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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

Respondent's brief in opposition adds little to the arguments already addressed by the petition, brief in opposition, reply, and numerous *amici* briefs in the companion case, *PHEAA v. United States ex rel. Oberg*, No. 15-1045. What little respondent adds is wrong and actually strengthens the case for this Court's review. And respondent never denies—and could not deny—the one salient difference between this case and *Oberg*—*viz.*, this case presents the arm-of-the-state question in the context of an Eleventh Amendment defense, which makes it an ideal vehicle to address the question presented.

Respondent contends that the decision below implicates no conflict at all, either between Pennsylvania state officials and federal judges in a foreign circuit, or among the courts of appeals. Respondent is wrong on both counts. The conflict between Harrisburg and Richmond is real and cuts to the very heart of our federalist system. Respondent misses the boat by complaining that Pennsylvania courts have analyzed PHEAA's status under state law, not federal law. That is what state courts do when considering whether a state entity possesses the state's sovereign immunity. The inquiry in federal court, by contrast, is a federal question, but the starting point for that question should be the state's own treatment of the entity. And on the proper weight to be given state treatment, the circuits are meaningfully split. Some circuits view state-law treatment as well-nigh dispositive (for example, granting rehearing based on an intervening state-court decision) and others consider it as a subpart of

one of the less significant factors in a multifactor test. Respondent suggests that the various multifactor tests cover similar territory. But not only are there meaningful differences; any similarities stem from decisions of this Court involving multi-state entities or political subdivisions (like a county school board) that produce erroneous results when woodenly applied to statewide entities of a single state located in the state capital and staffed by state employees, like PHEAA.

Respondent complains that the Pennsylvania Treasurer's *amicus* brief adds new facts, but that brief simply marshals public-record materials that lay bare that the federal judges in Richmond misunderstood Pennsylvania law. And respondent minimizes the Fourth Circuit's determination that PHEAA is a "political subdivision"—a conclusion at odds with Pennsylvania law—by suggesting it was just shorthand for the Fourth Circuit's conclusion and not part of its analysis. But this Court has treated that issue differently, and in all events, respondent's answer just underscores the problems inherent in applying precedents designed for school boards and county sheriffs—true political *sub*divisions—to statewide entities like PHEAA.

The issue presented here and in *Oberg* is practically important and central to Our Federalism, as underscored by the number and diversity (from state officials, to relators, to the public-sector union that represents PHEAA's employees) of *amici* supporting certiorari. The same issue arises both in Eleventh Amendment cases like this and in statutory cases like *Oberg*. In one case or the other, plenary review is critical.

I. The Fourth Circuit's Decision Creates Two Intractable Conflicts.

A. The Fourth Circuit's Decision Has Created a Conflict Between State Officials In Harrisburg And Federal Judges In Richmond That Only This Court Can Resolve.

Respondent contends that there is no meaningful "dispute between Harrisburg and Richmond" because PHEAA cites no Pennsylvania cases addressing "whether PHEAA is an arm of the state under the federal Constitution." Opp.8. He contends that the Pennsylvania cases that PHEAA cites address either PHEAA's sovereign immunity under state law or its status for other state-law purposes. Opp.8-10. But that is what state courts do. Absent the relatively unusual situation where the Eleventh Amendment is directly applicable in a suit against the State in state court, *see Alden v. Maine*, 527 U.S. 706 (1999), state court decisions recognizing that a state agency shares the State's sovereign immunity will always do so as a matter of state law. The point thus has never been that there is a direct conflict between Pennsylvania state courts and federal courts in answering the federal arm-of-the-state question. The point has always been that State officials, including state courts, uniformly recognize that PHEAA is Pennsylvania, and the Fourth Circuit found otherwise by misunderstanding state law and (mis)applying federal law.

That anomalous situation does not create a direct conflict between state and federal courts on an issue of federal law, but it does create a practical conflict

between Harrisburg and Richmond that highlights the Fourth Circuit's error and magnifies the need for this Court's review. There is just no denying the reality that while PHEAA cannot be haled into state court by a private citizen (because state courts applying state law share the view of every Commonwealth official that PHEAA is an arm of the state), PHEAA can be haled into federal court by a private citizen (because the Fourth Circuit applying federal law gives little weight to how Pennsylvania views its own agency). Thus, a suit that would be dismissed in state court in Pittsburgh can proceed in federal court in Wheeling. That situation is practically untenable and fully justifies this Court's review.[1]

Whatever quibbles Respondent can raise about the vintage or reasoning of the Pennsylvania court decisions (since they never purported to be applying federal law directly, the observation that some predated certain decisions of this Court is utterly irrelevant), there can be no doubt about the state-law status of PHEAA in light of the *amicus* briefs of the Pennsylvania Legislature and Pennsylvania Treasurer and the statute passed after the decisions here and in *Oberg*. The *amicus* briefs could not make more clear that Pennsylvania unambiguously considers PHEAA an arm of the Commonwealth. *See*

[1] Neither this case nor *Oberg* presents any question regarding the broader meaning or scope of the Eleventh Amendment. Whether the Eleventh Amendment applies broadly or narrowly, it protects only arms of the state, so a coherent and easily applied test for that status is necessary. Indeed, since the issue will often arise on an appealable motion to dismiss, the need for a more readily administrable test is paramount.

P.R. Ports Auth. v. Fed. Mar. Comm'n, 531 F.3d 868, 876-77 (D.C. Cir. 2008) (Commonwealth's filing of amicus brief "emphatically declaring that [entity] is an arm of the Commonwealth" "strongly support[s]" arm-of-the state status). And the bipartisan legislation passed by the Legislature and signed by the Pennsylvania Governor is even more emphatic, declaring that PHEAA "is an integral part and arm of the Commonwealth," "is directly controlled by the Commonwealth," and "fulfill[s an] essential state governmental function of providing Commonwealth students with access to higher education opportunities and providing essential higher education programs for the benefit of Commonwealth students." General Appropriation Act of 2015, §107, H.B. 1460, 2015-16 Gen. Assemb., Reg. Sess. (Pa. 2015).

Respondent simply ignores this legislation, but the position of Pennsylvania is clear beyond cavil: In state court and under state law, PHEAA enjoys both sovereignty and sovereign immunity. Put simply, as far as the Commonwealth is concerned, PHEAA is the Commonwealth.

The emphatic declarations of Pennsylvania's Legislature, Governor, and Treasurer underscore the fundamental conflict between Richmond and Harrisburg and the stakes in these cases. Sovereign States in our federal system are free to order their affairs and structure their governments as they see fit. *See* Pet.31. Indeed, one of federalism's chief virtues is that it leaves states free to experiment with novel governmental structures and social programs. *Id.* PHEAA is precisely that. It is an agency so successful at performing its government function that it has

undertaken that function for other jurisdictions, and become a source of both pride and millions of dollars in financial aid for Pennsylvanians. *See* Pet.5-6, 34-35, *PHEAA v. United States ex rel. Oberg*, No. 15-1045 (Feb. 16, 2016) ("*Oberg* Pet."). But the Fourth Circuit, by clumsily applying an ill-suited test, essentially rejected the experiment, concluding that Pennsylvania's novel and successful effort to create an efficient, effective government agency managed to create something that is not really a government agency at all.

That is the conflict between Richmond and Harrisburg. It is not merely a doctrinal dispute over the proper application of a multifactor test. It is about who gets to structure state governments in our federal system: federal courts, or state legislatures. That is an issue worthy of this Court's review.

B. The Circuits Are in Conflict.

Respondent raises essentially the same arguments as Oberg to contend that the Fourth Circuit's decision below does not conflict with the decisions of sister circuits, and is mistaken for the same reasons. *See* Reply Br.2-8, *PHEAA v. United States ex rel. Oberg*, No. 15-1045 (Apr. 5, 2016) ("*Oberg* Reply"). In particular, respondent's argument that all circuits give more or less the same weight to a state court's treatment of an entity suffers the same fatal flaws as Oberg's comparable claim. *See id.* at 4-5. While the First Circuit makes state treatment the nearly-determinative starting point for the analysis, and the Eleventh Circuit has reversed itself when state-law treatment was clarified, the Fourth Circuit gave the emphatic view of the Commonwealth little

more than a shrug. That is a real split that the surfeit of multifactor tests cannot obscure.

Respondent's broader effort to suggest that "the courts of appeals have coalesced around a single set of factors" inspired by this Court's decision in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), Opp.15, is flawed on multiple levels.

To begin with, that respondent characterizes the current mélange of two- to six-factor tests within the circuits as "a single set of factors" is reason enough to discount his argument. Furthermore, to the extent respondent suggests that the commonality in the diverse tests emanates from *Hess,* that is part and parcel of the problem. *Hess* arose in the distinct context of a multistate agency where no one State controlled the entity and both States could potentially disclaim responsibility for bankrupting judgments. The Court's reasoning was well-met to resolve that case, but extending it to more common statewide entities is a recipe for error. *See Oberg* Reply 7-8.

In all events, the plethora of varying tests with different numbers of varying factors applied across the circuits reflects both substantive splits and a crying need for this Court's intervention. This Court's decision in *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), which addressed the question of how to determine a corporation's "principal place of business" under 28 U.S.C. §1332(c)(1), presents a parallel. The Court observed that to answer this question, "different circuits (and sometimes different courts within a single circuit) have applied … highly general multifactor tests in different ways." *Hertz*, 559 U.S. at 91. These tests "highlight different factors or

emphasize similar factors differently." *Id.* The Court recognized that an effort to achieve uniform and coherent answers applying such disparate tests was "doomed to failure" and "at war with administrative simplicity," and this inability to "achieve a nationally uniform interpretation of federal law" was an unacceptable and "unfortunate consequence in a federal legal system." *Id.* at 92. The Court thus replaced "the Courts of Appeals' divergent and increasingly complex interpretations" with a "single, more uniform interpretation." *Id.*

The circumstances described in *Hertz* are precisely the circumstances here. The circuits have elaborated an increasingly complex array of multifactor tests that "highlight different factors or emphasize similar factors differently," and have "applied [those] highly general multifactor tests in different ways." The varying applications of varying tests, moreover, have resulted in a "muddled mess." Jameson B. Billsborrow, *Keeping the Arms in Touch: Taking Political Accountability Seriously in the Eleventh Amendment Arm-of-the-State Doctrine*, 64 Emory L.J. 819, 821 (2015); *see also*, *e.g.*, *Mancuso v. N.Y. State Thruway Auth.*, 86 F.3d 289, 293 (2d Cir. 1996) (describing arm-of-the-state doctrine as, "at best, confused."); Kreipke Br.5. As in *Hertz*, this Court's review and a "single, more uniform" test for determining what constitutes an arm of the state are needed.

II. The Fourth Circuit's Decision Is Incorrect.

Respondent has little to add in defense of the substance of the Fourth Circuit's decision beyond a reprise of the unavailing arguments in the *Oberg* opposition. *See Oberg* Reply 8-11.

Respondent's few distinct arguments are meritless. First, respondent claims that the Pennsylvania Treasurer's *amicus* brief introduces "new factual assertions" that this Court should ignore. Opp.25. That assertion is both wrong and underscores the problem with the Fourth Circuit's approach. The Treasurer's brief cites only the record and public sources. Rather than introduce new facts, the Treasurer's brief explains why the Fourth Circuit grossly misunderstood the Treasurer's role in the oversight of, and control over, PHEAA's finances as detailed in the record below—misunderstandings on which the Fourth Circuit's holding rests. Respondent's plea for this Court to disregard the Treasurer's brief is an obvious effort to avoid having to grapple with arguments that fatally undermine the Fourth Circuit's decision. Equally important, the very fact that the Fourth Circuit rested its decisions on details of the Treasurer's approval process while ignoring the indisputable fact that the Commonwealth views PHEAA as the Commonwealth underscores the error of the Fourth Circuit's minutiae-driven approach to the arm-of-the-state inquiry.

Second, respondent suggests that the Fourth Circuit acknowledged that PHEAA's board is comprised entirely of state legislators and gubernatorial appointees but "concluded that it was outweighed by other markers of independence."

Opp.26. That misstates the decision below. In reality, the Fourth Circuit placed *no* weight on the composition of PHEAA's board, repeatedly reasoning that the Commonwealth did not exercise control over PHEAA because PHEAA's board, and not the Commonwealth, set policy for PHEAA. *Oberg* Pet.32. But as PHEAA has explained, PHEAA's board is comprised *entirely* of state officials. Thus, whatever control *the Board* exercises is control exercised *by Pennsylvania*. *Oberg* Pet.33.

Third, respondent accuses PHEAA of "play[ing] word games with the term 'political subdivision,'" arguing that the Fourth Circuit used it only as "a contrast to what PHEAA is *not* under *federal* law: an arm of the state." Opp.27-28. Thus, respondent argues, the Fourth Circuit "used 'political subdivision' as no more than an antonym for 'arm of the state.'" *Id.* at 28.

But that is certainly not how this Court has treated an entity's status as a "political subdivision"; this Court has viewed that status not as simply a conclusion at the end of an arm-of-the-state analysis, but as an important component of that very analysis. In *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), for example, the Court specifically looked to whether school boards were included in state law definitions of "political subdivision." Because, the Court explained, "[u]nder Ohio law the 'State' does not include 'political subdivisions,' and 'political subdivisions' do include local school districts," state-law treatment as a "political subdivision" supported the conclusion that the local school board was not an arm of the state. *Id.*

at 280. Likewise, in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), the Court looked to the specific language in the interstate compact at issue describing the multistate entity "as a political subdivision." *Id.* at 401 (quotation marks omitted).

These decisions plainly demonstrate that "political subdivision" is not merely a label affixed to an entity after determining, through other means, that it does not constitute an arm of the state. Rather, state law treatment as a political *sub*division supported a conclusion that an entity was not the state. Applying a similar analysis here points to the opposite conclusion, as PHEAA *is not* a "political subdivision" under Pennsylvania law, but rather is a statewide agency. In all events, to the extent the Fourth Circuit did view "political subdivisions" as synonymous with non-arms-of-the-state, that only underscores the outsized influence that decisions of this Court involving local school boards and multistate entities have had even when courts are analyzing statewide agencies. The lower courts are desperately in need of guidance from this Court that comes in the consideration of a statewide agency located in the state capital and staffed by state employees, and not in outlying contexts.

III. This Case Is An Ideal Vehicle For This Court To Review This Exceedingly Important Issue.

While largely parroting the arguments advanced by the respondent in *Oberg*, respondent here ignores the one relevant difference between the two cases. Unlike *Oberg*, which involves whether PHEAA is a

"person" under the False Claims Act, this case directly involves Eleventh Amendment immunity. As PHEAA has explained, both cases squarely present the question whether PHEAA is an arm of the state for federal-law purposes, and either case is an ideal vehicle for addressing this issue. Pet.2-4; *Oberg* Pet.23 n.7; *Oberg* Reply 13. Nevertheless, should the Court prefer to address the arm-of-the-state question in the Eleventh Amendment context, this case constitutes the perfect vehicle. Respondent has nothing to say about this, conceding the point.

Respondent also has nothing to say about the exceptional importance of this issue. *See* Pet.28-32; *Oberg* Pet.35-36; *Oberg* Reply 11-12. In particular, he does not—and could not—deny the grievous injury to our federal system worked by the Fourth Circuit's decision. As PHEAA has explained, the court of appeals left Pennsylvania with only one option: to restructure PHEAA—and potentially a host of other agencies—to conform to the vague multifactor test applied by federal judges in Richmond. But this choice is both unrealistic and intolerable. It is unrealistic because no State can be expected to try to thread the needle by restructuring an agency so that it can be assured of enjoying sovereign immunity under all of the circuits' vague and varying tests. What works for Richmond would be unnecessary in Boston, and might still prove insufficient in San Francisco. It is intolerable because no sovereign State should have to restructure agencies that it plainly intends to be a part of the State according to opaque instructions set forth by a federal appellate court. *See* States' Br.8-9. The far better option for both States and the federal courts is for this Court to grant review and provide much-

needed clarity and uniformity to this important area of the law.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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