NOS. 15-1044, 15-1045

In the
Supreme Court of the United States

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

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY,
Petitioner,
v.
LEE PELE,
Respondent.

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF

When it comes to the federal government's own immunity, it demands clear lines that ensure that an immunity from litigation does not require costly litigation to vindicate. When it comes to the immunity of the sovereign States, the federal government appears far more tolerant of conflicting and confusing tests that make a state agency's sovereign status a guessing game. The government's *amicus* brief attempts to minimize the confusion in the circuits while conceding that the same state agency treated as immune by the D.C. Circuit was recently held non-immune by the First Circuit. The conflict and confusion in the circuits are real.

Moreover, nothing in the government's submission denies the clear split of authority between the federal judges in Richmond and the state officials in Harrisburg. Those state officials see a state-level agency discharging state functions (including disbursing hundreds of millions of dollars annually to Pennsylvania students) from an office in the state capital staffed with state workers. To them, the issue is not even close. The federal judges and now the federal government view that same reality through the lens of a four-factor test that produces nothing but confusion. The state officials plainly seem to have the clearer view and the better argument, but if they are wrong, they at least deserve a test clear enough for them to return PHEAA to the fold of state agencies. As reflected by the remarkable array of *amici* supporting certiorari—including the Pennsylvania Legislature, the Pennsylvania Treasurer, the Pennsylvania state

employees' union, Pennsylvania universities and colleges, eleven other States, and even litigants *opposed* to PHEAA on the merits—the decision below demeans Pennsylvania's dignity, threatens Pennsylvania's treasury, imperils Pennsylvanians' higher-education opportunities, and plainly warrants the Court's review.

I. The Circuits Are In Conflict.

Courts, commentators, and a host of disparate *amici* agree that the arm-of-the-state doctrine is a muddled mess. The government grudgingly acknowledges that "different circuits have articulated their multi-factor tests in different ways," but nevertheless insists that these tests are "generally" consistent, and each circuit weighs "essentially" the same considerations. US.Br.9, 17. Given that all the circuits have been forced to fashion their tests from the same few precedents of this Court addressing multi-state and local entities, a trace of family resemblance is to be expected, but the split is real. Circuits have come to the opposite conclusion about the same state agency and place materially different weight on various factors, including, critically here, state treatment of the agency. Nor is this an area where circuit confusion and imprecise tests are tolerable. When it comes to its own immunity, the federal government is the first to insist that the rules of sovereign immunity must be clear at the outset, and that an immunity that requires contentious litigation to establish is no immunity at all. *See, e.g.*, Br. of United States as *Amicus Curiae*, *Powerex Corp. v. Reliant Energy Servs.* at 18 n.11, No. 05-85 (Nov. 14, 2006) (noting the "important protection" provided

to "federal agencies" of "securing dismissal from the case on immunity grounds at the outset").

In truth, the government's attempts to reconcile the cases only underscore their incoherence. For example, the government insists that nothing is amiss in the Second Circuit because its "two-factor and six-factor tests have much in common," and "the two-factor test incorporates four factors from the six-factor test." US.Br.17. Similarly, the government explains that the Third Circuit, which believes it has a three-factor test, in fact "synthesizes what had previously been described as nine factors and is largely the same as the four-factor test" applied below. *Id.* Something has gone terribly wrong when circuits cannot keep track of how many factors their own tests feature.

The government notes that the circuits' varying tests depend in varying degrees on *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), which the government claims "provides guidance for determining arm-of-the-state status whether the instrumentality in question is a multistate entity, a local subdivision, or a state-created public corporation." US.Br.12-13. But *Hess* itself never purported to provide such broad guidance. Indeed, much of the opinion was spent *distinguishing* Compact Clause entities from more typical statewide agencies. *See, e.g.*, 513 U.S. at 42 ("[T]here is good reason not to amalgamate Compact Clause entities

with agencies of 'one of the United States' for Eleventh Amendment purposes.").[1]

Moreover, the undeniable fact that lower courts have been forced to "rel[y] on the considerations set forth in *Hess*," US.Br.16, is at the heart of the lower courts' confusion. Multi-state agencies and local entities present special challenges for arm-of-the-state analysis and present distinct situations where the State's own assessment of sovereign status should carry less weight. Lower courts have struggled in applying guidance designed for outlier situations to core state agencies. That confusion has manifested itself in incoherent and inconsistent tests, conflicting treatment of the same state agency, insufficient deference to States, and in this case a denial of sovereign status to an entity everyone in Pennsylvania readily identifies as an arm of the Commonwealth.

The government is no more convincing when it denies that PHEAA would be considered an arm of Pennsylvania in other circuits. Regarding the First Circuit, the government parrots Oberg's observation that a state court determination of sovereign immunity "does not substitute for an independent analysis under the federal standard." US.Br.18. No one ever said it did. As PHEAA has explained, the ultimate question remains one of federal law; but in

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[1] Neither *Regents of the University of California v. Doe*, 519 U.S. 425 (1997), nor *Auer v. Robbins*, 519 U.S. 452 (1997), provided further clarity. *Regents* actually compounded the doctrinal confusion, *Pele.*Pet.24 n.7, and *Auer* relegated a belatedly-raised arm-of-the-state argument to a footnote, 519 U.S. at 456 n.1.

answering that federal question, the circuits plainly disagree over the weight that a State's own treatment of an entity should be given, with some according it significant weight and others barely considering it.

The government actually underscores the confusion in the circuits by highlighting the First Circuit's recent decision in *Grajales v. Puerto Rico Ports Authority*, 831 F.3d 11 (1st Cir. 2016). The First Circuit began that opinion by lamenting that "it is not always easy to tell" arm-of-the-state status, and "[d]isputes over classification thus frequently arise." *Id.* at 13. Then, as if to prove the point, the panel concluded that the Puerto Rico Ports Authority (PRPA) is *not* an arm of Puerto Rico, expressly disagreeing with the D.C. Circuit's conclusion in *Puerto Rico Ports Authority v. Federal Maritime Commission*, 531 F.3d 868 (D.C. Cir. 2008), that PRPA *is* an arm of Puerto Rico. That direct conflict concerning the status of the same entity should give the lie to any claim that the circuits are not divided. And the fact that the First Circuit denied immunity to PRPA applying a test that seems more favorable to immunity than the D.C. Circuit's test is proof positive that confusion reigns and clarity is needed.

The government tries to explain away that conflict by arguing that the First and D.C. Circuits did not disagree "in their understandings of federal sovereign-immunity principles." US.Br.20 n.6. But both the diametrically opposite results and the First Circuit tell a different story. There is no doubt that PRPA is immune in Washington and subject to suit in Boston, and the First Circuit acknowledged its

disagreement with the D.C. Circuit over the "proper approach to follow" in determining arm-of-the-state status. *Grajales*, 831 F.3d at 19.

Turning to the Eleventh Circuit, the government again insists that "federal law, not state law" determines arm-of-the-state status. US.Br.20-21. Once again, PHEAA has never disagreed. But given the emphasis the Eleventh Circuit places on state law in answering the federal question, *Oberg*.Pet.21, the government does not and cannot deny that PHEAA would be considered an arm of Pennsylvania there. Indeed, just last month, the Eleventh Circuit rejected a claim of immunity *solely* because "[t]he Alabama Supreme Court has previously declined to extend sovereign immunity" to the entity. *Melton v. Abston*, 841 F.3d 1207, 1234 (11th Cir. 2016). What is minimally relevant in one circuit is outcome-determinative in another.

Finally, like respondents, the government does not deny that three of the Sixth Circuit's four factors support PHEAA's arm-of-the-state status. And the government concedes that the remaining factor focuses on whether the state treasury would pay for a judgment in the *hypothetical* (and relevant) eventuality that the entity lacked sufficient funds—not, as in the Fourth Circuit, on the irrelevant predictive question "whether the state treasury will pay for the judgment in *that* case." US.Br.21.

In suggesting that difference would not be outcome-determinative here, the government grossly misinterprets Pennsylvania law and ignores the record. The provision the government cites is a disclaimer of Commonwealth responsibility for

PHEAA's *voluntarily-incurred, financing-related debt*, 24 P.S. §5104(3), not for involuntary debt resulting from adverse money judgments. When it comes to the latter, which is all that is relevant, the record is unequivocal that *Pennsylvania would pay*. The Chairman of the House Appropriations Committee testified that Pennsylvania "would have no choice but to appropriate money" to pay a potentially bankrupting judgment against PHEAA. There is no contrary evidence, and *amicus* briefs from the state Treasurer and Legislature confirm the point. *Oberg*.Reply.5-6.

The government suggests that the Court "might have difficulty" articulating a "streamlined and concrete test for arm-of-the-state status." US.Br.22. But we have greater confidence in this Court, which has proven more than capable of cutting through conflicting lower-court tests and arriving at a "single, more uniform interpretation" of federal law. *Hertz Corp. v. Friend*, 559 U.S. 77, 91 (2010).

II. The Decision Below Is Incorrect.

Under any coherent approach to the arm-of-the-state inquiry, this should be an easy case. PHEAA is not a local agency, a regional agency, or a multi-state compact. It is instead a Pennsylvania instrumentality based in the Pennsylvania capital, located down the street from other Pennsylvania state agencies, staffed by state workers subject to same state-government-wide collective bargaining agreement negotiated by the Governor, controlled by a board comprised of Pennsylvania officials, and inextricably intertwined with the Pennsylvania treasury. It is precisely because PHEAA is

indistinguishable from other state agencies that no one in Harrisburg has any difficulty identifying PHEAA as an arm of the Commonwealth, and why no one in Harrisburg understands why a federal court and the federal government fail to appreciate that the state agency furnishing millions of dollars in higher-education financial aid for Pennsylvanians is part and parcel of the sovereign government of Pennsylvania.

Nor has the federal government risen to the challenge of explaining to the good people of Harrisburg what precisely PHEAA is if not an arm of the Commonwealth. The Fourth Circuit ventured that PHEAA is a "political subdivision," but that is demonstrably wrong, *Oberg*.Reply.9-10, and the federal government does not defend that conclusion. But the federal government offers no alternative. In reality, PHEAA is not a political subdivision, nor a multi-state agency. It is not a private corporation or an NGO. PHEAA is the Pennsylvania state agency responsible for discharging core state functions related to higher education from the state capital through the hard work of state employees.

The government offers more of a description than a defense of the Fourth Circuit's analysis. Conceding that "PHEAA possesses many of the same powers as traditional state agencies and remains subject to many of the same limitations," the government nevertheless methodically works through the four-factor test, cherry-picking favorable, if marginal, facts along the way. US.Br.3, 9-12. And the facts that the government emphasizes do not make PHEAA any less sovereign. For instance, like

respondents, the government points to PHEAA's out-of-state activities and financial success. US.Br.2-4. But PHEAA's loan servicing and guaranteeing activities for out-of-state students are done from PHEAA's offices in Harrisburg and raise millions of dollars in financial aid for Pennsylvanians. No private company or multi-state entity puts its proceeds in a single State's treasury for the ultimate benefit of that State's students. And surely a state agency is no less sovereign simply because it is good at what it does and generates resources for the State's citizens.[2]

The government's argument is essentially that while PHEAA concededly possesses many of the attributes of a sovereign state agency, at some point, in some unspecified way, PHEAA waived sovereign immunity by becoming too profitable or servicing too many out-of-state loans. That contention makes no sense and conflicts with the ordinary rule—which the federal government frequently invokes as to its *own* immunity—that a waiver of sovereign immunity

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[2] The government refers to "more than $6 billion" of assets held outside Pennsylvania. US.Br.3. This is a red herring. Those are merely student-loan receivables backing PHEAA's bonds, held by Delaware special-purpose entities to lower debt costs and allow PHEAA to provide more financial aid to Pennsylvanians. CA4.JA.2442-43. That rational decision inures to the benefit of Pennsylvanians and the Pennsylvania treasury and in no logical way makes PHEAA less sovereign. But, of course, if this arrangement is somehow what deprives PHEAA of its sovereign status, Pennsylvania could alter it. The current state of law, with its conflicting and unclear multi-factor tests, renders a State powerless to order its affairs in a way that ensures that federal courts will respect its sovereignty.

must be "unequivocally expressed." *Lane v. Pena*, 518 U.S. 187, 192 (1996).

On the only federal interest squarely implicated by this case, the government's position is equally misguided. The Department of Education has permitted PHEAA to guarantee federal student loans, which may be done only by a "State or nonprofit private institution or organization." 20 U.S.C. §1085(j). No one claims that PHEAA is a "nonprofit private institution or organization." Thus, it appears that DOE has treated PHEAA as a "State" for years. The government attempts to deny that inconvenient reality by contending that the word "State" in §1085(j) is used not as a noun signifying the "State" but as an adjective modifying "institution or organization." Thus, the government contends, PHEAA is a "State … institution or organization" (but apparently not an arm of the State). US.Br.15.

That is hardly an obvious reading of §1085(j) standing alone, but it becomes utterly indefensible given §1085(j)'s express reference to "an agreement under section 1078(b) of this title." Section 1078(b) makes clear beyond cavil that "State" is a noun and not an awkward modifier of "institution or organization." Section 1078(b) permits agreements with "*any* State or *any* nonprofit private institution or organization" regarding loans insured "under a student loan insurance program of *that State, institution, or organization.*" 20 U.S.C. §1078(b)(1) (emphases added). The italicized portions make clear that in both §1078(b) and §1085(j), "State" is a noun meaning "State." That plain-text reading confirms what Pennsylvania—and DOE—officials have

believed all along: PHEAA is a "State," *i.e.*, the Commonwealth of Pennsylvania.

Finally, the government oddly criticizes PHEAA for failing—at the certiorari stage no less—to articulate "any specific alternative test." US.Br.13, 22. One would think that merits answers could await merits briefing, but at any rate, PHEAA has already provided far more clarity than most of the circuits. As the petition indicates, the proper test is one that puts primacy on the State's own treatment of the State agency and distinguishes statewide agencies from the more unusual and more difficult questions raised by more local agencies (like sheriffs and school boards) and multi-state agencies. *Oberg*.Pet.26-28. Indeed, while further elaboration can await the merits briefing, the proper test should create a strong presumption that a state-level agency treated as sovereign by the state government and state courts is an arm of the state. Such a test would put the burden on a challenger to show why such an agency lacks sovereign immunity and would provide the kind of upfront clarity that a rule of immunity demands.

III. These Cases Are Ideal Vehicles To Review This Exceedingly Important Issue.

The government does not dispute that the arm-of-the-state question here is one of fundamental importance to our constitutional union. *Pele*.Pet.28-32. Nor could it. Given the number of factors and sub-factors crafted by the circuits, the end result in any arm-of-the-state analysis can easily vary from court to court.

States are thus unable, *ex ante*, to predict whether instrumentalities they consider to be state agencies can nonetheless be haled into federal court, subjecting the State itself to the indignity and fiscal consequences of suit. And, *ex post*, to recapture immunity, States may be forced to restructure an instrumentality to the satisfaction of a superintending federal court, even though "[a] State is entitled to order the processes of its own governance." *Alden v. Maine*, 527 U.S. 706, 752 (1999).

Even then, a State would have no assurance that the *next* federal court to come along might not apply a different test or conclude that the agency has made a little too much money, or serviced a few too many out-of-state loans, to warrant continued arm-of-the-state status. Worse, a federal court might refuse to address arm-of-the-state status if another court previously denied it. That is exactly what has happened to PHEAA. In *Lang v. PHEAA*, __ F. Supp. 3d __, 2016 WL 4445275 (M.D. Pa. Aug. 23, 2016), a Pennsylvania district court recently held that the Fourth Circuit's *Oberg* decision estopped PHEAA from asserting immunity. Thus, a misguided decision by three judges in Richmond is now preventing judges anywhere else—*including in Pennsylvania*—from even considering PHEAA's arm-of-the-state status.

The government identifies no vehicle problem preventing review.[3] The closest it comes is to suggest

[3] The government concedes that *Pele* squarely presents the constitutional issue. US.Br.8 n.2.

that PHEAA is somehow "atypical," and a ruling here might not be "broadly applicable." US.Br.9. But the government is wrong on both counts. PHEAA is not some oddball agency or exotic hybrid. It is a state-level government agency, based in the state capital, controlled by state officials, staffed by state employees, executing a core state function. Moreover, by finding that PHEAA's success and out-of-state servicing render it no less sovereign, this Court could clarify broadly applicable principles of sovereign immunity.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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