

COMMONWEALTH OF KENTUCKY  
COURT OF APPEALS  
CASE NO. 2018-CA-001246

PENNSYLVANIA HIGHER EDUCATION  
ASSISTANCE AGENCY,  
Appellant,

v.

COMMONWEALTH OF KENTUCKY *ex rel.*  
ANDY BESHEAR in his official capacity  
as ATTORNEY GENERAL OF KENTUCKY,  
Appellee.

Appeal from Franklin Circuit Court  
Case No. 18-CI-00254

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**BRIEF OF AMICI CURIAE  
KENTUCKY EQUAL JUSTICE CENTER AND THE  
STUDENT BORROWER PROTECTION CENTER**

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**Certificate of Service Required by CR 76.12(6)**

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## INTRODUCTION AND STATEMENT OF PURPOSE

This case presents an unusual question with far-reaching consequences and a straightforward answer. The Pennsylvania Higher Education Assistance Agency (“PHEAA”) asks this Court to exempt it from the Consumer Protection Act (“CPA”), KRS 367.100 *et seq.*, the universal and most fundamental market regulation prohibiting deception and unfair treatment of Kentucky consumers. PHEAA has metastasized into one of the nation’s largest student loan servicer, responsible for managing and collecting student loans owed by thousands of Kentuckians. Withdrawing the CPA’s protection from those borrowers and freeing PHEAA—alone among marketplace participants—from investigations and enforcement actions by the Attorney General leaves Kentuckians vulnerable to mis- and malfeasance that can upend their financial lives, all without effective recourse.

In the last twelve months, PHEAA’s novel contention has been rejected in trial courts literally spanning the country, from Massachusetts<sup>1</sup> to Kentucky to Washington state.<sup>2</sup> PHEAA is a “person” under the CPA not just because it falls within the catch-all phrase “other legal entities,” but also because PHEAA’s own repeated representations to the Secretary of State establish that it is a “corporation” under Kentucky law. Amici

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<sup>1</sup> See *Commonwealth of Massachusetts v. Pennsylvania Higher Educ. Assistance Agency*, No. 1784CV02682-BLS2, 2018 WL 1137520 at \*8 (Feb. 28, 2018) (unpublished) (rejecting argument that PHEAA was exempt from consumer protection law as a “State or political subdivision[] thereof” because “PHEAA is not a State, an arm of state, or a political subdivision of a State” when it engaged in trade or commerce by servicing student loans in Massachusetts).

<sup>2</sup> See Order Granting Respondent and Cross-Petitioner Washington State Attorney General’s Office’s Motion for Summary Judgment and Denying Petitioner Pennsylvania Higher Education Assistance Agency’s Motion for Summary Judgment, *Pennsylvania Higher Education Assistance Agency v. Washington State Attorney General’s Office*, Thurston County Superior Court Case No. 18-2-01415-34 (October 25, 2018).

Kentucky Equal Justice Center and the Student Borrower Protection Center<sup>3</sup> therefore respectfully request that this Court affirm the trial court's ruling.

## ARGUMENT

### I. Exempting PHEAA from Kentucky's Comprehensive CPA Would Have Wide-Ranging Negative Effects on Kentucky Student Loan Borrowers.

The General Assembly passed the CPA because “the public health, welfare and interest require a strong consumer protection program to protect the public interest and the well-being of both the consumer public and the ethical sellers of goods and services...”. KRS 367.120. “The Kentucky legislature [therefore] created a statute which has the broadest application in order to give Kentucky consumers the *broadest possible protection* for allegedly illegal acts.” *Stevens v. Motorist Mutual Ins. Co.*, 759 S.W. 2d 819, 821 (Ky. 1988) (emphasis added). Kentucky courts have therefore consistently interpreted the CPA's scope expansively. *See, e.g., id.* at 821 (applying CPA to sale and provision of insurance); *Stafford v. Cross Country Bank*, 262 F. Supp. 2d 776, 792-93 (W.D. Ky. 2003) (applying CPA to sale of consumer credit). Kentucky is therefore in accord with the expansive construction of similar consumer protection statutes in other jurisdictions. *See, e.g., Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 602, 200 P.3d 695 (2009) (holding that Washington's “CPA attempts ‘to bring within its reach [ ] every person who conducts unfair or deceptive acts or practices in any trade or commerce.’”<sup>4</sup>).

The CPA is the most fundamental market regulation on the books; its mandate is simple: those doing business in Kentucky must compete honestly, rather than by deceiving their customers or the public. KRS 367.170(1) (“Unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.”). Exempting PHEAA from this basic rule would have significant harmful

<sup>3</sup> The Student Borrower Protection Center is funded through and affiliated with the Resource Legacy Fund, a tax-exempt 501(c)(3) organization.

<sup>4</sup> Quoting *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984)) (emphasis and alteration in original).

consequences for Kentucky consumers and businesses. Although this case centers on enforcement of the Attorney General’s Civil Investigative Demand, a ruling that PHEAA is not a “person” and therefore exempt from the CPA would have far-reaching consequences.

First, as demonstrated by this case, the Attorney General would be unable to investigate PHEAA’s practices, let alone secure restitution for injured consumers. *See* KRS 367.200. Second, Kentucky courts would be powerless under Kentucky law to enjoin PHEAA from engaging in unfair or deceptive acts or practices targeting Kentuckians. *See* KRS 367.190. Third, Kentucky consumers harmed by PHEAA would be deprived of the ability to seek redress for their injuries under the CPA as intended by the Legislature. KRS 367.220(1) (providing for private actions by consumers who suffer “any ascertainable loss of money, property, real or personal” due to unfair or deceptive trade practices).

Freeing PHEAA from the consequences of unfair or deceptive practices targeting Kentuckians would have devastating consequences. PHEAA describes itself as one of the nation’s largest student loan servicers, and as such administers and collects payments on both federal and private student loans owed by thousands of Kentuckians. PHEAA’s 2018 Annual Report explains that it services \$425 billion in student loans across the country, including more than \$4.5 billion of its own loans, and \$32 billion in client-owned private loans through its “Commercial Servicing” business line, as well as \$320 billion in federal student loans and additional private loans through “remote servicing” operations.<sup>5</sup>

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<sup>5</sup> *See* <https://www.pheaa.org/about/pdf/financial-reports/annual/2018AuditedFinancialStatements.pdf> (last accessed December 31, 2018). Courts may take judicial notice at any stage of the proceedings of adjudicative facts that are not subject to reasonable dispute. KRE 201. In other words, KRE 201 allows judicial notice to be taken of facts which can be determined from “unimpeachable sources.” Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 1.00(2)(c), at 7 (5th ed.2013); *see also* *Clay v. Commonwealth*, 291 S.W.3d 210, 219 (Ky.2008). PHEAA cannot argue that its own annual report, audited by the accounting firm of Ernst & Young, is insufficiently reliable to serve as the basis for judicial notice. This Court should exercise its discretion to take judicial notice of PHEAA’s annual report pursuant to KRE 201(c).

As a consequence, PHEAA handles more than one out of every ten dollars in non-mortgage consumer debt in the United States.<sup>6</sup> Servicing private student loans on behalf of the National Collegiate Student Loan Trust— the focus of the Attorney General’s current investigation—is a substantial part of PHEAA’s “Commercial Servicing” business. A bit of background on private student lending and securitization is helpful.

Between 2001 and 2007, many of the largest banks in the United States originated sub-prime student loans, packaged into securities (student loan asset-backed securities, or “SLABS”), and sold them to investors—leaving students and investors with the consequences of any loan defaults. Two federal agencies explained 2012 that “many lenders made money by originating and then selling private student loans with less regard for borrowers’ creditworthiness.” Consumer Financial Protection Bureau, *CFPB and U.S. Department of Education Joint Report Finds a Cycle of Boom and Bust in Private Student Loan Market* (July 2012).<sup>7</sup> Unfortunately, these SLABS’s performance mirrored the same “boom-and-bust” cycle of sub-prime residential mortgage-backed securities (“RMBS”) that devastated homeowners and investors during the financial crisis.

For nearly two decades—and continuing through the present—PHEAA has served as the student loan servicer responsible for managing the accounts of borrowers in Kentucky and across the nation on behalf of the NCSLT. An analysis performed by Bloomberg News found the NCSLT instruments to be the poorest-performing SLABS ever created by Wall Street. PHEAA’s central role in the ongoing SLABS debacle is directly connected with the Attorney General’s current investigation.

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<sup>6</sup> The Federal Reserve Bank of New York estimates that American consumers collectively owe \$3.92 trillion in non-housing consumer debt. PHEAA’s operations touch \$425 billion of this debt, or 10.84 percent. Data available at <https://www.newyorkfed.org/microeconomics/hhdc> (last accessed December 28, 2018).

<sup>7</sup> Available at <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-and-u-s-department-of-education-joint-report-finds-a-cycle-of-boom-and-bust-in-private-student-loan-market/> (last accessed December 25, 2018).



Kentuckians also need the CPA’s protection in a variety of contexts outside PHEAA’s participation in the troubling private student loan servicing and collection practices that gave rise to the Attorney General’s current investigation. To take one example, PHEAA is the designated servicer for borrowers enrolled in the Public Service Loan Forgiveness (“PSLF”) program. This program forgives the remaining balance of Direct federal student loans after public servants – like prosecutors, first responders, active duty servicemembers, and employees at nonprofits focused on servicing military families, veterans, and survivors – make ten years’ worth of payments on qualifying repayment plans. 20 U.S.C. § 1087e(m). To date, the results are dismal: The Department of Education reported that as of September 30, 2018, more than that 41,000 borrowers had submitted applications for PSLF, but only 206 had actually received forgiveness;<sup>8</sup> in other words, more than 99.9% of PSLF applicants were rejected. PHEAA’s operations are a likely source of these difficulties. Consumer Financial Protection Bureau, *Staying on track while giving back: The cost of student loan servicing breakdowns for people serving their communities* (June 2017).<sup>9</sup> Indeed, PHEAA officials admit that even though it is specifically tasked with administering the PLSF program, “their staff are sometimes unaware of important policy clarifications.” U.S. Government Accountability Office, *Public Service Loan Forgiveness: Education Needs to Provide Better Information for the Loan Servicer and Borrowers*, GAO-18-547, p. 16 (Sept. 2018).<sup>10</sup>

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<sup>8</sup> Data available at <https://studentaid.ed.gov/sa/about/data-center/student/loan-forgiveness/pslf-data> (last accessed December 31, 2018). This Court should exercise its discretion to take judicial notice of the U.S. Department of Education’s data pursuant to KRE 201(c).

<sup>9</sup> Available at [https://files.consumerfinance.gov/f/documents/201706\\_cfpb\\_PSLF-midyear-report.pdf](https://files.consumerfinance.gov/f/documents/201706_cfpb_PSLF-midyear-report.pdf) (last accessed December 31, 2018).

<sup>10</sup> Available at <https://www.gao.gov/assets/700/694506.pdf> (last accessed December 31, 2018). This Court should exercise its discretion to take judicial notice of the U.S. Government Accountability Office’s report pursuant to KRE 201(c).

If this Court carves an exemption from the CPA for PHEAA, public service employees will lose a powerful tool to hold PHEAA accountable and obtain relief for years of unnecessary payments occasioned by PHEAA's mis- and malfeasance.

Finally, the Kentucky Consumer Protection Act does not exist only to protect consumers. It also exists to ensure that other businesses have a fair marketplace in which to compete. When passing the Kentucky Consumer Protection Act, the legislature found that "the public health, welfare and interest require a strong and effective consumer protection program to protect the public interest and the well-being of *both* the consumer public *and the ethical sellers of goods and services....*" KRS 367.120 (emphasis added). Creating an exemption for PHEAA will not only put Kentucky consumers at risk, it will disadvantage other student loan servicers by exempting a competitor from both the state's regulatory oversight and aggrieved consumers' private claims.

## **II. PHEAA Is a "Person" under the Consumer Protection Act Because It Is a Corporation.**

The trial court did not identify the aspect of KRS 367.110(1)'s definition of "person" upon which it based its ruling that PHEAA is subject to the CPA, but the briefing on PHEAA's petition below focused on whether it fell within the meaning of "any other legal entity." *See* KRS 367.110(1). The trial court's ruling that PHEAA is a "person" should be affirmed because in addition to being a "legal entity," PHEAA is also a "corporation." *See So. Fin. Life Ins. Co. v. Combs*, 413 S.W.3d 921, 926 (Ky.2013) ("[I]t is well settled that we . . . may affirm on any grounds supported by the record.") (citing *McCloud v. Commonwealth*, 286 S.W.3d 780, 786 n. 19 (Ky.2009)).

### **A. The Plain Language of KRS 367.100(1) Encompasses PHEAA.**

Kentucky Revised Statute 367.110(1) defines "person" as "natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity." PHEAA falls squarely within KRS 367.110(1)'s definition of "person" because it is a "corporation." *See* 24 Pa. Stat. § 5101 ("There is hereby created a body

*corporate* and politic constituting a *public corporation* and government instrumentality which shall be known as the ‘Pennsylvania Higher Education Assistance Agency.’”) (emphasis added). “Public” and “private” corporations are merely two different “classifications” of corporation, much like “closely held” and “professional” corporations. Corporation, *Black’s Law Dictionary* 307-10 (5th ed. 1979). The term “corporation” in KRS 367.110(1) is sufficiently broad to cover the “public” classification of “corporations.”<sup>11</sup> Indeed, the Washington Superior Court ruled that PHEAA was a “corporation” and therefore a “person” under the indistinguishable language of Washington’s Consumer Protection Act.<sup>12</sup> In any event, PHEAA’s repeated representations to Kentucky officials establish that it is a “corporation” subject to the CPA.

**B. The Kentucky Secretary of State Granted PHEAA Permission to Transact Business in the Commonwealth Based on Representations by PHEAA and the Pennsylvania Department of State that PHEAA is a Corporation.**

On November 20, 2002, PHEAA submitted its Application for Certificate of Authority to Kentucky’s Secretary of State, seeking “authority to transact business in Kentucky.”<sup>13</sup> PHEAA’s application represented that it was “a nonprofit corporation”

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<sup>11</sup> For example, KRS 367.110(1) does not specifically include limited liability companies, but no one contends that they are not “persons” subject to the CPA.

<sup>12</sup> *See* Order Granting Respondent and Cross-Petitioner Washington State Attorney General’s Office’s Motion for Summary Judgment and Denying Petitioner Pennsylvania Higher Education Assistance Agency’s Motion for Summary Judgment, *Pennsylvania Higher Education Assistance Agency v. Washington State Attorney General’s Office*, Thurston County Superior Court Case No. 18-2-01415-34 (October 25, 2018), p. 3. RCW 19.86.110(1) defines “person” to include “natural persons, corporations, trusts, unincorporated associations and partnerships.”

<sup>13</sup> <https://app.sos.ky.gov/corpscans/26/0548526-09-99999-20021120-ACA-3445470-PU.pdf> (last visited December 31, 2018). Kentucky’s Secretary of State is an unimpeachable source, particularly with regard to the documents filed with it by PHEAA and other corporations, and PHEAA cannot disclaim the documents it filed. This Court should exercise its discretion to take judicial notice of PHEAA’s filings pursuant to KRE 201(c).

under KRS 273, and represented that “[t]he name of the corporation to be used in Kentucky is Pennsylvania Higher Education Assistance Agency, Inc.” PHEAA’s decision to add “Inc.” to its name appears to be an attempt to comply with KRS14A.3-010, which requires the names of corporations and nonprofit corporations to “end with the word ‘corporation,’ ‘company,’ or ‘limited’ or the abbreviation ‘Corp.,’ ‘Inc.,’ .Co.,’ or ‘Ltd.’ or words or abbreviations of like import in another language . . . .”

In support of its application, PHEAA submitted a certification from the Commonwealth of Pennsylvania Department of State that PHEAA “is duly *incorporated* under the laws of the Commonwealth of Pennsylvania and remains a subsisting *corporation*....” (Emphasis added.)<sup>14</sup> These representations by PHEAA and the Pennsylvania Secretary of State are dispositive of this appeal: PHEAA must be considered a corporation when it transacts business in Kentucky, and it is therefore a “person” as defined in KRS 367.110(1). PHEAA’s filings over the next decade confirm that the CPA applies to PHEAA.

**C. PHEAA repeatedly represented to Kentucky’s Secretary of State that it is a Corporation.**

Corporations and other entities must file annual reports of Kentucky’s Secretary of State as a condition of doing business in the Commonwealth.<sup>15</sup> Accordingly, on June 26, 2003, PHEAA filed an Annual Report representing that its “EXACT CORPORATE NAME” was Pennsylvania Higher Education Assistance Agency, Inc.”<sup>16</sup> PHAA then submitted annual reports to the Secretary of State representing that the “Company” was

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<sup>14</sup> <https://app.sos.ky.gov/corpscans/26/0548526-09-99999-20021120-ACA-3445470-PU.pdf> (last visited December 31, 2018).

<sup>15</sup> See <https://www.sos.ky.gov/bus/business-filings/Pages/Annual-Reports.aspx> (last visited December 31, 2018).

<sup>16</sup> <https://app.sos.ky.gov/corpscans/26/0548526-09-99999-20030303-ASN-901792-PU.pdf> (last visited December 31, 2018).

Pennsylvania Higher Education Assistance Agency, Inc.” on June 1, 2005;<sup>17</sup> February 15, 2006;<sup>18</sup> May 24, 2007;<sup>19</sup> July 18, 2008;<sup>20</sup> June 5, 2009;<sup>21</sup> February 12, 2010;<sup>22</sup> April 12, 2011;<sup>23</sup> March 20, 2012;<sup>24</sup> and April 9, 2013.<sup>25</sup> PHEAA made similar representations of its corporate status to Secretaries of State across the country.

PHEAA, like many other corporations, does business in Kentucky under an assumed name pursuant to KRS 365.015. On March 3, 2003, PHEAA filed a Certificate of Assumed Name with the Secretary of State, which “certifies that the assumed name of American Education Services has been adopted by Pennsylvania Higher Education Assistance Agency, Inc. which is the ‘real name’ of . . . a Foreign Corporation – Non-Profit.”<sup>26</sup> PHEAA’s September 10, 2012 Renewal Certificate of Assumed Name “certifie[d] that the assumed name of AMERICAN EDUCATION SERVICES is hereby

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<sup>17</sup> <https://app.sos.ky.gov/corpscans/26/0548526-09-99999-20050601-ARP-336866-PU.pdf> last visited December 31, 2018).

<sup>18</sup> <https://app.sos.ky.gov/corpscans/26/0548526-09-99999-20060215-ARP-671257-PU.pdf> last visited December 31, 2018).

<sup>19</sup> <https://app.sos.ky.gov/corpscans/26/0548526-09-99999-20070524-ARP-2686694-PU.pdf> last visited December 31, 2018).

<sup>20</sup> <https://app.sos.ky.gov/corpscans/26/0548526-09-99999-20080718-ARP-3151390-214460-PU.pdf> last visited December 31, 2018).

<sup>21</sup> <https://app.sos.ky.gov/corpscans/26/0548526-09-99999-20090605-ARP-3985104-PU.pdf> last visited December 31, 2018).

<sup>22</sup> <https://app.sos.ky.gov/corpscans/26/0548526-09-99999-20100212-ARP-4273831-PU.pdf> last visited December 31, 2018).

<sup>23</sup> <https://app.sos.ky.gov/corpscans/26/0548526-09-99999-20100212-ARP-4273831-PU.pdf> last visited December 31, 2018).

<sup>24</sup> <https://app.sos.ky.gov/corpscans/26/0548526-09-99999-20120320-ARP-5064539-PU.pdf> last visited December 31, 2018).

<sup>25</sup> <https://app.sos.ky.gov/corpscans/26/0548526-09-99999-20130409-ARP-5464627-PU.pdf> last visited December 31, 2018).

<sup>26</sup> <https://app.sos.ky.gov/corpscans/26/0548526-04-99999-20120910-REN-5253080-PU.pdf> (last visited December 31, 2018).

renewed by PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY, INC. a business entity organized and existing in the state of Pennsylvania.”<sup>27</sup>

PHEAA’s representations, spanning more than a decade, establish that it is a corporation, and falls squarely within the CPA’s scope. Its current position arguing to the contrary – which, if accepted, would place PHEAA above the law – would be troubling under any circumstances. But when considered in light of its prior representations to Kentucky officials, PHEAA’s bid to escape the CPA reveals a company intent on operating without regard to its obligations to be truthful with either state officials or consumers. The Court should reject PHEAA’s tactical pivot, and instead treat PHEAA as what it held itself out to be.

**D. PHEAA cannot escape fundamental Kentucky law prohibiting deception by tactically claiming that it misrepresented its very nature to Kentucky authorities.**

As demonstrated above, PHEAA’s repeated representations to Kentucky officials conclusively establish that PHEAA is a “corporation” and therefore a “person” under KRS 367.110(1). Having represented to the Secretary of State that it *is* a corporation more than a dozen times, PHEAA cannot about-face and claim *not* to be a corporation before this court when the Attorney General seeks to apply Kentucky law. *Cf. Mefford v. Norton Hospitals, Inc.*, 507 S.W.3d 580, 584 (Ky. App. 2016) (noting that “[t]he doctrine of judicial estoppel evolved as an equitable principle intended to protect the integrity of the judicial process by prohibiting a party from taking inconsistent positions in judicial proceedings,” to be applied depending upon “(1) whether the party’s later position is clearly inconsistent with its earlier position; (2) whether the party succeeded in persuading a court to accept the earlier position; and (3) whether the party seeking to

<sup>27</sup> <https://app.sos.ky.gov/corpscans/26/0548526-04-99999-20120910-REN-5253080-PU.pdf> (last visited December 31, 2018). PHEAA failed to file its 2014 annual report, and “the Secretary of State revoked the corporation’s authority to transact business in Kentucky on September 30, 2014.” It appears that PHEAA has disregarding the Certificate of Revocation, and has continued to do business in Kentucky in defiance of the Secretary of State.

assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.”).

### **III. PHEAA’s Likely Counterarguments Are Unavailing.**

PHEAA has argued (unsuccessfully) elsewhere that it is a “public corporation,” and that Pennsylvania defines “public corporation” as “any county, city, borough, township, school district, or other municipality or incorporated district of this Commonwealth.” This argument fails for several reasons. First, PHEAA’s preferred definition of “public corporation” is lifted from a separate Pennsylvania statute addressing local government, and specifically provides that its definition of “public corporation” is limited to the provisions of that chapter. 53 P.S. § 5406 (“The term ‘public corporation,’ *as used herein*, shall mean . . . .”) (emphasis added). PHEAA’s own “definitions” statute, 24 P.S. § 5102.1, includes no definition for “public corporation,” and there is no basis for inserting a definition from one Pennsylvania statute into another where Pennsylvania’s legislature chose not to do so and PHEAA cannot claim to be a municipality, county, or any of the other listed governmental units. Second, PHEAA’s argument is at odds with its own statements to Kentucky and Pennsylvania officials that it is a “nonprofit corporation” and a “business corporation.” Finally, PHEAA cannot explain why a “public corporation” – which is simply a type of corporation – should be exempt from the CPA when it reaches outside its own jurisdiction to operate a commercial business in Kentucky.

PHEAA’s reference to *Jamgotchian v. Kentucky Horse Racing Com’n*, 488 SW 3d 594 (Ky. 2016), is entirely inapposite. The Supreme Court’s passing reference to a distinction between private and public corporations while applying the Commerce Clause lends no assistance in applying the CPA. PHEAA does not allege that Kentucky law discriminates against it in violation of the Commerce Clause. The opposite is true: Kentucky’s Attorney General seeks to apply Kentucky law to PHEAA *just like every other student loan servicer who reaches into the Commonwealth to conduct business*. PHEAA can find no refuge in Commerce Clause jurisprudence.

PHEAA may argue that the Court should disregard its representations to the Secretary of State because it merely chose the option on Kentucky's forms that most closely aligned with its actual status, but that it is not, in fact, what it represented itself to be. This argument is troubling – indeed, any contention that PHEAA can play fast and loose with representations to Kentucky officials simply demonstrates why application of the CPA to its interactions with Kentucky consumers is so essential. Moreover, it does not explain why PHEAA *added* the abbreviation “Inc.” onto its name, or why it chose to operate in Kentucky under an assumed name like other corporations.

PHEAA may paradoxically argue that it is not a “corporation” under *U.S. ex rel. Oberg v. Pennsylvania Higher Educ. Assistance Agency*, 804 F.3d 646, 651 (4th Cir. 2015). As the Commonwealth will no doubt explain in detail, the *Oberg* court *rejected* the notion that PHEAA was an “arm of the state” and entitled to share in Pennsylvania’s sovereign immunity. For purposes of this amicus brief, *Oberg* held that PHEAA *was* a “person” under the federal False Claims Act (FCA), 804 F.3d at 677, under case law holding that “[c]orporations, including municipal corporations like cities and counties, are ‘persons’ under the FCA,” while “arms” or “alter egos” of the state are not considered “persons” for FCA liability. *Id.* at 650. That the *Oberg* court was required to distinguish “arms or alter egos of the state from mere political subdivisions” in order to apply sovereign immunity, *id.* at 651, does not even suggest that PHEAA is exempt from Kentucky’s CPA when it reaches into Kentucky to conduct private business.

This Court should not conjure an exception for corporations affiliated with other governments when they reach into Kentucky to service private student loans on behalf of other commercial interests. Instead, whether PHEAA’s affiliation with Pennsylvania



exempts it from the CPA is more properly addressed in the context of PHEAA's "sovereign immunity" argument.<sup>28</sup>

Finally, recognizing PHEAA as a corporation subject to the CPA will not draw Kentucky governmental agencies and political subdivisions into the CPA's ambit. PHEAA has evolved into a nationwide commercial student loan servicer, reaching beyond Pennsylvania's borders not to provide governmental services, but to turn a profit by servicing private student loans on behalf of corporate financial interests. Conversely, Kentucky governmental entities run by Kentuckians providing governmental services to their constituents cannot reasonably be described as "corporations"; nor can those services be reasonably be described as "trade or commerce." KRS 367.110(2).

#### CONCLUSION

PHEAA's own repeated representations to Kentucky officials establish that it is a "corporation," and therefore a "person" subject to the CPA. Amici therefore respectfully request that this Court not exempt PHEAA from fundamental Kentucky law, but instead affirm the trial court's judgment.

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Respectfully submitted,



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<sup>28</sup> Sovereign immunity is beyond the scope of this amicus brief; the Kentucky Attorney General's Office will explain why the trial court's rejection of PHEAA's self-characterization of itself as an "arm of the state" of Pennsylvania was correct when PHEAA conducts commercial activities in Kentucky.