

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 TIMOTHY REESE, PENNSYLVANIA STATE
TREASURER, AS *AMICUS CURIAE* IN SUPPORT
OF THE PETITIONS FOR WRITS OF CERTIORARI**

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**INTEREST OF PENNSYLVANIA'S STATE
TREASURER TIMOTHY REESE
AS *AMICUS CURIAE***

Pennsylvania Treasurer Timothy Reese submits this brief as *amicus curiae* to provide the Court with the perspective of the Commonwealth's chief financial official as it pertains to oversight of and control over Pennsylvania agency finances and the potential impact on the Commonwealth's General Fund from the loss of sovereign protections traditionally afforded to independent administrative state agencies.¹

Pennsylvania's Treasurer is constitutionally established and is elected by the voters of Pennsylvania. Pa. Const., Art. IV, §§ 1 and 18. The Treasurer and the Pennsylvania Treasury, the state agency he heads, exercise oversight authority over all state public funds, grants and other public money, including funds of the Petitioner, the Pennsylvania Higher Education Assistance Agency (PHEAA.) *See* 72 P.S. §§ 301-304. The Treasurer's oversight focuses on ensuring the proper and lawful disbursement of those funds, but it extends to the investment, and, broadly stated, the safeguarding of those public monies. That

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* has made a monetary contribution to its preparation or submission. Pursuant to this Court's Rule 37.2, counsel of record for petitioners and respondents were timely notified of intent to file this brief. Letters from the parties consenting to the filing of this brief are on file with the clerk.

authority and those responsibilities lead to the Treasurer's interest in this case.²

First, the Fourth Circuit has mischaracterized the Treasurer's oversight role as "purely ministerial," *i.e.*, as without substance or importance. App -31, -36.³ That mischaracterization was material to its conclusion that PHEAA was "an independent political subdivision" rather than a state agency. The Treasurer is well situated to address that description and place the proper materials and interpretation before the Court.

Second, the Treasurer has special expertise as to the predictable effects of the Fourth Circuit's decision on Pennsylvania state agencies. He has concomitant concerns that the decision may harm the financial health of the Commonwealth, imposing a real risk of overriding Pennsylvania's decisions as to those areas in which it waives its sovereign immunity and allows suit against it, and those in which it does not. If PHEAA, an entity that is indisputably a Commonwealth agency under state law, can be stripped of its sovereign protections, the Treasurer is concerned that other state entities may receive comparable treatment.

For these reasons, Pennsylvania Treasurer Timothy Reese submits this Brief as *Amicus Curiae* supporting grant of PHEAA's Petitions for Writs of Certiorari.

²The Treasury Department's Chief Counsel provided a Declaration that is part of the trial record in this matter.

³References in the form of "App-" refer to the Appendix submitted with the Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The Fourth Circuit's arm-of-the-state test and its application to PHEAA has led to an errant conclusion that poses a risk of serious harm to Pennsylvania's fiscal position. Central to that conclusion was the Court's characterization of the financial oversight of PHEAA conducted by the Treasurer and other state officials as "ministerial," as "operat[ing] predominantly at the administrative edges ... of PHEAA's authority." App-30, -52. That conclusion is erroneous.

The Treasurer's control of state funds extends from cradle to grave, from deposit to expenditure. The Treasurer holds monies of all state entities, including funds appropriated to PHEAA and earned from its operations. The Treasurer reviews for "legality and correctness" every payment that PHEAA, and other state agencies, seeks to make, and approves or disapproves requisitions as he independently determines. With certain limited exceptions, the Treasurer invests the idle funds of state agencies, including PHEAA.

The Treasurer's pre-expenditure audit is part of multiple limitations imposed on PHEAA's discretionary expenditure of funds. The legislature establishes the agency's powers and the purposes for which money may be spent; the Attorney General reviews most contracts for legality; and Pennsylvania's Auditor General conducts post-expenditure review. Together, these are substantial restrictions, designed to circumscribe and protect an agency's use of taxpayer funds. All state entities are subject to the same restrictions and enjoy the same limited degree of freedom, including entities

like the Revenue or Transportation Departments that all would agree are state entities.

Pennsylvania has established many commissions, boards, and agencies, PHEAA among them, that operate as “independent” entities, not subject to day-to-day Executive Branch oversight. Although almost every agency has some unique attributes, the structure and enabling statutes of these independent agencies are quite alike. Thus, the decision here as to PHEAA gives rise to the concern that the Fourth Circuit’s test and reasoning, especially if adopted by other courts, will expose the Commonwealth to significant financial risk beyond that posed by this case.

Finally, a substantial money judgment against PHEAA, as sought here, could affect the Commonwealth’s fiscal condition and funding decisions in several distinct ways. Payment of a judgment, from PHEAA funds, directly reduces the funding available for PHEAA’s operations and its various grant and scholarship programs. The Legislature must then determine whether to replenish those funds in whole or in part, or to reduce PHEAA funding and operations. Depending on the size of a judgment and legislative decisions about the appropriate responses to it, satisfying a judgment can lessen the extent to which the Commonwealth, through PHEAA, can further the public goal of fostering higher education among its citizens.

For these reasons, the Court should grant the Petitions for Writs of Certiorari in these two matters.

ARGUMENT

I. The Fourth Circuit Mischaracterized the State Treasurer's Financial Oversight Authority of PHEAA as a "Ministerial" and Insignificant Limitation on PHEAA's Autonomy

The second prong of the Fourth Circuit's four-part arm-of-the-state test focuses on the "degree of autonomy exercised by the entity." Central to the Court's conclusion that PHEAA is substantially autonomous was its characterization of the Treasurer's expenditure oversight authority as "purely ministerial." App -31, -36. That characterization is seriously amiss as to the Pennsylvania's Treasurer oversight and management of the Commonwealth's expenditures. Additionally, the Fourth Circuit ignored other aspects of financial control the Treasury, and the Commonwealth generally, exercises over PHEAA, as it does with all state agencies.

All public funds of the Commonwealth must be deposited into the custodial control of the State Treasurer. 72 P.S. § 301. This includes all PHEAA funds, both those appropriated to PHEAA and those earned by it from lending, loan service, loan guaranteeing and debt issuances. Treasury then "credits" those monies to the Commonwealth's General Fund or to one of numerous separate funds. 72 P.S. § 302; 24 P.S. § 1504(3). No agency may spend monies from any of those funds unless "a requisition therefor shall have been presented to or prepared by the State Treasurer." 72 P.S. §§ 306-07 and 1501; *see also* Pa Const., Art. III, § 24. When funds (other than funds of the state's retirement systems) are idle (having been

deposited to the Treasury but not yet approved by him for expenditure), they are invested under the Treasurer's control and at his direction. 72 P.S. § 301.1. As this short recitation reflects, the Treasurer's control of state monies extends from cradle to grave, from deposit to expenditure. It extends in the same manner to PHEAA as it does to agencies, such as the Departments of Transportation and Revenue, that all would agree are arms of the state. This A to Z control of an entity's funds is a hallmark of being a state agency.

Turning in more detail to the Treasurer's expenditure approval authority, the most significant point is that it only extends to the expenditure of state public funds and not to expenditures made by non-state agencies. 72 P.S. § 1501. The Pennsylvania Fiscal Code explicitly directs state "administrative departments," "independent administrative boards or commission," and "departments, boards or commissions" to prepare and submit all expenditure requisitions to the Treasury Department for approval. *Id.* The Treasurer does not hold within his custodial control the operating funds of non-state entities and therefore does not conduct pre-expenditure audits as to those funds. Non-state entities, ranging from regional transportation authorities to local borough council members, have their own auditing procedures and personnel, but the Treasurer is not involved. Having its expenditures pre-audited by the Treasury is another hallmark of a state entity.

The Fiscal Code further directs that the Treasurer not approve any requisition until after he has independently determined that the requisition is

“lawful and correct,” in accordance with general accepted auditing standards. 72 P.S. §§ 307 and 1502; *see also* Pa. Const., Art. III, § 24 (“No money shall be paid out of the treasury, except on appropriations made by law and on warrant issued by the proper officers....”). This involves an independent evaluation of the legality of each requisition and a determination of its correctness. Even court judgments or litigation settlements must be submitted to the Treasurer and cannot be paid without his approval.

This function, known as pre-expenditure auditing, is performed by an independently-elected officeholder, separate from the Governor, his Budget Secretary, the Attorney General and the General Assembly. It is part one of the Commonwealth’s two part auditing process; the state Auditor General, another independently-elected officeholder, exercises post-expenditure audit authority. 72 P.S. § 401. The Treasurer’s review is thus a critical component of a deliberate constitutional and statutory system of financial checks and balances, purposefully intended to impose limitations on the expenditure autonomy of all state agencies. As a state agency entrusted with substantial state funds, PHEAA’s expenditures are subject to both pre- and post-payment audits by the State Treasurer and the State Auditor General, respectively.⁴

⁴ The Pennsylvania Constitution reinforces the important of “independence” in this financial system of checks and balances by prohibiting the Treasurer from seeking the Office of Auditor General until four years after he served as State Treasurer. Pa. Const., Art. IV, § 18. This prevents the same person from both authorizing the disbursement of funds and auditing their expenditure.

As applied to PHEAA and other state agencies, the Treasurer's pre-expenditure oversight is both consequential and substantive. Pursuant to the state Fiscal Code, PHEAA must submit each invoice requesting the payment of public funds to Treasury's Bureau of Fiscal Review. The Bureau audits each requisition in accordance with generally accepted auditing standards, reviewing all related invoices, receipts, contracts and purchase orders. 72 P.S. § 1502. In so doing, Treasury accesses PHEAA's internal IT payment processing system to directly review the supporting documentation. Prior to its approval of an invoice, Treasury confirms both the authority for the payment (*e.g.*, a valid contract approved by the State Attorney General) and a match between the amount due on the invoice and the payment request. *Id.*

Importantly, Treasury's expenditure review also includes a determination that the expenditure is consistent with and authorized by PHEAA's statutory mission and purpose as well as the relevant legislative appropriation. Although PHEAA, like most state entities, is granted authority to set certain policies and make substantive decisions concerning the expenditure of funds appropriated to or earned by the agency, this authority is limited both by applicable statutes and the related principle that the legislature must set the basic standards and priorities. *See Blackwell v. State Ethics Commission*, 567 A.2d 630, 636 (Pa. 1989).

For example, PHEAA may only expend funds for purposes consistent with its statutory purpose, *see* 24 P.S. § 5102, and as authorized by its specifically conferred "powers and duties," as enumerated at 24

P.S. § 5104.⁵ PHEAA cannot spend appropriated funds or operating earnings for any purpose that is inconsistent with that legislative mission or language in an appropriation act or for which it otherwise lacks authority. Treasury ensures that all of PHEAA's expenditures satisfy those directives and rejects expenditures that he determines do not. PHEAA's only recourse in that event is to challenge the Treasurer's decision in state court.⁶

Underscoring the ultimate legislative control exercised over PHEAA's expenditures are two aspects of the legislative appropriation process. First, the Commonwealth's annual Appropriations Act appropriates hundreds of millions of dollars to PHEAA for its basic scholarship programs, including various

⁵ PHEAA's stated purpose is:

to improve the higher educational opportunities of persons who are residents of this State and who are attending approved institutions of higher education, in this State or elsewhere, by assisting them in meeting their expenses of higher education in accordance with the provisions of this act and by enabling the agency, lenders and postsecondary institutions to make loans available to students and parents for postsecondary education purposes.

24 P.S. § 5102.

⁶ This is not a hypothetical scenario. The Pennsylvania Treasury has rejected requests for the expenditure of public funds when it concludes the expenditure departs from the requesting agency's statutory mandate. *See, e.g.,* Press Release, *Pa. Treasury Dep't, Treasurer McCord Questions Legality of Payments to Private Manager for Lottery Expansion* (Dec. 12, 2012), available at <http://www.patreasury.gov/media/archive/2012/12-12-lotteryprivate-payments.html>.

grant and subsidy programs. Second, the General Assembly has the authority to transfer funds from PHEAA, including funds previously appropriated for PHEAA's student loan and grant programs, to the Commonwealth's general fund. That authority is quite real. In recent years, the legislature has transferred funds in 2008 (\$14.8 million combined from PHEAA's Medical Education Loan Program and Technology Scholarship Program); 2009 (\$6 million from PHEAA's Scholarship Restricted Revenue Account and smaller amounts from six other PHEAA Funds); 2011 (\$8.3 million from PHEAA's State Grants Restricted Revenue Account); and 2015 (\$10.5 million from PHEAA's Scitech and GI Bill Restricted Revenue Account).⁷ Indeed, as this Brief is filed, the Pennsylvania Legislature is debating how many million dollars of PHEAA-generated revenue to use for General Fund purposes as part of an effort to resolve a long-standing budget impasse.⁸

Having determined that a PHEAA requisition meets the applicable standards, the Treasury does not review the wisdom *per se* of a proposed expenditure, a point the Fourth Circuit thought important. App-30. But this limitation on the Treasurer's review is not unique to PHEAA but extends to Treasury's review of every

⁷ See Act of July 4, 2008, P.L. 1735, No. 38A, § 1912; Act of August 5, 2009, P.L. 607, No. 1A, § 1909; Act of June 30, 2011, P.L. 633, No. 1A, § 1909; and Act of December 29, 2015, P.L. __, No. 10, § 2113.

⁸ See Jan Murphy, Harrisburg Patriot News, March 18, 2016, *PHEAA plays role in balancing \$30 billion budget awaiting action by Wolf*, accessible at http://www.pennlive.com/politics/index.ssf/2016/03/states_student_aid_agency_inte.html#incart_river_index.

expenditure of every state agency, from road repairs to an invoice for educational instruction. Each department, agency, commission or board of state government has this same degree of spending autonomy and discretion, subject to and circumscribed by its enabling statute and the budgetary appropriation.

The Fourth Circuit seemed to think that PHEAA exercised authority more broadly than other state agencies. It does not. The Department of Transportation determines what road projects to fund; the Department of Environmental Protection develops its enforcement priorities with associated costs; and the Department of Community and Economic Development issues multi-million dollar grants for sewer and water systems. As to each of these expenditures, and the analogous expenditures of other state agencies, the Treasurer reviews for legality and correctness but does not second guess the agency's policy judgment that the expenditure is necessary or desirable.

The Fourth Circuit's apparent rule that an entity is autonomous if pre-expenditure oversight does not go to the wisdom of the expenditure would result in no entity attaining state agency status. That gross overbreadth marks the rule as one lacking logic and pertinence. The Fourth Circuit compounds this error and reveals the extent of its confusion as to oversight of PHEAA and other agencies, when it discounts Treasury's approval process on the basis that it "doesn't even commence until PHEAA has exercised its discretion to enter into a contract or otherwise take action that requires a payment to be made." App-30. The Court omits the central facts that: (1) PHEAA cannot enter

into a contract unless another independently-elected official – the Attorney General – has approved, *see* 71 P.S. § 732-204(f); and (2) no payment is “require[d] ... to be made” – or, more accurately, *can be* made – unless and until the Treasurer has approved. While the Treasurer’s role is itself substantial in limiting an agency’s autonomy, other state officials have authority that imposes other limitations on autonomy. These various constraints imposed by various agencies and branches of government must be viewed together, not in isolation.

Turning briefly to the Treasury’s investment authority and responsibilities, it is the Treasurer, not PHEAA, who manages the investment of “PHEAA funds,” placing them within the investment pool that contains all Commonwealth funds. The Treasurer makes the funds available to PHEAA and other agencies based on their liquidity needs. While Treasury is able to meet the expenditure needs of PHEAA under most circumstances, access to PHEAA funds is, at bottom, subject to the discretion of the Treasury, prevailing financial circumstances, and competing liquidity needs of other agencies. PHEAA does not possess unfettered access to “its funds,” a conclusion that strongly weighs against a finding of autonomy.

In sum, the Treasurer’s oversight of the disbursement of public funds is not, as the Fourth Circuit characterized it, “ministerial,” an “[un]complicated” act fairly compared to a perfunctory bookkeeping function. To the contrary, that function is central to the Commonwealth’s fulfillment of its obligation to its citizens that public monies be carefully

spent. The often stated dichotomy – will the money that pays a potential judgment come from the state treasury or from the agency’s funds? – leads to this as to PHEAA: the agency’s funds, wherever located, are under the control of the State Treasurer; cannot be paid out without his approval; and are subject to recapture by the Legislature at any time. In all meaningful ways, PHEAA’s fiscal autonomy is circumscribed by state law and the actions of officials acting under it.

II. The Fourth Circuit’s Arm-of-the-State Analysis Threatens the Sovereign Status of Other Commonwealth Agencies

The Fourth Circuit’s analysis of PHEAA’s autonomy from Commonwealth control raises serious concerns that other Commonwealth agencies that, like PHEAA, operate independently from the Executive Department *per se* will likewise be denied the state sovereign protection they hold under Pennsylvania law. Although almost every agency has some unique attributes, the structure and enabling statutes of these independent agencies, including PHEAA’s, share many similarities. Thus, the underlying decision here gives rise to the Treasurer’s concern that the Fourth Circuit’s test and reasoning, especially if adopted by other courts, will expose the Commonwealth to significant financial risk beyond that posed by this case in isolation.

Pennsylvania statute establishes many commissions, boards and agencies, conferring upon them independent management authority. Among them are: the Pennsylvania Game Commission, the Pennsylvania Fish and Boat Commission, the State

Civil Service Commission, the Pennsylvania Public Utility Commission, the Pennsylvania Securities Commission, the Historical and Museum Commission, the Milk Marketing Board, the Pennsylvania Liquor Control Board, the Pennsylvania Human Relations Commission, the Pennsylvania Labor Relations Board, the State Tax Equalization Board, the Pennsylvania Crime Commission, the State Ethics Commission, the Public School Employees' Retirement Board, the State Employees Retirement Board, the Department of the Auditor General, the Pennsylvania Gaming Control Board – and PHEAA and the State Treasury. *See* 4 Pa.C.S.A. § 1201; 24 Pa.C.S.A. § 8501; 71 Pa.C.S. § 5901; and 71 P.S. §§ 61(a), 732-102. The enabling statutes for these agencies, and others, routinely refer to them as “an *independent* agency.” As the agency listing reflects, these agencies perform core government tasks and provide essential government services, ranging from retirement benefit administration and alcoholic beverage regulation to managing tax policy and employee ethics to gaming licensing and oversight. They are all recognized as state agencies under Pennsylvania law.

Like PHEAA, the governance boards of these independent state agencies are almost universally and entirely composed of legislative and gubernatorial appointments; their annual program budgets are reviewed and funding appropriated by the General Assembly; they have only such powers as the legislature has granted them; they are subject to pre and post expenditure audit review by the Treasurer and the Auditor General; when they issue debt, the amount is legislative capped and issuance requires the Governor's approval; all appropriated funds and

earnings are deposited with the state Treasury (excepting the Retirement Funds); and all contracts valued over \$20,000 are reviewed and approved by the state Attorney General. Most significantly, as statutory creations, their continued existence – and PHEAA’s – is subject to the ongoing consent of the General Assembly.

The Fourth Circuit described these elements of state control as “operat[ing] predominantly at the administrative edges rather than at the discretionary heart of PHEAA’s authority.” App-52. That conclusion and the reasons for it are erroneous. Indeed, other courts, primarily within the Third Circuit (where most such litigation against Pennsylvania entities takes place) have found these same constraints sufficient, as meaningfully limiting the agency’s autonomy. For example, the District Court for the Eastern District of Pennsylvania, in *Heppler v. Pennsylvania Liquor Control Board*, 2011 WL 2881221 (E.D. Pa 2011), applied the Third Circuit’s three-part test in concluding that the Pennsylvania Liquor Control Board was an arm of the state.⁹ The district court found that “the fact that the PLCB’s membership is controlled by the executive and legislative branches of the Commonwealth weighs against a finding of autonomy. *Id* at *7.

Similar reasoning was applied by the Third Circuit when considering the sovereign status of the

⁹ As the Petitions demonstrate, there is wide variability among the circuits as to the applicable arm-of-the-state test. The Third Circuit’s test was announced in *Fitchik v. N.J. Transit Rail Operations, Inc.*, 873 F.2d 655, 659 (3d Cir. 1989).

Pennsylvania Turnpike Commission in *Christy v. Pennsylvania Turnpike Comm'n*, 54 F.3d 1140, 1144 (3d Cir. 1995). Although ultimately deciding that the Turnpike Commission was not an arm of the Commonwealth, the Third Circuit nonetheless reasoned that the Turnpike Commission was sufficiently controlled by the state, and therefore did not operate so autonomously as to preclude a finding that it was an arm of the state, because the executive and legislative branches appointed its members. *Id.* at 1149. The Executive and legislative control over an agency's operations was also a substantial factor in federal courts' findings of the sovereign status of the Pennsylvania State Employee Retirement Board (*Larsen v. SERS*, 554 F.Supp.2d 403, 411 (M.D. Pa 2008), and *Flesch v. Eastern Pennsylvania Psychiatric Institute*, 434 F.Supp. 963, 977 (E.D. Pa 1977)); the Pennsylvania State System of Higher Education (*Skehan v. State System of Higher Education*, 815 F.2d 244, 248 (3d Cir. 1987)); and the Pennsylvania Gaming Control Board (*Damico v. Harrah's Philadelphia Casino & Racetrack*, 2015 LEXIS 20637 *10 (E.D. Pa 2015)). In these cases, the common factors described earlier were deemed controls that sufficiently limited the agency's autonomy. The controls were meaningful, not "ministerial" or at the "administrative edges."

In contrast, the Fourth Circuit dismissed these same controls as inconsequential limits on PHEAA's autonomy. That holding and analysis creates substantial uncertainty concerning the sovereign status of Pennsylvania's independent Boards, Commissions, and agencies in matters brought in the Fourth Circuit and in courts that may follow its lead. As a consequence, the decision in this case places the

Commonwealth's General Fund assets at increased risk.

III. A Substantial Money Judgment Against PHEAA Would Affect the Commonwealth's Financial Condition and the Legislature's Program Funding Decisions

A substantial monetary judgment against PHEAA, as sought here, could affect the Commonwealth's fiscal condition and funding decisions in several distinct ways.

First, all judgments and settlements are paid from PHEAA funds under the Treasurer's control. Substantial legal judgments reduce the funding available for PHEAA's operations and its various grant and scholarship programs. While PHEAA's debts do not constitute general obligations of the Commonwealth, they do constitute obligations on funds appropriated to and earned by PHEAA (both of which are under the Treasurer's custody and control). The Legislature is then faced with a choice: either replenish those funds to allow operations and programs to continue at their prior levels, or reduce PHEAA funding, and therefore the scope of PHEAA's programs, by the amount of the judgment (or some lesser amount). Replenishing PHEAA's funds in whole or in part requires either raising supplemental funds or redirecting funds from another purpose or program. Both alternatives impact the Commonwealth's budgeting and appropriation process. Depending on the size of a judgment or settlement and legislative decisions about the appropriate responses to it, satisfying a judgment can therefore lessen the extent to which the Commonwealth, through PHEAA, can

further the public goal of fostering higher education among its citizens. PHEAA's chairman, who is also majority chairman of the House Appropriations Committee, made this essential truism below; incomprehensibly, the Fourth Circuit rejected it as insufficiently factually supported. App-41, n. 16. But it is the Fourth Circuit that has its facts wrong.

Second, the Treasurer is the investor-in-chief of all (non-pension) Commonwealth funds, including funds appropriated to and those earned by PHEAA. The Treasurer has a fiduciary obligation to ensure the protection of all Commonwealth assets. PHEAA's funds are comingled for purposes of investment with all other monies within the state's General Fund and special funds, allocated between short-term cash investments and longer-term higher risk investments. Treasury's primary financial obligation is to maintain principal protection and meet the liquidity needs of all state government's operations. An unforeseen and substantial judgment, necessitating a sudden withdrawal from the General Fund, could threaten the ability of the Treasury to meet the liquidity needs of state agencies.

Third, the Treasurer has since 2007 helped PHEAA meet its substantial liquidity needs by providing PHEAA with a line of credit, backed by state funds under his custody; the amount in the line of credit has ranged from \$200 to \$500 million. Because PHEAA's revenues, primarily those generated from loan repayments and service fees, fluctuate over the course of the fiscal year, the funds in this line of credit are critical to PHEAA's ability to directly hold loans made to Pennsylvania students and parents, and to establish

and maintain a loan rehabilitation program that allows students and parents who previously defaulted on student loans to bring their loans into good standing.

A substantial unexpected liability against PHEAA could wreak potential havoc on these loan programs, to the detriment of Pennsylvania students and parents. Funds invested in short term obligations and available for short term use might be exhausted and become unavailable. This would harm state agencies generally, limiting their access to immediately available funds and harming those expecting payment from the agency. Indeed, the line of credit documentation, a Fifth Amended and Restated Note Purchase Agreement, defines an event of default, which triggers repayment obligations, as including the entry of “one or more judgments for the payment of money ... against [PHEAA], which ... exceed \$5,000,000 in the aggregate.” If PHEAA were to come into default and be unable to repay its line of credit to the Commonwealth’s General Fund, the Treasury would be forced to liquidate other assets and would likely incur an investment loss in the General Fund, all as a consequence of an exposure risk that was unforeseen until the Fourth Circuit’s decision.

The exposure of PHEAA to litigation in the Fourth Circuit, or in other courts that adopt similar tests and reasoning, thus implicates the Commonwealth’s General Fund.

CONCLUSION

For these reasons, Timothy Reese, Pennsylvania State Treasurer, respectfully requests that the Court grant the Petitions for Writ of Certiorari in these two matters.

Respectfully submitted,

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