NO. 15-1045

In the
Supreme Court of the United States

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY,
Petitioner,
v.
UNITED STATES OF AMERICA,
EX REL. JON H. OBERG,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

REPLY BRIEF

"Without exception, Pennsylvania considers PHEAA an arm of the Commonwealth." Speaker Br.5. The Fourth Circuit and respondent, however, take a different view. The Fourth Circuit held that PHEAA, which indisputably *cannot* be haled into Pennsylvania court, *can* be haled into federal court and subjected to private damages actions like respondent's quarter-*billion*-dollar suit. Respondent defends that conclusion by emphasizing a series of irrelevancies, from PHEAA's use of trade names to the degree of scrutiny provided in mandatory approvals by the Pennsylvania Treasurer and Attorney General. As PHEAA and a diverse array of *amici*—including the Pennsylvania Legislature, the Pennsylvania Treasurer, the Pennsylvania state employees' union, Pennsylvania universities and colleges, eleven other States, and even litigants *opposed* to PHEAA on the merits—have explained, the Fourth Circuit's decision implicates an outcome-dispositive circuit split over the arm-of-the-state doctrine. Moreover, the decision and respondent's defense of it demean Pennsylvania's dignity, threaten Pennsylvania's treasury, and imperil Pennsylvania students' much-needed higher-education assistance.

Respondent offers no principled reason to deny review of this exceptionally important case. He dismisses the circuit split as courts merely applying a different number of factors in considering the same basic issues. But the circuit split goes to matters of substance, and the sheer variety of approaches both generally and with regard to the weight to be given the State's own treatment of an agency highlight the need

for this Court's review. Respondent notes that all the circuits' tests derive principally from this Court's decision in *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994). But as the petition explained at length, that is part of the problem. Respondent never defends the notion that a test designed for the unique context of multistate entities *should* govern the very different context of statewide agencies addressing matters of statewide concern. Lower courts are applying widely divergent multifactor tests based on *Hess* not because it makes any sense, but because they have little choice absent the clarity that only this Court can provide. Respondent suggests that this case presents a poor vehicle for review, but whether this Court grants review in this case or its companion case, *Pele v. PHEAA*, No. 15-1044, plenary review is essential.[1] The circuits are badly split, States face suits that undermine both their dignity and their treasuries, and there is no denying the unseemly conflict between state officials in Harrisburg and federal judges in Richmond.

I. The Circuits Are Conflicted.

Respondent baldly denies any "inter-circuit conflict on the factors governing arm-of-the-state analysis," praising "the consistency of the precedent."

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[1] While PHEAA filed both petitions the same day, respondent in *Pele*—but not *Oberg*—sought an extension of time to respond, putting the two cases on different schedules. Because the petitions seek review of decisions issued the same day, by the same court, involving the same petitioner, the same arm-of-the-state issue, the same relevant facts, and amicus briefs addressing both cases, the Court may wish to reschedule/straightline this case with *Pele* for consideration together.

Opp.1, 29. But courts and commentators have repeatedly acknowledged that the arm-of-the-state doctrine is a "muddled mess," with "blatant contradiction[s]" among the circuits. Jameson B. Bilsborrow, *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); Pet.14-18. Current arm-of-the-state doctrine so hopelessly "frustrates litigants, confuses courts, and undermines an entire body of law" that *amici* who *disagree* with PHEAA on the merits urge certiorari here. Kreipke Br.5.

Respondent's attempts to downplay the circuit split as not outcome-determinative falter. Respondent concedes that the First Circuit asks initially whether "the state has indicated an intention" that "the entity share the state's sovereign immunity," and only if this inquiry is "inconclusive" does it "proceed to the second stage and consider whether the state's treasury would be at risk" from an adverse judgment. *United States ex rel. Willette v. Univ. of Mass., Worcester*, 812 F.3d 35, 39-40 (1st Cir. 2016). And respondent does not dispute that Pennsylvania has unambiguously "indicated an intention"—by statutes, court decisions, and practice—that PHEAA "share [its] sovereign immunity." *See* Pet.19, 30; Speaker Br.10 ("[I]n Pennsylvania, PHEAA is the exemplar for agencies that qualify for sovereign immunity."). Thus, PHEAA would enjoy arm-of-the-state status in the First Circuit.[2]

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[2] Respondent weakly suggests that the relevant Pennsylvania decisions predate "the current PHEAA." Opp.24. But he

Respondent nonetheless maintains that the First Circuit "considers the same characteristics … as the Fourth Circuit." Opp.21-22. But the First Circuit looks to characteristics "implicitly" indicating the State's sovereign-immunity intent *only* in the "absence of an explicit statement." *Willette*, 812 F.3d at 39. Thus, the First Circuit would not reach those characteristics in a case like this. Moreover, the First and Fourth Circuits—like other circuits—put different emphases on different characteristics. *See* Kreipke Br.15-18; States Br.4-8.[3] The First Circuit gives significant weight to the State's own view, while the Fourth Circuit gives controlling weight to "the effect of the action on the state treasury." *Md. Stadium Auth. v. Ellerbe Becket Inc.*, 407 F.3d 255, 262 n.11 (4th Cir. 2005). Accordingly, in the First Circuit, PHEAA's undisputed sovereign immunity in Pennsylvania would carry the day. In the Fourth Circuit, it is merely one consideration within a less important fourth factor.

Inadvertently underscoring the need for more definitive guidance, respondent claims that the First Circuit's two-factor test merely restates an earlier six-factor test equivalent to the Fourth Circuit's four-factor test. Opp.22-23. It would be a stinging indictment of multifactor tests if two-factor, four-factor, and six-factor tests really were identical; regardless, the First Circuit has specifically explained

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identifies no decision indicating that Pennsylvania courts would overrule these precedents, and ignores the other overwhelming evidence establishing Pennsylvania's intention that PHEAA share its sovereign immunity.

[3] *Amici* States have filed in *Pele*.

that its "reformulate[d]" arm-of-the-state test comprises "a progression." *Irizarry-Mora v. Univ. of P.R.*, 647 F.3d 9, 12-13 (1st Cir. 2011).

Respondent invokes *dicta* observing that "a state court determination" of sovereign immunity "does not substitute for an independent analysis under the federal standard" for determining arm-of-the-state status. *Redondo Constr. Corp. v. P.R. Highway & Trans. Auth.*, 357 F.3d 124, 128 n.3 (1st Cir. 2004). PHEAA has never suggested otherwise. The question remains one of federal law, but the degree to which federal courts give weight to an entity's treatment in state court in answering that federal question is one on which the circuits are in disarray.

Turning to the Sixth Circuit, respondent ignores that three of the Sixth Circuit's four factors firmly support PHEAA's arm-of-the-state status. Pet.20. As for the remaining factor, the Sixth Circuit examines "the State's *potential* liability for a judgment against the entity." *Ernst v. Rising*, 427 F.3d 351, 359 (6th Cir. 2005) (emphasis added). The Fourth Circuit, however, refused to consider PHEAA's potential liability if a judgment hypothetically exceeded PHEAA's ability to pay. App.40 n.15.

Respondent answers that the Sixth Circuit considers "potential legal liability," which Pennsylvania statutes "disclaim." Opp.26. But the "potential liability" inquiry applies equally to both legal and functional liability. *See Hess*, 513 U.S. at 51 (sovereign immunity unavailable only when State is not obligated "both legally and practically" to pay judgment exceeding entity's ability to pay). And the only relevant context for considering either question is

a potentially bankrupting judgment—which, the only record evidence indisputably confirms, Pennsylvania would cover. *See* JA248 (House Appropriations Chairman testifying that Pennsylvania "would have no choice but to appropriate money" were "significant judgment" entered against PHEAA); Speaker Br.1-2; Treasurer Br.18. Respondent dismisses that unrefuted evidence as "self-serving," just a few pages before dismissing affronts to the States' dignity as illusory.

Respondent downplays the conflict with the Eleventh Circuit by once again invoking that circuit's recognition of what PHEAA has never disputed and has expressly acknowledged—namely, that the ultimate question here is one of federal law. But given the emphasis that the Eleventh Circuit places on state treatment in answering that federal question, respondent's contention that the Eleventh Circuit's test is "nearly identical to the Fourth Circuit's test," Opp.28, is simply wishful thinking. Unlike the Fourth Circuit, the Eleventh Circuit holds that "'the most important factor" in the arm-of-the-state test is "how the entity has been treated by the state courts." *Ross v. Jefferson Cty. Dep't of Health*, 701 F.3d 655, 659 (11th Cir. 2012). Accordingly, the Eleventh Circuit has reversed course in light of an intervening state court decision to avoid the "incongruous result" of an entity subject to suit in federal but not state court. *Versiglio v. Bd. of Dental Exam'rs of Ala.*, 686 F.3d 1290, 1292 (11th Cir. 2012).[4]

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[4] Tellingly, respondent invokes Eleventh Circuit cases involving local school districts and boards. As both the petition

Respondent's assertion that the Third Circuit recently "reached the same conclusion" as the Fourth Circuit, Opp.2, 19, 29-31, blatantly misrepresents the decision in *Lang v. PHEAA*, 610 F. App'x 158 (3d Cir. 2015). The Third Circuit merely held that it could not decide the arm-of-the-state issue on a *motion to dismiss*, having been presented "with little beyond the allegations in the complaint … and several Pennsylvania statutes." *Id.* at 160. While the petition noted the Third Circuit's three-factor test as part of the general disarray in the circuits, it acknowledged *Lang* and did count the Third Circuit as part of the more substantive circuit split. *See* Pet.15 & n.5. That said, the fact that the Third Circuit's test, like many of the circuits' multifactor tests, requires factual development before it can be applied is itself in substantial tension with the very notion that state agencies are supposed to be immune from suit in federal court, not subject to uncertainty and substantial discovery to determine their immunity. *See* States' Br.8-13.

Finally, respondent emphasizes that the lower courts have taken their cues from *Hess*, even "in non-Compact Clause cases." Opp.1, 13-18. But as the petition made clear, this is part and parcel of the problem. The circuits have been forced to fashion all-purpose multifactor tests from decades-old decisions that (1) did not purport to set out such tests, and

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and *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), make clear, that is a context where state-law treatment cannot be dispositive. But extending that logic to minimize the States' own treatment of statewide agencies is both wrong and an issue dividing the circuits.

(2) addressed considerations particular to specialized contexts (local actors and multistate entities). Pet. 22-28; *Pele* Pet.21-25. Thus, twenty-plus years after *Hess*, the arm-of-the-state doctrine remains "confusing and difficult to apply," Héctor G. Bladuell, *Twins or Triplets?: Protecting the Eleventh Amendment Through a Three-Prong Arm-of-the-State Test*, 105 Mich. L. Rev. 837, 844 (2007), and, as here, can lead to pernicious results for States and their citizens.

II. The Decision Below Is Incorrect.

The Fourth Circuit's decision is egregiously wrong, as subsequent developments have underscored. The notion that PHEAA was anything but a state agency entitled to share Pennsylvania's sovereign immunity came as a profound shock to state officials in Harrisburg. Pennsylvania responded with bipartisan legislation reaffirming that PHEAA "is an integral part and arm of the Commonwealth," "is directly controlled by the Commonwealth," "maintain[s]" Commonwealth funds, and serves "essential state governmental function[s]." Pet.12. And the Pennsylvania Legislature's and Pennsylvania Treasurer's *amicus* briefs thoroughly explain how the decision misapprehends Pennsylvania law, demeans Pennsylvania's sovereignty and dignity, and threatens Pennsylvania's treasury. *See 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).

Respondent ignores all that and fails to defend critical aspects of the decision PHEAA has demonstrated to be fundamentally flawed. *See, e.g.*, Pet.32-33 (explaining that majority-legislator composition of PHEAA's board renders control by PHEAA's board in fact control by Pennsylvania Legislature); *id.* at 31-32 (explaining that PHEAA is not a "political subdivision" under Pennsylvania law); *id.* at 31 n.10 (explaining that federal government considers PHEAA the "State").

Instead, respondent presses a series of irrelevancies. For example, respondent emphasizes the Pennsylvania governor's inability to direct certain PHEAA actions. Opp.4-5. But as the Pennsylvania Treasurer explains, numerous Pennsylvania agencies (including PHEAA) operate independently from the governor yet carry out essential government functions, are subject to extensive Commonwealth control, and are considered arms of Pennsylvania. Treasurer Br.4, 13-17; *Pele* Pet.20 n.4. Many federal agencies are similarly insulated from direct presidential control, but remain fully entitled to sovereign immunity.

Similarly, respondent minimizes the degree of scrutiny the Pennsylvania Treasurer and Attorney General apply in discharging their mandatory roles in approving expenditures, contracts, and litigation. But surely all that matters is the undeniable fact that such review is mandated by state law (and would be wholly inapposite were PHEAA not a state agency). In reality, the Treasurer's control over PHEAA's finances is not "ministerial," as the Fourth Circuit believed, App.31, 36, but "consequential and substantive,"

comprising "cradle to grave" control. Treasurer Br.5-13. Furthermore, a "money judgment against PHEAA" would come out of the Pennsylvania treasury and require the Treasurer's approval. *Id.* at 7, 13, 17. And a "substantial" judgment—like the quarter-*billion* dollars respondent seeks, Pet. for Mandamus 19, *United States ex rel. Oberg v. PHEAA*, No. 15-2602 (4th Cir. Dec. 31, 2015)—would damage "the Commonwealth's fiscal condition and funding decisions." Treasurer Br.17-19. It would "impact the Commonwealth's budgeting and appropriation process," "threaten the ability of the Treasury to meet the liquidity needs of state agencies," and force the Treasurer "to liquidate other assets and … likely incur an investment loss in the General Fund." *Id.*

Stressing PHEAA's "national commercial operations" and financial success, Opp.2, 6-8, respondent argues that the Fourth Circuit correctly discounted PHEAA's arm-of-the-state status because its "out-of-state activities" were "not conducted as Pennsylvania governmental functions." *Id.* at 33. But those loan servicing and guaranteeing activities are plainly "Pennsylvania governmental functions." They are authorized by the Pennsylvania Legislature, are undertaken within Pennsylvania by Pennsylvanians, and—most important—generate revenues resulting in *hundreds of millions of dollars in additional financial aid to Pennsylvanians*, which respondent completely ignores. Pet.5-6, 34-35. Respondent repeatedly emphasizes certain facts that flow directly from the fact that PHEAA is good at what it does and generates substantial resources for Pennsylvania students by servicing out-of-state loans. But the fact that PHEAA does some business under trade names or uses certain

sophisticated financing arrangements is not even relevant under the Fourth Circuit's capacious four-factor test, let alone under the Eleventh Amendment. That respondent continues to emphasize such irrelevancies underscores the costs of open-ended multifactor tests in this context.[5]

III. The Issue Is Exceptionally Important And Merits Review Here Or In *Pele*.

The diverse *amici* supporting certiorari confirm the exceptional importance of this case and the imperative need for review. If upheld, the decision below will "expose the Commonwealth to significant financial risk" and have a "long term impact on both the Pennsylvania budget … [and] future funding for state agencies." Treasurer Br.3-4; Speaker Br.2, 13.

Exposing PHEAA to monetary damages will be particularly "devastating," AICUP Br.4, and "disastrous," Temple Br.6, for Pennsylvania students, colleges, and universities. Its effects will "be felt immediately and directly by the Commonwealth's colleges and universities" and undermine opportunities "for some of the Commonwealth's most economically challenged students," AICUP Br.5, by imperiling their ability to "obtain a post-secondary education" and achieve the "employment

[5] Respondent obliquely invokes *North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015), to claim that "state fiat" cannot supplant federal arm-of-the-state determinations. Opp.3, 33-34. PHEAA has never suggested otherwise, and respondent has never previously suggested that *Dental Examiners*—a state-action antitrust immunity decision issued before respondent completed his Fourth Circuit briefing—is relevant.

opportunities" that higher education brings, AFSCME Br.3, 5.

Apart from these "catastrophic" Pennsylvania consequences, AICUP Br.12, this case's importance extends to the "[m]any states" that have created student financial assistance agencies, *id.* at 15. And as eleven States further confirm, current arm-of-the-state doctrine leaves States unable to "know *in advance* when entities designated as part of the State under state law may nevertheless be held liable and what, specifically, the States must do to avoid such liability and burdensome jurisdictional discovery." States Br. 8-9; *Pele* Pet.28-32; Pet.35-36; Bladuell, *supra*, at 846 (describing "judicial fishing expeditions" and absence of "predictability in judgments" under current doctrine).

Respondent suggests that this case is a poor vehicle because "[t]he ultimate issue here is whether PHEAA is a 'person'" under the False Claims Act. Opp.34. But respondent ignores that all seven circuits to address the question have held that the arm-of-the-state test used in the Eleventh Amendment context is the appropriate framework for determining whether an entity is a "person" under the FCA, Pet.23 n.7, given the "virtual coincidence of scope" between the two inquiries, *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 779-80 (2000).

Respondent nevertheless argues that because "PHEAA is a corporation," the Court "would need to determine whether PHEAA's claim of immunity should have been denied summarily without arm-of-the-state evaluation." Opp.35. But PHEAA is a "public corporation and government instrumentality"

created "in all respects for the benefit of" Pennsylvanians. 24 P.S. §§5101, 5105.6. That is why respondent himself successfully urged the Fourth Circuit to employ the arm-of-the-state test he now spuriously suggests might not apply. *See* Appellant's Br. 30, *United States ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.*, No. 10-2320 (4th Cir. Feb. 17, 2011).

In reality, this case is an ideal vehicle. The Fourth Circuit squarely confronted the arm-of-the-state question, there are no disputed material facts, and a decision in PHEAA's favor would end this case. The record and *amicus* briefing are well-developed, and the arm-of-the-state issue has thoroughly percolated in the circuits. Nevertheless, as PHEAA has explained, should the Court prefer to address the arm-of-the-state question in the Eleventh Amendment context, the companion case *Pele* provides an appropriate vehicle, and this case could be held pending the disposition of *Pele*. *See* Pet.23 n.7; *Pele* Pet.2-4; n.1, *supra*. Whichever case the Court chooses, review is imperative.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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