No. 15-1045

In the Supreme Court of the United States

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY,

Petitioner,

v.

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

Respondent.

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

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

The Commonwealth of Pennsylvania established Petitioner Pennsylvania Higher Education Assistance Agency ("PHEAA") with all the corporate powers necessary to conduct a nationwide financial services business and with few restrictions on the use of those powers. The Commonwealth elected to expressly disavow any responsibility for PHEAA's debts and to avoid any obligation to support PHEAA. It chose to act only as a passive shareholder, leaving the direction of PHEAA to its management and a Board of Directors not reporting to any state official. PHEAA capitalized on its independence by creating a profitable nationwide business; self-funding its business operations; generating a massive surplus; and operating under trade names intentionally selected to conceal any affiliation with the Commonwealth.

The question presented is:

Whether the Fourth Circuit correctly held that PHEAA is a "person" accountable for its false claims to the federal government under 31 U.S.C. §§ 3729 *et seq.*?

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After holding its four-factor "arm-of-the-state" analysis applicable, the Fourth Circuit applied it to the comprehensive record evidence of PHEAA's operations and determined that PHEAA was a "person" subject to False Claims Act ("FCA") liability. The court found that Pennsylvania would be neither legally nor functionally liable for any obligation incurred by PHEAA and that Pennsylvania's relationship to PHEAA was sufficiently detached to avoid any perception that the adjudication of Relator Jon H. Oberg's FCA complaint could be considered an affront to the sovereign dignity of Pennsylvania. Under this Court's controlling teaching in *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994), the Fourth Circuit's fact-intensive decision was clearly correct, and no further review is warranted.

PHEAA strains to meet the requirements of this Court's Rule 10 by constructing a purported inter-circuit conflict on the factors governing arm-of-the-state analysis, claiming that these differences arise from a lack of clarity in this Court's Eleventh Amendment jurisprudence, and arguing that these allegedly differing tests would be outcome determinative. But PHEAA misrepresents the cited cases which, properly read, focus on the same facts the Fourth Circuit considered and also implement the "twin pillars" Eleventh Amendment analysis established in *Hess* and relied upon below. Likewise, PHEAA's contention that the decision below is "incorrect" depends on PHEAA's distorted presentation

of the record and inappropriately seeks to have this Court act as a court of general review.

The Fourth Circuit's arm-of-the-state analytical framework, like that of every other circuit, considered whether Pennsylvania would be legally or functionally responsible for paying a judgment against PHEAA. Based on Pennsylvania's express disclaimer of liability in PHEAA's enabling statute, the absence of any legal requirement that the Commonwealth support PHEAA if it were in deficit, the fact that PHEAA has been entirely self-funded for nearly thirty years, and PHEAA's vast financial resources, including billions of dollars it holds in Delaware Special Purpose Entities ("SPEs"), the court below easily concluded that the present case posed no financial risk to Pennsylvania's treasury.

Turning to the Commonwealth's sovereign dignity, the court below looked carefully at the actual *pro forma* implementation of the financial and legal controls theoretically available to the Commonwealth, PHEAA's expansive activities outside Pennsylvania (dwarfing its administrative service to the Commonwealth's grant program) under trade names disguising state ownership, and the operational independence of PHEAA's management and Board. Recognizing the Commonwealth's treatment of PHEAA as entitled to sovereign immunity under state law, the Fourth Circuit declined to let that characterization determine the applicability of federal law, and held it outweighed by other sovereign dignity factors. A recent decision in PHEAA's home circuit reached the same conclusion. *Lang v. PHEAA*, 610 F. App'x 158 (3d Cir. 2015).

PHEAA's argument, reduced to its core, is that Pennsylvania's fiat should dictate the reach of the federal FCA and permit Pennsylvania to immunize PHEAA from all FCA liability including recovery sought by the federal government itself. This position is unprecedented. In fact, this Court recently made clear in a case involving an undisputed state agency that the actual level of state supervision, rather than non-operative characterizations in state law, should determine sovereign immunity in actions under federal law. *N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n*, 135 S. Ct. 1101, 1114 (2015).

In short, PHEAA has given no good reason why this Court should expend its scarce resources on reviewing the FCA "person" issue already addressed in *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000), and *Cook County v. United States ex rel. Chandler*, 538 U.S. 119 (2003), or harmonizing the phrasing of circuit court decisions implementing the arm-of-the-state guidance in *Hess*. PHEAA's nationwide, management-controlled financial enterprise is the paradigm of a "person" under the FCA, and the Fourth Circuit's careful, fact-intensive decision should not be disturbed.

STATEMENT OF THE CASE

I. LEGAL AND FACTUAL BACKGROUND

PHEAA's statement of the case ignores the Fourth Circuit's detailed analysis of how PHEAA actually operates and relates to the Commonwealth. Discovery made clear that PHEAA's nationwide, multi-billion dollar financial services business is conducted largely

outside Pennsylvania, not meaningfully supervised by the Commonwealth, and self-funded.

A. PHEAA's Broad Corporate Authority

PHEAA was established as "a body corporate and politic constituting a public corporation and government instrumentality" with broad powers. 24 P.S. § 5101. "PHEAA has the power to sue and be sued; enter into contracts; and own, encumber, and dispose of real and personal property" in its own name. App.11 (citing 24 P.S. §§ 5101, 5104(3)); App.87. The Commonwealth disavowed liability for PHEAA's bond debt and all other obligations. 24 P.S. § 5104(3) ("[N]o obligation of [PHEAA] shall be a debt of the State and [PHEAA] shall have no power to pledge the credit or taxing power of the State nor to make its debts payable out of any moneys except those of the corporation."). Nothing in PHEAA's incorporating statutes obligates the Commonwealth to provide any financial support to PHEAA.

PHEAA is not subject to executive control. Instead, PHEAA is "governed and all of its corporate powers [are] exercised by a board of directors." *Id.* § 5103(a). The Board has ordinary corporate powers, including the general authority "[t]o perform such other acts as may be necessary or appropriate to carry out effectively the objects and purposes of the agency as specified in this act." *Id.* § 5104(7). At the time the fraudulent claims were submitted, Board members were gubernatorial appointees and state legislators appointed by the heads of their respective chambers, s*ee* App.11 (citing 24 P.S. § 5103(a) (2006)), but the Fourth Circuit found that neither the Governor nor the Legislature controlled or even actively supervised

PHEAA.[1] For example, on two occasions, budget shortfalls caused the Governor of Pennsylvania to impose mandatory freezes or across-the-board cuts in agency budgets. As to PHEAA, however, the Governor could only "ask" for similar concessions. App.25; *accord id.* at 59 ("[G]overnors *ask* PHEAA to return appropriated funds when times are tight but *direct* other agencies to do so.") (emphasis in original). Similarly, when PHEAA's Board rejected a billion-dollar buyout offer from student loan competitor SLM Corporation ("Sallie Mae"), the spokesman for then-Governor Rendell disclaimed any involvement, stating that: "We have no influence over PHEAA's decision-making." *Id.* at 48.

The Fourth Circuit also noted that "[t]estimony from PHEAA board members . . . shows the lack of involvement by the General Assembly in PHEAA's operational affairs." *Id.* at 44. PHEAA's Chairman testified that, while he would respond to legislators' questions, "I do not report back to anyone in the General Assembly." *Id.* at 45. The Fourth Circuit's opinion details numerous decisions involving tens and even hundreds of millions of dollars (establishment of annual budgets, settlements of claims, establishment and funding of a separate charitable entity, and rejection of the Sallie Mae buyout) made by PHEAA's

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[1] The Governor is required to approve debt issuances by PHEAA and the Legislature has capped the total amount of debt that PHEAA may incur. 24 P.S. §§ 5104(3), 5105.1(a)(1). As the Fourth Circuit noted, however, these limited restrictions apply equally to municipal corporations, which are "persons" subject to the FCA pursuant to this Court's decision in *Cook County v. United States ex rel. Chandler*, 538 U.S. 119 (2003). *See* App.3.

Board and/or officers with no input from the General Assembly. *Id.* at 24, 26-27, 46-47. As a non-legislative board member noted, the General Assembly's "only role" was to create PHEAA, and if "[t]hey change their mind, they can create a statute to change it." *Id.* at 45. The record thus shows that PHEAA operates without legislative or executive involvement.

B. PHEAA's National Commercial Operations

The Petition asserts that PHEAA's "*chief function* is the administration of Pennsylvania's State Grant Program." Pet. at 5 (emphasis added). This claim contradicts the record. By every conceivable measure, PHEAA's profitmaking commercial activities dwarf the grant administration service it provides to the Commonwealth. Only 3% of PHEAA's employees work in grant administration; it accounts for less than 10% of PHEAA's total expenses.[2] JA 2280.[3] PHEAA spent more on outside student loan collection agency fees in 2013—$41.9 million—than it spent annually to administer the State Grant Program. *Id.* Since 2002, the majority of PHEAA's revenues and profits have come from out-of-state activities. App.13, 55-58.

"PHEAA is a very wealthy corporation engaging in nationwide commercial student-loan financial services activities." App.61. "PHEAA is now 'one of the nation's

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[2] While PHEAA in some years has donated a portion of its commercial earnings to the grant program, it has not done so every year. The costs of the administrative function are covered by PHEAA's commercial earnings. App.13-14.

[3] As in the Petition, "JA" refers to the Joint Appendix filed in the Fourth Circuit.

largest providers of student financial aid services.'" *Id.* at 2 (quoting *id.* at 83-84). PHEAA has not limited its lending to Pennsylvania students, has serviced loans for non-Pennsylvania students, and has guaranteed loans issued to students in Delaware, Georgia, and West Virginia. *Id.* at 13. PHEAA abandoned lending operations in 2008, but then expanded its other money-making operations, including acting as a student loan servicing contractor for the Federal Government. *Id.* at 14 n.4, 23 n.7.

As the Fourth Circuit concluded, "PHEAA's financial success, which has never really been in dispute, is clearly established in the record." *Id.* at 23. For 2006, during the period in which PHEAA was submitting the false claims at issue, "PHEAA's financial statements show gross revenues of $416 million, net revenues of $156 million, and total net assets of $498 million." *Id.* By 2014, when the case was in discovery, PHEAA's financial position had grown even stronger: $640 million in gross revenues, $222 million in net revenues, and $709 million in unrestricted net assets. *Id.* "The earnings from PHEAA's extensive commercial operations have made PHEAA 'financially independent' of the Commonwealth." *Id.* at 13 (quoting *id.* at 86).

In operating its national commercial businesses, PHEAA intentionally obscures its affiliation with the Commonwealth of Pennsylvania. PHEAA's commercial operations are conducted under the trade names "American Education Services" ("AES") and FedLoan Servicing, *id.* at 13, to mask PHEAA's affiliation with Pennsylvania from out-of-state customers. JA 2291, 2460, 2986-87, 3428-29, 3434, 3437-39. PHEAA has

differentiated the majority of employees who work on commercial operations as "AES" employees; the minority of employees who work on grant administration are deemed "PHEAA" employees. *Id.* at 2280. A handout provided to employees states: "Most of us work for AES." *Id.* at 2281. Since the early 2000s, employees working on PHEAA's commercial activities outside of the state had both a "PHEAA" and "AES" email address. *Id.*

C. PHEAA's Financial and Operational Independence from the Commonwealth

It is undisputed that PHEAA neither requires nor receives financial support from the Commonwealth: "PHEAA has received no appropriations to support its operations since *1988*." App.13 (emphasis added). In the ensuing nearly three decades, PHEAA's operations (including administration of the grant program) have been entirely self-funded, and the only appropriated funds passing through PHEAA are earmarked for grants for students. *Id.*

Notwithstanding its undisputed financial independence, PHEAA inexplicably asserts in the Petition that the decision below "threatens Pennsylvania's fiscal integrity." Pet. at 3. As the Fourth Circuit held, however, Pennsylvania would be neither legally nor functionally liable for a judgment against PHEAA.

In *Oberg II* and *Oberg III*, the Fourth Circuit recognized that PHEAA was not legally responsible for PHEAA's debts. App.84; *id.* at 19 & n.6. PHEAA claimed that all of its funds were Commonwealth funds because they were held for PHEAA's account in the

state treasury, but the Fourth Circuit found that claim to be exaggerated because "PHEAA created [SPEs] under Delaware law" which held trust accounts that "represent the bulk of PHEAA's corporate wealth" holding some $6 billion in assets. *Id.* at 14. PHEAA used these funds to pay a settlement relating to excess special allowance payments—the gravamen of Relator's action. *Id.* at 25. The Fourth Circuit concluded "the fact that the settlements were paid with a portion of the $6 billion held in trust *outside* the state Treasury is additional evidence of PHEAA's ability to fund a judgment without the use of state funds." *Id.* at 26 (emphasis in original).

Even as to funds PHEAA deposited in the state treasury, the Fourth Circuit explained why those funds belonged to PHEAA, with the state merely acting as custodian. *Id.* at 29-30. State statutes make clear that PHEAA's funds can only be used by PHEAA. 24 P.S. §§ 5104(3) (PHEAA revenues held in state Treasury "shall be available" to PHEAA and "utilized at the discretion of the board of directors"), 5105.10 (deposits into PHEAA's segregated account "are hereby appropriated to the board and may be applied and reapplied as the board shall direct"). Those funds are held in a segregated account within the Treasury. App.14. While PHEAA attributed significance to the fact that its funds in the state Treasury were "commingled" for investment purposes, the Fourth Circuit concluded that PHEAA's own treasurer had properly analogized the "commingling" to the actions of a mutual fund, and that "the Treasurer's concurrent authority to use those funds to generate interest does not somehow divest PHEAA of control over its funds." *Id.* at 32. Thus, the impact of a judgment that would

have to be satisfied from PHEAA's treasury account would fall on PHEAA, not the Commonwealth.

Turning to the issue of Commonwealth control, PHEAA argued that because disbursement of funds from its treasury account required the Treasurer's approval, PHEAA's activities were subject to financial control. The Fourth Circuit found, however, that "[t]he Treasury Department's review . . . *is not a substantive review*." *Id.* at 30 (emphasis added). "The Department does not evaluate the wisdom of the underlying contract or the reasonableness of the agreed-upon price, but instead simply confirms that a valid contract authorizes payment and that the payment amount sought matches the amount agreed to in the contract." *Id.* Thus, the "approval process does not constrain or otherwise interfere with PHEAA's statutory authority to make the *substantive* decisions controlling the use of its revenues." *Id.* (emphasis in original).

Similarly, the Fourth Circuit concluded that statutory provisions relating to the role of the Pennsylvania Attorney General do little to constrain PHEAA's independence. While the Attorney General technically must approve contracts in excess of $20,000 in value, the evidence showed that review is limited to form and legality—"a checklist-driven, essentially non-substantive review process." *Id.* at 49. While PHEAA must follow opinions it requests from the Attorney General, PHEAA's in-house General Counsel admitted he had no recollection that any such opinion had ever been provided, and had no idea how to obtain one because he had never asked. JA 2287, 2841-42. In contrast to this limited, superficial involvement by the Attorney General, PHEAA's Board, which has the

authority to make substantive decisions for the corporation, has a private law firm as its own independent legal advisor. App.17. And while the Attorney General must approve most litigation, PHEAA's General Counsel could not recall such a request ever being denied. *Id.*[4]

The Fourth Circuit took note of certain other constraints on PHEAA's conduct, but it concluded that, while relevant, "these minor strings ultimately do little work in distinguishing arms of the state from independent political subdivisions." *Id.* at 51 (citing *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997)). Based on this detailed analysis, the court concluded that "the record establishes that PHEAA, not the Commonwealth, controls PHEAA's funds and makes the substantive decisions governing the focus and direction of the company and its day-to-day operations." *Id.* at 53-54 (footnote omitted).

II. PROCEDURAL HISTORY

This action under the FCA was originally filed under seal by Relator Jon Oberg, a former Department of Education employee, in 2007. The Complaint alleged that nine defendant student loan companies, including PHEAA, had filed false claims with the Department of Education for tens of millions of dollars of "special allowance payments," a federal student loan subsidy. PHEAA is the sole remaining defendant in the action;

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[4] The fact that the Attorney General for the first time apparently denied a delegation request from PHEAA in *Lang* following the Fourth Circuit's decision, *see* Pet. at 7, was simply a self-serving effort to paper the record in a failed attempt to salvage a more favorable arm-of-the-state decision in the Third Circuit.

prior settlements have resulted in the United States Treasury recovering nearly $70 million.

The "person" issue has been before the Fourth Circuit three times. In *Oberg I*, the Fourth Circuit held that the four traditional Eleventh Amendment "arm-of-the-state" factors should be used to assess whether PHEAA was a "person" subject to suit under the FCA. *Id.* at 152. In *Oberg II*, the Fourth Circuit closely examined the underlying statutes and the allegations in Dr. Oberg's complaint and found that they supported the conclusion that PHEAA was a "person" and not an arm of the state. *Id.* at 88-89. The court remanded for limited discovery to ascertain whether the allegations had evidentiary support. *Id.* at 89.

In *Oberg III*, the Fourth Circuit considered the voluminous factual record compiled in discovery and held as a matter of law that PHEAA had been proven to be a "person" and was not an arm of the state. The court found that the Commonwealth of Pennsylvania was neither legally nor functionally liable for a judgment against PHEAA and that PHEAA functioned with a substantial degree of autonomy from the state; thus, the first two factors weighed heavily in favor of the conclusion that PHEAA was a person and not an arm of the state. *Id.* at 59-61. The court concluded that the other two factors, state concerns and treatment under state law, weighed in favor of arm-of-the-state status, albeit more weakly because discovery had found evidence supporting both sides. *Id.* On balance, the court concluded that "the factors would add up to 'political subdivision,' not 'alter ego of Pennsylvania.'" *Id.* at 60. Recognizing this Court's precedent that, where the "indicators point in different

directions, the Eleventh Amendment's twin reasons for being remain our prime guide," the Fourth Circuit considered the goals of protecting state treasuries and preserving the sovereign dignity of the state and reached the same conclusion. *Id.* at 60-61 (citing *Hess*, 513 U.S. at 51-52). The court concluded that permitting the action to proceed would not put the Commonwealth Treasury at risk, and that "[i]n light of PHEAA's intended and actual independence from the Commonwealth, we cannot conclude that it would be an affront to PHEAA's sovereign dignity to permit this action to proceed against PHEAA." *Id.* at 62 (citing *Hess*, 513 U.S. at 52). Accordingly, the court remanded for consideration of the merits of Dr. Oberg's FCA claims. *Id.*

REASONS FOR DENYING THE PETITION

I. THIS CASE SATISFIES NONE OF THE CRITERIA FOR REVIEW BY THIS COURT.

A. The Fourth Circuit's Arm-of-the-State Analysis Properly Implemented Definitive Guidance from this Court.

PHEAA contends that this Court has failed to give adequate arm-of-the-state guidance to the lower courts. Not so. The Fourth Circuit, as other circuits, conforms to this Court's guidance in *Hess* and explicitly tested its record-based conclusion against the twin pillars of Eleventh Amendment immunity this Court has delineated. The bulk of the Fourth Circuit's interlocutory opinion is devoted to analyzing the factual record relating to the risk of draining the Pennsylvania treasury or offending Pennsylvania's

sovereign dignity and demonstrates convincingly that neither risk arises in this case.

The Fourth Circuit's four-factor test is entirely consistent with this Court's guidance in *Hess*, which is cited throughout the opinion. In *Hess*, considering whether a judgment against the Port Authority Trans-Hudson Corp. ("PATH") would affect the state treasuries of the compacting states, this Court looked first to potential state *legal* liability and found it precluded by the relevant state statutes. 513 U.S. at 37 ("Debts and other obligations of the Port Authority are not liabilities of the two founding states . . . ."), 38 ("A judgment against PATH . . . would not be enforceable against either New York or New Jersey."), 46. The Fourth Circuit found it equally clear that a judgment against PHEAA would not be enforceable against Pennsylvania. App.19; *id.* at 84 (citing 24 P.S. § 5104(3)).

After finding that no legal exposure existed, *Hess* also considered whether there might be functional liability and explained the parameters of that doctrine. The Court noted with approval the D.C. Circuit's conclusion that where the state has an obligation to sustain an agency and 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." *Hess*, 513 U.S. at 50 (quoting *Morris v. Metro. Wash. Transit Auth.*, 781 F.2d 218, 227 (D.C. Cir. 1986)). In language equally applicable to PHEAA, the Court held that this standard was not met "where the agency is structured, as the Port Authority is, to be self-sustaining." *Hess*,

513 U.S. at 50. The Court specifically rejected the proposition—also argued by PHEAA here—that a possible reduction in PATH surplus contributions to the state owners could show functional liability because "[t]he proper focus is not on the use of profits or surplus, but rather is on losses and debts." *Id.* at 51.

The Fourth Circuit's analysis of functional liability directly tracked (and specifically referred to) this Court's *Hess* decision. Like PATH, PHEAA is self-sustaining and for decades has not relied upon funding from the state. App.43-44. It has hundreds of millions of dollars of annual revenues and net assets exceeding $1 billion. *Id.* at 44. Many of PHEAA's assets are held outside the state treasury. Those funds could be, and have been, used to fund prior settlements. *Id.* at 24-28.[5] Even funds held custodially by the state treasurer are controlled by PHEAA. *Id.* at 29-32. And PHEAA's argument that a judgment against it could diminish the funds it might contribute to the state is foreclosed by *Hess* and totally speculative.[6] PHEAA's functional liability argument is unfounded.

The Fourth Circuit's analysis of the tripartite "dignity" factors is also consistent with this Court's discussion in *Hess*. In addition to financial autonomy,

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[5] Contrary to the Petition's assertion that all PHEAA funds are in the Treasury, Pet. at 7, PHEAA has billions of dollars in cash-generating assets (namely, student loan receivables) in PHEAA's Delaware SPEs. App.14. Those funds were used to pay settlements. *Id.* at 25-26.

[6] PHEAA could elect to continue contributing voluntarily from its ongoing earnings stream or its $1 billion reserve. Moreover, PHEAA has *not* contributed funds every year.

Hess assessed the investment of sovereign dignity by considering, among other facts, appointment of officers, retention of veto power by the state governors, formation as a "body corporate and politic," the functions of the agency and whether they are of the type traditionally performed by the state, and treatment under state law and state courts. 513 U.S. at 44-47. The Court noted that the indicators did not all point in the same direction. *Id.* at 44. Some, such as the ability of the governors to veto actions, the fact that all commissioners were appointed by the states, and the fact that "State courts . . . repeatedly have typed the Port Authority an agency of the States rather than a municipal unit or local district," pointed toward an arm-of-the-state finding. *Id.* at 30. Others, however, such as PATH's financial independence, pointed the other way and were determinative.

The Fourth Circuit's analysis here looked to the same evidence considered in *Hess*. PHEAA's demonstrated financial independence was given significant but not determinative weight. App.44.[7] PHEAA's corporate legal personality and its authority to sue and be sued, enter into contracts, and purchase and sell property on its own were given weight. *Id.* at 46. The Court also took into account evidence that neither the Governor nor the Legislature controlled PHEAA, as well as PHEAA's own representations that it operated independently. *Id.* at 43-48. The Court further noted that the Governor had only limited veto

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[7] Pursuant to this Court's post-*Hess* decision in *Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 765 (2002), the treasury factor is no longer given primary weight. The Fourth Circuit followed this directive. App.81 n.4.

power (over bond issuances) and, unlike true state agencies, PHEAA controlled its own budget. *Id.* at 46. The Court evaluated various other statutory controls, and concluded that they resulted in only limited state oversight. *Id.* at 48-54. The Court considered PHEAA's administrative services and voluntary contributions to the state but noted that the majority of PHEAA's revenues and profits came from out-of-state operations not traditionally performed by a state. *Id.* at 13, 55-58; *accord United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 719 (10th Cir. 2006) (no arm-of-the-state status where, *inter alia*, entity "earn[ed] the bulk of its revenue" from its "nationwide activity as a commercial laboratory").[8] Finally, the Court credited Pennsylvania's treatment of PHEAA, which generally deemed PHEAA a state agency, but concluded that other facts (such as a grossly disproportionate management pay scale) pointed in the other direction. App.59.

Thus, as in *Hess*, the Fourth Circuit assessed the relevant facts and weighed them carefully against the "solvency and dignity" interests that "underpin the Eleventh Amendment." 513 U.S. at 52. Finding an

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[8] PHEAA claims that it is a "statewide" entity and thus more likely to be an arm of the state than an entity that addresses only local concerns. *See, e.g.,* Pet. at 12-13. But PHEAA indisputably is a *national* entity. App.40 ("PHEAA is engaged in nationwide, commercial financial-aid activities that bring in hundreds of millions of dollars in net revenues every year."). Likewise, PHEAA's attempt to analogize itself to an entity with an occasional "out-of-state trade mission or university athletic event," (Pet. at 34), highlights the weakness of PHEAA's position. *Most* of PHEAA's revenues and earnings are from out of state. App.13, 55-58.

entity that has been self-funded for decades, that holds billions in assets in out-of-state SPEs, that operates a nationwide commercial business with only very limited state oversight, and that does so under trade names that are intended to and do conceal any affiliation with the state, the Court readily concluded that neither a state solvency nor a dignity interest would support a finding that PHEAA was an arm of the state. App.59-62.

Because it essentially forecloses PHEAA's "lack of guidance" argument, PHEAA attempts to dismiss *Hess* as an irrelevant "Compact Clause" case. *See* Pet. at 25-28. But the circuits have rejected this position and, as the Fourth Circuit did here, consistently have looked to *Hess* in non-Compact Clause cases.

For example, in *Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. and the Caribbean Cardiovascular Ctr., Inc.*, 322 F.3d 56 (1st Cir. 2003), the First Circuit noted that the arm-of-the-state doctrine arises in three contexts—political subdivisions, Compact Clause entities, and special purpose public corporations—and that the "analytical doctrine has moved freely amongst these three categories, applying common principles." *Id.* at 61. The court concluded that the "analysis of *Hess* is not limited to Compact Clause entities" because "*Hess* is founded on the twin reasons underlying the Eleventh Amendment, reasons common to all categories of cases." *Id.* at 66. Other circuits have reached the same conclusion. *See, e.g.*, *Mancuso v. N.Y. State Thruway Auth.*, 86 F.3d 289, 293 (2d Cir. 1996). Thus,

notwithstanding PHEAA's protestations, *Hess* controls analysis of arm-of-the-state issues.[9]

B. There Is No Outcome-Determinative Circuit Conflict.

PHEAA mischaracterizes circuit case law in an attempt to manufacture a non-existent circuit split. In focusing on how common factors are described and enumerated, PHEAA elevates form over substance and exaggerates inconsequential differences. And most importantly, PHEAA ignores the fact that the Third Circuit—*i.e.*, PHEAA's *home circuit*—recently held that Commonwealth law provisions do not prove that PHEAA is an arm of the state.

The Fourth Circuit's four-factor arm-of-the-state test simply elaborates on *Hess*'s "twin pillars" of sovereign immunity. The *Oberg III* panel analyzed the factors as follows:

- First, it considered "whether any judgment against [PHEAA] . . . will be paid by the State." App.4. In applying this factor, the Court analyzed both "potential legal liability" and "functional liability." *Id.* at 4-5.

- Second, it assessed "the degree of autonomy exercised by [PHEAA]," including "who appoints the entity's directors or officers, who funds the entity, and whether the State retains a veto over

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[9] As *Fresenius* notes, *Hess* also concluded that Compact Clause entities were subject to a separate presumption against Eleventh Amendment immunity, much as, under *Chandler*, incorporated entities are presumed to be FCA persons. 322 F.3d at 66.

the entity's actions." *Id.* at 4. Under this factor, the Fourth Circuit also considered whether PHEAA has the ability to contract, sue and be sued, and purchase and sell property, as well as whether it is represented in legal matters by the state attorney general. *Id.* at 42.

- Third, it considered "whether [PHEAA] is involved with state concerns as distinct from non-state concerns, including local concerns." *Id.* at 4. "Non-state concerns" also encompass out-of-state operations. *Id.* at 54.

- Fourth, it looked to "how [PHEAA] is treated under state law," and in particular, whether PHEAA's "relationship with the State is sufficiently close to make [it] an arm of the State." *Id.* at 4. It explained that whether an entity is an arm of the state is ultimately a question of federal law, but that in answering that question, the court must analyze state law that defines the agency's character. *Id.* at 5-6. The court considered the relevant state statutes, regulations, and constitutional provisions which characterize PHEAA, and the holdings of state courts on the question. *Id.* at 58-59.

After balancing these factors and determining that PHEAA was not an arm of the state, the Fourth Circuit then tested its conclusions directly under *Hess*'s twin pillars of Eleventh Amendment immunity. *See id.* at 59-62.

PHEAA attaches case-dispositive importance to the fact that other circuits articulate a different number of factors, arguing that PHEAA would be considered an

arm of the state elsewhere. But the number of factors used is a formalistic and superficial difference. Like the Fourth Circuit, every other circuit's arm-of-the-state test elaborates on *Hess*'s twin pillars. Even the Second Circuit's decision in *Mancuso*, 86 F.3d 289—which PHEAA cites for alleged confusion among the circuits—recognized that *Hess* was controlling. *Id.* ("Although *Hess* involved a bistate entity, we nevertheless believe that it is the proper starting place for our Eleventh Amendment inquiry."). Regardless of the number of factors articulated, the tests applied are not "substantially different"—they are, in fact, nearly identical.

For example, PHEAA contends that, under the First Circuit's two-prong test, PHEAA would be deemed an "arm of the state". But the First Circuit's arm-of-the-state framework, based on *Hess*, does not differ substantively from the Fourth Circuit's framework, and First Circuit precedent in fact supports the outcome here.

In the First Circuit, a court must first determine "if 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." *United States v. Univ. of Mass., Worcester*, 812 F.3d 35, 39 (1st Cir. 2016). If the structural analysis is inconclusive, "the court must proceed to the second stage and consider whether the state's treasury would be at risk in the event of an adverse judgment." *Id.*

In applying the first factor, the First Circuit considers the same characteristics of the entity as the Fourth Circuit. PHEAA fails to mention that the

"structural analysis" in the First Circuit "is not controlled by a mechanical checklist of pertinent factors" and "include[s] such things as the degree of state control over the entity, the way in which the entity is described and treated by its enabling legislation and other state statutes, how state courts have viewed the entity, the functions performed by the entity, and whether the entity is separately incorporated." *Id.* at 39-40. And regarding the treasury factor, the First Circuit, like the Fourth Circuit, focuses on legal liability, but also considers whether the State "indirectly assume[s] the obligation for the entity's debts by providing virtually all of the funds needed for [its] operation." *Irizarry-Mora v. Univ. of P.R.*, 647 F.3d 9, 17 (1st Cir. 2011) (internal quotation omitted).

PHEAA also fails to mention that the First Circuit's two-step framework is merely an "updated and clarified" articulation of the First Circuit's previous multifactor test. *See id.* at 12. Under that test, the First Circuit, like the Fourth, considered:

> (1) whether the agency has the funding power to enable it to satisfy judgments without direct state participation or guarantees; (2) whether the agency's function is governmental or proprietary; (3) whether the agency is separately incorporated; (4) whether the state exerts control over the agency, and if so, to what extent; (5) whether the agency has the power to sue, be sued, and enter contracts in its own name and right; (6) whether the agency's property is subject to state taxation; and

> (7) whether the state has immunized itself from responsibility for the agency's acts or omissions.

Metcalf & Eddy, Inc. v. P.R. Aqueduct & Sewer Auth., 991 F.2d 935, 939–40 (1st Cir. 1993). As the First Circuit explained:

> [W]e explicitly stated in [*Fresenius*] that the "reshaping" of our law did not represent an actual change in the substance of the analysis. We observed that *Hess* had "refined" the *Metcalf & Eddy* analysis, which we described as "consistent with *Hess*."

Irizarry-Mora, 647 F.3d at 12 (quoting *Fresenius*, 322 F.3d at 68). In other words, the number of factors analyzed did not change the fact that *Hess* ultimately governs in the First Circuit, as it does in the Fourth Circuit and elsewhere.

PHEAA's contention that the First Circuit affords "great deference to the State's characterization of an agency" is over-stated, if not misstated. In *Redondo Const. Corp. v. P.R. Highway & Transp. Auth.*, 357 F.3d 124 (1st Cir. 2004)—which PHEAA does not mention—the First Circuit applied its two-factor test and deferred to a decision from the Puerto Rico Supreme Court concluding that the Puerto Rico Highway and Transportation Authority was *not* an arm of the state. *Id.* at 126-129. The court stated:

> The deference here afforded to the determination of state legislative intent by the state's highest court does not suggest that a similar deference would be merited in the converse scenario of a state court determination that an entity shares the state's immunity.

> *When the vindication of federal rights is at issue, a state court determination that the state intends an entity to share its immunity, while worthy of consideration among other indicators, does not substitute for an independent analysis under the federal standard to determine whether the entity should indeed benefit from the Eleventh Amendment's protection*.

Id. at 128 n.3 (citing *Hess*, 513 U.S. at 45) (emphasis added). Thus, PHEAA's assertion that the First Circuit would afford dispositive weight to the dated determinations of a handful of Pennsylvania state court decisions that have found PHEAA to be a "Commonwealth agency" under state law, *see* Pet. at 18-19, is refuted by First Circuit precedent.[10]

Moreover, the Fourth Circuit's *Oberg III* decision is consistent with the First Circuit's decision in *Pastrana-Torres v. Corporacion De P.R. Para La Difusión Pública*, 460 F.3d 124 (1st Cir. 2006). There, the court held that a public broadcasting company was not eligible for Eleventh Amendment immunity. Factors weighing in favor of the entity's arm-of-the-state status included that it was bound by Puerto Rico's Administrative Procedure Act, its Board of Directors was appointed by the Governor and confirmed by the Senate, and it was required to submit reports on

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[10] Notably, the "unbroken line of authority" describing PHEAA as a state agency that PHEAA principally relies upon, Pet. at 30, ends in 1983. Thus, these decisions did not consider the PHEAA that became financially independent in 1988, *see* App.13, let alone the current PHEAA, with its massive national operations and billions of dollars held in Delaware SPEs. *See* App.14.

certain subjects to the Governor and Legislature. *Id.* at 127. But factors weighing against arm-of-the-state status included that its enabling act described it as a juridical personality independent from government; its Board of Directors could approve or amend regulations as it deemed necessary; the state could not veto the Board's decisions; the entity could raise revenues through soliciting donations and charging user fees; and the entity had the power to sue and be sued, to enter into contracts, and to acquire and maintain property. *Id.* at 126-27. Notably, the First Circuit rejected the company's argument that it should have been deemed an arm of the state because a provision in its enabling act declared that it was an "instrumentality of the Commonwealth," explaining that this kind of language "has been deemed not dispositive on arm-of-the-state questions." *See id.* at 126 n.2.

PHEAA also contends that the Sixth Circuit applies a "substantially different" four-factor arm-of-the-state test that would accord PHEAA Eleventh Amendment immunity. *See* Pet. at 16, 20. But the basis on which PHEAA reaches this conclusion is difficult to ascertain. The Sixth Circuit test—which PHEAA recites in its Petition—is nearly identical to the Fourth Circuit test. Specifically, the Sixth Circuit considers:

> (1) the [s]tate's potential liability for a judgment against the entity; (2) the language by which 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) (*en banc*). And the Sixth Circuit derived this test directly from *Hess*. *Id.* at 358-59.

PHEAA contends that the Sixth Circuit differs from the Fourth because it examines the treasury factor by determining "potential liability"—*i.e.*, whether the state would support the entity in the event of a hypothetical judgment exceeding the entity's funds. Pet. at 20. But this argument mischaracterizes the analysis in both circuits. It is clear from *Ernst* that the Sixth Circuit looks to *legally compelled* state responsibility. 427 F.3d at 359 (citing *Regents*, 519 U.S. at 431). There, in reviewing the status of a state pension system, the court relied on a statute obligating the state to appropriate funds to make up any shortfall in funding the pension obligations. *Id.* at 360.

Citing *Regents*, the Fourth Circuit also analyzed potential *legal* liability. App.4-5, 19-20 (citing *Regents*, 519 U.S. at 431). However, unlike in *Ernst*, Pennsylvania statutes *expressly disclaim legal responsibility* for PHEAA's obligations and Pennsylvania has no obligation to fund PHEAA. App.19 n.6. The Fourth Circuit also found that Pennsylvania is not *functionally* liable for PHEAA because PHEAA is entirely self-funded, has over $1 billion in net assets, and presented no credible evidence that the State would step in or be obligated to support PHEAA financially. *Id.* at 23-42. To the contrary, as the Fourth Circuit points out, Pennsylvania has not supported PHEAA when it has suffered financial losses. *See id.* at 41 n.16.

Although *Ernst* did not expressly address functional liability, it suggested that the treasury factor does not turn merely on the State's volitional willingness to pay a judgment, but rather on the legal obligation to do so and whether the State funds the entity generally. *See Ernst*, 427 F.3d at 362 ("*Hess* frames the pertinent inquiry this way: 'If the expenditures of the enterprise exceed receipts, is the State in fact obligated to bear and pay the resulting indebtedness of the enterprise?'") (quoting *Hess*, 513 U.S. at 51). Moreover, subsequent Sixth Circuit case law makes clear that there is no conflict between the Sixth and Fourth Circuit on the treasury factor.

For example, in *Lowe v. Hamilton Cty. Dep't of Job & Family Servs.*, 610 F.3d 321, 326 (6th Cir. 2010), the Sixth Circuit considered a county health department. The defendant argued that the treasury factor favored arm-of-the-state status because the state would reimburse the defendant for any judgment. The Sixth Circuit disagreed, finding under *Regents* that the analytic question was legal liability, not ultimate financial responsibility. *Id.* at 326. The court further found that the treasury factor weighed against arm-of-the-state status because a reimbursement obligation was not established by the statutory scheme at issue. *Id.* at 328; *see also Kreipke v. Wayne State Univ.*, 807 F.3d 768, 776 (6th Cir. 2015) (summarizing the holding in *Ernst* as follows: "if a state's constitution and statutory law make the state responsible for funding an entity, that reality makes the state potentially responsible for a judgment against it"). The same is true here. Thus, PHEAA's hypothetical and counter-factual speculation that Pennsylvania would cover a judgment based on the self-serving declaration of its

Chairman would be insufficient in the Sixth Circuit just as it was insufficient in the Fourth.

PHEAA also contends that the Eleventh Circuit would have reached a result different from the Fourth Circuit. But the Eleventh Circuit's four-factor test also derives from *Hess* and is nearly identical to the Fourth Circuit's test. Like the Fourth Circuit, 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.), *cert. denied sub nom. Lesinski v. S. Fla. Water Mgmt. Dist.*, 134 S. Ct. 2312 (2014).

PHEAA claims, as it does with the First Circuit, that the Eleventh Circuit affords more deference to a state's own determination of an entity's arm-of-the-state status than does the Fourth Circuit. But it again mischaracterizes the case law to reach this conclusion. PHEAA relies on *Versiglio v. Bd. of Dental Exam'rs of Ala.*, 686 F.3d 1290 (11th Cir. 2012), in which the Eleventh Circuit first held that the defendant was not an arm of the state, but reversed its decision after rehearing because the Supreme Court of Alabama had subsequently determined that the entity was an arm of the state. *See id.* at 1291. The Eleventh Circuit thereafter clarified, however, that it does not defer to a state's characterization of the entity. *See, e.g.*, *Lightfoot v. Henry Cty. Sch. Dist.*, 771 F.3d 764, 770-71 (11th Cir. 2014) ("[I]t is federal law, not state law, that ultimately governs whether an entity is immune under the Eleventh Amendment. . . . State-law immunity

does not control our analysis[.]"). And in *Walker v. Jefferson Cty. Bd. of Educ.*, 771 F.3d 748, 754 (11th Cir. 2014), the court addressed *Versiglio* and expressly found that it did not collapse the entire arm-of-the-state inquiry into the single question of whether a state court grants state law immunity to the entity. *Id.* at 753-54. Rather, just as in the Fourth Circuit, a state's determination is only one factor within a four-part test. *See id.* at 754. Indeed, the Eleventh Circuit ultimately denied sovereign immunity in *Walker*, despite the fact that the entity had immunity under state law. *See id.* The Eleventh Circuit would not reach a result with respect to PHEAA different from the Fourth Circuit.

In view of the consistency of the precedent following *Hess*, it is not surprising that PHEAA's home circuit, the Third Circuit, recently refused to dismiss a case brought against PHEAA on Eleventh Amendment immunity grounds. The Third Circuit applies a three-factor test based on *Hess* that is substantially similar to the Fourth Circuit's test. The Third Circuit considers "(1) whether the money that would pay the judgment would come from the state, which entails consideration of whether payment will come from the state's treasury, whether the agency has the money to satisfy the judgment, and whether the sovereign has immunized itself from responsibility for the agency's debts; (2) the status of the agency under state law, including how state law treats the agency generally, whether the entity is separately incorporated, whether the agency can sue or be sued in its own right, and whether it is immune from state taxation; and (3) what degree of autonomy the agency has." *Lang*, 610 F. App'x at 160 (internal quotations and alterations omitted).

Applying these factors, the Third Circuit held, based on the allegations in the complaint and the Pennsylvania statutes, that PHEAA failed to establish that it was entitled to Eleventh Amendment immunity. *Id.* The first factor weighed against arm-of-the-state status because "the statutory scheme governing PHEAA" established that "no obligation of [PHEAA] shall be a debt of [Pennsylvania] and [PHEAA] shall have no power to pledge the credit or taxing power of [Pennsylvania] nor to make its debts payable out of any moneys except those of [PHEAA]," *id.* at 161 (quoting 24 P.S. § 5104(3)), and because "PHEAA's funds are kept in a segregated account under the PHEAA board's control," *id.* (citing 24 P.S. § 5105.10), and are "used at [PHEAA's] discretion to carry out its corporate purposes," *id.* (citing 24 P.S. § 5104(3)). Recognizing that it was a "close question," the court held that the third factor also weighed against arm-of-the-state status because "PHEAA allegedly uses no tax dollars to support its salaries or activities, and it is controlled by a relatively autonomous board of directors that has unfettered control over PHEAA funds kept in a segregated account within the state's Treasury;" "PHEAA may independently enter into contracts, sue and be sued in its own name, purchase and sell property, borrow money, earn profits from investments, and provide substantial bonuses to its executives;" and "PHEAA describes itself as more akin to a corporation than a state agency and states that it competes with loan servicing competitors nationwide." *Id.* at 162 (internal citations omitted). And while it found that the second factor weighed in favor of sovereign immunity because Pennsylvania law "appear[s]" to treat PHEAA as an arm of the state, *id.* at 161, the Third Circuit concluded: "Because the first and third

factors on this record do not weigh in favor of immunity, we are unable to conclude at this stage that PHEAA has established it is entitled to Eleventh Amendment immunity." *Id.* at 162.

In short, the Third Circuit agreed with the Fourth Circuit's *Oberg II* decision at the motion to dismiss stage. Thus, while PHEAA complains of the Fourth Circuit's supposed errors in analyzing and interpreting Pennsylvania law, PHEAA's home circuit interpreted that law in precisely the same manner. Because, like the Fourth Circuit, the Third Circuit requires "a fact-intensive review [of the factors] that calls for individualized determinations," *id.* at 160 (quotation omitted), it remanded for discovery. But as the Fourth Circuit's 72-page opinion in *Oberg III* makes clear, discovery will only confirm the Third Circuit's initial determination. Not just a federal court in Richmond disagreed with lawmakers in Harrisburg—so did the federal court in Philadelphia.

In sum, there is no circuit split justifying a grant of *certiorari* here. Balancing tests like the arm-of-the-state test established in *Hess* make outcomes fact driven and entity specific. But that does not mean that the test itself is in need of review.

C. There is No Error Warranting Exercise of this Court's Supervisory Power.

Ignoring this Court's admonition that "certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law," Rule 10(c), PHEAA argues at length that the Fourth Circuit's decision is "incorrect." Pet. at 28-37.

PHEAA attacks the Fourth Circuit's determination that Pennsylvania is not legally or functionally at risk for PHEAA's liabilities, claiming that "however hypothetical" a judgment exceeding PHEAA's vast resources might be—*i.e.*, a judgment exceeding all of PHEAA's $6 billion in assets, Pet. at 33-34—Pennsylvania "would have no choice but to appropriate funds to pay the judgment." *Id.* at 33. But the Fourth Circuit's determination that the statutory scheme and factual record demonstrate that Pennsylvania would have a choice is correct, and there is no basis for review.

This Court's functional liability decisions are based in reality, not implausible hypotheticals. *See Hess*, 513 U.S. at 51; *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 400-01 (1979) ("[S]ome agencies exercising state power have been permitted to invoke the [Eleventh] Amendment in order to protect the state treasury from liability that would have essentially the same practical consequences as a judgment against the State itself.") (footnote omitted; emphasis added). As this Court explained in *Regents*, the arm-of-the-state test requires a court only to consider "potential legal liability," 519 U.S. at 425, which is precisely what the Fourth Circuit, App.4-5—as well as the Sixth Circuit in *Ernst*, 427 F. 3d at 362—has done. In the absence of legal liability, as is the case with PHEAA, this Court made clear in *Hess* that the only question is whether there is any evidence demonstrating that a state would, nevertheless, necessarily reimburse the agency for any financial shortfall. *Hess*, 513 U.S. at 49-51. As the Fourth Circuit explained, the evidence revealed during discovery here demonstrates that Pennsylvania would *not* step in to compensate PHEAA for a hypothetical

financial shortfall. App.41 n.16. As such, the Fourth Circuit's decision is consistent with this Court's precedent.

PHEAA also challenges the Fourth Circuit's giving weight to PHEAA's predominant out-of-state commercial activity under trade names disguising its connection to the Commonwealth. App.56-57. But the Fourth Circuit was again correct in determining that making PHEAA federally accountable for out-of-state activities not conducted as Pennsylvania governmental functions could not threaten Pennsylvania's sovereign dignity.

PHEAA's principal contention is that federal courts assessing the arm-of-the-state issue should be bound by the state's characterization and judicial treatment of a state-owned entity. There is, however, no support for this sweeping proposition in this Court's cases or circuit precedent. In *Hess*, for example, this Court concluded that PATH could not claim Eleventh Amendment immunity even though "State courts . . . have repeatedly typed the Port Authority an agency of the States . . . ." 513 U.S. at 45. And the First Circuit, whose precedent PHEAA contends supports its position, has made clear that "a state court determination that the state intends an entity to share its immunity, while worthy of consideration among other indicators, does not substitute for an independent analysis under the federal standard to determine whether the entity should indeed benefit from the Eleventh Amendment's protection." *Redondo,* 357 F.3d at 128 n.3.

The Fourth Circuit carefully considered Pennsylvania's treatment of PHEAA as a

Commonwealth agency and found it outweighed by other indicators arising from *Hess* for federal law purposes. There is no reviewable error in its analysis. Indeed, this Court made clear just last Term that immunities that would shield state-created entities, including those termed an "agency of the state" and exercising sovereign regulatory functions, should be narrowly construed to safeguard fundamental national policies. *See N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1114. Where, as here, protection of the federal fisc is at issue, that analogous precedent is compelling. Indeed, permitting state fiat to determine arm-of-the-state status would permit states to freely enter commercial markets outside their borders through corporate entities they do not meaningfully supervise and exempt those entities from accountability under federal law. *Hess* makes clear that position is untenable.

II. THIS CASE IS NOT A GOOD VEHICLE FOR RECONSIDERING THE COURT'S ARM-OF-THE-STATE JURISPRUDENCE.

The ultimate issue here is whether PHEAA is a "person" under 31 U.S.C. § 3729 and thus accountable to the United States for the tens of millions in excess payments it fraudulently extracted from the U.S. Department of Education. Whether arm-of-the-state analysis is the correct means of resolving the "person" issue and how, even if applicable, arm-of-the-state principles should be applied under the FCA, is an issue addressed in *Oberg I* and precedent to reviewing the Fourth Circuit's specific analysis in *Oberg III*.

In *Stevens*, 529 U.S. at 781-82, 787, this Court held that the touchstone for the "person" determination was

the understanding of that word in the 1863 Congress that enacted the FCA. On that basis, the Court determined that states and their constituent executive agencies were presumed not to be "persons," while corporate entities, regardless of state ownership, were presumed to be "persons." *Id.* at 780-82; *see also Chandler*, 538 U.S. at 1243-44. There can be no doubt that PHEAA is a corporation and, more importantly, that the 1863 Congress would have understood it to be a "person" under this Court's then applicable jurisprudence. *See Bank of the U.S. v. Planters Bank of Ga.*, 22 U.S. 904, 907 (1824) ("[W]hen a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen."); *cf. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (recognizing pre-existing limitations on claims that state-owned commercial enterprises should be treated as states). Given the *Stevens* "person" analysis, the Court would need to determine whether PHEAA's claim of immunity should have been denied summarily without arm-of-the-state evaluation. At a minimum, the Court would have to consider how the presumption of "person" status applicable to PHEAA under *Stevens* and *Chandler* can be overcome.

These issues, not addressed in the Petition or in *Oberg III*, would precede adjudication of the question raised in the Petition and should obviate the arm-of-the-state issue on which PHEAA claims additional guidance is needed. Even if this Court believed that further elaboration of *Hess* for Eleventh Amendment purposes might be worthwhile, this FCA case is far less than an optimum vehicle for considering it.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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