conclusion that PHEAA is an arm of the Commonwealth in other courts of appeal. The principal reason that the Fourth Circuit ruled otherwise was based on its own way of applying this particular factor that some courts of appeal do not even consider. Thus, under the current state of the law, PHEAA could be sued in one part of the country and have a defense of sovereign immunity, but in another the defense would be rejected.

In fact, such a result remains a real possibility for PHEAA at this time as it has been sued by private citizens in federal courts in two separate circuits—the Third and the Fourth. In these cases, PHEAA raised a defense of sovereign immunity and had different legal standards applied to determine the applicability of the Eleventh Amendment. While a federal district court in Pennsylvania found PHEAA was an arm of the State, *Lang v. PHEAA*, 2013 U.S. Dist. LEXIS 189980, at *18 (M.D. Pa. November 20, 2013), the Third Circuit, applying a three-factored test, reversed and remanded to the trial court so the parties may engage in discovery on the issue, *Lang v. PHEAA*, 610 Fed. App'x 158, 162 (3rd Cir. 2015). The matter is still ongoing.

In the cases at issue in the petitions before this Court, two federal district courts in Virginia concluded that PHEAA was entitled to sovereign immunity after extensive discovery and appellate review. App.74; *Pele v. PHEAA*, 53 F. Supp. 3d 857, 871 (E.D. Va. 2014). Ultimately, the Fourth Circuit reversed the trial courts' final decisions on the matters, applying a four-factor test and concluding that PHEAA was not an arm of the State. App.62; *Pele v. PHEAA*, 2015 U.S. App. LEXIS 18274, at *4 (4th Cir. October 21, 2015). The fact that

the same state agency could face different legal standards in different circuits of the courts of appeal for the identical principle of federal law underscores the absurdity of the existing conflict in our federal courts of appeal and the need for resolution by this Court. Depending on the result of litigation currently ongoing in federal district court in Pennsylvania, there exists the real possibility that PHEAA could be found to be an arm of the State by one circuit but not by another. Such a nonsensical result commands this Court's attention and supports review of this matter.

Most importantly, the decision by the Fourth Circuit (or any similar decision by another circuit) poses a significant danger to the viability of PHEAA and its statutory mission to provide grants and loans to Pennsylvania residents to fund post-secondary education. If PHEAA no longer has the sovereign immunity conferred upon it by the General Assembly, it will undoubtedly become the target of multiple lawsuits in multiple federal forums asserting a variety of federal claims. That litigation holds the potential to significantly harm PHEAA by undermining the agency's financial resources (that otherwise provide assistance to needy students) and diverting the attention of its managers, supervisors, and employees to defend the agency in federal litigation. The result will be a far less vibrant state agency capable of maximizing its means to assist students. In light of the General Assembly's clear intent to avoid PHEAA's involvement in such litigation, this Court should grant the petitions and accept review of this matter.

CONCLUSION

Therefore, for the above reasons, *Amicus Curiae*, the American Federation of State, County & Municipal Employees, Council 13, AFL-CIO, respectfully request this Court grant the petitions for writ of certiorari filed by PHEAA in Case Nos. 15-1044 and 15-1045.

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