No. 24-1028

In the Supreme Court of the United States

PENNSYLVANIA PROFESSIONAL LIABILITY JOINT UNDERWRITING ASSOCIATION,

Petitioner,

v.

JOSH SHAPIRO, GOVERNOR OF PENNSYLVANIA, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONER

KATHERINE C. YARGER
LEHOTSKY KELLER COHN LLP
700 Colorado Blvd. # 407
Denver, CO 80206

KEVIN J. MCKEON
DENNIS A. WHITAKER
MELISSA A. CHAPASKA
HMS LEGAL LLP
501 Corporate Cir.
Suite 302
Harrisburg, PA 17011

SCOTT A. KELLER
Counsel of Record
STEVEN P. LEHOTSKY
SHANNON G. DENMARK
LEHOTSKY KELLER COHN LLP
200 Massachusetts Ave. NW
Suite 700
Washington, DC 20001
(512) 693-8350
scott@lkcfirm.com

Counsel for Petitioner

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The Third Circuit's opinion centered on this Court's 200-year-old opinion in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). So too do Respondents' oppositions. As the Solicitor General recently argued in this Court, however, one cannot ignore the cases this Court has decided since *Dartmouth*. Those cases, the Solicitor General explained, make clear that a "key consideration" in identifying governmental entities is "control[] by the State." U.S. Amicus Br., *Okla. Statewide Charter Sch. Bd. v. Drummond*, Nos. 24-394 & 24-396, 2025 WL 819548, at *4 (U.S. Mar. 12, 2025). Respondents fail to acknowledge, let alone address, the Solicitor General's position that governmental control is "critical." *Id.* at *21. And because this Court ultimately affirmed that case by an equally divided Court, it could not provide needed guidance on the issue.

But this case presents an ideal vehicle to do so. Petitioner JUA does not seek to "supplant" or "modify the *Dartmouth College* analysis." Gov.BIO.16, 19. Rather, JUA seeks this Court's guidance on how to resolve recurring issues splitting the circuits that have developed from *Dartmouth* and its progeny.

Certiorari is warranted. Respondents' attempt to write off the square 3-1 circuit split as the product of factual differences is belied by the reasoning of the cases themselves. None of the distinctions Respondents draw mattered to the legal analysis. The Third Circuit's misapplication of this Court's precedents contradicts *Dartmouth*, *see* NELF.Amicus.4-14, as well as more recent cases cited by the Solicitor General making clear that

governmental control is a key consideration in differentiating private and governmental entities. And Respondents say nothing about the federal government recognizing JUA as a distinct entity from the Commonwealth by granting it 26 U.S.C. § 501(c)(6) status. *See* Pet.6. Respondents try to minimize Pennsylvania's $300 million taking as low "stakes" and a "one-off." Legis.BIO.23. But the circuit split demonstrates that States have tried this sort of money grab before—and presumably will be empowered to do so again if the Third Circuit's blueprint stands. *See* Pet.4; AMA.Amici.18. And Respondents' sole vehicle argument is misguided. The fact that this case raises *federal* constitutional questions is a vehicle feature—not a bug. This Court should grant certiorari and provide the much-needed guidance it was not able to provide in *Drummond*.

I. The circuit split is real, as is the broader confusion it implicates.

A. Respondents do not dispute that the First, Fifth, and Seventh Circuits all held that entities that were privately funded, privately controlled, and performed a private function were *private*. *See Asociación de Subscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 20 (1st Cir. 2007); *Tex. Catastrophe Prop. Ins. Ass'n v. Morales*, 975 F.2d 1178, 1182 (5th Cir. 1992); *Ill. Clean Energy Cmty. Found. v. Filan*, 392 F.3d 934, 936-38 (7th Cir. 2004). The Third Circuit here, meanwhile, determined that such an entity was *governmental*. App.4a-5a. Nor do Respondents dispute that the First, Fifth, and Seventh Circuits—like the

Solicitor General—*emphasized* the absence of governmental control in their analysis. *See Arroyo-Melecio v. Puerto Rican Am. Ins. Co.*, 398 F.3d 56, 62 (1st Cir. 2005); *Morales*, 975 F.2d at 1182; *Filan*, 392 F.3d at 937-38. The Third Circuit here, meanwhile, *ignored* the absence of governmental control. App.28a-35a. Put simply, the Third Circuit's decision cannot be reconciled with the decisions of the First, Fifth, and Seventh Circuits.

Respondents nonetheless dispute the existence of this split for two reasons, both of which are unpersuasive.

First, Respondents suggest that there is no split because the Third Circuit did not say there is a split. Gov.BIO.13; Legis.BIO.24. But lower courts often create splits without declaring they are doing so—including the Third Circuit. *Compare, e.g.*, *PPL Corp. v. Commissioner*, 569 U.S. 329, 334 (2013) (granting certiorari "to resolve a Circuit split"), *with PPL Corp. v. Commissioner*, 665 F.3d 60 (3d Cir. 2011) (not acknowledging split); *and Royal Canin U.S.A., Inc. v. Wullschleger*, 604 U.S. 22, 30 (2025) ("grant[ing] certiorari to resolve [a] Circuit split"), *with Wullschleger v. Royal Canin U.S.A., Inc.*, 75 F.4th 918 (8th Cir. 2023) (not acknowledging split). That is no reason to deny certiorari, and lower courts cannot insulate their opinions from this Court's review by refusing to acknowledge a circuit split.

Second, Respondents argue that the cases on the other side of the split involved "fundamentally different entities and are, therefore, easily

distinguishable." Gov.BIO.12; *see* Legis.BIO.24-29. But the thin distinctions Respondents draw make no difference to these decisions' legal analysis, as the district court correctly recognized. *See* App.167a ("[W]e disagree with the General Assembly's assertion that these factual distinctions are dispositive.").[1]

Respondents attempt to distinguish the First Circuit's case in *Asociación* and Fifth Circuit's case in *Morales* on the ground that the members of the private entities in those cases shared in the entities' profits and losses.[2] Gov.BIO.13-15; Legis.BIO.25-27. But as the district court here recognized, that fact was not "dispositive." App.167a. "No decision" supports Respondents' "contention that an entity's public or private status turns on for-profit versus nonprofit nature." *Id.*; *see Filan*, 392 F.3d at 936-38 (deeming a nonprofit entity private). Rather, what mattered to the First and Fifth Circuits was that the entities were privately funded (like JUA), privately controlled (like JUA), and exercised a private function (like JUA). *See* Pet.18-22, 24.

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[1] The Legislative Respondents are therefore wrong to assert that the district court was "align[ed] with the Third Circuit's analysis" in distinguishing the cases on the other side of the split. Legis.BIO.24 n.8.

[2] Respondents also attempt to distinguish the First Circuit's *Arroyo-Melecio* case on the ground that the insurance association's "private status was undisputed." Legis.BIO.26. But the insurance association's status was very much disputed in *Asociación*, which deemed the association private. 484 F.3d at 20.

Respondents attempt to distinguish the Seventh Circuit's *Filan* case on the ground that "Illinois did not create the environmental trust" but merely authorized its creation. Gov.BIO.15; *see* Legis.BIO.28 n.10. That ignores the Seventh Circuit's statement that "'authorized' []realistically mean[s] … 'commanded'[] the company to establish the plaintiff foundation." *Filan*, 392 F.3d at 935. In other words, the State's involvement in the creation of the foundation was "coercive." *Id.* at 937. In any event, the Seventh Circuit made crystal clear that the level of state involvement in an entity's creation was not dispositive in its analysis. *Id.* at 936. What mattered was instead that the foundation was privately funded (like JUA) and privately controlled (like JUA). *Id.* at. 937-38.[3]

Each of these distinctions makes no legal difference. Like JUA here, the entities in the First, Fifth, and Seventh Circuit cases were privately funded, privately controlled, and performed a private function. *See* Pet.23. That is what matters under this Court's precedents. *See infra* pp.7-10; Pet.32-33.

B. Respondents do not dispute that courts take differing approaches to assessing the line between private and governmental entities in various constitutional contexts. *See* Pet.24-28. Respondents

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[3] Respondents also attempt to distinguish *Filan* by suggesting that "the funds originated as … private property." Legis.BIO.28. The same is true of JUA, which "undisputed[ly]" never "dr[ew] on the public fisc." App.31a

deem this confusion irrelevant for two primary reasons. Neither has merit.

First, the Legislative Respondents argue that JUA "did not preserve" any argument about broader confusion in the lower courts. Legis.BIO.22. This argument is misguided. JUA's observation about broader confusion across various constitutional doctrines is not a "claim[]" that can be waived. Legis.BIO.29 (citation omitted). Rather, it is a reason this Court's discretionary review is warranted to provide lower courts guidance that this Court was unable to provide in *Drummond*. *See* Sup. Ct. R. 10.

Second, Respondents observe that the line between private and governmental entities arises in "different legal contexts." Legis.BIO.30; *see* Gov.BIO.19-20. True, but that is a *cause* of the confusion, not any *resolution* to it. Respondents fail to grapple with the fact that the question posed in each of these constitutional contexts is the same: Is a particular entity private or governmental? Recognizing the similarity of the question, the Governor below urged the district court to borrow the standard from a different constitutional context. *See* App.159a ("Governor Wolf rejoins that whether a party asserts or disclaims constitutional liability is 'an empty distinction.'" (citation omitted)). The confusion is undeniable, and this case is a good vehicle to begin clearing it up.

* * *

In sum, this case presents both a 3-1 circuit split as well as broader circuit confusion on this issue across multiple constitutional doctrines. This Court should grant review to resolve both.

II. The decision below was wrong.

Respondents wrongly suggest that JUA seeks to "supplant" or "modify the *Dartmouth College* analysis." Gov.BIO.16, 19. JUA's argument remains, as it always has been, rooted firmly in *Dartmouth*. *Dartmouth* recognized that the nature of the entity's "funds" is a key factor in determining whether an entity is private or governmental. 17 U.S. (4 Wheat.) at 632-33. *Dartmouth* also stressed the nature of the entity's function as another factor—whether it is exercising "political power" or is involved "in the administration of the government." *Id.* at 629. And, finally, *Dartmouth* took care to recognize that Dartmouth's trustees "were appointed by, and act under," the school's private founder. *Id.* at 633. Subsequent cases in related contexts have not replaced this analysis but rather confirm its three key components: whether an entity is privately funded, whether an entity is privately controlled, and whether an entity exercises a private function. *See* Pet.32-33.

This tracks the Solicitor General's position. Earlier this Term, the Solicitor General recognized this Court's precedents hold that a "key consideration" in identifying governmental entities is "control[] by the State." U.S. Amicus Br., *Drummond*, Nos. 24-394 & 24-396, 2025 WL 819548, at *4. Respondents fail to acknowledge, let alone address, the Solicitor General's

position that government control is a "critical" factor in determining whether an entity is private or governmental. *Id.* at *21.

It is no mystery why. Respondents resist the Solicitor General's, and JUA's, distillation of this Court's precedents because their argument fails under it.

First, Respondents do not dispute that JUA's board is *privately controlled*. *See* Pet.7. Instead, the Legislative Respondents suggest that "[i]t is hard to see how this matters." Legis.BIO.11 n.2. Yet the Solicitor General just said this is a "key consideration"—indeed, a "hallmark[]"—in the private versus governmental analysis. U.S. Amicus Br., *Drummond*, Nos. 24-394 & 24-396, 2025 WL 819548, at *20, 26. And this Court's precedents make it easy to see why. *See, e.g.*, *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 399 (1995) (requiring that "the Government … retains for itself permanent authority to appoint a majority of the directors").[4] The Legislative Respondents' reliance on vague assertions of control effected through statute and JUA's plan of operations is also misguided. Legis.BIO.11 n.2 As JUA explained, the control the Commonwealth exercises over JUA differs little from the general regulatory

[4] The Executive Respondents are therefore wrong to suggest that *Lebron* supports their argument. Gov.BIO.19 n.9. JUA is private under the *Lebron* analysis because, as JUA argued below and the district court found, *see* App. 159a, the Commonwealth did not "retain[] for itself permanent authority to appoint a majority of [JUA's] directors." 513 U.S. at 399.

authority it exercises over any other private insurer. *See* Pet.6-7.

Second, Respondents do not dispute that all of JUA's *funds* stem from *private* insurance premiums. *See* App.31a ("[I]t is undisputed that the JUA has not drawn on the public fisc."). Respondents bizarrely suggest that the "General Assembly has always considered the JUA a state instrumentality and the funds maintained by the JUA state funds." Gov.BIO.6; *see* Legis.BIO.1. But for 42 years, the General Assembly did not declare JUA or its surplus public in any law—until it set its sights on JUA's surplus. *See* Pet.9-11. Respondents also suggest that "[n]o entity, other than the Commonwealth, has an interest in the JUA." Gov.BIO.27; *see* Legis.BIO.2. But as JUA already explained, that incorrect assertion misunderstands JUA's plan of operations and ignores the interest JUA's insureds have in payment of their insurance claims from JUA's funds. *See* Pet.35-36.

Third, Respondents do not dispute that JUA provides *private insurance* to *private parties*. *See* Pet.6-7. Respondents resist the private nature of this function, characterizing JUA as "a governmental tool the Commissioner *could* use to *regulate* the private market." Gov.BIO.23 (first emphasis added); *see* Legis.BIO.1. That abstracted characterization just obscures the reality that JUA "is, at its core, an insurance company." App.168a. Any business, if subsequently imbued with governmental power, *could* be used to regulate. But before Pennsylvania's attempted confiscation, JUA did not itself exercise any

"political power" or participate in "the administration of the government"—nor does it currently. *Dartmouth*, 17 U.S. (4 Wheat.) at 629.

In the end, Respondents argue that JUA is a governmental entity because (1) JUA "was created by the General Assembly," and (2) JUA plays an "'integral role in the administration of the Commonwealth's insurance market.'" Gov.BIO.11 (citation omitted). But neither of those features makes an entity governmental under *Dartmouth*. *Dartmouth* was clear that an entity is not governmental simply because the State brought about its existence. 17 U.S. (4 Wheat.) at 638-39. Otherwise, *all* corporations would be governmental. *See* Pet.34. *Dartmouth* was also clear that an entity is not governmental simply because it serves "an object of national concern." *Id.* at 634. Otherwise, *all* charitable entities would be governmental. *See* Pet.29-30.

The Executive Respondents resist the first of these instructions by suggesting that *creation* under state statute and *incorporation* under state statute are fundamentally different. Gov.BIO.25. They are not. As the Seventh Circuit explained, "[t]he fact that the state legislature authorized the creation of [an entity] does not make [it] a state agency." *Filan*, 392 F.3d at 936.

III. The question presented has broad constitutional importance.

Respondents do not dispute that the question presented bears on the ability of entities to vindicate their constitutional rights. *See* Pet.37-38. Nor do Respondents dispute the broad range of constitutional rights the Third Circuit's decision may prevent an entity from vindicating—from rights under the Takings Clause, Due Process Clause, Contract Clause, and First Amendment (as here) to rights under the Equal Protection Clause, Commerce Clause, Guarantee Clause, and Supremacy Clause. *See* Pet.38. Respondents instead attempt to diminish the importance of this case in two ways, both of which fall flat.

First, the Legislative Respondents suggest that this is "an intensely fact-bound case in a specialized area with no broader implications." Legis.BIO.23. According to the Legislative Respondents, it is not worth this Court's time to clarify the nature of a legal analysis that involves a "fact-specific determination." Legis.BIO.23 (citation omitted). If that were true, this Court would *never* grant review in a case to decide whether an entity is private or governmental. But this Court frequently grants review in such cases, including recently. *See, e.g.*, *Okla. Statewide Charter Sch. Bd. v. Drummond*, Nos. 24-394 & 24-396, 2025 WL 1459364 (U.S. May 22, 2025); *Biden v. Nebraska*, 600 U.S. 477, 489-94 (2023). And it also frequently grants review to clarify constitutional legal principles implicating undisputed facts in other contexts, as well. *See, e.g.*, *Kansas v. Glover*, 589 U.S. 376, 381 (2020)

(deciding "whether the facts known to Deputy Mehrer at the time of the stop gave rise to reasonable suspicion"); *Pearson v. Callahan*, 555 U.S. 223, 227 (2009) (deciding whether "petitioners are entitled to qualified immunity").

Granting review here would plainly have "broader implications." Legis.BIO.23. Many types of entities may fall near the dividing line between private and governmental. That includes entities in fields and industries ranging from energy to education to healthcare. *See* Pet.37 (citing cases). And it also includes other statutorily created insurance associations in other States.[5] One need look no further than the cases on the other side of the split to see that the Commonwealth's money grab here was not "a one-off situation." Legis.BIO.23; *see Asociación*, 484 F.3d at 9; *Filan*, 392 F.3d at 935.

Second, the Legislative Respondents assert that the "stakes are not high" here. Legis.BIO.34. But JUA stands to lose $300 million of its funds. *See* App.3a. That is more than just "some" money. Legis.BIO.34. The stakes are high both for JUA in this case, and for other entities who will fall victim to governments trying to appropriate their millions in future cases.

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[5] *See, e.g.*, *Welcome/History of HPIA*, HPIA, https://perma.cc/H82D-QYTG (Hawaii Property Insurance Association created by the Hawaii Legislature); *Florida Guaranty Funds and Associations*, MyFloridaCFO, https://perma.cc/P29P-L3EB (Florida Life and Health Insurance Guaranty Association created by the Florida Legislature).

IV. This case is an ideal vehicle.

Respondents identify no vehicle problem that would prevent this Court from resolving the question presented. Their responses confirm that this case is an ideal vehicle. The Executive Respondents underscore that the question presented was thoroughly briefed over the course of "six years of extensive appellate litigation." Gov.BIO.10. And the Third Circuit's decision marked a stark departure from cases that have been on the books for "several decades." Gov.BIO.13.

The only vehicle argument Respondents can muster is an oblique warning that this Court should not "make the same mistake" as the Pennsylvania Supreme Court and grant review of a question that will later be dismissed "'as having been improvidently granted.'" Gov.BIO.20 (quoting App.46a). But that argument fundamentally misunderstands the nature of this Court's review of *federal* constitutional issues. The Pennsylvania Supreme Court dismissed the certified question as improvidently granted because the question of JUA's status as a private or governmental entity "'is one *of federal law*'" that "is not … moored in … current state law jurisprudence." App.44a-45a (citation omitted). This Court, of course, has full jurisdiction to decide federal constitutional questions. There is no possibility this Court will "make the same mistake" as the Pennsylvania Supreme Court. Gov.BIO.20. This case presents an important federal question ripe for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SCOTT A. KELLER
Counsel of Record
STEVEN P. LEHOTSKY
SHANNON G. DENMARK
LEHOTSKY KELLER COHN LLP
200 Massachusetts Ave. NW
Suite 700
Washington, DC 20001
(512) 693-8350
scott@lkcfirm.com

KATHERINE C. YARGER
LEHOTSKY KELLER COHN LLP
700 Colorado Blvd. # 407
Denver, CO 80206

KEVIN J. MCKEON
DENNIS A. WHITAKER
MELISSA A. CHAPASKA
HMS LEGAL LLP
501 Corporate Cir., Suite 302
Harrisburg, PA 17011

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JUNE 2025