NO. ______

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

PETITION FOR WRIT OF CERTIORARI

JASON L. SWARTLEY
JAMES J. JARECKI
PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY
1200 N. 7th Street
Harrisburg, PA 17102

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
ANDREW N. FERGUSON
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Petitioner

(Additional Counsel Listed On Inside Cover)

February 16, 2016

DANIEL B. HUYETT
NEIL C. SCHUR
STEVENS & LEE P.C.
111 North 6th Street
Reading, PA 19603

JOSEPH P. ESPOSITO
JILL M. DEGRAFFENREID
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue NW
Washington, DC 20037

Counsel for Petitioner

QUESTION PRESENTED

The Pennsylvania Higher Education Assistance Agency (PHEAA) was created by the Commonwealth of Pennsylvania as a state-level agency to carry out the essential governmental function of providing Pennsylvanians with financial aid for higher education. Like other state agencies, PHEAA is treated as an arm of Pennsylvania by Pennsylvania law, entitled to sovereign immunity in Pennsylvania courts, governed by Pennsylvania officials, based in the state capital, staffed entirely by state employees, and is inextricably intertwined with the Pennsylvania treasury. Nonetheless, after applying a multifactor balancing test, the Fourth Circuit held that the agency was not an arm of the Commonwealth of Pennsylvania but rather an "independent political subdivision" subject to suit in federal court.

The question presented is:

Whether the Pennsylvania Higher Education Assistance Agency, a statewide agency located in the capital and unambiguously treated as an arm of the state by Pennsylvania, is an arm of Pennsylvania for purposes of federal law, or is instead an "independent political subdivision" as determined by the Fourth Circuit and its multifactor balancing test.

PARTIES TO THE PROCEEDING

Petitioner Pennsylvania Higher Education Assistance Agency was the defendant in the district court and the appellee in the court of appeals. It was created and is controlled by the Commonwealth of Pennsylvania.

Respondent Jon H. Oberg is an individual and was the plaintiff in the district court and appellant in the court of appeals.

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PETITION FOR WRIT OF CERTIORARI

Since its creation in 1963, the Pennsylvania Higher Education Assistance Agency (PHEAA) has occupied an inherently sovereign role as a "government instrumentality" of the Commonwealth of Pennsylvania. 24 P.S. §5101. PHEAA's purpose is, and always has been, to "improve the higher educational opportunities" of Pennsylvania citizens by assisting them in financing the costs of higher education. *Id.* §5102. To that end, from its headquarters in the state capital, PHEAA administers nearly half a billion dollars annually in financial aid to Pennsylvania students on behalf of the Commonwealth. Furthermore, by exercising powers expressly granted to it by the Pennsylvania legislature, PHEAA has generated revenues that it uses both to cover its administrative costs and to supplement financial aid to Pennsylvania students by hundreds of millions of dollars. As a result, PHEAA has helped make higher education possible for literally millions of Pennsylvanians.

Not surprisingly in light of its important sovereign function, Pennsylvania law uniformly and unambiguously treats PHEAA as an arm of the Commonwealth. Like other Pennsylvania agencies, PHEAA enjoys sovereign immunity in the Pennsylvania courts. It is exempt from state taxation. It promulgates regulations and possesses subpoena power. The Pennsylvania Attorney General must approve all of its material contracts and must represent it in litigation unless she delegates that authority. PHEAA's governing board is composed entirely of Pennsylvania state officials, a majority of whom are sitting legislators. PHEAA must deposit all revenues into the Pennsylvania treasury, it cannot spend anything without first obtaining the Pennsylvania Treasurer's approval, and all expenses are paid by checks drawn on the Pennsylvania treasury. Its employees use Pennsylvania's retirement and healthcare plans, are paid from the Pennsylvania treasury according to terms negotiated between the state employees' union and the Governor, and wear badges clearly stating: "Commonwealth of Pennsylvania State Employee." PHEAA's sovereign role is so well established that an unbroken line of Pennsylvania precedent holds that PHEAA is an agency of the Commonwealth.

Given these uncontested facts, it would seem clear that PHEAA is an arm of Pennsylvania entitled to the immunity conferred upon sovereigns in federal court. The Fourth Circuit, however, unfamiliar with Pennsylvania agencies and Pennsylvania law, concluded otherwise, applying a multifactor balancing test to the exclusion of the deference owed a sovereign state. Applying a balancing test fashioned for differentiating local school boards and multistate entities from statewide agencies, the Fourth Circuit reached the remarkable conclusion that PHEAA is nothing more than an "independent political subdivision," akin to a local school board or county sheriff's office. Thus, while Pennsylvania regards PHEAA as a sovereign arm of Pennsylvania entitled to immunity in Pennsylvania courts, would-be plaintiffs can cross the border to West Virginia or Maryland and file suit in federal court, where PHEAA will be treated like any other private party.

The decision below is egregiously wrong, demeans Pennsylvania's sovereign dignity, and threatens Pennsylvania's fiscal integrity and its citizens' access to higher education. It also implicates a deeply entrenched circuit split over the proper test for identifying an arm of the state and dramatically illustrates the need for this Court to provide guidance in a case involving a statewide agency, rather than a political subdivision or multistate entity. This Court has not squarely addressed the arm-of-the-state question in cases involving a statewide agency, but rather has addressed local school boards and multistate entities. As a result, the courts of appeals have been left to fashion balancing tests based on precedents addressing outlier situations and have splintered and created disparate two-, three-, four-, five-, and even six-factor balancing tests.

The differences in those tests can be outcome-determinative. In numerous other circuits, substantial deference would have been given to Pennsylvania's treatment of PHEAA as an arm of the state, and PHEAA would rightly have been deemed an arm of Pennsylvania for federal law purposes. But here, the Fourth Circuit's amorphous, four-factor balancing test led it to miss the forest for the trees. What should have been a straightforward case involving a statewide agency based in the state capital that a sovereign State has deemed an arm of the state became a sophistic exercise akin to comparing the length of a line to the weight of a rock. And while there are profound conflicts in the circuits over the means for determining arm-of-the-state status, in some respects the most important conflict is that Pennsylvania believes that PHEAA is an arm of the state, as reconfirmed by recent legislation, and the Fourth Circuit does not. That direct conflict between state officials in Harrisburg and federal judges in Richmond is untenable and reflects the utter confusion in the doctrine and the need for the Court's review on this important issue.

OPINIONS BELOW

The Fourth Circuit's opinion is reported at 804 F.3d 646 (4th Cir. 2015). App.1-62. The district court's opinion is reported at 77 F. Supp. 3d 493 (E.D. Va. 2015). App.63-74.

JURISDICTION

The Fourth Circuit issued its opinion on October 21, 2015. It denied PHEAA's petition for rehearing on November 17, 2015. App.163-64. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment and pertinent provisions of the False Claims Act are reproduced in the appendix.

STATEMENT OF THE CASE

A. PHEAA's Creation, Governance, and Operation

1. In 1963, the Pennsylvania legislature created PHEAA as a "government instrumentality" to "improve the higher educational opportunities of" Pennsylvanians "by assisting them in meeting their expenses of higher education … and by enabling the agency, lenders and postsecondary institutions to make loans available to students and parents for

postsecondary education purposes." 24 P.S. §§5101-5102. PHEAA was created "*in all respects* for the benefit of the people of the Commonwealth, for the improvement of their health and welfare, and for the promotion of the economy." *Id.* §5105.6 (emphasis added). "[S]uch purposes," the legislature continued, "are public purposes and the agency will be performing an essential governmental function in the exercise of the powers conferred upon it." *Id.*

PHEAA's enabling legislation provided that it would take effect only "upon the adoption by the electorate of an amendment to the Constitution of Pennsylvania authorizing grants or loans for higher educational purposes." *Id.* §5112. Pennsylvania citizens immediately adopted such an amendment, *see* Pa. Const. art. III, §29, thereby resulting in PHEAA's creation.

PHEAA's chief function is the administration of Pennsylvania's State Grant Program. App.13; 24 P.S. §§5151-52. In response to annual budget requests, the Pennsylvania legislature appropriates funds for the Grant Program, and PHEAA "distributes every penny … to qualifying students." App.57. In the last five years alone, PHEAA has administered more than $1.5 billion in Grant Program funds for the benefit of hundreds of thousands of Pennsylvania students. *See* JA2528.[1]

To carry out its "essential governmental function," 24 P.S. §5105.6, PHEAA is also statutorily empowered to service and guarantee "loans funded, guaranteed or reinsured under Federal laws," *id.*

[1] "JA" refers to the Fourth Circuit joint appendix.

§5104(1), and guarantee loans under the Federal Higher Education Act, *id.* §5104(1.2). And it has authority to "make, service, invest in, purchase, make commitments to purchase, take assignments of or administer loans." *Id.* §5104(1.1)(iii).

These activities have generated substantial revenues that benefit Pennsylvania and its citizens. First, these revenues fully fund PHEAA's operations. Indeed, PHEAA has carried out its government responsibilities so effectively that the legislature has not had to appropriate any taxpayer funds for PHEAA's operational expenses since 1988. App.13. Second, PHEAA has disbursed much of this generated revenue as additional financial aid to Pennsylvanians; since 2011 alone, it has contributed more than $310 million to the Commonwealth's financial aid programs. *See* JA2528-29, 2531, 2535-36.

2. PHEAA is governed and functions precisely as one would expect of a sovereign Pennsylvania agency. Based in the state capital, Harrisburg, it is controlled by a twenty-member board of directors, a majority of whom—sixteen out of twenty—are members of the Pennsylvania legislature and the rest of whom are gubernatorial appointees. App.11.[2]

Like other Pennsylvania agencies, PHEAA has authority to issue binding regulations, which must receive approval from Pennsylvania's Regulatory Review Commission and Attorney General and are "accorded great weight" in Pennsylvania courts.

[2] The legislature amended the relevant statute in 2010, but as the Fourth Circuit acknowledged, that change is "not relevant to the disposition of" this case. App.11 n.3.

Cherry v. PHEAA, 642 A.2d 463, 464 (Pa. 1994); App.17. PHEAA has statewide subpoena power, and it can enter judgments of defaults valid statewide. 24 P.S. §5104(10)-(11). The Pennsylvania Attorney General represents PHEAA in all civil litigation unless she delegates that authority. App.17.[3] The Attorney General must also review and approve all PHEAA contracts over $20,000, in part to ensure that the contract does not waive Pennsylvania's sovereign immunity. App.16; JA713, 2837, 2841. Like other state agencies, PHEAA can solicit opinions from the Attorney General, and it is bound to follow those opinions. App.16; 71 P.S. §§732-102, -204.

PHEAA's property, income, and activities are exempt from state taxation. *See* 24 P.S. §§5105.6, 5106-07. As with other Pennsylvania agencies, all PHEAA revenues must be deposited in the Pennsylvania state treasury. App.14-15. Although nominally earmarked for the "Educational Loan Assistance Fund," the funds are in fact commingled with the Commonwealth's general investment fund and invested by the Pennsylvania Treasurer, not PHEAA, App.15; 24 P.S. §5105.10. PHEAA may borrow money, but only with gubernatorial approval and only up to a legislatively dictated limit. *See* 24 P.S. §§5104(3), 5105.1(a.1).

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[3] Thus, for example, the Attorney General approved PHEAA's delegation request in this case, JA763-773, but recently denied PHEAA's delegation request in another federal lawsuit. *See* Br. in Supp. of Mot. for Summ. J. 24, *Lang v. PHEAA*, No. 12-1247 (M.D. Pa. Feb. 13, 2016) (Dkt. 135); Mot. for Summ. J, Ex. 2, at ¶65 & Ex. G, *Lang* (Dkt. 133-3).

Like other Pennsylvania agencies, PHEAA may use its revenues only for the "purposes of the agency," *id.* §5104(3), and only with the approval of the Treasury Department. *See* App.15; 72 P.S. §307. All PHEAA expenses are paid by the Pennsylvania Treasurer; checks are drawn on the Pennsylvania treasury and signed by the Pennsylvania Treasurer. App.15-16. PHEAA must report its financial condition to the Governor and legislature annually. App.18. Its financial information is included in Pennsylvania's annual financial report. *Id.* It is subject to—and has undergone—auditing by Pennsylvania's Auditor General. App.17.

Like all other Pennsylvania agency employees, PHEAA's employees are paid by the Pennsylvania Treasurer, and they must participate in the Pennsylvania state retirement system and use the Pennsylvania state healthcare fund. App.18; 71 P.S. §§5102, 5301. All but one work in Pennsylvania. JA2464-66. PHEAA employee badges state: "Commonwealth of Pennsylvania State Employee." App.73. PHEAA's union employees are represented by a public-sector union—the American Federation of State, County and Municipal Employees—and their compensation is governed by a contract negotiated by the Governor's office. *Id.*; JA344. PHEAA's officers, managers, and board members are "public officials" subject to the Pennsylvania Public Official and Employee Ethics Act, the state's anti-corruption law. App.73; 65 P.S. §1102.

In light of the foregoing, an unbroken line of Pennsylvania court decisions treats PHEAA as a Pennsylvania agency. *See, e.g.*, *PHEAA v. Barksdale*, 449 A.2d 688, 689 (Pa. Super. Ct. 1982) (PHEAA "is undeniably an agency of the Commonwealth"); *PHEAA v. Xed*, 456 A.2d 725, 726 (Pa. Commw. Ct. 1983); *Richmond v. PHEAA*, 297 A.2d 544, 546-47 (Pa. Commw. Ct. 1972).

B. Procedural History

1. Respondent brought a *qui tam* action under the False Claims Act (FCA) alleging that PHEAA and other comparable agencies in Arkansas, Kentucky, and Vermont filed fraudulent claims with the federal government. After the United States declined to intervene, the district court dismissed PHEAA and the other state agencies because they are not "person[s]" subject to FCA liability. *See* App.156-62; *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787-88 (2000) (holding that States and state agencies are not "persons" under FCA). The Fourth Circuit vacated, holding that "the arm-of-the-state analysis used in the Eleventh Amendment context provides the appropriate legal framework" for deciding whether a governmental entity is a "person" under the FCA, and instructing the district court to apply it on remand. App.151-54.

On remand, the district court applied the Fourth Circuit's four-factor arm-of-the-state-test: (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"; (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." App.133, 137, 139-

40, 142. Concluding that all four factors favored PHEAA's arm-of-the-state status, the court granted PHEAA's motion to dismiss; it also dismissed the other three state agencies. App.144-45.

The Fourth Circuit again vacated, concluding that "the third and fourth factors suggest that PHEAA is an arm of the state," but, on the first two factors, respondent had "alleged sufficient facts that PHEAA is not an arm of the state." App.89. It remanded for discovery regarding whether PHEAA is an arm of the state. *Id.* The Fourth Circuit reached a similar conclusion for the Vermont agency, but agreed with the district court that Arkansas' agency is an arm of the state. (Kentucky had settled before the Fourth Circuit's decision.) App.93, 100.

After extensive discovery, PHEAA moved for summary judgment on the arm-of-the-state question. The district court held that "further factual development" had established that all four factors weighed in favor of finding PHEAA an arm of the state. App.66-67, 68-69, 70-71, 73. Accordingly, it granted summary judgment to PHEAA, holding likewise with respect to the Vermont agency. App.74.

2. Respondent appealed, claiming that he had raised sufficient factual disputes to defeat summary judgment and to send the arm-of-the-state question to a jury. The Fourth Circuit determined that there was "no material dispute about the relevant facts" and that arm-of-the-state status is a legal, not jury, question. App.10-11 & n.2. It nonetheless *sua sponte* held that *respondent* was entitled to summary judgment,

concluding that PHEAA is not an arm of Pennsylvania.[4]

In so holding, the Fourth Circuit again relied on its four-factor balancing test. On the first factor, the Fourth Circuit held that Pennsylvania was not "functionally liable" for judgments against PHEAA because "PHEAA's control over [its] wealth" made it unlikely that Pennsylvania's "help would be required to satisfy [a] hypothetical judgment." App.35, 40-41 & n.15. On the second factor, the court held that PHEAA "operates autonomously"; the fact that PHEAA's board is comprised exclusively of state officials and appointees only "suggests some level of state control," and Pennsylvania's many restrictions on PHEAA operate "at the administrative edges rather than the discretionary heart of PHEAA's authority." App.43, 50, 52. On the third factor, the court conceded that PHEAA's work involves "an essential governmental function," is "clearly of legitimate state concern," "provide[s] significant services to the citizens of Pennsylvania," and "inure[s] to the benefit of Pennsylvania citizens." App.57 (quotation marks omitted). The court nevertheless discounted all of this because "'the majority of PHEAA's revenue and income was derived from out-of-state activity,'" *i.e.*, PHEAA's servicing and guaranteeing loans for non-Pennsylvanians. App.57. Thus, this factor "just barely" favored PHEAA. App.58. On the fourth factor, the court conceded that "PHEAA is generally treated as a state agency under state law." App.59. Nonetheless, it concluded that this factor only

[4] Vermont settled before the Fourth Circuit's decision, leaving PHEAA as the sole defendant.

"tip[ped]" in PHEAA's favor because of a few isolated practices unconnected to any Pennsylvania statute, regulation, or decision. *Id*.

The court then "balance[d]" the four factors and concluded that PHEAA is "an independent political subdivision" of Pennsylvania, not an arm of Pennsylvania. App.60, 62.

The sovereign government of Pennsylvania responded swiftly. The legislature enacted, and the Governor signed, legislation declaring that PHEAA "is an integral part and arm of the Commonwealth" and "is directly controlled by the Commonwealth." H.B. 1460, 2015-16 Gen. Assemb., Reg. Sess. §107 (Pa. 2015). The legislation also reiterated that PHEAA simply "maintained" Commonwealth funds, and it underscored PHEAA's "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." *Id.*

REASONS FOR GRANTING THE PETITION

The Commonwealth of Pennsylvania plainly considers PHEAA to be an arm of the state; the Fourth Circuit just as plainly does not. The Fourth Circuit's decision is not only egregiously wrong and an affront to Pennsylvania's sovereign dignity; it also implicates a thicket of conflicting lower court balancing tests—ranging from two to six factors—obscuring what should be a straightforward determination of whether a statewide agency treated as an arm of the state under state law is also an arm of the state for federal-law purposes. There is no question that PHEAA would be classified as an arm of the state under the tests of several circuits that give more deference to States and less weight to extraneous factors. But the problem with the conflicting circuit precedent runs even deeper. This Court has squarely confronted the arm-of-the-state question only in the context of county school boards and multistate agencies. The lower courts have extrapolated multifactor balancing tests from those cases and applied them to heartland cases like this—a statewide agency located in the state capital, staffed with state-government employees discharging statewide functions, and unambiguously considered an arm of the state under state law—with anomalous results, as demonstrated here.

Under any coherent approach to determining arm-of-the-state status, the Fourth Circuit's decision is incorrect. Pennsylvania's statutes, decisions, and practices overwhelmingly demonstrate that PHEAA is a state agency, and PHEAA's mission, governance, and operations bear this characterization out—as does Pennsylvania's unambiguous declaration in response to the decision below that PHEAA is an arm of the state. Pennsylvania's considered judgment that PHEAA is an arm of *its* government should carry the day and prevent PHEAA from being haled into federal court. Yet the Fourth Circuit subordinated this sovereign interest to a hodgepodge of irrelevant facts and dubious reasoning under its multifactor balancing test. Time and again, this Court has emphasized the importance of respecting state sovereignty. State sovereignty is too important and too consequential to have the answer to a question as basic as whether a state agency like PHEAA is in fact an arm of the state for federal-law purposes turn on the vagaries of which two- to six-factor balancing test a court applies and how the court does the balancing. In short, there is a conflict in the circuits, a conflict between state officials in Harrisburg and federal judges in Richmond, and an acute need for this Court to substitute clarity for a thicket of conflicting balancing tests.

I. This Court's Precedents Have Left The Circuits Conflicted Over The Proper Test For Determining Whether An Entity Is An Arm Of The State.

The courts of appeals have hopelessly splintered over how to determine whether a particular entity is an arm of the state. The disarray stems from this Court's having addressed that question only in cases involving either multistate entities or local bodies, instead of state-level entities. The resulting assortment of all-purpose tests in the lower courts has produced both confusion and, as this case demonstrates, anomalous results.

A. The Circuits Apply Vastly Different Arm-of-the-State Tests, Under Many of Which PHEAA Would Rightly Have Been Deemed an Arm of Pennsylvania.

1. Courts and commentators agree: "The jurisprudence over how to apply the arm-of-the-state doctrine is, at best, confused." *Mancuso v. N.Y. State Thruway Auth.*, 86 F.3d 289, 293 (2d Cir. 1996); *accord* Erwin Chemerinsky, Federal Jurisdiction §7.4, at 444 (6th ed. 2012) ("[T]he law concerning the immunity of state agencies, boards, and other entities from suit in federal courts is quite inconsistent."). To answer the seemingly straightforward question of whether an entity is an arm of the state, the circuits have adopted two-, three-, four-, five, and six-factor tests. Even

circuits that apply the same number of factors, moreover, define those factors differently.

Some circuits employ a two-factor test. The First Circuit asks first "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 v. Univ. of P.R.*, 647 F.3d 9, 12 (1st Cir. 2011). Only if the results are inconclusive does the court "proceed to the second stage and consider whether the state's treasury would be at risk in the event of an adverse judgment." *Id.* The Seventh Circuit employs a substantially different two-factor test addressing "(1) the extent of the entity's financial autonomy from the state; and (2) the 'general legal status' of the entity." *Burrus v. State Lottery Comm'n of Ind.*, 546 F.3d 417, 420 (7th Cir. 2008). The Eighth Circuit applies a still different two-factor test assessing "the agency's degree of autonomy and control over its own affairs and, more importantly, whether a money judgment against the agency will be paid with state funds." *Thomas v. St. Louis Bd. of Police Comm'rs*, 447 F.3d 1082, 1084 (8th Cir. 2006).

Other circuits employ a three-factor test. The Third Circuit examines "(1) the source of the money that would pay for the judgment; (2) the status of the entity under state law; and (3) the entity's degree of autonomy." *Haybarger v. Lawrence Cty. Adult Prob. & Parole*, 551 F.3d 193, 198 (3d Cir. 2008).[5] The Tenth

[5] Applying the Third Circuit's three-factor test, a district court found PHEAA to be an arm of Pennsylvania and granted PHEAA's motion to dismiss on Eleventh Amendment immunity

Circuit looks to "(1) the state's legal liability for a judgment; (2) the degree of autonomy from the state—both as a matter of law and the amount of guidance and control exercised by the state; and (3) the extent of financing the agency receives independent of the state treasury and its ability to provide for its own financing." *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 718 (10th Cir. 2006). And the District of Columbia Circuit assesses "(1) the State's intent as to the status of the entity, including the functions performed by the entity; (2) the State's control over the entity; and (3) the entity's overall effects on the state treasury." *P.R. Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 873 (D.C. Cir. 2008).

Still other circuits employ a four-factor test. The Fourth Circuit is one. *See* p. 9, *supra* (describing test). The Sixth Circuit employs a substantially different four-factor test addressing "(1) the State's potential liability for a judgment against the entity; (2) the language by which state statutes and state courts refer to the entity and the degree of state control and veto power over the entity's actions; (3) whether state or local officials appoint the board members of the entity; and (4) whether the entity's functions fall within the traditional purview of state or local government." *Ernst v. Rising*, 427 F.3d 351, 359 (6th Cir. 2005) (citations omitted). The Eleventh Circuit examines "(1) how state law defines the entity; (2)

grounds. The Third Circuit remanded for further development of the record, *see Lang v. PHEAA*, 610 F. App'x 158 (3d Cir. 2015), and PHEAA recently moved for summary judgment on Eleventh Amendment immunity grounds, *see* n.3, *supra*.

what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity." *United States ex rel. Lesinski v. S. Fla. Water Mgmt. Dist.*, 739 F.3d 598, 602 (11th Cir. 2014).

The Ninth Circuit employs a five-factor test, examining "[1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has the power to take property in its own name or only the name of the state, and [5] the corporate status of the entity." *Beentjes v. Placer Cty. Air Pollution Control Dist.*, 397 F.3d 775, 778 (9th Cir. 2005).

The Fifth Circuit employs a six-factor test that considers "(1) whether the state statutes and case law characterize the agency as an arm of the state; (2) the source of the funds for the entity; (3) the degree of local autonomy the entity enjoys; (4) whether the entity is concerned primarily with local, as opposed to state-wide problems; (5) whether the entity has authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property." *Richardson v. S. Univ.*, 118 F.3d 450, 452 (5th Cir. 1997) (brackets omitted).

Finally, the Second Circuit cannot decide whether it employs a two-factor or six-factor test. Its two-factor test examines "(1) the extent to which the state would be responsible for satisfying any judgment that might be entered against the defendant entity, and (2) the degree of supervision exercised by the state over the defendant entity." *Clissuras v. City Univ. of N.Y.*, 359 F.3d 79, 82 (2d Cir. 2004). Its six-factor test examines

"(1) how the entity is referred to in its documents of origin; (2) how the governing members of the entity are appointed; (3) how the entity is funded; (4) whether the entity's function is traditionally one of local or state government; (5) whether the state has a veto power over the entity's actions; and (6) whether the entity's financial obligations are binding upon the state." *Gorton v. Gettel*, 554 F.3d 60, 62 (2d Cir. 2009). Acknowledging the "lack of clarity" in its approach, the court recently applied *both* tests simultaneously. *Leitner v. Westchester Cmty. Coll.*, 779 F.3d 130, 136-37 (2d Cir. 2015).

2. These disparate tests are not simply varying formulations of the same underlying principles. They demonstrate a real conflict in the circuits' approaches to determining whether an entity is an arm of the state, especially concerning the degree to which the State's own explicit treatment of the agency is informative or controlling. In the First Circuit, there is great deference to the State's characterization of an agency. The Ninth Circuit, by contrast, manages to consider five different factors without accounting for the State's treatment of the entity. Thus, these differences can be outcome-determinative. Indeed, PHEAA would rightly have been deemed an arm of Pennsylvania for both federal- and state-law purposes in several circuits.

Under the First Circuit's two-step inquiry, for example, the analysis would have been over at the first step, which asks "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. Pennsylvania has plainly done so. "In Pennsylvania, sovereign immunity is available to a Commonwealth party, which is 'a Commonwealth agency and any employee thereof.'" *Snead v. Soc'y for Prevention of Cruelty to Animals of Pa.*, 985 A.2d 909, 913 (Pa. 2009) (quoting 42 P.S. §8501). A "Commonwealth agency" is "[a]ny executive agency or independent agency," 42 P.S. §102, a category that explicitly includes PHEAA, *see* 71 P.S. §732-102. Moreover, PHEAA's structure and operation have led Pennsylvania courts universally to hold that PHEAA is "an agency of the Commonwealth." *Barksdale*, 449 A.2d at 689; *Xed*, 456 A.2d at 726; *Richmond*, 297 A.2d at 546-47; *cf. Marshall v. Port Auth. of Allegheny Cty.*, 568 A.2d 931, 933-34 (Pa. 1990) (holding that an "agency of the Commonwealth" is "plainly … entitled to immunity"). Finally, it is undisputed that the Pennsylvania Attorney General reviews *every* PHEAA contract over $20,000 to ensure that the contract "does not waive the sovereign immunity of the Commonwealth of Pennsylvania." JA713; *see also* JA2837, 2841. Indeed, in a recent federal suit, the Attorney General asserted PHEAA's sovereign immunity. *See* Answer 13, *Chambers v. PHEAA*, No. 15-73 (M.D. Pa. May 8, 2015).[6] Because Pennsylvania has clearly "indicated an intention" that PHEAA "share [its] sovereign immunity," and no Pennsylvania statute or decision suggests otherwise, PHEAA would be an arm of the state for federal-law purposes in the First Circuit.

[6] The case was dismissed without reaching the sovereign immunity question.

PHEAA would also clearly be deemed an arm of the state under the Sixth Circuit's four-factor test. *See Ernst*, 427 F.3d at 359; p. 16, *supra* (describing test). The Sixth Circuit's first factor, "potential liability," asks whether a state's treasury would pay for a judgment in the "hypothetical[]" situation where the entity could not cover a judgment. *See* 427 F.3d at 362. While the Fourth Circuit refused to consider such a "hypothetical" situation, App.40 n.15, that is the "proper inquiry," according to the Sixth Circuit: "not whether the state treasury would be liable in *this* case, but whether … the state treasury would be subject to 'potential legal liability' *if* the [entity] did not have the money to cover the judgment." 427 F.3d at 362. Undisputed testimony by PHEAA's chairman—who is also chairman of the Pennsylvania House Appropriations Committee—established exactly that: a judgment exceeding PHEAA's ability to pay would be funded by legislative appropriations from the Pennsylvania treasury. *See* JA248.

The other Sixth Circuit factors also squarely support PHEAA's arm-of-the-state status. "[S]tate statutes and state courts" indisputably treat PHEAA as an arm of Pennsylvania, and the composition of PHEAA's board—sitting legislators and gubernatorial appointees, with no local appointees—gives Pennsylvania "control and veto power" over PHEAA's actions. And PHEAA's function of providing Pennsylvanians with higher-education financial assistance plainly falls within the "traditional purview of state," not local, government. *Ernst*, 427 F.3d at 359. Under the Sixth Circuit's test, therefore, PHEAA is clearly an arm of Pennsylvania.

The Fourth Circuit's decision also conflicts with the Eleventh Circuit's decision in *Versiglio v. Board of Dental Examiners of Alabama*, 686 F.3d 1290 (11th Cir. 2012). There, the Eleventh Circuit had initially held that the defendant was not an arm of Alabama, noting that the highest Alabama court to have addressed the issue had also so held. *Id.* at 1292. Shortly afterward, however, the Alabama Supreme Court held that the defendant *was* an arm of Alabama. *Id.* The Eleventh Circuit then vacated its previous judgment and held that the entity was an arm of Alabama for federal-law purposes. *Id.* Observing that it "gives great deference to how state courts characterize the entity in question," the court explained that a contrary holding would "have resulted in the incongruous result of having a 'state agency' that is immune from suit under state law but not federal law." *Id.* at 1292-93. Here, the Fourth Circuit created exactly that "incongruous result," as PHEAA is plainly treated as an arm of the Commonwealth for state-law purposes in the Pennsylvania courts. *See also P.R. Ports Auth.*, 531 F.3d at 873 (D.C. Circuit holding that commonwealth's "characterization of [entity] as a government instrumentality … strongly support[ed]" arm-of-state status).

The conflicts between the decision below and other circuits' decisions are not simply the product of applying multifactor tests to different circumstances. Rather, they result from the fact that these circuits employ substantially different tests from the Fourth Circuit that properly emphasize the sovereign's treatment of the entity under state law. The divergent outcomes under different circuits' tests, moreover, reflect the broader disarray in the circuits regarding how to determine whether an entity is an arm of the state. Finally, it bears emphasizing that while courts of appeals have, on occasion, held that a statewide entity—rather than a local or multistate entity—is not an arm of the state, *see, e.g.*, *Mancuso*, 86 F.3d at 296, we are aware of no case where a court of appeals has done so by disregarding an out-of-circuit sovereign's own view of that entity. That conflict—between state officials in Harrisburg and federal judges in Richmond—is unprecedentedly stark.

B. The Circuit Conflict Results From this Court's Lack of Guidance Regarding Treatment of Statewide Entities That the State Itself Considers to Be an Arm of the State.

The disarray in the circuits is the direct product of a lack of clear guidance from this Court on this important question. The Court has addressed arm-of-the-state status only in peripheral cases involving either local bodies or multistate entities created by interstate compacts. It has never addressed the arm-of-the-state status of a statewide entity, much less a statewide entity that state law emphatically treats as an arm of the state. As a result, the circuits have formulated all-purpose multifactor tests from precedents that did not purport to set them out. And those tests have emphasized factors useful for dealing with multistate entities and school boards, but far less helpful in dealing with more common statewide agencies; furthermore, the tests often fail to emphasize the deference owed to States concerning which statewide entities share the sovereign's immunity.

1. The Eleventh Amendment immunizes unconsenting States and state agencies from federal-court suit. *E.g.*, *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 747 (2002). At the same time, "[p]olitical subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities" entitled to sovereign immunity. *Reynolds v. Sims*, 377 U.S. 533, 575 (1964); *Edelman v. Jordan*, 415 U.S. 651, 667 n.12 (1974).[7]

The intersection of these two rules led to the Court's first decision addressing immunity of an "arm of the state" in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). There, a

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[7] This case does not directly involve Eleventh Amendment immunity but rather whether PHEAA is a "person" under the FCA. "[E]very circuit that has confronted the question" has concluded that determining whether an entity is a "person" under the FCA uses "the same test as that used for determining whether an entity is an arm of the state entitled to share in Eleventh Amendment immunity." *United States ex rel. Willette v. Univ. of Mass., Worcester*, ___ F.3d ___, 2016 WL 325026, at *2 (1st Cir. Jan. 27, 2016). Thus, this case presents the question whether PHEAA is an arm of the state for federal-law purposes, just as squarely as an Eleventh Amendment case. Nonetheless, should this Court prefer to address the arm-of-the-state question in the Eleventh Amendment context, the companion case *Pele v. PHEAA*, ___ F. App'x ___, 2015 WL 6162942 (4th Cir. Oct. 21, 2015), decided the same day as this case and relying exclusively on the decision in this case, squarely presents the Eleventh Amendment arm-of-the-state question under materially identical facts. PHEAA has filed a petition for certiorari in *Pele* alongside this petition.

local school board claimed Eleventh Amendment immunity. *Id.* at 276. In a single paragraph, the Court rejected that claim. The Court explained that the Eleventh Amendment question "turns on whether the [school board] is to be treated as an arm of the State … or is instead to be treated as a municipal corporation or other political subdivision." *Id.* at 280. Emphasizing that the board was "but one of many local school boards in Ohio" and, under Ohio law, local school districts were "political subdivisions," the Court concluded that the school board "is more like a county or city than it is like an arm of the State." *Id.*[8] The need to distinguish local municipalities from state government entities necessarily means that the States' own treatment of local government entities cannot be dispositive. But some circuits have mistakenly extended that reasoning to give little or no deference to a State's own judgment about which statewide entities share the State's sovereign immunity. The failure to appreciate the differences in the contexts can lead directly to the kind of error exemplified in the decision below.

The Court next confronted this issue in a wholly different context—a bistate entity. In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), the petitioner sued an entity (TRPA) jointly created by California and Nevada and approved by Congress pursuant to the Compact Clause, U.S. Const. art. I, §10, cl.3. 440 U.S. at 394-

[8] Several years earlier, the Court held that a California county was not an arm of California and was therefore a California citizen for purposes of the federal diversity statute. *See Moor v. Alameda County*, 411 U.S. 693, 717-20 (1973).

95. TRPA asserted Eleventh Amendment immunity, which the Court rejected, noting, among other things, that California and Nevada had both specifically disclaimed "any intent to confer immunity on" TRPA; the compact described TRPA as a "separate legal entity" and a "political subdivision" and not as an "arm of the State"; TRPA's role—land use regulation—was "traditionally a function performed by local governments"; and the agency's rules were "not subject to veto at the state level." *Id.* at 400-02.

The Court's next arm-of-the-state decision also involved a bistate entity created pursuant to the Compact Clause. In *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), petitioners brought suit against the entity (PATH), which asserted Eleventh Amendment immunity. *Id.* at 33. In rejecting immunity, the Court emphasized the differences between States and multistate entities. *See, e.g.*, *id.* at 40 (observing that "[b]istate entities occupy a significantly different position in our federal system than do the States themselves"). And it relied on *Lake Country Estates*, which similarly "decided whether a bistate entity qualified for Eleventh Amendment immunity." *Id.* at 42-43. Because that decision's "indicators of immunity" pointed in different directions, *id.* at 44, the Court turned to "the Eleventh Amendment's twin reasons for being": "the integrity retained by each State in our federal system," and what it deemed "the impetus for the Eleventh Amendment: the prevention of federal-court judgments that must be paid out of a State's treasury." *Id.* at 39-40, 47-48. As to the former, the Court concluded that it is not "disrespectful to one State to call upon [a] Compact Clause entity to answer complaints in federal court." *Id.* at 47. As to the latter, the Court held that were "the expenditures of [PATH] [to] exceed receipts," no state would be "in fact obligated to bear and pay [its] resulting indebtedness," both "legally and practically." *Id.* at 51-52.[9]

2. The foregoing cases reflect several critical features underscoring the need for review here. First, the confusion in the circuits over determining what constitutes an arm of the state results from the Court's having not actually addressed a statewide entity's or other core state actor's status. Instead, this Court has addressed outlier situations—local school boards or multistate entities created pursuant to the Compact Clause. The former context is uniquely ill-suited for deference to state-law judgments because of the federal-law need to distinguish between States and local governments. But while the question always remains one of federal law, deference to state-law treatment is far more appropriate in the context of statewide entities, where there is no comparable federal-law need to differentiate state and local agencies. And the multistate-entity context demands consideration of multiple subtle factors because of the distinct concerns inherent with entities formed by two or more States. For example, two States may be addressing shared local concerns in border

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[9] In *Regents of the University of California v. Doe*, 519 U.S. 425 (1997), the Court did not squarely address an arm-of-state question, but held that the presence of a federal indemnity for certain functions did not rob the university of its Eleventh Amendment immunity. That decision nonetheless undermines the decision below because the Court emphasized that the nature of the entity, not the practical question of how the judgment would be paid, is dispositive.

communities. Likewise, there is a distinct concern with a bistate entity that neither State will view a judgment against the entity as a claim on its treasury. None of those considerations arises in the context of a statewide entity discharging statewide functions from the state capital. Yet as this case amply demonstrates, courts of appeals applying multifactor tests based on considerations relevant in the unique contexts of *Doyle*, *Lake Country Estates*, and *Hess* can produce absurd results in what should be straightforward cases.

Second, *Hess* held that "the vulnerability of the State's purse [is] the most salient factor in Eleventh Amendment determinations." 513 U.S. at 48. Since *Hess*, however, the Court has repeatedly recognized that the "preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 266-67 (2011) (quotation marks omitted). The "primary function of sovereign immunity" is "not to protect state treasuries, but to afford the States the dignity and respect due sovereign entities." *Id.* at 267 (quotation marks omitted); *see also Fed. Mar. Comm'n*, 535 U.S. at 760; *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997) (noting that sovereign immunity is "designed to protect" "the dignity and respect afforded a State"). While multistate entities have treasuries, they do not possess the dignity interests of States. Multistate entities have only the powers conferred by the States and no inherent residual sovereignty. As a result, cases involving multistate entities are unhelpful if not irrelevant when determining arm-of-the-state status of components of a single State's government. In cases like this, a proper respect for the State's dignity interests demands deference to the State's determination that a component of state government shares the State's immunity.

The decision in this case demonstrates that tests designed to ferret out local subdivisions and multistate agencies from true arms of the state are ill-suited for formulating general tests applicable to statewide entities like PHEAA. The time has come for this Court to address how the arm-of-the-state doctrine applies to statewide entities expressly and emphatically declared by the sovereign to be its instrumentality. This case squarely presents that question and squarely gives this Court an opportunity to provide desperately needed guidance to the lower courts.

II. The Decision Below Is Incorrect.

1. Under any coherent approach to determining arm-of-the-state status, this is not a difficult case. PHEAA is neither a local subdivision akin to a county school board nor a multistate entity created pursuant to the Compact Clause. It is a "government instrumentality" of Pennsylvania, based in the state capital, executing the "essential governmental function" of providing higher education financial aid for Pennsylvanians across the state. 24 P.S. §§5101, 5102, 5105.6. PHEAA could not have even come into existence absent an amendment to the Pennsylvania Constitution. *See* pp. 4-5, *supra*. It was created "in all respects for the benefit of the people of the Commonwealth, for the improvement of their health and welfare, and for the promotion of the economy."

24 P.S. §5105.6. Pursuant to those "public purposes," *id.*, in the last five years alone, PHEAA has disbursed more than $1.5 billion appropriated by the legislature to hundreds of thousands of Pennsylvanians, supplementing that grant money with hundreds of millions of dollars generated by its other statutorily authorized activities. *See* pp. 5-6, *supra*.

Most important, Pennsylvania law indisputably treats PHEAA as a state agency and deems it an arm of the state. As is true for other state agencies, PHEAA's property, income, and activities are all exempt from state taxation. PHEAA may issue regulations interpreting statutes it is charged with implementing. *See, e.g.*, 24 P.S. §5197 (delegating to PHEAA responsibility to "adopt such regulations … as are necessary and not inconsistent with the provisions of this act"). Like a federal agency accorded *Chevron* deference, PHEAA's interpretations are "accorded great weight" by Pennsylvania courts and overturned only if clearly erroneous. *Cherry*, 642 A.2d at 463-64. Its regulations, moreover, must first receive approval from Pennsylvania's Regulatory Review Commission and Pennsylvania's Attorney General. PHEAA can solicit opinions from the Attorney General and is bound to follow those opinions. The Attorney General must represent PHEAA in litigation unless she delegates that authority. PHEAA has statewide subpoena power and can enter legal judgments of default.

Like other Pennsylvania agencies, PHEAA is subject to—and has undergone—auditing by the Pennsylvania Auditor General. Its revenues must be deposited in the Pennsylvania state treasury, where they are commingled with other state funds and invested by the Pennsylvania Treasurer. PHEAA may expend its funds only with the Treasury Department's approval. All of PHEAA's bills are paid by the Pennsylvania Treasurer. Checks to third parties—such as a potential judgment in this case—are drawn on the Pennsylvania treasury and signed by the Pennsylvania Treasurer. PHEAA's employees are paid by the Pennsylvania Treasurer and must use state retirement and healthcare systems. Union employees are represented by a public-sector union that negotiates with the Governor's office. PHEAA's officers and managers are subject to Pennsylvania's anti-corruption law. All PHEAA employee badges state: "Commonwealth of Pennsylvania State Employee." *See* pp. 6-8, *supra*.

For good reason, then, an unbroken line of Pennsylvania precedent holds that PHEAA "is undeniably an agency of the Commonwealth" for state-law purposes. *Barksdale*, 449 A.2d at 689; *see Xed*, 456 A.2d at 726; *Richmond*, 297 A.2d at 546-47. As an "agency of the Commonwealth," PHEAA is "plainly … entitled to immunity" in Pennsylvania courts. *Marshall*, 568 A.2d at 933-34. Indeed, one of the reasons for the Attorney General's review of every PHEAA contract over $20,000 is to ensure that PHEAA has not waived sovereign immunity. And the Pennsylvania Attorney General recently asserted PHEAA's sovereign immunity in federal court. *See* pp. 7-9, 18-19, *supra*.

There can thus be no serious dispute that Pennsylvania—by its statutes, judicial decisions, and practice—*overwhelmingly* and *unequivocally* considers PHEAA a state agency and an arm of the state. If there were any remaining doubt, one need look no further than Pennsylvania's swift response to the Fourth Circuit's decision. Barely one month after the Fourth Circuit denied rehearing, the legislature enacted, and the Governor signed, legislation declaring that PHEAA "is an integral part and arm of the Commonwealth" and "is directly controlled by the Commonwealth." H.B. 1460, at §107. The legislation also reiterated that PHEAA simply "maintained" Commonwealth funds, and it underscored PHEAA's "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." *Id.* Under Pennsylvania law, therefore, PHEAA does not just look, swim, and quack like a duck—it is emphatically a duck.[10]

2. The Fourth Circuit's conclusion that PHEAA is *not* an arm of Pennsylvania is a classic exercise in losing the forest for the trees and a case study for why this Court's guidance regarding the arm-of-the-state doctrine is desperately needed. The Fourth Circuit held that PHEAA is an "independent political subdivision." Since PHEAA is a statewide agency operating out of the state capital, this declaration can

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[10] Furthermore, PHEAA has entered into agreements with the federal government to guarantee loans in Delaware, West Virginia, and Georgia. JA333. Federal law, however, authorizes only a "State or nonprofit private institution or organization" to guarantee federal student loans. 20 U.S.C. §1085(j). Nobody contends that PHEAA is a "nonprofit private institution or organization." Thus, in the federal government's view, PHEAA is a "State."

only mean that it is an orphan, at least in the courts of the Fourth Circuit. It certainly is not a "political subdivision" under Pennsylvania law, which defines "political subdivision" as a "county, city, borough, incorporated town, township, school district, vocational school district [or] county institution district," 1 P.S. §1991, none of which remotely describes PHEAA. In a grand understatement, the court acknowledged in passing that Pennsylvania law "generally" treats PHEAA "as a state agency under state law," App.59, but it discounted this critical point—and the overwhelming statutory and case law supporting it—based on a few isolated and marginal practices unconnected to any Pennsylvania statute, regulation, or decision. Even still, the court acknowledged that Pennsylvania's treatment of PHEAA as a state agency favored finding it an arm of the state under the fourth prong of its four-factor test.

The court nonetheless held that PHEAA was not an arm of the state by concluding that other "factors" in its multifactor test outweighed Pennsylvania's own considered view of PHEAA. Its analysis of those factors, however, underscores that multifactor arm-of-the-state tests devised from precedents addressing only outlying situations present a high risk of obscuring reality when it comes to core statewide agencies like PHEAA. For example, the Fourth Circuit repeatedly reasoned that PHEAA is autonomous from Pennsylvania because PHEAA's board, and not Pennsylvania, is chiefly responsible for PHEAA's financial decisions and policymaking. App.24-25, 44-45, 47. But PHEAA's board is comprised *exclusively* of state officials; indeed, a majority are sitting Pennsylvania legislators. *See* p. 6, *supra*. Control exercised by PHEAA's board is in fact *control exercised by Pennsylvania.*

The Fourth Circuit also placed considerable weight on its belief that Pennsylvania would not be liable for a judgment against PHEAA. But the court reached this conclusion by focusing on PHEAA's significant revenues and "control over" its substantial assets. *See* App.22, 23-24, 31-32, 35, 36-38, 41. That ignores the restrictions that Pennsylvania law places on PHEAA's use of funds and the fact that any "control" exercised by PHEAA is control exercised by Pennsylvania through PHEAA's board, comprised entirely of Pennsylvania officials. More important, the Fourth Circuit declined to ask the only arguably relevant question, which is whether the state treasury would be liable in the event, however hypothetical, of a judgment that exceeded PHEAA's assets. *See Ernst*, 427 F.3d at 362 (deeming this the "proper inquiry"). On that question, the undisputed record evidence showed that Pennsylvania would have no choice but to appropriate funds to pay the judgment. *See* JA248.

The Fourth Circuit sidestepped that "proper inquiry" because, it asserted, PHEAA's "corporate wealth" made such a hypothetical liability unlikely. App.40-41 & n.15. But that creates a dynamic where a state agency's arm-of-state status under federal law will turn on its cash-on-hand or relative financial success in discharging its government function. And those factors bear no rational nexus to whether a state agency is in fact an arm of the state. PHEAA's financial success is the result of its effective performance of the "essential governmental function" entrusted to it by Pennsylvania statute. There is no question that PHEAA has become sufficiently proficient in servicing loans that it performs those functions for other States and in coordination with federal programs. But there is no rule that a state agency becomes less sovereign just because it is good at what it does. One cannot imagine a more perverse incentive toward government ineptitude than a rule providing that sovereign immunity is inversely proportional to an agency's effectiveness.

The court also discounted PHEAA's arm-of-state status because "the majority of PHEAA's revenue and income was derived from out-of-state activity." App.55. The court fashioned this inquiry from a prong of its four-factor test originally designed to separate statewide agencies from entities directed at only local or regional concerns. While the extent to which a government entity's focus is less than statewide may be relevant, a statewide entity's focus on matters extending beyond state borders is or should be irrelevant, lest every out-of-state trade mission or university athletic event imperil a state entity's sovereign status. Nonetheless, the Fourth Circuit believed this to be "highly relevant" to the arm-of-the-state inquiry. In reality, PHEAA's "out-of-state activity" (*i.e.*, servicing and guaranteeing non-Pennsylvania loans) not only is undertaken by state employees in Pennsylvania pursuant to powers granted by the Pennsylvania legislature, but also has resulted in Pennsylvanians receiving *hundreds of millions of dollars* in *additional* financial aid, all in furtherance of PHEAA's "essential governmental function" of providing higher education assistance to Commonwealth citizens. It makes no sense to reject arm-of-the-state status because a state agency engages in substantial out-of-state activities redounding exclusively to the benefit of in-state citizens. *See Willette*, ___ F.3d at ___, 2016 WL 325026, at *6 ("[T]hat a governmental agency generates revenue for the state does not deprive the agency of arm-of-the-state status."); *cf. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685 (1999) (sovereign immunity exists "whether or not the State is acting for profit, in a traditionally 'private' enterprise, and as a 'market participant'").

3. The Fourth Circuit's opinion manages both to disregard how PHEAA is actually characterized under Pennsylvania law—as an arm of the state—and to characterize PHEAA as something it emphatically is *not* under Pennsylvania law—a "political subdivision." The decision is poorly reasoned and manifestly wrong, but also emblematic of the current state of the doctrine, which permits courts assessing arm-of-the-state status to run roughshod over state dignity interests in the course of applying the subprongs of multifactor tests. More fundamentally, the Fourth Circuit's decision fails to give proper deference to a State's own treatment of its statewide entities. This Court's review is urgently needed to replace a surfeit of balancing tests with an approach to statewide entities that is focused on the State's own treatment of the agency. *Cf.*, *e.g.*, *Irizarry-Mora*, 647 F.3d at 12.

* * *

The need for this Court's review is manifest. The circuits are hopelessly divided, and the division goes well beyond how many factors to balance. In some circuits, a State's own treatment of a statewide entity is well-nigh dispositive. In other circuits, the State's own treatment does not even make the list of factors for consideration. And in the Fourth Circuit, the State's own treatment is the fourth, and apparently least important, factor. But the conflict does not end there. The conflict between the views of state officials in Harrisburg and federal judges in Richmond could not be starker. Pennsylvania responded to the decision below by reaffirming PHEAA's status as an arm of Pennsylvania and attempting to correct some of the Fourth Circuit's misconceptions about how things work in Harrisburg. And what else could Pennsylvania do? Attempting to restructure PHEAA to comply with the varying and in some ways incompatible tests applied by the circuits would be a fool's errand. What is desperately needed is the certainty and clarity that only this Court can provide. Sovereign States need clear rules to know whether entities they consider to be their sovereign arms can nonetheless be haled into federal court. A proper respect for state sovereignty and dignity demands nothing less.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

JASON L. SWARTLEY
JAMES J. JARECKI
PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY
1200 N. 7th Street
Harrisburg, PA 17102

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
ANDREW N. FERGUSON
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
(202) 234-0090
pclement@bancroftpllc.com

DANIEL B. HUYETT
NEIL C. SCHUR
STEVENS & LEE P.C.
111 North 6th Street
Reading, PA 19603

JOSEPH P. ESPOSITO
JILL M. DEGRAFFENREID
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue NW
WASHINGTON, DC 20037

Counsel for Petitioner

February 16, 2016

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-1093

UNITED STATES ex rel. JON H. OBERG,

Plaintiff-Appellant,

v.

PENNSYLVANIA HIGHER
EDUCATION ASSISTANCE AGENCY,

Defendant-Appellee,

and

NELNET, INC.; KENTUCKY HIGHER EDUCATION STUDENT LOAN CORP.; SLM CORPORATION; PANHANDLE PLAINS HIGHER EDUCATION AUTHORITY; BRAZOS GROUP; ARKANSAS STUDENT LOAN AUTHORITY; EDUCATION LOANS INC/SD; SOUTHWEST STUDENT SERVICES CORPORATION; BRAZOS HIGHER EDUCATION SERVICE CORPORATION; BRAZOS HIGHER EDUCATION AUTHORITY, INC.; NELNET EDUCATION LOAN FUNDING, INC.; PANHANDLE-PLAINS MANAGEMENT AND SERVICING CORPORATION; STUDENT LOAN FINANCE CORPORATION; EDUCATION LOANS INC.; VERMONT STUDENT ASSISTANCE CORPORATION,

Defendants.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, Senior District Judge.
No. 1:07-cv-00960-CMH-JFA

Argued: May 12, 2015
Decided: October 21, 2015

Before TRAXLER, Chief Judge,
and GREGORY and KEENAN, Circuit Judges.

Vacated and remanded by published opinion. Chief Judge Traxler wrote the opinion, in which Judge Gregory and Judge Keenan concurred.

OPINION

TRAXLER, Chief Judge:

The Pennsylvania Higher Education Assistance Agency ("PHEAA"), was established by the Commonwealth of Pennsylvania in 1963 "to improve access to higher education by originating, financing, and guaranteeing student loans." *United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency* ("*Oberg II*"), 745 F.3d 131, 135 (4th Cir. 2014). In addition to administering state-funded grant and scholarship programs on behalf of the Commonwealth, PHEAA conducts nationwide lending, servicing, and guaranteeing activities, and it "now constitutes one of the nation's largest providers of student financial aid services." *Id.* at 138.

Dr. Jon H. Oberg brought this action against PHEAA and other private and state-created student-loan entities under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-33, alleging that from 2002 through 2006, the defendants fraudulently claimed hundreds of millions of dollars in federal student-loan interest-subsidy payments to which they were not entitled. *See Oberg II*, 745 F.3d at 135. As this case has proceeded up and down the appeals ladder,[1] the other defendants have settled or were dismissed from the case, and PHEAA is now the sole remaining defendant.

The only issue in this appeal is whether PHEAA qualifies as an "arm of the state" or "alter ego" of Pennsylvania such that it cannot be sued under the FCA. *See Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787-88 (2000). We conclude that PHEAA is not an arm of Pennsylvania, and we therefore reverse the district court's order granting summary judgment in favor of PHEAA and remand for further proceedings on the merits of Oberg's FCA claims against PHEAA.

I.

The FCA imposes civil liability on "any person" who makes or presents a false claim for payment to the federal government. 31 U.S.C. § 3729(a)(1). Corporations, including municipal corporations like cities and counties, are "persons" under the FCA, *see Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 126-27, 134 (2003), but states and state agencies are not, *see Vermont Agency of Nat. Res.*, 529 U.S. at 787-88. To determine whether PHEAA falls into the former or the latter category, we apply "the arm-of-the-state analysis used in the Eleventh Amendment context." *Oberg II*, 745 F.3d at 135. If

[1] *See United States ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.* ("*Oberg I*"), 681 F.3d 575 (4th Cir. 2012); *United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency* ("*Oberg II*"), 745 F.3d 131 (4th Cir. 2014).

PHEAA qualifies as an "arm" or "alter ego" of Pennsylvania, then it is not a "person" subject to liability under the FCA. *See United States ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.* ("*Oberg I*"), 681 F.3d 575, 580 (4th Cir. 2012) (internal quotation marks omitted).

We evaluate four non-exclusive factors when considering whether a state-created entity functions as an arm of its creating state:

> (1) whether any judgment against the entity as defendant will be paid by 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. (quoting *S.C. Dep't of Disabilities & Special Needs v. Hoover Universal, Inc.*, 535 F.3d 300, 303 (4th Cir. 2008)).

Although the focus of the first factor is whether the "primary *legal* liability" for a judgment will fall on the state, *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 428 (1997) (emphasis added), the practical effect on the state treasury of a judgment against the entity must also be considered. "Where an agency is so structured that, as a practical matter, if the agency is to survive, a judgment must expend itself against state treasuries," *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 50 (1994) (alteration omitted), the agency will be found to be an arm of the state, *see Oberg II*, 745 F.3d at 137; *Cash v. Granville Cnty. Bd. of Educ.*, 242 F.3d 219, 223 (4th Cir. 2001).

"[I]f the State treasury will be called upon to pay a judgment against a governmental entity, the [entity is an arm of its creating state], and consideration of any other factor becomes unnecessary." *Cash*, 242 F.3d at 223. If the state treasury will not be liable for a judgment rendered against the entity, we must consider the remaining factors, which focus on the nature of the relationship between the state and the entity it created. *See id.* at 224; *accord Lee-Thomas v. Prince George's Cty. Pub. Sch.*, 666 F.3d 244, 248 n.5 (4th Cir. 2012).

The purpose of the arm-of-state inquiry is to distinguish arms or alter egos of the state from "mere political subdivisions of [the] State such as counties or municipalities," which, though created by the state, operate independently and do not share the state's immunity. *Kitchen v. Upshaw*, 286 F.3d 179, 184 (4th Cir. 2002); *see Mt. Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) ("The issue here thus turns on whether the Mt. Healthy Board of Education is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend."). Although we must consider "the provisions of state law that define the agency's character," *Regents*, 519 U.S. at 429 n.5, "[u]ltimately . . . , the question whether a particular state agency has the same kind of independent status as a county or is instead an arm of the State, and therefore one of the United States within the meaning of the Eleventh Amendment, is a question of federal law," *id.* (internal quotation marks omitted).

In our first opinion in this case, we held that the district court erred by concluding that PHEAA was a state agency and dismissing Oberg's complaint without applying the arm-of-state analysis. *See Oberg I*, 681 F.3d at 581. On remand, the district court applied the arm-of-state analysis and again granted the motion to dismiss, concluding that PHEAA was not a person within the meaning of the FCA.

Oberg again appealed, and we again held that the district court erred by dismissing the claims against PHEAA. *See Oberg II*, 745 F.3d at 140-41. Considering the arm-of-state issue in light of the statutes governing PHEAA's operation and the facts alleged in Oberg's complaint, we held in *Oberg II* that Oberg had plausibly alleged that PHEAA was not an arm of the state but was instead a "person" subject to suit under the FCA. *See id.*

We first concluded that Pennsylvania was "neither *legally* nor *functionally* liable for any judgment against PHEAA." *Id.* at 138. PHEAA was not legally liable because "state law expressly provides that obligations of PHEAA shall *not* be binding on the State," *id.* (internal alterations omitted), and requires PHEAA's debts to be paid from "'moneys . . . of the corporation,'" *id.* (quoting 24 Pa. Stat. § 5104(3)). As to practical or functional liability, PHEAA argued that

Pennsylvania was functionally liable for a judgment against PHEAA because Pennsylvania statutes require PHEAA to deposit its commercially generated revenues with the state Treasury and require the Treasurer's approval of any payment from state Treasury funds. We rejected that argument, however, given that the statute requiring the deposit also explicitly granted control over those funds to PHEAA, not the Treasurer, and the funds were held in a segregated account within the Treasury. *See id.* at 138-39. Because PHEAA had control over "substantial 'moneys' [that] derive exclusively from its own operations," *id.* at 138, "any judgment in this case [would be paid] with [PHEAA's] own moneys from its segregated fund," *id.* at 139, and we therefore concluded that Pennsylvania would not be functionally liable for any judgment against PHEAA. And because there was no functional or legal liability, we held that the first arm-of-state factor weighed "heavily against holding that PHEAA is an arm of the state." *Id.*

As to the second arm-of-state factor, we noted that the indicia of autonomy reflected in the statutory framework and the facts alleged in the complaint pointed in both directions. The composition of PHEAA's board (gubernatorial appointees and state legislators) weighed in favor of arm-of-state status, as did the statutory requirement that the Governor approve any PHEAA bond issues and the fact that PHEAA's activities were subject to audit by the Commonwealth Auditor General. *See id.* at 139. Nonetheless, other facts "strongly suggest[ed] that PHEAA is not an arm of the state," including PHEAA's financial independence, its control over its revenues deposited with the state Treasury, and its corporate powers "to enter into contracts, sue and be sued, and purchase and sell property in its own name." *Id.* Drawing all inferences from these facts in Oberg's favor, as required given the procedural posture of the case, we concluded that the autonomy factor "counsels against holding that PHEAA is an arm of the state." *Id.*

As to the third arm-of-state factor, we held it weighed in favor of arm-of-state status because PHEAA was focused on improving access to higher education, a matter of "legitimate state concern." *Id.* at 140. We rejected Oberg's argument that PHEAA was not *primarily* focused on state concerns, given PHEAA's extensive out-of-state commercial activities. Noting the allegation in Oberg's complaint that one third of PHEAA's 2005 earnings came from out-of-state activities, we held that "it does not seem plausible that by 2006—the last year encompassed by Dr. Oberg's allegations—PHEAA's operations focused *primarily* out of state." *Id.* And as to the fourth factor, we concluded that state law treated PHEAA as a state agency, which also weighed in favor of treating PHEAA as an arm of the state. *See id.*

Considering the factors together, we held that the district court erred by dismissing Oberg's complaint:

> [A]lthough the third and fourth factors suggest that PHEAA is an arm of the state, the first (strongly) and second (albeit less strongly) point in the opposite direction. At this early stage, construing the facts in the light most favorable to the plaintiff, we must conclude that Dr. Oberg has alleged sufficient

> facts that PHEAA is not an arm of the state, but rather a "person" for FCA purposes.

Id. (internal quotation marks omitted). We vacated the district court's order dismissing Oberg's complaint, and we instructed the district court on remand "to permit limited discovery on the question whether PHEAA [was] truly subject to sufficient state control to render it a part of the state." *Id.* at 140-41 (internal quotation marks omitted).

On remand, the parties engaged in discovery, and PHEAA filed a motion for summary judgment on the arm-of-state issue. The district court granted the motion, holding that all four factors weighed in favor of arm-of-state status. *See United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency* ("*Oberg III*"), 77 F. Supp. 3d 493 (E.D. Va. 2015). In the district court's view, this court's contrary conclusion could not be sustained in light of the post-remand "factual development" of the case. *Id.* at 497. The district court therefore held that because PHEAA was an arm of Pennsylvania, it was not subject to suit under the FCA, and the court granted summary judgment in favor of PHEAA.

II.

Oberg again appeals, arguing that the district court's analysis of the arm-of-state factors is inconsistent with our opinion in *Oberg II* and that its ultimate conclusions as to those factors are not supported by the record. In Oberg's view, the Pennsylvania statutes governing PHEAA's operation and the factual information developed through discovery establish that PHEAA is *not* an arm of Pennsylvania. Oberg thus contends that the district court erred by granting summary judgment in favor of PHEAA and dismissing his action.

"We review a grant of summary judgment *de novo*, applying the same standard as the trial court and without deference to the trial court." *Dash v. Mayweather*, 731 F.3d 303, 310 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1761 (2014). Summary judgment is appropriate only if "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a).

In this case, we see no material dispute about the relevant facts detailing PHEAA's operations and relationship with Pennsylvania. Instead, the dispute is over the legal effect of the materially undisputed facts—whether the relevant statutes and the facts developed during discovery establish that PHEAA is the alter ego of Pennsylvania.[2] *See Greene v. Barrett*, 174 F.3d 1136, 1139-40 (10th Cir. 1999) ("If there is no genuine issue of material fact in dispute, we determine whether the district court correctly applied the substantive law."). And that question is a pure

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[2] While Oberg argues that the evidence establishes that PHEAA is not an arm of Pennsylvania, he also suggests that arm-of-state status is a question of fact to be resolved by a jury. We disagree. Although we held in *Oberg II* that whether a defendant is a "person" is an element of an FCA plaintiff's case, *see Oberg II*, 745 F.3d at 136, we nonetheless agree with PHEAA that personhood and arm-of-state status nonetheless remain legal issues to be resolved by the court. *Cf. Farwell v. Un*, 902 F.2d 282, 288 (4th Cir. 1990) (although negligence plaintiff "must prove that defendant owed plaintiff a duty, breached that duty, and that the breach proximately caused the claimed injury[,] . . . . whether and in what form any legal duty exists is a question of law for the courts").

question of law reviewed *de novo*. *See United States ex rel. Lesinski v. S. Fla. Water Mgmt. Dist.*, 739 F.3d 598, 602 (11th Cir.) ("[W]hether an entity constitutes an arm of the state [and therefore not a "person" under the FCA] . . . is a question of law subject to *de novo* review."), *cert. denied*, 134 S. Ct. 2312 (2014); *cf. Hutto v. South Carolina Ret. Sys.*, 773 F.3d 536, 542 (4th Cir. 2014) ("Whether an action is barred by the Eleventh Amendment is a question of law that we review *de novo*."). We will summarize the statutes and evidence governing PHEAA's authority and operations before turning to Oberg's challenges to the district court's decision.

III.

PHEAA was created as "a body corporate and politic constituting a public corporation and government instrumentality." 24 Pa. Stat. § 5101. PHEAA has the power to sue and be sued; enter into contracts; and own, encumber, and dispose of real and personal property. *See id.* § 5104(3); *Oberg II*, 745 F.3d at 139. During the time period relevant to this appeal, PHEAA was governed by a twenty-member board of directors composed of the Secretary of Education; three gubernatorial appointees; eight members of the Senate appointed by the Senate's president; and eight members of the House of Representatives appointed by the Speaker of the House. *See* 24 Pa. Stat. § 5103(a) (2006).[3] Board members may be removed by the official who appointed them. *See* Pa. Const. art. VI, § 7

[3] In 2010, 24 Pa. Stat. § 5103 was repealed and a revised version of it was recodified at 71 Pa. Stat. § 111.2. The changes to the composition of PHEAA's board are not relevant to the disposition of this appeal.

("All civil officers shall hold their offices on the condition that they behave themselves well while in office, and shall be removed on conviction of misbehavior in office or of any infamous crime. Appointed civil officers, other than judges of the courts of record, may be removed at the pleasure of the power by which they shall have been appointed."); *Burger v. School Bd.*, 923 A.2d 1155, 1162 (Pa. 2007) ("[A]rticle VI, § 7 of] the Constitution does not vest in the appointing power unfettered discretion to remove. Instead, valid removal depends upon the officer behaving in a manner not befitting the trust placed in him by the appointing authority.").

PHEAA's purpose is "to improve the higher educational opportunities of [Pennsylvania] residents . . . who are attending approved institutions of higher education . . . by assisting them in meeting their expenses of higher education." 24 Pa. Stat. § 5102. To further its statutory purpose, PHEAA is authorized to issue, purchase, service, and guarantee student loans. *See* 24 Pa. Stat. § 5104.

PHEAA is statutorily authorized to "borrow moneys by making and issuing notes, bonds and other evidences of indebtedness of the agency . . . for the purposes of purchasing, making or guaranteeing loans." *Id.* § 5104(3). The Governor must approve all debt issuances, *see id.*, and the General Assembly has capped the total amount of debt that PHEAA may incur, *see* 24 Pa. Stat. § 5105.1(a.1). Under state law, PHEAA bears sole responsibility for its bonds and other debts. *See id.* § 5104(3) ("[N]o obligation of [PHEAA] shall be a debt of the State and [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."). Because the Pennsylvania General Assembly has determined that PHEAA is performing an "essential governmental function," PHEAA bonds are generally free from taxation. 24 Pa. Stat. § 5105.6.

As noted, PHEAA is now "one of the nation's largest providers of student financial aid services." *Oberg II*, 745 F.3d at 138. During the time period relevant to this case, PHEAA's commercial activity—much of it conducted under the trade names "American Education Services" and "FedLoan Servicing"—included issuing loans to Pennsylvania students, servicing loans for non-Pennsylvania students, and guaranteeing loans issued to students in Delaware, Georgia, and West Virginia. PHEAA's 2014 financial statements show revenues exceeding $600 million, net revenues of more than $220 million, and unrestricted net assets of more than $700 million. *See* J.A. 3147-48. The earnings from PHEAA's extensive commercial operations have made PHEAA "financially independent" of the Commonwealth, *Oberg II*, 745 F.3d at 139, and PHEAA has received no appropriations to support its operations since 1988.

PHEAA administers Pennsylvania's State Grant Program, distributing appropriated funds as grants and scholarships to qualifying students. PHEAA absorbs the costs of administering the program, however, and disburses 100% of the appropriated funds to students. In 2005, PHEAA contributed $25 million of its earnings to supplement the State Grant Program, and it has made contributions ranging from

$45 – 75 million in many, but not all, of the years since.

During the time period relevant to this case, PHEAA issued revenue bonds to fund the loans it originated, repaying the bonds with loan-repayment revenues.[4] PHEAA created special-purpose entities incorporated under Delaware law to formally issue the bonds and hold the student-loan receivables as assets. These revenues are held in trust in accounts outside of the Pennsylvania Treasury until the bonds are repaid or the release provisions of the underlying documents are otherwise satisfied. These trust accounts represent the bulk of PHEAA's corporate wealth—more than $6 billion of $8.6 billion total long term assets. *See* J.A. 3148.

As to the other revenues generated by PHEAA's commercial activities, however, state law requires them to be deposited in the Pennsylvania Treasury, *see* 24 Pa. Stat. § 5104(3), a requirement similar to that applicable to other state agencies. PHEAA's revenues on deposit with the state Treasury are held in a segregated fund known as the "Educational Loan Assistance Fund." 24 Pa. Stat. § 5105.10. Although the revenues are in the custody of the state Treasurer, state law expressly vests control over the revenues in PHEAA. *See* 24 Pa. Stat. § 5104(3) (requiring revenues earned through financial-services activities

[4] PHEAA stopped originating federally guaranteed student loans in 2008, "due to the global fiscal crisis." J.A. 327. *See* J.A. 2440. As of July 1, 2010, the federal government took over as the originator of all federal student loans. *See* Health Care & Educ. Reconciliation Act of 2010, Pub. L. No. 111-152, §§ 2201-2213, 124 Stat. 1029, 1074-81.

to be “deposited in the State Treasury,” but providing that the revenues “shall be available" to PHEAA and “may be utilized at the discretion of the board of directors for carrying out any of the corporate purposes of the agency”); *id.* § 5105.10 (“[A]ll appropriations and payments made into the [Educational Loan Assistance Fund] are hereby appropriated to the board and may be applied and reapplied as the board shall direct and shall not be subject to lapsing.”).

Much like funds invested in a mutual fund, PHEAA’s funds, though separately accounted for, are commingled with the funds of other Commonwealth agencies for investment purposes. *See* 72 Pa. Stat. § 301.1 (generally authorizing Treasurer to invest funds held in state depositories); *see also* J.A. 2474 (PHEAA treasurer’s description of investment process: “It works kind of like a mutual fund . . . taking money from [separate Commonwealth agencies] and keeping track of what each of us has, but putting it together and putting it into investment funds.”). The Treasury Department devises and executes the investment strategy for the commingled funds. *See* 72 Pa. Stat. § 301.2; *see also* J.A. 2796.

State law prohibits payment “from any of the funds of the State Treasury” without approval of the Treasurer. 72 Pa. Stat. § 307. To obtain approval for payment of funds in the custody of the Treasurer, PHEAA must present the Treasurer with requisitions for payment. The Treasury Department audits the requisitions by reviewing “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." J.A. 673-74. "If the requisitions appear to be lawful and correct, the Treasurer issues his warrant for payment." J.A. 673. If payment is approved, the Treasury Department transfers funds to PHEAA electronically or sends PHEAA a check. The checks are payable to the vendor and are drawn on the state Treasury account and signed by the Treasurer.

For purposes of the "Commonwealth Attorneys Act," 71 Pa. Stat. §§ 732-101 – 732-506, the term "Commonwealth agency" includes "independent" and "executive" agencies; PHEAA is classified as an independent agency, *see id.* § 732-102. As is the case with other Commonwealth agencies, if the Attorney General provides PHEAA with a legal opinion, PHEAA must follow the advice set out in the opinion. *See id.* § 702-204(a)(1).

While PHEAA has the authority to enter into contracts, it must, like other Commonwealth agencies, submit contracts involving more than $20,000 for a "form and legality" review by the Attorney General. 71 Pa. Stat. § 732-204(f). The review involves determining "whether the contract has all of the legal terms that the Commonwealth requires and no terms that are prohibited"; whether "PHEAA has the authority to enter into the contract"; and whether "the contract is constitutional under the State and Federal constitutions." J.A. 713; *see* 71 Pa. Stat. § 732-204(f) (requiring Attorney General to determine whether a "contract is in improper form, not statutorily authorized or unconstitutional"). If an agency seeks to enter into a contract with a party who owes money to the Commonwealth, the Attorney General will not review the contract until the debt has been satisfied. *See* J.A. 2856.

PHEAA is authorized to pursue student-loan collection actions independently, *see* 24 Pa. Stat. § 5104.3, but the Commonwealth Attorneys Act otherwise requires the Attorney General to represent PHEAA in civil litigation absent a delegation of authority, *see* 71 Pa. Stat. § 732-204(c). PHEAA's standard practice is to seek such delegations in all non-collection actions; PHEAA's general counsel could not recall a request ever being denied. A private law firm serves as counsel to PHEAA's board. The Attorney General's office would have conducted the form-and-legality review of the contract engaging the law firm, but the decision to engage counsel did not require a delegation from or other review by the Attorney General.[5]

Pennsylvania law treats PHEAA as a typical state agency in other respects. PHEAA is authorized to promulgate and enact regulations, but the regulations must be approved by Pennsylvania's Regulatory Review Commission. *See* 71 Pa. Stat. §§ 745.3, 745.5. PHEAA must report its year-end condition to the Governor and the legislature. *See* 24 Pa. Stat. § 5108. It is subject to examination by the Commonwealth's Auditor General, *see id.*, and was in fact the subject of a "special performance audit" in 2008. J.A. 2312. Its property and income are exempt from state taxation,

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[5] In 2013, PHEAA paid outside counsel a total of more than $7 million.

see 24 Pa. Stat. § 5107, and all of its properties revert to the Commonwealth upon dissolution, *see id.* § 5109.

PHEAA's employees are paid through the state Treasury, receive healthcare benefits through the Commonwealth, and participate in the Commonwealth's retirement system. PHEAA's board members and executives are subject to state ethics laws. *See* 65 Pa. Cons. Stat. §§ 1102-03. PHEAA executives, however, are not paid in accordance with state pay scales. At least until 2007, PHEAA's top executives were compensated under a "unique" and very generous pay scale created by the PHEAA board. J.A. 2342.

For accounting purposes, the Commonwealth treats PHEAA as a "component unit" of the "primary government," J.A. 595, and it includes PHEAA's financial information in the Commonwealth's Comprehensive Annual Financial Report. The Report defines the "primary government" to include the Commonwealth and "all Commonwealth departments, agencies, boards, and organizations that are not legally separate." J.A. 595. "Component units" are defined as "all legally separate organizations for which the [primary government] is financially accountable, and other organizations for which the nature and significance of their relationship with the [primary government] are such that exclusion [of their financial information] would cause the financial statements to be misleading or incomplete." *Id.*

IV.

We turn now to Oberg's specific challenges to the district court's analysis of the arm-of-state issue.

A. State Treasury

The first arm-of-state factor focuses on "whether any judgment against the entity as defendant will be paid by the State," *Oberg I*, 681 F.3d at 580 (internal quotation marks omitted), an inquiry that includes legal or functional liability, *see Oberg II*, 745 F.3d at 137. We held in *Oberg II* that Pennsylvania was not legally liable, *see id.* at 138, and that conclusion remains controlling in this appeal, *see Everett v. Pitt Cty. Bd. of Educ.*, 788 F.3d 132, 142 (4th Cir. 2015) (explaining that under the "law of the case" doctrine, rulings by an appellate court on questions of law generally "must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal" (internal quotation marks omitted)).[6] Our analysis in this appeal, therefore, will focus on functional liability.

The functional-liability analysis looks to whether, as a practical matter, a judgment against a state-created entity puts state funds at risk, despite the fact

[6] The law-of-the-case doctrine does not apply if "the prior decision was clearly erroneous and would work manifest injustice." *TFWS, Inc. v. Franchot*, 572 F.3d 186, 191 (4th Cir. 2009) (internal quotation marks omitted). Although PHEAA suggests, almost in passing, that we erred by rejecting legal liability in *Oberg II*, *see* Brief of Respondent at 22 n.6, "[a] prior decision does not qualify for this . . . exception by being just maybe or probably wrong; it must strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." *TFWS*, 572 F.3d at 194 (internal quotation marks and alteration omitted). Given the previously discussed statutory provisions disclaiming liability for PHEAA's obligations and requiring PHEAA's debts to be paid from moneys of the corporation, *Oberg II*'s no-legal-liability holding doesn't strike us as wrong at all, much less dead-fish wrong.

that the state is not legally liable for the judgment. Thus, functional liability will be found "[w]here an agency is so structured that, as a practical matter, if the agency is to survive, a judgment must expend itself against state treasuries." *Hess*, 513 U.S. at 50, *cited in Oberg II*, 745 F.3d at 137; *Ristow v. South Carolina Ports Auth.*, 58 F.3d 1051, 1054 (4th Cir. 1995) (finding Ports Authority to be an arm of the state despite absence of legal liability because the state "provides whatever economic support is necessary over and above the Port Authority's net revenues to insure its continued vitality" and "takes back any portion of the Authority's net revenues, which, in its legislative judgment, is not necessary or desirable for the Ports Authority's operation"). A state may also be functionally liable if the funds available to pay any judgment effectively belong to the state rather than the agency.

Applying these principles in *Oberg II*, we concluded that Pennsylvania was not functionally liable because PHEAA was statutorily vested with control over the significant revenues generated by its extensive commercial activities, such that the judgment would be paid with funds belonging to PHEAA, not Pennsylvania. *See Oberg II*, 745 F.3d at 139 ("[B]ecause state law instructs that PHEAA would pay any judgment in this case with its own moneys from its segregated fund, the first factor weighs heavily against holding that PHEAA is an arm of the state." (citation omitted)); *id.* at 138 (noting that "PHEAA's substantial 'moneys' derive exclusively from its own operations").

The district court rejected that conclusion on remand, however. Believing that this court's analysis could not be sustained in light of the post-remand "factual development" in the case, *Oberg III*, 77 F. Supp. 3d at 497, the district court held that Pennsylvania would be functionally liable for any judgment entered against PHEAA. In the district court's view, the fact that PHEAA's earnings are deposited in the state Treasury, where they are commingled with other state funds and cannot be spent without approval of the Treasurer, showed that "the Commonwealth retains [such] significant control over PHEAA's assets and generated revenue" that "[p]ractically speaking, PHEAA's money becomes State money." *Id.* We agree with Oberg that the district court's analysis on this point is largely inconsistent with our decision in *Oberg II*.

Notwithstanding the district court's "factual development" reference, its analysis did not depend on the evidence developed during discovery, but instead turned on its understanding of the general statutory framework governing PHEAA's operation. As we have already explained, however, this court in *Oberg II* rejected the all-funds-are-state-funds argument. Instead, we held that because PHEAA was statutorily vested with control over the funds on deposit with the state Treasury, PHEAA's revenues remained "moneys . . . of the corporation" *despite* the statutory provisions relied on by the district court. *Oberg II*, 745 F.3d at 138 (internal quotation marks omitted).

Given that we were reviewing the granting of a Rule 12(b)(6) motion to dismiss in *Oberg II*, our holding was based on an assumption that the control statutorily vested in PHEAA was in fact exercised by PHEAA. Nonetheless, because we held that Oberg had plausibly alleged that PHEAA was not an arm of the state, we necessarily concluded that the statutory framework governing PHEAA's operations did not, in and of itself, establish a level of control sufficient to make PHEAA an arm of Pennsylvania. If the relevant statutory facts focused on by the district court—that PHEAA's revenues are held in the state Treasury and cannot be used for payment without approval of the Treasurer—were enough to establish functional liability even in the face of the PHEAA's statutorily granted power over those revenues, then we would have *affirmed*, not vacated, the district court's arm-of-state conclusion in *Oberg II*.

In finding Pennsylvania functionally liable, the district court thus ignored the statutory facts that we found critical to the issue—PHEAA's control over its significant independent funds—and gave the other relevant statutory facts a legal effect that we rejected in *Oberg II*. We therefore agree with Oberg that the district court erred by analyzing the functional liability question in an manner inconsistent with the approach dictated by *Oberg II*.

This court, however, "review[s] judgments, not opinions." *Catawba Indian Tribe of S.C. v. City of Rock Hill*, 501 F.3d 368, 372 n.4 (4th Cir. 2007) (per curiam). Thus, even though the district court's analysis of the state-treasury factor was erroneous, reversal would not be required if the evidence developed through discovery shows a level of control *actually* exercised by the Commonwealth that changes the *Oberg II* calculus and establishes that

Pennsylvania is functionally liable for a judgment against PHEAA. *See Oberg II*, 745 F.3d at 140-41 (remanding for "limited discovery on the question whether PHEAA is *truly subject to sufficient state control* to render it a part of the state" (emphasis added; internal quotation marks and alterations omitted)). We turn to that question now.

1.

Discovery produced substantial evidence of PHEAA's financial strength and independence.

PHEAA's financial success, which has never really been in dispute, is clearly established in the record. For 2006, when the last of the conduct alleged in Oberg's complaint took place, PHEAA's financial statements show gross revenues of $416 million, net revenues of $156 million, and total net assets of $498 million. J.A 2573-74. PHEAA's 2014 financial statements show impressive growth-gross revenues of $640 million, net revenues of $222 million, with total net assets of $1 billion and unrestricted net assets of $709 million.[7] *See* J.A. 3147-48. The evidence thus establishes that PHEAA has "substantial moneys," as we assumed to be true in *Oberg II*. 745 F.3d at 138 (internal quotation marks omitted).

PHEAA is statutorily vested with control over its funds on deposit with the Treasury Department, and discovery confirmed that PHEAA is in fact exercising

[7] As noted, PHEAA stopped originating student loans in 2008. Despite the loss of that line of business, PHEAA's revenues have increased dramatically. That increase is primarily attributable to a contract with the federal government to service federally issued student loans.

control over its funds. PHEAA's control over fiscal matters is established, first and foremost, by PHEAA's own officials. Timothy Guenther, PHEAA's treasurer, repeatedly testified in his deposition that financial decisions were made by PHEAA's Board of Directors. Guenther testified that PHEAA's board approves PHEAA's annual budget based on revenue and expenses estimates developed by PHEAA staff; decides each year what portion (if any) of its earnings will be used to supplement the State Grant Program; and establishes PHEAA's corporate investment policy. And as to the annual report of its major financial decisions and overall financial condition that PHEAA is required to make to the Governor and General Assembly, Guenther acknowledged that the financial decisions reflected in that report were made by PHEAA's board. *See* J.A. 2469.

The declaration of PHEAA's chairman of the board likewise shows that PHEAA, not the Commonwealth, controls PHEAA's operations and its funds. *See* J.A. 246 ("*PHEAA's Board* makes sure that as much excess revenue, in light of PHEAA's long-term operational and financial requirements, is contributed to programs and financial assistance for the benefit of Pennsylvania students" (emphasis added)); J.A. 249 ("The Board oversees PHEAA, makes the policy decisions for the direction of [the] agency, and tasks PHEAA's executives and managers with implementing those decisions and directions on a day-to-day basis."); *id.* ("PHEAA's Board reviews, analyzes and approves PHEAA's internal budget, which is proposed by management and presented to the Board."); *see also* J.A. 2406 ("Briefing Book" preparing PHEAA CEO for appearance before legislative committee stating that "[t]he board is responsible for how we spend our money").

Specific incidents and events described in the record provide further evidence of PHEAA's control. For example, when Commonwealth revenues fall short of expectations, it is not unusual for the Governor to ask state agencies to cut spending and return a portion of their budget to the General Assembly. The record contains two gubernatorial letters requesting PHEAA's assistance, and these letters distinguish PHEAA from other state agencies and make it clear that PHEAA has control over its budget that other agencies do not. *See* J.A. 3118 (letter from Gov. Corbett stating that he had "*directed* agencies under [his] jurisdiction to freeze . . . spending" but was "*ask[ing]* that [PHEAA] make the same sacrifice as the agencies under [his] jurisdiction" (emphasis added)); J.A. 3120 (letter from Gov. Rendell noting that he had "*directed* commonwealth agencies to place 1.9% of their discretionary budgets into budgetary reserve" but "*ask[ing]* [PHEAA] to make the same spending reductions that our commonwealth agencies are making" (emphasis added)).

In addition, in 2007, PHEAA settled a dispute with the Department of Education related to the interest-subsidy issue raised in Oberg's complaint for $11.3 million. According to PHEAA's treasurer, PHEAA paid the Department of Education with loan-repayment funds held in trust in accounts outside the Pennsylvania Treasury. PHEAA also settled a dispute with the IRS for $12.3 million, and a portion of the IRS settlement was also paid from assets held in trust. *See* J.A. 2480. The Attorney General would have conducted the form-and-legality review of the settlements, but it otherwise had no involvement in the substantive decision to settle the disputes or the negotiation of the settlement terms. *See* J.A. 2845, 2847-48. The General Assembly was not required to approve the settlements, and it did not appropriate funds to replace those spent by PHEAA. In our view, PHEAA's actions in settling the disputes demonstrates PHEAA's control over its funds and its financial independence from the Commonwealth. And the fact that the settlements were paid with a portion of the $6 billion held in trust *outside* the state Treasury is additional evidence of PHEAA's ability to fund a judgment without the use of state funds.

PHEAA's creation and support of the Pennsylvania Higher Education Foundation ("PHEF") also provides compelling evidence of PHEAA's financial independence and control.[8] Although PHEAA itself is authorized to solicit and receive private donations, *see* 24 Pa. Stat. § 5104(3) & (8); *id.* § 5106, PHEAA officials believed that "'many private donors are reluctant to donate funds to a government agency,'" 2008 Auditor General's Report at 74, Exhibit 1 to Oberg's Opposition to PHEAA's Motion for Summary Judgment ("2008 Auditor General's Report").[9] PHEAA thus created PHEF, a one-employee,[10] tax-exempt charitable organization,

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[8] PHEF has been inactive since 2009.

[9] The parties included only a portion of this report in the Joint Appendix.

[10] PHEF's single employee is its president and CEO. From PHEF's inception through at least August 2008, PHEF's

for the purpose of soliciting private corporate donations. PHEAA provided the funds and administrative services necessary for PHEF's operation. From 2001 through 2007, PHEAA provided PHEF with more than $86 million in cash and donated services. Over that same period, PHEF collected $11.1 million in private donations. *See* 2008 Auditor General's Report at 75. While PHEAA has the general authority "[t]o perform such . . . acts as may be necessary or appropriate to carry out effectively the objects and purposes of the agency," 24 Pa. Stat. § 5104(7), PHEAA had no specific statutory authority to create or make donations to a charitable organization, *see* J.A. 2410 ("Briefing Book" preparing PHEAA CEO for appearance before legislative committee stating that there was "[n]o express legislative authority" for PHEAA's funding of PHEF).

In our view, the evidence outlined above establishes the critical facts assumed in *Oberg II* when we rejected the claim of functional liability: 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. *See Burrus v. State Lottery Comm'n*, 546 F.3d 417, 420 (7th Cir. 2008) ("Because the Lottery raises revenue on its own account, controls and funds its own operations, and does not expose state coffers when monetary judgments are rendered against it, we conclude that it is an entity financially independent from the state."). As we discuss below, state law does impose some restrictions on PHEAA's use of its funds,

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president and CEO was a former president and CEO of PHEAA itself. *See* 2008 Auditor General's Report at 75.

but those restrictions do not divest PHEAA of control over its funds or otherwise establish that the Commonwealth is functionally liable for a judgment against PHEAA.

2.

The primary way the Commonwealth exercises some control over PHEAA's funds is through the statutory requirements that PHEAA deposit its commercial revenues in the Treasury Department and the Treasurer approve any payment of funds held by Treasury.

To the extent that PHEAA continues to assert that these statutory provisions establish that all of PHEAA's funds on deposit in the state Treasury effectively belong to the Commonwealth,[11] that argument is foreclosed by *Oberg II*, which necessarily concluded that these statutory requirements do not, in and of themselves, transform PHEAA funds into Commonwealth funds. *See Oberg II*, 745 F.3d at 138; *cf. Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655, 661 (3d Cir. 1989) (en banc) ("The [statutory] designation of the money as 'public' simply does not answer the question of who has dominion

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[11] In support of this argument, PHEAA points to the testimony of PHEAA treasurer Timothy Guenther, who stated in his deposition that "[a]ll PHEAA funds held in the Treasury are funds of the Commonwealth." J.A. 2447. To the extent Guenther asserts that the funds are Commonwealth funds simply because they are deposited in the state Treasury, that argument is foreclosed by *Oberg II*. Moreover, whether PHEAA funds belong to the Commonwealth for purposes of the arm-of-state analysis is ultimately a question of federal law that cannot be established by a witness's conclusory assertion of the ultimate legal issue.

over the money in [state-created entity's] accounts."). Indeed, Pennsylvania law expressly recognizes that not all funds held by the Treasurer actually belong to the Commonwealth. *See* 72 Pa. Stat. § 301 (requiring Treasurer to deposit in specified accounts "all moneys of the Commonwealth received by it, *including moneys not belonging to the Commonwealth* but of which the Treasury Department or the State Treasurer is custodian" (emphasis added)).

PHEAA also contends, however, that the actual payment-approval process, as established through discovery, "significantly constrain[s]" its spending and signifies a level of control that makes the Commonwealth functionally liable. Brief of Respondent at 18. We disagree.

The Treasury Department's review-and-approval process, as described by the evidence in the record, is not particularly complicated. PHEAA prepares and submits a payment request; the Treasury Department reviews the payment request and its "backup documentation such as invoices, receipts, contracts, [and] purchase orders," to confirm the existence of a contract authorizing payment and an invoice matching the payment request. J.A 673. If the review raises questions, the Department rejects the request and returns it to PHEAA for resolution of the issues. If the review shows the payment request "to be lawful and correct, the Treasurer issues his warrant for payment." *Id.* When a check is required, the vendor is paid with a check drawn on the state Treasury and signed by the Treasurer.

The approval process clearly reflects some level of Commonwealth control over PHEAA, as it effectively requires PHEAA to adopt certain book-keeping procedures if it wants its vendors to be paid. The Treasury Department's review, however, is not a substantive review. The Department does not evaluate the wisdom of the underlying contract or the reasonableness of the agreed-upon price, but instead simply confirms that a valid contract authorizes payment and that the payment amount sought matches the amount agreed to in the contract. The approval process thus does not constrain or otherwise interfere with PHEAA's statutory authority to make the *substantive* decisions controlling the use of its revenues. *See* 24 Pa. Stat. § 5104(3) (PHEAA revenues held in the state Treasury "shall be available" to PHEAA and "utilized at the discretion of the board of directors for carrying out any of the corporate purposes of the agency"); *id.* § 5105.10 (deposits into PHEAA's segregated state Treasury account "are hereby appropriated to the board and may be applied and reapplied as the board shall direct"). Indeed, the approval process doesn't even commence until PHEAA has exercised its discretion to enter into a contract or otherwise take action that requires a payment to be made.

PHEAA, however, argues that, "[a]s the thousands of examples of requisition questions and denials produced in discovery clearly show, Treasury's review is no mere rubber stamp." Brief of Respondent at 19. In PHEAA's view, the approval process "is not ministerial in nature" because it "involves a comprehensive, multi-step process involving several levels of submission, substantive review, and authorization." Brief of Respondent at 19 (internal quotation marks omitted). We disagree.

Whether the review-and-approval process is ministerial depends on the nature of the review, not on the frequency with which the review identifies problems. And here, the undisputed evidence shows that Treasury Department officials simply check, cross-check, and confirm the information contained in contracts, purchase orders, and invoices. Complicated contracts may sometimes lead to lengthy email exchanges trying to unravel the agreed-upon pricing terms, but even then, the Department's role is simply to confirm that a valid contract authorizes the payment being sought in the amount being sought.[12]

We recognize, of course, that by dictating the steps to be followed for payment to be made to a PHEAA vendor, the approval requirement places some not-insignificant constraints on the manner in which PHEAA pays its bills. Dictating specific payment procedures, however, is not the same as dictating spending policy and priorities. Because the Treasury Department's ministerial, checklist-focused approval process does not substantively constrain

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[12] When arguing that the approval process is not ministerial, PHEAA notes that "after receiving a $63 invoice from PHEAA's outside counsel seeking reimbursement for a meal, Treasury demanded an itemized receipt from PHEAA and inquired whether the meal included alcohol." Brief of Respondent at 19 n.5. Given that Pennsylvania's reimbursement policy precludes reimbursement for alcoholic beverages and requires "[c]omplete justification" for reimbursement requests, *see Commonwealth Travel Procedures Manual* §§ 4.1, 7.1 (Nov. 1, 2011) (PDF file saved as ECF opinion attachment), the Treasury Department simply asked PHEAA to provide the information necessary to show that payment was authorized. We see no relevant difference between that request and a request for PHEAA to provide the contract underlying a given invoice.

PHEAA's fiscal discretion, the approval requirement does not, in and of itself, give Pennsylvania a level of control over PHEAA funds sufficient to transform PHEAA's independently earned revenues into money belonging to the Commonwealth.

PHEAA also argues that Pennsylvania is functionally liable because PHEAA's funds on deposit in the Treasury are commingled with state funds and invested by the Treasurer. We disagree. That PHEAA's revenues were commingled with state revenues and invested by the Treasurer were statutory facts before the court in *Oberg II* but were insufficient, standing alone, to establish functional liability. While discovery has added to those statutory facts and establishes that the Treasurer makes the decisions about investing these commingled funds, we do not believe that adds much to the analysis. The commingling and investing—a process that PHEAA's own treasurer compared to an ordinary mutual fund—may reflect the Treasurer's *custodial* control over the funds on deposit, but it does not establish a lack of *substantive* control by PHEAA. That is, PHEAA is statutorily vested with the power to control its commercially generated revenues on deposit in the Treasury. The Treasurer's concurrent authority to use those funds to generate interest does not somehow divest PHEAA of control over its funds or otherwise interfere with PHEAA's exercise of substantive control over its funds. Accordingly, we conclude that PHEAA's own "moneys," generated through PHEAA's commercial activities and held in a segregated account, are not transformed into "moneys" of the Commonwealth simply because they are commingled with other state funds for investment purposes.

PHEAA also contends that it is "fiscally dependent" on the Commonwealth, and the Commonwealth is therefore functionally liable, because it must submit annual budget requests to obtain appropriations from the General Assembly, the legislature has capped the total amount of debt PHEAA can incur, and the Governor must approve all debt issuances. Brief of Respondent at 19. Again, we disagree.

As the record establishes, PHEAA submits budget requests only to receive the *appropriated* funds to be distributed under the State Grant Program. PHEAA is not required to submit budget requests to gain access to its independently generated revenues, and the General Assembly does not take PHEAA's revenues to fill holes in the Commonwealth's budget. PHEAA's participation in the state budgeting process in its capacity as administrator of the State Grant Program thus does not cast doubt on PHEAA's power to control its extensive, independent funds, nor does it otherwise make PHEAA fiscally dependent on Pennsylvania.

As to the statutory limit on PHEAA's total debt and the gubernatorial-approval requirement, these provisions may well make PHEAA fiscally dependent on Pennsylvania for state accounting purposes. *See* Commonwealth's Comprehensive Annual Financial Report, J.A. 595-96 (treating PHEAA as a "component unit" of the Commonwealth's "primary government" because "PHEAA is fiscally dependent, as the Governor must approve the issuance of its debt"). For purposes of the arm-of-state inquiry, however, we do not believe these restrictions suffice to make

Pennsylvania functionally liable for a judgment against PHEAA.

Preliminarily, we note that while the debt-limit and gubernatorial-approval provisions do place some constraints on PHEAA's business activities, nothing in the statutes directly addresses PHEAA's control over its revenues, which is the key to the functional liability question in this case. Moreover, these statutory requirements obviously have not been obstacles to PHEAA's financial success, and there is no basis in the record for us to conclude that Pennsylvania in the future would use these powers to shrink PHEAA's operations and revenues to a point where it could not withstand a judgment against it. *See Hess*, 513 U.S. at 50.

In any event, while these statutory provisions do restrict PHEAA's financial independence to some degree, Pennsylvania municipalities—which are subject to liability under the FCA—also face similar requirements.[13] These statutes thus provide little help in "draw[ing] the line between a State-created entity functioning independently of the State from a State-created entity functioning as an arm of the State or its alter ego." *Oberg I*, 681 F.3d at 580 (internal quotation

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[13] *See* Pa. Const. art. IX, § 10 ("[T]he General Assembly shall prescribe the debt limits of all units of local government including municipalities and school districts."); 53 Pa. Cons. Stat. § 8022(a) (placing limitations on the amount of nonelectoral debt incurred by local government units); 53 Pa. Cons. Stat. § 8110(a) (requiring local governments to submit a "debt statement" to the Department of Community and Economic Development of the Commonwealth before issuing bonds); 53 Pa. Cons. Stat. § 8111 (Department must approve local government's application before local government may issue bonds).

marks omitted). The debt-limit and gubernatorial-approval provisions were among the statutory facts that we considered in *Oberg II* and found insufficient, in and of themselves, to compel arm-of-state status, and there is nothing in this record establishing that these statutory facts should be given more weight than we gave them in *Oberg II*.

3.

Under these facts, the district court erred in concluding that Pennsylvania was functionally liable for a judgment against PHEAA. As we have explained, PHEAA's "substantial," independently generated corporate wealth, *Oberg II*, 745 F.3d at 138, and PHEAA's control over that wealth, were key to *Oberg II*'s functional-liability analysis. The evidence discussed above confirmed the existence of these facts.

Far from being a thinly capitalized agency, *see Hess*, 513 U.S. at 50, PHEAA earns hundreds of millions of dollars a year through its commercial financial services operations and holds more than $1 billion in net assets. While its commercial earnings are deposited in the Pennsylvania Treasury, PHEAA is statutorily vested with control over those revenues. *See* 24 Pa. Stat. § 5104(3); *id.* § 5105.10. And as outlined above, the evidence produced through discovery confirms that PHEAA is in fact exercising the control granted to it by statute and that substantive decisions about the use of its substantial revenues are made by PHEAA, not the Governor or the General Assembly. This point is exemplified by PHEAA's creation of PHEF and its donation to PHEF of $86 million in cash and services goods, all without specific statutory authority.

Of course, PHEAA is subject to some measure of state control over its finances, including the gubernatorial-approval requirement, the legislative cap on total debt, and the Treasury payment-approval requirement. *Oberg II* held that those facts did not outweigh the control PHEAA had over its independent funds, however, and the record contains no evidence that causes us to reach a different conclusion. The gubernatorial-approval requirement and legislative cap may theoretically place a ceiling on PHEAA's earning capacity at some as-yet unestablished level, but an income ceiling does not affect PHEAA's right or ability to control the revenues it actually earns. The Treasury payment-approval process, though not an entirely inconsequential burden, is nonetheless a purely ministerial process that does not in any way restrict PHEAA's authority to set policy and make all substantive decisions about where and how its funds are best directed. None of these facts, whether considered individually or collectively, materially diminish or constrain PHEAA's substantive control (vested by law and exercised in fact) over its funds and financial decisions.

PHEAA, however, objects to any consideration of the extent of its corporate wealth and its ability to fund a judgment through its own resources, insisting that arm-of-state status cannot depend on whether the state-created entity happens to be "flush at a particular juncture." Brief of Respondent at 25. PHEAA argues that for the first two decades of its existence, it depended on state appropriations to fund its operations. PHEAA contends that in those early years, "the Commonwealth would have been on the hook to pay a judgment against PHEAA," and it contends that "[t]here is no principled basis for rescinding PHEAA's status as an arm of the Commonwealth simply because it now enjoys financial success by discharging its statutory mission." Brief of Respondent at 26. We disagree.

First, *Oberg II requires* us to consider PHEAA's wealth and its ability to use its funds to pay a judgment. Those facts, as previously discussed, were the critical facts on which *Oberg II*'s functional-liability decision was grounded. *Oberg II* thus established that PHEAA's access to its substantial corporate wealth was relevant to the functional-liability question, and that determination is a legal ruling that remains applicable in this appeal. *See TFWS, Inc. v. Franchot*, 572 F.3d 186, 191 (4th Cir. 2009) ("The law of the case doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." (internal quotation marks omitted)).

Moreover, even were we to ignore *Oberg II*'s focus on these facts, case law would still require their consideration. Specifically, the Supreme Court's decision in *Hess* establishes that an agency's access to independent funds is relevant to the functional-liability question.

In *Hess*, the Court explained that, "[w]here an agency is so structured that, as a practical matter, if the agency is to survive, a judgment must expend itself against state treasuries, common sense and the rationale of the eleventh amendment require that sovereign immunity attach to the agency." *Hess*, 513 U.S. at 50 (internal quotation marks omitted). "There is no such requirement where the agency is structured . . . to be self-sustaining." *Id.*[14] When determining whether the state-created entity was "structured" to be "self-sustaining," the *Hess* Court considered the entity's financial statements, which showed that the entity "had over $2.8 billion in net assets and $534 million in its General Reserve Fund," *id.* at 36 n.6, as well as the entity's independent source of revenues, which "account[ed] for the Authority's secure financial position," *id.* at 36. Although the creating states otherwise exercised a not-insignificant amount of control over the entity, *see id.* at 36-37, the Court held in *Hess* that the entity was not entitled to share in the states' Eleventh Amendment immunity given the entity's "anticipated and actual financial independence," *id.* at 49; *see also id.* at 52 ("[T]he Port Authority is financially self-sufficient; it generates its own revenues, and it pays its own debts. Requiring the Port Authority to answer in federal court . . . does not touch the concerns—the States' solvency and dignity—that underpin the Eleventh Amendment.").

In our view, the Court's approach in *Hess* forecloses any argument that an entity's independent financial resources and its ability to fund any judgments against it are not relevant to the functional-liability inquiry. PHEAA suggests, however, that *Hess*'s focus on the financial circumstances of the state-created entity was subsequently rejected by the Supreme Court in *Regents of the University of California v. Doe*, 519 U.S.

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[14] Although *Hess* involved an entity created by two states, we have held that "the same general principles identified in [*Hess*] must also apply in the single state context." *Gray v. Laws*, 51 F.3d 426, 432 (4th Cir. 1995).

425 (1997), which PHEAA contends held that the state's "potential" liability was the key factor in the arm-of-state inquiry. We disagree.

In *Regents*, the question was whether the University of California was an arm of the state for Eleventh Amendment purposes. Although there was no dispute that California was *legally* liable for the University's debts, *see id.* at 428, the Ninth Circuit nonetheless concluded that the University was *not* an arm of California because a contractual indemnification agreement with the federal government would have relieved California of the financial consequences of a judgment in that case, *see id.* The Supreme Court reversed. Rejecting "the notion that the presence or absence of a third party's undertaking to indemnify the agency should determine whether it is the kind of entity that should be treated as an arm of the State," *id.* at 431, the Supreme Court held that "with respect to the underlying Eleventh Amendment question, it is the entity's *potential* ***legal*** *liability*, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant," *id.* (emphasis added).

The *Regents* Court thus held that *if the state is legally liable* for a judgment against the state-created entity, the entity is entitled to Eleventh Amendment immunity and does not lose that immunity by virtue of an indemnity agreement that ultimately shifts the state's loss to a third party. *See id.* at 430-31; *see also Cash*, 242 F.3d at 221-22 n.1 ("[I]n *Regents*, the Court held that the fact that a judgment against the State would be covered by the voluntary indemnification agreement of a third party did not strip away the State's Eleventh Amendment immunity because the State still bore the legal risk of an adverse judgment." (internal quotation marks omitted)). Because *Regents* addressed *Hess* and built on *Hess*'s analysis when reaching its own ruling, *see Regents*, 519 U.S. at 430-31, Regents' focus on *legal* liability cannot somehow be understood as a silent rejection of the heart of *Hess*'s analysis of *functional* liability.[15]

In sum, PHEAA is engaged in nationwide, commercial financial-aid activities that bring in hundreds of millions of dollars in net revenues every year and have allowed it to accumulate more than one billion dollars in net assets, and PHEAA has

[15] This court has concluded that *Regents*' use of "potential" liability, *Regents*, 519 U.S. at 431, requires us to consider the effect of a "hypothetical" judgment that exceeds the entity's revenues. *See Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 545 (4th Cir. 2014) ("[T]he proper inquiry is not whether the state treasury would be liable in *this* case, but whether, hypothetically speaking, the state treasury would be subject to potential legal liability *if* the [state-created entity] did not have the money to cover the judgment." (internal quotation marks omitted)). We have already held that the Commonwealth is not legally liable for a judgment against PHEAA. *See Oberg II*, 745 F.3d at 138. And for the reasons previously discussed, 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. To the extent that PHEAA suggests that *Hutto*'s "hypothetical" inquiry requires us to imagine not only a judgment that exceeds PHEAA's revenues, but also that PHEAA's accumulated cash and other assets have vanished, that proposition is not only an over-reading of *Hutto*, but also inconsistent with *Hess*, which considered real, not imaginary, financial information when rejecting arm-of-state status. *See Hess*, 513 U.S. at 36.

substantive control over those independent funds. A judgment in this case would thus be paid with PHEAA funds, not funds belonging to the Commonwealth. And given PHEAA's control over its sizeable corporate wealth, there is little likelihood that a judgment against PHEAA, even one that exceeds its current revenues, would imperil its survival such that the Commonwealth would effectively be required to swoop in with financial support.[16] Accordingly, in light of PHEAA's "anticipated and actual financial independence," *Hess*, 513 U.S. at 49, the district court erred in finding the Commonwealth of Pennsylvania functionally liable for a judgment against PHEAA. And because Pennsylvania is neither legally nor functionally liable, the state-treasury factor therefore "weighs heavily against holding that PHEAA is an arm of the state." *Oberg II*, 745 F.3d at 139; *see Cash*, 242 F.3d at 225 (explaining that if the state treasury

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[16] Although PHEAA's chairman stated in his declaration that the Commonwealth "would have no choice but to appropriate money" for PHEAA if a "significant judgment" were entered against it, J.A. 248, the chairman did not identify any facts supporting his opinion. *Cf. Williams v. Giant Food, Inc.*, 370 F.3d 423, 433 (4th Cir. 2004) (explaining that a "mere[] . . . self-serving opinion . . . cannot, absent objective corroboration, defeat summary judgment"). Moreover, the record evidence that shines light on this issue points to the opposite conclusion, given that the Commonwealth did not replenish PHEAA's coffers after it paid millions of dollars to settle the disputes with the Department of Education and the IRS, nor did the Commonwealth provide extra funds when PHEAA had a $27-million operating loss in 2008. Under these circumstances, the chairman's unsupported opinion about actions the Commonwealth might take cannot establish functional liability. *Cf. Cash*, 242 F.3d at 225 (speculative effect on state treasury insufficient to establish functional liability).

will not be affected by a judgment, that fact weighs against arm-of-state status).

B. Autonomy

The second arm-of-state factor requires us to determine "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 I*, 681 F.3d at 580 (internal quotation marks omitted). "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." *Oberg II*, 745 F.3d at 137 (citations omitted).

1.

In *Oberg II*, we held that while the composition of PHEAA's board, the gubernatorial-approval requirement for bond issuances and the Auditor General's oversight over PHEAA pointed towards arm-of-state status, other relevant factors, including PHEAA's financial independence and its corporate powers "strongly suggest[ed] that PHEAA is not an arm of the state." *Id.* at 139. Giving Oberg the benefits of all reasonable inferences, we held that the autonomy factor "counsels against holding that PHEAA is an arm of the state." *Id.*

On remand, the district court concluded that the facts developed through discovery made "Pennsylvania's control over PHEAA . . . quite clear." *Oberg III*, 77 F. Supp. 3d at 498. The district court believed that the composition of PHEAA's board—gubernatorial appointees and state legislators or officials—"gives the Commonwealth significant control over the direction of PHEAA." *Id.* The court also noted that "Pennsylvania retains several forms of veto power over PHEAA's actions. The Treasurer must, as with all agencies, approve all expenditures, the Governor must approve all of PHEAA's debt issuances, and the Attorney General must approve all PHEAA contracts in excess of $20,000." *Id.* The district court explained that, "[a]lthough PHEAA's funding and partial fiscal autonomy weighs against a finding that PHEAA is a state agency, most of the evidence shows substantial Commonwealth control and supports finding PHEAA to be an arm of Pennsylvania." *Id.*

Oberg argues on appeal that the district court's analysis of the autonomy factor is inconsistent with our analysis in *Oberg II*. In Oberg's view, the evidence produced through discovery demonstrates that PHEAA in fact operates autonomously, without significant oversight or control by the Commonwealth. We agree with Oberg that the statutory scheme governing PHEAA's operation and the evidence in the record establish PHEAA's operational autonomy. *See Oberg II*, 745 F.3d at 141 (describing the ultimate question as whether "PHEAA is *truly subject* to sufficient state control to render it a part of the state" (emphasis added; internal quotation marks and alteration omitted)).

2.

The record contains substantial evidence showing that PHEAA operates autonomously, largely free from state interference in its substantive decisions.

The "[m]ost critical[]" evidence of PHEAA's autonomy is evidence of its "financial[] independen[ce]." *Id.* As already discussed, the evidence developed through discovery confirmed the financial independence we assumed in *Oberg II*. PHEAA is not dependent on state money for its survival and has not received appropriated funds for operational support since 1988. PHEAA supports itself through its commercial financial-services activities, through which it earns hundreds of millions of dollars annually and has accumulated more than $1 billion in net assets. PHEAA is statutorily vested with control over those funds, *see* 24 Pa. Stat. §§ 5104(3), 5105.10, and the evidence from PHEAA's own officials establishes that PHEAA in fact exercises that statutory control, *see, e.g.*, J.A. 2469 (PHEAA treasurer acknowledging that PHEAA board makes the financial decisions reflected in PHEAA's annual report to Governor and General Assembly); J.A. 249 ("PHEAA's Board reviews, analyzes and approves PHEAA's internal budget, which is proposed by management and presented to the Board."). PHEAA's control over its substantial, independently generated revenues thus establishes PHEAA's financial independence, which is a critical component of operational autonomy. *See Oberg II*, 745 F.3d at 139.

Testimony from PHEAA board members also shows the lack of involvement by the General Assembly in PHEAA's operational affairs. When asked whether the General Assembly "submit[ted] policy or business recommendations" to PHEAA, one of the non-legislative members of the board responded,

> The Legislature created PHEAA. . . . [I]t told them what they have to do, give them the business operation to take care of the students of Pennsylvania.
>
> That was the Legislature's role. That's their only role at this point. They change their mind, they can create a statute to change it.

J.A. 3353. The absence of significant legislative control or oversight is also reflected in the testimony of PHEAA's chairman, who stated that "[i]f the Speaker of the House or any member of the General Assembly would ask me a question regarding PHEAA, I certainly would meet with them and discuss whatever the matter is with them. But I do not report back to anyone in the General Assembly." J.A. 2696; *see also* Declaration of PHEAA Chairman of the Board, J.A. 249 ("The Board oversees PHEAA, makes the policy decisions for the direction of [the] agency, and tasks PHEAA's executives and managers with implementing those decisions and directions on a day-to-day basis.").[17]

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[17] In his declaration in support of PHEAA's motion for summary judgment, PHEAA's chairman stated that "I know from my tenure on the Board and as its Chairman that *by virtue of the composition of PHEAA's Board* with members of the legislative and executive branches, *the Commonwealth exercises absolute control over PHEAA*." J.A. 248 (emphasis added). *Oberg II*, of course, forecloses any argument that the composition of the board establishes absolute control. Moreover, as we have previously indicated, a witness's conclusory assertion of the answer to a legal question is not controlling. *Cf. Doren v. Battle Creek Health Sys.*, 187 F.3d 595, 598-599 (6th Cir. 1999) (explaining that conclusory affidavits "restating the requirements of the law" but

The broad range of powers statutorily granted to PHEAA is also important evidence of PHEAA's operational autonomy. "PHEAA has the power to enter into contracts, sue and be sued, and purchase and sell property in its own name, all of which suggest operational autonomy." *Oberg II*, 745 F.3d at 139. The statutes granting PHEAA control over its funds on deposit with the Treasury similarly are evidence of PHEAA's operational autonomy. *See* 24 Pa. Stat. §§ 5104(3), 5105.10,

PHEAA's creation and support of PHEF also provides powerful evidence of PHEAA's autonomy. Even though PHEAA is statutorily authorized to solicit and accept charitable donations, it created PHEF and gave PHEF more than $10 million a year to do that job.[18] And it did so in the absence of express statutory authority to create and support a dependent charitable organization, and without any involvement of the Governor or General Assembly beyond the routine review-and-approval processes of the Treasury Department and the Attorney General. PHEF thus provides a telling example of PHEAA exercising the financial and operational autonomy granted to it by statute.

Another telling example of PHEAA's financial and operational autonomy involves an unsolicited, $1-billion buy-out offer made in 2005 by the SLM

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containing no "specific facts" do not "create a genuine issue of material fact sufficient to defeat summary judgment").

[18] From all that appears in the record, PHEF did its job quite poorly. PHEF collected $11 million in private contributions over a six-year period in which PHEAA provided PHEF with more than $86 million in cash and donated services.

Corporation, better known as Sallie Mae. PHEAA's board rejected the offer on its own, without direction from the Governor or General Assembly.

PHEAA's response to a dispute about billing calculations with the agency administering Commonwealth employee-benefit programs provides another concrete example of PHEAA's independence from the Commonwealth. After the billing dispute arose, PHEAA's board first explored the possibility of providing health benefits "outside" the Commonwealth. J.A. 2880. Eventually, the board unilaterally reduced the amount it paid the agency for its employees' health benefits. *See* J.A. 2881. In our view, these actions show autonomy on the part of PHEAA, not domination by the Commonwealth.

Moreover, PHEAA itself routinely asserts its financial strength and its independence from the Commonwealth. For example, PHEAA has described itself as an "independent public corporation," J.A. 3407, and as "a self-funded organization with operations similar to a not-for-profit business," J.A. 3408. *See also* J.A. 3020 (letter from a PHEAA vice-president to a Pennsylvania newspaper defending PHEAA's salaries and bonuses and distinguishing PHEAA from a "typical state agency").

Similarly, the Commonwealth has indicated, through both formal and less-formal channels, its lack of control over PHEAA. On the formal side, the Commonwealth's Comprehensive Annual Financial Reports state that the Commonwealth "does not significantly impose its will on the PHEAA." J.A. 596. Less formally, after PHEAA rejected the Sallie Mae offer, a spokesman for then-Governor Edward Rendell stated, "We have no influence over PHEAA's decision-making." J.A. 3364.

When this evidence is considered along with PHEAA's statutory corporate powers and its statutory control over its funds on deposit with the Treasury, we believe it convincingly establishes that PHEAA operates independently, without significant interference from the Commonwealth. *See, e.g.*, *Vogt v. Board of Commissioners*, 294 F.3d 684, 694-95 (5th Cir. 2002) (finding levee district to be autonomous for arm-of-state purposes because district "has considerable management authority . . . [and] no branch of government exercises supervisory control over the day-to-day operations of the levee district" (internal quotation marks omitted)).

3.

While there is evidence showing a certain level of Commonwealth control over PHEAA, it does not change our view of PHEAA's autonomy.

The most significant evidence of state control is that involving the Attorney General. As described above, PHEAA must submit contracts over $20,000 to the Attorney General for a "form and legality" review determining whether the "contract is in improper form, not statutorily authorized or unconstitutional." 71 Pa. Stat. § 732-204(f)). A Deputy Attorney General explained the review process:

> Our standard under the statute is form and legality, and what that includes is . . . the form of the contract. . . . Does it comply with the contract law, also does it include terms that are required of a Commonwealth contract, and does it not include terms that

> would be prohibited in a Commonwealth contract.
>
> Then we look to authority. Does the agency as a public agency have the statutory authority to engage in this type of transaction, are there any other statutes or court decisions that would allow or preclude the contract. And then, thirdly, we look at the constitutionality. As a public agency, is this type of thing constitutional in the state or federal constitution.
>
> If all that is all right, we approve it. We do not look to business judgment. We do not look to financial issues. We do not look to political issues.

J.A. 3055; *see also* J.A. 3058 (agreeing that "the Attorney General's Office is not getting involved in business matters," only "legal formalities to ensure that it complies with Pennsylvania law"; J.A. 3095 ("I don't look at the business. I don't look [at whether it] is . . . a good idea. I don't look [at whether it] is . . . what I would do in their place. I look to legal issues."). Thus, much like the Treasury Department's payment-approval process, the Attorney General's review process is a checklist-driven, essentially non-substantive review process.

Although the review process is largely ministerial, there is no doubt that it amounts to an exercise of state control that restricts PHEAA's autonomy to some degree. The other aspects of the Attorney General's involvement in PHEAA's affairs, such as the requirement that the Attorney General represent PHEAA in litigation absent a delegation of authority and the binding nature of any legal opinions issued by the Attorney General, likewise must be understood as restrictions on PHEAA's autonomy.

Other indications of PHEAA's lack of autonomy relied upon by PHEAA derive from the general statutory provisions governing PHEAA's finances and operations: PHEAA was created by the Commonwealth, can exercise only those powers granted to it by the Commonwealth, and can be dissolved by the Commonwealth. Under the statute in force during the time relevant to Oberg's complaint, PHEAA's 20-member board was composed of gubernatorial appointees and state officials, which suggests some level of state control. *See Oberg II*, 745 F.3d at 139. In addition, PHEAA must deposit its commercial revenues in the state Treasury, and the Treasurer must approve payments made from those funds. The Governor must approve PHEAA's debt issuances, and the General Assembly has capped the total amount of debt PHEAA can incur. PHEAA is required to report its financial condition annually to the Governor and General Assembly, and it is subject to audit by the Commonwealth's Auditor General. PHEAA is also subject to the Commonwealth's Sunshine Act, *see* 65 Pa. Cons. Stat. § 701, and its Right-To-Know Law, *see* 65 Pa. Cons. Stat. § 67.102.[19] All of these statutory facts were considered by the court in *Oberg II* but were insufficient in the face of PHEAA's statutory control over its funds to tip the autonomy factor to PHEAA's favor. Our review of the

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[19] Certain of PHEAA's contracts are exempt from the Right-To-Know Law. *See* 24 Pa. Stat. § 5104(1.1)(iii).

record gives us no basis for striking a different balance.

Of the various statutory strings that tie PHEAA to the Commonwealth, some are more important than others. For example, the requirement that PHEAA annually report to the Governor and General Assembly, and the applicability to PHEAA of the open-meetings and right-to-know laws, are "minor strings," *Takle v. Univ. of Wis. Hosp. & Clinics Auth.*, 402 F.3d 768, 771 (7th Cir. 2005), that have little practical effect on PHEAA's independence and are not dissimilar from requirements imposed by the state on other political subdivisions.[20] While they are relevant to the arm-of-state analysis, these minor strings ultimately do little work in distinguishing arms of the state from independent political subdivisions. *See Regents*, 519 U.S. at 429, n.5 (arm-of-state inquiry seeks to determine whether "a particular state agency has the same kind of independent status as a county or is instead an arm of the State"). Accordingly, while we conclude that these minor strings do point towards

[20] *See* 65 Pa. Cons. Stat. § 703 (Sunshine Act applies to "any political subdivision of the Commonwealth," which is defined to include "[a]ny county [or] city"); 65 Pa. Cons. Stat. § 67.102 (Right-To-Know Law applies to a "local agency," which is defined as "[a]ny political subdivision, intermediate unit, charter school, cyber charter school or public trade or vocational school," and "[a]ny local, intergovernmental, regional or municipal agency, authority, council, board, commission or similar governmental entity."); 53 Pa. Cons. Stat. § 8110 (requiring local governments to submit a "debt statement to the Department of Community and Economic Development of the Commonwealth before issuing bonds).

arm-of-state status, they do not carry much weight in the final analysis.

There is no doubt, however, that some of the more important statutory strings tying PHEAA to the state, such as the payment-approval process of the Treasury Department and the oversight exercised by the Attorney General, operate to restrict PHEAA's autonomy to a certain degree. The arm-of-state inquiry, however, does not turn on whether the entity is subject to any amount of state regulation at all, or whether it is subject to more regulation than a private business, but whether the entity functions independently of the state *despite* the state regulation to which it is subject. *See Oberg I*, 681 F.3d at 580 (explaining that the arm-of-state factors "endeavor to draw the line between a State-created entity functioning independently of the State from a State-created entity functioning as an arm of the State or its alter ego" (internal quotation marks omitted)); *Univ. of R.I. v. A.W. Chesterton Co.*, 2 F.3d 1200, 1205 (1st Cir. 1993) ("[The arm-of-state factors] are designed to disclose the extent to which state law endows the incorporated State-related entity with the operational authority, discretion, and proprietary resources with which to function *independently* of the State.").

In this case, the relevant state statutes simply do not amount to "pervasive control over PHEAA," as PHEAA contends. Brief of Respondent at 27. These statutory restrictions operate predominantly at the administrative edges rather than the discretionary heart of PHEAA's authority. They may dictate the manner in which PHEAA pays its bills, or require the inclusion or exclusion of a few contract clauses, but they do not intrude on PHEAA's exercise of its substantive discretion.[21] When the question is whether a state exercises such control over an entity that the entity "is simply a tool of the state," *Oberg II*, 745 F.3d at 139, control over matters of substance is what matters. *See United States ex rel. Sikkenga v. Regence BlueCross BlueShield of Utah*, 472 F.3d 702, 720 (10th Cir. 2006) (state-created entity autonomous under arm-of-state test because entity's board of directors "sets policies and operational objectives" and entity's "day-to-day operations are independent" (internal quotation marks omitted)); *cf. Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 385, 399 (1995) (finding Amtrak to be a governmental entity against whom a First Amendment claim could be brought, notwithstanding statutory directive that it "be operated and managed as a for profit corporation," because the federal government exerts control over Amtrak "as a *policymaker*" (emphasis added; internal quotation marks omitted)).

As discussed above, the record establishes 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-

[21] In 2007, a firestorm of criticism erupted after PHEAA spent more than $80,000 on tickets to Hershey Park for employees and their guests as part of PHEAA's annual "Employee Appreciation Day" at the park. J.A. 3019. The contracts and payments associated with the event were routinely processed through and approved by the Attorney General's office and the Treasury Department. *See* J.A. 2478, 2840. Had these review processes been substantive, as PHEAA insists they are, the road to approval of these expenses would likely have been bumpier.

day operations.[22] We therefore conclude that the autonomy factor weighs heavily against arm-of-state status.

C. State Concerns

The third arm-of-state factor requires us to consider "whether the entity is involved with state concerns as distinct from non-state concerns, including local concerns." *Oberg I*, 681 F.3d at 580 (internal quotation marks omitted). "'Non-state concerns,' however, do not mean *only* 'local' concerns, but rather also encompass other non-state interests like out-of-state operations." *Oberg II*, 745 F.3d at 137.

In *Oberg II*, we found this factor weighed in favor of arm-of-state status because PHEAA's focus on improving access to higher education was a matter of "legitimate state concern." *Oberg II*, 745 F.3d at 140. In the course of this ruling, we rejected Oberg's argument that "due to PHEAA's commercial focus, its

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[22] According to PHEAA, it does not matter whether the Commonwealth *actually* exercises control over PHEAA; "[i]t is the Commonwealth's indisputable *authority* to veto PHEAA's legal decisions that is relevant." Brief of Respondent at 34, n.16. In making this argument, PHEAA again ignores *Oberg II*, which vacated and remanded for discovery "on the question whether PHEAA is truly subject to sufficient state control to render it a part of the state." *Oberg II*, 745 F.3d at 141 (internal quotation marks and alteration omitted). If the mere existence of authority flowing from the statutes relied upon by PHEAA were sufficient to resolve the autonomy question, discovery would not have been required. Moreover, given the based-on-the-pleadings conclusion in *Oberg II* that the autonomy factor weighed against arm-of-state status, *see Oberg II*, 745 F.3d at 139, the *Oberg II* court necessarily concluded that the level of state control reflected in the governing statutes was outweighed by PHEAA's statutorily vested control over its funds.

operations do not involve an area of legitimate state concern," *id.* at 139-40, as well as his argument that PHEAA's extensive out-of-state commercial activities showed that PHEAA was not primarily focused on state concerns, *see id.* at 140.

The district court on remand concluded that, notwithstanding PHEAA's substantial out-of-state activity and income, PHEAA's activities primarily involve state, rather than "non-state concerns." *See Oberg III*, 77 F. Supp. 3d at 499. In the court's view, "[t]he fact that PHEAA purchases, services, and guarantees loans to borrowers throughout the country does not constitute non-state concerns because this was done to generate earnings to return to Pennsylvania students and defray their costs." *Id.*

On appeal, Oberg argues that after discovery, the state-concerns factor weighs *against* arm-of-state status. As a sanction for PHEAA's discovery violations, the magistrate judge ordered that "it shall be taken as established . . . that from 2002 to [October 2014], the majority of PHEAA's revenue and income was derived from out-of-state activity." J.A. 172. Oberg contends that our analysis in *Oberg II* makes the percentage of out-of-state earnings determinative of this factor. Accordingly, because it is now established that the majority of PHEAA's revenues are generated by out-of-state activities, Oberg argues that the district court erred in concluding that the state-concern factor weighed in favor of arm-of-state status.[23]

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[23] PHEAA makes various arguments about why Oberg's focus on the out-of-state percentage is irrelevant or unwise. *See* Brief of Respondent at 37-39. In making these arguments, however,

Although *Oberg II* clearly makes the amount of out-of-state activity *relevant*, *see Oberg II*, 745 F.3d at 137, we do not believe it makes out-of-state activity *dispositive*, as Oberg argues. Addressing Oberg's argument in the prior appeal that PHEAA's operations "were so focused out of state that PHEAA was not involved *primarily* with state concerns," we noted that the complaint alleged that in 2005, "one-third of PHEAA's earnings came from outside the Commonwealth." *Oberg II*, 745 F.3d at 140 (internal quotation marks and alterations omitted). We then explained that if "one-third of PHEAA's earnings came from outside Pennsylvania in 2005, it does not seem plausible that by 2006—the last year encompassed by Dr. Oberg's allegations—PHEAA's operations focused *primarily* out of state." *Id.*

Oberg II's observation that the complaint did not plausibly allege that the majority of PHEAA's revenues were earned outside the state cannot be understood as an acceptance of Oberg's argument that an entity cannot be *primarily* involved in state concerns if the entity earns more than half of its revenues from out of state. After all, *Oberg II*'s analysis of the state-concerns factor considered facts beyond the in- versus out-of-state source of PHEAA's earnings, *see id.* at 140, and there is no reason to think those facts would suddenly become irrelevant the

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PHEAA fails to acknowledge that *Oberg II explicitly* held that out-of-state operations are relevant to the state-concerns factor. *See Oberg II*, 745 F.3d at 137 ("'Non-state concerns,' however, do not mean *only* 'local' concerns, but rather *also encompass other non-state interests like out-of-state operations*." (second emphasis added)).

moment out-of-state earnings cross the halfway point. Accordingly, while we find it highly relevant to the state-concerns factor that "the majority of PHEAA's revenue and income was derived from out-of-state activity," J.A. 172, we do not believe that fact to be dispositive.

Instead, when evaluating this factor, we must continue to give weight to the fact that PHEAA's work—"facilitat[ing] the attainment of education by supplying student financial aid services," *Oberg II*, 745 F.3d at 140—involves what Pennsylvania believes to be an "essential governmental function," 24 Pa. Stat. § 5105.6, and what we have concluded "is clearly of legitimate state concern," *Oberg II*, 745 F.3d at 140. We must also consider the fact that PHEAA does provide significant services to the citizens of Pennsylvania. *See Ram Ditta v. Md. Nat'l Capital Park & Planning Comm'n*, 822 F.2d 456, 459 (4th Cir. 1987) (considering whether the services provided by the entity inured primarily to the benefit of local residents rather than state citizens in general). PHEAA administers the State Grant Program and distributes every penny of its state appropriations to qualifying students, and it has on several occasions made significant contributions of its own earnings to the state program. Thus, to the extent that PHEAA's business activities inure to the benefit of anyone other than itself and its employees, they inure to the benefit of Pennsylvania citizens.

After considering all of these facts and the relevant statutory provisions, we conclude that PHEAA's case for arm-of-state status under this factor has been weakened by discovery. The extent of

PHEAA's out-of-state earnings is relevant to the state-concern factor, *see Oberg II*, 745 F.3d at 137, and discovery has established those earnings at a level *Oberg II* believed "implausible," *id.* at 140. Nonetheless, in light of the other relevant facts noted above, we believe this factor still points towards arm-of-state status, but just barely.

D. Treatment under State Law

The final arm-of-state factor requires us to consider how the entity is treated under state law. "In addressing this factor, a court may consider both the relevant state statutes, regulations, and constitutional provisions which characterize the entity, and the holdings of state courts on the question." *Id.* at 138 (internal quotation marks omitted). Noting that PHEAA was created to perform an "essential government function" for the benefit of the state's citizens and that Pennsylvania courts treat PHEAA as a state agency, this court in *Oberg II* concluded that the state-law factor weighed in favor of arm-of-state status. *Oberg II*, 745 F.3d at 140.

The district court reached the same conclusion on remand. The district court observed that PHEAA was created by the General Assembly, that "[a]ll of PHEAA's limited powers and authority come from the General Assembly by statute," *Oberg III*, 77 F. Supp. 3d at 499, that it is exempt from state taxation, that it is subject to Pennsylvania open-meeting and right-to-know laws, and that its employees are treated as Commonwealth employees. The district court thus concluded that "Pennsylvania law clearly regards PHEAA as a state agency," *id.* at 499, a conclusion that "weighs *heavily* in favor of finding PHEAA to be an arm of the state," *id.* at 500 (emphasis added).

We agree with the district court that PHEAA is generally treated as a state agency under state law. We see nothing in the record, however, to support the heavy weight the district court assigned to this factor. As the district court noted, discovery established that PHEAA employees are treated as Commonwealth employees for purposes of payroll, retirement, and health-care benefits, which perhaps shows that the state treats PHEAA as it does traditional state agencies. But discovery also yielded evidence showing the state treats PHEAA differently than it does traditional agencies—for example, PHEAA management employees are not paid in accordance with Commonwealth pay scales; governors *ask* PHEAA to return appropriated funds when times are tight but *direct* other agencies to do so; and the Commonwealth acknowledges in its financial reports that it does not impose its will on PHEAA. While the statutes and state-court decisions relied on in *Oberg II* remain sufficient to tip this factor towards arm-of-state status, *see Oberg II*, 745 F.3d at 140, the factual information learned through discovery falls fairly evenly on both sides of the scale. Accordingly, although this factor weighs in favor of arm-of-state status, we cannot conclude that it weighs *heavily* in favor.

V.

Our analysis of the arm-of-state factors thus brings us to this point. As to the state-treasury factor, *Oberg II*'s determination that Pennsylvania is not legally liable for a judgment against PHEAA remains controlling. And as to functional liability, the keys facts assumed by the court in *Oberg II*—PHEAA's control over its significant, independent corporate wealth—were confirmed through discovery and foreclose a finding of functional liability. Because the Commonwealth of Pennsylvania is neither legally nor functionally liable for a judgment against PHEAA, the state Treasury is not implicated in this case, and the first factor weighs heavily against arm-of-state status.

As to the autonomy factor, the statutes and evidence described above establish that PHEAA exercises control over its revenues, makes policy decisions, sets its own budget, and otherwise manages the day-to-day activities of the company without significant interference from the Commonwealth. The areas in which the state exercises some amount of control primarily involve ministerial matters and do not diminish PHEAA's control over substantive matters. Because the Commonwealth vests PHEAA with a significant amount of autonomy, this factor also weighs heavily against arm-of-state status.

As to the state-concerns factor and the state-law factor, both weigh in favor of arm-of-state status. Since it has been established for purposes of this case that the majority of PHEAA's revenues during the relevant period were generated through out-of-state activities, however, the state-concerns factor only weakly points to arm-of-state status.

If we simply did the math, so to speak, the factors would add up to "political subdivision," not "alter ego of Pennsylvania." Arm-of-state status, however, is a question of balance, not math. In cases like this one, where the arm-of-state "indicators point in different directions, the Eleventh Amendment's twin reasons for being remain our prime guide." *Hess*, 513 U.S. at 47. In our view, these twin reasons—"the protection of state treasuries and respect for the sovereign dignity of the states," *Gray v. Laws*, 51 F.3d 426, 432 (4th Cir. 1995)—guide us to the same conclusion: For purposes of federal law, PHEAA is a political subdivision, not an arm or alter ego of Pennsylvania.

PHEAA is a very wealthy corporation engaging in nationwide commercial student-loan financial-services activities. It is statutorily vested with substantive control over its commercial revenues, and it in fact exercises control over those revenues. Its commercial revenues have made PHEAA entirely self-sufficient, and the Commonwealth has not appropriated funds for PHEAA's operational support since 1988. The Commonwealth does not assert ownership of PHEAA's commercial revenues, and it is neither legally nor functionally liable for a judgment against PHEAA. Permitting this action to proceed against PHEAA thus does not place the Pennsylvania treasury at risk.

Permitting the action to proceed likewise does not offend the sovereign dignity of Pennsylvania. Although the Commonwealth has imposed some not-insignificant restrictions on PHEAA's operations, the Commonwealth has nonetheless vested PHEAA with broad power over its finances and operations. PHEAA, not the Governor or the General Assembly, sets policy for the corporation and makes the substantive fiscal and operational decisions. Indeed, the Commonwealth admits in its public financial statements that it cannot impose its will on PHEAA. Thus, the Commonwealth has structured PHEAA to be financially and operationally independent, and PHEAA in fact operates independently, without significant Commonwealth interference or substantive supervision. In light of PHEAA's intended and actual independence from the Commonwealth, we cannot conclude that it would be an affront to Pennsylvania's sovereign dignity to permit this action to proceed against PHEAA. *See Hess*, 513 U.S. at 52 ("[T]he Port Authority is financially self-sufficient; it generates its own revenues, and it pays its own debts. Requiring the Port Authority to answer in federal court . . . does not touch the concerns—the States' solvency and dignity—that underpin the Eleventh Amendment.").

We therefore conclude that PHEAA is an independent political subdivision, not an arm of the Commonwealth, and that PHEAA is therefore a "person" subject to liability under the False Claims Act. In our view, any other conclusion "would . . . heighten a mystery of legal evolution" by "spread[ing] an Eleventh Amendment cover over an agency that consumes no state revenues but contributes to the State's wealth." *Hess*, 513 U.S. at 51, n.21 (internal quotation marks omitted). Accordingly, we hereby vacate the district court's grant of summary judgment in favor of PHEAA, and we remand for further proceedings on the merits of Oberg's FCA claims against PHEAA.

VACATED AND REMANDED

Appendix B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

No. 1:07-cv-00960

UNITED STATES OF AMERICA
ex rel. JON H. OBERG,

Plaintiff,

v.

PENNSYLVANIA HIGHER EDUCATION
ASSISTANCE AGENCY & VERMONT
STUDENT ASSISTANCE CORPORATION,

Defendants.

Filed: January 16, 2015

MEMORANDUM OPINION

THIS MATTER comes before the Court on Defendants' Pennsylvania Higher Education Assistance Agency ("PHEAA") and Vermont Student Assistance Corporation ("VSAC," collectively "Defendants") Motion for Summary Judgment.

The Commonwealth of Pennsylvania created PHEAA in 1963 for the purpose of improving the higher education opportunities of Pennsylvanians. 24 Pa. Cons. Stat. Ann. § 5102. PHEA does this by making and financing loans, awarding grants and scholarships, and providing financial aid services.

VSAC is a public nonprofit corporation created by the State of Vermont in 1965 to perform a similar role as PHEAA. Its stated purpose is "to provide opportunities for persons who are residents of Vermont to attend colleges or other postsecondary education institutions" and "to provide career, education, and financial aid counseling and information services." Vt. Stat. Ann. tit. 16, § 2821. Like PHEAA, VSAC makes and finances student loans and awards grants and scholarships, as well as other services to prepare students for higher education. Vermont has designated it as the "agency to receive federal funds assigned to the state of Vermont for student financial aid programs." *Id.* § 2823(c).

In September 2007, Plaintiff Dr. Jon Oberg brought a qui tam action, on behalf of the United States, alleging the Defendants defrauded the United States Department of Education in violation of the False Claims Act ("FCA"). The FCA prohibits any person from knowingly presenting a false or fraudulent claim to the United States government for payment or approval. 31 U.S.C.A § 3729. This Court dismissed the Complaint as to the original four Defendants, holding that each entity is a state agency and thus not a "person" subject to the FCA. In June 2012, the United States Court of Appeals for the Fourth Circuit vacated this Court's judgment and remanded the case in order for this Court to apply the arm-of-the-state analysis. *U.S. ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.*, 681 F.3d 575, 581 (4th Cir. 2012). Upon remand, this Court again dismissed the Complaint, finding the Defendants to be state agencies under the arm-of-the-state analysis. *U.S. ex rel. Oberg v. Pa. Higher Educ. Auth.*, No. 01:07-

CV-960, 2012 WL 6099086, at *9 (E.D. Va. Dec. 5, 2012).

Reviewing the case for a second time, the Fourth Circuit affirmed this Court's dismissal as to Defendant Arkansas Student Loan Authority as an arm of the State of Arkansas.[1] *U.S. ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 745 F.3d 131, 142-45 (4th Cir. 2014). However, as to PHEAA and VSAC, the Court reversed and remanded for limited discovery on the issue of whether the Defendants constituted arms of the state. The parties have conducted discovery and the Defendants have each moved for summary judgment.

To determine whether a State-created entity operates independently of the State or is an arm of the State, the court considers four factors: first, whether a judgment against the entity will be paid by the State; second, the degree of autonomy exercised by the entity; third, whether the entity is involved with state concerns; and fourth, how the entity is treated under state law. *S.C. Dep't of Disabilities & Special Needs v. Hoover Universal, Inc.*, 535 F.3d 300, 303 (4th Cir. 2008); *see also Ram Ditta v. Md. Nat. Capital Park & Planning Comm'n*, 822 F.2d 456, 457-58 (4th Cir. 1987). Each of these four factors and how they relate to PHEAA and VSAC will be discussed in turn.

The first factor, would the State pay the judgment in this case, is not limited to direct liability but

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[1] Before the appeal could be heard, Defendant Kentucky Higher Education Student Loan Corporation reached a settlement with Plaintiff. *U.S. ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 745 F.3d 131, 135 n.1 (4th Cir. 2014).

includes functional liability. *Oberg*, 745 F.3d at 137. Functional liability encompasses any judgment of which the State will ultimately bear the cost. *Hutto v. S.C. Ret. Sys.*, __ F.3d __, No. 13-1523, 2014 WL 6845450, at *4-7 (4th Cir. Dec. 5, 2014) (*quoting Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 51 (1994)). The Supreme Court has held that functional liability will be found where a judgment against the agency "would have had essentially the same practical consequences as a judgment against the State itself." *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979); *see also Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 50 (1994) (*quoting Morris v. Washington Metropolitan Area Transit Auth.*, 781 F.2d 218, 227 (D.C. Cir. 1986) (holding that functional liability will be found "[w]here an agency is so structured that, as a practical matter, if the agency is to survive, a judgment must expend itself against state treasuries, common sense and the rationale of the eleventh amendment require that sovereign immunity attach to the agency")). Functional liability sets aside the formulaic legal test and employs a practical analysis. *Ristow v. S.C. Ports Auth.*, 58 F.3d 1051, 1053 (4th Cir. 1995).

A judgment against PHEAA would create functional liability for the Commonwealth of Pennsylvania. While the Fourth Circuit held that this factor "weighs decidedly against holding that PHEAA is an arm of the state," relying primarily on state law dictating that PHEAA obligations shall not be binding upon the State, *Oberg*, 745 F.3d at 138, this conclusion is not reached following further factual development. Although Pennsylvania law directs that the Commonwealth will not be bound by any obligation incurred by PHEAA, the functional liability inquiry focuses on the practical consequences of a judgment. It is clear that a judgment against PHEAA would implicate the Pennsylvania Treasury. In fact, the Commonwealth retains significant control over PHEAA's assets and generated revenue. All of PHEAA's generated revenues are deposited in the Pennsylvania Treasury, where they are earmarked and then commingled and invested with the general fund. PHEAA has no authority to control the manner of investment of these funds and all of PHEAA's expenditures must be approved by the Treasurer. Tellingly, Pennsylvania regards PHEAA's finances as State money, including it in Financial Reports in order to present an accurate picture of Pennsylvania's finances. Practically speaking, PHEAA's money becomes State money. Additionally, any payment made directly by PHEAA would either reduce the amount of money available to achieve its statutory purpose, absent a special appropriation by the Pennsylvania legislature. Thus, Pennsylvania would be functionally liable for a judgment against PHEAA and the first factor weighs in favor of holding PHEAA to be an arm of the state.

Similarly, a judgment against VSAC would create functional liability for the State of Vermont and possibly direct liability. Like PHEAA, VSAC's assets are essentially State assets. By statute, all of VSAC's net earnings inure to the benefit of the State. Vt. Stat. Ann. tit. 16, § 2821. VSAC has also not achieved financial independence from the State,—receiving $17 to $20 million per year in appropriations from the Legislature for student grants and raising revenue for administrative costs through State-approved activities. And, as with PHEAA, any judgment paid directly by VSAC reduces the funding available to pursue its statutory purpose. Thus, Vermont would be functionally liable for a judgment against VSAC. Further, there is no statutory prohibition against the State directly paying a judgment against VSAC; there has simply never been an opportunity to discover whether or not Vermont would assume direct liability for a judgment against VSAC. The first factor weighs in favor of holding VSAC to be an arm of the state.

The second factor, the degree of autonomy exercised by the entity, focuses on the amount of control the State retains over the entity to direct its actions. *Cash v. Granville Cnty. Bd. of Educ.*, 242 F.3d 219, 225 (4th Cir. 2001). The Court considers "who appoints the entity's directors or officers, who funds the entity, and whether the State retains a veto over the entity's actions." *Hoover Universal, Inc.*, 535 F.3d at 303. The Court will also consider the entity's ability to contract, sue and be sued, and purchase and sell property. *Ram Ditta*, 822 F.2d at 458. Consideration will be given to whether or not the State Attorney General represents the entity in legal matters. *Md. Stadium Auth. v. Ellerbe Becket Inc.*, 407 F.3d 255, 264 (4th Cir. 2005).

The Fourth Circuit held that PHEAA's degree of autonomy presented a close question. *Oberg*, 745 F.3d at 139. After further factual development, Pennsylvania's control over PHEAA appears to be quite clear. PHEAA's 20-member Board is made up of only Pennsylvania officials, consisting of sixteen members of the Pennsylvania legislature, the Secretary of Education, and three gubernatorial appointees. This arrangement gives the Commonwealth significant control over the direction of PHEAA. Additionally, Pennsylvania retains several forms of veto power over PHEAA's actions. The Treasurer must, as with all agencies, approve all expenditures, the Governor must approve all of PHEAA's debt issuances, and the Attorney General must approve all PHEAA contracts in excess of $20,000. The Attorney General must also represent PHEAA in any litigation unless the Attorney General delegates representation to PHEAA. PHEAA must provide the Pennsylvania Legislature with a report of its fiscal condition annually and it is subject to audit by the Pennsylvania Auditor General. Ultimately, PHEAA is a statutory creation and its activities are limited to those permitted by statute; the Pennsylvania Legislature retains the power to modify PHEAA's permitted activities at any time. While PHEAA has not required state assistance for its general operating expenses recently, it only began successfully raising revenue after 22 years of legislative appropriations, and assistance would likely resume if it became necessary again. Although PHEAA's funding and partial fiscal autonomy weighs against a finding that PHEAA is a state agency, most of the evidence shows substantial Corrunonwealth control and supports finding PHEAA to be an arm of Pennsylvania.

VSAC is subjected to a similar amount of control by the State of Vermont. VSAC's 11-member Board consists of five gubernatorial appointees, one State senator chosen by the Senate Corrunittee on Corrunittees, one member of the Vermont House of Representatives chosen by the Speaker of the House, the State Treasurer, and three members chosen by the Board itself. The Governor selects the Chair of the Board and may remove any of his or her appointees at any time. VSAC must provide the Vermont Secretary of Administration with an annual audit report and must file with the Legislature a biennial report of its activities. VSAC also submits an annual report on the financial status of the Vermont Higher Education Investment Plan. Although VSAC, like PHEAA, raises revenue and does not currently rely on the State for its administrative costs, Vermont would appropriate funds to VSAC to sustain it during a financially difficult time. Finally, Vermont has explicitly reserved the right to "alter, amend, repeal, or otherwise change [VSAC's] structure, organization, programs, or activities" at any time. Vt. Stat. Ann. tit. 16, § 2821(b). Thus, like PHEAA, VSAC's autonomy exists only as far as permitted by Vermont, and can be withdrawn at will. The evidence presented favors finding VSAC to be an arm of the state.

The third factor, whether the entity is involved with state concerns, focuses on the entity's activities. *Hoover Universal, Inc.*, 535 F.3d at 303. "Non-state concerns" include both "local concerns" and out-of-state operations. *Id.* Higher education is, generally, "an area of quintessential state concern and a traditional state government function." *Md. Stadium Auth.*, 407 F.3d at 265. In *Cash*, however, the Fourth Circuit held that a school board, with only a countywide jurisdiction, was only locally concerned, despite education being a statewide concern. *Cash*, 242 F.3d at 226. Conversely, in *Hoover Universal, Inc.*, the Fourth Circuit held that an insurance agency providing insurance to many municipalities, counties, and school districts, did not make its activities local because it did so throughout the state. *Hoover Universal, Inc.*, 535 F.3d at 307-08.

PHEAA engages in statewide activities. The statutory purpose of PHEAA is "to improve the higher educational opportunities of persons who are residents of this State and who are attending approved institutions of higher education, in this State or elsewhere, by assisting them in meeting their expenses of higher education." 24 Pa. Cons. Stat. Ann. § 5102. PHEAA may only engage in activities that pursue its statutory purpose. *Id.* § 5104. PHEAA's activities center around making higher education affordable for Pennsylvanians and Pennsylvania students, which is "clearly of legitimate state concern." *Oberg*, 745 F.3d at 140. PHEAA provides this service throughout the Commonwealth of Pennsylvania like the insurance agency in *Hoover Universal, Inc.* and is not limited to a particular geographic area like the school board in *Cash*. The fact that PHEAA purchases, services, and guarantees loans to borrowers throughout the country does not constitute non-state concerns because this was done to generate earnings to return to Pennsylvania students and defray their costs. The third factor weighs in favor of finding PHEAA to be a Pennsylvania agency.

VSAC is similarly involved with state concerns. Like PHEAA, VSAC was created "to provide opportunities for persons who are residents of Vermont to attend colleges or other postsecondary education institutions" and "to provide career, education, and financial aid counseling and information services." Vt. Stat. Ann. tit. 16, § 2821. To achieve this purpose, VSAC is statutorily authorized to award grants and scholarships, and makes and finances student loans. *Id.* §§ 2841-2846, 2851-2854, 2823, 2861-2869. Additionally, VSAC conducts a myriad of services for students, such as educational workshops, career fairs, financial aid services for Vermont schools, and scholarship fundraising. These programs are administered on a statewide basis. During fiscal years 2002 through 2007, VSAC made loans almost entirely to Vermont residents or students of Vermont schools. Ultimately, VSAC serves a vital role in the State of Vermont to advance, and make accessible, higher education, a strong state concern. The third factor supports finding agency status for VSAC.

The fourth factor, how the entity is treated under state law, focuses on the nature of the entity and its relationship with the state. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977); *Hoover Universal, Inc.*, 535 F.3d at 303, *see also Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997). To characterize the nature and relationship, the Court will consider all relevant statutes, regulations and constitutional provisions, as well as state court decisions that define the entity's character. *Md. Stadium Auth.*, 407 F.3d at 265.

Pennsylvania law clearly regards PHEAA as a state agency. PHEAA was created by amendment to the State Constitution, Pa. Const. art. III, § 29, "for the benefit of the people of the Commonwealth, for the improvement of their health and welfare, and for the promotion of economy." 24 P.S. § 5105.6. All of PHEAA's limited powers and authority come from the

General Assembly by statute. 24 P.S. § 5104. Pennsylvania has exempted all of PHEAA's property, income, and activities from taxation, including income from issued bonds and notes. 24 P.S. §§ 5105.6, 5107. PHEAA, like other state agencies, is subject to Pennsylvania's Sunshine Act and Right-to-Know law. 65 Pa. Cons. Stat. Ann. § 703; 65 Pa. Cons. Stat. Ann. § 67.102. Employees of PHEAA are Commonwealth employees, bearing employment badges that state, "Commonwealth of Pennsylvania State Employee." They receive pay from the Commonwealth Treasury and must participate in the State Employee's Retirement System and must have healthcare coverage from the Pennsylvania Employees Benefit Trust Fund. PHEAA employees are members of the American Federation of State, County and Municipal Employees ("AFSCME") union. PHEAA's officers, managers, and Board members are "public officials" subject to the Pennsylvania Public Official and Employee Ethics Act. 65 Pa. C.S.A. § 1102. Finally, Pennsylvania courts have held that PHEAA is an agency of the state. *See Richmond v. Pa. Higher Educ. Assistance Agency*, 297 A.2d 544, 546 (Pa. Commnw. Ct. 1972); *Pa. Higher Educ. Assistance Agency v. Reid*, 15 Pa. D. & C.3d 661, 665-66 (Pa. Com. Pl. 1980) (holding that the conclusion that PHEAA is an agency of the Commonwealth is "inescapable"); *Pa. Higher Educ. Assistance Agency v. Barksdale*, 449 A.2d 688, 689 (Pa. Super. Ct. 1982) (holding that PHEAA is "undeniably an agency of the Commonwealth"). The fourth factor weighs heavily in favor of finding PHEAA to be an arm of the state.

VSAC is similarly an agency of the State of Vermont. VSAC's enabling legislation expressly provides that VSAC "shall be an instrumentality of the state" and designates it as "the state agency to receive federal funds assigned to the state of Vermont for student financial aid programs." Vt. Stat. Ann. tit. 16, § 2823. VSAC's limited powers are specifically enumerated by statute. *Id.* Similarly to PHEAA, VSAC is subject to Vermont's Open Meeting Law, which requires "[a]ll meetings of a public body are ... to be open to the public at all times." Vt. Stat. Ann. tit. 1, § 312. VSAC is also subject to Vermont's Public Records Law, which requires VSAC, like other agencies, to provide public access to records and documents. Vt. Stat. Ann. tit. 1, § 315-320. Finally, like PHEAA, VSAC is exempt from all taxation, including taxation on income from bonds and notes issued by VSAC, "a body corporate and public of this state." Vt. Stat. Ann. tit. 16, § 2825. Vermont law treats VSAC as an agency and the final factor supports finding VSAC to be an arm of the state.

For the aforementioned reasons this Court finds that each Defendant is an arm of their respective states. Thus, neither Defendant is a person who may be sued under the False Claims Act. Accordingly, this Court finds that summary judgment should be granted in favor of the Defendants. An appropriate order shall issue.

s/Claude M. Hilton
Claude M. Hilton
United States District Judge

Alexandria, Virginia
January 16, 2015

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-2513

UNITED STATES ex rel. JON H. OBERG,

Plaintiff-Appellant,

v.

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY; VERMONT STUDENT ASSISTANCE CORPORATION; ARKANSAS STUDENT LOAN AUTHORITY,

Defendants-Appellees,

and

NELNET, INC.; SLM CORPORATION; PANHANDLE PLAINS HIGHER EDUCATION AUTHORITY; BRAZOS GROUP; EDUCATION LOANS INC/SD; SOUTHWEST STUDENT SERVICES CORPORATION; BRAZOS HIGHER EDUCATION SERVICE CORPORATION; BRAZOS HIGHER EDUCATION AUTHORITY, INC.; NELNET EDUCATION LOAN FUNDING, INC.; PANHANDLE-PLAINS MANAGEMENT AND SERVICING CORPORATION; STUDENT LOAN FINANCE CORPORATION,

Defendants.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, Senior District Judge.
No. 1:07-cv-00960-CMH-JFA

Argued: September 19, 2013
Decided: March 13, 2014

Before TRAXLER, Chief Judge,
and MOTZ and KEENAN, Circuit Judges.

Affirmed in part, vacated in part, and remanded by published opinion. Judge Motz wrote the opinion, in which Judge Keenan joined. Chief Judge Traxler wrote a separate opinion concurring in the judgment in part and dissenting in part.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

This appeal returns to us after remand to the district court. Dr. Jon Oberg, as relator for the United States, brought this action against certain student loan corporations, alleging that they defrauded the Department of Education and so violated the False Claims Act ("FCA" or "the Act"), 31 U.S.C. §§ 3729 *et seq.* (2006). The district court initially dismissed the complaint in its entirety. When Dr. Oberg appealed, we held that the court had not employed the proper legal framework—the arm-of-the-state analysis—in reaching its conclusion and thus vacated its judgment and remanded the case. *See U.S. ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.*, 681 F.3d 575, 579-81 (4th Cir. 2012) ("*Oberg I*"). After applying the arm-of-the-state analysis on remand, the district court again concluded that all of the student loan corporations constituted state agencies not subject to suit under the Act and so again granted their motions to dismiss. For the reasons that follow, we affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

I.

On behalf of the United States, Dr. Oberg brought this action against the Pennsylvania Higher Education Assistance Agency, the Vermont Student Assistance Corporation, and the Arkansas Student Loan Authority (collectively "appellees"). Appellees are corporate entities established by their respective states to improve access to higher education by originating, financing, and guaranteeing student loans.[1]

Dr. Oberg alleges that appellees defrauded the Department of Education by submitting false claims for Special Allowance Payments ("SAP"), a generous federal student loan interest subsidy. According to Dr. Oberg, appellees engaged in noneconomic sham transactions to inflate their loan portfolios eligible for SAP, and the Department of Education overpaid hundreds of millions of dollars to appellees as a result of the scheme. Dr. Oberg alleges that appellees violated the FCA when they knowingly submitted these false SAP claims.

The FCA provides a cause of action against "any person" who engages in certain fraudulent conduct, including "knowingly present[ing], or caus[ing] to be presented, a false or fraudulent claim for payment or

[1] Dr. Oberg also sued other defendants not parties to this appeal. Among those defendants was another student loan corporation, the Kentucky Higher Education Student Loan Corporation, which reached a settlement with Dr. Oberg shortly before the most recent appeal.

approval" to an officer, employee, or agent of the United States. 31 U.S.C. § 3729(a)(1)(A). The Act does not define the term "person." In *Vermont Agency of Natural Resources v. United States, ex rel. Stevens*, 529 U.S. 765, 787-88 (2000), the Supreme Court held that a state or state agency does not constitute a "person" subject to liability under the Act. But the Court also noted that corporations, by contrast, are "presumptively *covered* by the term 'person.'" *Id.* at 782 (emphasis in original). And three years later, the Court applied the latter presumption and held that municipal corporations like counties are 'persons' subject to suit under the FCA. *See Cook Cnty. v. U.S. ex rel. Chandler*, 538 U.S. 119, 122 (2003).

Accordingly, a court must walk a careful line between two competing presumptions to determine if a *state-created* corporation is "truly subject to sufficient state control to render [it] a part of the state, and not a 'person,' for FCA purposes." *Oberg I*, 681 F.3d at 579.[2] In the prior appeal, we held that the appropriate legal framework for this delicate inquiry is the arm-of-the-state analysis used in the Eleventh Amendment context. *Id.* at 579-80. Because the district court had not undertaken this analysis, we vacated its judgment and remanded the case to the

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[2] Dr. *Oberg* insists that only one presumption applies: that all corporate entities—regardless of their affiliation with a state—must overcome a "presumption of 'personhood.'" Appellant's Br. 15. The dissent seems to agree. *See* Dissent. Op. at 34. But this assertion ignores the Supreme Court's clear instruction that in the context of corporations created by and sponsored by a state, *competing* presumptions are at play. *See Stevens*, 529 U.S. at 782 (observing that "the presumption with regard to corporations is just the opposite of the one governing [state entities]").

district court for application of the proper legal framework. *Id.* at 581.

On remand, after applying the arm-of-the-state analysis, the district court concluded that each appellee is part of its respective state and thus not a "person" under the Act, and so again granted appellees' motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Dr. Oberg then timely noted this appeal.

On review of a Rule 12(b)(6) dismissal, we consider a case de novo. *See E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011). We evaluate only whether the complaint states "a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007). In doing so, we construe "facts in the light most favorable to the plaintiff," *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009), and "draw all reasonable inferences in [his] favor" *Kolon Indus.*, 637 F.3d at 440. Yet "we need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Kloth v. Microsoft Corp.,* 444 F.3d 312, 319 (4th Cir. 2006). Nor do we credit allegations that offer only "naked assertions devoid of further factual enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations marks, alteration, and citation omitted).

Moreover, in reviewing a Rule 12(b)(6) dismissal, we are not confined to the four corners of the complaint. It is well established that "we may properly take judicial notice of matters of public record," including statutes. *Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009). We may also consider "documents incorporated into the complaint by reference," *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007), "as well as those attached to the motion to dismiss, so long as they are integral to the complaint and authentic," *Philips*, 572 F.3d at 180. Thus, before us, the parties properly cite to and rely on state statutes and exhibits integral to the complaint.

Finally, we note that although arm-of-the-state status may well constitute an affirmative defense in the related Eleventh Amendment context, this is not so in an FCA case. To succeed in an FCA case, a relator must demonstrate that a defendant is a "person" within the meaning of the Act. As the dissent recognizes, this is "a *statutory* question." Dissent. Op. at 36. That is, personhood is an element of the statutory FCA claim, not an immunity providing a defense from suit as in the Eleventh Amendment context. *See, e.g., U.S. ex rel. Adrian v. Regents of Univ. of Cal.*, 363 F.3d 398, 401-02 (5th Cir. 2004) (dismissing FCA action on 12(b)(6) motion because "the FCA does not provide a cause of action against state agencies").[3]

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[3] The dissent's suggestion to the contrary thus misses the mark. Tellingly, it offers only Eleventh Amendment cases in support of its contention that arm-of-the-state status is an affirmative defense. *See* Dissent. Op. at 35-36. But the Supreme Court has made clear that the statutory FCA question is distinct from the Eleventh Amendment inquiry. *See Stevens*, 529 U.S. at 779-80 (explaining that the Court initially considers whether "the [FCA] itself permits the cause of action it creates to be asserted against States" before reaching the Eleventh Amendment sovereign immunity question).

II.

In applying the arm-of-the-state analysis, we consider four nonexclusive factors to determine whether an entity is "truly subject to sufficient state control to render [it] a part of the state." *Oberg I*, 681 F.3d at 579.

First, when (as here), an entity is a *defendant*, we ask "whether any judgment against the entity as defendant will be paid by the State." *Oberg I*, 681 F.3d at 580 (quoting *S.C. Dep't Disabilities & Special Needs v. Hoover Universal, Inc.*, 535 F.3d 300, 303 (4th Cir. 2008)).[4] The Supreme Court has instructed that in assessing this factor, an entity's "potential legal liability" is key. *Regents*, 519 U.S. at 431; *see also Parker v. Franklin Cnty. Cmty. Sch. Corp.*, 667 F.3d 910, 927-28 (7th Cir. 2012) (focusing on legal liability for payment of a judgment in the wake of *Regents*); *Cooper v. Se. Penn. Transp. Auth.*, 548 F.3d 296, 303 (3d Cir. 2008) (same); *U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 718 (10th Cir. 2006) (same). Thus, we consider whether state

[4] When an entity is a *plaintiff*, this factor requires us to determine "whether any recovery by the entity as plaintiff will inure to the benefit of the State." *Hoover Universal*, 535 F.3d at 303. We previously regarded the first factor as "the most important consideration," *Ram Ditta v. Md. Nat'l Capital Park & Planning Comm'n,* 822 F.2d 456, 457 (4th Cir. 1987), and the dissent seems to regard it as dispositive, *see* Dissent. Op. at 41. But as we noted in *Oberg I*, 681 F.3d at 580 n.3, more recent Supreme Court precedent suggests that although this factor remains of "considerable importance," *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 430 (1997), it does not deserve dispositive preeminence, *see Fed. Maritime Comm'n v. S.C. State Ports Auth.,* 535 U.S. 743, 765 (2002).

law "provides that obligations of [the entity] shall *not* be binding on [the] State." *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 402 (1979) (emphasis in original). In doing so, we look to whether "State law indicates that a judgment against [the entity] can be enforced against the State." *Cash v. Granville Cnty. Bd. of Educ.*, 242 F.3d 219, 224 (4th Cir. 2001).

An entity may also constitute an arm of the state "where the state is *functionally* liable, even if not legally liable." *Stoner v. Santa Clara Cnty. Office of Educ.*, 502 F.3d 1116, 1122 (9th Cir. 2007) (emphasis added); *see also Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 50 (1994) ("Where an agency is so structured that, as a practical matter, if the agency is to survive, a judgment must expend itself against state treasuries, common sense and the rationale of the eleventh amendment require that sovereign immunity attach to the agency.") (internal quotation marks and alteration omitted).

Second, we assess "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 I*, 681 F.3d at 580 (quoting *Hoover Universal*, 535 F.3d at 303). 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, *see Cash*, 242 F.3d at 225; *Ram Ditta*, 822 F.2d at 458, and whether it is represented in legal matters by the state attorney general, *see, e.g., Md. Stadium Auth. v. Ellerbe Becket, Inc.*, 407 F.3d 255, 264 (4th Cir. 2005).

Third, we consider "whether the entity is involved with state concerns as distinct from non-state concerns, including local concerns." *Oberg I*, 681 F.3d at 580 (quoting *Hoover Universal*, 535 F.3d at 303). "Non-state concerns," however, do not mean *only* "local" concerns, but rather also encompass other non-state interests like out-of-state operations. *See Hoover Universal*, 535 F.3d at 307 (characterizing this factor as "whether the entity is involved with statewide, as opposed to local or *other non-state concerns*") (emphasis added).

Fourth, we look to "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." *Oberg I*, 681 F.3d at 580 (quoting *Hoover Universal*, 535 F.3d at 303). Whether an entity is an arm of the state is ultimately a question of federal law, "[b]ut that federal question can be answered only after considering the provisions of state law that define the agency's character." *Regents*, 519 U.S. at 429 n.5. "In addressing this factor, a court may consider both the relevant state statutes, regulations, and constitutional provisions which characterize the entity, and the holdings of state courts on the question." *Md. Stadium Auth.*, 407 F.3d at 265 (internal quotation marks omitted).

With these principles in mind, we now apply arm-of-the-state analysis to each of the appellees.

III.

We initially consider the Pennsylvania Higher Education Assistance Agency ("PHEAA"). In 1963, the Pennsylvania General Assembly created PHEAA, which, according to PHEAA itself, now constitutes one of the nation's largest providers of student financial aid services. Although PHEAA continues to administer state-funded student aid programs in Pennsylvania, it acknowledges that it also operates nationally under the names American Education Services and FedLoan Servicing.

The first factor in the arm-of-the-state analysis, whether Pennsylvania would pay a judgment against PHEAA in this case, weighs decidedly against holding that PHEAA is an arm of the state. For "instead of the state treasury being directly responsible for judgments against [PHEAA], [state law] expressly provides that obligations of [PHEAA] shall *not* be binding on [the] State." *Lake Country Estates*, 440 U.S. at 402 (emphasis in original). Pennsylvania explicitly disavows liability for *all* of PHEAA's debts. *See* 24 Pa. Cons. Stat. § 5104(3) (2012) ("no obligation of the agency shall be a debt of the State"). In addition, state law emphasizes that PHEAA's debts are not "payable out of any moneys except those of the corporation." *Id.* Aside from state appropriations that go directly to students in the form of education grants, moreover, PHEAA's substantial "moneys" derive exclusively from its own operations. The Pennsylvania treasury is thus neither *legally* nor *functionally* liable for any judgment against PHEAA. *See Stoner*, 502 F.3d at 1122.

Nevertheless, PHEAA contends that the important first factor weighs in favor of concluding that it is an arm of the state because state statutes require that its funds be deposited into the state treasury and that "no money" be paid from the treasury without approval from the state treasurer.

See 24 Pa. Cons. Stat. § 5104(3); 72 Pa. Cons. Stat. § 307 (2013). This argument, however, ignores "a commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines*, 504 U.S. 374, 384 (1992). The statutory provisions specifically outlining PHEAA's "powers and duties" clearly indicate that PHEAA's board of directors—not the state treasurer—controls PHEAA's funds. Those statutes provide that PHEAA's funds "shall be available to the agency" and "may be utilized at the discretion of the board of directors for carrying out any of the corporate purposes of the agency." 24 Pa. Cons. Stat. § 5104(3). Further, the state treasurer may use PHEAA's funds only for purposes "consistent with guidelines approved by the board of directors." *Id.*

Moreover, PHEAA's funds are held in a *segregated* account apart from general state funds. *Id.* § 5105.10. Our sister circuits have recognized that such an arrangement counsels against establishing arm-of-the-state status under this factor. The First Circuit, for instance, held that the University of Rhode Island is not an arm of its state in part because its funds are not "merged with[] the general fund, but are kept in segregated accounts [in the state treasury] pending discretionary disbursement by the [University's] Board." *Univ. of R.I. v. A.W. Chesterton Co.*, 2 F.3d 1200, 1210 (1st Cir. 1993). Similarly, the Third Circuit, in assessing whether the Public School Employees' Retirement Board of Pennsylvania was an arm of the state, remanded the case for further consideration in part because—like PHEEA's account—the entity's fund was "set apart in the state treasury from general state funds and [ ] administered by the State Treasurer at the discretion of the Board." *Blake v. Kline*, 612 F.2d 718, 723 (3d. Cir. 1979) (footnote and citations omitted). In sum, because state law instructs that PHEAA would pay any judgment in this case with its own moneys from its segregated fund, *see* 24 Pa. Cons. Stat. § 5104(3) (2012), the first factor weighs heavily against holding that PHEAA is an arm of the state.

The second factor, the degree of autonomy exercised by the entity, presents a closer question. PHEAA's board of directors is composed of gubernatorial appointees and state legislators or officials. *See* 24 Pa. Cons. Stat. § 5103 (repealed July 2010, but effective during the period when PHEAA allegedly violated the FCA). Such an arrangement frequently indicates state control. *See Md. Stadium Auth.*, 407 F.3d at 264. Further, state officials exercise some degree of veto power over PHEAA's operations. For example, the Auditor General may review PHEAA's activities, 24 Pa. Cons. Stat. § 5108, and PHEAA must seek the approval of the Governor in order to issue notes and bonds, *id.* § 5104(3). These factors may mean, as PHEAA contends, that it is simply a tool of the state.

But other indicia relevant to the autonomy analysis—PHEAA's source of funding, control over its revenues, and corporate powers—strongly suggest that PHEAA is not an arm of the state. Most critically, PHEAA is financially independent. According to its annual reports, which were attached to the amended complaint, PHEAA receives *no* operational funding from Pennsylvania. *See also* Appellees' Br. 53 (conceding the point). Pennsylvania law, moreover, expressly instructs that PHEAA's funds "shall be available to the agency," and that PHEAA's board may use those funds in *any* manner that furthers the agency's corporate purposes. 24 Pa. Cons. Stat. § 5104(3). Meanwhile, the state treasurer's use of PHEAA's funds must adhere to "guidelines approved by the board" of PHEAA. *Id.* Finally, PHEAA has the power to enter into contracts, sue and be sued, and purchase and sell property in its own name, all of which suggest operational autonomy. *See Cash*, 242 F.3d at 225; *Ram Ditta*, 822 F.2d at 458. Although the facts relevant to this second factor cut both ways, when we consider "all reasonable inferences in favor of the plaintiff" as we must at this stage, *Kolon Indus.*, 637 F.3d at 440, we conclude that this factor also counsels against holding that PHEAA is an arm of the state.

The third factor is whether PHEAA "is involved with statewide, as opposed to local or other non-state concerns." *Hoover Universal*, 535 F.3d at 307. Dr. Oberg poses two arguments relevant to this factor.

Initially, he contends that due to PHEAA's commercial focus, its operations do not involve an area of legitimate state concern. *See* Appellant's Br. 43; Reply Br. 25-26. This argument fails. Pennsylvania created PHEAA to finance, make, and guarantee loans for higher education, and "[h]igher education is an area of quintessential state concern and a traditional state government function." *Md. Stadium Auth.*, 407 F.3d at 265. PHEAA does not provide higher education directly, but it nonetheless facilitates the attainment of education by supplying student financial aid services. This work is clearly of legitimate state concern.

Dr. Oberg's remaining argument as to the third factor is that PHEAA's operations from 2002 to 2006—during the time in which PHEAA allegedly conducted fraudulent transactions in violation of the FCA—were so focused *out of state* that PHEAA was not involved *primarily* with state concerns.[5] *See Ram Ditta*, 822 F.2d at 459; *cf. Hoover Universal*, 535 F.3d at 307. To this end, Dr. Oberg alleges that "PHEAA conducts substantial operations outside of Pennsylvania," and that as early as 2005, "one-third of PHEAA's earnings c[a]me from outside the [C]ommonwealth," after which it further "expanded its operations." PHEAA's financial reports, cited throughout Dr. Oberg's complaint, tend to corroborate these claims, so there is little doubt that during the period in question PHEAA's operations extended well beyond the borders of Pennsylvania. Even so, if only one-third of PHEAA's earnings came from outside Pennsylvania in 2005, it does not seem plausible that by 2006—the last year encompassed by Dr. Oberg's allegations—PHEAA's operations focused *primarily* out of state. *See Ram Ditta*, 822 F.2d at 459; *see also Iqbal*, 556 U.S. at 678 (explaining that "[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and

[5] PHEAA counters that out-of-state operations are irrelevant because this factor is concerned only with whether an entity's focus is statewide as opposed to *local*. The argument is misguided. Rather, this factor looks to "whether the entity is involved with statewide, as opposed to local *or other non-state concerns*." *Hoover Universal*, 535 F.3d at 307 (emphasis added).

plausibility of entitlement to relief") (internal quotation marks and citation omitted). Therefore, we believe this factor weighs in favor of arm-of-the-state status for PHEAA.

The final factor, how PHEAA is treated under state law, also supports PHEAA's contention that it is an arm of Pennsylvania. A state statute provides that "the creation of the agency [was] in all respects for the benefit of the people . . . and the agency [performs] an essential governmental function." 24 Pa. Cons. Stat. § 5105.6. PHEAA's enabling legislation was made effective by "amendment to the Constitution of Pennsylvania authorizing grants or loans for higher education," *id.* § 5112, and Pennsylvania state courts have concluded that PHEAA is a state agency for jurisdictional purposes, *see, e.g.*, *Richmond v. Penn. Higher Educ. Assistance Agency*, 297 A.2d 544, 546 (1972); *Penn. Higher Educ. Assistance Agency v. Barksdale*, 449 A.2d 688, 689-90 (1982).

In sum, although the third and fourth factors suggest that PHEAA is an arm of the state, the first (strongly) and second (albeit less strongly) point in the opposite direction. At this early stage, construing the facts in the light most favorable to the plaintiff, *Nemet Chevrolet*, 591 F.3d at 255, we must conclude that Dr. Oberg has alleged sufficient facts that PHEAA is not an arm of the state, but rather a "person" for FCA purposes. We therefore vacate the judgment of the district court as to PHEAA and remand to permit limited discovery on the question whether PHEAA is "truly subject to sufficient state control to render [it] a part of the state." *Oberg I*, 681 F.3d at 579.

IV.

We next consider whether Dr. Oberg's complaint states a plausible claim that the Vermont Student Assistance Corporation ("VSAC") is a "person" subject to suit under the FCA. The Vermont legislature created VSAC in 1965 to provide Vermont residents with opportunities to attend college by awarding education grants and financing student loans. Vt. Stat. Ann. tit. 16, § 2821(a) (2013). According to VSAC's financial statements—referenced repeatedly in Dr. Oberg's complaint—the agency currently administers a state grant program and a higher education investment plan; originates, services, and guarantees student loans; and provides higher education information and counseling services.

The upshot of the first arm-of-the-state factor—who would pay a judgment in this case—is unclear. State law provides no definite guidance. On one hand, Dr. Oberg alleges that Vermont would not pay a judgment because the state disclaims legal liability for VSAC's debts. Yet, in contrast to Pennsylvania, which disavows liability for any and all of PHEAA's obligations, *see* 24 Pa. Cons. Stat. § 5104(3), Vermont does so only with respect to VSAC's debt obligations issued to finance loans for higher education, *see* Vt. Stat. Ann. tit. 16, § 2823(f); *id.* at § 2868(i). Dr. Oberg has identified no state law indicating that a *judgment* obligation could not be enforced against the state, and we have found none. *See Lake Country Estates*, 440 U.S. at 402 (finding relevant whether state law "provides that obligations of [the entity] shall *not* be binding on [the] State").

On the other hand, VSAC's contention that Vermont would pay a judgment rests on the state's duty to "support and maintain" VSAC. Vt. Stat. Ann. tit. 16, § 2823(a). But an obligation stated in such general terms is not conclusive. Moreover, although state appropriations compose nearly twenty percent of VSAC's revenues, such funding goes entirely to students in the form of need-based grants. Thus, whether Vermont would be legally or functionally liable for a judgment here is unclear. At this stage, however, we must construe all facts in the light most favorable to the plaintiff, *Nemet Chevrolet*, 591 F.3d at 255, so we assume that this critical (albeit not dispositive) first factor weighs against arm-of-the-state status for VSAC.

The second factor, VSAC's degree of autonomy from the state, also presents a close question. Vermont law provides that eight members of VSAC's eleven-member board of directors are either state officials or gubernatorial appointees, and that the board elects the remaining three members. Vt. Stat. Ann. tit. 16, § 2831. Moreover, Vermont retains important oversight authority over VSAC. The state "reserves the right at any time to alter, amend, repeal or otherwise change the structure, organization, programs, or activities" of VSAC, *id.* § 2821(b), and state law provides that VSAC may issue no debt obligation "without the approval in writing of the governor," *id.* § 2823(f).

Other autonomy indicators, however, counsel against holding that VSAC is an arm of the state. VSAC not only exercises corporate powers including the capacity to contract and sue and be sued, *see Cash*, 242 F.3d at 225, it is also, like PHEAA, financially independent. VSAC's financial statements, cited throughout the complaint, indicate that VSAC uses state appropriations *only* for need-based educational grants; no state funds finance its operations. In addition, VSAC's board is broadly empowered to adopt policies and regulations governing its lending activities, Vt. Stat. Ann. tit. 16, § 2834, and "to do any and all acts and things as may be necessary" to secure its debt obligations, *id.* § 2868(d). Thus, although we recognize that certain facts relevant to the autonomy analysis suggest that VSAC is an arm of the state, others weigh decidedly against that conclusion. Once again "draw[ing] all reasonable inferences in favor of the plaintiff," *Kolon Indus.*, 637 F.3d at 440, we believe this factor also counsels against holding as a matter of law that VSAC is an arm of the state.

As to the third factor, whether VSAC is involved with statewide concerns, Dr. Oberg alleges that this factor weighs against holding that VSAC is an arm of the state because "Vermont law allows VSAC to conduct business in other States" and the agency has "contracted with borrowers and companies outside Vermont." But these assertions do not equate to an allegation that VSAC's operations centered *primarily* outside Vermont at any point in time. *See Ram Ditta*, 822 F.2d at 459. Indeed, Dr. Oberg's allegations here fall short even of those he offers as to PHEAA's extra-state operations, which we have held do not rise to the level of establishing a plausible claim of arm-of-the-state status under this factor. *See Iqbal*, 556 U.S. at 678. Rather, VSAC's financial statements indicate that during the period in question the agency was focused on the statewide concern of facilitating postsecondary educational opportunities for residents of Vermont.

With respect to the fourth factor, how state law treats the entity, Dr. Oberg alleges that Vermont does not treat VSAC as it treats "true agencies of the state." But in fact Vermont law expressly provides that VSAC "shall be an instrumentality of the state," Vt. Stat. Ann. tit. 16, § 2823(a), exempts VSAC from all taxation, *id.* § 2825, and "designate[s] [VSAC] as the state agency to receive federal funds assigned to the state of Vermont for student financial aid programs," *id.* § 2823(c).

In sum, although the first and second factors present close questions, we must conclude in compliance with Rule 12(b)(6) that both weigh against holding VSAC an arm of the state. Accordingly, while the third and fourth factors suggest otherwise, we must also hold that Dr. Oberg's allegations as to VSAC are sufficient to survive a motion to dismiss. This is so particularly given the first factor's enduring importance. *See supra* at 8 n.4. We recognize that some of Dr. Oberg's allegations test the outer bounds of the plausibility standard, but at this juncture, we must construe all facts in the light most favorable to the plaintiff. We therefore vacate the judgment of the district court with respect to VSAC and remand to permit limited discovery on this question.

V.

Finally, we consider whether the Arkansas Student Loan Authority ("ASLA") is an arm of the state of Arkansas. The state legislature created ASLA in 1977 to help Arkansas provide higher educational opportunities for its residents. Ark. Code Ann. § 6-81-

102 (2013). ASLA currently originates and disburses student loans at postsecondary schools throughout the state. It also sponsors outreach services to increase awareness about financial aid in higher education.

In contrast to PHEAA and VSAC, all four factors weigh in favor of holding that ASLA is an arm of the state. First, although § 6-81-113 of the Arkansas Code disavows liability for debt obligations issued to finance student loans, it says nothing about liability for *other* debts like a judgment obligation. Critically, Arkansas statutes elsewhere indicate that state revenues would be used to satisfy a judgment against ASLA. State law instructs that "[a]ll moneys received by [ASLA]" from its lending operations are "specifically declared to be cash funds," and further, that "cash funds" are "revenues of the state." *Id.* at §§ 6-81-118(a)(1), 19-6-103. Accordingly, because ASLA's income derives overwhelmingly from its lending activities, and because such income statutorily belongs to Arkansas, it follows that the state would foot the bulk of any judgment against ASLA. Dr. Oberg's allegations to the contrary establish only a dubious possibility that ASLA could procure some "other income" with which to satisfy a judgment. *See* Reply Br. at 14. More is required to survive a motion to dismiss. *See Iqbal*, 556 U.S. at 678.

The dissent misses the mark in contending that Arkansas's statutory scheme is "similar in many ways to that in Pennsylvania," Dissent. Op. at 50 n.4, and that state funds would not be used to satisfy a judgment against ASLA because, "in reality," Arkansas "claims" only ASLA's "surplus revenues," Dissent. Op. at 51. Arkansas does not, "in reality," "claim" only ASLA's "surplus revenues" as revenues of the state. Arkansas law expressly provides that "*all moneys*" received by ASLA in connection with its lending activities are revenues of the state. Ark. Code Ann. §§ 6-81-118(a)(1), 19-6-103. And Arkansas law carefully cabins ASLA's use of those *state* revenues to certain lending costs, *id.* § 6-81-118(b)-(c), an arrangement far removed from the Pennsylvania scheme granting PHEAA "discretion[ary]" authority to use its funds for *any* corporate purpose, *see* 24 Pa. Cons. Stat. § 5104(3).

The dissent also misses the mark in suggesting that our analysis here is "directly contrary" to that in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), for this contention ignores crucial differences between the two cases. While ASLA is a corporation created by a single state to further educational opportunities in that state, the Port Authority in *Hess* is a bistate "Compact Clause entity" with "diffuse" political accountability. *Id.* at 42. Because Congress must authorize the creation of such bistate entities, *see* U.S. Const. art. 1, § 10, cl. 3, they "owe their existence to [both] state and federal sovereigns" and so "lack the tight tie to the people of one State that an instrument of single State has," *Hess*, 513 U.S. at 42. For this reason, the Supreme Court recognizes a "general approach" for Compact Clause entities, like the Port Authority, under which a court will "presume" that they are not arms of the state. *Id.* at 43. (Of course, the Court has established no similar "general approach" for state-created corporations like ASLA.)

Notwithstanding this presumption, and even though no state appropriated funds to the Port Authority or claimed the Authority's income as its revenue, the Authority argued that it was an arm of a state because it dedicated some of its surplus to "public projects which the States themselves might otherwise finance." *Id.* at 50. The Supreme Court had little difficulty rejecting that argument, noting that because the Authority was a profitable Compact Clause entity that retained and controlled its income, the associated states would not pay a judgment against it. *Id.* at 51. ASLA, by contrast, is "an instrument of a single [s]tate," *id.* at 43, and state law expressly provides that all of its lending income belongs to that state. Thus, state funds necessarily would be used to pay a judgment against ASLA. In sum, *Hess* does not in any way undermine our holding that this first factor indicates that ASLA is an arm of the state.[6]

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[6] The dissent disputes this conclusion for two additional reasons. Relying on the principle that the "specific governs the general," *Morales*, 504 U.S. at 384, the dissent notes that only general statutory provisions—not those "exclusively applicable to ASLA"—define "cash funds" as "revenues of the state." *See* Dissent. Op. at 48-49. But the principle of statutory construction on which the dissent relies applies only where general and specific statutory provisions conflict, or where a general provision would render a more specific one superfluous. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012). The principle finds no footing where, as here, specific and general statutory provisions do *not* conflict, but rather go hand in hand. That is, the specific provision defining ASLA's revenues as "cash funds" is entirely consistent with the general provision declaring that "cash funds" are revenues of the state.

As to the second arm-of-the-state factor, ASLA operates with little autonomy from Arkansas despite its corporate powers. State legislative records establish that, unlike Pennsylvania and Vermont, Arkansas provides its student loan corporation substantial funding.[7] Moreover, the Arkansas Attorney General represents ASLA in litigation, including the case at hand, and state law limits ASLA's powers in several significant ways. For example, Arkansas subjects ASLA's use of cash funds to approval by the General Assembly, Ark. Code Ann. § 19-4-802, and prevents its sale of bonds "until the bond issue has the written approval of the Governor

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The dissent also posits that "the fact that ASLA's funds are held in a segregated fund outside the state treasury counsels against arm-of-state status." Dissent. Op. at 49. As a general rule, we agree that such an arrangement would weigh against holding that an entity is an arm of its state. But Arkansas is an exception to this general rule, because state law *expressly* declares agency income deposited outside the state treasury to be revenue of the state. Ark. Code Ann. § 19-6-103. In contrast to the dissent's suggestion, *see* Dissent. Op. at 50 n.4, ASLA's statutory scheme thus operates nothing like that governing PHEAA.

[7] The dissent unconvincingly suggests that this funding is irrelevant to the autonomy inquiry because it derives from ASLA's own cash funds. Dissent. Op. at 51, 55. But the *source* of state funds used to support ASLA's operations matters not. What matters is whether an entity's funds belong to the state. *See supra* at 25-26. In this case, state law expressly provides that they do. Every dollar ASLA earns through its lending activities becomes a dollar of state revenue "to be used as required and to be expended only for such purposes and in such manner as determined by law." Ark. Code Ann. § 19-6-103. That Arkansas, in its discretion, returns some of this money to ASLA to finance its operations does not change that fact.

after he or she has received the approval of the State Board of Finance," *id.* § 6-81-108.

Critically, the Governor of Arkansas also appoints every member of ASLA's board of directors. *See id.* § 6-81-102(d). "The fact that all of [an entity's] decisionmakers are appointed by the Governor," we have recognized, "is a key indicator of state control." *Md. Stadium Auth.*, 407 F.3d at 264; *see also, Hoover*, 353 F.3d at 307; *Kitchen*, 286 F.3d at 185; *Cash*, 242 F.3d at 225. The dissent all but ignores this fact, claiming instead that ASLA is autonomous because its board members serve fixed terms and may not be removed at will. Dissent. Op. at 56. This argument fails. Even where board members serve fixed terms, state authority to appoint all of an entity's decisionmakers remains powerful evidence of state control. *See Md. Stadium Auth.*, 407 F.3d at 258, 264 (stressing importance of power to appoint although board members "serve five year terms"). Arkansas law, moreover, is equivocal with respect to the governor's removal power. Indeed, it suggests that the governor may remove board members simply by selecting new ones, as appointments to ASLA's board are for four-year terms "or until a successor is appointed." Ark. Code Ann. § 6-81-102(e).

Third, with respect to whether ASLA is focused on state concerns, Dr. Oberg merely alleges that Arkansas law "allows ASLA to lend to any qualified borrower nationwide" and that ASLA "can and has entered into contracts with institutions outside Arkansas." The operative question, however, is whether ASLA is *primarily* involved with state concerns. *See Ram Ditta*, 822 F.2d at 459. And Dr.

Oberg has alleged no facts indicating that ASLA is not primarily involved with the state concern of helping to finance higher education for Arkansas residents. The dissent, while conceding that student-loan financing facilitates the important state goal of educating youth, maintains that ASLA is also engaged in non-state concerns like "the servicing of federal student loans." Dissent. Op. at 55. But ASLA's federal-loan servicing work did not begin until 2012, so is irrelevant to the question whether ASLA was a "person" within the meaning of the FCA from 2002 to 2006 when it allegedly violated the Act.

Fourth, as the dissent agrees, Arkansas law plainly treats ASLA as an arm of the state. ASLA was established by state law as "the instrumentality of the state charged with a portion of the responsibility of the state to provide educational opportunities." Ark. Code Ann. § 6-81-102(c). Its lending revenues are statutorily defined as "revenues of the state," *id.* §§ 6-81-118, 19-6-103, and the Supreme Court of Arkansas has described ASLA as "a state agency created by . . . the 1977 Acts of Arkansas," *Turner v. Woodruff*, 689 S.W.2d 527, 528 (Ark. 1985).

In short, we conclude that each of the four factors counsels in favor of holding that ASLA is an arm of the state. To be sure, as the dissent points out, arm-of-the-state analysis is a fact-intensive inquiry often ill suited to judgment on the pleadings. *See* Dissent. Op. at 58-59. But where, as with ASLA, the relevant facts are clear, Rule 12(b)(6) mandates dismissal. *See, e.g.*, *Stoner*, 502 F.3d at 1121-23 (dismissing FCA action on 12(b)(6) motion); *Adrian*, 363 F.3d at 401-02 (same).

We therefore hold that ASLA is an arm of Arkansas and so not subject to suit under the FCA.

VI.

We affirm the judgment of the district court with respect to ASLA. We vacate that portion of the district court's judgment dismissing Dr. Oberg's FCA claims against PHEAA and VSAC and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART,
VACATED IN PART,
AND REMANDED

TRAXLER, Chief Judge, concurring in the judgment in part and dissenting in part:

This is an appeal from the granting of a Rule 12(b)(6) motion to dismiss, a motion that tests the plausibility of the plaintiff's allegations rather than the plaintiff's ability to ultimately prove his allegations or the defendant's ability to establish a defense. In my view, plaintiff Jon Oberg's Fourth Amended Complaint plausibly alleges that all of the defendant student-loan corporations (together, the "Loan Companies") are "persons" against whom an action under the False Claims Act (the "FCA") can be maintained. Whether the Loan Companies qualify as arms of their creating states is an affirmative defense that need not be anticipated or negated by the allegations of the complaint, *see Goodman v. Praxair, Inc.*, 494 F.3d 458, 466 (4th Cir. 2007) (en banc), and is a question that cannot be finally resolved here without discovery and fact-finding by the district court.

Accordingly, I concur in that portion of the judgment vacating the dismissal of Oberg's False Claims Act claims asserted against the Pennsylvania Higher Education Assistance Agency ("PHEAA") and the Vermont Student Assistance Corporation ("VSAC"), but I dissent from the dismissal of the claims asserted against the Arkansas Student Loan Authority ("ASLA").

I.

"The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint"; the motion "does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Butler v.*

United States, 702 F.3d 749, 752 (4th Cir. 2012) (internal quotation marks omitted), *cert. denied*, 133 S. Ct. 2398 (2014).

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must allege facts plausibly establishing the elements of his asserted cause of action. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Walters v. McMahen*, 684 F.3d 435, 439 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 1493 (2013). While the plaintiff is not required to "forecast evidence sufficient to prove the elements of the claim," he "must allege sufficient facts to establish those elements" and "advance [his] claim across the line from conceivable to plausible." *Walters*, 684 F.3d at 439 (internal quotation marks omitted). When considering a motion to dismiss, we give no deference to legal conclusions asserted in the complaint, but we must accept all factual allegations as true. *See id.*

II.

Broadly speaking, the False Claims Act imposes liability on a "person" who knowingly presents a false or fraudulent claim for payment or knowingly makes or uses a false record or statement material to a false claim. *See* 31 U.S.C. § 3729(a)(1)(A) & (B). In order to survive the motion to dismiss, Oberg was therefore obliged to plead facts plausibly establishing that the named defendants are "persons" within the meaning of the FCA.

While states are not "persons" subject to *qui tam* actions under the FCA, *see Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787-88 (2000), corporations, including municipal corporations like cities and counties, are "persons" under the Act, *see Cook Cnty. v. United States ex rel. Chandler*, 538 U.S. 119, 134 (2003); *see also* 1 U.S.C. § 1 ("In determining the meaning of any Act of Congress, unless the context indicates otherwise[,] . . . the word[] 'person' . . . include[s] corporations . . . ."). There is no dispute that each of the Loan Companies is a corporation, and Oberg alleged the corporate status of each Loan Company in his complaint. Because corporations are presumed to be "persons" under the FCA, *Chandler*, 538 U.S. at 126, Oberg's allegations of corporate status plausibly established that the Loan Companies are "persons" within the meaning of the FCA, *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level.").

The Loan Companies, however, all contend that they are alter-egos or arms of their creating states. The Companies therefore argue that they, like the states themselves, do not qualify as "persons" under the FCA. Arm-of-state status is an Eleventh-Amendment-based inquiry focused on determining whether a state-created entity is so closely related to the state that it should be permitted to share in the state's sovereign immunity. *See United States ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.*, 681 F.3d 575, 580 (4th Cir. 2012) ("*Oberg I*"). Although this court has not addressed the issue, the circuits that have considered similar assertions of arm-of-state status have uniformly concluded that it is an affirmative defense to be raised and established by the entity claiming to be an arm of the state. *See Sung Park v. Ind. Univ. Sch. of Dentistry*, 692 F.3d 828, 830 (7th Cir. 2012) ("[S]overeign immunity is a waivable affirmative defense."); *Aholelei v. Dep't of Pub. Safety*, 488 F.3d 1144, 1147 (9th Cir. 2007) ("Eleventh Amendment immunity is an affirmative defense . . . ." (internal quotation marks omitted)); *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 237-39 (2d Cir. 2006) (treating Eleventh Amendment immunity "as akin to an affirmative defense"); *see also Gragg v. Ky. Cabinet for Workforce Dev.*, 289 F.3d 958, 963 (6th Cir. 2002) ("[T]he entity asserting Eleventh Amendment immunity has the burden to show that it is entitled to immunity, *i.e.*, that it is an arm of the state."); *Skelton v. Camp*, 234 F.3d 292, 297 (5th Cir. 2000) (holding that the party seeking immunity "bear[s] the burden of proof in demonstrating that [it] is an arm of the state entitled to Eleventh Amendment immunity"); *Christy v. Pa. Turnpike Comm'n*, 54 F.3d 1140, 1144 (3d Cir. 1995) ("[T]he party asserting Eleventh Amendment immunity (and standing to benefit from its acceptance) bears the burden of proving its applicability."). I believe these decisions were correctly decided and that the arm-of-state issue raised by the Loan Companies is an affirmative defense.[1]

Preliminarily, although a plaintiff must plead facts establishing that the court has jurisdiction over

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[1] In our first opinion, we concluded that the district court had not applied the arm-of-state analysis, and we remanded the case for the district court to apply that analysis in the first instance. *See United States ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.*, 681 F.3d 575, 581 (4th Cir. 2012). While we noted that the ultimate question of whether the Loan Companies were subject to suit under the FCA did not turn solely on their corporate status, *see id.* at 579, we did not consider the sufficiency of Oberg's allegations or address whether arm-of-state status was an affirmative defense.

his claim, *see, e.g., Pinkley, Inc. v. City of Frederick*, 191 F.3d 394, 399 (4th Cir. 1999), the arm-of-state issue here is not jurisdictional. Instead, as the Supreme Court made clear in *Stevens*, it is a *statutory* question of whether the defendants named by Oberg qualify as "persons" under the FCA. *See Stevens*, 529 U.S. at 779 (distinguishing the question whether the FCA permits actions against states from whether the Eleventh Amendment would prohibit such an action and electing to resolve the case on statutory grounds).

Moreover, the arm-of-state claim operates like other affirmative defenses, in that the claim would preclude liability even if all of Oberg's allegations of wrongdoing are true. *See Emergency One, Inc. v. Am. Fire Eagle Engine Co.*, 332 F.3d 264, 271 (4th Cir. 2003) ("[A]ffirmative defenses share the common characteristic of a bar to the right of recovery even if the general complaint were more or less admitted to." (internal quotation marks and alteration omitted)); *Black's Law Dictionary* (9th ed. 2009) (defining "affirmative defense" as "[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true."). In my view, then, the arm-of-state status asserted by the Loan Companies must be treated as an affirmative defense. And once the arm-of-state issue in this case is recognized as an affirmative defense, the error in dismissing Oberg's claims on the pleadings becomes apparent.

As noted above, a Rule 12(b)(6) motion "test[s] the sufficiency of a complaint" but "does not resolve contests . . . [about] the merits of a claim or the applicability of defenses." *Butler*, 702 F.3d at 752 (internal quotation marks omitted). A plaintiff therefore has no "obligation to anticipate" an affirmative defense by pleading facts that would refute the as-yet unasserted defense. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *see McMillan v. Jarvis*, 332 F.3d 244, 248 (4th Cir. 2003); *Guy v. E.I. DuPont de Nemours & Co.*, 792 F.2d 457, 460 (4th Cir. 1986); *accord de Csepel v. Republic of Hungary*, 714 F.3d 591, 607-08 (D.C. Cir. 2013) ("[A]lthough it is certainly true that plaintiffs must plead the elements of their *claims* with specificity, they are not required to negate an affirmative defense in their complaint . . . ." (internal quotation marks and alteration omitted)).

As our *en banc* court explained in *Goodman*, an affirmative defense may provide the basis for a Rule 12(b)(6) dismissal only "in the relatively rare circumstances . . . [where] all facts necessary to the affirmative defense clearly appear *on the face of the complaint*." *Goodman*, 494 F.3d at 464 (internal quotation marks and alteration omitted); *see also Xechem, Inc. v. Bristol–Myers Squibb Co.*, 372 F.3d 899, 901 (7th Cir. 2004) ("Only when the plaintiff pleads itself out of court—that is, admits all the ingredients of an impenetrable defense—may a complaint that otherwise states a claim be dismissed under Rule 12(b)(6).").

Application of these principles to this case requires Oberg to plausibly allege that the Loan Companies are "persons" within the meaning of the FCA. Oberg did just that by alleging that the Companies are corporations operating independently of their creating states. The Loan Companies' contrary claim that they are alter-egos of their creating states is an affirmative defense which they bear the burden of pleading and proving. Because Oberg had no obligation to anticipate that defense by alleging facts establishing that the multi-factored, factually intensive arm-of-state inquiry should be resolved in his favor, the dismissal of his claims at this stage of the proceedings is improper. *See Butler*, 702 F.3d at 752; *Goodman*, 494 F.3d at 464, 466.[2]

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[2] The majority's apparent view that arm-of-state status is an affirmative defense in the Eleventh Amendment context but not in this case is puzzling. Although the arm-of-state inquiry here presents a statutory rather than constitutional question, the principles at stake are the same as in any case raising Eleventh Amendment issues. If arm-of-state status is a waivable affirmative defense when the Eleventh Amendment is directly implicated, so too should it be a waivable affirmative defense when the Eleventh Amendment is indirectly implicated. While "personhood" is clearly an element of a plaintiff's claim under the FCA, Oberg, as previously discussed, carried his burden of demonstrating the Loan Companies' personhood by alleging their independent corporate status. The burden should then fall to the defendants to plead and prove that they are *not* persons but rather are arms of their creating state. *United States ex rel. Adrian v. Regents of University of California*, 363 F.3d 398 (5th Cir. 2004), the case relied on by the majority, does not suggest otherwise. In that case, the plaintiff brought an FCA action against an entity—the Regents of the University of California—that courts had repeatedly found to be an arm of the state. *See id.* at 401-02. The Fifth Circuit did not address the affirmative-defense issue, but its affirmance of a Rule 12(b)(6) dismissal of the claims against an entity previously found to be an arm of the state is consistent with the rule recognized by this court in *Goodman* that an affirmative defense may be resolved on a Rule 12(b)(6) motion when the facts necessary to the defense appear on the face of the complaint. *See Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007) (en banc).

III.

Even if Oberg were somehow required to allege that the Loan Companies are not arms of their states, I believe the allegations of the complaint are still more than sufficient to withstand the motion to dismiss.

As to PHEAA and VSAC, the majority concludes that Oberg's allegations plausibly establish that the companies are not alter-egos of their creating states. Although I agree with the majority's ultimate conclusion as to these defendants, I do not agree with the majority's application of the Rule 12(b)(6) standard to the arm-of-state state factors. The sufficiency of the complaint as to PHEAA and VSAC is not a close question in my view, and I therefore concur only in the judgment vacating the dismissal of Oberg's claims against PHEAA and VSAC. While the question is perhaps a bit closer as to the claims against ASLA, I nonetheless believe the Oberg has plausibly alleged facts establishing that ASLA is not an arm of the state of Arkansas. Accordingly, for the reasons set out below, I dissent from the majority's affirmance of the Rule 12(b)(6) dismissal of Oberg's claims against ASLA.

When determining whether an entity qualifies as an arm of the state, we consider four non-exclusive 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.

Oberg I, 681 F.3d at 580 (quoting *Dep't of Disabilities & Special Needs v. Hoover Universal, Inc.*, 535 F.3d 300, 303 (4th Cir. 2008)).

While the focus of the first factor is whether the "primary legal liability" for a judgment will fall on the state, *Regents of Univ. of Ca. v. Doe*, 519 U.S. 425, 428 (1997), we must also consider the *practical effect* of a judgment against the entity, *see Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 51 (1994). "[I]f the State treasury will be called upon to pay a judgment against a governmental entity, then Eleventh Amendment immunity applies to that entity, and consideration of any other factor becomes unnecessary." *Cash v. Granville Cnty. Bd. of Educ.*, 242 F.3d 219, 223 (4th Cir. 2001). "[S]peculative, indirect, and ancillary impact[s] on the State treasury," however, are insufficient to trigger immunity. *Id.* at 225.

If the state would not be liable for a judgment rendered against the entity, we must then consider the remaining factors, which serve to determine whether the entity "is so connected to the State that the legal action against the entity would, despite the fact that the judgment will not be paid from the State treasury, amount to the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Id.* at 224 (internal quotation marks omitted); *see Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) ("The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities."). In my view, Oberg's complaint contains factually detailed, specific allegations addressing the treasury factor and the dignity factors so as to preclude the granting of the motion to dismiss.

A.

The complaint alleges that ASLA, not its creating state, would be liable for any judgment rendered against it. *See* J.A. 116-18. While that assertion is arguably a legal conclusion not entitled to be treated as true, *see, e.g.*, *Iqbal*, 556 U.S. at 678, the assertion is supported by specific factual allegations that are supported by statutes, financial reports, and other information specifically referenced in the complaint and properly considered in the context of a motion to dismiss. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009). These allegations and information establish the following:

- ASLA is a corporation entitled to enter into contracts, own property, and sue and be sued in its own name. *See* Ark. Code Ann. § 6-81-102(c) (establishing ASLA as a "public body politic and corporate, with corporate succession").

- Arkansas has specifically disclaimed liability for ASLA's obligations. *See* Ark. Code Ann. § 6-81-113(a)(3).
- Arkansas law authorizes ASLA to pay expenses associated with its lending activities from the revenues earned from those activities. *See* Ark. Code Ann. §§ 6-81-118(c)(3), 6-81-124(c)(1).
- ASLA generates substantial income streams and relies on those income streams, rather than state appropriations, to support its business operations, and ASLA has substantial assets from which a judgment could be paid. *See* J.A 781-827 (ASLA financial statements).
- ASLA has a line of credit provided by Arkansas. ASLA borrowed $50,000,000 under the line of credit in 2008 and repaid the note in full by September 2010. *See* J.A. 802. ASLA has also borrowed money from a private lender to improve its liquidity, with student loan revenues providing the source of repayment. *See* J.A. 802.
- ASLA has commercial insurance to protect itself from losses arising out of torts and its errors and omissions. *See* J.A. 805.

In my view, these allegations are more than sufficient to make plausible Oberg's assertion that the Arkansas state treasury would not be liable for a judgment rendered against ASLA. *See Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 288 (4th Cir. 2012) ("Plausibility requires that the factual allegations be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." (internal quotation marks and alteration omitted)).

Although the majority considers ASLA's status as a corporation only when analyzing the state-dignity factors, that fact is clearly relevant to the state-treasury factor as well. *See Cash*, 242 F.3d at 224 (considering entity's corporate form when analyzing state-treasury factor). The fact that Arkansas elected to structure ASLA as a corporation makes it plausible that the state will not be liable for any judgments in this case, since insulating others from liability for corporate debt is one of the signal attributes of the corporate form. *See, e.g., Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 753 (7th Cir. 1985) ("General corporation law is clear that personal liability for a corporation's debts cannot be imposed on a person merely because he is an officer, shareholder, and incorporator of that corporation."). That Arkansas has specifically disclaimed liability for ASLA's obligations further establishes plausibility, particularly given the absence of any statute *requiring* Arkansas to pay a judgment against ASLA. *See Cash*, 242 F.3d at 224-25 (noting the absence of statute authorizing recovery from state coffers when concluding that judgment against entity would not affect state treasury); *Gray v. Laws*, 51 F.3d 426, 436 (4th Cir. 1995) (noting the absence of statute requiring payment by state).

Moreover, the allegations of the complaint and the financial documents referenced in the complaint show that ASLA generates significant revenue streams through its lending and other business activities.

ASLA uses those revenues, as required by state law, to pay the expenses of its business activities. In light of these revenue streams, ASLA's ability to raise revenues through other sources, *see* J.A. 802 (line of credit and private lending available to ASLA), and its insurance protection, it is entirely plausible a judgment in this case will have no legal or practical effect on the Arkansas state treasury. *See Burrus v. State Lottery Comm'n*, 546 F.3d 417, 420 (7th Cir. 2008) (concluding that state lottery commission was not an arm of the state, in part because the lottery "has no need for recourse to the state treasury" given the "large stream of revenue" it generates).

B.

The allegations of Oberg's complaint likewise plausibly demonstrate that ASLA has significant autonomy and independence from its creating state. The allegations of the complaint and the documents referenced therein establish the following:

- ASLA is a corporation entitled to enter into contracts, own property, and sue and be sued in its own name. *See* Ark. Code Ann. § 6-81-102(l).
- ASLA is governed by a board of directors, none of whom are state officials, who serve fixed terms and are not removable by the governor. *See id.* § 6-81-102(d) & (e).
- ASLA has authority to structure and operate its business activities as it deems proper, including the authority to issue general obligation bonds secured by its revenues and to create subsidiary corporations. *See id.* §§ 6-81-102(k), 6-81-102(l)(8)-(10) & (25).

- ASLA is supported by the revenues it earns from its business activities, not by the state. Although ASLA receives appropriations from the state earmarked for salaries and certain operating expenses, the funds so appropriated are "cash funds" earned by ASLA through its business activities. *See* Ark. Code Ann. § 6-18-118; J.A. 412.
- ASLA's revenues are not deposited into the state treasury, but are deposited into various accounts controlled by ASLA. *See* Ark. Stat. § 6-81-118(a) & (f).
- ASLA's business activities extend outside the state of Arkansas and include the buying and selling of loan pools on the secondary market and the servicing of loans made directly by the federal government.
- ASLA has borrowed and repaid money from the state of Arkansas, executing a promissory in favor of the state and using its revenues to repay the loan. *See* J.A. 802.

These allegations are not naked factual assertions that need not be accepted as true, nor are they mere legal conclusions that can be disregarded. *See Iqbal*, 556 U.S. at 678. Instead, they are specific, detailed factual allegations that paint a plausible picture of an autonomous corporation operating in the commercial sphere largely free of state oversight or interference, such that it would not be an affront to the dignity of Arkansas to permit this action to proceed.

Accordingly, given the operational independence established by these allegations, and the financial independence established by the state-treasury allegations discussed above, I believe it is at least plausible that ASLA is a "person" within the meaning of the FCA, not an arm of the state of Arkansas. *See id.* ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.").

IV.

ASLA, however, makes various arguments about how a judgment could affect the state treasury and points to various statutes indicating that the state has more control over it than Oberg's allegations suggest. In my view, these arguments do not provide a basis for granting the motion to dismiss. Even after *Twombly* and *Iqbal*, we still must view the properly alleged facts in the plaintiff's favor and must give the plaintiff the benefit of all reasonable inferences that can be drawn from those facts. *See E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011); *see also Sepulveda-Villarini v. Dep't. of Educ. of P.R.*, 628 F.3d 25, 30 (1st Cir. 2010) (Souter, J.) ("A plausible but inconclusive inference from pleaded facts will survive a motion to dismiss . . . ."). While ASLA's arguments are not frivolous, they are not so conclusive as to render Oberg's allegations implausible for purposes of Rule 12(b)(6). *See Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) ("Plaintiff's complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that plaintiff's explanation is *im*plausible."); *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 458 (6th Cir. 2011) ("[T]he plausibility of [the defendants' theory] does not render all other reasons implausible.").

A.

ASLA argues that a judgment against it would affect the state treasury. Arkansas law requires the revenues from ASLA's business activities to be deposited into accounts outside the state treasury. *See* Ark. Code Ann. § 6-81-118(a), (b) & (f). Under provisions of Arkansas law not exclusively applicable to ASLA, all funds required to be deposited somewhere other than the state treasury are "'cash funds'" that are "declared to be revenues of the state to be used as required and to be expended only for such purposes and in such manner as determined by law." Ark. Code Ann. § 19-6-103. Such cash funds must be "budgeted and proposed expenditures approved by enactments of the General Assembly." *Id.* § 19-4-802(a). Relying on these statutes, ASLA contends that a judgment against it is, as a practical matter, a judgment against Arkansas, since all of ASLA's money is really the state's money under § 19-6-103.

ASLA's argument overlooks several important points. First of all, as the majority noted in its discussion of PHEAA's arm-of-state assertion, the fact that ASLA's funds are held in a segregated fund outside the state treasury counsels against arm-of-state status. *See* Majority Op. at 13-14; *see also* *Burrus*, 546 F.3d at 420; *Univ. of R.I. v. A.W. Chesterton Co.*, 2 F.3d 1200, 1210 (1st Cir. 1993). Moreover, unlike the generally applicable § 19-6-103, the statute specifically addressing ASLA's funds does not declare ASLA's cash funds to be revenues of the state, *see* Ark. Code Ann. § 6-18-118, and nothing in

§ 6-18-118 appears to subject ASLA's use of the funds to wholesale control by the General Assembly.[3] Instead, § 6-18-118 simply requires ASLA's segregated cash funds to be "used as provided in *this subchapter*"—subchapter 1 of Chapter 81 governing student loans. *Id.* § 6-18-118(b) (emphasis added). Subchapter 1, in turn, gives *ASLA*—not the state legislature—nearly complete authority over the use of its funds, including the authority to pay expenses arising from its lending activities. *See* Ark. Code Ann. § 6-81-118(c)(3) & (4) (giving ASLA authority to "use the proceeds of any bond issues, together with any other available funds" for "[p]aying incidental expenses in connection with loans" and "[p]aying expenses of authorizing and issuing bonds"); *id.* § 6-81-118(f) ("The revenues not deposited into the State Treasury shall be deposited into an account or accounts specified by resolution of the authority and used for carrying out the provisions of any resolution, indenture securing bonds of the authority, or other agreement of the authority under this subchapter."); *id.* § 6-81-124(a) (requiring "[a]ll proceeds derived from a particular obligation" to be deposited into a "proceeds fund" to be "expended only on approval of [ASLA]"); *id.* § 6-81-124(c)(1) (authorizing funds contained in proceeds fund to be used for "payment of the necessary expenses, including, without limitation, the costs of issuing the authority's obligations,

[3] As the majority recognized when considering PHEAA's claim, the terms of the statute specifically governing ASLA should be given priority over the generally applicable § 19-6-103. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general . . . .").

incurred by the authority in carrying out its responsibilities under this subchapter”).[4]

More importantly, however, the fact that Arkansas declares all of ASLA’s cash funds to be state funds does not conclusively establish that the Arkansas state treasury would be affected by a judgment against ASLA in this case. As shown by the relevant statutes and other information in the record, the cash funds “claimed” by the state consist *entirely* of revenues generated by ASLA’s lending and other business activities. And because the expenses of those business activities must be paid from the cash funds, the funds so claimed by the state in reality consist only of ASLA’s surplus revenues.

As the Supreme Court has explained, however, the state-treasury factor focuses “*not on the use of profits or surplus*, but rather . . . on losses and debts.” *Hess*, 513 U.S. at 51 (emphasis added)). “If the expenditures of the enterprise exceed receipts, is the State in fact obligated to bear and pay the resulting

[4] Arkansas’ statutory arrangement thus is similar in many ways to that in Pennsylvania. Like Arkansas, Pennsylvania law appears to treat the Loan Company’s funds as state funds, *see* 24 Pa. Cons. Stat. § 5104(3) (requiring PHEAA’s funds to be deposited into state treasury), and to require state approval of any expenditure of those funds, *see* 72 Pa. Cons. Stat. § 307, but the statute specifically governing PHEAA’s operation gives control of those funds to the company, *see* 24 Pa. Cons. Stat. § 5104(3); *see* Majority Op. at 11-13 (describing operation of Pennsylvania statutes governing PHEAA). After considering Pennsylvania’s statutory structure, the majority concluded that the state-treasury factor “weighs heavily against holding that PHEAA is an arm of the state.” Majority Op. at 14. In my view, Arkansas’ similar statutory scheme also weighs against arm-of-state status.

indebtedness of the enterprise? When the answer is 'No'—both legally and practically—then the Eleventh Amendment's core concern is not implicated." *Id.*

The majority's assertion that the source of the cash funds claimed by Arkansas does not matter because Arkansas claims all of the cash funds as its own, *see* Majority Op. at 27-28 n.7, thus seems directly contrary to the Supreme Court's analysis in *Hess*. Under the majority's view, a self-supporting entity—that is, an entity that supports itself not through state appropriations but through the revenues earned from its own commercial activities—is dependent on the state as a matter of law because a state statute arguably declares the entity's *profits* to be revenues of the state. The Supreme Court raised a suspicious eyebrow at such an argument in *Hess*, *see* 513 U.S. at 51 n.21 (observing that "[i]t would indeed heighten a mystery of legal evolution were we to spread an Eleventh Amendment cover over an agency that consumes no state revenues but contributes to the State's wealth" (internal quotation marks and alteration omitted)), and the argument is no more persuasive here.

Oberg's allegations of a self-supporting, commercially insured corporation with tens of millions of dollars in annual revenue and access to a $50 million line of credit and other private loans provide a non-speculative basis for concluding that ASLA would not need Arkansas's help to pay a judgment rendered against it.[5] Nothing more need be established at this

[5] Indeed, the financial statements referenced in the pleadings show that ASLA absorbed an operational loss in 2011 without any financial assistance from the state. *See* J.A. 790.

point in the proceedings. *See Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level."); *Walters*, 684 F.3d at 439 (plaintiff's allegations must be sufficient to "advance [his] claim across the line from conceivable to plausible").

B.

The state-dignity factors of the arm-of-state inquiry include (1) "the degree of autonomy exercised by the entity"; (2) "whether the entity is involved with state concerns as distinct from non-state concerns, including local concerns"; and (3) "how the entity is treated under state law." *Oberg I*, 681 F.3d at 580. As previously discussed, I believe that Oberg's allegations of a corporate entity that is answerable to boards of directors rather than elected state officials and that operates largely free of state interference plausibly establish that ASLA is not "so connected to the State that the legal action against the entity would, despite the fact that the judgment will not be paid from the State treasury, amount to the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Cash*, 242 F.3d at 224 (internal quotation marks omitted).

I recognize, however, that other inferences can reasonably be drawn from the information alleged in the complaint and contained in the record. Nonetheless, the question at this stage of the proceedings is not whether the defendant's view of the issues is reasonable, but whether the plaintiff has plausibly alleged an entitlement to relief. *See, e.g., Butler*, 702 F.3d at 752 (motion to dismiss "test[s] the sufficiency of a complaint" but "does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses" (internal quotation marks omitted)). And in my view, the state-dignity factors do not conclusively establish that the Loan Companies are arms of their creating states, notwithstanding the fact that some of the factors might reasonably support that conclusion.

For example, Arkansas appears to treat ASLA as a state agency. *See* Ark. Code Ann. § 6-81-102(c) (describing ASLA an "an instrumentality of the state"); *Turner v. Woodruff*, 689 S.W.2d 527, 528 (Ark. 1985) (describing ASLA as a "state agency"). While this factor thus points toward a finding of arm-of-state status, whether an entity qualifies as an arm of its creating state is a matter of federal law, *see Regents*, 519 U.S. at 429 n.5, and this single factor is not dispositive of the inquiry.

In addition, there can be no dispute that ASLA is involved, at least in part, in matters of statewide concern. "[E]ducating the youth" of a state and providing higher education is "clearly an area of statewide concern," *Md. Stadium Auth. v. Ellerbe Becket Inc.*, 407 F.3d 255, 265 (4th Cir. 2005), and making loans available to students certainly facilitates that goal. However, ASLA is also engaged in other, more commercial activities, such as the buying and selling of loan pools on the secondary market and the servicing of federal student loans, that arguably are more appropriately characterized as "non-state concerns." *See Hoover Universal*, 535 F.3d at 307 (considering "whether the entity is involved with *statewide, as opposed to local or other non-state concerns*" (emphasis added)); *cf. Fresenius Med. Care*

Cardiovascular Res., Inc. v. Puerto Rico, 322 F.3d 56, 64 (1st Cir. 2003) ("Not all entities created by states are meant to share state sovereignty. . . . Some entities may be meant to be commercial enterprises, viable and competitive in the marketplace in which they operate.").

As to the question of autonomy, the fact that ASLA generates its own revenues and is not dependent on state appropriations is a strong indication of the Loan Companies' operational independence from the states. While ASLA receives an appropriation earmarked for salaries and certain other expenses, it is an appropriation of ASLA's own "cash funds," J.A. 412, which, as previously discussed, are funds generated by ASLA through its business activities. That kind of appropriation does not make ASLA dependent on the state. *See Burrus*, 546 F.3d at 422 (appropriation of funds generated by entity claiming arm-of-state status "is of a different kind than the appropriations we have found to be the mark of a state agency, namely, those appropriations that come directly from the state." (internal quotation marks omitted)).[6]

Other facts, however, suggest that ASLA is not entirely autonomous. For example, all members of ASLA's board of directors are appointed by the governor, *see* Ark. Stat. Ann. § 6-81-102(d), a fact that

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[6] In any event, even if ASLA did receive some money from the state, that fact alone would not conclusively establish that ASLA is dependent on the state. *See, e.g., Kitchen v. Upshaw*, 286 F.3d 179, 184-85 (4th Cir. 2002) (finding that an entity that received some state funding was not an arm of the state); *Cash*, 242 F.3d at 224, 226 (same).

clearly provides some indication of state control. *See Md. Stadium Auth.*, 407 F.3d at 264. Arkansas law, however, provides that the board members serve fixed terms, *see* Ark. Stat. Ann. § 6-81-102(e), with no suggestion that they may be removed by the governor at will.[7] *See Edmond v. United States*, 520 U.S. 651, 664 (1997) ("The power to remove officers, we have recognized, is a powerful tool for control."); *Auer v. Robbins*, 519 U.S. 452, 456 n.1 (1997) (concluding that Board of Police Commissioners was not an arm of the state because the state was not responsible for the Board's financial liabilities and the only form of state control was the governor's power to appoint four of five Board members); *P.R. Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 877 (D.C. Cir. 2008) ("The Governor's power to remove a majority of the Board at will allows him to directly supervise and control PRPA's ongoing operations."); *Takle v. Univ. of Wisc. Hosp. & Clinics Auth.*, 402 F.3d 768, 770 (7th Cir. 2005) ("[T]he power to appoint is not the power to control.").[8]

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[7] According to the majority, the fact that ASLA board members serve for four years "or until a successor is appointed," Ark. Code § 6-81-102(e), "*suggests* that the governor may remove board members simply by selecting new ones." Majority Op. at 29 (emphasis added). It seems highly unlikely that the Arkansas legislature would hide removal-at-will authority in a clause that more reasonably seems to authorize terms of more than four years in cases where an appointment is not timely made. In any event, an ambiguous statutory scheme is far from sufficient to establish for purposes of a Rule 12(b)(6) motion that ASLA's board is subject to the direct control of the governor.

[8] Contrary to the majority's characterization of my views, I do not contend that ASLA "*is* autonomous" because of the manner in which its board is appointed, Majority op. at 28 (emphasis

In addition, all bonds issued by ASLA must be approved by the governor, a fact the majority finds significant. *See* Majority Op. at 27-28 (including gubernatorial approval requirement among the facts establishing that ASLA "operates with little autonomy"). The approval requirement, however, is a function of federal law, which places a ceiling on the volume of certain tax-exempt "private activity" bonds (including student loan bonds) that can be issued within a state and vests with the state governor the authority to change the allocation of the state ceiling among issuers, and which requires state approval of such bond issues. *See* 26 U.S.C. § 141(e)(1)(E); *id.* § 144(b); *id.* § 146(a)-(e); *id.* § 147(f); *see generally Steele v. Indus. Dev. Bd. of Metro. Gov't Nashville*, 301 F.3d 401, 404 (6th Cir. 2002); Congressional Research Service, *Tax-Exempt Bonds: A Description of State & Local Government Debt* at 9-11 (June 19, 2012). Under these circumstances, the gubernatorial-approval requirement is less indicative of a lack of autonomy than it might otherwise be. In any event, the gubernatorial-approval requirement does not conclusively establish that ASLA lacks autonomy.

Thus, on the record before us, the facts relevant to the state-dignity factors cut both ways, with some supporting Oberg's claim that ASLA is not an arm of

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added), only that Oberg *has alleged specific facts relevant to ASLA's autonomy sufficient to survive a Rule 12(b)(6) motion.* As I have previously discussed, the fact that other inferences can be drawn from the information in the record does not render Oberg's allegations implausible. *See Sepulveda-Villarini v. Dep't. of Educ. of P.R.*, 628 F.3d 25, 30 (1st Cir. 2010) (Souter, J.) ("A plausible but inconclusive inference from pleaded facts will survive a motion to dismiss . . . .").

the state, and others supporting ASLA's contrary claim. But because Oberg's allegations on this point more than satisfy the *Iqbal-Twombly* plausibility requirement, ASLA's arguments provide no basis for affirming the dismissal of Oberg's claims.

V.

As is apparent from the arm-of-state test itself and the nature of the considerations it entails, whether a state-created entity is so closely connected to its creating state that it should be permitted to share in the state's immunity from suit generally is a fact-intensive inquiry dependent on an understanding of the *actual* operations of the entity and the *actual* relationship between the entity and the state. *See, e.g., Hess*, 513 U.S. at 49 (considering the entity's "anticipated and *actual* financial independence (emphasis added)); *Hoover*, 535 F.3d at 303 ("The line separating a State-created entity functioning independently of the State from a State-created entity functioning as an arm of the State or its alter ego is determined by the particular legal and *factual circumstances* of the entity itself." (emphasis added)); *Gray*, 51 F.3d at 434 (remanding case to the district court because it was "in the best position to address in the first instance the competing questions of fact and state law necessary to resolve the eleventh amendment issue" (internal quotation marks omitted)). While there certainly have been and will continue to be cases where the arm-of-state issue can be resolved on the pleadings, multi-factored balancing tests "do[] not easily lend [themselves] to dismissal on a Rule 12(b)(6) motion." *Decotiis v. Whittemore*, 635 F.3d 22, 35 n.15 (1st Cir. 2011). In my view, this case is one of the typical cases that cannot be resolved on the pleadings. Indeed, the inconclusive nature of most of the state-dignity factors highlights this very problem. We have no information about the actual operations of the Loan Companies or the actual amount of control and oversight exercised by the states and thus cannot determine the actual nature of the relationship between the Loan Companies and their creating states.

Nonetheless, the facts as alleged by Oberg plausibly establish that the state treasuries will not be affected by a judgment against the Loan Companies and that the Loan Companies are sufficiently independent from their creating states that permitting this action to proceed would not be an affront to the dignity of the states. To require anything more at this stage of the proceedings is to ignore the purpose and scope of a motion to dismiss, which is to test the facial sufficiency of the complaint, not resolve contests about the merits or applicable defenses. *See Butler*, 702 F.3d at 752; *Goodman*, 494 F.3d at 464.

Accordingly, while I concur in the judgment insofar as it vacates the dismissal of the claims against PHEAA and VSAC, I dissent from the opinion and judgment affirming the dismissal of the claims against ASLA.

Appendix D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

No. 1:07-cv-00960

UNITED STATES OF AMERICA
ex rel. JON H. OBERG,

Plaintiff,

v.

PENNSYLVANIA HIGHER
EDUCATION AUTHORITY, et al.,

Defendants.

Filed: December 5, 2012

MEMORANDUM OPINION

This matter comes before the Court on remand from the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit"). The Fourth Circuit determined that the arm-of-the-state analysis used in the Eleventh Amendment context provides the appropriate legal standard in deciding whether an entity is a "person" subject to suit under the False Claims Act ("FCA"), as there is a "'virtual coincidence of scope' between the statutory inquiry under the FCA and the Eleventh Amendment sovereign immunity inquiry." *United States of America ex rel. Jon H. Oberg v. Kentucky Higher Educ. Student Loan Corp.*, 681 F.3d 575, 580 (4th Cir. 2012) (internal citations omitted). The Fourth Circuit adopted the four factors set forth in *S.C. Dep't of Disabilities & Special Needs v. Hoover Universal, Inc.*, 535 F.3d 300 (4th Cir. 2008), to be used in applying the arm-of-the-state analysis. Defendants' Pennsylvania Higher Education Assistance Agency ("PHEAA"), Kentucky Higher Education Student Loan Corporation ("KHESLC"), Vermont Student Assistance Corporation ("VSAC"), and Arkansas Student Loan Authority's ("ASLA") Motions to Dismiss are again before this Court to apply the arm-of-the-state analysis.

In September 2007, Plaintiff Dr. Jon Oberg ("Oberg") brought a qui tam action, on behalf of the United States, against Defendants, alleging violations of the Federal False Claims Act, 31 U.S.C.A § 3729 (West 2003). This Court dismissed the complaint as to all four Defendants, holding that each entity is a state agency and thus not subject to the FCA. In June 2012, the Fourth Circuit vacated this Court's judgment and remanded the case in order for this Court to apply the arm-of-the-state analysis. *See Oberg*, 681 F.3d at 581. In the Fourth Amended Complaint, filed in August 2012, Plaintiff again alleges that Defendants submitted fraudulent claims under the Federal Family Education Loan Program in violation of the FCA, in order to obtain 9.5% special allowance payments ("SAP"). More specifically, that Defendants used pre-October 1, 1993 tax-exempt bond proceeds to unlawfully make or buy additional loans that were guaranteed the minimum 9.5% yield. Plaintiff alleges that such activity was prohibited by the repeal of the 9.5% SAP in 1993, and Department of Education regulations put in place for the purpose of phasing out the 9.5% SAPs. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 (the "1993 OBRA");

34 C.F.R. § 682.302 (1992); Dear Colleague Letter 96-L-186 (March 1, 1996).

Defendants are all entities created by their respective states for the purpose of generating higher educational opportunities, each with defined powers within their state code. Defendant PHEAA is a "public corporation and government instrumentality," created by the legislature of the Commonwealth of Pennsylvania for the purpose of "improv[ing) the higher educational opportunities of persons who are residents of this State and who are attending approved institutions of higher education, in this State or elsewhere, by assisting them in meeting their expenses of higher education . . ." 24 Pa. Stat. Ann. §§ 5101-5102 (West 2006). The Commonwealth of Pennsylvania's objective for PHEAA is stated as, "in all respects for the benefit of the people of the Commonwealth, for the improvement of their health and welfare, and for the promotion of the economy, and that such purposes are public purposes and the agency will be performing an essential governmental function." 24 Pa. Stat. Ann. § 5105.6 (West 2006).

All of PHEAA's powers and duties are established by state statute. Further, all of PHEAA's money is deposited into the Pennsylvania Commonwealth Treasury, including revenues. *Id.* § 5104. The Commonwealth exercises significant control over funds within the treasury, authorization is required before any use of the funds and is limited to carrying out the corporate purpose of the agency. *See Id.* Moreover, PHEAA must obtain the Governor's approval before borrowing any money and is subject to audit by the Commonwealth Auditor General. 24 Pa.

Cons. Stat. §§ 5104(3), 5104(1.1), 5105.1, 5108 (West 2006). All of PHEAA's funds and property would revert to the Commonwealth in the event of dissolution. 24 Pa. Stat. Ann. § 5109 (West 2006).

PHEEA is operated by a board of directors comprised of the Secretary of Education, three members appointed by the Governor and confirmed by the Senate, eight members appointed by the President pro tempore of the Senate, and eight appointed by the Speaker of the House of Representatives of Pennsylvania. *See* 71 Pa. Stat. Ann. § 111.2(a)(1) (West 2012). The Commonwealth's Attorney General must review and approve all Commonwealth deeds, leases and contracts to be executed by PHEAA, and consent to PHEAA defending or initiating legal action. 71 Pa. Stat. Ann. §§ 732-204(c),(f) (West 2012). PHEAA is also required to make an annual report of its condition at year end, which is provided to the Governor and legislature. 24 Pa. Stat. Ann. § 5108 (West 2006).

Defendant VSAC is a state created public non-profit corporation established to help residents of Vermont plan and pay for education or training beyond high school. *See* Vt. Stat. Ann. tit. 16, § 2821 (2004). VSAC is designated as the state agency to receive federal funds assigned to the state of Vermont for student financial aid programs." *Id.* § 2823(c). As an instrumentality of the state", the State of Vermont is required, by statute, to "support and maintain" VSAC. *See Id.* 2823(a). Upon termination of VSAC all of VSAC's property and net earnings would vest to the State. *See Id.* 2821(b). Further, VSAC is run by an 11-person board of directors, all of whom are either current elected Vermont officials or appointed by the Governor of Vermont. *Id.* § 2831. Additionally, the State of Vermont may change the structure, organization or activities of VSAC, or terminate VSAC altogether. *Id.* § 2821(b). VSAC must also obtain the Governor's approval in order to issue debt obligations. *Id.* § 2823.

Defendant KHESLC was established by the Kentucky General Assembly as "an independent de jure municipal corporation and political subdivision of the Commonwealth of Kentucky created to perform essential governmental services". Ky. Rev. Stat. Ann. § 164A.020(3) (West 2006). The purpose of KHESLC's creation was to carry out the public purpose and legislative intent of the Commonwealth of Kentucky, "that the attainment by every citizen of his or her educational goals will inure to the general welfare, well-being, and productivity of the Commonwealth." *Id.* § 164A.010(1).

KHESLC is governed by a 15-member Board of Directors, all of whom are appointed by the Governor of Kentucky. *Id.* § 164A.050(3)(a). Eight voting members are "chosen from the general public residing in the Commonwealth of Kentucky; and [s]even voting members of the board of directors of the Kentucky Higher Education Assistance Authority appointed by the Governor . . ." *Id.* Several commonwealth officials, including the President of the council on Postsecondary Education, the Secretary of the Finance and Administration Cabinet the Secretary of Education and the State Treasurer of the Commonwealth of Kentucky serve as ex officio voting members of KHESLC. *Id.* § 164A.050(3)(c). The

Governor of Kentucky maintains the power to remove any of the eight directors chosen from the general public for cause. *See id.* § 164A.050(6).

As an instrumentality of Kentucky, KHESLC must obtain General Assembly approval prior to issuing bonds, under certain circumstances. *See id.* § 164A.080. KHESLC is an agency authorized to issue bonds, and is accountable to the State for "all money received and disbursed during each fiscal year", thus, KHESLC must submit an annual report and audit of its expenditures and investments to the State Governor, General Assembly, and to the Secretary of the Finance and Administration Cabinet. *See id.* § 164A.170; § 42.545; § 45A.840(3) (West 2006). Like PHEAA and VSAC, upon dissolution all of KHESLC's property would vest in the Commonwealth of Kentucky. *See* Ky. Rev. Stat. Ann. § 164A.230 (West 2006).

Defendant ASLA is an authority established for the purpose of providing educational opportunities for the citizens of Arkansas. The Arkansas General Assembly empowered the Governor of the State, by proclamation, to establish ASLA, and pursuant to this authority ASLA was established as a state agency in 1977. Ark. Code Ann. § 6-81-102 (2007). State statute provides that the Defendant is "a public body politic and corporate," and "shall be the instrumentality of the state charged with a portion of the responsibility of the state to provide educational opportunities . . ." *Id.* § 6-81-102(c).

ASLA is a "state agency" operating exclusively to exercise those powers granted by the enactment of subchapter 81, and is governed by seven directors appointed by the Governor. *See Id.* § 19-4-801(2)(A); §§ 6-81-102(c),(d)(1). Many of ASLA's actions such as spending funds, entering into contracts, and issuing or selling bonds are subject to review and approval by Arkansas government officials. *See* Ark. Code Ann. § 19-4-802; §§ 19-11-1005, 1006; §§ 6-81-107, 108 {2007). In addition, all ASLA funds are declared "cash funds" by statute. *See* Ark. Code Ann. § 19-4-801 {2010). Cash funds are "revenues of the state to be used as required and to be expended only for such purposes and in such manner as determined by law." *Id.* § 19-6-103.

Under the FCA, any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" to the United States Government, is in violation of the act. *See* 31 U.S.C.A. § 3729 (2006). The United States Supreme Court, however, has held that state agencies are not construed as "persons" under the FCA, and therefore are not subject to liability under the act. *Vermont Agency of Natural Resources v. U.S. ex. Rel. Stevens*, 529 U.S. 765, 787-88 (2000). In order to determine whether an entity is in fact a state agency, so as to not be subject to the FCA, the arm-of-the-state analysis must be applied. *U.S. ex rel. Oberg v. Kentucky Higher Educ. Student Loan Corp.*, 681 F.3d 575 (4th Cir. 2012).

"In applying the arm-of-the-state analysis, we consider four nonexclusive factors". *Id.* at 580. First, 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. *Oberg*, 681 F.3d at 580. "The broader inquiry does not focus on whether funds are retained in a particular account of the State or in the general fund of the State treasury . . ." *S. Carolina Dept. of Disabilities & Special Needs v. Hoover Universal, Inc.*, 535 F.3d 300, 305 (4th Cir. 2008). Economic reality cannot be ignored in this context; this court must look to the practical effect of a judgment against each Defendant. *See Ristow v. South Carolina Ports Authority*, 58 F.3d 1051, 1053-54 (4th Cir. 1995) (judgment against Ports Authority could not be legally enforced against the State but the practical effect of the State's treatment of fiscal affairs of the Port Authority would implicate the State treasury).

Defendant PHEAA deposits all of its money into the Pennsylvania Commonwealth Treasury, specifically in the Higher Education Assistance Fund. Accordingly, any judgment against PHEAA would necessarily come out of state treasury funds. As the Fourth Circuit noted in *Hoover*, it is irrelevant that PHEAA's funds are retained in a separate account within the treasury. *Hoover*, 535 F.3d at 305. The fact that the State would be required to bear the burden of a judgment against PHEAA in some financial capacity readily satisfies this factor.

Further, the fact that PHEAA uses its own revenues to support its operations, in part, is not dispositive. PHEAA is a public entity which generates revenue in order to support its function. Even if these revenues were in fact used to pay a judgment, Pennsylvania legislature would then have to appropriate additional funds to support PHEAA, which would be to the detriment of the

Commonwealth and would affect Pennsylvania taxpayers.

As for Defendant VSAC, the State of Vermont is required to support and maintain VSAC by statute, and thus would necessarily be burdened by a judgment against VSAC. "Where an agency is so structured that, as a practical matter, if the agency is to survive, a judgment must expend itself against state treasuries, common sense and the rationale of the Eleventh Amendment require that sovereign immunity attach to the agency" *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 50 (1994). While there is no statute specifically requiring the State of Vermont to pay for a judgment against VSAC, there has also been no compelling evidence presented that indicates the Government would not be required to do so, literally or practically. State law makes clear that VSAC's revenues "shall not inure to the benefit of any person other than the state." Vt. Stat. Ann. Tit. 16 § 2821 (2004). VSAC, then, serves to benefit the State and any judgment against it would necessarily impact this function. The structure of VSAC, and its intertwining with the State of Vermont, suggests a judgment against VSAC would have a detrimental impact on the Treasury and the Government of the State of Vermont. The Government and the taxpayers of the State of Vermont should not be required to absorb the repercussions of a judgment against VSAC. Therefore, this court finds that VSAC satisfies the first factor of the arm-of-the-state analysis.

Defendant KHESLC's funds can be, and have been, redirected to other state agencies and initiatives upon request of the State, this fact alone weighs in favor of the first factor of the arm-of-the-state analysis. *See Hoover*, 535 F. 3d at 306. While Kentucky statutes make clear that the Commonwealth of Kentucky will not be responsible for financially backing KHESLC's student loans and bond obligations, and that such debts shall be payable by KHESLC alone, they do not indicate that KHESLC is an entity separate from the State or that it is solely responsible for paying any judgment entered against it. Ky. Rev. Stat. Ann. §§ 164A.080, 070, 010 (West 2006). To the contrary, Kentucky budgetary funds are allowed to be used to restore such reserve fund or replacement fund to its contractually required level". Ky. Rev. Stat. Ann. § 164A.160 (West 2006). For this reason, this Court finds that the Treasury of the Commonwealth of Kentucky will be practically responsible for, and burdened by, a judgment entered against KHESLC.

Defendant ASLA has no authority to use any funds to pay a judgment; all of its funds are "cash funds" subject to control of the State. Where funds are restricted in their use, despite not being held within the Treasury, they are subject to audit and budget planning, and thus any award that delves into those funds directly interferes with the State's fiscal autonomy. *See Maryland Stadium Auth. v. Ellerbe Becket Inc.*, 407 F.3d 255, 264 (4th Cir. 2005). Cash funds, by definition, are "revenues of the state to be used as required and to be expended only for such purposes and in such manner as determined by law". Ark. Code Ann. § 19-6-103 (2007). ASLA's funds are cash funds and thus funds of the State, therefore this Court finds that the State of Arkansas would be responsible for a judgment entered against ASLA.

The second factor in the arm-of-the-state analysis inquires into the degree of autonomy exercised by the entity, including such circumstance 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*, 681 F.3d at 580. This factor focuses on the State's authorization and control of the entity's operations and less on the nature of the entity's operations. *Hoover*, 535 F.3d at 306. Each of the Defendants have directors appointed by the governor of their respective states, "[t]here can be no doubt that in this way the State, through its top officials, retains ultimate veto power over the actions of the Board . . ." *Id.* at 307. (stating that the all members of the board being elected by the Governor weighs in favor of second prong).

Defendant PHEAA's Board of Directors is comprised of elected officials, members elected by the Governor, and a few independent members, this, among other things, demonstrates an inherent veto power that the Commonwealth of Pennsylvania has over PHEAA. Further, despite PHEAA's limited ability to contract with third parties, be sued and sue in its own name, acquire and dispose of property and borrow money with approval—it remains primarily controlled by, and closely tied to, the Commonwealth. PHEAA is subject to various forms of oversight by the Commonwealth of Pennsylvania, and operational independence alone does not negate state control over an entities function.

PHEEA's funding is derived partially through its servicing activities and partially through appropriations, but all of its funds are subject to state control. PHEAA must obtain approval from the State Treasurer prior to the disbursement of funds, the Attorney General approves all legal transactions and litigation, the Auditor General may audit PHEAA's activities, and PHEAA makes annual reports to the Commonwealth. The assertion that PHEAA is akin to a private corporation is negated by these facts. Further, while PHEAA is funded partially through its servicing activities this fact alone does not preclude a finding that PHEAA is an arm of the Commonwealth of Pennsylvania. Therefore, PHEAA is subject to a sufficient amount of control by the Commonwealth of Pennsylvania.

Defendant VSAC is designated as a state agency and an instrumentality of the State by statute, this language clearly designates state ownership and control. The State maintains control through eight of eleven board members, all of which are elected Vermont officials or appointees of the Governor of Vermont. VSAC must file reports every two-years regarding its activities, submit annual reports to legislative officials on the financial status of the Vermont Higher Education Investment Plan, and the State may change or terminate VSAC at any time. VSAC is subject to state control to perform its most basic function, in order to issue debt obligations VSAC must first obtain the approval of the Governor. VSAC has made a sufficient showing of a lack of autonomy and control by the state of Vermont.

As to Defendant KHESLC, the Commonwealth of Kentucky maintains a presence within KHESLC through the ten members of the Board of Directors elected by the Governor of Kentucky. The

Commonwealth of Kentucky also limits KHESLC's autonomy by requiring approval of certain bonds before issue, monitoring KHESLC's use of funds, and requiring submittal of an annual report and audit to various government officials. KHESLC must submit all personal services contracts to the Kentucky General Assembly for review, and must receive approval from the Government Contract Review Committee of the Legislative Research Commission before entering into certain contracts. *See* Ky. Rev. Stat. § 45A.695, 45A.690, 45A.705 (West 2006). For these reasons, this Court finds that KHESLC is not an autonomous entity, and is subject to sufficient control by the Commonwealth of Kentucky.

Defendant ASLA's seven directors are each appointed by the Governor, ASLA was established by action of the Governor, and it functions under appropriations made by the General Assembly. The State of Arkansas also controls ASLA's actions through various required approvals that amount to veto powers. ASLA's powers and autonomy are limited by statute and confined to its Arkansas-specific educational mission. ASLA has some discretion over its operations, but the State is an ever present manager of ASLA's primary activity. In addition, ASLA, as a state agency of Arkansas, is subject to heavy restrictions on the use of its funds; its revenues are subject to state appropriation and oversight. Thus, this Court finds that ASLA is subjected to the control of the State of Arkansas.

We now turn to the third factor of the arm-of-the-state analysis, which considers whether the entity is involved with state concerns as distinct from non-state concerns, including local concerns. *Oberg*, 681 F.3d at 580. This factor examines whether the entity "deals with local rather than statewide concerns", an entity's involvement with local concerns weighs against an entity being an arm-of-the-state. *Kitchen v. Upshaw*, 286 F.3d 179, 184 (4th Cir. 2002). Further, the Fourth Circuit has recognized that, "[h]igher education is an area of quintessential state concern and a traditional state governmental function." *Md. Stadium Auth. v. Ellerbe Becket Inc.*, 407 F. 3d 255, 265 (4th Cir. 2005). Each Defendant is involved with serving the needs of their respective states by performing the government function of creating higher educational opportunities through financing. Moreover, "[t]he absence of the power to tax is a strong indication that an entity is more like an arm-of-the-state than like a county or city, because that enablement gives an entity an important kind of independence." *Maryland Stadium Auth. v. Ellerbe Becket Inc.*, 407 F.3d 255, 264 (4th Cir. 2005) (quoting *Kashani v. Purdue Univ.*, 813 F.2d 843, 846 (7th Cir. 1987)) (internal quotations omitted). None of the Defendants have the power to tax.

Defendant PHEAA is primarily concerned with financing the higher education of the citizens of Pennsylvania. It was created to serve its function on a state-wide level. While some of PHEAA's services may extend to those citizens of Pennsylvania wishing to travel to another state in order to receive their education, or to citizens of other states in an ancillary capacity, these facts do not preclude a finding that PHEAA is involved primarily with the concerns of the Commonwealth of Pennsylvania, as opposed to local concerns. Moreover, revenues derived from PHEAA's activities outside of Pennsylvania generate additional financial aid for the citizens of Pennsylvania. Therefore, this court finds that PHEAA is involved with state concerns.

Defendant VSAC operates a statewide higher education lending program. Specifically established "to provide opportunities for persons who are residents of Vermont to attend colleges or other postsecondary education institutions by awarding grants, guaranteeing, making, financing, and servicing loans of funds to students . . .", there can be no doubt as to VSAC's statewide focus. Vt. Stat. Ann. tit. 16, § 2821 (2004). VSAC does not discriminate based on choice of school, thus it finances loans out of state for Vermont residents as well as in state for Vermont citizens and others choosing to attend school in Vermont. Nonetheless, it is clear that VSAC is focused on statewide concerns.

Defendant KHESLC was created by the General Assembly of Kentucky because "providing higher education assistance to needy, qualified students is in the best interest of the Commonwealth and constitutes the implementation of a public purpose of statewide import of the Commonwealth." Ky. Rev. Stat. Ann. §§ 164A.010 (West 2006). This primary purpose is not negated BY KHESLC's limited lending activity outside of the State, for the same reason it does not affect each of the other Defendants satisfaction of this factor. This court finds that KHESLC is involved with state concerns.

Defendant ASLA was created by the state of Arkansas as the instrumentality of the State charged with the responsibility of providing educational opportunities to citizens of Arkansas. Ark. Code Ann.

§ 6-81-102 (2007). In doing so, ASLA does not focus on any particular locality but instead serves the State of Arkansas as a whole. As an instrumentality of the State, ASLA is funded and regulated by the state of Arkansas. ASLA is involved with state concerns.

Lastly, we consider 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. *Oberg*, 681 F.3d at 580. As to this factor this Court considers "the relevant state statutes, regulations, and constitutional provisions which characterize the entity, and the holdings of the state courts on the question." *Md. Stadium Auth.*, 407 F.3d at 265 (citations omitted).

As to Defendant PHEAA, Pennsylvania's Commonwealth Court, which has original jurisdiction of only those disputes in which the Commonwealth or its officers are a party, has included PHEAA in the definition of the "Commonwealth" for purposes of the Court's original jurisdiction and the Commonwealth's sovereign immunity. *Richmond v. PHEAA*, 297 A.2d 544, 546-47 (Pa. Commw. Ct. 1972); 42 Pa. C.S.A. § 761 (2012). PHEAA is considered a state agency" by the court. *Id.* Additionally, Pennsylvania state courts have concluded that PHEAA is an agency of the Commonwealth of Pennsylvania. *See, e.g., PHEAA v. Barksdale*, 449 A.2d 688, 689 (Pa. Super. Ct. 1982); *PHEAA v. Reid*, 15 Pa. D.& C.3d at 665-66.

Moreover, Pennsylvania statutes delegate to PHEAA the task of performing an essential government function in serving the people of Pennsylvania. 24 Pa. Stat. Ann. § 5105.6 (2006). The entities exemption from a variety of taxes further demonstrates its alter ego status. *Id.* § 5107; § 5105.6. PHEAA is also empowered with the ability to enact regulations that have binding force within the Commonwealth of Pennsylvania. *See* 24 Pa. Stat. Ann. 5104(6) (2006). The treatment of PHEAA by Pennsylvania courts, combined with the extensive legislation enacted to regulate the entity, establishes PHEAA's state agency status.

Defendant VSAC is designated as a state agency and instrumentality of the State, by statute. Its authority to borrow money and issue debt is limited to furthering its governmental and public purpose." In addition, VSAC is provided various tax exemptions by the State of Vermont, including exemptions on real and personal property, bonds, notes and other obligations. Vt. Stat. Ann. tit. 16, § 2825 (2004). No court in Vermont has had occasion to address VSAC's status as an agency of the State. However, as previously discussed there is a significant amount of Vermont legislation governing VSAC's operations, and the agency is treated as an entity of the State.

Defendant KHESLC is a political subdivision of the Commonwealth of Kentucky. The Commonwealth's statutes previously discussed were enacted to establish and operate KHESLC as an agency of the State. KHESLC is subject to various forms of oversight and regulation by the Commonwealth of Kentucky, as discussed above, indicating a close relationship with the State. While Kentucky courts have not had occasion to declare KHESLC a state agency per se, the Kentucky Court of Appeals has found that the Kentucky Housing

Corporation, another state created independent de jure municipal corporation and political subdivision of Kentucky, is a "state agency" investor. *Samuel T. Issac & Assocs., Inc. v. Federal Nat'l Mortg. Ass'n*, 647 S.W.2d 495, 497 (Ky. Ct. App. 1982). This implies that Kentucky Courts consider such entities as state agencies. Based on KHESLC's status as a state created entity, and the numerous Kentucky statutes regulating KHESLC, this court concludes that the Commonwealth of Kentucky treats KHESLC as a state agency.

As for Defendant ASLA, the Arkansas Supreme Court has held the ASLA "is a state agency created by Act 873 of the 1977 Acts of Arkansas." *Turner v. Woodruff*, 689 S.W.2d 527, 528 (Ark. Sup. Ct. 1985). State statutes charge ASLA with the governmental responsibility of providing educational opportunities. Ark. Code Ann§ 6-81-102(d) (2007). ASLA's status as a state agency allows it to promulgate regulations. *Id.* §§ 104, 102(e)(1). Moreover, the Attorney General of Arkansas defends ASLA in this matter, as well as other matters, representing the fact that ASLA is distinctly a part of the State of Arkansas' Government and is defended by its attorney as a result. ASLA is also subject to the Arkansas Freedom of Information Act, along with other state agencies. Ark. Code Ann. § 25-19-101, *et seq*. ASLA is treated as a state agency by the State of Arkansas.

For the aforementioned reasons this Court finds that each Defendant is an arm of each of their respective states. Accordingly, each Defendant is not a person who may be sued by a qui tam relator, Plaintiff in this action, under the False Claims Act.

Plaintiff has therefore not stated a claim upon which relief can be granted against any of the Defendants, and Defendants Motions to Dismiss should be granted.

s/____________________________
Claude M. Hilton
United States District Judge

Alexandria, Virginia
December 5, 2012

Appendix E

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 10-2320

UNITED STATES OF AMERICA
ex rel. JON H. OBERG,

Plaintiff-Appellant,

v.

KENTUCKY HIGHER EDUCATION STUDENT LOAN CORPORATION; PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY; VERMONT STUDENT ASSISTANCE CORPORATION; ARKANSAS STUDENT LOAN AUTHORITY,

Defendants-Appellees,

and

NELNET, INC.; SLM CORPORATION; PANHANDLE PLAINS HIGHER EDUCATION AUTHORITY; EDUCATION LOANS INC/SD; SOUTHWEST STUDENT SERVICES CORPORATION; BRAZOS HIGHER EDUCATION SERVICE CORPORATION; BRAZOS HIGHER EDUCATION AUTHORITY, INC.; NELNET EDUCATION LOAN FUNDING, INC.; PANHANDLE-PLAINS MANAGEMENT AND SERVICING CORPORATION; STUDENT LOAN FINANCE CORPORATION; BRAZOS GROUP,

Defendants.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
John F. Anderson, Magistrate Judge.
No. 1:07-cv-00960-CMH-JFA

Argued: May 17, 2012
Decided: June 18, 2012

Before TRAXLER, Chief Judge,
and MOTZ and KEENAN, Circuit Judges.

Vacated and remanded by published opinion. Judge Motz wrote the opinion, in which Chief Judge Traxler and Judge Keenan joined.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

In this False Claims Act case, relator Dr. Jon Oberg, on behalf of the United States, brought a *qui tam* action alleging that appellees—corporations organized by four states, Kentucky, Pennsylvania, Vermont, and Arkansas—defrauded the United States Department of Education. The district court granted appellees' motions to dismiss on the ground that they were "state agencies" and therefore not subject to suit under the False Claims Act as interpreted in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 787-88 (2000). For the reasons that follow, we vacate and remand for further proceedings consistent with this opinion.

I.

On behalf of the United States, Dr. Oberg sued the Kentucky Higher Education Student Loan Corporation, Pennsylvania Higher Education Assistance Agency, Vermont Student Assistance Corporation, and Arkansas Student Loan Authority (collectively "appellees"), as well as other defendants not parties to this appeal, under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729 *et seq*. Appellees are corporate entities created by their respective states to improve the availability of higher educational opportunities by financing, making, and/or guaranteeing student loans. Each appellee operates with varying degrees of control by and support from its respective sponsoring state.

In his complaint, Dr. Oberg asserts that appellees knowingly made fraudulent claims to the United States Department of Education by engaging in various non-economic transactions to inflate their loan portfolios eligible for Special Allowance Payments ("SAP"), a federal student loan interest subsidy. As a result, according to Dr. Oberg, the Department of Education overpaid millions of dollars of SAP to appellees.

Each appellee moved to dismiss Dr. Oberg's complaint contending that it was a "state agency" and thus, under *Stevens*, 529 U.S. at 787-88, was not a "person" that could be sued under the FCA. The district court agreed and dismissed Dr. Oberg's complaint with regard to all four appellees. In so holding, the court did not apply any stated legal test. Instead, the court primarily looked to state statutory provisions, which, in its view, demonstrated each entity's status as a "state agency."

Dr. Oberg noted a timely appeal. We review de novo a dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6). *Robinson v. Am. Honda Motor Co.*, 551 F.3d 218, 222 (4th Cir. 2009).

II.

This appeal presents the question of whether each of the appellees—various state-created corporate entities intended to facilitate the issuance of student loans—constitutes a "person" subject to liability under the FCA. The FCA provides a cause of action against "any person" who undertakes certain fraudulent behavior, including "knowingly present[ing], or caus[ing] to be presented, a false or fraudulent claim for payment or approval" to an officer, employee, or agent of the United States. 31 U.S.C. § 3729(a)(1)(A). The relevant provisions of the FCA do not define the term "person." The Supreme Court, however, has provided helpful guidance on this question.

In *Stevens*, the Court held that "the False Claims Act does not subject a State (or state agency) to liability." 529 U.S. at 787-88. To arrive at this conclusion, the Court applied the "longstanding interpretive presumption that 'person' does not include the sovereign." *Id.* at 780. The Court reasoned that the "various features of the FCA . . . far from providing the requisite affirmative indications that the term 'person' included States for purposes of *qui tam* liability, indicate quite the contrary." *Id.* at 787. Accordingly, the Court concluded that the Vermont Agency of Natural Resources, a state agency, could not be sued under the FCA.

In explaining its holding, the *Stevens* Court also noted that "the presumption with regard to corporations is just the opposite of the one governing here," *i.e.*, corporations "are presumptively *covered* by the term 'person.'" *Id.* at 782. Three years later, in *Cook County v. United States ex rel. Chandler*, the

Court applied this presumption to a municipal corporation. 538 U.S. 119 (2003). There, the Court expressly held that, unlike states and state agencies, municipal corporations are "persons" subject to *qui tam* suits under the FCA. *Id.* at 125. The *Chandler* Court noted, as it had in *Stevens*, that the term "person" historically extended to municipal and private corporations. *Id.* at 125-26. The Court explained that, at the time of the FCA's enactment, "municipal corporations and private ones were simply two species of 'body politic and corporate,' treated alike in terms of their legal status as persons capable of suing and being sued." *Id.* at 126. As a result, the Court held that Cook County, as a municipal corporation, was a "person" subject to suit under the FCA.

From these two cases, the parties arrive at very different conclusions about how to determine whether each appellee is a proper FCA defendant. Relying heavily on *Chandler*, Dr. *Oberg* initially argues that any corporation, regardless of its association with a state, is "a legal personality independent of 'the State'" and so presumptively a "person" for purposes of the FCA. Appellant's Br. at 24-25. Because each appellee is a corporation, Dr. Oberg maintains that each is a proper FCA defendant. Such a broad rule—rendering every corporation, no matter how close its relationship to a state, a "person" for FCA purposes—appears inconsistent with *Stevens*' express holding that the term "person" in the FCA does *not* include any state or state agency. 529 U.S. at 787-88.

For their part, appellees contend that, under *Stevens*, they are not proper FCA defendants because they are state agencies, treated as such by their respective state legislative and judicial branches. Appellees maintain that *Chandler* "concluded only that local governments, unlike States and State agencies, are persons under the FCA" and because they are not local government entities, *Chandler* does not apply to them. Appellees' Br. at 7. But nothing in *Stevens* suggests that the fact that a state legislature or a state court labels a corporation a state agency immunizes that corporation from suit under the FCA. Nor is *Chandler* as narrow as appellees suggest. Although a municipal corporation was sued there, the Court's discussion of the personhood of corporations makes clear the historical significance of corporate status. *See Chandler*, 538 U.S. at 125-26.

Thus, at least initially, each side attempts to over-simplify the question at hand. To determine if appellees are subject to suit under the FCA, the critical inquiry is neither whether they are corporations with "independent legal personalities" (a phrase that appears nowhere in *Stevens* or *Chandler*), as Dr. Oberg maintains, nor whether they have been denominated "state agencies" by legislatures or courts, as appellees appear to contend. Rather the critical inquiry is whether appellees are truly subject to sufficient state control to render them a part of the state, and not a "person," for FCA purposes. Accordingly, we turn to that inquiry.

III.

Several of our sister circuits have recognized that the arm-of-the-state analysis used in the Eleventh Amendment context provides the appropriate legal framework for this inquiry. *See, e.g.*, *Stoner v. Santa*

Clara Cnty. Office of Educ., 502 F.3d 1116, 1121-22 (9th Cir. 2007); *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 718 (10th Cir. 2006); *United States ex rel. Adrian v. Regents of Univ. of Cal.*, 363 F.3d 398, 401-02 (5th Cir. 2004).[1]

This is so because, although the question of whether an entity is a proper FCA defendant is one of statutory rather than constitutional interpretation, there is a "virtual coincidence of scope" between the statutory inquiry under the FCA and the Eleventh Amendment sovereign immunity inquiry. *Stevens*, 529 U.S. at 780; *see also Stoner*, 502 F.3d at 1121 (recognizing that the *Stevens* analysis "was driven by canons of statutory construction relating to protection of the state's sovereign immunity"). Indeed, "*Stevens* teaches that . . . Eleventh Amendment case law should guide our determination of whether an entity is a state agency and thus not a 'person' for purposes of [the FCA]." *Stoner*, 502 F.3d at 1121. Hence, a court should employ the Eleventh Amendment arm-of-the-state analysis in determining if an entity is properly regarded as the state or an agency of the state and so not subject to suit under the FCA.[2]

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[1] We have used the arm-of-the-state analysis in other contexts, like diversity cases, *see, e.g.*, *S.C. Dep't of Disabilities & Special Needs v. Hoover Universal, Inc.*, 535 F.3d 300 (4th Cir. 2008), but have not previously had occasion to consider whether it is appropriate in the FCA context. Accordingly, that the district court did not use this analysis in its consideration of the parties' arguments is unsurprising.

[2] Each party makes an alternative argument that, if the arm-of-the-state analysis applies, it prevails. Appellees, however, also suggest that the application of this analysis might produce

In applying the arm-of-the-state analysis, we consider 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.

Hoover Universal, 535 F.3d at 303 (internal quotation marks and alterations omitted); *see Cash v. Granville Cnty. Bd. of Educ.*, 242 F.3d 219, 224 (4th Cir. 2001); *Ram Ditta v. Md. Nat'l Capital Park & Planning*

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results incompatible with the *Chandler* holding that local governments are "persons" under the FCA, citing district court cases holding local government units entitled to sovereign immunity. Appellees' Br. at 36. We think this concern is unfounded. We have confidence in the ability of the district courts to apply *Chandler* appropriately to local governments, especially given that the Eleventh Amendment itself also distinguishes between states and municipal corporations. *See, e.g.*, *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977).

Comm'n, 822 F.2d 456, 457-59 (4th Cir. 1987).[3] These factors endeavor to draw the line between "a State-created entity functioning independently of the State from a State-created entity functioning as an arm of the State or its alter ego." *Hoover Universal*, 535 F.3d at 303.

The same questions must be considered here in order to determine if any of the appellees is properly subject to liability under the FCA. If an appellee functions as an arm of the state, *Stevens* dictates that it is not a "person" under the FCA and, therefore, not subject to FCA liability. If, on the other hand, an appellee functions independently of the state, it is subject to suit under the FCA.[4]

Because the district court did not employ this arm-of-the-state analysis in determining whether each of the appellees is a state agency subject to suit under the FCA, we vacate its judgment and remand the case for the court to apply this analysis in the first instance.

VACATED AND REMANDED

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[3] We note that although in the past we have referred to the first factor as "the most important consideration," *Ram Ditta*, 822 F.2d at 457, more recent Supreme Court precedent suggests that the first factor does not deserve such preeminence, *see, e.g., Fed. Maritime Comm'n v. S.C. Ports Auth.*, 535 U.S. 743, 765 (2002).

[4] We leave it to the discretion of the district court to determine whether some discovery is necessary to resolve this question with respect to one or more of the appellees.

Appendix F

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

No. 1:07-cv-00960

UNITED STATES OF AMERICA
ex rel. JON H. OBERG,
Plaintiff,
v.
NELNET, INC., et al.,
Defendants.

Filed: December 1, 2009

ORDER

This matter comes before the Court on Defendants' Motions to Dismiss and Motions to Sever and Dismiss or, in the alternative, to Transfer Venue. Plaintiff has brought a qui tam action against the Defendants alleging violations of the Federal False Claims Act, 31 U.S.C. § 3729, *et seq*. All Defendants in this case move to dismiss for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)6.

In the First Amended Complaint, Plaintiff pleads, in general terms, the improper transfer of funds out of Defendants' 9.5% Special Allowance Payment (SAP) portfolios. Plaintiff alleges that Defendants used pre-October 1, 1993 tax-exempt bond proceeds to unlawfully make or buy additional loans that are guaranteed the minimum 9.5% yield. While Plaintiff does plead such a scheme in a generalized manner, Plaintiff then makes particular allegations as to each Defendant regarding improper transfers which increased their 9.5% SAP portfolio. As such, there are sufficient allegations to state a claim on which recovery may be had.

In addition, several Defendants argue that jurisdiction and venue are improper in this Court and that Plaintiff does not allege any basis to join the Defendants. Section 3732(a) of the False Claims Act provides that, "[a]ny action under section 3730 may be brought in any judicial district in which the defendant, or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred . . ." 31 U.S.C. § 3732(a) (2009). Congress enacted Section 3732(a) to minimize the costs associated with trying "multiple suits involving the same scheme or pattern or fraudulent conduct against each defendant" in multiple districts. *See* S. Rep. No. 99-345, at 32 (1986). One of the Defendants named in this action resides in this district. Therefore, venue is proper in this Court. Also, under Rule 20 of the Federal Rules of Civil Procedure, jurisdiction and venue are proper in this Court because Plaintiff alleges issues "of law or fact common to all defendants [that] will arise in the action." Fed. R. Civ. P. 20(a)(2)(B).

There are four Defendants, Kentucky Higher Education Student Loan Corporation, Pennsylvania Higher Education Assistance Agency, Vermont Student Assistance Corporation, and the Arkansas Student Loan Authority, who claim to be state agencies, and therefore not liable under the False Claims Act. These state agency Defendants cite *Vermont Agency of Natural Res. v. United States ex. rel. Stevens*, 529 U.S. 765 (2000), for the proposition that an agency of the state is not a "person" who may be sued by a qui tam relator under the False Claims Act.

Defendant Kentucky Higher Education Student Loan Corporation (KHELSC) was established by Act of the Kentucky General Assembly in 1978 as a public, non-profit "independent de jure municipal corporation and political subdivision of the Commonwealth of Kentucky." KRS § 164A.020–050 (2009). It was created as a "body corporate and politic to act as a financing agency" to perform "essential governmental and public functions" of the State in improving and otherwise promoting the availability of higher educational opportunities for the people of the Commonwealth of Kentucky through a program of financing, making, and purchasing of insured student loans. *Id. See also* KRS § 164A.010 (2009). KHESLC was established to carry out the public purpose and legislative intent of the General Assembly of the Commonwealth of Kentucky, "that the attainment by every citizen of his or her educational goals will inure to the general welfare, well-being, and productivity of the Commonwealth." KRS § 164A.010(1).

By statute, KHESLC is governed by a 15-member Board of Directors, ten of whom are appointed by the Governor of Kentucky. The Governor of Kentucky maintains the power to remove, for cause, any such director. In addition, several state officials, including the President of the council on Postsecondary

Education, the Secretary of the Finance and Administration Cabinet, the Secretary of Education and the State Treasurer of the Commonwealth of Kentucky serve as ex officio voting members of KHESLC. *See* KRS § 164A.050. As an instrumentality of Kentucky, KHESLC must obtain General Assembly approval prior to issuing bonds, under certain circumstances. *See* KRS § 164A.080 (2009). It is an "agency authorized to issue bonds," and is accountable to the State for "all money received and disbursed during each fiscal year." As such, KHESLC must submit an annual report and audit of its expenditures and investments to the State Governor, General Assembly, and to the Secretary of the Finance and Administration Cabinet. *See* KRS § 164A.170; KRS § 42.545 and KRS § 45A.840(3). The statute provisions are conclusive that KHESLC is a state agency and therefore not an actionable defendant under the False Claims Act.

Defendant Pennsylvania Higher Education Assistance Agency (PHEAA) is an agency of the Commonwealth, established by the Pennsylvania General Assembly on August 7, 1963. *See* 24 P.S. §§ 5101 *et seq.* Under these provisions, PHEAA is designated as a "public corporation and government instrumentality." 24 P.S. § 5101 (2009). By statute, it is governed and controlled by a 20-person bipartisan board of directors, every member of which is either a current elected Commonwealth official or an appointee of the Governor of Pennsylvania. 24 P.S. § 5103 (2009).

PHEAA's enabling statute provides that "creation of the agency is in all respects for the benefit of the people of the Commonwealth, for the improvement of their health and welfare, and for the promotion of the economy, and that such purposes are public purposes and the agency will be performing an essential governmental function." 24 P.S. § 5105.6 (2009). The Commonwealth's Auditor General has authority to audit PHEAA's books at any time and reviews the working papers generated by its private auditing firm annually. 24 P.S. §§ 5104(1.1) & 5108 (2009). At the end of the fiscal year, PHEAA must make an annual report of its activities to the Governor and the Legislature, showing its condition at the end of that year. 24 P.S. § 5108. Pursuant to Pennsylvania statute, funds received by PHEAA are deposited into the Educational Loan Assistance Fund, which is a fund within the Commonwealth Treasury. 24 P.S. § 5105.10 (2009). Its financial activities are subject to substantial Commonwealth control. PHEAA cannot incur debt to finance loan activities without the Governor's approval. 24 P.S. §§ 5104(3), § 5105.1(a) (2009).

Pennsylvania's Commonwealth Court, which has original jurisdiction of only those disputes in which the Commonwealth or its officers are a party,[1] included PHEAA in the definition of the "Commonwealth" for purposes of the Court's original jurisdiction and the Commonwealth's sovereign immunity. *Richmond v. PHEAA*, 297 A.2d 544, 546-47 (Pa. Commw. Ct. 1972). In addition, Pennsylvania state courts and federal courts have found PHEAA to be an agency or a state actor of the Commonwealth of Pennsylvania. *See, eg., PHEAA v. Barksdale*, 449 A.2d

[1] *See* 42 Pa. C.S. § 761 (2009); PA. R.A.P. 106 (2009).

688, 689 (Pa. Super. Ct. 1982). *See also Vera v. PHEAA*, No. 1:09-CV-341 (Slip Op.). PHEAA's status is a state agency, and thus, not a proper defendant in this action.

Defendant Vermont Student Assistance Corporation (VSAC) was created by the state of Vermont in 1965 as a public nonprofit corporation to help residents of Vermont plan and pay for education or training beyond high school. *See* Vt. Stat. Ann. Tit. 16 § 2821 (2009). VSAC was established by the Vermont legislature as "the state agency to receive federal funds assigned to the state of Vermont for student financial aid programs." Vt. Stat. Ann. Tit. 16 § 2823 (c) (2009). The statute expressly provides that VSAC is "an instrumentality of the state." *Id.* at § 2823(a).

With respect to lending activities in particular, VSAC is authorized only to "make and finance the making of educational loans and to issue its debt obligations for the purpose of acquiring funds therefore," and that "no resolution or other action" providing for the issuance of such debt "may be effective without the approval in writing of the governor." *Id.* at 2823. Vermont statute further provides that net earnings of VSAC "shall not inure to the benefit of any person other than the state." *Id.* § 2821(b). Defendant VSAC is an agency of the state of Vermont and therefore not a proper defendant in this action.

Defendant Arkansas Student Loan Authority (ASLA) is an authority created by proclamation of the Governor of Arkansas. The State of Arkansas by statute empowered the Governor of the State, by proclamation, to establish the Arkansas Student Loan Authority. The Arkansas General Assembly authorized ASLA's creation either as a state authority or as a non-profit corporation. Ark. Code Ann. § 6-81-103(a) (2009). Pursuant to this authority, then-Governor David Pryor established ASLA by proclamation as a state agency in 1977. Ark. Code Ann. § 6-81-102(a) (2009). Once established, state statute provides that the Defendant is "a public body politic and corporate," and "shall be the instrumentality of the state charged with a portion of the responsibility of the state to provide educational opportunities . . . ." Ark. Code Ann. § 6-81-102(d).

ASLA's powers and autonomy are limited by statute and confined to its Arkansas-specific educational mission. It is a "state agency" as defined by Arkansas statute. Ark. Code Ann. § 19-4-801(2)(A) (2009) ("'State agency' means all boards, commissions, . . . and any other office or unit of government of the State of Arkansas created or established pursuant to law or pursuant to any action of the Governor, functioning under appropriation made by the General Assembly . . ."). ASLA was established by action of the Governor, it functions under appropriation made by the General Assembly, and its funds are state funds of Arkansas. The Arkansas Supreme Court has held the ASLA "is a state agency created by Act 873 of the 1977 Acts of Arkansas." *Turner v. Woodruff*, 689 S.W.2d 527, 528 (Ark. Sup. Ct. 1985). The Arkansas Student Loan Authority is a state agency and cannot be sued by a *qui tam* relator in this action.

For the above reasons, it is hereby ORDERED that Defendants' Motions to Dismiss, Sever or

Transfer are DENIED except as to the state agency defendants and it is further ORDERED that Defendants Kentucky Higher Education Student Loan Corporation, Pennsylvania Higher Education Assistance Agency, Vermont Student Assistance Corporation, and Arkansas Student Loan Authority are dismissed from this action.

s/

Claude M. Hilton
United States District Judge

Alexandria, Virginia
December 1, 2009

Appendix G

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-1093

UNITED STATES ex rel. JON H. OBERG,

Plaintiff-Appellant,

v.

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY,

Defendant-Appellee,

and

NELNET, INC.; KENTUCKY HIGHER EDUCATION STUDENT LOAN CORP.; SLM CORPORATION; PANHANDLE PLAINS HIGHER EDUCATION AUTHORITY; BRAZOS GROUP; ARKANSAS STUDENT LOAN AUTHORITY; EDUCATION LOANS INC/SD; SOUTHWEST STUDENT SERVICES CORPORATION; BRAZOS HIGHER EDUCATION SERVICE CORPORATION; BRAZOS HIGHER EDUCATION AUTHORITY, INC.; NELNET EDUCATION LOAN FUNDING, INC.; PANHANDLE-PLAINS MANAGEMENT AND SERVICING CORPORATION; STUDENT LOAN FINANCE CORPORATION; EDUCATION LOANS INC.; VERMONT STUDENT ASSISTANCE CORPORATION,

Defendants.

Filed: November 17, 2015

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

s/Patricia S. Conner, Clerk

Appendix H

U.S. Const. amend. XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

31 U.S.C. §3729
False claims

(a) Liability for Certain Acts.—

(1) In general.—Subject to paragraph (2), any person who—

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410 [1]), plus 3 times the amount of damages which the Government sustains because of the act of that person.

(2) Reduced damages.—If the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

(3) Costs of civil actions.—A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Definitions.—For purposes of this section—

(1) the terms "knowing" and "knowingly"—

(A) mean that a person, with respect to information—

(i) has actual knowledge of the information

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud;

(2) the term "claim"—

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government—

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

(3) the term “obligation” means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term "material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(c) Exemption From Disclosure.—Any information furnished pursuant to subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

(d) Exclusion.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.