

Nos. 15-1044, 15-1045

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**In the Supreme Court of the United States**

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PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY,  
*Petitioner,*

v.

LEE PELE,  
*Respondent.*

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PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY,  
*Petitioner,*

v.

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

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

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**BRIEF OF THE ASSOCIATION OF INDEPENDENT  
COLLEGES AND UNIVERSITIES OF PENNSYLVANIA  
AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONS  
FOR WRITS OF CERTIORARI**

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## **QUESTION PRESENTED**

With respect to each of these cases, the question presented is the same:

Whether the Pennsylvania Higher Education Assistance Agency, an agency of state government created by state statute and constitutional amendment, located in the state capital of Harrisburg, and treated by the Pennsylvania General Assembly and the courts of Pennsylvania as an arm of the state, is an arm of Pennsylvania for purposes of federal law.

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## INTEREST OF THE AMICUS CURIAE<sup>1</sup>

The Association of Independent Colleges and Universities of Pennsylvania (“AICUP”) serves as the unified voice of private nonprofit higher education in the Commonwealth of Pennsylvania. Established in 1995 following the merger of two predecessor organizations founded in the 1950s and ’60s, AICUP is a non-profit, tax exempt educational and charitable organization that educates policymakers, courts, media representatives, and civic and corporate leaders on higher education issues affecting Pennsylvania’s independent higher education sector. Its principal mission is to secure government and philanthropic support for the benefit of hundreds of thousands of students who study at those institutions and the 80,000 Pennsylvanians who are employed in the independent higher education sector. AICUP works to create partnerships among its member institutions to enhance their programs and reduce their costs.

More than eighty colleges and universities are AICUP members. Among them are Pennsylvania’s

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<sup>1</sup> 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*’s 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.

leading independent research universities, including the University of Pennsylvania and Lehigh, Bucknell, and Drexel Universities; many of the nation's leading liberal arts colleges, including Swarthmore, Haverford, Bryn Mawr, and Franklin & Marshall Colleges; and more than seventy other general, scientific, technical, religious, and specialized institutions. Pennsylvania's independent higher education sector is enormous, contributing \$18 billion annually to the economy of the Commonwealth and paying \$6 billion annually in salaries and wages to employees. Association of Independent Colleges and Universities of Pennsylvania, MAKING THE CASE FOR INDEPENDENT HIGHER EDUCATION (2016), [www.aicup.org/Newsroom//Publications](http://www.aicup.org/Newsroom//Publications).

Private education in the United States is largely tuition-driven, and Pennsylvania's independent colleges and universities are no exception. The average annual tuition for AICUP member institutions is more than \$32,000. For the typical student at an independent college or university in Pennsylvania, tuition charges are significantly offset by financial aid, which comes from many sources: federal financial assistance, institutional grants and scholarships, and—most importantly for purposes of the cases now before this Court—state aid programs, including financial assistance programs administered by petitioner Pennsylvania Higher Education Assistance Agency. For many of AICUP's member institutions, affordability is critical to their ability to attract and retain highly qualified students; affordability, in turn, depends on the continued

vitality of aid programs from PHEAA and other sources.

PHEAA has petitioned this court to review two lower court decisions that threaten dire consequences for the state aid programs that benefit AICUP institutional members. The protection from suit to which PHEAA is entitled as an arm of the Commonwealth of Pennsylvania is vital to the financial stability of higher education in Pennsylvania, one of the Commonwealth's most important economic engines. AICUP submits this brief in order to draw the Court's attention to the important link between PHEAA's financial strength and the affordability of higher education in Pennsylvania. It is precisely because of that link that the principle of protection from suit at issue in these cases—either by virtue of the absence of “personhood” for purposes of the applicability of the False Claims Act in *Oberg* or Eleventh Amendment immunity in *Pele*—is so important to AICUP, its members, and the Commonwealth citizens those members serve.

### **SUMMARY OF ARGUMENT**

The questions presented in these two petitions are closely linked, if not identical. The question in *Oberg* is whether the Pennsylvania Higher Education Assistance Agency, a state agency created by act of the Pennsylvania General Assembly, is an arm of the state and therefore not a “person” subject to suit under the limiting definitional language in the False Claims Act. The question in *Pele* is whether PHEAA



is an arm of the state and therefore entitled to immunity from suit under the Eleventh Amendment. AICUP believes, for the reasons explained at length in PHEAA's petitions, that the answer to both questions is yes and the actions against PHEAA should be dismissed. This brief considers why, as a matter of constitutional law and public policy, the arm-of-the-state doctrine and the doctrine of Eleventh Amendment immunity exist and why the decision of the court below in these cases, if allowed to stand, would be contrary to the public interest and devastating to the higher education community in Pennsylvania and, by extension, many other states.

In two conjoined strands of jurisprudence that are virtually coincident in scope, this Court has consistently declared that non-consenting states are immune from liability for money judgments either because they do not qualify as "persons" under the meaning of that term in the False Claims Act or because they enjoy Eleventh Amendment immunity. One powerful reason is to protect public coffers against claims for money damages. As succinctly explained by Professor Ernest Young:

*Immunity serves the public interest by providing public officials with breathing space in which to adjust the government's financial obligations to private individuals while considering competing demands on the public fisc. ... [W]hat is at stake is not simply some amorphous "dignity" interest but the ability of the state to provide public education, maintain state highways, and operate state prisons.*

Ernest A. Young, *Its Hour Come Round At Last? State Sovereign Immunity and the Great State Debt Crisis of the Early Twenty-First Century*, 35 HARV. J. L. & PUB. POL'Y 593, 620 (2012) (emphasis added) (cited in this brief as “Young, *State Sovereign Immunity*”).

The judgments of the court below, if allowed to stand, threaten lasting damage to the Commonwealth of Pennsylvania’s ability to preserve the affordability of college and university attendance. Pennsylvania statutory law declares as public policy the goal of “improv[ing] the higher educational opportunities of persons who are residents of [Pennsylvania] and who are attending approved institutions of higher education, in this State or elsewhere, *by assisting them in meeting their expenses of higher education.*” 24 P.S. § 5102 (emphasis supplied). Were Pennsylvania to be exposed to the potentially ruinous impact of absorbing more than a quarter of a *billion* dollars in court-awarded damages, as the respondents in these cases seek, the effects would be felt immediately and directly by the Commonwealth’s colleges and universities, public and private, in the form of compromised PHEAA grantmaking and the potential scaling back of targeted PHEAA programs designed to open college doors for some of the Commonwealth’s most economically challenged students. It is precisely to protect against such threats to the public fisc that this Court, over many decades, has defended the rights of states and their duly constituted “arms” to be free of the consequences of suits for money damages.

Because the decisions of the court below pose threats to critical public policy goals established by the Pennsylvania General Assembly, AICUP urges the Court to hear PHEAA's appeals from those decisions.

## ARGUMENT

### **1. Protecting State Government from Exposure for Money Judgments—Whether By Invoking the “Personhood” Principle Under the False Claims Act or By Asserting Immunity Under the Eleventh Amendment—Serves the Crucial Public Policy of Protecting the Public Fisc.**

Under the Federal False Claims Act (“FCA”), a private person may bring a civil action “in the name of the [Federal] Government” against “[a]ny person” who knowingly makes a false record or statement under delineated circumstances to the Federal Government. 31 U.S.C. §§ 3729(a), 3730(b). The statute does not define the term “person.”

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), this Court applied the “longstanding interpretive presumption that ‘person’ does not include the sovereign” and held that states are not subject to liability in actions brought by private parties under the FCA. 529 U.S. at 780, 787-88. In its analysis, the Court emphasized the “virtual coincidence of scope” between the question of “whether States can be sued” under the

FCA and the question of “whether unconsenting States can be sued” in the Eleventh Amendment context. *Id.* at 779–80. See *Kreipke v. Wayne State Univ.*, 807 F. 3d 768, 775 (6th Cir. 2015) (“the scope of the inquiry into whether an entity is a ‘person’ under the FCA is virtually identical to the sovereign immunity inquiry under the Eleventh Amendment”). Other decisions prior and subsequent to *Stevens* establish that the Eleventh Amendment to the United States Constitution bars an action for money damages by a private individual against an “arm of the state.” *Regents of the Univ. of California v. Doe*, 519 U.S. 425, 429 (1997); *Northern Ins. Co. of New York v. Chatham County, Georgia*, 547 U.S. 189, 193 (2006).

The Court has offered two rationales for its state immunity jurisprudence. First, protecting states against money damages has been characterized as a “fundamental postulate[ ]” of our constitutional order. *Alden v. Maine*, 527 U.S. 712, 729 (1999). As the Court observed in *Alden*, it was “well established in English law” at the time the Constitution was ratified that “the Crown could not be sued without consent in its own courts,” and American courts adopted that construct from English political theory. *Id.* at 715. Second, allowing the states to be sued by individuals in a court of law does not comport with the “dignity” and “respect” owed them as sovereign entities in our dual-sovereignty system of government. *Idaho v. Coeur D’Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997); see also *Alden*, *supra*, 527 U.S. at 713. Underlying the Court’s reasoning is a coherent and compelling policy consideration:

“Political decisions, such as those respecting the disbursement of funds from the state treasury, must remain in the hands of the politically accountable branches of government and out of the hands of the judiciary.” Marc D. Falkoff, *Abrogating State Sovereign Immunity in Legislative Courts*, 101 COLUM. L. REV. 853, 855 (2001).

State immunity, whether compelled by the personhood limitation in the FCA or the immunity guarantee in the Eleventh Amendment, serves the vital public policy of protecting the public fisc against the potentially ruinous consequences of money judgments against the state:

Sovereign immunity has survived in this country not out of nostalgia for merry olde England, but rather because it serves practical public values. ... When a private plaintiff recovers a large damage award against a state government, the money inevitably comes out of funds that otherwise would be available for public use. It is one thing to compensate a plaintiff for grievous injuries; it is quite another to take money from the ... education budget to do so. Unsurprisingly, the ebb and flow of immunity doctrine has tended to follow practical necessity; the more dire the financial straits that government confronts, the more that zero-sum realities compel protection of the state's coffers.

Young, *State Sovereign Immunity* at 597.

**2. PHEAA’s Mission is to Foster Higher Education Opportunities for the Citizens of Pennsylvania by Making College and University Attendance More Affordable.**

Created in 1963 by the Pennsylvania General Assembly, PHEAA’s mission, as articulated in its enabling legislation, is “to improve the higher educational opportunities of persons who are residents of [Pennsylvania] and who are attending approved institutions of higher education, in this State or elsewhere, *by assisting them in meeting their expenses of higher education.*” 24 P.S. § 5102 (emphasis added). Like analogous tuition assistance agencies in many other states, PHEAA makes higher education more affordable by providing student financial aid services through a portfolio of scholarship and loan programs designed to foster affordable access to higher education for Pennsylvania citizens. PHEAA serves students through loan guaranty programs, loan servicing, financial aid processing, outreach, and other student aid programs, and also contributes substantial amounts to financial aid programs in Pennsylvania. PHEAA’s mission has never been more critical than it is now, as student debt levels reach crisis proportions and federal and state appropriations in support of higher education are reduced. *See generally* Jonathan D. Glater, *Student Debt and Higher Education Risk*, 103 Cal. L. Rev. 1561, 1571-79 (2015); Daniela Kraiem, *The Cost of Opportunity: Student Debt and Social Mobility*, 48 Suffolk U. L. Rev. 689, 696-98 (2015).

PHEAA administers the Pennsylvania State Grant Program, the Commonwealth's principal publicly supported postsecondary student aid program. For the current fiscal year, Pennsylvania appropriated \$305 million in taxpayer funds to PHEAA to support tuition grants under the Pennsylvania State Grant Program. PHEAA administers those grants, which benefit 145,000 tuition-paying recipients, through its offices in Harrisburg, the Commonwealth's capital city. PHEAA contributes tens of millions of dollars each year—\$91 million in the last fiscal year—to supplement state-appropriated amounts. Almost half—44 percent—of PHEAA's grants under the State Grant Program are awarded to students at Pennsylvania's private colleges and universities. Pa. Higher Education Assistance Agency, *2015 Student Aid Handbook for Legislators*, [www.pheaa.org/about/pdf/handbook-legislators.pdf](http://www.pheaa.org/about/pdf/handbook-legislators.pdf).

In partnership with the Pennsylvania Department of Education and other state agencies, PHEAA also administers targeted, state-supported financial aid programs that sustain the Commonwealth's historically black institutions (Lincoln University and Cheyney State University); allocate state-appropriated funds to provide services for economically and educationally disadvantaged undergraduate students; provide critical financial assistance directly to higher education institutions to assist them in capturing federal funds requiring a state or local match; and provide state-funded formula grants to AICUP's members—independent, nonprofit colleges and universities—to help them

maintain enrollment levels and stabilize their educational costs. *Id.* PHEAA plays an especially important role in providing financial support to low- and moderate-income students, opening the door to college attendance for students who might not be able to matriculate without PHEAA grants—a vulnerable population that would be especially threatened were PHEAA resources to be diminished or diverted because of an adverse court judgment in these proceedings.

**3. The Decision of the Court Below in *Oberg III* Endangers PHEAA’s Ability to Promote College and University Affordability and Threatens Extraordinary Harm to Pennsylvania Students, Pennsylvania’s Economy, and the Higher Education Sector in Pennsylvania.**

In *United States ex rel. Oberg v. Pennsylvania Higher Ed. Assistance Agency*, 804 F. 3d 646 (4th Cir. 2015) (*Oberg III*), *pet. for cert. filed* Feb. 16, 2016, the Fourth Circuit held that PHEAA is a “person” susceptible to suit for money damages under the FCA and remanded the case for further discovery and trial on the merits of relator’s claim for money damages. In his complaint, the relator alleges that, for a four-year period commencing in 2002 and ending in 2006, PHEAA “fraudulently claimed hundreds of millions of dollars in federal student-loan interest-subsidy payments to which [it was] not entitled.” *See Oberg III*, 804 F. 3d at 650. The relator suggests that, were judgment to be rendered against PHEAA on the



merits of his claims, PHEAA could be liable for as much as \$276 million—more than a quarter of a *billion* dollars—in money damages.<sup>2</sup>

At any time in the history of the Commonwealth of Pennsylvania, such a financial liability would be onerous in the extreme. At this particular moment, it would be ruinous.

PHEAA programs are an essential component of the Commonwealth's legislative and public policy strategy for preserving the affordability of higher education for Pennsylvania residents. A judgment of substantial dimension against PHEAA would severely impair, if not destroy, PHEAA's ability to subsidize college costs for hundreds of thousands of Pennsylvania residents. If the Commonwealth were not to appropriate additional funds in a like amount to PHEAA, an adverse judgment would imperil the ability of all Pennsylvania colleges and universities—private institutions most acutely—to maintain current levels of enrollment and could have catastrophic budgetary consequences for some of the smaller, less well endowed private institutions in the Commonwealth. Those institutions would face the double bind of either raising tuition to stanch the gap created by a reduction in PHEAA funding or making

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<sup>2</sup> “Petitioner has alleged that PHEAA defrauded the federal government out of \$92 million. Trebled pursuant to the FCA, this would result in \$276 million in damages owed to the United States Government, plus penalties and attorneys’ fees for Petitioner’s counsel. See 31 U.S.C. §§ 3729-30.” *Petition for a Writ of Mandamus* 19 in *Oberg III* (December 31, 2015).

draconian cuts to their operating budgets that would discourage student matriculation.

It is precisely to protect the interests of Commonwealth colleges, universities and tuition-paying students against this kind of financial uncertainty that the FCA limits exposure to “persons” and arms of the state are excluded from the definition of personhood.

Never before in the history of this country has public concern over the cost of higher education been as acute as it is today; and never have the pressures operating on the higher education sector to contain costs been greater. Those pressures arise, in part, from steady reductions in federal and state financial support for higher education. Since 2012, the American Institutes for Research, a respected Washington policy research organization, has operated The Delta Cost Project, a research study on rising college costs and measures for promoting affordability. The project is operated in conjunction with the United States Department of Education’s National Center for Education Statistics. Three years ago the project prepared a useful report titled “Rising Tuition and Diminishing State Funding: An Overview.” From that report:

- Over the last decade, tuition at public four-year institutions has risen 70 percent faster than the cost of living; at private institutions, tuition has risen 35 percent faster than that same benchmark;

- Between 2008 and 2013, 48 of the nation's fifty states (all but North Dakota and Wyoming) reduced per-student spending on higher education;
- Postsecondary institutions have primarily raised tuition to make up for losses of support from state and federal sources, and not to fund new programs.

[<http://www.deltacostproject.org/sites/default/files/products/Delta%20Cost%20Collective%20Bargaining%20Presentation.pdf>.]

Four years ago, the president of one of AICUP's member institutions—Dr. Esther L. Barazzone of Chatham University in Pittsburgh—contributed an essay on college affordability to a report published in THE PITTSBURGH QUARTERLY. Dr. Barazzone wrote:

Access and affordability are among the greatest challenges facing higher education today. ... Higher education institutions are working to make high-quality education accessible and affordable through online classes, cost cutting, and the generous provision of student scholarships that come from our already strained resources. However, it grows ever more challenging to keep costs affordable for students, who are often left to shoulder the burden, while continuing to maintain our high standards of quality.

[E. L. Barazzone, *A Crisis in Higher Education*, PITTSBURGH QUARTERLY (Fall 2012), <http://pittsburgh>

[quarterly.com/index.php/Education/a-crisis-in-higher-education.html](http://quarterly.com/index.php/Education/a-crisis-in-higher-education.html).]

There could not be a more challenging time than now for Pennsylvania colleges and universities to face the specter of diminished assistance from the Commonwealth's principal source of institutional financial assistance and supplemental state grant funding for Pennsylvania students. It was precisely to protect against such threats to the public fisc that this Court, over many decades, affirmed the rights of states and their duly constituted "arms" to be protected against suits for money damages. To repeat the point: "the more dire the financial straits that government confronts, the more that zero-sum realities compel protection of the state's coffers" through protection against money-damage liability on the part of the state and its arms. Young, *State Sovereign Immunity* at 597.

## CONCLUSION

Because PHEAA is an agency of Pennsylvania state government, and because AICUP serves Pennsylvania's higher education community, this brief is perforce Pennsylvania-centric. These petitions nevertheless pose issues of national significance. Many states have by statute created student financial assistance agencies to support higher education through financial aid programs for state residents. While each state configures its agency differently, all serve the same function of promoting higher education by making college more affordable. As state support for higher education

dwindles and as every state worries about keeping the cost of college manageable, those states all have an interest in knowing with certainty and clarity whether their state loan guaranty agencies are protected from liability under the FCA and other federal laws.

AICUP supports PHEAA's petitions for writ of certiorari. The decisions of the court below implicate one of the most substantial public policy issues of our time: the barriers to higher education, and hence to the competitive position of the American workforce, arising from the increasing cost of college attendance and the decline in state and federal appropriations in support of higher education. AICUP respectfully urges the Court to grant the petitions for writs of certiorari.

Respectfully submitted,

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