No. 15-1044

IN THE

# Supreme Court of the United States

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY,
*Petitioner,*

v.

LEE PELE,
*Respondent.*

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

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the Pennsylvania Higher Education Assistance Agency is an arm of the state for purposes of sovereign immunity under the federal Constitution.

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

### CASES

**STATUTES AND RULES**

## INTRODUCTION

The Pennsylvania Higher Education Assistance Agency (PHEAA), which holds, services, and guarantees more than $100 billion worth of loans for borrowers across the country, ruined Lee Pele's credit. PHEAA incorrectly reported that Pele had defaulted on student loans that were not his loans at all. PHEAA sought to avoid accountability to Pele by claiming to be an arm of the state of Pennsylvania entitled to sovereign immunity.

Applying the same factors that every circuit applies, the court of appeals held that PHEAA is not an arm of the state because Pennsylvania law provides that Pennsylvania is not responsible for a judgment against PHEAA and because PHEAA is autonomous, generating and controlling its own huge revenues independently of Pennsylvania.

In seeking this Court's review, PHEAA claims first that Pennsylvania courts disagree with the decision below. The cases PHEAA cites, however, answer state-law questions, not the federal-law sovereign immunity question at issue here.

Second, PHEAA charges that the circuits are divided over the relevant considerations for the arm-of-the-state inquiry. PHEAA's contention is a matter of semantics, based on differences in the language or organization of the circuits' tests rather than their substance. In fact, consistent with this Court's guidance in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), every circuit determines an entity's arm-of-the-state status by examining four factors: the vulnerability of the state treasury to an adverse judgment, the autonomy of the entity, the entity's function, and the entity's treatment under state law.

Third, PHEAA contends that four circuits would decide its arm-of-the-state status differently than the Fourth Circuit has. In two of these circuits, PHEAA relies on inapposite cases. In another, PHEAA reads snippets of case law out of context. In the fourth, PHEAA interprets circuit precedent in a manner that the issuing circuit itself has explicitly rejected. Other than the decision below, the only federal appellate decision regarding PHEAA's status held that the same state-treasury and autonomy factors relied on below precluded a finding of immunity at the pleading stage.

The petition should be denied.

## STATEMENT OF THE CASE

In December 2013, Lee Pele sued PHEAA under the federal Fair Credit Reporting Act (FCRA) alleging that PHEAA failed to correct inaccurate reports that it had sent to credit reporting agencies stating that Pele had defaulted on student loans. App-6. The loans PHEAA attributed to Pele were loans that Pele had never authorized, initiated, received, or guaranteed. App-6.

After discovery, both sides sought summary judgment on (among other issues) whether PHEAA is entitled to sovereign immunity as an arm of the state of Pennsylvania. App-7. The district court held that PHEAA was an arm of the state and therefore granted PHEAA's summary judgment motion and denied Pele's motion. App-30.

The court of appeals heard Pele's appeal from that decision in tandem with *United States ex rel. Oberg v. Pennsylvania Higher Education Assistance Agency*, 804 F.3d 646 (4th Cir. 2015), which presented the same arm-of-the-state question regarding the same entity. *Oberg* is a False Claims Act case in which the plaintiff alleges that

several student-loan entities, including PHEAA, defrauded the U.S. Department of Education. *Id.* at 650. In both *Pele* and *Oberg*, the court of appeals vacated the district court's ruling that PHEAA is an arm of the state. Because the Court laid out its reasoning in *Oberg* and decided *Pele* in a brief memorandum citing *Oberg*, *see* App-3-4, the following account draws on the Court's analysis in *Oberg*.

**A. The nature of PHEAA**

Created in 1963 by the Pennsylvania legislature, PHEAA is now "one of the nation's largest providers of student financial aid services." *Oberg*, 804 F.3d at 650, 655 (citation and internal quotation marks omitted). PHEAA administers state-funded student aid programs in Pennsylvania and also services and guarantees loans to students nationwide under the names American Education Services and FedLoan Servicing. *Id.* "PHEAA earns hundreds of millions of dollars a year through its commercial financial services operations and holds more than $1 billion in net assets." *Id.* at 665. PHEAA's extensive commercial operations have made it financially independent of the Commonwealth; PHEAA has received no state appropriations to fund its operations since 1988. *Id.* at 655.

"[T]he majority of PHEAA's revenues are generated by out-of-state activities[.]" *Id.* at 674. Of the $105 billion in loans that PHEAA held, guaranteed, or serviced in 2013 and could break down geographically, approximately $71.7 billion (68 percent) were non-Pennsylvania loans. Jt. App'x, *Pele v. Pa. Higher Educ. Assistance Agency*, No. 14-2202 (4th Cir. filed Feb. 3, 2014) ("4th Cir. JA"), at 541-43. This number understates PHEAA's loan-servicing activities with respect to non-Pennsylvania residents because the numbers do not

include the federal loans that PHEAA services as FedLoan Servicing. *Id.* at 543. PHEAA's Chief Financial Officer testified that "most" of the loans in that category are likewise out-of-state loans. *Id.* at 375-77. And for each year from 2008 to 2013 (the five most recent years covered in discovery), PHEAA both serviced more loans outside Pennsylvania and guaranteed more loans outside Pennsylvania than within Pennsylvania. *Id.* at 536-59.

Although Pennsylvania law requires PHEAA's revenues to be deposited in the state treasury, state law also expressly grants PHEAA control over its funds, which are held in a segregated account. *Oberg*, 804 F.3d at 655 (citing 24 Pa. Stat. §§ 5104(3) & 5105.10). Because state law prohibits payment from the state treasury without approval of the state treasurer, PHEAA must submit requisitions for payment, which the Treasury Department issues after ministerial review consisting of checking "backup documentation such as invoices, contracts, [and] purchase orders" and "confirming the authority for the payment (e.g., a valid supporting contract), and a match between the amount due on the invoice and the payment request." *Id.* at 656 (citation and internal quotation marks omitted).

PHEAA alone is responsible for its debts, *id.* at 654; Pennsylvania explicitly disclaims responsibility for PHEAA's debts via two separate statutory provisions. *See* 24 Pa. Stat. § 5104(3) ("[N]o obligation of the agency shall be a debt of the State."); *accord id.* § 5104(8) ("[N]o obligation of the agency shall be a debt of the Commonwealth[.]"). Accordingly, PHEAA has paid several million-dollar settlements in recent years, *see* 4th Cir. JA 349, 379-80; *Oberg*, 804 F.3d at 667 n.16, and PHEAA's Chief Financial Officer is not aware of any payments from state coffers to cover the cost of

settlements; rather, settlements are paid with PHEAA's own discretionary funds. 4th Cir. JA 385, 421.

PHEAA is authorized by statute to borrow money, issue bonds, enter into contracts, sue and be sued, and buy and sell property. *Oberg*, 804 F.3d at 654. PHEAA's contracts are reviewed for "form and legality" by the state Attorney General. *Id.* at 656. PHEAA is authorized to pursue student-loan collections independently. *Id.* Although PHEAA must be represented by the Attorney General absent a delegation of authority, PHEAA's practice is to seek and receive such a delegation (which is apparently never denied). *Id.* Counsel to PHEAA's board of directors is a private law firm. *Id.* PHEAA must report its condition to the Governor and legislature yearly, may be audited by the Auditor General, and is exempt from state taxation. *Id.* at 657. PHEAA executives, however, are not paid in accordance with state pay scales. *Id.*

In at least two cases, PHEAA has invoked federal diversity jurisdiction as a citizen — as opposed to an arm — of Pennsylvania. *See* 4th Cir. JA 507-09, 519-20.

**B. The decision below**

Applying its four-factor balancing test based on this Court's decision in *Hess*, the court of appeals held that PHEAA is not an arm of the state. First, the court considered whether a judgment against PHEAA would be paid by Pennsylvania. *Oberg*, 804 F.3d at 657-68. The court considered both "legal" and "functional" liability — the latter question referring to "whether, as a practical matter, a judgment against a state-created entity puts state funds at risk, despite the fact that the state is not legally liable for the judgment." *Id.* at 658. The court confirmed its finding from an earlier appeal that the state would have no legal liability for a judgment against

PHEAA, because state law provides that Pennsylvania is not responsible for PHEAA's debts. *Id.* at 657 & n.6.

As to functional liability, the court of appeals rejected the view that the location of PHEAA's money in the state treasury makes the state functionally liable. Rather, "because PHEAA was statutorily vested with control over the funds on deposit with the state Treasury, PHEAA's revenues remain[] moneys of the corporation" even when deposited in a state account. *Id.* at 658 (citation, internal quotation marks, and source's alteration marks omitted). Moreover, discovery — including the testimony of both PHEAA's board chairman and its treasurer — confirmed that "PHEAA has substantial, commercially generated revenues held both inside and outside the state Treasury, and that PHEAA exercises its statutory right to control those revenues." *Id.* at 661. The court cited examples of PHEAA's fiscal independence in practice, including a gubernatorial spending request that implicitly acknowledged that that the governor did not have control over PHEAA's budget, and PHEAA's independent decision to settle lawsuits against it. *Id.* at 660. The court rejected the view that review of expenditures by the state treasurer demonstrates ultimate state control over the funds, because discovery showed that the review is ministerial, not substantive. *Id.* at 662-63 (noting that "officials simply check, cross-check, and confirm the information contained in contracts, purchase orders, and invoices," and contrasting rules about "payment procedures" with "dictating spending policy and priorities"). Ultimately, because any judgment against PHEAA would be paid with its own funds, and "in light of PHEAA's 'anticipated and actual financial independence,'" *id.* at 667-68 (quoting *Hess*, 513 U.S. at 49), the court of appeals

concluded that the state-treasury factor weighed heavily against arm-of-the-state status.

Second, turning to PHEAA's autonomy, the court took note of "substantial evidence showing that PHEAA operates autonomously, largely free from state interference in its substantive decisions." *Id.* at 669. The court based this conclusion on PHEAA's financial independence, statutory authority to control its own funds and actual practice of doing so, freedom from legislative oversight over its activities, powers to contract and sue, powers to buy and sell property, and history of exercising its powers to make independent decisions such as creating a charitable foundation to help solicit private donations for PHEAA and rejecting a buyout offer from Sallie Mae. *Id.* at 669-71. The court weighed this evidence against indicia of state influence, including ministerial Attorney General review of contracts, the Treasury's payment-approval procedures, and the fact that most of PHEAA's board members are state officials. *Id.* at 671-72. Noting that PHEAA retains "substantive discretion" to manage its affairs and controls its day-to-day operation, the court concluded that the restrictions on PHEAA's independence "operate predominantly at the administrative edges rather than the discretionary heart of PHEAA's authority." *Id.* at 673. Therefore, PHEAA's autonomy weighed heavily against arm-of-the-state status.

Third, the court looked at whether PHEAA's activities focused on state or non-state concerns. *Id.* at 674-75. Balancing the extent of PHEAA's out-of-state earnings with PHEAA's state-focused mission of assisting Pennsylvania students, the court concluded that this factor points "just barely" in favor of arm-of-the-state status. *Id.* at 675.

Fourth, the court examined treatment under state law. *Id.* at 675-76. The similarities between certain aspects of Pennsylvania's treatment of PHEAA and of state agencies tipped this factor toward arm-of-the-state status despite some respects in which the state treats PHEAA differently (like the special management pay scale). *Id.* at 676.

Balancing the four factors, the court heeded this Court's admonition to focus on the reasons underlying sovereign immunity: the protection of state treasuries and respect for states' sovereign dignity. *Id.* at 676 (citing *Hess*, 513 U.S. at 47). Given PHEAA's financial self-sufficiency, independence from the state, and inability to put the state treasury at risk, the court concluded that PHEAA is not an arm of the state. *Id.* at 676-77.

## REASONS FOR DENYING THE WRIT

### I. The Decision Below Does Not Conflict With Decisions Of The Pennsylvania Courts.

Although PHEAA makes much of a supposed dispute between Harrisburg and Richmond, the Pennsylvania Supreme Court cases PHEAA cites to demonstrate this purported conflict do not address, under the modern standard, the question decided below: whether PHEAA is an arm of the state under the federal Constitution.

Only one Pennsylvania decision PHEAA cites, *Richmond v. Pennsylvania Higher Education Assistance Agency*, 297 A.2d 544 (Pa. Cmwlth. Ct. 1972), comes close to addressing the question. The issue in that intermediate appellate case was whether PHEAA could be liable for the litigation costs of a scholarship applicant who successfully appealed PHEAA's decision to deny him aid. *Id.* at 545-46. The court denied costs because of

the absence of statutory authority for imposing them. *Id.* at 546. After stating this conclusion, the court continued:

> Moreover, by reason of the general immunity of the sovereign, costs cannot be placed upon the Commonwealth even under a statutory provision unless the legislative intention to do so is clearly manifest, either by express terms or necessary implication. *Tunison v. Commonwealth*, 347 Pa. 76, 31 A.2d 521 (1943). This immunity from liability for costs is generally extended to state officers, boards, or other agencies. *See* Annot., 72 A.L.R.2d 1379, 1385, 1406 (1960).

*Id.* at 546-47. This two-sentence discussion of an alternative ground, devoid of analysis, is of scant guidance regarding the views of the Pennsylvania courts today on the question presented. First, this 1972 decision predated all of this Court's modern arm-of-the-state jurisprudence *See* Pet. 21-22 (noting that this Court's first arm-of-the-state case was decided in 1977). Second and equally important, the court gave no indication that it was referring to sovereign immunity under the *federal* Constitution as opposed to state law.

The rest of PHEAA's state-law authorities range even further from the question presented. Two are intermediate appellate court cases from the early 1980s finding that PHEAA is a state agency for the purpose of applying *state* laws, including a state statute of limitations, *see Pa. Higher Educ. Assistance Agency v. Xed*, 456 A.2d 725, 726 (Pa. Cmwlth. Ct. 1983), and a state law addressing the appropriate state court to resolve disputes involving PHEAA, *see Pa. Higher Educ. Assistance Agency v. Barksdale*, 449 A.2d 688, 690 (Pa. Super. Ct. 1982).

The other two Pennsylvania cases on which the petition relies address *neither* PHEAA *nor* federal sovereign immunity. Instead, they explain that, as a matter of state law, a "Commonwealth party" is entitled to *state* statutory sovereign immunity, and whether an entity qualifies for this treatment depends on "the plain language of legislation pertaining to the entity." *Snead v. Soc'y for Prevention of Cruelty to Animals of Pa.*, 985 A.2d 909, 913 (Pa. 2009); *accord Marshall v. Port Auth. of Allegheny Cty.*, 568 A.2d 931, 933-34 (Pa. 1990). The arm-of-the-state analysis for federal sovereign immunity, however, is different. *See Hess*, 513 U.S. at 44-46 (analyzing several factors). State law of sovereign immunity "cannot override the dictates of federal law." *Howlett v. Rose*, 496 U.S. 356, 377-78 (1990).

Finally, PHEAA's statutory authorities just define "Commonwealth agency." *See* 42 Pa. Stat. § 102; 71 Pa. Stat. § 732-102. They do not resolve PHEAA's status — particularly not as a matter of federal constitutional law.

Thus, the Pennsylvania courts have not disagreed with the decision below about whether PHEAA is an arm of the state under federal law.

## II. There Is No Circuit Split.

### A. The circuits apply the same factors to the "arm of the state" question and all give weight to the state's treatment of the entity.

PHEAA's contention that the circuits apply different tests to the arm-of-the-state question is based on the circuits' differing wording, not the substance of the analysis. In fact, all circuits consider the same four factors when determining whether an entity is an arm of the state:

(1) **Treasury**: Would a judgment against the entity be paid by the state?[1]

(2) **Autonomy**: To what extent is the entity controlled by the state?[2]

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[1] *See Irizarry-Mora v. Univ. of P.R.*, 647 F.3d 9, 13 n.3 (1st Cir. 2011) (considering "whether the state bore legal liability for the entity's debts"); *Leitner v. Westchester Cmty. Coll.*, 779 F.3d 130, 135 (2d Cir. 2015) (considering "the extent to which the state would be responsible for satisfying any judgment that might be entered against the defendant entity" and "whether the entity's obligations are binding upon the state"); *Haybarger v. Lawrence Cty. Adult Prob. & Parole*, 551 F.3d 193, 198 (3d Cir. 2008) (considering "the source of the money that would pay for the judgment"); *Oberg*, 804 F.3d at 650 (4th Cir.) (considering "whether any judgment against the entity as defendant will be paid by the State"); *Richardson v. Southern Univ.*, 118 F.3d 450, 452, 455 (5th Cir. 1997) (considering "the source of the funds for the entity," which includes "whether or not money damages assessed against [the entity] are paid from the State treasury"); *Lowe v. Hamilton Cty. Dep't of Job & Family Servs.*, 610 F.3d 321, 325 (6th Cir. 2010) (considering "the State[']s potential legal liability for a judgment against" the entity); *Burrus v. State Lottery Comm'n*, 546 F.3d 417, 420 (7th Cir. 2008) (considering "whether a judgment against the entity would result in the state increasing its appropriations to the entity"); *Thomas v. St. Louis Bd. of Police Comm'rs*, 447 F.3d 1082, 1084 (8th Cir. 2006) (considering "whether a money judgment against the agency will be paid with state funds"); *Beentjes v. Placer Cty. Air Pollution Control Dist.*, 397 F.3d 775, 778 (9th Cir. 2005) (considering "whether a money judgment would be satisfied out of state funds"); *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 718 (10th Cir. 2006) (considering "the state's legal liability for a judgment"); *United States ex rel. Lesinski v. S. Fla. Water Mgmt. Dist.*, 739 F.3d 598, 602 (11th Cir. 2014) (considering "who is responsible for judgments against the entity"); *P.R. Ports Auth. v. Fed. Maritime Comm'n*, 531 F.3d 868, 873 (D.C. Cir. 2008) (considering "the entity's overall effects on the state treasury").

[2] *See Irizarry-Mora*, 647 F.3d at 13 n.3 (1st Cir.) (considering "extent of state control including through the appointment of board

(*Footnote continued*)

(3) **Function**: Is the entity performing a state-wide function?[3]

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members and the state's power to veto board actions or enlarge the entity's responsibilities"); *Leitner*, 779 F.3d at 135 (2d Cir.) (considering "the degree of supervision exercised by the state over the defendant entity"; "how the governing members of the entity are appointed"; "how the entity is funded"; and "whether the state has a veto power over the entity's actions"); *Haybarger*, 551 F.3d at 198 (3d Cir.) (considering "the entity's degree of autonomy"); *Oberg*, 804 F.3d at 650-51 (4th Cir.) (considering "the degree of autonomy exercised by the entity, including such circumstances as who appoints the entity's directors or officers, who funds the entity, and whether the State retains a veto over the entity's actions"); *Richardson*, 118 F.3d at 452 (5th Cir.) (considering "the degree of local autonomy the entity enjoys"; "whether the entity has authority to sue and be sued in its own name"; and "whether the entity has the right to hold and use property"); *Lowe*, 610 F.3d at 325 (6th Cir.) (considering "the degree of control and veto power which the state has over" the entity and "whether state or local officials appoint [the entity's] board members"); *Burrus*, 546 F.3d at 420 (7th Cir.) (considering "the extent of state funding, the state's oversight and control of the entity's fiscal affairs, the entity's ability to raise funds independently, [and] whether the state taxes the entity"); *Thomas*, 447 F.3d at 1084 (8th Cir.) (considering "the agency's degree of autonomy and control over its own affairs"); *Beentjes*, 397 F.3d at 778 (9th Cir.) (considering "whether the entity may sue or be sued" and "whether the entity has the power to take property in its own name"); *Sikkenga*, 472 F.3d at 718 (10th Cir.) (considering "the degree of autonomy from the state" and "the extent of financing the agency receives independent of the state treasury and its ability to provide for its own financing"); *Lesinski*, 739 F.3d at 602 (11th Cir.) (considering "what degree of control the State maintains over the entity" and "where the entity derives its funds"); *P.R. Ports Auth.*, 531 F.3d at 873 (D.C. Cir.) (considering "the State's control over the entity").

[3] Most circuits explicitly list this factor in their tests. *See Irizarry-Mora*, 647 F.3d at 13 n.3 (1st Cir.) (considering "whether the entity's functions are readily classifiable as state functions or local or non-governmental functions"); *Leitner*, 779 F.3d at 135 (2d

(*Footnote continued*)

(4) **State-law treatment**: How does state law treat the entity?[4]

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Cir.) (considering "whether the entity's function is traditionally one of local or state government"); *Oberg*, 804 F.3d at 651 (4th Cir.) (considering "whether the entity is involved with state concerns as distinct from non-state concerns"); *Richardson*, 118 F.3d at 452 (5th Cir.) (considering "whether the entity is concerned primarily with local, as opposed to state-wide problems"); *Lowe*, 610 F.3d at 325 (6th Cir.) (considering "whether [the entity's] functions fall under the traditional purview of state or local government"); *Beentjes*, 397 F.3d at 778 (9th Cir.) (considering "whether the entity performs central governmental functions"); *Steadfast Ins. Co. v. Agric. Ins. Co.*, 507 F.3d 1250, 1253 (10th Cir. 2007) (considering "whether the entity in question is concerned primarily with local or state affairs"); *P.R. Ports Auth.*, 531 F.3d at 873 (D.C. Cir.) (considering "the functions performed by the entity"). The remaining circuits do not list function but nonetheless have considered it when adjudicating whether an entity qualifies as an arm of the state, *see Peirick v. Ind. Univ.-Purdue Univ. Indianapolis Athletics Dep't*, 510 F.3d 681, 696 (7th Cir. 2007) (finding it "significant" that entity "serves the entire state"); *Gorman v. Easley*, 257 F.3d 738, 744 (8th Cir. 2001) (rejecting arm-of-the-state status in part because the entity's "functions are primarily local"), *rev'd on other grounds sub nom. Barnes v. Gorman*, 536 U.S. 181 (2002), or an arm of the state for particular activities, *see Carter v. City of Phila.*, 181 F.3d 339, 351 (3d Cir. 1999); *Walker v. Jefferson Cty. Bd. of Educ.*, 771 F.3d 748, 757 (11th Cir. 2014).

[4] *See Irizarry-Mora*, 647 F.3d at 13 n.3 (1st Cir.) (considering "how the enabling and implementing legislation characterized the entity and how the state courts have viewed the entity"); *Leitner*, 779 F.3d at 135 (2d Cir.) (considering "how the entity is referred to in the documents that created it"); *Haybarger*, 551 F.3d at 198 (3d Cir.) (considering "the status of the entity under state law"); *Oberg*, 804 F.3d at 651 (4th Cir.) (considering "how the entity is treated under state law"); *Richardson*, 118 F.3d at 452 (5th Cir.) (considering "whether the state statutes and case law characterize the agency as an arm of the state"); *Lowe*, 610 F.3d at 325 (6th Cir.) (considering "the language employed by state courts and state statutes to describe" the entity); *Burrus*, 546 F.3d at 420, 422 (7th

(*Footnote continued*)

PHEAA's characterization of the circuits as relying on different numbers of factors is based on non-substantive differences in how each circuit states its test. For instance, some circuits list autonomy as one "factor," whereas others enumerate specific aspects of autonomy as multiple "factors," even though the substance of the analysis is the same. The Fourth Circuit groups all autonomy considerations together as one factor that includes several non-exclusive considerations: "the degree of autonomy exercised by the entity, *including* such circumstances as who appoints the entity's directors or officers, who funds the entity, and whether the State retains a veto over the entity's actions." *Oberg*, 804 F.3d at 650-51 (emphasis added); *see also id.* at 668 ("Also relevant to the autonomy inquiry is the determination whether an entity has the ability to contract, sue and be sued, and purchase and sell property, and whether it is represented in legal matters by the state attorney general." (citation and internal quotation marks omitted)). In the Ninth Circuit, "whether the entity may sue or be sued" and "whether the entity has the power to

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Cir.) (considering the entity's "general legal status," including "the state of Indiana's own view of the entity it created"); *Thomas*, 447 F.3d at 1084 (8th Cir.) ("[C]ourts must consider[] the provisions of state law that define the agency's character." (citation and internal quotation marks omitted)); *Beentjes*, 397 F.3d at 778 (9th Cir.) (considering "the corporate status of the entity" and how "California law treats the governmental agency"); *Sturdevant v. Paulsen*, 218 F.3d 1160, 1166 (10th Cir. 2000) (considering "the characterization of the governmental unit under state law" as part of the autonomy and financial independence analysis), *cited with approval in Sikkenga*, 472 F.3d at 717-18; *Lesinski*, 739 F.3d at 602 (11th Cir.) (considering "how state law defines the entity"); *P.R. Ports Auth.*, 531 F.3d at 873 (D.C. Cir.) (considering "the State's intent as to the status of the entity").

take property in its own name," are listed separately. *Beentjes*, 397 F.3d at 778. The Fifth Circuit lists three separate autonomy factors: "the degree of local autonomy the entity enjoys"; "whether the entity has authority to sue and be sued in its own name"; and "whether the entity has the right to hold and use property." *Richardson*, 118 F.3d at 452. This linguistic or organizational difference regarding considerations going to the same question — how autonomous is the entity? — does not reflect a disagreement over the substance of the analysis. PHEAA's simplistic differentiation of circuits by counting enumerated factors elevates form over substance.

Nuances in consideration of the function factor likewise make no substantive difference, and certainly made no difference to the outcome here. The Fourth Circuit's analysis would not have changed had the court considered whether the specific *activities* that are the subject of Pele's complaint are state-focused (the approach taken in Third and Eleventh Circuit cases, s*ee supra* note 3), rather than whether PHEAA's function *in general* is state-focused. If anything, the focus on PHEAA's overall function in the decision below worked to PHEAA's advantage because it took account of PHEAA's administration of aid programs to Pennsylvania students — a function that PHEAA was not performing when it violated the FCRA by inaccurately attributing defaulted loans to Pele.

That the courts of appeals have coalesced around a single set of factors is no accident. It is, rather, the product of this Court's guidance in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994). In applying the arm-of-the-state inquiry to the Compact Clause entity PATH (a railway connecting New York

and New Jersey), the Court there considered several different "[i]ndicators of immunity," including the states' control over the entity, *id.* at 44, the views of state courts, *id.* at 45, whether the entity's functions are state functions, *id.*, and the financial relationship between PATH and the treasuries of the creating states, including whether the states would be liable for PATH's debts, *id.* at 45-46. The fact that all twelve circuits have adopted substantially the same test reflecting and implementing *Hess* belies PHEAA's suggestion that *Hess* gives insufficient guidance regarding the arm-of-the-state inquiry. PHEAA's complaint that a precedent concerning a bistate entity is a poor guide to an analysis usually employed to categorize intra-state entities is unpersuasive in light of the identity of concerns animating the arm-of-the-state inquiry in both contexts: protecting states' treasuries and dignitary interests. *Id.* at 39-40, 47 (identifying these factors as "the Eleventh Amendment's twin reasons for being").

PHEAA wrongly contends that the circuits disagree about the importance of state-law treatment of the entity, with some circuits assigning it "near-dispositive" weight, others weighing it as one factor among several, and others failing to consider it at all. Pet. 18-20. In fact, every circuit considers this factor — including the three circuits (Eighth, Ninth, and Tenth) that PHEAA claims do not. PHEAA's confusion about the Eighth and Ninth Circuits appears to arise from reading lists of factors out of context. Both courts have made clear that state law is an important part of the analysis. *See Thomas*, 447 F.3d at 1084 (8th Cir.) (stating, immediately before listing factors, that "courts must consider[] the provisions of state law that define the agency's character" (citation and internal quotation marks omitted)); *Beentjes*, 397 F.3d at 778 (9th Cir.) ("We must examine these factors in

light of the way California law treats the governmental agency." (citation and internal quotation marks omitted)). As for the Tenth Circuit, PHEAA cites *Sikkenga*, whose list of factors did not include treatment under state law. But the prior Tenth Circuit case on which *Sikkenga* relied described the test as including "the characterization of the governmental unit under state law," *Sturdevant*, 218 F.3d at 1166, and considered that question in its analysis, *id.* at 1167-68. The Tenth Circuit has, since *Sikkenga*, included that factor in its list. *See Steadfast Ins. Co.*, 507 F.3d at 1253.

PHEAA's claim that some circuits apply "near-dispositive weight" to state-law treatment likewise crumbles upon scrutiny. Regarding the First Circuit, PHEAA relies on that court's statement that "a court must first determine whether the state has indicated an intention — either explicitly by statute or implicitly through the structure of the entity — that the entity share the state's sovereign immunity." *Irizarry-Mora*, 647 F.3d at 12, *quoted in* Pet. 19. PHEAA wrongly assumes that an inquiry into a state's intention means consideration of state-law treatment alone. On the contrary, the First Circuit's analysis includes:

> (1) extent of state control including through the appointment of board members and the state's power to veto board actions or enlarge the entity's responsibilities; (2) how the enabling and implementing legislation characterized the entity and how the state courts have viewed the entity; (3) whether the entity's functions are readily classifiable as state functions or local or non-governmental functions; and (4) whether the state bore legal liability for the entity's debts.

647 F.3d at 13 n.3 (citation and internal quotation marks omitted). Far from enjoying "near-dispositive weight," the questions "how the enabling and implementing legislation characterized the entity and how the state courts have viewed the entity" constitute one factor among several. *Id.* Further underscoring that this first "structural prong" of the First Circuit's analysis is a multi-factor inquiry and not a principle of total deference to state law, the court in *Irizarry-Mora* explained that its test "did not represent an actual change in the substance of the analysis" from an earlier formulation in which the court employed a generalized multi-factor balancing without "steps." *See id.* at 12-13 & n.2. Accordingly, in *Irizarry-Mora* itself, which concerned whether the University of Puerto Rico is an arm of the state, the First Circuit considered the factors it listed rather than simply deferring to a state-law characterization. *See id.* at 12-17.

PHEAA's reliance on the Eleventh Circuit's opinion in *Versiglio v. Board of Dental Examiners*, 686 F.3d 1290 (11th Cir. 2012), is even weaker, because the Eleventh Circuit has explicitly rejected PHEAA's reading of that case. In *Walker v. Jefferson County Board of Education*, 771 F.3d 748 (11th Cir. 2014), the defendants argued that *Versiglio* "can be read as collapsing the entire Eleventh Amendment multi-factor test into a single dispositive inquiry — whether the state courts grant state law immunity to the entity for suits based on state law." *Id.* at 754. The court rejected that reading as in conflict with two prior circuit precedents, including one en banc, and the court reaffirmed its multi-factor test. *Id.*

PHEAA and its amici are particularly exercised about the supposedly competing tests in the Second

Circuit. The tests are not inconsistent, as the Second Circuit has recently explained: "[T]he tests have much in common, and the choice of test is rarely outcome-determinative. The *Clissuras* test incorporates four of the six *Mancuso* factors. To the extent that the *Clissuras* factors point in different directions, the additional factors from the *Mancuso* test can be instructive." *Leitner*, 779 F.3d at 137. The Second Circuit's analysis looks to the same treasury, autonomy, function, and state-law treatment factors that other courts of appeals assess. *See supra* nn. 1-4.

The amicus brief of Relators delves into abstract differences concerning the interpretation of the treasury factor and its relative importance. *See* Br. of Relators 15-18. But neither PHEAA nor its amici show that any such nuances tend to alter the results of the arm-of-the-state inquiry, must less that they would have affected the outcome here. The court of appeals considered both the practical and legal liability of Pennsylvania; neither approach pointed to PHEAA's desired outcome. *See Oberg*, 804 F.3d at 657-68. And the court of appeals did not afford special weight to the treasury factor. *See id.* at 676-77 (discussing all factors in light of the Eleventh Amendment's purposes identified in *Hess*). Nonetheless, PHEAA lost.

Because the circuits apply substantially the same test to determine an entity's arm-of-the-state status, this Court's review is not warranted.

### B. PHEAA is wrong that other courts of appeals would decide the question presented differently than the court below.

Because the circuits look to the same factors, PHEAA's sovereign immunity claim would fare no better outside the Fourth Circuit. The only other federal court

of appeals decision to consider PHEAA's arm-of-the-state status is *Lang v. Pennsylvania Higher Education Assistance Agency*, 610 F. App'x 158 (3d Cir. 2015). There, the Third Circuit, mirroring much of the Fourth Circuit's analysis in *Oberg*, held that the record was not sufficiently developed at the pleading stage to justify granting sovereign immunity, *id.* at 160-62, because the treasury and autonomy factors "on this record do not weigh in favor of immunity," *id.* at 162.

Although PHEAA cannot point to any appellate decisions that disagree with the decision below regarding whether PHEAA is an arm of the state, PHEAA contends that four circuits — the First, Sixth, Eleventh, and D.C. Circuits — would rule differently on PHEAA's arm-of-the-state status if they had the chance. PHEAA's speculation is ill-founded.

As to the First Circuit, PHEAA claims in the *Oberg* petition that the First Circuit would rule differently based on the "first step" (the "structural prong") of that court's analysis. *See* Pet., *Pa. Higher Educ. Assistance Agency v. Oberg*, No. 15-1045 ("*Oberg* Pet."), at 18-19 (citing *Irizarry-Mora*, 647 F.3d at 12). But as noted above, the First Circuit, like the others, applies a multi-factor test. Indeed, the First Circuit rejected the proposition that an entity's characterization under the law of Puerto Rico as an "instrumentality of the Commonwealth" was "dispositive" of arm-of-the-state analysis. *See Pastrana-Torres v. Corporacion De Puerto Rico Para La Difusion Publica*, 460 F.3d 124, 126 n.2 (1st Cir. 2006); *accord Redondo Constr. Corp. v. P.R. Hwy. & Transp. Auth.*, 357 F.3d 124, 128 n.3 (1st Cir. 2004). Instead of total deference to state characterizations, the "structural prong" of the First Circuit analysis that PHEAA invokes calls for an

analysis of four factors — the same four factors (listed in a different order) as the court of appeals applied to PHEAA here. *Compare Oberg*, 804 F.3d at 650-51 (considering state liability for an adverse judgment; autonomy including state appointment of officers, state funding, and state ability to veto decisions; whether the entity is involved in state functions; and treatment under state law), *with Irizarry-Mora*, 647 F.3d at 13 n.3 (listing the same factors in this order: autonomy, state-law treatment, state function, and state liability). PHEAA provides no reason to conclude that the First Circuit would apply the same test to reach a different result than the Fourth Circuit.

PHEAA's argument that the Sixth Circuit would come out differently than the decision below is likewise unpersuasive, because that court too looks to the same factors. *See Lowe*, 610 F.3d at 325. PHEAA trains its fire on the question of the state's liability for an adverse judgment, contending that although this factor is considered in both the Fourth and Sixth Circuits, the Sixth Circuit looks to "potential liability" in the hypothetical scenario in which the entity cannot cover a judgment, whereas the Fourth Circuit does not. *Oberg* Pet. 20 (discussing *Ernst v. Rising*, 427 F.3d 351 (6th Cir. 2005) (en banc)). In fact, neither circuit approaches hypothetical liability with the absolutist view that PHEAA attributes to it. In *Oberg*, the Fourth Circuit avoided the hypothetical not because hypotheticals are never relevant but because it was too far-fetched *in this case*: "PHEAA's control over significant cash reserves means there is little likelihood that the Commonwealth's help would be required to satisfy the hypothetical judgment…. *Hess* … considered real, not imaginary, financial information[.]" *Oberg*, 804 F.3d at 667 n.15. By contrast, the Sixth Circuit in *Ernst* found the

hypothetical much more plausible, because if the plaintiffs in that case obtained their judgment, "it is quite possible that the [defendant entity] could not satisfy that judgment and it is clear in that event that the state treasury would have to pay the bill." 427 F.3d at 360. The question also took on more urgency in *Ernst* because the defendant entity in that case could not look anywhere but the state for money to satisfy a judgment. *See id.* at 362 ("Where else would the money come from?"). In PHEAA's case, by contrast, an obvious alternative source of revenue exists: PHEAA's income as a multi-billion dollar student loan servicing business. *Oberg* and *Ernst* do not conflict; on the contrary, they both ground their inquiries in the practical realities of particular entities' funding.

PHEAA's claim that the Eleventh Circuit would view PHEAA differently than the Fourth Circuit, *Oberg* Pet. 21, is easily debunked, because (as noted above) it relies on a reading of the Eleventh Circuit's *Versiglio* decision that that court has explicitly rejected. *See supra* page 18. In addition, contrary to PHEAA's assumption that the Eleventh Circuit would defer to the views of state courts about an entity's status, the Eleventh Circuit has twice since *Versiglio* denied federal arm-of-the-state status to an entity that state law characterized as an arm of the state. *See Lightfoot v. Henry Cty. Sch. Dist.*, 771 F.3d 764, 770-71, 778 (11th Cir. 2014) (holding that a Georgia school district was not an arm of the state despite state court decision holding that it was as a matter of state law); *Walker*, 771 F.3d at 753-57 (same, regarding Alabama school districts).

Finally, PHEAA suggests that the D.C. Circuit would split with the Fourth Circuit based on the decision in *Puerto Rico Ports Authority v. Federal Maritime*

*Comm'n*, 531 F.3d 868 (D.C. Cir. 2008), that the Puerto Rico Ports Authority (PRPA) is an arm of the state. But PRPA's legal relationship to Puerto Rico is quite different from PHEAA's to Pennsylvania. In particular, Pennsylvania law categorically shields Pennsylvania from responsibility for PHEAA's debts. *See* 24 Pa. Stat. § 5104(3) ("[N]o obligation of the agency shall be a debt of the State."). By contrast, Puerto Rico — despite a general legal provision disavowing PRPA's debts, *see* 531 F.3d at 879 — *is* in fact "legally liable for some of PRPA's actions," namely "certain torts committed by PRPA's officers, employees, or agents when they are acting in their official capacity and within the scope of their function, employment, or agency relationship." *Id.* at 880. Based on this liability risk under Puerto Rico law, the D.C. Circuit concluded that "the structure here indicates a closer relationship between PRPA and the Commonwealth than if the Commonwealth were only a financial backstop to PRPA: By law, the Commonwealth is substituted for PRPA and directly responsible for PRPA's actions in certain cases." *Id.* No similar relationship exists between Pennsylvania and PHEAA; on the contrary, "[a] judgment in this case would thus be paid with PHEAA funds, not funds belonging to the Commonwealth." *Oberg*, 804 F.3d at 667.

PHEAA stresses that the D.C. Circuit examined whether Puerto Rico would be responsible "for funding the entity or paying the entity's debts or judgments," not just whether Puerto Rico "would be responsible to pay a judgment *in the particular case at issue*." 531 F.3d at 878, *quoted in* Pet. 18. Pennsylvania, however, is not responsible for any judgment in this case or in any other: Pennsylvania law expressly disclaims responsibility for PHEAA's debts. *See* 24 Pa. Stat. §§ 5104(3) & (8). And unlike with PRPA there are no statutory exceptions to

this general rule. Thus, the *Puerto Rico Ports Authority* decision shows only that different outcomes result when the same legal standard is applied to different facts.

**III. The Decision Below Is Correct.**

Applying the factors that all courts of appeals apply (treasury, autonomy, function, state-law treatment), the Fourth Circuit reached the correct result here. As to the state treasury, the court of appeals correctly concluded that Pennsylvania law expressly disclaimed liability for PHEAA's debts and that Pennsylvania would not be functionally responsible for a judgment against PHEAA. *Oberg*, 804 F.3d at 657-68. As to autonomy, the court of appeals rightly read Pennsylvania law as providing PHEAA with substantial autonomy and relied on a discovery record confirming PHEAA's exercise of its independence. *Id.* at 668-73. The focus of PHEAA's activities is a question that bore little on the court's final analysis, as it was close to neutral. *Id.* at 674-75. As to state-law treatment, the court of appeals noted that Pennsylvania law treats PHEAA like a state agency in some respects but rightly found that factor overcome by the others. *Id.* at 675-77. In balancing these factors, the court of appeals hewed closely to this Court's guidance in *Hess*. *See id.* at 676-77.

PHEAA's attacks on the decision below mostly amount to a request that this Court reweigh factors the court of appeals has already carefully considered or reach different factual conclusions about PHEAA's governing structure and its relationship with state officials. *See Oberg* Pet. 28-29, 30, 33 (rehashing arguments about state law treatment and interpretations of the factual record already considered below). Those attacks are meritless for the reasons the Fourth Circuit has already given. Moreover, this Court rarely grants

certiorari "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. R. 10.

The Pennsylvania State Treasurer, weighing in as amicus, offers his own account of the state expenditure review process in an apparent attempt to supplement the record with new factual assertions directly to this Court. *See* Br. of Timothy Reese 5-13. But the parties had ample opportunity for discovery below and produced a voluminous record, including a declaration from Christopher B. Craig, the Chief Counsel of the Pennsylvania Department of the Treasury (who is among Treasurer Reese's attorneys in this Court). 4th Cir. JA 100. In any event, this Court has long recognized that it "cannot take cognizance of any fact beyond the scope of the record, as it was made up in the court below." *United States v. Hosmer*, 76 U.S. 432, 433 (1869).

PHEAA's other arguments either conflict with this Court's decisions or do not make sense on their own terms. Regarding the vulnerability of the state treasury, PHEAA insists that the "only arguably relevant question" is "whether the state treasury would be liable in the event, however hypothetical, of a judgment that exceeded PHEAA's assets." *Oberg* Pet. 33. Pennsylvania law answers this question unequivocally in the negative, twice. *See* 24 Pa. Stat. § 5104(3) ("[N]o obligation of the agency shall be a debt of the State."); *accord id.* § 5104(8) ("[N]o obligation of the agency shall be a debt of the Commonwealth[.]"). Perhaps PHEAA is suggesting that Pennsylvania might *choose* to appropriate money for PHEAA in the unlikely event that a judgment depletes PHEAA's assets. However, in *Hess*, the Court rejected the argument that PATH was entitled to sovereign immunity on the theory that a judgment against PATH

would induce New York and New Jersey to spend money on services otherwise provided by PATH. *Hess*, 513 U.S. at 50-51; *see also Christy v. Pa. Tpk. Comm'n*, 54 F.3d 1140, 1147 (3d Cir. 1995) ("Although the Commonwealth might well *choose* to appropriate money to [an entity] to enable it to meet a shortfall caused by an adverse judgment, such voluntary payments by a state simply do not trigger Eleventh Amendment immunity." (emphasis in original; citation, internal quotation marks, and source's alteration marks omitted)).

Regarding autonomy, PHEAA focuses on the composition of its board. *See Oberg* Pet. 32-33. But the court of appeals considered that point in its analysis and concluded that it was outweighed by other markers of independence, including PHEAA's huge independent revenue stream and the fact that board members, once appointed, make substantive decisions independent of state control. *Oberg*, 804 F.3d at 668-73. PHEAA assails the notion that it controls its own assets, reasoning that its money is kept in the state treasury. *See Oberg* Pet. 29-30. PHEAA's focus on where the money is held elevates form over substance, ignoring the reality that the money is identifiable as, accountable as, treated as, and statutorily designated as PHEAA's money. *See, e.g.*, 24 Pa. Stat. § 5104(3) (providing that 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*" (emphasis added)); *id.* (providing that PHEAA's earnings "shall be available to the agency and shall be deposited in the State Treasury and may be utilized at the discretion of the board of directors for carrying out any of the corporate purposes of the agency"). PHEAA's own Chief Financial Officer testified in deposition that the "net worth" *of PHEAA* was $951.6 million in 2013, 4th Cir. JA 362, and that

PHEAA operates independently of the need for state funding, *id.* at 405-10. Those statements would be nonsensical if PHEAA did not have its own money, because the reserves would be the state's money and PHEAA would have no "net worth" of its own.

PHEAA's plea to focus nearly exclusively on state-law treatment of the entity is contrary both to *Hess* and to this Court's decision last year in *North Carolina State Board of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101 (2015). In *Hess*, as discussed, the Court looked to several factors in addition to state-law treatment. *See* 513 U.S. at 44-51. In *Dental Examiners*, the Court confronted another question concerning an entity's immunity — whether a state dental board was entitled to immunity from antitrust liability because of its status as a "state agency" — and the Court answered that it was not, under a functional analysis. *See* 135 S. Ct. at 1110-16. In both cases, the Court rejected the view that an entity's treatment under state law controls the outcome. *See id.* at 1113-14 (rejecting argument that "entities designated by the States as agencies are exempt from" the usual conditions on antitrust immunity); *Hess*, 513 U.S. at 45, 52 (holding that PATH is not an arm of the state, although "State courts … repeatedly have typed the Port Authority an agency of the States").

Finally, PHEAA plays word games with the term "political subdivision": PHEAA argues that the court of appeals, in stating that PHEAA is a "political subdivision, not an arm of the Commonwealth," *Oberg*, 804 F.3d at 677, misused that term as a matter of state law and thus must have erred in analyzing sovereign immunity. Read in context, however, the court's use of "subdivision" is not a grand statement about what type of entity PHEAA is under Pennsylvania law, but a contrast

to what PHEAA is *not* under *federal* law: an arm of the state. At the outset of its opinion, the court explained, "The purpose of the arm-of-state inquiry is to distinguish arms or alter egos of the state from mere political subdivisions … which do not share the state's immunity." *Id.* at 651 (citation and internal quotation marks omitted). As applied to PHEAA, the court of appeals used "political subdivision" as no more than an antonym for "arm of the state" without suggesting that it bore any greater significance. *See id.* at 676, 677.

In sum, the court of appeals correctly applied the considerations that drove this Court's analysis in *Hess*. This Court should decline PHEAA's request to engage in a fact-intensive reweighing of those factors or to apply them in a manner that departs from *Hess*.

## CONCLUSION

The petition for certiorari should be denied.

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