No. 24-1028

In the Supreme Court of the United States

PENNSYLVANIA PROFESSIONAL LIABILITY JOINT UNDERWRITING ASSOCIATION,
Petitioner

v.

GOVERNOR OF PENNSYLVANIA, ET AL.,
Respondents

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

BRIEF FOR THE PENNSYLVANIA GOVERNOR AND INSURANCE COMMISSIONER RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Is the Pennsylvania Professional Liability Joint Underwriting Association (JUA)—an entity created by the state legislature to perform public duties under authority and strictly according to statute, and existing only by the grace of that statute—a public entity?

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JURISDICTION

The Court of Appeals issued its opinion on December 16, 2024, and denied a petition for rehearing on January 15, 2025 (App. 183a-186a). The petition for a writ of certiorari was filed on March 24, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Pennsylvania Professional Liability Joint Underwriting Association (JUA) was created by Pennsylvania's General Assembly in 1975 to fix a specific public problem: the lack of certain medical malpractice insurance. The JUA was created by statute in support of a larger public regulatory regime, performs public duties under authority of and strictly according to that statute, and exists only by the grace of that statute. Over forty years later, with the insurance landscape dramatically changed, the Pennsylvania General Assembly sought to amend its statute and revise its creation.

A. The Pennsylvania Legislature Created the JUA as a Tool for the Insurance Commissioner to Regulate the Private Market

1. The early 1970s were a difficult time for Pennsylvania's medical community, which found it increasingly difficult to purchase malpractice insurance. 3d Cir. Appx., Vol. 4 at A1270 (2/1/18 Sersha Depo. 31:4-7).[1] Pennsylvania responded to this coverage crisis in 1975 by enacting the Health Care Services Malpractice Act (Malpractice Act), Act of Oct. 15, 1975, P.L. 390, No. 111 (40 Pa. Stat. § 1301.101 *et seq*. (repealed)). The purpose of the Malpractice Act—"to make available professional liability insurance at a reasonable cost"—was accomplished through the creation of two interconnected entities: (1) the Medical Professional Liability Catastrophe Fund (CAT Fund) and (2) the JUA. 40 Pa. Stat. §§ 1301.102, 1301.701-704, 1301.801-810 (repealed).

The CAT Fund was created as a contingency fund, paying medical malpractice awards that exceeded $100,000 per occurrence. 40 Pa. Stat. § 1301.701 (repealed). It was funded "by the levying of an annual surcharge on all health care providers." 40 Pa. Stat. § 1301.701(e) (repealed).

The Insurance Commissioner was also tasked with establishing "a plan assuring that professional liability

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[1] There were two joint appendixes below, not counting the reproduced record before the Pennsylvania Supreme Court. For the sake of simplicity, Respondents will confine their citations to the Joint Appendix at 18-2297, filed March 26, 2019. Respondents will cite to this record as "3d Cir. Appx."

Susan Sersha is JUA's president. 3d Cir. Appx., Vol. 4 at A1252 (2/1/18 Sersha Depo. at 13:10-13).

insurance will be conveniently and expeditiously available *** to those providers who cannot conveniently obtain insurance through ordinary methods ***." 40 Pa. Stat. § 1301.801, 802 (repealed). This was done by the creation of a "joint underwriting association" made up of "all insurers authorized to write insurance in accordance with section 202(c)(4) and (11) of *** The Insurance Company Law of 1921." *Ibid.*

The Malpractice Act granted the Commissioner wide authority to "carry out the objectives" of this plan. 40 Pa. Stat. § 1301.804 (repealed). If the Commissioner found that "the private insurance market" was unfairly discriminating against high-risk physicians, he or she could "declare" that the JUA was the "sole and exclusive source" of medical malpractice insurance within the Commonwealth. 40 Pa. Stat. § 1301.808 (repealed). The Commissioner also possessed broad discretion to "dissolve the plan" or "reestablish the plan" as conditions within the private market dictated. *Ibid.* The JUA was a cudgel the Commissioner could wield against an unruly private market.

2. In 2002, the Malpractice Act was repealed and replaced with the Medical Care Availability and Reduction of Error Act (MCARE Act), Act of March 20, 2002, P.L. 154, No. 13 (40 Pa. Stat. § 1303.101 *et seq*.). The MCARE Act continued the objectives of the Malpractice Act—"ensuring that medical care is available in this Commonwealth through a comprehensive and high-quality health care system"—which the General Assembly declared was "essential to the public health, safety and welfare of all the citizens of Pennsylvania." 40 Pa. Stat. § 1303.102.

The MCARE Act created the MCARE Fund, the purpose of which, like the CAT Fund, is to pay claims against doctors and hospitals for damages awarded in

malpractice actions in excess of their primary coverage. 40 Pa. Stat. § 1303.102. "[T]he purpose and coverage obligations of the MCARE Fund are very similar to those of the CAT Fund." *Fletcher v. Pennsylvania Prop. & Cas. Ins. Guar. Ass'n*, 985 A.2d 678, 691 (Pa. 2009).

The JUA's statutory authorization to operate was also continued by the MCARE Act. Unlike with the Malpractice Act, however, the Commissioner no longer had unilateral discretion to dissolve the JUA. The establishment of the JUA was now a statutory command: "There is established a nonprofit joint underwriting association to be known as the Pennsylvania Professional Liability Joint Underwriting Association." 40 Pa. Stat. § 1303.731. As before, "all insurers authorized to write insurance in accordance with section 202(c)(4) and (11) of *** The Insurance Company Law of 1921" are compelled to be members of the JUA. *Ibid.*

The JUA's mission and powers remain statutorily cabined to providing medical professional liability insurance to doctors and hospitals who could not otherwise obtain coverage from the private market. 40 Pa. Stat. § 1303.732, App.198a-199a. Specifically, the JUA is statutorily required to offer "medical professional liability insurance to health care providers *** who cannot conveniently obtain medical professional liability insurance through ordinary methods at rates not in excess of those applicable to similarly situated health care providers ***." *Ibid.* The JUA also remains supervised by the Commissioner. 40 Pa. Stat. §§ 1303.731, App.197a-198a. Under the MCARE Act, the Commissioner must approve any plan of operations and the JUA cannot borrow any funds to cover deficits without the Commissioner's authorization. 40 Pa. Stat. § 1303.733(a), App.199a

In 2005, the JUA dutifully amended its Plan of Operations to reflect the amendments to its enabling statute and the regulatory regime of which it is a part. 3d Cir. Appx., Vol. 4 at A1174 (2005 Plan of Operations). The amended plan begins by affirming that the JUA "was originally established pursuant to the [Malpractice Act] and is being carried on pursuant to [MCARE]." *Ibid.* (2005 Plan at art. I). This plan defines the JUA's "purpose" as "offer[ing] medical professional liability insurance to health care providers in accordance with section 732 of [MCARE]." *Ibid.* 2005 Plan at art. III (2)). The plan further dictates, under the police powers authority granted to it by the General Assembly, that membership is compulsory for covered insurers:

> *Every* such insurer *** *shall* be a member of the Association, *shall* be bound by this Plan and *shall* remain a member as a condition of its authority to continue to transact the business of insurance on the Commonwealth of Pennsylvania.

Ibid. (2005 Plan at art. III (1)) (emphasis added). Members do not pay any money into the JUA, and the JUA does not pay its members dividends, profits, or any revenue. 3d Cir. Appx., Vol. 4 at A1307 (2/1/18 Sersha Depo. at 68:8-19); 3d Cir. Appx., Vol. 6 at 2359 (Joint Statement of Facts §§ 47-48).

B. Tort Reform Changed the Medical Malpractice Landscape, Prompting the Pennsylvania Legislature to Amend its Creation

With the implementation of tort reform in Pennsylvania, providing liability coverage to high-risk physicians and hospitals became more profitable. *See* 72 Pa. Stat. § 201-D(1) (legislative findings). The JUA never

had to borrow money to fulfill its statutory obligations. 3d Cir. Appx., Vol. 6 at A2359 (Joint Statement of Facts § 50). And with profits and investments accumulating—and no member entitled to claim a share of those earnings—by 2018, JUA had amassed a $268,124,500 surplus fund. *Pennsylvania Prof'l Liab. Joint Underwriting Ass'n v. Wolf*, 324 F.Supp.3d 519, 526 (M.D. Pa. 2018) (*JUA I*). The surplus fund is excess money beyond what the JUA estimates it needs to cover liabilities. *Ibid.*

1. Act 44 of 2017: The General Assembly sought to access unutilized state funds

In its petition, the JUA accuses the General Assembly of nefarious motives. Pet. 8-11 (accusing the Commonwealth of attempting to "confiscate" the JUA's money three times). Not so. The General Assembly has always considered the JUA a state instrumentality and the funds maintained by the JUA state funds. App. 203a (Act 44, § 201-D (3)). It is not surprising then that the Commonwealth sought to move surplus funds its instrumentality did not need to other public services.

In examining how best to allocate Commonwealth resources, the General Assembly discovered that "[a]s a result of a decline in the need in this Commonwealth for the medical professional liability insurance policies offered by [the JUA] under [MCARE], and a decline in the nature and amounts of claims paid out by [the JUA] under the policies, the [JUA] has money in excess of the amount reasonably required to fulfill its statutory mandate." 72 Pa. Stat. § 201-D(1), App.203a.

On October 30, 2017, Governor Wolf signed House Bill 674 into law as Act 44, which implemented the 2017-2018 budget through amendments to the Fiscal

Code. Act of Oct. 30, 2017, No. 44, P.L. 725 (Act 44). In Act 44, the General Assembly declared that because the JUA was "an instrumentality of the Commonwealth," all "money under the control of the [JUA] belongs to the Commonwealth," and that certain funds needed to be reallocated to other public priorities "in the best interest of the residents of this Commonwealth." 72 Pa. Stat. § 201-D(2)-(5), App.203a.

Accordingly, the JUA was ordered to transfer $200 million to the State Treasurer for deposit into the General Fund. 72 Pa. Stat. § 203-D, App.205a. If the JUA failed to transfer the funds by December 1, 2017, "the provisions of Subchapter C of Chapter 7 of the MCARE Act shall expire" and JUA would be abolished. 72 Pa. Stat. § 207-D, App.207a.

In response, the JUA initiated a civil rights action against the Governor claiming that Act 44 violated its constitutional rights. The District Court declared the JUA a private entity—essentially a private insurance company—whose surplus fund was private property. App.174a (*JUA I*). Based on this, the District Court concluded that Act 44 "attempt[ed] to take by legislative requisition the private property of a private association," in violation of the Fifth and Fourteenth Amendments, and permanently enjoined Sections 1.3 and 13 of Act 44. App.179a. The Governor and General Assembly appealed to the Court of Appeals. Nos. 18-2297 & 18-2323.

2. Act 41 of 2018: The General Assembly amended MCARE to clarify that the JUA is a state instrumentality

In June 2018, Governor Wolf signed into law Act of June 22, 2018, No. 41, P.L. 273, 40 Pa. Stat. §§ 323.1-

A - §323.21-A (Act 41). Act 41 conveyed the unambiguous legislative intent that the JUA is an instrumentality of the Commonwealth. 40 Pa. Stat. § 323.1-A(1), (3), App.188a. Act 41 amends MCARE to explicitly bring the JUA under the direct day-to-day operational control of the Insurance Department; provides that the JUA's claims and liabilities are absorbed by the Commonwealth; restructures the Board of Directors to be composed of governmental appointees; and makes the Executive Director and staff Commonwealth employees. 40 Pa. Stat. §§ 323.11-A, 323.12-A, App.190a-194a.

Act 41 prompted a second lawsuit by the JUA against the Governor, the Commissioner, and General Assembly leadership raising similar claims as before. *Pennsylvania Prof'l Liab. Joint Underwriting Ass'n v. Wolf*, 381 F.Supp.3d 324 (M.D. Pa. 2018) (*JUA II*). On cross-motions for summary judgment, the District Court declared Sections 3, 4, and 5 of Act 41 an unconstitutional taking of the JUA in violation of the Fifth and Fourteenth Amendments, and permanently enjoined their enforcement. App.131a (*JUA II*). The Governor and General Assembly appealed to the Court of Appeals. Nos. 19-1057 & 19-1058.

3. Act 15 of 2019: Enjoined from amending its own statutory creation, the General Assembly made the JUA at least more publicly accountable

On June 28, 2019, Governor Wolf signed Act of June 28, 2019, No. 15, P.L. 101, 71 Pa. Stat. §§ 420.1-420.6 (Act 15), into law, amending the Commonwealth Administrative Code of 1929, codified at 71 Pa. Stat. § 51 *et seq*., to include six new provisions directed at making the JUA more publicly accountable.

Section 1502-B provides that "the operations of the joint underwriting association shall be funded through appropriations determined by the General Assembly." 71 Pa. Stat. § 420.2, App.200a-201a. Section 1503-B requires the JUA to "submit written estimates to the Secretary of the Budget as required of administrative departments, boards, and commissions" under 71 Pa. Stat. § 235, and appear before General Assembly committees twice a year to testify about the association's budget and fiscal status. 71 Pa. Stat. § 420.3, App.201a-202a. Section 1504-B requires the JUA's board of directors to hold quarterly public meetings. 71 Pa. Stat. § 420.4, App.202a. Section 1505-B requires the JUA to comply with the Commonwealth Attorneys Act,[2] the Right-to-Know Law,[3] the Pennsylvania Web Accountability and Transparency Act (PennWATCH),[4] and the Procurement Code.[5] 71 Pa. Stat. § 420.5, App.202a. And under Section 1506-B, the JUA must submit an employee list to several Commonwealth agencies under Section 234 of the Administrative Code, operate from Commonwealth-owned property, and ensure that employees with access to federal tax information meet Department of Revenue guidelines. 71 Pa. Stat. §420.6, App.203a.

The JUA initiated a third lawsuit on July 1, 2019, arguing that Act 15 violated various provisions of the United States Constitution. *Pennsylvania Prof'l Liab. Joint Underwriting Ass'n v. Wolf*, 509 F.Supp.3d 212 (M.D. Pa. 2020) (*JUA III*). Following discovery, the parties cross-moved for summary judgment. The District

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[2] 71 Pa. Stat. § 732-101, *et seq*.
[3] 65 Pa. Stat. § 67.101, *et seq*.
[4] 72 Pa. Stat. § 4664.1, *et seq*.
[5] 62 Pa. Const. Stat. § 101, *et seq*.

Court[6] granted the JUA's summary judgment in part, permanently enjoining Sections 1502-B, 1503-B, and 1505-B(1) of Act 15.[7] App.87a (*JUA III*). That court concluded that appropriating public money to fund the JUA's operations amounted to a regulatory taking, in violation of the Fifth Amendment. App.69a-70a. And that guaranteeing the JUA free representation through the Pennsylvania Office of Attorney General violated its First Amendment right to counsel. App.77a78a. The District Court granted the General Assembly and Governor's summary judgment motions as to all remaining claims. App.81a-83a, 88a.

All parties appealed to the Court of Appeals. Nos. 21-1099, 21-1112, & 21-1155.

C. The Court of Appeals Determined that the JUA is a Public Institution

The parties briefed this controversy in the Court of Appeals twice: once on the District Court's injunction of Act 44 of 2017 and Act 41 of 2018; and once on the District Court's partial injunction of Act 15 of 2019. The Court of Appeals then consolidated all of the appeals and heard argument on November 9, 2022.

After argument, that court filed a Petition to Certify a Question of State law with the Pennsylvania Supreme Court. App.44a. The Pennsylvania Supreme Court granted the petition, but ultimately dismissed it as improvidently granted. App.46a.

After six years of extensive appellate litigation, the Court of Appeals unanimously held that the JUA was

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[6] The Honorable Christopher C. Conner, now retired, adjudicated all three lawsuits at the trial level.

[7] 71 Pa. Stat. §§ 420.2, 420.3, and 420.5.

a public institution "without the ability to maintain the constitutional claims it has asserted against the Commonwealth." App.35a. Relying of this Court's reasoning in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518 (1819), the Court of Appeals found that "Pennsylvania established the JUA to serve an integral role in the administration of the Commonwealth's insurance market and, consequently, in the health care market too." App.35a. It gave the JUA "the coercive power of state government to compel private insurance companies to take specific actions" and "only the Commonwealth has a legally protectable interest in the JUA and its resources." *Ibid.* The Court of Appeals reversed the District Court's injunctions of Acts 44, 41, and 15.[8]

The JUA sought rehearing *en banc*, which the Court of Appeals denied without a single dissent. App.186a.

REASONS FOR DENYING THE WRIT

The JUA, in the words of the District Court, is "a unique creature[.]" App.81a. But what the District Court overlooked, and the Court of Appeals recognized, is that the JUA's uniqueness derives from how it was created by the General Assembly and its "integral role in the administration of the Commonwealth's insurance market[.]" App.35a. Pennsylvania did what States do best: experiment in how it structured its government to accomplish an important public policy. And after careful examination of this intensely fact-bound case, the Court of Appeals correctly recognized that the

[8] The Court of Appeals affirmed the District Court's judgment to the extent it upheld the constitutionality of portions of Act 15. App.20a n.20.

JUA is a public entity. App.5a, App.30a ("In this instance, we believe that the Commonwealth's creation and use of the JUA for the stated purposes indicates that it can rightly be considered a feature of the Commonwealth's government and hence as a public institution.").

The JUA's petition presents this Court with no compelling reason to grant review of this decision. S. Ct. R. 10. The petition should be denied for at least three broad reasons.

First, contrary to the JUA's insistence, no split exists on this issue. The cases the JUA proffer involve fundamentally different entities and are, therefore, easily distinguishable.

Second, the JUA's attempt to tinker with the *Dartmouth College* analysis fails. None of the cases the JUA seeks to staple onto that analysis supports its position. And the JUA's claims of "broader confusion" among the courts is likewise unsupported. By focusing on inapposite cases involving incorporated entities, the JUA seeks to lead this Court down the wrong path.

Third, the Court of Appeals' decision is simply correct. The JUA's attempt to undermine that decision ignores its own origin and misapprehends the Court of Appeals' analysis.

I. NO SPLIT EXISTS AMONG THE CIRCUITS ON THIS ISSUE

In attempting to contrive a circuit split, the JUA points to three cases: *Texas Catastrophe Prop. Ins. Ass'n v. Morales*, 975 F.2d 1178 (5th Cir. 1992); *Asociación De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1 (1st Cir. 2007); and *Illinois Clean Energy v. Filan*,

392 F.3d 934 (7th Cir. 2004). These cases, however, do not demonstrate a split.

First, the age of these three supposed splits belies the JUA's claim that this is a "recurring constitutional issue***." Pet. at 16. If this truly were a recurring issue, the JUA would not need to reach back several decades.

Second, the Third Circuit is not shy about acknowledging splits with sister circuits. *See*, *e.g.*, *In re Asbestos Products Liab. Litig. (No. VI)*, 921 F.3d 98, 109 (3d Cir. 2019) ("To the extent our holding today creates a circuit split with the Sixth Circuit, it is compelled by our own precedent."); *Reading Health Sys. v. Bear Stearns & Co.*, 900 F.3d 87, 103-04 (3d Cir. 2018) ("In so holding, we split with some of our sister circuits ***."). But here, the Court of Appeals easily distinguished *Morales* and *Asociación*. App.36a-38a. And rightfully so, as they are easily distinguishable. As for *Filan*, that case is so fundamentally different from this matter that it highlights why the JUA is a public entity.

1. In *Morales*, the Fifth Circuit held that the Constitution limited Texas' actions toward a state-created insurance association because, unlike here, its members shared in the association's profits and losses. 975 F.2d at 1182-1183; App.35a. Because those private member-insurance-companies possessed a financial stake, Texas was not "alone interested" in the association's operations. *Id.* at 1183 (citing *Dartmouth College*). The association's insurer-members were "interested in protecting their private monies," and Texas could not "deprive those companies of the rights guaranteed them by the Constitution of the United States

to protect their private property." *Ibid*. Thus, the "insurance scheme in *Morales* differed from the JUA in a particularly significant way[.]" App.38a.

In the last 33 years since *Morales*, the Fifth Circuit has only substantively discussed that decision once: in an unpublished decision in *Mississippi Surplus Lines Ass'n v. Mississippi*, 261 Fed.Appx. 781 (5th Cir. 2008). There, the Fifth Circuit recognized that "*Morales* was not a takings case" and the fact that member-insurance-companies were liable to cover the association's expenses was critical to that court's prior decision. *Id.* at 787. As correctly noted by the Third Circuit, the JUA's members are *not* liable for expenses and have *no* property interest in the JUA's assets. App.35a

Far from splitting with the Fifth Circuit, the Third Circuit relied on that court's application of *Dartmouth College* to adjudicate this matter. App.25a-26a. The disposition in each case is different because the entities examined and the state laws at issue were different. This is not a split.

2. In *Asociación*, the First Circuit held that a government established motor vehicle joint underwriting association could assert a takings claim against Puerto Rico. 484 F.3d at 20. Describing the association as "[a] private corporation," the court provided little analysis beyond its reliance on its prior decision in *Arroyo-Melecio v, Puerto Rican American Ins. Co.*, 398 F.3d 56, 62 (1st Cir. 2005).

In *Arroyo-Melecio*, "[t]he First Circuit engaged in no analysis of the association's status as a public or private entity; it did not have to. The statute that created that association and its relevant rules stated that it was 'a private association,' had the 'general corporate powers of a private corporation,' and was 'for-profit[.]'"

App.37a (citations omitted). None of the parties in *Arroyo-Melecio* disputed the association's private corporate status, App.37a, because, as in *Morales*, the member-insurers shared in the profits and losses of the private corporation. *Asociación*, 484 F.3d at 20; *Arroyo-Melecio*, 398 F.3d at 62. That is not the case here.

3. In *Filan*, Illinois allowed a company (ComEd) to sell seven power plants on the condition that the company establish a foundation incorporated under Illinois' General Not For Profit Corporations Act of 1986, 805 ILCS 105/101.05 *et seq*. 392 F.3d 934, 935-936 (7th Cir. 2004). Only the foundation's structure and mission were prescribed by special legislation. *Id.* at 935. Thus, unlike here, the Not For Profit Corporations Act, not the authorizing statute, provided the foundation with legal status as a separate entity from the State. *Id.* at 936-37. Because of this, the Seventh Circuit found that the foundation was like any other charitable corporation—a private entity. *Id.* at 937.

The differences between the foundation in *Filan* and the JUA are obvious and dispositive. Illinois did not create the environmental trust in *Filan*, a private energy company did. *See Ill. Clean Energy Cmty. Found. v. Filan*, No. 03-7596, 2004 WL 1093711, at *8 (N.D. Ill. Apr. 30, 2004) ("[The statute] did not create [the trust]. ComEd created [the trust], as it was authorized–but not required–to do under [the statute]."). The funds at issue in *Filan* were ComEd profits, donated by ComEd to a private environmental trust created by ComEd. Here, by contrast, the funds are the product of a Commonwealth-created entity's performance of a statutory mandate. This money has no "private" character outside the Commonwealth's "legislative scheme to maintain a high-quality health care system ***." App.35a.

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None of the decisions the JUA cites creates a split with the Third Circuit. Each presents facts fundamentally different from the instant controversy. Whether the entity has members who possess an interest in its profits, *Morales*, 975 F.2d at 1183; *Arroyo- Melecio*, 398 F.3d at 62, or was created by a private company under the State's general not-for-profit corporation law, *Filan*, 392 F.3d at 935-936, these idiosyncratic cases rest on the unique nature of the entity involved and the state law creating them. The fact that different courts of appeals came to different conclusions when examining entities with different structures and origins does not a split make.

II. THE JUA'S EVER CHANGING TEST WOULD NOT AID THIS COURT IN ANSWERING THE QUESTION PRESENTED

In its petition, the JUA faults the Court of Appeals for not following a three-part test the JUA constructs from *Dartmouth College,* 17 U.S. (4 Wheat) 518, *Piqua Branch of State Bank of Ohio v. Knoop*, 57 U.S. (16 How.) 369 (1853), *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995), and *Biden v. Nebraska*, 600 U.S. 477 (2023). Pet. at 28-33. The JUA's heavy reliance on the last three cases is new and bespeaks a floundering to cobble together a test—any test—to supplant *Dartmouth College*. This is because, as the Court of Appeals correctly concluded, if this Court's long-standing analysis in *Dartmouth College* is faithfully applied, the JUA reveals itself to be a public entity.

1. Before the Court of Appeals, all parties agreed that *Dartmouth College* controlled. App.27a, And at no point did the JUA cite to (let alone discuss) *Knoop*. This

was not for want of opportunity—the JUA filed 14 briefs, collectively containing some 536 pages, in three different courts. As for its newfound reliance on *Lebron*, the JUA successfully argued below that "*Lebron* has no application here ***." Dist. Ct. 1:17-cv-02041, no. 75 at 2-5 (JUA's br. in opp. to summary judgment); *see also* App.160a (Dist. Ct. May 17, 2018 decision) (agreeing with the JUA that "*Lebron* has no application in this posture"); App.108a (Dist. Ct. Dec. 18, 2018 decision) (finding "reliance on the United States Supreme Court's decision in *Lebron* *** to be misplaced"). The JUA's sudden embrace of these cases is convenient but unavailing.

2. The way the JUA belatedly uses *Knoop*, *Lebron*, and *Nebraska* also confuses the question presented.

In *Knoop*, Ohio enacted in 1845 "a general banking law" permitting citizens to incorporate "banking companies[.]" 57 U.S. at 393. Under this act, these private corporations were required to pay the State 6% of their profits "in lieu of all taxes to which the company, or the stockholders therein, would otherwise be subject." *Id.* at 394. When Ohio passed a new law raising the tax on banks, a bank incorporated under the 1845 act sued. This Court held that the 1845 act constituted a contract with the incorporated banks, and "a contract made for a specific tax, as in the case before us, is binding." *Id.* at 389. This "impair[ed] the obligation of the contract, which is prohibited by the Constitution of the United States[.]" *Id.* at 392.

The JUA's reliance on this case is perplexing, as there was no serious question that "a bank, where the stock is owned by individuals, is a private corporation." *Id.* at 380. The JUA is not a corporation, has issued no stock, and its members indisputably possess no interest in its assets. App.35a. Thus, the *Knoop* decision—

primarily involving the nature of Ohio's Act of 1845—does not inform the present controversy.

In *Nebraska*, this Court examined whether Missouri had an interest in the Missouri Higher Education Loan Authority (MOHELA), "a nonprofit government corporation." 600 U.S. at 489. As discussed below in Section III(A), the JUA is an *unincorporated association*, which at the time of its creation by Pennsylvania possessed no legal identity outside of the regulatory scheme of which it is a part. *See Krumbine*, 663 A.2d at 160; *Campbell v. Floyd*, 25 A. 1033, 1036 (Pa. 1893). Whether a State has an interest, for purposes of standing, in a corporation does not answer whether the JUA, an unincorporated entity, can bring civil rights claims against its creator. These two analyses are distinct.

The JUA makes this mistake again by relying on *Lebron*. There, this Court examined whether Amtrak, a "for profit corporation" incorporated "under the District of Columbia Business Corporation Act, D.C. Code Ann. § 29–301 et seq. (1981 and Supp.1994)," could be considered an "instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution." 513 U.S. at 385, 394. In holding that Amtrak was an instrumentality, this Court made clear that Amtrak was not a government entity in all contexts. *Id.* at 392. Amtrak's charter, which explicitly disclaimed agency status, "was sufficient to deprive Amtrak of all those inherent powers and immunities of Government agencies that it is within the power of Congress to eliminate." *Ibid.* This included "depriv[ing] Amtrak of sovereign immunity from suit and of the ordinarily presumed power of Government agencies authorized to incur obligations to

pledge the credit of the United States." *Ibid.* (citations omitted).[9]

The JUA's proposed one-test-fits-all approach finds no support in *Lebron*. Being a governmental instrumentality for purposes of the First Amendment does not render the entity an instrumentality for all other purposes. The JUA's repeated attempt to modify the *Dartmouth College* analysis fails.

3. The JUA makes this same mistake again when it erroneously asserts that courts are "confus[ed]" about the dividing line between private and public entities. Pet. at 24. In that section of its petition, the JUA complains that courts apply different tests to determine if an entity may bring a constitutional claim, may be sued for a constitutional claim, or may assert sovereign immunity. Pet. at 24-28. Of course courts have different tests; these are different questions that require different considerations. *See Lebron*, 513 U.S. at 392.

This is not the first time the JUA erred in this way. In the Pennsylvania Supreme Court, the JUA cobbled together a test from inapposite Pennsylvania cases involving dissimilar entities (mostly corporations) in fundamentally dissimilar situations. The JUA discussed a variety of Pennsylvania cases that examined whether different entities were "Commonwealth agencies" or

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[9] If applied to this case, this Court's analysis in *Lebron* supports the Court of Appeals' decision. There, this Court found material that Amtrak was created by statute, and that the statute was intended to advance a public purpose. 513 U.S. at 384-85. This Court considered a Congressional finding in Amtrak's enabling law that stated that "public convenience and necessity" required improving the railroad passenger system, as proof of Amtrak's public purpose. *Ibid*. So too here, as the JUA was created by the Pennsylvania General Assembly as "integral to the Commonwealth's administration of a highly regulated, safe, and accessible health care system ***." App.30a.

equivalent to the Commonwealth itself for purposes of local tax laws, sovereign immunity, the Commonwealth Court's original jurisdiction, and the Right-to-Know Law. 7 EAP 2023, JUA br. at 37-46 (May 18, 2023). The Pennsylvania Supreme Court rejected this argument, noting that the cases cited by the JUA "were context-driven decisions." App.45a. Whether an entity "should be treated as governmental," or is exempt from local property taxes, or is entitled to governmental immunity, simply did not assist in answering the question presented here. App.45a-46a.

After granting the Petition for Certification of Question of State Law, the Pennsylvania Supreme Court was forced to dismiss the matter "as having been improvidently granted ***." App.46a. This Court should not make the same mistake.

III. THE COURT OF APPEALS CORRECTLY HELD THAT THE JUA IS A PUBLIC ENTITY UNDER *DARTMOUTH COLLEGE*

Unable to demonstrate a split or confusion, the JUA and its *amici* retreat to arguing error-correction. Pet. at 28-37; Br. of New England Legal Found. at 4-14; Br. of American Medical Assoc. at 9-15. Every petitioner believes the court of appeals erred in either its analysis or understanding of the facts; merely arguing error is not a compelling reason to grant review. *See* S. Ct. R. 10.

The JUA's argument is unavailing for two additional reasons. *First*, the JUA ignores material facts about its origin. *Second*, the JUA's argument that the Court of Appeals erred in its analysis, Pet. at 34-36, is itself riddled with errors.

A. Pennsylvania created the JUA as a public institution employed in the administration of government

As correctly recognized by the Court of Appeals, the origin of an entity is critical to determining its nature. A.29a-30a. For example, when examining whether Dartmouth College was a public or private entity, this Court began by examining the college's origin, noting that Rev. Eleazer Wheelock established the college as a charity school for the instruction of Native Americans. *Dartmouth College*, 17 U.S. (4 Wheat) at 631. This origin was important, as "[t]he character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created." *Id.* at 638. Public entities are created by the State for its own purposes, whereas private corporations are begot by the private will and pleasure of individuals under the general permission of the State. Because Dartmouth College was created by the private will and pleasure of Dr. Wheelock for his noble purposes, it was a private entity. *Id.* at 640-641.

The JUA makes barely a mention of its creation by the General Assembly in 1975, relegating this history to a single paragraph. Pet. at 5. But facts are stubborn things, and the JUA cannot escape its origin merely by ignoring it.

1. The General Assembly's decision to form the JUA as an *unincorporated association*, rather than a corporation, confirms the JUA's governmental nature. When the JUA was created in 1975, and statutorily continued in 2002, associations had no independent legal status in Pennsylvania. *See Krumbine v. Lebanon County Tax Claim Bureau*, 663 A.2d 158, 160 (Pa. 1995); *Campbell*,

25 A. at 1036.[10] The JUA's existence was entirely dependent on its role within the Malpractice Act regulatory scheme. As the Court of Appeals noted, "[t]he JUA is integral to the Commonwealth's administration of a highly regulated, safe, and accessible health care system[.]" App.30a.

Even beyond the historical significance of the JUA's status as an unincorporated association, its lack of incorporation distinguishes it from the cases on which it relies. In *Lebron*, Amtrak was statutorily defined as "a for profit corporation[.]" 513 U.S. at 385. In *Nebraska*, there was no question that MOHELA was "a nonprofit government corporation[.]" 600 U.S. at 489. In *Knoop*, the banks were incorporated companies and issued stock. 57 U.S. (16 How.) at 380. Even in *Dartmouth College,* the college had a charter of incorporation. 17 U.S. at 638.

The General Assembly had the statutory tools to create the JUA as a corporation, *see* Pennsylvania Corporation Act of 1874,[11] or a non-profit corporation, *see* Nonprofit Corporation Law of 1972,[12] but chose neither option. The Commonwealth did not want the JUA to function outside of its regulatory role. As the Court of Appeals explained, "the Commonwealth's creation and use of the JUA for the stated purposes indicated that it

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[10] The JUA cites to Pennsylvania's Uniform Unincorporated Nonprofit Association Law (Unincorporated Association Law) as the source of its legal status. Pet. at 6 (citing 15 Pa. Con. Stat. § 9114(a)). Notably, the Unincorporated Association Law was not enacted until 2013—35 years *after* the General Assembly created the JUA. *See* Act of July 9, 2013, P.L. 476, No. 67.

[11] Act Apr. 29 1874, P.L. 73, 15 Pa. Stat. § 1 *et seq*. (repealed)

[12] Act of Nov. 15, 1972, P.L. 1063, codified as 15 Pa. Const. Stat. Chapter 51.

can rightly be considered a feature of the Commonwealth's government and hence as a public institution." App.30a.

2. The General Assembly created the JUA as a tool to regulate the private malpractice insurance market. Under the Malpractice Act, if the Commissioner found that "the private insurance market" was unfairly discriminating against high-risk physicians, he or she could "declare" that the JUA was the "sole and exclusive source" of medical malpractice insurance within the Commonwealth. 40 Pa. Stat. § 1301.808 (repealed). If JUA was simply another private insurance company, as it claims, the Commissioner's authority to grant it a statewide monopoly would be extraordinary, and possibly violative of the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq*.

The Commissioner also possessed broad discretion to "dissolve the plan" or "reestablish the plan" as conditions within the private market dictated. 40 Pa. Stat. § 1301.808 (repealed). The JUA was a governmental tool the Commissioner could use to *regulate* the private market; it was never *part* of that market.

The General Assembly chose to modify several of the Commissioner's powers when it continued the JUA's statutory authorization through the MCARE Act. For example, the Commissioner no longer had unilateral discretion to dissolve the JUA or declare it the exclusive source of medical malpractice insurance. *See* 40 Pa. Stat. § 1303.731. But in doing so, the General Assembly did not incorporate a new entity to replace its instrumentality; the JUA remained the same integral component to Pennsylvania's medical malpractice regulatory structure. The essence of the JUA remained the same. Its mission and powers remained statutorily

cabined to providing medical professional liability insurance to doctors and hospitals who could not otherwise obtain coverage from the private market. 40 Pa. Stat. § 1303.732(a). And importantly, its members continued having no interest in its assets or profits. App.35a.

The JUA's mission also has not changed under the recent challenged legislation. It remains the last-resort public-option for medical providers unable to obtain medical malpractice insurance on the private market. In fact, the Commonwealth has improved its creation by moving the JUA into the Pennsylvania Insurance Department, App.190a, assuming its liabilities, App.191a, giving it new governance, App.191a-194a, funding its operations, App.201a, and requiring it to be more transparent, App.202a-203a. Therefore, even if Pennsylvania is entering into a "hard market," as *amici* predict, Br. of American Medical Assoc. at 9, 17-18, the Commonwealth is well positioning its creation to triumph over that challenge.

B. The JUA's criticism of the Court of Appeals' analysis is plagued by errors

1. The JUA criticizes the Court of Appeals for finding that the JUA "support[s] a public purpose within the state insurance market." Pet. at 34 (quoting an introductory paragraph at App.4a-5a instead of the analysis at 28a-33a). The JUA argues merely having a public purpose is insufficient. *Id.* But this misapprehends the Court of Appeals' analysis, which found a deep integration with the Commonwealth's regulatory structure.

"Pennsylvania established the [JUA] in 1975 to ensure that health care providers could obtain [medical

professional liability] insurance at a reasonable cost and that victims of medical negligence would promptly receive fair compensation." App.29a. "The JUA is integral to the Commonwealth's administration of a highly regulated, safe, and accessible health care system: it ensures that health care providers in high-risk specialties or reentering practice can and will do business within the Commonwealth, where obtaining required insurance coverage would otherwise by cost-prohibitive." App.30a. The JUA is "an essential piece of [the Commonwealth's] supervision of [Pennsylvania's] insurance market and health care system[.]" *Ibid.* Given "the Commonwealth's creation and use of the JUA" for these purposes, the entity "can rightly be considered a feature of the Commonwealth's government and hence as a public institution." *Ibid.* Despite its attempt to paint itself otherwise, the JUA is an integral part of the Commonwealth's regulatory structure.

2. The JUA complains that state creation of an entity is not sufficient; otherwise, "*all corporations* would be government entities." Pet. at 34 (emphasis in original). Not so. Corporations are the "offspring of [the] will and pleasure" of private individuals under the general permission of the State. *Dartmouth College*, 17 U.S. at 661 (Washington, J., concurring). The JUA, conversely, was created and designed by the General Assembly for its own specific public purpose, through passage of the Malpractice Act, and thereafter, the MCARE Act. App.5a, 29a-30a. It is a creation of the Commonwealth's will and pleasure, to serve its purposes.

3. The JUA purports to quote the Court of Appeals as conceding that the "JUA's funds are 'undisputed[ly]' private[.]" Pet. 35. The Court of Appeals did not say this. That court merely observed "it is undisputed that the JUA has not drawn on the public fisc." App.31a.

These two statements are not equivalent. As explained by the Court of Appeals, "the JUA's funds are not simply private money exchanged among private individuals and entities in a typical insurance market. The funds are the result of the Commonwealth's acquisition of policyholders' premium payments for a public purpose." *Ibid.* The fact that these premium payments began as private money by medical providers is of no moment to this analysis. Tax money begins as private money of individuals. Speeding tickets begin as private money of individuals. This does not make tax revenue and fines collected by the State private money. The important component, which the Court of Appeals addresses and the JUA ignores, is that this money is acquired to support a governmental purpose—"to make available a comprehensive and high-quality health system in the Commonwealth, one aspect of which is to ensure access to affordable [medical professional liability] insurance. 40 Pa. Stat. §§ 1303.102(1), (3)." *Ibid.*

4. The JUA asserts that the Court of Appeals is wrong to say that "[t]he JUA's funds are the result of the Commonwealth's enforced acquisition of funds to support those goals, and only the Commonwealth has a legally protectable interest in the JUA and its resources." App. 35a; Pet. at 35. This is supposedly because "[n]o statute *requires* healthcare providers to obtain insurance from JUA." Pet. 35 (emphasis added). This carefully worded statement ignores the statutorily defined purpose of the JUA.

Pennsylvania law requires all health-care providers practicing within the Commonwealth to either purchase minimal "medical professional liability insurance from an insurer which is licensed or approved by the department" or to "provide self-insurance" at a cer-

tain amount. 40 Pa. Stat. § 1303.711. The JUA is statutorily tasked (the statute uses the word "shall") with offering medical professional liability insurance to health care providers "who cannot conveniently obtain medical professional liability insurance through ordinary methods at rates not in excess of those applicable to similarly situated health care providers ***." 40 Pa. Stat. § 1303.732(a). The JUA is, by statutory command, the "insurer of last resort for high-risk medical providers ***." App.3a. Healthcare providers who cannot obtain affordable insurance on the private market, therefore, must either purchase insurance from the JUA or stop practicing in Pennsylvania. Situation and statute require these healthcare providers to obtain insurance from JUA.

5. The JUA complains that the Court of Appeals found that only the Commonwealth has a legally protectable interest in the JUA. Pet. at 35-36. This, the JUA claims, rests on the assumption that Pennsylvania would receive the profits from any dissolution. *Ibid.* Again, the JUA oversimplifies that court's analysis.

The Court of Appeals noted a question posed by the Governor and Insurance Commissioner: "Suppose one sought to purchase [the] JUA. To whom would they write the check?" App.32a. "[N]ot the members, the Board, or the JUA itself. The JUA has no beneficiaries or donors. So the question stands: Were the JUA able to be sold, who besides the Commonwealth would be entitled to receive the profit from the sale?" *Ibid.*

The JUA could provide no answer to this simple question. *Ibid.* And it makes no attempt to answer this question here. That is because the answer is fatal to its argument. No entity, other than the Commonwealth, has an interest in the JUA. App.35a.

The Court of Appeals summarized its findings thusly:

> In the end, the JUA's possible financial booms and busts do not give its policyholders or members a legal interest in its assets. The JUA fails to identify any other legally protectable interest on behalf of anyone but the Commonwealth. As far as we can tell, the Commonwealth, which created the JUA as part of its broader legislative scheme to maintain a high-quality health care system, is the only one with an interest in the JUA.

App.35a. The Court of Appeals did not err in its analysis or conclusions.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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