No. 15-1044

In the Supreme Court of the United States

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY, PETITIONER,

v.

LEE PELE, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE STATES OF WISCONSIN, ARIZONA, HAWAII, IDAHO, INDIANA, LOUISIANA, MICHIGAN, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

In deciding whether a state entity is an "arm of the State" for purposes of Eleventh Amendment immunity, should federal courts employ a clear, uniform test that "accord[s] States the dignity that is consistent with their status as sovereign entities," *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 760 (2002)?

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INTEREST OF *AMICI CURIAE*

The *amici curiae* are the States of Wisconsin, Arizona, Hawaii, Idaho, Indiana, Louisiana, Michigan, South Carolina, South Dakota, Utah, and West Virginia.[1] Entities that are part of a State—like many state agencies and universities—are regularly sued as civil defendants in federal court. In many cases, these entities seek to invoke their State's Eleventh Amendment immunity. The States therefore have a sovereign interest in ensuring that federal courts apply a predictable, uniform rule for determining when a defendant state entity is an "arm of the State," and thus protected by the State's Eleventh Amendment immunity. Unfortunately, the courts of appeals have failed to develop a clear rule in this critical area of law. Instead, they have employed inconsistent two-, three-, four-, five-, and six-factor tests. And many of the factors considered are highly fact-intensive and require extensive discovery. The prevalence of these conflicting tests fails to "accord States the dignity that is consistent with their status as sovereign entities." *Fed. Mar. Comm'n*, 535 U.S. at 760.

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[1] Under Rule 37.2, counsel of record for all parties received notice at least 10 days prior to the date of the *amici curiae*'s intention to file this brief. Neither consent nor leave of Court is required under Rule 37.4.

SUMMARY OF ARGUMENT

"[I]mmunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today." *Alden v. Maine*, 527 U.S. 706, 713 (1999). Consistent with the States' preexisting sovereign immunity, the Eleventh Amendment provides that federal jurisdiction does not extend "to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State." U.S. Const. amend. XI. Under this Amendment, "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990) (citation omitted).

Applying Eleventh Amendment immunity is straightforward in most cases when the State itself is the named defendant: the State is immune from suit unless the State has consented or Congress has properly abrogated the immunity. *See id.*

The situation is more nuanced, however, when the plaintiff does not name the State itself as the defendant, but instead names a different entity. To address such cases, this Court has held that a State's Eleventh Amendment immunity extends to "state agents and state instrumentalities." *Regents of the Univ. of Calif. v. Doe*, 519 U.S. 425, 429 (1997). In other words, an "arm of the State" is protected by the State's sovereign immunity. *Alden*, 527 U.S. at

756. This Court has provided critical guidance for an "arm of the State" inquiry evaluating counties, municipalities, and interstate compacts. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Moor v. Alameda Cty.*, 411 U.S. 693 (1973); *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391 (1979); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994). But this Court has not addressed how the analysis applies to other entities like state agencies and universities.

The lack of guidance from the Court on this critical question has led to disarray in the courts of appeals. As the Petition in this case cogently explains,[2] there is an entrenched division of lower-court authority over the proper test for determining whether a state entity is an "arm of the State" for purposes of Eleventh Amendment immunity. While some of the circuits properly agree that the entity's status under state law is an important consideration, the agreement largely ends there.

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[2] There are two petitions pending in companion cases. The petition in the present case, *Pennsylvania Higher Education Assistance Agency v. Lee Pele*, No. 15-1044, involves the issue of "arm of the State" sovereign immunity under the Eleventh Amendment. 2015 WL 6162942 (4th Cir. Oct. 21, 2015). A petition is also pending in *Pennsylvania Higher Education Assistance Agency v. United States, ex rel. John H. Oberg*, No. 15-1045, addressing a closely related—and arguably analytically identical—"arm of the State" question under the False Claims Act. 804 F.3d 646 (4th Cir. 2015) ("*Oberg III*").

The various circuits consider divergent, fact-intensive factors such as the defendant entity's funding, liabilities, functions, and autonomy, with different circuits looking at different sets of factors, often analyzing each of the factors in different ways.

The result of these inconsistent inquiries is that the States that wish to invoke their sovereign immunity are subjected to unpredictable litigation and burdensome discovery. Under these tests, the States have been forced to produce reams of documents, submit extensive declarations, and offer up their officials to time-consuming and intrusive depositions. Subjecting States to this uncertain litigation fails to "accord States the dignity that is consistent with their status as sovereign entities." *Fed. Mar. Comm'n*, 535 U.S. at 760.

ARGUMENT

I. There Is A Widely Acknowledged Division Of Authority Regarding The Proper Test For Determining "Arm Of the State" Status For State Entities

There is a broad consensus that because this Court "has not articulated a clear standard for determining whether a state entity is an 'arm of the state' entitled to sovereign immunity," the courts of appeals "have applied different tests for establishing sovereign immunity." *Leitner v. Westchester Comm. Coll.*, 779 F.3d 130, 134 (2d Cir. 2015). "The different factors the circuits consider, and the

inconsistency with which some circuits conduct their tests, hamper the uniform examination of this issue." Héctor G. Bladuell, *Twins or Triplets?: Protecting the Eleventh Amendment Through A Three-Prong Arm-of-the-State Test*, 105 Mich. L. Rev. 837, 844–45 (2007); *accord Hess*, 513 U.S. at 59 (O'Connor, J., dissenting) (citing Alex Rogers, Note, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 Colum. L. Rev. 1243 (1992)).

The lower courts are divided as to how many—and which—factors to analyze in deciding "arm of the State" status. *See, e.g.*, *Burrus v. State Lottery Comm'n*, 546 F.3d 417, 420 (7th Cir. 2008) ("(1) the extent of the entity's financial autonomy from the state; and (2) the general legal status of the entity"); *Haybarger v. Lawrence Cty. Adult Prob. & Parole*, 551 F.3d 193, 198 (3d Cir. 2008) ("(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"); *Ernst v. Rising*, 427 F.3d 351, 359 (6th Cir. 2005) ("(1) whether the state would be responsible for a judgment against the entity in question; (2) how state law defines the entity; (3) what degree of control the state maintains over the entity; and (4) the source of the entity's funding"); *Beentjes v. Placer Cty. Air Pollution Control Dist.*, 397 F.3d 775, 778 (9th Cir. 2005) ("(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"); *Vogt v. Bd. of Comm'rs of the Orleans Levee Dist.*, 294 F.3d 684, 689 (5th Cir. 2002) ("(1) whether state statutes and case law characterize the agency as an arm of the state; (2) the source of 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 statewide, 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").

While some circuits correctly view an entity's status under state law as an important consideration, the agreement generally ends there. Specifically, various courts of appeals consider at least four categories of additional factors as part of their "arm of the State" analyses, with some courts considering all of these factors, and other courts considering only some and in divergent ways:

Funding Of The State Entity. Many courts of appeals inquire into how the defendant state entity is funded. *See, e.g., Burrus*, 546 F.3d at 420; *U.S. ex rel. Sikkenga v. Regence BCBS of Utah,* 472 F.3d 702, 721 (10th Cir. 2006). For example, courts routinely "conduct[] detailed inquiries into [ ] colleges' fiscal and governance structures," focusing on, *inter alia*, "how much funding" a college receives from the State. *Leitner*, 779 F.3d at 136. Similar factual inquires occur outside of the state university

context. *See Cooper v. SEPTA*, 548 F.3d 296, 302 (3d Cir. 2008); *Oberg III*, 804 F.3d at 659–661.

Impact On The State's Treasury. Some circuits consider the extent to which the defendant state entity impacts the State's treasury. *Burrus,* 546 F.3d at 421; *Sikkenga,* 472 F.3d at 718. This inquiry is framed in different ways by different circuits: some courts consider the defendant's "overall effects on the [State] treasury," *P.R. Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 878 (D.C. Cir. 2008), while others simply look to whether liabilities will be paid out of the defendant's profits or state funds, *Burrus,* 546 F.3d at 421.

Functions Performed By The State Entity. Some circuits consider whether the defendant's functions are state activities, as opposed to local or non-state responsibilities. *See, e.g., U.S. ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1147 (9th Cir. 2004); *Leitner*, 779 F.3d at 139.

Autonomy Of The State Entity. While most circuits consider a defendant-entity's autonomy from the State as a relevant consideration to some extent, the circuits widely diverge as to how such autonomy is to be determined. Some look to whether the State has veto power over the entity's actions, *Leitner,* 779 F.3d at 138–39, while others consider who appoints the members of the management or board, *Pub. Sch. Ret. Sys. of Mo. v. State St. Bank & Trust Co.*, 640 F.3d 821, 828 (8th Cir. 2011). Some look to whether the State taxes the defendant state entity, *Kashani*

v. Purdue Univ., 813 F.2d 843, 845–46 (7th Cir. 1987), while others consider a defendant's ability to sue and be sued in its own name, *U.S. ex rel. Ali*, 355 F.3d at 1147, or issue bonds, raise taxes, and make contracts, *Vogt*, 294 F.3d at 694. Still others focus on whether the State controls the entity's personnel decisions. *See Ross v. Jefferson Cty. Dep't of Health*, 701 F.3d 655, 660 (11th Cir. 2012).

II. The Courts Of Appeals' Divergent, Fact-Intensive Tests Have Forced The States To Endure Uncertain Litigation And Burdensome Discovery

A. The States are entitled to immunity from suit consistent "with their status as sovereign entities." *Fed. Mar. Comm'n*, 535 U.S. at 760. This immunity derives from the "respect [that is] owed [to States] as members of the federation." *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). "The very object and purpose of the eleventh amendment [is] to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties." *Ex parte Ayers*, 123 U.S. 443, 505 (1887).

The States' sovereign rights require clear rules regarding when their entities receive Eleventh Amendment protection. Specifically, respect for the States' sovereign dignity favors rules that allow States to know *in advance* when entities designated as part of the State under state law may nevertheless be held liable and what, specifically,

the States must do to avoid such liability and burdensome jurisdictional discovery. After all, "[o]ne of the purposes of immunity . . . is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991); *accord* John H. Clough, *Federalism: The Imprecise Calculus of Dual Sovereignty*, 35 J. Marshall L. Rev. 1, 33 (2001) (sovereign immunity preserves "the dignity of the sovereign states from being held to answer through the discovery process at the insistence of private party litigants"). The paramount need for clear rules to limit a sovereign's liability and exposure to extensive discovery is particularly justified in Eleventh Amendment cases, which involve civil liability. *See generally Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 383–85 (2004).

Disregarding these critical sovereign interests, many courts of appeals have adopted divergent, multi-factor tests to determine whether a state entity is an "arm of the State," which tests inevitably lead to unpredictable results and extensive discovery. *See supra* 4–8. As the Fourth Circuit explained in describing its own test, many of these inquiries are "ill suited to judgment on the pleadings." *U.S. ex rel. Oberg v. Pa. Higher Educ. Assistance Agency* (*Oberg II*), 745 F.3d 131, 145 (4th Cir. 2014). Other courts have remarked that certain types of state agencies, like universities, require a "fact-intensive review that calls for individualized

determinations." *Bowers v. NCAA*, 475 F.3d 524, 546 (3d Cir. 2007); *see also Leitner*, 779 F.3d at 136.

B. A brief survey of several lawsuits filed against state entities illustrates the extensive discovery inherent in the circuits' divergent, multi-factor tests for sovereign immunity.

States are often forced to endure extensive jurisdictional discovery in lawsuits filed against their own state universities. For example, in *Bowers v. NCAA*, No. 97-2600, 2001 WL 1772801 (D.N.J. July 3, 2001), the district court rejected the University of Iowa's sovereign-immunity defense, finding that the most important factor was the fact that only 21% of the University's operations were funded by the State of Iowa. *Id.* at *3, *10. The court made this decision following extensive discovery. *See, e.g., Bowers,* No. 97-2600, Dkt. 94 (granting plaintiff's application to take up to 30 depositions). On appeal, the Third Circuit ruled that "[w]hether a public university is entitled to Eleventh Amendment immunity is a fact-intensive review," but ultimately held that the University of Iowa was an arm of the State. *Bowers,* 475 F.3d at 546.

Similarly, in *Pikulin v. City University of New York*, No. 95-1147, 1996 WL 720094 (S.D.N.Y. Dec. 13, 1996), nearly two years in to a lawsuit brought against CUNY, the district court dismissed the case on sovereign-immunity grounds, relying on several district court decisions holding that CUNY was an arm of New York State. *Id.* at *1. The Second

Circuit reversed and remanded the case to the district court, requiring it to "develop a record sufficient to allow the district court to consider fully CUNY's relationship to the state." *Pikulin v. City Univ. of N.Y.*, 176 F.3d 598, 601 (2d Cir. 1999). Other lawsuits against state universities have similarly involved discovery and fact-intensive immunity analysis. *See, e.g.*, *Sherman v. Curators of Univ. of Mo.*, 16 F.3d 860, 864–65 (8th Cir. 1994); *Watson v. Univ. of Utah Med. Ctr.*, 75 F.3d 569, 575–77 (10th Cir. 1996).

The courts of appeals have even required discovery in federal lawsuits brought against state trial courts. In *Barachkov v. 41B District Court*, 311 Fed. App'x 863 (6th Cir. 2009), the Sixth Circuit instructed the federal district court to determine whether, as part of the immunity analysis, "the State of Michigan will be potentially liable for any judgment against the [defendant] 41B District Court." *Id.* at 869. On remand, the parties participated in motion practice, hearings, and discovery for nearly two years. *Englar v. 41B District Court*, No. 04-cv-73977, Dkts. 80–132. Then, after all of this discovery had taken place, the federal district court dismissed the lawsuit based upon an intervening Sixth Circuit decision. *Id.*, Dkt. 122 (citing *Pucci v. Nineteenth Dist. Ct.*, 628 F.3d 752 (6th Cir. 2010)).

Finally, while the States take no position here on the ultimate resolution of the immunity question with regard to the Pennsylvania Higher Education

Assistance Agency, the scope of discovery in this case starkly illustrates the need for a clear, simple rule. The agency was forced to answer 38 interrogatories, 65 document requests, and 110 requests for admissions. *Pele v. Penn. Higher Educ. Assistance Agency*, No. 1:13-cv-01531 (E.D. Va. Aug. 27, 2014) (Dkt. No. 65). Furthermore, Pennsylvania's officials responded to a 43-topic 30(b)(6) notice, resulting in 9 depositions of Pennsylvania officials totaling over 40 hours and 1,500 pages of additional discovery. *Id.*

Even more extensive discovery occurred in the companion case, *Oberg*, a *qui tam* action against state agencies created by Kentucky, Pennsylvania, Vermont, and Arkansas. The district court originally dismissed the lawsuit against all of the agencies by looking "to state statutory provisions, which, in its view, demonstrated each entity's status as a 'state agency.'" *U.S. ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.* (*Oberg I*), 681 F.3d 575, 578 (4th Cir. 2012). The Fourth Circuit reversed and remanded, ordering the district court to apply its four-factor "arm of the State" analysis. *Id.* at 580–81. On remand, the district court again found the defendants to be arms of their respective States. *Oberg II*, 745 F.3d 131, 135–36. On the second appeal, the Fourth Circuit agreed that the Arkansas agency was an arm of the State, but remanded the case again for discovery to determine whether PHEAA and the Vermont Student Assistance Corporation were arms of their respective States. *Id.* at 145. In the meantime, Kentucky settled. *Id.* at 135 n.1. The Fourth Circuit ordered discovery to

focus on whether these agencies were "truly subject to sufficient state control to render [them] part of the state." *Id.* at 140–41. Back at the district court, significant additional discovery occurred, including massive document discovery. No. 1:07-cv-960 (E.D. Va. 2014) (Dkt. Nos. 651, 653, 667). As of August 2014, for example, PHEAA produced *282,136 pages* of documents to the plaintiffs, following review by a team of 60 reviewers working an average of 10-hour days. *Id.* Dkt. 667.

* * *

In all, the courts of appeals are hopelessly splintered regarding how to determine whether a state entity is an arm of the State, such that it can benefit from Eleventh Amendment immunity. This division of authority has led to a series of inconsistent, fact-intensive, and multi-factor tests, which have subjected the States to extensive discovery incompatible with the very notion of immunity. Only intervention from this Court can cure this problem, by providing a clear rule so that States know when their state entities are protected by sovereign immunity.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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