Nos. 15-1044 and 15-1045

In the Supreme Court of the United States

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY, PETITIONER

v.

LEE PELE

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY, PETITIONER

v.

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

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
CURTIS E. GANNON
Assistant to the Solicitor General
MARK B. STERN
NICOLAS Y. RILEY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the Pennsylvania Higher Education Assistance Agency is an arm of the Commonwealth of Pennsylvania for purposes of immunity under the Eleventh Amendment.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Discussion 8
A. The court of appeals correctly held that PHEAA is not an arm of the Commonwealth of Pennsylvania 9
B. The decisions below do not conflict with any decision of another circuit 15
C. PHEAA's atypical nature makes these cases poor vehicles for reconsidering or clarifying *Hess* 22
Conclusion 23

TABLE OF AUTHORITIES

Cases:

Auer v. *Robbins*, 519 U.S. 452 (1997) 13
Cook County v. *United States ex rel. Chandler*, 538 U.S. 119 (2003) 8
Ernst v. *Rising*, 427 F.3d 351 (6th Cir. 2005), cert. denied, 547 U.S. 1021 (2006) 21, 22
Fresenius Med. Care Cardiovascular Res., Inc. v. *Puerto Rico & the Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56 (1st Cir.), cert. denied, 540 U.S. 878 (2003) 16
Grajales v. *Puerto Rico Ports Auth.*, 831 F.3d 11 (1st Cir. 2016) 19, 20
Gray v. *Laws*, 51 F.3d 426 (4th Cir. 1995) 16
Hess v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994) .... *passim*
Irizarry-Mora v. *University of P.R.*, 647 F.3d 9 (1st Cir. 2011) 18

Cases—Continued: Page

Lang v. *Pennsylvania Higher Educ. Assistance Agency*, No. 12-1247, 2016 WL 4445275 (M.D. Pa. Aug. 23, 2016) 17

Leitner v. *Westchester Community Coll.*, 779 F.3d 130 (2d Cir. 2015) 17

Lightfoot v. *Henry County Sch. Dist.*, 771 F.3d 764 (11th Cir. 2014) 20

Mancuso v. *New York State Thruway Auth.*, 86 F.3d 289 (2d Cir.), cert. denied, 519 U.S. 992 (1996) 16

Puerto Rico Aqueduct & Sewer Auth. v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) 17

Puerto Rico Ports Auth. v. *Federal Mar. Comm'n*, 531 F.3d 868 (D.C. Cir. 2008), cert. denied, 555 U.S. 1170 (2009) 16, 20

Ramirez v. *Puerto Rico Fire Serv.*, 715 F.2d 694 (1st Cir. 1983) 17

Redondo Constr. Corp. v. *Puerto Rico Highway & Transp. Auth.*, 357 F.3d 124 (1st Cir. 2004) 18

Regents of the Univ. of Cal. v. *Doe*, 519 U.S. 425 (1997) 13

United States ex rel. Willette v. *University of Mass., Worcester*, 812 F.3d 35 (1st Cir. 2016), petition for cert. pending, No. 15-1437 (filed May 27, 2016) 8

Vermont Agency of Nat. Res. v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) 8

Versiglio v. *Board of Dental Exam'rs of Ala.*, 686 F.3d 1290 (11th Cir. 2012) 20

Walker v. *Jefferson County Bd. of Educ.*, 771 F.3d 748 (11th Cir. 2014) 21

Constitution and statutes:

U.S. Const. Amend XI .... *passim*

Statutes—Continued: Page

Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.* 7
False Claims Act, 31 U.S.C. 3729 *et seq.* 4
31 U.S.C. 3729(a) 4
31 U.S.C. 3729(a)(1) 8
20 U.S.C. 1085(j) 15
24 Pa. Stat. Ann. (West 2006):
§ 5101 2
§ 5102 2
§ 5104(3) (West 2006 & Supp. 2016) 2, 3, 14, 19, 21
§ 5104(8) (West 2006 & Supp. 2016) 2, 14, 19, 21
§ 5105.10 3

Miscellaneous:

13 Charles Alan Wright et al., *Federal Practice and Procedure* (3d ed. 2008) 14

In the Supreme Court of the United States

No. 15-1044

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY, PETITIONER

v.

LEE PELE

No. 15-1045

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY, PETITIONER

v.

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

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petitions for writs of certiorari should be denied.

STATEMENT

1. In 1963, the Commonwealth of Pennsylvania created the Pennsylvania Higher Education Assistance Agency (PHEAA) as a "public corporation and government instrumentality" for the purpose of "improv[ing]

the higher educational opportunities of [Pennsylvania] residents." 24 Pa. Stat. Ann. §§ 5101, 5102 (West 2006). To that end, PHEAA issues loans to Pennsylvania students and administers a state grant program, which uses funds appropriated by the state legislature to provide scholarships to qualifying Pennsylvania students. Pet. App. 13-14.[1]

In addition to providing those services to Pennsylvania students, PHEAA guarantees and services loans issued to students outside of Pennsylvania. Pet. App. 13. Operating under such names as "American Education Services" and "FedLoan Servicing," it has become one of the largest providers of student financial-aid services in the country. *Id.* at 13, 83-84. Those commercial activities generate significant revenue for PHEAA—more than $220 million in net revenues in 2014 alone—making it possible for PHEAA to operate without receiving any appropriations from the Commonwealth since 1988. *Id.* at 13.

State law makes PHEAA responsible for paying all of its own debts and provides that "no obligation of the agency shall be a debt of the State." 24 Pa. Stat. Ann. § 5104(3) (West. 2006 & Supp. 2016). The same statute further provides 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." *Ibid.*; see *id.* § 5104(8) (West 2006 & Supp. 2016) ("[N]o obligation of the agency shall be a debt of the Commonwealth and it shall have no power to pledge the credit or taxing power of the Com-

---

[1] "Pet.," "Pet. App.," and "Cert. Reply" refer to the filings in No. 15-1045. Citations to petitioner's filings in No. 15-1044 are preceded with "*Pele*."

monwealth or to make the agency's debts payable out of any moneys except those of the agency.").

In recent years, PHEAA has, with statutory authorization, funded the loans it originates by issuing revenue bonds. 24 Pa. Stat. Ann. § 5104(3); Pet. App. 14. It has accordingly created special-purpose entities under Delaware law, which formally issue the loans and hold certain assets of the corporation. Pet. App. 14. The resulting revenues are typically held in trust accounts outside of the Pennsylvania Treasury. *Ibid.* They are valued at more than $6 billion and represent a significant portion of PHEAA's corporate assets. *Ibid.* All of PHEAA's remaining revenues must be held in a segregated fund within the Pennsylvania Treasury. 24 Pa. Stat. Ann. § 5104(3); *id.* § 5105.10 (West. 2006). The Pennsylvania Treasurer maintains custody of those funds, which may be commingled with other state funds for investment purposes. *Id.* § 5104(3). Those funds, however, must remain available to PHEAA for carrying out its corporate purposes. *Id.* § 5105.10. See Pet. App. 14-15.

At the times relevant here, PHEAA was run by a 20-member board of directors, comprising the Commonwealth's Secretary of Education, three gubernatorial appointees, and 16 state legislators appointed by the heads of their respective chambers. Pet. App. 11 & n.3. Each board member was subject to removal by the state official who appointed him. *Ibid.*

Despite its corporate structure, PHEAA possesses many of the same powers as traditional state agencies and remains subject to many of the same limitations. For instance, it is authorized to issue regulations, and its non-executive employees are generally treated as state employees. Pet. App. 16-18. Unlike other agen-

cies, however, PHEAA is not subject to gubernatorial control over its budget. During a revenue shortfall, the Governor can direct other agencies to return a portion of their appropriated funds, but PHEAA generally retains discretion over whether it will return a comparable share of its own budget. *Id.* at 25, 59.

2. Case No. 15-1045 is a *qui tam* action brought by respondent Jon Oberg under the False Claims Act (FCA), 31 U.S.C. 3729 *et seq.* As relevant here, Oberg alleges that PHEAA defrauded the U.S. Department of Education by claiming student-loan subsidies to which it was not entitled. Pet. App. 2-3.

a. After the United States declined to intervene, the district court dismissed the claims against PHEAA on the ground that it is not a "person" subject to suit by a *qui tam* relator under 31 U.S.C. 3729(a). Pet. App. 155-162.

In the first of three successive appeals in the case, the court of appeals vacated the dismissal order. Pet. App. 146-154. The court held that "the arm-of-the-state analysis used in the Eleventh Amendment context provides the appropriate legal framework" for determining whether an entity is a "person" under the FCA. *Id.* at 151. It remanded for the district court to apply the circuit's arm-of-the-state test, which consists of four "nonexclusive" factors: (1) "whether any judgment against the entity as defendant will be paid by the State or whether any recovery by the entity as plaintiff will inure to the benefit of the State"; (2) "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"; (3) "whether the entity is involved with state concerns as distinct

from non-state concerns, including local concerns"; and (4) "how the entity is treated under state law, such as whether the entity's relationship with the State is sufficiently close to make the entity an arm of the State." *Id.* at 153.

b. On remand, the district court again dismissed Oberg's claims, concluding that PHEAA is an arm of the State under the four-factor test. Pet. App. 127-145.

On Oberg's second appeal, the court of appeals vacated in relevant part, Pet. App. 75-126, holding that the district court had misapplied the arm-of-the-state factors with respect to PHEAA, *id.* at 83-89. The court remanded with instructions to permit "limited discovery" on the arm-of-the-state question. *Id.* at 89.

c. Following discovery, PHEAA moved for summary judgment on the ground that it is an arm of the State. Pet. App. 65. The district court granted summary judgment to PHEAA. *Id.* at 63-74.

On Oberg's third appeal, the court of appeals vacated and remanded for further proceedings on the merits of the FCA claims against PHEAA. Pet. App. 1-62. The court held that "PHEAA is not an arm of Pennsylvania" under its four-factor approach. *Id.* at 3.

The court of appeals concluded that the first factor —the potential impact on the state treasury of a judgment against PHEAA—"weighs heavily against holding that PHEAA is an arm of the state." Pet. App. 41 (citation omitted). The court noted, *inter alia*, that PHEAA possessed "sizeable corporate wealth" (much of which was held outside of the state treasury) and had paid prior (non-litigation) settlements out of its own funds without reimbursement from the Commonwealth. *Id.* at 25-26, 37, 41. Noting PHEAA's broad authority to control its own funds, as well as the absence of any

requirement that the Commonwealth pay judgments against the corporation, the court concluded that "Pennsylvania is neither legally nor functionally liable" for any money judgment in this case. *Id.* at 41.

The court of appeals found that the second factor—PHEAA's autonomy—also "weighs heavily against arm-of-state status." Pet. App. 54. The court acknowledgeed that the composition of PHEAA's board evinces "some level of state control," as do the various statutory requirements with which PHEAA must comply. *Id.* at 50-51. But the court concluded that those restrictions "do not intrude on PHEAA's exercise of its substantive discretion," and that "PHEAA, not the Commonwealth, controls PHEAA's funds and makes the substantive decisions governing the focus and direction of the company and its day-to-day operations." *Id.* at 53-54.

Examining the third factor—PHEAA's function and purpose—the court of appeals found that PHEAA provided services to Pennsylvania students that were "clearly of legitimate state concern." Pet. App. 57 (citation omitted). The court deemed it "highly relevant," however, that the majority of PHEAA's revenue was generated through its out-of-state activities. *Ibid.* Balancing those considerations, the court concluded that this factor "points towards arm-of-state status, but just barely." *Id.* at 58.

Finally, the court of appeals found that the fourth factor—PHEAA's treatment under state law—"tip[s]" toward arm-of-the-state status. Pet. App. 59. The court explained that, although Pennsylvania statutes and judicial decisions "generally treat[]" PHEAA "as a state agency," that treatment differs in some ways from that of "traditional state agencies." *Ibid.*

The court of appeals concluded that, while the four factors do not point clearly in one direction, on balance they counsel against treating PHEAA as an arm of the State. Pet. App. 61. Relying on *Hess* v. *Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), the court explained that the ultimate purpose of the inquiry is to determine whether a judgment against PHEAA would "place the Pennsylvania treasury at risk" or "offend the sovereign dignity" of the Commonwealth. Pet. App. 61. The court concluded that, because "the Commonwealth has structured PHEAA to be financially and operationally independent, and PHEAA in fact operates independently, without significant Commonwealth interference," allowing this suit to proceed would not threaten Pennsylvania's financial interests or its sovereign dignity. *Id*. at 61-62.

3. Case No. 15-1044 is an action brought by respondent Lee Pele under the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq*. Pele alleges that PHEAA, as servicer of his student loans, failed to correct credit reports that inaccurately described him as being in default. *Pele* Pet. App. 6.

a. PHEAA moved to dismiss, contending that it is entitled to Eleventh Amendment immunity as an arm of the Commonwealth of Pennsylvania. *Pele* Pet. App. 6-7. Applying the four-factor test discussed above, and concluding that PHEAA had failed to meet its burden, the district court denied the motion to dismiss. *Id*. at 7. Following discovery, however, the district court granted summary judgment for PHEAA. *Id*. at 5-30.

b. The court of appeals vacated the judgment. *Pele* Pet. App. 1-4. The court explained that the arm-of-the-state question was "materially identical" to the question presented in *Oberg* (in which the same panel

issued its decision on the same day). *Id.* at 4. Having found in *Oberg* that "PHEAA is *not* an arm of the Commonwealth," *id.* at 3-4, the court vacated the district court's order and remanded for further proceedings on the merits of Pele's FCRA claims, *id.* at 4.

4. PHEAA filed petitions for rehearing in both *Oberg* and *Pele*, and both petitions were denied. Pet. App. 163-164; *Pele* Pet. App. 31.

DISCUSSION

The proper disposition of these cases turns on whether PHEAA is an arm of the Commonwealth of Pennsylvania for purposes of sovereign immunity under the Eleventh Amendment. That question is directly presented in *Pele*. See *Pele* Pet. App. 2-3, 9-11. In *Oberg*, the decision below reflects the current consensus in the courts of appeals that the analysis of the statutory question whether a state-created public corporation is a "person" that may be sued by a *qui tam* relator under the FCA is co-extensive with Eleventh Amendment arm-of-the-state analysis. Pet. App. 3-4, 151-152; see, *e.g.*, *United States ex rel. Willette* v. *University of Mass., Worcester*, 812 F.3d 35, 39 (1st Cir. 2016) (citing cases), petition for cert. pending, No. 15-1437 (filed May 24, 2016).[2]

---

[2] The FCA imposes civil liability on "any person" who, *inter alia*, knowingly presents the federal government with "a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1). This Court has held that a relator who proceeds under the *qui tam* provisions of the FCA may not bring a claim against a State or state agency. See *Vermont Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 787-788 (2000). The Court has also recognized, however, that corporations "are presumptively *covered* by the term 'person.'" *Id.* at 782; see *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119, 122, 127 n.7 (2003) (holding

The court of appeals correctly weighed multiple considerations that this Court has previously identified as relevant to the arm-of-the-state inquiry. While various courts of appeals have articulated those factors in different ways, the approaches the courts have taken are generally consistent, and there is no reason to conclude that petitioner would have prevailed in any other circuit. Petitioner proffers no bright-line rule that would simplify the arm-of-the-state inquiry for the lower courts, and PHEAA's atypical status as an entity with substantial assets earned from out-of-state activities further reduces the likelihood that this Court's review would produce broadly applicable guidance. The petitions for writs of certiorari should be denied.

A. The Court Of Appeals Correctly Held That PHEAA Is Not An Arm Of The Commonwealth Of Pennsylvania

1. The court of appeals' conclusion that PHEAA is not an arm of the State is grounded in, and supported by, this Court's decision in *Hess* v. *Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994).

a. The Court in *Hess* considered whether the Port Authority Trans-Hudson Corporation (PATH), a commuter-railroad corporation created under a compact between New York and New Jersey, was entitled to

---

that municipal corporations are subject to *qui tam* suits under the FCA and rejecting asserted distinctions between such corporations and "quasi corporations" created by the State). The United States takes no position on whether (as the court of appeals concluded) respondent Oberg's right to proceed as a *qui tam* relator depends solely on whether PHEAA is an arm of the State. If the Court concludes that the constitutional question warrants its review, it should sidestep the statutory-construction question—which the parties have only glancingly addressed, see *Oberg* Br. in Opp. 34-35; Cert. Reply 12-13—by granting certiorari only in *Pele*.

Eleventh Amendment immunity. 513 U.S. at 32-33. The Court looked to various factors, including the extent to which PATH depended on the States for fiscal support; how much control state lawmakers exercised over PATH's operations and finances; the functions PATH performed; and how state courts and statutes had treated PATH. *Id.* at 44-46. The Court observed that those "indicators of immunity point[ed] in different directions." *Id.* at 47. It therefore sought further guidance from "the Eleventh Amendment's twin reasons for being." *Ibid.* With respect to the first reason, the Court explained that federal-court suits are not an "affront to the dignity" of multistate entities because "their political accountability is diffuse" and "they lack the tight tie to the people of one State that an instrument of a single State has." *Id.* at 41-42.

The Court's analysis, however, went beyond that observation about the nature of multistate entities. It also considered the Eleventh Amendment's other core purpose: "the prevention of federal-court judgments that must be paid out of a State's treasury." *Hess*, 513 U.S. at 48. In that respect, the Court reasoned that PATH's "anticipated and actual financial independence" and "long history of paying its own way" demonstrated that, as both a legal and a practical matter, New York and New Jersey would not be liable for any judgment entered against PATH. *Id.* at 49; see *id.* at 49-51. The Court therefore held that the purposes of the Eleventh Amendment would not be served by giving PATH arm-of-the-state status. *Id.* at 52.

b. In the decisions below, the court of appeals applied a four-factor balancing test that closely tracks *Hess*'s "indicators of immunity," 513 U.S. at 47. The first factor (the likely effect on the state treasury of

"any judgment against the entity," Pet. App. 4) reflects *Hess*'s focus on whether New York and New Jersey would be "responsible for the payment of judgments," 513 U.S. at 46. The second factor ("the degree of autonomy exercised by the entity," Pet. App. 4) reflects *Hess*'s consideration of the States' influence over the Port Authority's governing commission, see 513 U.S. at 44. The third factor (the entity's involvement with "state concerns," rather than "local concerns," Pet. App. 4) tracks *Hess*'s analysis of "Port Authority functions" and whether they could be "classified as typically state or unquestionably local," 513 U.S. at 45. The fourth factor ("how the entity is treated under state law," Pet. App. 4) encompasses *Hess*'s parsing of the language used to describe the Port Authority in its "implementing legislation" and in state-court decisions, 513 U.S. at 44-45.

Because those factors "point[ed] in different directions" here, as they did in *Hess*, the court of appeals properly looked to the "Eleventh Amendment's twin reasons for being"—protecting the State's treasury and preserving its sovereign dignity—as the "prime guide" in weighing the factors. Pet. App. 60-61 (quoting *Hess*, 513 U.S. at 47). With respect to the state treasury, the court of appeals explained that PHEAA's "commercial revenues have made PHEAA entirely self-sufficient," and that "the Commonwealth has not appropriated funds for PHEAA's operational support since 1988." *Id.* at 61. The court further noted that Pennsylvania "does not assert ownership of PHEAA's commercial revenues" and "is neither legally nor functionally liable for a judgment against PHEAA." *Ibid.* The court's reliance on those considerations was consistent with *Hess*, which recognized that PATH was "financially

self-sufficient," "generate[d] its own revenues," and "pa[id] its own debts." 513 U.S. at 52.

Turning to Pennsylvania's dignitary interests, the court of appeals cited considerable evidence that PHEAA "operates independently, without significant Commonwealth interference or substantive supervision." Pet. App. 62. The court observed that Pennsylvania has, in both statute and practice, "vested PHEAA with broad power over its finances and operations." *Id.* at 61. The court noted that Pennsylvania has admitted "in its public financial statements that it cannot impose its will on PHEAA." *Ibid.* Based on that record, the court concluded that "PHEAA's intended and actual independence from the Commonwealth" means that it would not "be an affront to Pennsylvania's sovereign dignity to permit this action to proceed against PHEAA." *Id.* at 62 (citing *Hess*, 513 U.S. at 52).[3]

2. Petitioner contends (Pet. 26) that *Hess* should be limited to "outlier situations" involving multistate entities. But *Hess* provides guidance for determining arm-of-the-state status whether the instrumentality in question is a multistate entity, a local subdivision, or a

---

[3] In petitioner's view (Pet. 33), "any 'control' exercised by PHEAA is control exercised by Pennsylvania through PHEAA's board, comprised entirely of Pennsylvania officials." As the Court in *Hess* explained, however, "ultimate control of every state-created entity" will always reside with the State that can "destroy or shape any unit it creates." 513 U.S. at 47. Even the *Hess* dissenters did not rest on the States' power to appoint and remove members of the Port Authority as a ground for finding PATH to be entitled to arm-of-the-state immunity. Instead, they relied on an express gubernatorial power to veto specific actions, *id.* at 61, 63 (O'Connor, J., dissenting)—a kind of power that Pennsylvania does not have over PHEAA.

state-created public corporation like PHEAA. The Court in *Hess* drew upon several lower-court decisions that had involved single-state entities. See 513 U.S. at 48-50, 52. And this Court has subsequently invoked *Hess* in addressing arm-of-the-state questions involving single-state entities. See *Auer* v. *Robbins*, 519 U.S. 452, 456 n.1 (1997) (relying on *Hess* in concluding that a board of police commissioners almost entirely appointed by the Governor of Missouri was "not an 'arm of the state' for Eleventh Amendment purposes" because a locality was responsible for its "financial liabilities"); *Regents of the Univ. of Cal.* v. *Doe*, 519 U.S. 425, 430-431 (1997) (noting that *Hess*'s analysis extended beyond the "unique" nature of "the bistate entity"; relying on *Hess*'s emphasis on "the importance of a State's legal liability" in holding that state university system enjoyed Eleventh Amendment immunity).

3. Petitioner repeatedly implies that *Hess*'s multifactor test should somehow be simplified (at least in the context of statewide, single-state entities). But petitioner never articulates any specific alternative test.

a. Petitioner asserts (*Pele* Pet. 25) that courts should apply some unspecified measure of "deference to the State's determination that a component of state government shares the State's immunity."[4] Petitioner

[4] See also, *e.g.*, Pet. 2 (emphasizing that "Pennsylvania regards PHEAA as a sovereign arm of Pennsylvania entitled to immunity in Pennsylvania courts"); Pet. 22-23 (criticizing multifactor tests that "often fail to emphasize the deference owed to States concerning which statewide entities share the sovereign's immunity"); Pet. 26 (contending that "deference to state-law treatment is far more appropriate in the context of statewide entities" than in that of local entities); Pet. 35 (stating that the Court should "replace a surfeit of balancing tests with an approach to statewide entities that is focused on the State's own treatment of the agency").

concedes, however, that "the arm-of-the-state question is ultimately one of federal law." *Pele* Pet. 18; see Cert. Reply 6. Under settled federal-law principles, "the fact that a governmental entity has been given sovereign immunity in its own state courts by state law is not dispositive of" the arm-of-the-state question. 13 Charles Alan Wright et al., *Federal Practice and Procedure* § 3524.2, at 370 (3d ed. 2008).

b. Petitioner is no more concrete in explaining how a State should express its non-binding determination that an entity shares its sovereign immunity. Notwithstanding its criticism of "the Fourth Circuit's minutiae-driven approach," *Pele* Cert. Reply 9, petitioner offers its own laundry list of purported indicators that PHEAA is sufficiently like "other state agencies" to be deemed an arm of the State: It is "based in the state capital"; is "exempt from state taxation"; "may issue regulations"; "can solicit opinions from," or be represented by, "the Attorney General"; "is subject to * * * auditing by the Pennsylvania Auditor General"; "may expend its funds only with the Treasury Department's approval"; and has employees who participate in state benefit programs, "are represented by a public-sector union," and wear "badges" calling them "State Employee[s]." Pet. 28-30.

Petitioner's list conspicuously fails to address the statutory provisions declaring that "[n]o obligation of [PHEAA] shall be a debt of" Pennsylvania. 24 Pa. Stat. Ann. § 5104(3) and (8). As a result, petitioner does not even attempt to explain how a federal court should balance PHEAA's various agency-like attributes with the legislature's deliberate action to insulate the Commonwealth from PHEAA's fiscal liabilities. Despite petitioner's concern for States' ability "to

experiment with novel governmental structures," *Pele* Cert. Reply 5, petitioner articulates no standard for identifying which novelties will, and which will not, preclude arm-of-the-state status.

c. Petitioner also asserts in passing (Pet. 31 n.10) that the federal government considers PHEAA to be a "State." That assertion is based on the facts that the U.S. Department of Education has permitted PHEAA to operate as a "guaranty agency" and that, under 20 U.S.C. 1085(j), such an agency must be a "State or non-profit private institution or organization." Petitioner's inference reflects a misunderstanding of the federal government's view and of Section 1085(j). The government has never recognized PHEAA as a state agency, let alone as a "State," and it did not implicitly do so simply by permitting PHEAA to operate as a guaranty agency. Section 1085 uses the term "State" as an adjective modifying "institution or organization"—terms that the relevant statute does not define. PHEAA identifies nothing in the statutory text or legislative history suggesting that Congress intended that the phrase "State * * * institution or organization" under Section 1085(j) would include only entities that qualify as arms of the State for Eleventh Amendment purposes.

Petitioner therefore fails to show that the court of appeals erred either by invoking a multifactor balancing test drawn from *Hess* or in its ultimate determination that PHEAA is amenable to a federal-court suit brought by a private party.

B. The Decisions Below Do Not Conflict With Any Decision Of Another Circuit

1. Although petitioner suggests that *Hess*'s reasoning should be limited to "the distinct context of a multistate agency," *Pele* Cert. Reply 7; see Pet. 26-27, peti-

tioner identifies no court of appeals that has adopted that view. Like the Fourth Circuit, other courts of appeals have relied on the considerations set forth in *Hess* when determining whether single-state entities are entitled to Eleventh Amendment immunity. Those courts have recognized that "*Hess* is founded on the twin reasons underlying the Eleventh Amendment, reasons common to all categories of cases," and that *Hess*'s approach is therefore "not limited to Compact Clause entities." *Fresenius Med. Care Cardiovascular Res., Inc.* v. *Puerto Rico & the Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 66 (1st Cir.), cert. denied, 540 U.S. 878 (2003); see, *e.g.*, *Puerto Rico Ports Auth.* v. *Federal Mar. Comm'n*, 531 F.3d 868, 874 (D.C. Cir. 2008) (noting that *Hess* supplies arm-of-state criteria to be applied to government-created public corporation), cert. denied, 555 U.S. 1170 (2009); *Mancuso* v. *New York State Thruway Auth.*, 86 F.3d 289, 293 (2d Cir.) ("Although *Hess* involved a bistate entity, we nevertheless believe that it is the proper starting place for our Eleventh Amendment inquiry in this case [against a public corporation created by New York State]."), cert. denied, 519 U.S. 992 (1996); *Gray* v. *Laws*, 51 F.3d 426, 431 (4th Cir. 1995) ("[E]ssentially the same broad principles identified by [*Hess*] as relevant in the multistate entity context apply also in determining whether, within a single state, a governmental entity is 'state' or 'local' for purposes of the Eleventh Amendment.").[5]

---

[5] Two of the decisions cited above involved entities established by Puerto Rico rather than by a State, but that fact was immaterial to those courts' analyses. The D.C. Circuit has held that Congress granted Puerto Rico "the same sovereign immunity that the States possess," *Puerto Rico Ports Auth.*, 531 F.3d at 872, and the

As petitioner explains (Pet. 15-18), different circuits have articulated their multi-factor tests in different ways. Despite those varying verbal formulations, every circuit to consider whether a statewide entity is an arm of the State has analyzed essentially the same factors that this Court discussed in *Hess*. *Pele* Br. in Opp. 10-14 & nn.1-4 (correlating the same factors with relevant portions of decisions from every circuit). Contrary to petitioner's suggestion (Cert. Reply 4), it is not "a stinging indictment of multifactor tests" that some courts describe a particular consideration as a stand-alone factor and others describe it as a subpart of a more general factor or otherwise take it into account. Thus, the Second Circuit has explained that its two-factor and six-factor tests "have much in common," and that the two-factor test "incorporates four" factors from the six-factor test. *Leitner* v. *Westchester Community Coll.*, 779 F.3d 130, 137 (2015). And a district court recently concluded—in another suit against PHEAA—that the Third Circuit's three-factor arm-of-the-state test synthesizes what had previously been described as nine factors and is "largely the same" as the four-factor test that was applied by the Fourth Circuit in the decisions below. *Lang* v. *Pennsylvania Higher Educ. Assistance Agency*, No. 12-1247, 2016 WL 4445275, at *8 (M.D. Pa. Aug. 23, 2016).

2. Even more importantly for current purposes, petitioner identifies no sound reason to believe that the

---

First Circuit does not distinguish between Puerto Rico and States for purposes of Eleventh Amendment immunity, see *Ramirez* v. *Puerto Rico Fire Serv.*, 715 F.2d 694, 697 (1983); cf. *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 141 n.1 (1993) (noting the First Circuit's practice and "express[ing] no view on this matter").

result in these cases would have been different in another circuit. Petitioner therefore cannot substantiate its assertion (Cert. Reply 1) that there is an "outcome-dispositive circuit split over the arm-of-the-state doctrine."

a. Petitioner describes (Cert. Reply 4) the First Circuit as one in which "PHEAA's undisputed sovereign immunity in Pennsylvania [state courts] would carry the day." Petitioner relies on the First Circuit's statement that it need not address "whether the state's treasury would be at risk" if it has first concluded that "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." Pet. 15 (quoting *Irizarry-Mora* v. *University of P.R.*, 647 F.3d 9, 12 (1st Cir. 2011)). Petitioner paraphrases the first step of that inquiry as giving "near-dispositive weight to a state's characterization of an entity, presumptively conferring arm-of-the-state status * * * to an entity that would share the state's sovereign immunity under state law." *Pele* Pet. 18-19.

As applied by the First Circuit, however, that first-step determination is not as simple or deferential as petitioner implies. In *Redondo Construction Corp.* v. *Puerto Rico Highway & Transportation Authority*, 357 F.3d 124, 128 (1st Cir. 2004), the court recognized that "a state court determination that the state intends an entity to share its immunity, while worthy of consideration among other indicators, does not substitute for an independent analysis under the federal standard to determine whether the entity should indeed benefit from the Eleventh Amendment's protection." *Id.* at 128 n.3 (citing *Hess*, 513 U.S. at 45).

In a more recent opinion—which post-dates petitioner's reply briefs—the First Circuit explained that *the first step alone* "requires consideration of the broad range of structural indicators that *Hess* * * * identified as relevant," including "[1] how state law characterizes the entity, [2] the nature of the functions performed by the entity, [3] the entity's overall fiscal relationship to the Commonwealth * * *, and [4] how much control the state exercises over the operations of the entity." *Grajales* v. *Puerto Rico Ports Auth.*, 831 F.3d 11, 17-18 (2016). Some of those "indicators," moreover, incorporate multiple subsidiary considerations. For instance, the "third structural indicator" requires an analysis of "the overall fiscal relationship" between the state and the entity, including the entity's own "funding power * * * to satisfy judgments without direct state participation," the "extent the entity receives state funding and support," whether "the state has immunized itself from responsibility for the agency's acts," and whether the State "bears legal liability for the entity's debts." *Id.* at 24 (citations omitted). In applying that analysis to the Puerto Rico Ports Authority (PRPA), the First Circuit emphasized that, outside one context, "the debts and obligations of PRPA are not those of the Commonwealth." *Id.* at 27. The court viewed that analogue to the statutory provisions that prevent PHEAA from creating debts for Pennsylvania (24 Pa. Stat. Ann. § 5104(3) and (8)), along with other aspects of the fiscal relationship, as "point[ing] against the conclusion that PRPA is an arm of the Commonwealth." 831 F.3d at 28. The circuit that decided *Grajales* would not simply defer to Pennsylva-

nia state courts' determinations that PHEAA is not amenable to suit in state court.[6]

b. Petitioner also contends (Pet. 21) that the decisions below conflict with *Versiglio* v. *Board of Dental Examiners of Alabama*, 686 F.3d 1290 (11th Cir. 2012), in which the court switched the result of its own arm-of-the-state analysis in light of an intervening Alabama Supreme Court decision granting an immunity from suit in state court. The Eleventh Circuit has recognized, however, that "it is federal law, not state law, that ultimately governs whether an entity is immune under the Eleventh Amendment," and that state law "does not control" the analysis. *Lightfoot* v. *Henry County Sch. Dist.*, 771 F.3d 764, 771 (2014). That court has specifically rejected the suggestion that *Versiglio* "can be read as collapsing the entire Eleventh Amendment multi-factor test into a single dispositive

---

[6] In concluding that PRPA was not an arm of Puerto Rico, the First Circuit acknowledged the D.C. Circuit's contrary holding in *Puerto Rico Ports Authority*, *supra*, that PRPA was entitled to immunity. See *Grajales*, 831 F.3d at 14. That difference was based not on a disagreement about the nature of the arm-of-the-state analysis, but on different readings of PRPA's enabling act. The D.C. Circuit had explained that it "read *Hess* in much the same way as did Judge Lynch's thorough First Circuit opinion in *Fresenius*." *Puerto Rico Ports Auth.*, 531 F.3d at 874. In *Grajales*, the First Circuit concluded that the D.C. Circuit had placed too little emphasis on statutory language describing PRPA as "separate and apart" from Puerto Rico and had placed too much weight on statutory references "to PRPA at one point as a 'government instrumentality' and at another point as a 'government controlled corporation.'" 831 F.3d at 22 (citations omitted). The circuits thus differed in their interpretations of Puerto Rico law, not in their understandings of federal sovereign-immunity principles. PRPA has not sought this Court's review of the interlocutory decision in *Grajales*.

inquiry—whether the state courts grant state law immunity to the entity for suits based on state law." *Walker* v. *Jefferson County Bd. of Educ.*, 771 F.3d 748, 754 (11th Cir. 2014). The views of state courts represent "only one part" of the Eleventh Circuit's analysis and are not considered "determinative." *Ibid.* (citation omitted).

c. Finally, petitioner asserts (Pet. 20) that the Sixth Circuit "clearly" would find PHEAA to be an arm of the State because the first factor of that court's analysis focuses on the "state treasury's *potential* legal liability for the judgment," rather than on "whether the state treasury will pay for the judgment in *that* case." *Ernst* v. *Rising*, 427 F.3d 351, 359 (2005) (en banc), cert. denied, 547 U.S. 1021 (2006). In *Ernst*, however, the liability in question would have run against the state retirement system. A state statute required the legislature to appropriate the money "needed to adequately fund the retirement system," and the state constitution made that duty "a contractual obligation owed by the State to each retiree." *Id.* at 359-360 (citations and internal quotation marks omitted); see also *id.* at 364 ("If a State's constitution and statutory law make the State responsible for funding a certain agency's programs, that reality makes the State potentially responsible for a judgment against that agency."). Here, by contrast, Pennsylvania law specifically provides that PHEAA's obligations will *not* be a debt of the Commonwealth. 24 Pa. Stat. Ann. § 5104(3) and (8). Pennsylvania would therefore bear no actual or potential "legal liability" (*Ernst*, 427 F.3d at 359) for any adverse judgment against PHEAA. And, like the Fourth Circuit in the decisions below, the Sixth Circuit

in *Ernst* invoked "several" other "factors" it drew directly from *Hess*. 427 F.3d at 359.

C. PHEAA's Atypical Nature Makes These Cases Poor Vehicles For Reconsidering Or Clarifying *Hess*

Echoing other critics both before and after *Hess*, petitioner contends that an "open-ended multifactor test[]" (Cert. Reply 11) reduces certainty for those trying to predict whether a state-created entity will be deemed an arm of the State. See, *e.g.*, *Hess*, 513 U.S. at 59 (O'Connor, J., dissenting) (citing sources describing lower courts' "struggle[s]" with pre-*Hess* law); *Pele* Pet. 23-24 (describing pre- and post-*Hess* criticism). But the Court in *Hess* treated multiple factors as relevant; the courts of appeals have consistently applied *Hess* to disputes involving single-state entities; and petitioner has not identified a more succinct alternative standard. Those facts suggest that, if the Court granted review in one or both of these cases, it might have difficulty articulating a more streamlined and concrete test for arm-of-the-state status.

As discussed above, moreover, PHEAA is an atypical state entity. In addition to its financial and operational independence, the corporation engages in extensive out-of-state commercial activities (often under separate trade names) and holds a significant percentage of its very substantial assets outside the state treasury. Although PHEAA resembles a traditional state agency in various other respects, its unusual combination of wealth and autonomy appear to distinguish it from the vast majority of statewide entities that would typically seek to invoke Eleventh Amendment immunity. A decision of this Court applying arm-of-the-state principles to PHEAA therefore might provide little

guidance concerning the proper treatment of more typical state-created entities.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
CURTIS E. GANNON
Assistant to the Solicitor General
MARK B. STERN
NICOLAS Y. RILEY
Attorneys

DECEMBER 2016