No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Pennsylvania Professional Liability Joint Underwriting Association (JUA) is a 26 U.S.C. § 501(c)(6) nonprofit that provides medical professional liability insurance. JUA is funded by private premiums and earned interest, is controlled by a majority-private board, and acts as a private insurance provider. For 42 years, Pennsylvania treated JUA as a private entity. Then Pennsylvania realized JUA had nearly $300 million in surplus funds. Pennsylvania passed a series of laws to confiscate JUA's surplus funds and make it a governmental actor. The district court held that each law violated JUA's constitutional rights. But the Third Circuit held that JUA has no constitutional rights against the Commonwealth because JUA already was a "public entity rather than a private one." App.4a.

The Third Circuit's decision is contrary to this Court's instruction that an entity is not governmental merely because it is created by the State and performs an important function. *E.g.*, *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 638-39 (1819). And it creates a circuit split about whether a state-created entity that is privately funded, privately controlled, and performs a private function is private or governmental. The First, Fifth, and Seventh Circuits have deemed such entities private. The Third Circuit, meanwhile, deemed JUA governmental.

The question presented is whether a state-created entity that is privately funded, privately controlled, and performs a private function is a private entity that has constitutional rights against the State.

PARTIES TO THE PROCEEDING

Petitioner is the Pennsylvania Professional Liability Joint Underwriting Association. Petitioner was plaintiff-appellee in the Third Circuit in Nos. 18-2297, 18-2323, 19-1057, 19-1058, 21-1099 & 21-1112 and plaintiff-appellant in the Third Circuit in No. 21-1155.

Respondents are the Governor of Pennsylvania, Pennsylvania General Assembly, President Pro Tempore of the Pennsylvania Senate, Minority Leader of the Pennsylvania Senate, Speaker of the Pennsylvania House of Representatives, Minority Leader of the Pennsylvania House of Representatives, and Insurance Commissioner of Pennsylvania.

Respondent Governor of Pennsylvania was defendant-appellant in the Third Circuit in Nos. 18-2297, 19-1058 & 21-1112 and defendant-appellee in the Third Circuit in No. 21-1155.

Respondent Pennsylvania General Assembly was defendant-appellant in the Third Circuit in Nos. 18-2323, 19-1057 & 21-1099 and defendant-appellee in the Third Circuit in No. 21-1155.

Respondent President Pro Tempore of the Pennsylvania Senate was defendant-appellant in the Third Circuit in No. 19-1057.

Respondent Minority Leader of the Pennsylvania Senate was defendant-appellant in the Third Circuit in No. 19-1057.

Respondent Speaker of the Pennsylvania House of Representatives was defendant-appellant in the Third Circuit in No. 19-1057.

Respondent Minority Leader of the Pennsylvania House of Representatives was defendant-appellant in the Third Circuit in No. 19-1057.

Respondent Insurance Commissioner of Pennsylvania was defendant-appellant in the Third Circuit in No. 19-1058.

CORPORATE DISCLOSURE STATEMENT

The Pennsylvania Professional Liability Joint Underwriting Association has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

RELATED PROCEEDINGS

The proceedings directly related to this case are:

Pennsylvania Professional Liability Joint Underwriting Association v. Governor of Pennsylvania, Nos. 18-2297, 18-2323, 19-1057, 19-1058, 21-1099, 21-1112 & 21-1155, U.S. Court of Appeals for the Third Circuit. Petition for rehearing denied on January 15, 2025. Judgment entered on December 16, 2024.

Pennsylvania Professional Liability Joint Underwriting Association v. Governor of Pennsylvania, No. 7 EAP 2023, Supreme Court of Pennsylvania. Certified question dismissed on February 21, 2024.

Pennsylvania Professional Liability Joint Underwriting Association v. Wolf, No. 1:19-CV-1121, U.S. District Court for the Middle District of Pennsylvania. Judgment entered on December 22, 2020.

Pennsylvania Professional Liability Joint Underwriting Association v. Wolf, No. 1:18-CV-1308, U.S. District Court for the Middle District of Pennsylvania. Judgment entered on December 18, 2018.

Pennsylvania Professional Liability Joint Underwriting Association v. Wolf, No. 1:17-CV-2041, U.S. District Court for the Middle District of Pennsylvania. Judgment entered on May 17, 2018.

Pennsylvania Professional Liability Joint Underwriting Association v. Albright, No. 1:17-CV-0886, U.S. District Court for the Middle District of Pennsylvania. Stayed pending appeal on June 14, 2018.

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INTRODUCTION

This petition is an ideal vehicle for resolving a square 3-1 circuit split on a recurring question of law about an entity's ability to assert its constitutional rights against attempted State overreach. The dividing line at the heart of this question is familiar: Is a particular entity *private* so that it can assert constitutional rights against the State, or is it *governmental* so that it cannot sue the State?

The entity seeking to vindicate its constitutional rights in this case is the Pennsylvania Professional Liability Joint Underwriting Association (JUA). JUA is a 26 U.S.C. § 501(c)(6) nonprofit association created by Pennsylvania statute. JUA provides medical professional liability insurance to private healthcare providers in Pennsylvania. JUA generates revenue from insurance premiums paid by those private healthcare providers. And JUA's private members select the vast majority of its board. For 42 years, Pennsylvania treated JUA as a private entity just like all other private insurers in the Commonwealth.

But then Pennsylvania learned of JUA's nearly $300 million in surplus funds. Seeking to alleviate its own budget shortfalls, Pennsylvania suddenly claimed JUA—and its surplus funds—as its own. Pennsylvania passed a series of three laws in 2017, 2018, and 2019 attempting to confiscate JUA's surplus funds. JUA challenged each law as a violation of its constitutional rights, and the district court agreed.

The Third Circuit, however, held that JUA has no constitutional rights against Pennsylvania. The Third Circuit determined that JUA for decades has been a "public entity rather than a private one," so JUA "lacks the ability to maintain the constitutional claims it has asserted against the Commonwealth, its creator." App.4a-5a. According to the Third Circuit, Pennsylvania is free to take as much as it would like from JUA—there are no constitutional constraints.

This Court made clear two centuries ago that an entity is not governmental merely because the State creates it and it performs an important function. *See Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 638-39 (1819). Yet the Third Circuit here created a square circuit split over whether state-created entities like JUA that are privately funded, privately controlled, and perform a private function are nevertheless governmental.

Until this case, circuits agreed that such entities were private. *See Asociación de Subscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 20 (1st Cir. 2007) (insurance association); *Tex. Catastrophe Prop. Ins. Ass'n v. Morales*, 975 F.2d 1178, 1182 (5th Cir. 1992) (insurance association); *Ill. Clean Energy Cmty. Found. v. Filan*, 392 F.3d 934, 936-38 (7th Cir. 2004) (charitable foundation). But the Third Circuit deemed JUA governmental. In the First, Fifth, and Seventh Circuits, entities like JUA enjoy constitutional protections against State overreach. But not in the Third Circuit.

This clean circuit split is part of broader confusion among lower courts on the constitutional dividing line between private versus governmental entities. That line arises in a plethora of constitutional contexts. Here, an entity's ability to vindicate its constitutional rights as a plaintiff suing the State depends on whether that entity is private or governmental. *See Dartmouth*, 17 U.S. (4 Wheat.) at 640-41. But so does an individual's ability to maintain a constitutional claim *against* a particular entity as a defendant governmental actor. *See, e.g.*, *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 399 (1995). This line likewise determines whether a particular entity can assert sovereign immunity. *See, e.g.*, *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). And it dictates whether a State can establish Article III standing based on an entity's injury. *See, e.g.*, *Biden v. Nebraska*, 600 U.S. 477, 490-91 (2023).

This petition is an ideal vehicle to begin resolving that broader confusion by addressing this 3-1 split created by the Third Circuit. That split calls into question the ability of all manner of entities to protect themselves against State overreach—from insurance associations, as here, to charitable foundations to charter schools, among others. And in this case, the stakes are particularly high: $300 million hangs in the balance. There are no facts in dispute, and the district court already determined that, if JUA has constitutional rights, Pennsylvania violated them. App.70a, 78a, 130a-31a, 179a.

Pennsylvania's money grab is not an isolated incident. *See, e.g.*, *Asociación*, 484 F.3d at 20 (Puerto Rico attempted to withhold $173 million from private entity); *Filan*, 392 F.3d at 935 (Illinois attempted to confiscate $125 million from private entity). If allowed to stand, the Third Circuit's erroneous decision will provide a blueprint for other States to make this same maneuver confiscating private property.

This Court should grant certiorari, resolve the circuit split, and reverse.

OPINIONS BELOW

The Third Circuit's opinion (App.1a-41a) is reported at 123 F.4th 623. The district court's December 22, 2020 opinion (App.47a-88a) is reported at 509 F. Supp. 3d 212. The district court's December 18, 2018 opinion (App.92a-132a) is reported at 381 F. Supp. 3d 324. The district court's May 17, 2018 opinion (App.138a-79a) is reported at 324 F. Supp. 3d 519.

JURISDICTION

The Third Circuit issued its opinion on December 16, 2024, and denied a timely petition for rehearing on January 15, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced at App.187a-208a.

STATEMENT

A. The Pennsylvania Professional Liability Joint Underwriting Association (JUA) is funded entirely through private insurance premiums, controlled by a majority-private board, and provides private insurance.

1. In 1975, the Commonwealth of Pennsylvania passed the Pennsylvania Health Care Services Malpractice Act. P.L. 390, No. 111 (Oct. 15, 1975). This established a nonprofit Pennsylvania Professional Liability Joint Underwriting Association (JUA) to act as a medical malpractice insurer of last resort. *Id.*

The statute was repealed and replaced in 2002 by the Medical Care Availability and Reduction of Error Act. P.L. 154, No. 13 (Mar. 20, 2002) (codified at 40 Pa. Stat. & Cons. Stat. Ann. § 1303.101 *et seq*.). This 2002 act created a new "special fund" in the Commonwealth treasury called the "MCARE Fund." 40 Pa. Stat. & Cons. Stat. Ann. § 1303.712(a). This special MCARE Fund "provide[s] a secondary layer of medical professional liability coverage." App.96a. It is administered by the Pennsylvania Insurance Department. 40 Pa. Stat. & Cons. Stat. Ann. § 1303.713(a).

JUA is distinct from this Commonwealth-run special MCARE Fund. *Id.* § 1303.731. The 2002 act retained JUA in the same form as it had previously existed for decades. *Id.* §§ 1303.731-.733.

2. JUA is a nonprofit association that provides private insurance. *Id.* § 1303.731(a). It "is a legal entity distinct from its members and managers." 15 Pa. Stat. & Cons. Stat. Ann. § 9114(a). The federal government recognizes JUA as a 26 U.S.C. § 501(c)(6) nonprofit entity. App.96a.

JUA makes medical professional liability insurance "obtainable at an affordable and reasonable cost." 40 Pa. Stat. & Cons. Stat. Ann. § 1303.102(3). JUA offers insurance to healthcare providers who "cannot conveniently obtain medical professional liability insurance through ordinary methods at rates not in excess" of those applicable to similarly situated healthcare providers. *Id.* § 1303.732(a). JUA's insureds include those with a history of malpractice occurrences, those with high-risk specialties, those with gaps in coverage, or those reentering the profession. App.6a n.6.

All insurers authorized to write liability insurance in Pennsylvania must be members of JUA. 40 Pa. Stat. & Cons. Stat. Ann. § 1303.731(a). At JUA's inception, these insurers shared "the initial costs of [JUA's] operation among themselves." App.28a-29a.

JUA is subject to the same laws and regulations as other private insurers. 40 Pa. Stat. & Cons. Stat. Ann. § 1303.731(a). Just as any other private insurer, JUA pays taxes, 72 Pa. Stat. & Cons. Stat. Ann. § 7902, and must also "[s]ubmit rates and any rate modification to the department for approval," 40 Pa. Stat. & Cons. Stat. Ann. § 1303.731(b)(2)

(incorporating 40 Pa. Stat. & Cons. Stat. Ann. §§ 1181-99). JUA does not have the power to issue bonds, exercise eminent domain, or tax. App.157a. And the Commonwealth does not list JUA as a governmental entity in any publication or as a "special fund" administered by the Insurance Department. CA3 3/29/2021 Joint App.166-67.

3. JUA's board is majority private. All "powers and duties" of JUA "shall be vested in and exercised by a board of directors." 40 Pa. Stat. & Cons. Stat. Ann. § 1303.731(a). The board's composition is contained in JUA's plan of operations, which is approved by the Pennsylvania Insurance Commissioner. *Id.* § 1303.731(b)(1); App.7a. The current plan provides for a board of directors, comprised of at least 7 members. CA3 3/29/2021 Joint App.174. Notably, JUA's plan has always provided that the majority of the board be private members who are selected by private members. App.7a, 50a, 98a, 144a. The board has never been controlled by the Commonwealth. *See* App.95a. Rather JUA's plan has always vested policy and managerial control over JUA in JUA's board.

JUA is staffed by private employees hired and paid by JUA. App.51a. These employees receive no state health or pension benefits, and they work in office spaces leased by JUA. App.51a. JUA can retain private counsel of its choice. App.51a.

4. JUA is funded entirely through private money. As with any insurance plan, in exchange for coverage from JUA, healthcare providers pay policy premiums

to JUA. App.7a. JUA is funded by these policy premiums and the interest income generated from them. App.7a-8a. JUA holds these funds in a private account in its name. App.52a. The Commonwealth has never funded JUA. App.52a.

Under JUA's plan of operations, JUA may be dissolved by operation of law or at the request of its members, subject to the Pennsylvania Insurance Commissioner's approval. App.7a. Upon dissolution, all assets are distributed as determined by the board and approved by the Commissioner. App.50a-51a.

The Commonwealth insulated itself from any potential liability or debt from JUA. 40 Pa. Stat. & Cons. Stat. Ann. § 1303.731(c) (2017). JUA is authorized to borrow money upon the Commissioner's approval should it run a deficit. *Id.* § 1303.733(b). But JUA has never borrowed money. App.99a. Quite the opposite: JUA presently has a surplus of almost $300 million. App.8a.

JUA's $300 million in surplus funds is at the core of this lawsuit.

B. Procedural background.

Starting in 2017, 42 years after JUA was established, Pennsylvania made three attempts to confiscate JUA's surplus funds for itself. JUA challenged each attempt, and the district court rejected each attempt. But in a consolidated appeal, the Third Circuit reversed.

1. Pennsylvania tried to confiscate $200 million of JUA's surplus funds in 2017.

In 2017, after realizing that JUA had hundreds of millions of dollars in surplus funds, the Commonwealth requested that JUA "determine an efficient amount of surplus to hold in order to run its operation" and to recommend how it will divest itself of any "excess capital." App.9a (citation omitted). JUA responded that it would be "inappropriate to identify an efficient surplus operating range" because of a "lack of legal authority" about how any excess surplus should be handled. App.9a (citation omitted).

Pennsylvania then passed a law to "balance [the Commonwealth's] budget and provide for the health, welfare and safety" of its residents. P.L. 725, No. 44, § 1.3 (Oct. 30, 2017) (codified at 72 Pa. Stat. & Cons. Stat. Ann. § 201-D *et seq.*). The statute declared that JUA is "an instrumentality of the Commonwealth," and it directed JUA to "pay $200,000,000.00 to the State Treasurer for deposit into the General Fund" or else be abolished. 72 Pa. Stat. & Cons. Stat. Ann. §§ 201-D(3), 203-D.

JUA sued the Governor and General Assembly, contending that the law violated the "Substantive Due Process Clause, the Takings Clause, and the Contract Clause, as well as the doctrine of unconstitutional conditions." App.149a. The district court held that JUA could assert these claims against the Commonwealth because it was not a "political subdivision," was not the "government itself," and was

not a governmental entity or instrumentality of the Commonwealth. App.155a-74a (formatting altered). As the court explained, JUA "is, at its core, an insurance company." App.168a. The court then determined that the law was an unconstitutional taking and permanently enjoined it. App.179a. Defendants appealed.

2. Pennsylvania tried to confiscate $300 million of JUA's surplus funds in 2018.

In 2018, while the initial litigation was still pending, Pennsylvania tried again. P.L. 273, No. 41, §§ 3, 4 (June 22, 2018) (codified at 40 Pa. Stat. & Cons. Stat. Ann. § 323.1-A *et seq.*). The new law purported to make JUA, and all of its $300 million surplus, part of the Department of Insurance. Specifically, this act declared JUA to be an "instrumentality of the Commonwealth," and it sought to replace JUA's current member-controlled board with a state-controlled board. 40 Pa. Stat. & Cons. Stat. Ann. §§ 323.11-A(a), 323.12-A. The act also installed a new executive director, hired by the Commissioner and compensated by the Commonwealth, and it made the Commonwealth responsible for any claims or liabilities arising from policies issued by JUA. *Id.* §§ 323.11-A(c)(2), 323.12-A(f).

JUA sued the Governor, the Insurance Commissioner, and several legislative officials, contending that the act violated the substantive Due Process Clause, the Takings Clause, and the Contract Clause. App.103a-04a. The district court reaffirmed

its holdings in the initial litigation and permanently enjoined the second law as an unconstitutional taking. App.131a-32a. Defendants again appealed.

3. Pennsylvania tried again to confiscate $300 million of JUA's surplus funds in 2019.

Pennsylvania tried yet again to seize JUA's funds, as litigation over its first two attempts remained pending. P.L. 101, No. 15, § 7 (June 28, 2019) (codified at 71 Pa. Stat. & Cons. Stat. Ann. § 420.1 *et seq.*). In 2019, Pennsylvania passed a third law that would modify JUA in five critical respects: (1) JUA would be funded through appropriations determined by the General Assembly, 71 Pa. Stat. & Cons. Stat. Ann. § 420.2; (2) JUA would submit a budget estimate to the Commonwealth and participate in the budget process, *id.* § 420.3; (3) it would present actuarial and fiscal information at quarterly public meetings, *id.* § 420.4; (4) it would be subject to public transparency and other laws applicable to governmental entities, *id.* § 420.5; and (5) it would conduct operations in Commonwealth-owned facilities, disclose its employees to state officials, and coordinate with the Department of Revenue related to federal tax information, *id.* § 420.6.

JUA sued the Governor and General Assembly, contending that the new law violated the substantive and procedural aspects of the Due Process Clause, the Takings Clause, the Contract Clause, and the First Amendment right to civil counsel of choice. App.57a. The district court reaffirmed its prior holding that

JUA "is a private entity [whose] assets are private property." App.59a. The court then determined that the new law violated JUA's rights under the Takings Clause and First Amendment, and it enjoined all challenged provisions, except those requiring certain disclosures to the public and Commonwealth. App.70a, 78a, 87a-88a. The parties cross-appealed.

4. The Third Circuit deemed JUA a governmental entity, allowing Pennsylvania to confiscate JUA's $300 million of surplus funds.

The Third Circuit consolidated all three appeals to all three laws. Initially, the Third Circuit certified the following question to the Pennsylvania Supreme Court: "Under Pennsylvania law, is the Commonwealth's Joint Underwriting Association a public or private entity." App.44a.

The Pennsylvania Supreme Court granted the petition to answer the certified question but ultimately dismissed the petition as improvidently granted. App.44a. That court concluded that the question whether JUA is a private entity "that can assert federal constitutional rights against the Commonwealth is a matter of federal constitutional jurisprudence, not Pennsylvania law." App.45a.

The Third Circuit then proceeded to resolve "whether the JUA is indeed a creature of the Commonwealth beholden only to the Commonwealth; in other words, whether it is a public entity rather than a private one." App.4a. The court purported to

apply *Dartmouth* and asked "four guiding questions": "(1) whether the JUA's organic act granted it political power, (2) whether the JUA was created to be employed in the administration of government, (3) whether the JUA's funds are drawn from public property, and, finally, (4) whether anyone but the Commonwealth has an interest in the JUA." App.28a.

1. *Political power*. The court recognized that the Commonwealth did "not . . . grant [JUA] political power in the traditional sense." App.28a. But it noted that JUA serves "a public purpose." App.29a.

2. *Administration of government*. The court observed that "JUA is not a state agency in the traditional sense." App.29a. But it reasoned that JUA "is integral to the Commonwealth's administration of a highly regulated, safe, and accessible health care system." App.30a. However, JUA participates in this health care system on the same footing as any other private insurer. *See, e.g.*, App.125a. The Third Circuit was therefore wrong to suggest that JUA plays a role in "supervising . . . the Commonwealth's insurance market and health care system." App.30a.

The court noted that, by providing affordable insurance, JUA "ensures that health care providers in high-risk specialties or reentering practice can and will do business in the Commonwealth." App.30a. The court was quick, however, to acknowledge that not all "entities involved in the insurance or health care markets are, by that fact alone, necessarily public institutions." App.30a. It suggested JUA was different because it was created by the Commonwealth, which

purportedly gave JUA a sufficient "gradation[] of government involvement." App.30a.

3. *Public funding*. The court determined that this factor also was not satisfied "in the traditional sense." App.31a. As the court readily conceded, JUA "has never been funded by or endowed with public property." App.31a (quotation marks and citation omitted). But the court emphasized that JUA's funds exist to support "the goals of the Commonwealth . . . to make available a comprehensive and high-quality health system." App.31a. And it suggested that JUA's funds exist as a "result of the Commonwealth's enforced acquisition of premiums for a public purpose."[1] App.31a. The court also noted that, as a nonprofit, JUA provides no profits or dividends to anyone and so "no private party risks damage to its bank account should [JUA's] surplus be reduced." App.31.

4. *State interest*. The Third Circuit concluded by considering "whether anyone but the Commonwealth has an interest in the JUA." App.32a. The court noted that, upon dissolution, JUA's assets would be "distributed in such a manner as the Board may determine subject to the approval of the Commissioner." App.32a (citation omitted). But the court surmised, based on its own assumptions, that the funds could only flow to the Commonwealth under that system. App.32a-33a ("It is difficult to imagine

[1] It is unclear what "enforced acquisition" the court was referring to. *See infra* p.35.

where the assets, including the surplus, would go except to the Commonwealth."). The court did not address any policyholder or other member's current interest in JUA's assets.

The Third Circuit therefore recognized that JUA does not exercise political power, is not a traditional state agency, is not publicly funded, and would have a role in what happens to its funds upon dissolution. Nevertheless, the court concluded that "because the Commonwealth delegated power to the JUA to support a public purpose within the state insurance market, and because only the Commonwealth has a legally protectable interest in the JUA," it is a governmental entity that cannot sue the Commonwealth for constitutional violations. App.4a-5a.

The Third Circuit denied JUA's timely petition for rehearing on January 15, 2025. App.186a.

REASONS FOR GRANTING THE PETITION

I. The decision below creates a square 3-1 circuit split on a constitutional issue of nationwide importance.

The decision below conflicts with decisions of the First, Fifth, and Seventh Circuits. It is also emblematic of broader confusion over the constitutional dividing line between private and governmental entities.

A. Circuits are split on whether a state-created entity that is privately funded, privately controlled, and performs a private function is a private or governmental entity.

The Third Circuit below created a square split with the First, Fifth, and Seventh Circuits on a recurring constitutional issue of exceptional importance. The Third Circuit blocked JUA's constitutional claims by purporting to apply this Court's rule, dating back to *Dartmouth*, that a "creature of the state" cannot "assert constitutional rights against its creator." App.23a-25a (citing *Dartmouth*, 17 U.S. (4 Wheat.) at 629-54). But the First, Fifth, and Seventh Circuits have allowed similar entities that are privately funded, privately controlled, and performing private functions to assert constitutional claims against the State. This Court should grant review to resolve this split.

1. The Third Circuit below held that JUA was a governmental entity, even though it is privately funded, privately controlled, and performs a private function. The Third Circuit purported to follow "four guiding questions" from *Dartmouth*: (1) "whether the entity was granted political power"; (2) "whether the entity . . . was created to be employed in the administration of government"; (3) "whether the funds of the entity are public property"; and (4) "whether only the state has an interest in the entity." App.23a-24a. The Third Circuit recognized that, "in the traditional sense," the answer to the first three questions was no. App.28a-29a, 31a. And its answer to the fourth question was purely "hypothetical." App.32a.

But the Third Circuit nonetheless deemed JUA a governmental entity. The Third Circuit noted that JUA "serve[s] an integral role" in the "insurance market and . . . health care market." App.35a. And although it recognized that JUA's funds were currently private, the Third Circuit believed (based solely on its own supposition) that only Pennsylvania would have an interest in those assets upon any dissolution. App.32a-33a; *but see* App.50a-51a (upon dissolution, assets to be "distributed in such manner as the *Board may determine* subject to the approval of the Commissioner" (emphasis added) (citation omitted)). For these reasons, the Third Circuit concluded, "JUA lacks the ability to maintain the constitutional claims it has asserted against the Commonwealth." App.5a.

2. Three other circuits, in contrast, have determined that a privately funded and privately controlled entity performing a private function is a private entity, even if the State created it. In these circuits, an entity like JUA could therefore sue the State for violating its constitutional rights.

a. The Fifth Circuit in *Texas Catastrophe Property Insurance Association v. Morales* held that a state-created property insurance association (CATPOOL) was not a governmental entity. 975 F.2d at 1182. In that case, CATPOOL sued the state attorney general challenging a statute requiring CATPOOL to be represented by the state attorney general. *Id.* at 1180. CATPOOL claimed that the statute violated its constitutional right to counsel. *Id.* Like JUA here, CATPOOL was created by state statute. *Id.* at 1179. And like JUA, "all . . . property insurers" were "required to belong"; it was "directly funded by . . . private moneys"; it had its "own . . . legal counsel"; and it had a "board of directors" that was majority "[r]epresentatives of the member insurance companies." *Id.*

Applying *Dartmouth*, the Fifth Circuit determined that CATPOOL was "not a part of the state." *Id.* at 1182. The Fifth Circuit noted that "[t]he act creating CATPOOL is not 'a grant of political power,' as in the case of a municipality or other political subdivision," and "CATPOOL is not 'employed in the administration of the government.'" *Id.* at 1183. The Fifth Circuit further explained that CATPOOL's funds were "private monies." *Id.* As the

Fifth Circuit put it, "[i]f CATPOOL makes a profit, that money does not go to the state." *Id.* at 1182. And "[w]hen CATPOOL loses," that money does not come from the State. *Id.* So too for JUA. App.126a. The Fifth Circuit observed that although "the state . . . force[d] private insurers doing business in Texas to cover certain risks," that "d[id] not mean that the money coming out of the companies' bank accounts [wa]s state money." *Morales*, 975 F.2d at 1182-83 (footnote omitted). It remained "private money directed to pay private claims." *Id.* at 1183. As the Fifth Circuit explained, "[t]he state can deprive itself of any constitutional rights, as it deems wise, but it cannot prevent private insurers from protecting their own money with retained counsel of their choice." *Id.*

The Fifth Circuit has since emphasized the importance of "the nature of the organization holding the funds" and "the nature of the funds claimed by the State" in this analysis. *Miss. Surplus Lines Ass'n v. Mississippi* (*MSLA*), 261 F. App'x 781, 785 (5th Cir. 2008). In *MSLA*, the Fifth Circuit determined that a nonprofit corporation created at the request of the State to assist the insurance commissioner in carrying out his duties was a governmental entity that could not assert a takings claim against the State. *Id.* at 785-87. The Fifth Circuit expressly distinguished that nonprofit from CATPOOL in *Morales*: "[t]he money at issue in *Morales* . . . had a private end use—insuring businesses against risk and paying those businesses' claims." *Id.* at 787. The money at issue in *MSLA*, by contrast, "ha[d] a public end use"—"funding the operating costs of an association working exclusively

at the behest of the Commissioner." *Id.* The *MSLA* funds were "not held for payment to private companies, unlike the funds in *Morales*." *Id.* JUA's funds, of course, are held for payment to private medical providers. *See supra* pp.6-8. The district court therefore correctly distinguished *MSLA* on its facts. App.172a.

b. The Seventh Circuit in *Illinois Clean Energy Community Foundation v. Filan* held that a state-created nonprofit foundation was not governmental where it was privately funded and privately controlled. 392 F.3d at 936-38. In that case, Illinois demanded that the foundation "turn over $125 million of its assets to the state," and the foundation challenged that under the Takings Clause, as JUA did here. *Id.* at 935. The foundation was created pursuant to a state statute requiring an electric utility "to establish the . . . foundation and fund it with $225 million of the proceeds from [its] sale of [seven power] plants." *Id.* The foundation had no "public employees" and was not "subject to the state's rules governing the expenditure of public funds." *Id.* at 936. Unlike JUA here and CATPOOL in *Morales*, "five-sixths of the foundation's trustees" were appointed by state officials, but even that was not sufficient for the Seventh Circuit to deem it governmental. *Id.* at 937.

In determining that the foundation was not a governmental entity, the Seventh Circuit also relied on *Dartmouth*. *Id.* (citing 17 U.S. (4 Wheat.) at 638-40). Its analysis hinged on the fact that the foundation's funds were private and the State did not

functionally control the foundation. *Id.* at 937-38. As the Seventh Circuit explained, "[b]y forcing a transfer of private property from one private entity to another, the state did not destroy the private character of the property." *Id.* at 937. The "coercive element in the history of the authorizing statute is irrelevant." *Id.* Nor did the fact that the State appointed most of the foundation's trustees turn the foundation into a governmental entity. *Id.* The Seventh Circuit explained that "no more than three [trustees] can be from the same political party, since two of the five have to be [appointed by] legislative *minority* leaders." *Id.* This partisan divide made it "a fiction" that "the state 'controls' the foundation." *Id.* at 938. Thus, the Seventh Circuit concluded, "Illinois would be violating the Constitution if it confiscated any part of the foundation's assets." *Id.*

c. The First Circuit in *Asociación de Subscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza* similarly held that a state-created automobile insurance association (Puerto Rico's JUA) was not a governmental entity because it was privately funded and privately controlled. 484 F.3d at 20. Drivers in Puerto Rico could, upon acquiring or renewing a vehicle license, pay the premium for compulsory insurance to the Secretary of the Treasury. *Id.* at 7. The Secretary would then transfer the premiums to Puerto Rico's JUA to allow for the provision of insurance coverage. *Id.* Puerto Rico's JUA sued territorial officials for withholding these premiums, alleging that they did so in order "to alleviate the cash-flow problems of the

Commonwealth." *Id.* at 6. As here, all "private insurers" had to "belong" to Puerto Rico's JUA. *Id.* at 6-7. "Four of the five directors on the JUA's board of directors [were] elected by the members of the JUA," and the JUA was "subject to the provisions of the [Insurance] Code applicable to insurers." *Arroyo-Melecio v. Puerto Rican Am. Ins. Co.*, 398 F.3d 56, 62 (1st Cir. 2005). The funds of Puerto Rico's JUA were private. *Id.* at 61-62. And although Puerto Rico's "JUA [wa]s under some direction by the commonwealth," the commonwealth "d[id] not appear to have active supervision over the day-to-day affairs of the JUA." *Id.* at 62.

The First Circuit ultimately concluded that Puerto Rico's JUA was "private in nature." *Asociación*, 484 F.3d at 20 (citation omitted). And because Puerto Rico's JUA was a private entity, it could sue Puerto Rico for taking its property. *Id.* The First Circuit expressly relied on the Seventh Circuit's *Filan* holding that a "state-created foundation was not a state agency and therefore could sue the state for taking its property." *Id.* (citing 392 F.3d at 936-37). This accords with its earlier recognition that "a state cannot conscript an entire profession into an involuntary association and thus make it an 'integral component of state government' without standing to protect its interests from that government." *Med. Malpractice Joint Underwriting Ass'n of R.I. v. Pfeiffer*, 832 F.2d 240, 244 n.7 (1st Cir. 1987).

3. As the district court below correctly explained, this case would have come out differently in other circuits. App.167a (citing *Morales* and *Asociación*). JUA is privately funded. *See Morales*, 975 F.2d at 1183; *Filan*, 392 F.3d at 937; *Arroyo-Melecio*, 398 F.3d at 61-62. JUA is controlled by a majority-private board. *See Morales*, 975 F.2d at 1182; *Filan*, 392 F.3d at 937-38; *Arroyo-Melecio*, 398 F.3d at 62. And JUA does not exercise political power or participate in the administration of government. *See Morales*, 975 F.2d at 1179. So in these circuits, it would not have mattered that JUA is involved in insurance and healthcare markets. *See id.* at 1179-80; *Asociación*, 484 F.3d at 7. Nor is the "coercive element in the history of the authorizing statute" dispositive. *Filan*, 392 F.3d at 937; *see Morales*, 975 F.2d at 1182-83.

The Third Circuit wrongly distinguished *Morales* and *Asociación*. App.36a-38a. That *Asociación* drew on a prior "discussion" in another case, App.37a, does not undermine its holding. Nor is *Morales* distinguishable on the ground that CATPOOL's "member companies shared in its profits and losses," App.38a, because what matters is whether *the government* shares in an entity's profits and losses. Here, as in *Morales*, the government does not. *See supra* pp.7-8. As the district court aptly explained, "the Association's surplus is the private property of the Association." App.173a.

B. There is broader confusion about the dividing line between private and governmental entities for constitutional purposes.

This circuit split is part of broader confusion about the proper analysis for differentiating private from governmental entities for constitutional purposes.

1. Courts are confused about the proper test for differentiating private from governmental entities when determining whether an entity may bring constitutional claims against the State.[2] As explained, the Third Circuit here asked "four questions." App.28a. The Fifth Circuit, meanwhile, emphasized the nature of the organization and the nature of the funds. *Morales*, 975 F.2d at 1182-82. The Seventh Circuit focused on the nature of the entity's funds and who controls the entity. *Filan*, 392 F.3d at 937-38. And the First Circuit followed the Seventh Circuit. *Asociación*, 484 F.3d at 20 (invoking *Filan*).

Addressing this same question in the context of a charter school, the Sixth Circuit asked whether the entity "is a creation of the state, if its power to act rests entirely within the discretion of the state, and if it can be destroyed at the mere whim of the state, 'unrestrained by any provision of the Constitution of

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[2] Courts differ in framing this as a question of standing, *e.g.*, *Palomar Pomerado Health Sys. v. Belshe*, 180 F.3d 1104, 1107 (9th Cir. 1999), or the availability of a claim, *e.g.*, *Kerr v. Polis*, 20 F.4th 686, 696 (10th Cir. 2021).

the United States.'" *Greater Heights Acad. v. Zelman*, 522 F.3d 678, 680 (6th Cir. 2008) (citation omitted). That analysis "emphasi[zes] . . . governmental control." *Ky. Emps. Ret. Sys. v. Seven Ctys. Servs., Inc.*, 901 F.3d 718, 726 (6th Cir. 2018).[3]

2. The confusion over the proper analysis for differentiating private from governmental entities extends into other constitutional contexts, as well.

For example, courts apply various multi-factor tests when determining whether an entity is an "arm of the State" for sovereign immunity purposes. The Fifth Circuit, for example, asks:

> (1) whether state statutes and case law view the entity as an arm of the state; (2) the source of the entity's funding; (3) the entity's degree of local autonomy; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has the authority to sue and be sued in its own name; and (6) whether it has the right to hold and use property.

Springboards to Educ., Inc. v. McAllen Indep. Sch. Dist., 62 F.4th 174, 178-79 (5th Cir. 2023). The "most

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[3] Some state courts likewise emphasize governmental control in this analysis. *E.g.*, *Trs. of Columbia Acad. v. Bd. of Trs. of Richland Cnty. Sch. Dist. No. 1*, 262 S.C. 117, 126-27 (1974) (asking whether "the government [has] the sole right . . . to regulate, control and direct the corporation, and its funds and its franchises" (citation omitted)).

weight[y]" factor in this analysis is "the source of the entity's funding." *Id.*[4]

Even within the Fifth Circuit, however, there is disagreement. Rather than apply a six-factor test, Judge Oldham would recognize that "[i]f an entity has a separate legal status from the State (*e.g.*, as a corporation, LLC, or § 501(c)(3) nonprofit organization) or the state statute designating the entity includes a 'sue-and-be-sued' clause, the entity is not 'the State.'" *Id.* at 198 (Oldham, J., concurring).[5]

The Fifth Circuit's six-factor test is but one example. Other circuits examine a different number of factors. *See, e.g.*, *Good v. Dep't of Educ.*, 121 F.4th 772, 795 (10th Cir. 2024) (two-step test); *P.R. Ports Auth. v. Fed. Mar. Comm'n* (*PRPA*), 531 F.3d 868, 873 (D.C. Cir. 2008) (three-factor test); *Singleton v. Md. Tech. & Dev. Corp.*, 103 F.4th 1042, 1048 (4th Cir. 2024) (four-factor test).

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[4] Other courts decline to ascribe particular significance to an entity's source of funding. *E.g.*, *Cooper v. Se. PA Transp. Auth.*, 548 F.3d 296, 299 (3d Cir. 2008). Some courts ascribe particular significance to other factors. *E.g.*, *Irizarry-Mora v. Univ. of P.R.*, 647 F.3d 9, 12 (1st Cir. 2011) (the State's intention).

[5] Courts borrow the sovereign immunity analysis to identify governmental entities for purposes of diversity jurisdiction, *e.g.*, *Univ. of R.I. v. A.W. Chesterton Co.*, 2 F.3d 1200, 1203 (1st Cir. 1993); the False Claims Act, *e.g.*, *United States ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.*, 681 F.3d 575, 579-80 (4th Cir. 2012); and bankruptcy law, *e.g.*, *Ky. Emps. Ret. Sys.*, 901 F.3d at 730.

Courts look to yet another set of factors when determining whether an entity is "part of the government" such that it *may be sued* for constitutional violations. The D.C. Circuit's three-factor test is an example.[6] That court asks whether "[(1)] the Government creates [the] corporation by special law, [(2)] for the furtherance of governmental objectives, and [(3)] retains for itself permanent authority to appoint a majority of the directors of that corporation." *Herron v. Fannie Mae*, 861 F.3d 160, 167 (D.C. Cir. 2017) (quoting *Lebron*, 513 U.S. at 399).

This representative sampling is just the tip of the iceberg. *Cf. PRPA*, 531 F.3d at 872 (Kavanaugh, J.) ("Determining whether a particular entity is an arm of the State can be a difficult exercise.").

3. JUA would not be a governmental entity under any of these tests. JUA would not be governmental under the Sixth Circuit's test in *Zelman*, as JUA's "power to act" does not "rest[] entirely within the discretion of the state." 522 F.3d at 680. JUA would not be governmental under the Fifth Circuit's test in *Springboards*, as "the source of [JUA]'s funding" is private. 62 F.4th at 178. Nor would JUA be governmental under Judge Oldham's test, as JUA "has a separate legal status from the State" as a 26 U.S.C. § 501(c)(6) nonprofit. *Id.* at 198 (Oldham, J., concurring). And JUA would not be governmental

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[6] *But see Hall v. Am. Nat'l Red Cross*, 86 F.3d 919, 921 (9th Cir. 1996) (similar two-factor test).

under the D.C. Circuit's test in *Herron*, which requires "permanent government control." 861 F.3d at 168.

* * *

In sum, the Third Circuit here split from the First, Fifth, and Seventh Circuits on the question whether a state-created entity that is privately funded, privately controlled, and performs a private function is a private or governmental entity. This Court's guidance is needed to resolve that split—and to begin clearing up broader confusion over the dividing line between private and governmental entities.

II. The decision below erroneously held that JUA was a governmental entity, and it conflicts with this Court's precedents.

Review is also warranted because the Third Circuit erroneously departed from this Court's precedents.

A. JUA is a private entity under this Court's precedents.

1. The Constitution "constrains governmental actors and protects private actors." *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 804 (2019). Whereas private entities "enjoy[] constitutional protections," *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 363 (2009), an entity that is "created by a state" has "no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator," *Williams v. Mayor of Balt.*, 289 U.S. 36, 40 (1933).

In 1819, this Court held that Dartmouth College was a "private eleemosynary institution" with constitutional rights against the State. *Dartmouth*, 17 U.S. (4 Wheat.) at 639. Dartmouth College was "endowed by private individuals." *Id.* at 633. That endowment was "given to Dartmouth College" for the benefit of "Christianity, and of education generally, not . . . of New Hampshire particularly." *Id.* at 639-40. That Dartmouth College was founded "for the promotion of piety and learning" did not give it a governmental character. *Id.* at 633. The Court explained that "money may be given for education, and the persons receiving it do not, by being employed in the education of youth, become members of the civil government." *Id.* at 635. Nor did incorporation under state law somehow make the college a governmental institution. An entity "does not share in the civil government of the country, unless that be the purpose for which it was created." *Id.* at 636.

In 1853, the Court likewise held that the Piqua branch of the State Bank of Ohio was a "private corporation" with constitutional rights against the State. *Piqua Branch of State Bank of Ohio v. Knoop*, 57 U.S. (16 How.) 369, 380 (1853). As the Court explained, "a bank, where the stock is owned by individuals, is a private corporation." *Id.* It does not "follow[] that because the action of a corporation may be beneficial to the public, therefore [it] is a public corporation." *Id.* at 381. Charitable entities "are not public, though incorporated by the legislature, unless their funds belong to the government." *Id.* "Where the property of a corporation is private it gives the same

character to the institution, and to this there is no exception." *Id.*; *cf. Bank of U.S. v. Planters' Bank*, 22 U.S. (9 Wheat.) 904, 908 (1824) ("The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the Bank.").

2. Whether an entity is private versus governmental establishes various constitutional rights and liabilities. In *Dartmouth* and *Knoop*, as here, it established whether an entity could maintain constitutional claims against the State. But the same line also establishes, for example, whether an entity can be sued for constitutional violations and whether an entity can establish Article III standing on behalf of the State. This Court's analysis of the same line in those related contexts is instructive.

Lebron v. National Railroad Passenger Corp., for instance, addressed the line between private and governmental entities to determine whether an artist could assert a First Amendment claim against Amtrak. 513 U.S. at 399. The Court held Amtrak was a governmental entity that could be sued. *Id.* As this Court explained, "the Government create[d] [Amtrak] by special law, for the furtherance of governmental objectives, and retain[ed] for itself permanent authority to appoint a *majority* of the directors of that corporation." *Id.* (emphasis added).

Biden v. Nebraska addressed the line between private and governmental entities to determine whether harm to the Missouri Higher Education Loan Authority (MOHELA) amounted to harm *to Missouri*

for Article III standing. This Court determined that MOHELA was "an instrumentality of Missouri" such that harm to it constituted harm to Missouri. 600 U.S. at 491. As the Court explained, MOHELA "was created by the State to further a public purpose, is governed by state officials and state appointees, reports to the State, and may be dissolved by the State." *Id.*

Drawing on *Lebron* and *Nebraska*, the Solicitor General recently explained to this Court 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). Other cases are to the same effect. *See, e.g.*, *Cherry Cotton Mills v. United States*, 327 U.S. 536, 539 (1946) (Reconstruction Finance Corporation controlled by directors "appointed by the President and affirmed by the Senate" was governmental entity); *Arkansas v. Texas*, 346 U.S. 368, 370 (1953) (public university controlled by "Board of Trustees appointed by the Governor with consent of the Senate" was "state instrumentality"); *Pennsylvania v. Bd. of Dirs. of City Trs.*, 353 U.S. 230, 231 (1957) (per curiam) (private college controlled by "agency of . . . Pennsylvania" was governmental entity).

3. This Court's cases indicate that three primary features distinguish private from governmental entities. First, whether the entity is privately funded. *See, e.g.*, *Knoop*, 57 U.S. (16 How.) at 381; *Dartmouth*, 17 U.S. (4 Wheat.) at 632. Second, whether the entity is privately controlled. *See, e.g.*, *Nebraska*, 600 U.S. at 491; *Lebron*, 513 U.S. at 399. Third, whether the entity performs a private function. *See, e.g.*, *Dartmouth*, 17 U.S. (4 Wheat.) at 634-35. All three features make JUA a private entity.

First, like Dartmouth College, JUA is funded "by private individuals." *Id.* at 633. Pennsylvania has never funded JUA. JUA's funds consist of private premiums and earned interest. *See supra* pp.7-8. Those funds are held in private accounts in JUA's name. *See supra* p.8. And the "only provision of [JUA's originating act] that concerns the Association's finances" in fact "*distances* the Commonwealth therefrom, expressly disclaiming state responsibility for the Association's debts and liabilities." App.172a-73a (citing 40 Pa. Stat. & Cons. Stat. Ann. § 1303.731(c) (2017)). Because JUA's funds are private, they "give[] the same character to the institution." *Knoop*, 57 U.S. (16 How.) at 381.

Second, JUA has always been controlled by a majority-private board. *See supra* p.7. The Commissioner retains some "supervision" over JUA. App.168a. But that supervision is barely distinct from the Commissioner's general regulatory control over all private insurers. *See supra* pp.6-7. If the

Commissioner in fact controlled JUA, "we wouldn't have this lawsuit." *Filan*, 392 F.3d at 938.

This lack of government control distinguishes JUA from Amtrak, as the government "retain[ed] for itself permanent authority to appoint a *majority* of the directors of [Amtrak]." *Lebron*, 513 U.S. at 399 (emphasis added). And it also distinguishes JUA from MOHELA, which "is governed by state officials and state appointees." *Nebraska*, 600 U.S. at 491.

Third, JUA performs a private function. *See supra* pp.6-7. JUA "is, at its core, an insurance company." App.168a. It is not "engaged in work otherwise tasked by statute to the state's insurance commissioner." App.168a. Rather, it "provide[s] medical malpractice coverage to private persons practicing medicine within the Commonwealth." App.168a. This "function is inherently private." App.168a.

It does not matter that JUA's operation "may be beneficial to the public." *Knoop*, 57 U.S. (16 How.) at 381. JUA was not "created" with the "purpose" of exercising "political power" or "be[ing] employed in the administration of government." *Dartmouth*, 17 U.S. (4 Wheat.) at 629, 636. JUA does not perform any "essential public function," *Nebraska*, 600 U.S. at 490, or pursue a "purely governmental purpose[]," *Lebron*, 513 U.S. at 395 (citation omitted).

In sum, because JUA is privately funded, privately controlled, and performs a private function, it is a private entity under this Court's precedents.

B. The Third Circuit erred in holding that a privately funded and privately controlled entity performing a private function is a governmental entity.

The Third Circuit deemed JUA a governmental entity for three primary reasons. App.35a. Each fails.

First, the Third Circuit noted that JUA "support[s] a public purpose within the state insurance market." App.4a-5a. But this Court has already rejected that argument. Dartmouth College was not governmental simply because it promoted education, "an object of national concern." *Dartmouth*, 17 U.S. (4 Wheat.) at 634. And the Piqua branch of the State Bank of Ohio was not governmental simply because it was "beneficial to the public." *Knoop*, 57 U.S. (16 How.) at 381. This would be true, the Court noted, "of all corporations whose objects are the administration of charities." *Id.*

The Third Circuit recognized that this was the logical endpoint of its reasoning. App.30a. But it emphasized that the Commonwealth "creat[ed]" JUA. App.30a. If state creation were sufficient, however, then *all corporations* would be governmental entities. *Dartmouth* easily dispatched that absurd result two centuries ago. 17 U.S. (4 Wheat.) at 638-39; *see S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 543-44 (1987) ("The fact that Congress granted [an entity] a corporate charter does not render the [entity] a Government agent.").

Second, the Third Circuit noted that, although JUA's funds are "undisputed[ly]" private, they "are the result of the Commonwealth's enforced acquisition of funds to support [its] goals." App.31a, 35a. It is unclear what the Third Circuit meant by this. No statute *requires* healthcare providers to obtain insurance from JUA. 40 Pa. Stat. & Cons. Stat. Ann. § 1303.732(a) (JUA must "offer" insurance).

If the Third Circuit meant that insurers' provision of funds to establish JUA in 1975 renders JUA governmental, that is wrong. The existence of a "coercive element" in an entity's funding structure "is irrelevant." *Filan*, 392 F.3d at 937. What matters is whether "the funds of the [entity] be public property." *Dartmouth*, 17 U.S. (4 Wheat.) at 629-30. JUA's funds are "undisputed[ly]" private. App.31a. And any money required from insurers to establish JUA was "private property" transferred "from one private entity to another." *Filan*, 392 F.3d at 937.

Third, the Third Circuit suggested that "only the Commonwealth has a legally protectable interest in the JUA." App.35a. This suggestion was based on the Third Circuit's assumption that Pennsylvania "would be entitled to receive the profit" from any dissolution of JUA. App.32a. But this is pure conjecture. And it is contrary to JUA's plan of operations, which provides that "[u]pon dissolution," JUA's assets "*shall be distributed in such manner as the Board may determine* subject to the approval of the Commissioner." App.50a-51a (emphasis added) (citation omitted). Consistent with that plan of

operations, before enacting the statutes challenged in this litigation, the Commonwealth asked JUA how it proposed to distribute its surplus funds. *See supra* p.9.

Regardless, whatever might happen to JUA's assets upon a hypothetical future dissolution "would not deprive the Association of its *present* possessory right in the surplus." App.174a. Nor does it deprive JUA's insureds of their interest in the payment of their claims from JUA's funds.

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States no doubt "ha[ve] the power to create a state agency that is truly a part of the state—like the State Insurance Board." *Morales*, 975 F.2d at 1183. If the State funds that entity, controls that entity, and imbues that entity with a governmental function, then the State can claim its funds. Pennsylvania appears to have done something similar with its distinct MCARE Fund, which is "administered by the Insurance Department of Pennsylvania" and was created as a "special fund" of the Commonwealth. App.141a (citing 40 Pa. Stat. & Cons. Stat. Ann. §§ 1303.712(a)-.713(a)).

Pennsylvania "chose to solve a public health problem through a private, nonprofit association, over which the Commonwealth retained limited control, in which the Commonwealth had no financial interest, and for which the Commonwealth bore no responsibility." App.131a. That solution has obvious benefits for the Commonwealth, but it also has "constitutional consequences." App.110a; *cf. Va. Off.*

for Prot. & Advoc. v. Stewart, 563 U.S. 247, 258 (2011) (State's "decision to establish a public, rather than a private," entity carried constitutional consequences). Having chosen a private solution for insurance, the Commonwealth cannot now "legislatively recapture this private association for the purpose of accessing its assets." App.131a.

III. The question presented has broad constitutional importance.

This Court has a "duty . . . to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973). That duty requires this Court to police the dividing line between private and governmental entities.

In cases such as this one, that line determines whether an entity is able to vindicate its constitutional rights against the State. Entities in a wide variety of fields and industries—such as insurance,[7] energy and the environment,[8] education,[9] and healthcare[10]—can face questions about their private or governmental status. And the answer to those questions affects their

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[7] *E.g.*, App.5a-6a; *Morales*, 975 F.2d at 1179; *Asociación*, 484 F.3d at 6.

[8] *E.g.*, *Filan*, 392 F.3d at 935.

[9] *E.g.*, *Dartmouth*, 17 U.S. (4 Wheat.) at 639; *Pocono Mountain Charter Sch. v. Pocono Mountain Sch. Dist.*, 442 Fed. App'x 681, 687 (3d Cir. 2011).

[10] *E.g.*, *Palomar*, 180 F.3d at 1107.

ability to vindicate a wide variety of constitutional rights. The Third Circuit here blocked JUA from vindicating its rights under the Takings Clause, Due Process Clause, Contract Clause, and First Amendment. App.4a-5a. But other circuits in other cases have also blocked governmental entities' claims under the Equal Protection Clause,[11] Commerce Clause,[12] and Guarantee Clause.[13] Some circuits also block governmental entities' claims under the Supremacy Clause,[14] although most do not.[15]

The dividing line between private and governmental entities also has broad importance beyond this particular constitutional context. As noted, that line matters in determining, for example, whether an individual may bring constitutional claims against an entity, whether an entity may establish Article III standing on behalf of the State, and whether an entity may assert sovereign immunity. *See supra* pp.25-27, 30-31. This Court frequently grants certiorari to address the line between private and governmental entities in various contexts. *See, e.g.*,

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[11] *E.g.*, *Williams*, 289 U.S. at 40.

[12] *E.g.*, *City of Hugo v. Nichols (Two Cases)*, 656 F.3d 1251, 1265 (10th Cir. 2011).

[13] *E.g.*, *Kerr*, 20 F.4th at 701.

[14] *See Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360, 1364 (9th Cir. 1998).

[15] *E.g.*, *Ocean Cnty. Bd. of Comm'rs v. Att'y Gen.*, 8 F.4th 176, 180 (3d Cir. 2021).

Drummond, Nos. 24-394 & 24-396 (whether private religious school is governmental entity for First Amendment purposes); *Murthy v. Missouri*, No. 23-411 (whether social media website is governmental entity constrained by Constitution); *Lindke v. Freed*, No. 22-611 (whether city manager is governmental entity constrained by Constitution); *Manhattan Cmty. Access Corp. v. Halleck*, No. 17-1702 (whether public access channel is governmental entity constrained by Constitution).

The constitutional dividing line between private and governmental entities has especially high stakes here. Pennsylvania seeks to confiscate "about $300 million" from JUA's "private accounts." App.3a, 52a. Every dollar of that money stems from insurance premiums paid by private individuals. *See supra* pp.7-8. And it is being held to pay insurance claims of private individuals. *See supra* pp.6-8. Pennsylvania has decided, however, that this money is better spent on alleviating its own "perpetual budgeting inefficacies." App.179a. So it claims JUA's funds as its own. Pennsylvania's sudden labeling of JUA as a governmental entity rests not on any principled understanding of JUA's relationship to the Commonwealth but rather on a self-interested understanding of what benefits the state fisc.

The Third Circuit blessed the Commonwealth's money grab, providing a roadmap for other States to follow suit. The cases implicated just in this 3-1 circuit split confirm that States often seek to conscript the funds of private entities to "alleviate . . . cash-flow

problems." *Asociación*, 484 F.3d at 6. In *Filan*, for example, Illinois ordered the foundation to "turn over $125 million of its assets." 392 F.3d at 935. And in *Asociación*, Puerto Rico initially withheld from its JUA "$173 million." 484 F.3d at 9.

IV. This case is an ideal vehicle.

This case is an ideal vehicle for addressing the question presented. None of the facts are in dispute. "[I]t is undisputed that the JUA has not drawn on the public fisc," App.31a; that JUA's board is majority private, App.7a; and that JUA "offer[s] [medical professional liability] insurance to health care providers and [other] entities," App.6a. Nor is there any dispute that JUA was created by state statute. App.5a-6a.

The district court expressly recognized the circuit split. App.121a-22a, 161a-64a. And it held that if JUA has constitutional rights against the Commonwealth as the cases on the other side of the split hold, then the Commonwealth violated those rights. App.70a, 78a, 130a-31a, 179a. JUA's ability to recover for constitutional violations thus rises or falls with the resolution of the important constitutional question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18-2297 and 18-2323

PENNSYLVANIA PROFESSIONAL LIABILITY JOINT UNDERWRITING ASSOCIATION

v.

GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA, THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA
(Intervenor in District Court)

Governor of the Commonwealth of Pennsylvania,
Appellant in 18-2297

The General Assembly of The Commonwealth of Pennsylvania,
Appellant in 18-2323

Nos. 19-1057 and 19-1058

PENNSYLVANIA PROFESSIONAL LIABILITY JOINT UNDERWRITING ASSOCIATION

v.

GOVERNOR OF PENNSYLVANIA; THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA; PRESIDENT PRO TEMPORE PENNSYLVANIA SENATE; MINORITY LEADER PENNSYLVANIA

Appendix A

SENATE; SPEAKER PENNSYLVANIA HOUSE OF REPRESENTATIVES; MINORITY LEADER PENNSYLVANIA HOUSE OF REPRESENTATIVES; INSURANCE COMMISSIONER PENNSYLVANIA

President Pro Tempore Pennsylvania Senate; Minority Leader Pennsylvania Senate; Speaker Pennsylvania House of Representatives, Minority Leader Pennsylvania House of Representatives,
Appellants in 19-1057

Governor of Pennsylvania, Insurance Commissioner Pennsylvania,
Appellants in 19-1058

Nos. 21-1099, 21-1112, and 21-1155

PENNSYLVANIA PROFESSIONAL LIABILITY JOINT UNDERWRITING ASSOCIATION

v.

GOVERNOR OF PENNSYLVANIA; GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA

General Assembly of the Commonwealth of Pennsylvania,
Appellant in 21-1099

Governor of Pennsylvania,
Appellant in 21-1112

Pennsylvania Professional Liability Joint Underwriting Association,
Appellant in 21-1155

Appendix A

On Appeal from the United States District Court
For the Middle District of Pennsylvania
(D.C. Nos. 1-17-cv-2041, 1-18-cv-1308, and 1-19-cv-1121)
District Judge: Honorable Christopher C. Conner

Argued
November 9, 2022

Before: CHAGARES, *Chief Judge*, JORDAN,
and RESTREPO, *Circuit Judges*

(Filed December 16, 2024)

OPINION OF THE COURT

JORDAN, *Circuit Judge.*

Nearly fifty years ago, in response to a medical malpractice insurance crisis in the state, the General Assembly of the Commonwealth of Pennsylvania established the Joint Underwriting Association ("JUA"). The JUA's primary function is to act as a professional liability insurer of last resort for high-risk medical providers, who pay the JUA directly for the policies it issues. The JUA has never received funding from the Commonwealth. Since its inception, it has amassed through investments a surplus of about $300 million.

Every year from 2016 to 2019, the Commonwealth took legislative action trying either to transfer the JUA's surplus to the Commonwealth's General Fund or to assume control of the JUA.[1] The 2017, 2018, and 2019 statutes —

1. The General Fund holds all money the Commonwealth receives from the Commonwealth Department of Revenue or "any

Acts 44, 41, and 15, respectively — are the focus of the appeals before us now. After each of those enactments, the JUA sued various combinations of defendants, including the Commonwealth's Governor, General Assembly, Insurance Commissioner, and four state representatives (together, the Defendants), asserting multiple federal claims. According to the JUA, the Defendants have violated the Takings Clause, the Contract Clause, the First Amendment, and the JUA's rights to procedural and substantive due process.[2] In response to the JUA's challenges, the Defendants asserted, among other things, that the JUA was created by the Commonwealth and cannot assert constitutional claims against its creator. The District Court disagreed and entered an injunction, preventing the enforcement of most of the legislative changes to the JUA.[3]

The primary issue before us in these appeals is whether the JUA is indeed a creature of the Commonwealth beholden only to the Commonwealth; in other words, whether it is a public entity rather than a private one. We hold that it is, because the Commonwealth delegated power to the JUA to support a public purpose within

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other source" that is not required to be credited to another state fund. 72 P.S. § 302.

2. Those clauses and amendments are found at the following: Takings Clause, U.S. Const. amend. V; Contract Clause, *id.* art. 1, § 10, cl. 1; First Amendment, *id.* amend. 1; and due process, *id.* amend. XIV.

3. Portions of the acts unrelated to the JUA survived and are not at issue in this appeal.

the state insurance market, and because only the Commonwealth has a legally protectable interest in the JUA. As a public entity, the JUA lacks the ability to maintain the constitutional claims it has asserted against the Commonwealth, its creator. Accordingly, and for the reasons explained herein, we will reverse in part, affirm in part, and remand.

I. Background[4]

Because our analysis of the JUA's public nature must account for its role in the Commonwealth, we begin by explaining the JUA's history, operations, powers, and duties.

A. History and Operation of the JUA

The Commonwealth General Assembly established the JUA in 1975 in an effort to make medical professional liability ("MPL") insurance available at a reasonable cost.[5]

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4. This appeal consolidates 3d Cir. Nos. 18-2297, 18-2323, 19-1057, 19-1058, 21-1099, 21-1112, and 21-1155. The joint appendix filed in the appeals from *Pennsylvania Professional Liability Joint Underwriting Ass'n v. Wolf* (*JUA I*), 324 F. Supp. 3d 519 (M.D. Pa. 2018), and *Pennsylvania Professional Liability Joint Underwriting Ass'n v. Wolf* (*JUA II*), 381 F. Supp. 3d 324 (M.D. Pa. 2018), is cited as "C.A. No. 18-2297 J.A." The joint appendix filed in the appeals from *Pennsylvania Professional Liability Joint Underwriting Ass'n v. Wolf* (*JUA III*), 509 F. Supp. 3d 212 (M.D. Pa. 2020), is cited as "C.A. No. 21-1099 J.A."

5. The JUA was created by the Pennsylvania Health Care Services Malpractice ("PHCSM") Act. PHCSM Act, P.L. 390, No.

The JUA is required to offer MPL insurance to health care providers and entities that "cannot conveniently obtain [MPL] insurance through ordinary methods at rates not in excess of those applicable to [those] similarly situated[.]"[6] 40 P.S. § 1303.732(a). All insurers authorized to write liability insurance in the Commonwealth must be members of the JUA. *Id.* § 1303.731(a).

By statute, the JUA is supervised by the Insurance Department of Pennsylvania (the "Department") and owes four duties to the Department: (1) to submit a plan of operations to the Commissioner of the Department for approval; (2) to submit rates and any rate modifications to the Department for approval; (3) to offer MPL insurance to health care providers; and (4) to annually file with the Commissioner updated rates for all health care providers, which, in turn, the Commissioner "shall review and may adjust" when calculating annual assessments for the health care providers. *Id.* § 1303.731(b) (incorporating *id.* § 1303.712(f)). The original legislation insulated the Commonwealth from the JUA's debts and liabilities, but Act 41, enacted in 2018 and discussed in Section I.B.2., *infra*, repealed that provision. *Id.* § 1303.731(c).

111, § 802 (repealed 2002). The General Assembly replaced that Act in 2002 with the Medical Care Availability and Reduction of Error ("MCARE") Act, 40 P.S. § 1303.101 *et seq.*, which "established" the JUA as a "nonprofit joint underwriting association," *id.* § 1303.731(a).

6. According to the record, the JUA's insureds generally fall into four categories: (1) providers with a history of malpractice occurrences; (2) providers practicing high-risk specialties; (3) providers who have gaps in coverage; or (4) providers reentering the medical profession after the loss or suspension of their licenses or voluntary withdrawal from practice.

The "powers and duties" of the JUA are "vested in and exercised by" its Board of Directors. *Id.* § 1303.731(a). According to the JUA's plan of operations, which is subject to the Commissioner's approval, *id.* § 1303.731(b), the Board has no more than fourteen directors, consisting of the president of the JUA, up to eight member-company representatives elected by the JUA's members, up to four representatives from health care providers or the public nominated by the Board and appointed by the Commissioner, and one agent or broker elected by the JUA's members, *Pa. Pro. Liab. Joint Underwriting Ass'n v. Wolf* (*JUA II)*, 381 F. Supp. 3d 324, 328 (M.D. Pa. 2018). The JUA has four employees, none of whom are paid by the Commonwealth; nor do they receive any benefits under the Commonwealth's retirement system. *Pa. Pro. Liab. Joint Underwriting Ass'n v. Wolf* (*JUA III)*, 509 F. Supp. 3d 212, 218 (M.D. Pa. 2020). The organization's operating plan states that it may be dissolved by "operation of law" — like any nonprofit in the state, 15 Pa. C.S.A. § 9134(a)(5) — or dissolved at the request of its members, "subject to the approval of the Commissioner[,]" *JUA III*, 509 F. Supp. 3d at 218. At dissolution, the Board is tasked with determining how the JUA's assets are to be distributed, subject to the Commissioner's approval. *Id.*

The JUA issues insurance policies directly to its policyholders, who pay premiums to the JUA.[7] Those

7. The policyholders — those who seek insurance from the JUA in its role as a last-resort insurer — are different from the members of the JUA, who join "by virtue of becoming licensed carriers" of liability insurance in Pennsylvania. (C.A. No. 18-2297 J.A. at 308.) The typical JUA policy is limited to one year, with a limit of $500,000 per claim and aggregate limits of $1.5 million for individuals and $2.5 million for hospitals.

premiums — and the income earned on investments made with them — are now the JUA's sole source of funding; neither its members nor the Commonwealth contribute any money to its operation. The JUA holds "contingency funds" in two separate accounting categories: first, in reserves, which represent the "best estimate" of the funds needed for claims "that have been incurred but not yet paid," and second, in surplus, which is the "capital after all liabilities have been deducted from assets." (C.A. No. 18-2297 J.A. at 613, 2363.)

The JUA's surplus funds underly the disputes here. In December 2016, the JUA's surplus was $268,124,490. By March 2020, it had grown to $298,276,876. By at least one metric, this was an exceptional stockpile. In the insurance business, a risk-based capital ("RBC") ratio is the measure of the sufficiency of an insurer's contingency funds to cover the "full range of potential exposure from [its] claims."[8] (C.A. No. 18-2297 J.A. at 1162.) The Department expects insurers to maintain an RBC ratio of at least 300% of its potential exposure to claims by its policyholders. As of 2017, the JUA's RBC was 13,477%.

Because of that extraordinarily high ratio, the Department sent the JUA a letter about "certain matters involving a lack of regulatory compliance and deviation

8. A company's RBC ratio is calculated in accordance with a formula that "may adjust for the covariance between" the insurance company's asset, credit, underwriting, and "[a]ll business and other risks[.]" 40 P.S. § 221.4-B. The formula is set by the National Association of Insurance Commissioners, *id.* § 221.1-B, and a company's RBC ratio is generally confidential, *id.* § 221.11-B(a).

from sound business practices[.]"[9] (C.A. No. 18-2297 J.A. at 937.) The Department asked the JUA to "determine an efficient amount of surplus to hold in order to run its operation" and to recommend in its plan of operations how it will divest itself of the "excess capital[.]" (C.A. No. 18-2297 J.A. at 938.) In response, the JUA said that the Board would develop and undertake a plan of action to address the excess surplus when so required, but it went on to state that it would be "inappropriate to identify an efficient surplus operating range" because of a "lack of legal authority" about how any excess surplus should be handled. (C.A. No. 18-2297 J.A. at 988-89.) The JUA has no policy requiring the distribution of dividends to its policyholders; it has never paid any dividends to its policyholders; nor can it, consistent with statute, pay dividends or make distributions to its members.[10] *See* 15

9. At that time, when the JUA held more than $268 million in surplus funds, an auditor recommended that the JUA needed only about $21.5 million in reserves for "unpaid losses" and "unpaid loss adjustment expenses." (C.A. No. 18-2297 J.A. at 1162.)

10. In the event of a budget deficit, which has never occurred, the Board must alert the Commissioner. 40 P.S. § 1303.733(a). If the Commissioner approves, the JUA is authorized to borrow the funds needed to satisfy a deficit. *Id.* § 1303.733(b). An earlier version of the JUA's plan of operations, adopted in 2005, explained that the JUA could also fund a deficit by assessing its members in proportion to each member's participation, which the JUA would have to refund when it acquired the necessary funds through a loan or an increase in premiums. The JUA, however, has never borrowed money or assessed its members to fund its operations. Its CEO testified that the Insurance Department advised it to remove the assessment language from its plan of operations, and that the JUA "never intend[s]" to assess its members. (C.A. No. 18-2297 J.A. at 1318, 1470).

Pa. C.S.A. § 9114(d) (explaining that nonprofit associations can only use their profits for their nonprofit purposes); *id.* § 9132(a) ("[A] nonprofit association may not pay dividends or make distributions to a member or manager.").

Meanwhile, as we explain below, the legislature made efforts to reach the JUA's surplus capital.

B. The Commonwealth's Legislation and the JUA's Lawsuits

The several cases consolidated in this appeal stem from three pieces of legislation and the lawsuits that challenged them.

1. Act 44 of 2017 and *Pennsylvania Professional Liability Joint Underwriting Ass'n v. Wolf* (*JUA I*), 324 F. Supp. 3d 519 (M.D. Pa. 2018)

In 2017, the legislature passed and the Governor signed Act 44 to implement the annual budget for the Commonwealth. Act of Oct. 30, 2017, P.L. 725, No. 44, § 1 ("Act 44"). Act 44 mandated that the JUA transfer $200 million into the Commonwealth's General Fund.[11]

In 2018, the JUA removed from its plan of operations the specific language about its ability to assess its members.

11. Act 44 explicitly repealed Act 85, enacted in 2016, which had also demanded that the JUA transfer $200 million to the Commonwealth. *JUA I*, 324 F. Supp. 3d at 526. The JUA commenced a lawsuit following Act 85's enactment, which has been held in abeyance pending the resolution of these appeals. *Id.*

Id. § 1.3. It required payment by December 1, 2017, or the JUA would be abolished, and its funds transferred to the Commissioner. *Id.* Act 44's legislative findings included that the JUA "has money in excess of the amount reasonably required to fulfill its statutory mandate[,]" that its funds do not belong to its members or policyholders, and that it is an "instrumentality of the Commonwealth[.]" *Id.*

A week after Act 44's enactment, the JUA sued the Governor in the U.S. District Court for the Middle District of Pennsylvania, seeking declaratory and injunctive relief for violations of the Constitution, specifically, substantive due process, the Takings Clause, and the Contract Clause. The JUA also moved for a temporary restraining order ("TRO") and preliminary injunction against enforcement of the JUA-related section of Act 44. The District Court denied the JUA's request for a TRO and, upon motion by the General Assembly of Pennsylvania, granted leave for the General Assembly to intervene. After a hearing, the District Court granted the motion for a preliminary injunction, declaring that "[t]he uncompensable constitutional exigency imposed by Act 44 is one of extraordinary proportion." *Pa. Pro. Liab. Joint Underwriting Ass'n v. Wolf*, No. 1-17-cv-2041, 2017 U.S. Dist. LEXIS 193276, 2017 WL 5625722, at *11 (M.D. Pa. Nov. 22, 2017).

The parties filed cross-motions for summary judgment. The Governor and General Assembly argued that the JUA could not assert constitutional claims against the Commonwealth because the JUA is nothing more than

a creature of the Commonwealth itself.[12] *JUA I*, 324 F. Supp. 3d at 529, 532. The JUA responded that it "is not and never has been part of the state," so Act 44 directed a taking of "private property" by the Commonwealth with "no hope of 'just compensation[.]'" (M.D. Pa. 17-2041 D.I. 59 at 13-15.)

The District Court's analysis "beg[an] and end[ed] with the [JUA]'s Takings Clause claim." *JUA I*, 324 F. Supp. 3d at 528. After rejecting the arguments that the JUA was a political subdivision of the Commonwealth, or the Commonwealth itself, the Court found guidance in out-of-circuit cases involving "state-created insurer[s]-of-last-resort" suing their creators.[13] *Id.* at 532-35. The District Court said those cases did not suggest that state creation of an entity was "alone determinative" as to whether the

12. The General Assembly argued that the JUA's relationship with the Commonwealth is "sufficiently analogous" to that of a state with a municipality, so that it functions as a political subdivision and cannot bring a claim against its creator. *JUA I*, 324 F. Supp. 3d at 530. The District Court, however, distinguished the JUA from entities that generally fall under the political subdivision doctrine, stating that the JUA "has no power ... to tax, to issue bonds, or to exercise eminent domain" and that its mission is "inherently nongovernmental." *Id.* at 531. The District Court also rejected the Governor's argument that the JUA, like Amtrak (a "government entity" for the purposes of 42 U.S.C. § 1983 liability), is a government actor. *Id.* The Court reasoned that the Commonwealth had, at that time, *disclaimed* liability for the JUA and the JUA was not subject to extensive government control, so the comparison to Amtrak was not appropriate. *Id.* at 531-32.

13. *See infra* Section II.C (discussing out-of-circuit cases).

entity was public or private; rather, the courts "holistically examined" the entity's relationship with the state, using a "variety of factors[.]" *Id.* at 535.

Following suit, the Court conducted its own holistic examination of the JUA's relationship with the Commonwealth. It considered the JUA's function, the degree of control reserved to the Commonwealth in contrast with the degree of autonomy granted to the JUA, other aspects of the JUA's treatment by statute, and the nature of the funds in dispute. *Id.* at 535-38. For three reasons, the Court held that the JUA is a "private entity as a matter of law": first, the JUA is, "at its core, an insurance company" comprised of private members, governed by a private board, and supported by private employees; second, the JUA is subject to *de minimis* Commonwealth supervision in that it is only required to seek the Insurance Commissioner's approval of its plan of operations and any plan to borrow funds in case of a deficit; and, third and finally, the JUA is exclusively funded by private premiums, the payment of which has no public end-use. *Id.*

In so ruling, the District Court emphasized the legislature's choices in creating the JUA:

> [I]n the same legislation that created the [JUA], the General Assembly relinquished control thereof. ... The legislature had the option to tightly circumscribe the [JUA's] operations and composition of its board, to establish the

> control of the [JUA] as a special fund[14]... , or to retain meaningful control in any number of other ways. That the General Assembly chose to achieve a public health objective through a private association has a perceptible benefit: it assures availability of medical professional liability coverage throughout the Commonwealth at no public cost. By the same token, it also has a consequence: the General Assembly cannot claim *carte blanche* access to the [JUA's] assets.

Id. at 538 (citations omitted).

The Court granted summary judgment, declaratory judgment, and permanent injunctive relief to the JUA, holding that the sections of Act 44 related to the JUA were "plainly violative" of the Takings Clause. *Id.* at 540. There was a timely appeal. (C.A. Nos. 18-2297 & 18-2323.)

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14. The District Court contrasted the Commonwealth's choice not to establish the JUA as a "special fund" with the Commonwealth's choice to create the MCARE Fund as part of the MCARE Act (*see supra* n.5). *JUA I*, 324 F. Supp. 3d at 524. The MCARE Fund is administered by the Commonwealth Insurance Department and is used to "pay claims against participating health care providers for losses or damages awarded in [MPL] actions against them in excess of the basic insurance coverage required by" the statute. 40 P.S. § 1303.712(a). It is funded by annual assessments of its participants. *Id.* § 1303.712(i).

2. Act 41 of 2018 and *Pennsylvania Professional Liability Joint Underwriting Ass'n v. Wolf* (*JUA II*), 381 F. Supp. 3d 324 (M.D. Pa. 2018)

In 2018, the Commonwealth responded to the District Court's decision by enacting Act 41. That enactment followed a review of the JUA by the Insurance Commissioner that, according to a legislative finding, revealed "a need to modernize the [JUA] in order to produce needed economical and administrative efficiencies." Act of June 22, 2018, P.L. 273, No. 41, § 3 ("Act 41"). In Act 41, the Commonwealth expressed its intention to place the JUA "within the [Insurance D]epartment [to] give the [C]ommissioner more oversight of expenditures and ensure better efficiencies" in its operation. *Id.* The Act declared that the JUA "shall *continue* as an instrumentality of the Commonwealth and shall operate under the control, direction[,] and oversight of the [Insurance] Department." *Id.* (emphasis added). Of particular note, Act 41 mandated that the JUA transfer all of its assets to the Department within thirty days of the Act's effective date.[15] *Id.*

The JUA sued the Governor, the Insurance Commissioner, and four state representatives in their official capacities, again alleging violations of substantive

15. Act 41 also purported to make changes to the JUA's operations, including restructuring its Board, causing its liabilities to be considered as liabilities against the Commonwealth, installing a new executive director paid by the Commonwealth, and requiring the new Board to submit a new plan of operations for approval. Act of June 22, 2018, P.L. 273, No. 41, § 3.

due process, the Takings Clause, and the Contract Clause.[16] It sought injunctive and declaratory relief. As in *JUA I*, the District Court denied the JUA's TRO motion but granted its motion for a preliminary injunction. The parties then filed cross-motions for summary judgment.

The District Court granted summary and declaratory judgment and permanent injunctive relief in favor of the JUA, holding that "the Commonwealth cannot take the [JUA's] private property in the manner contemplated by Act 41." *JUA II*, 381 F. Supp. 3d at 342-43. Before discussing Act 41, the District Court reiterated its earlier holding that the JUA and its assets are "overwhelmingly private in nature." *Id.* at 333. It rejected the state representatives' argument that, under *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 4 L. Ed. 629 (1819), a lack of non-state interests in the JUA means that the Commonwealth can "wield its power [over the JUA], unrestrained by the federal Constitution[.]" *JUA II*, 381 F. Supp. 3d at 336. On the contrary, the Court said, "the state has never been alone interested in [the JUA's] transactions." *Id.* at 337 (internal quotation marks omitted). In the Court's view,

16. The JUA also named the General Assembly as a defendant, but counsel did not enter an appearance on its behalf, and it filed no answer. The District Court explained that "[a]ll filings by the [state representatives] have been made solely under the names of the four individual elected leaders and cannot be fairly construed as having been filed on behalf of the General Assembly itself." *JUA II*, 381 F. Supp. 3d at 330 n.2. After the District Court entered its order granting summary judgment to the JUA and permanently enjoining portions of Act 41, the parties stipulated that the order applied to the General Assembly.

> the record establishes that the [JUA's] members *do* have some interest in [it]. The [JUA] is organized as a nonprofit, and, by law, member companies do not share in profits as they did in [two cited out-of-circuit cases]. The [JUA's] reserves and its surplus are its first line of financial defense in the event it suffers a loss. But thereafter, it is the [JUA's] member insurance companies, *not* the Commonwealth, that would be held to account: under the [JUA's] current plan of operations, members may be assessed to make up any loss until the [JUA] can borrow sufficient funds to satisfy its deficit, repay borrowed funds, and reimburse members for assessments. Although the degree of member interest is not as enduring or direct as the member interest in [the out-of-circuit cases], it is member interest nonetheless and belies defendants' assertion that the state is "alone" interested in the [JUA].

JUA II, 381 F. Supp. 3d at 339 n.7 (internal citations omitted).

The Court also rejected the Governor's and Commissioner's argument that Act 41 was a valid response to the holding of *JUA I*. The Court declared that no authority supported the proposition that "the state can declare public what it created as — and a court has confirmed to be — a private entity." *Id.* at 335. As in *JUA I*, the District Court focused only on the JUA's Takings Clause claim, and it said that Act 41 was merely

an attempt to do indirectly what the District Court had already told the Commonwealth in *JUA I* it could not do directly.[17] *Id.* at 341. Again there was a timely appeal. (C.A. Nos. 19-1057 & 19-1058.)

3. Act 15 of 2019 and *Pennsylvania Professional Liability Joint Underwriting Ass'n v. Wolf* (*JUA III*), 509 F. Supp. 3d 212 (M.D. Pa. 2020)

The wheel turned again in 2019, with the passage of Act 15, which, unlike its predecessors, did not mandate the transfer of the JUA's surplus to the Commonwealth. Act of June 28, 2019, P.L. 101, No. 15, § 7 ("Act 15"). Instead, the Act requires the JUA to be funded by the Commonwealth and that it submit and testify to a budget estimate annually. *Id.* It also mandates that the JUA's Board hold quarterly public meetings as required by the state's Sunshine Act,[18] and that the JUA be considered as a "Commonwealth agency" for the purposes of the

17. The JUA had argued that issue preclusion applied to the suit, but the District Court held that the issues in *JUA I* were not identical to those in *JUA II* because the legislative act and constitutional question had changed. *JUA II*, 381 F. Supp. 3d at 334-35 ("[T]he dispositive inquiry [in *JUA III*] is '[w]hether the Commonwealth can now recapture the [JUA] through *post hoc* legislation — irrespective of private rights and interests accrued by the [JUA] over more than four decades' — without constitutional consequence." (third alteration in original)).

18. The Sunshine Act requires that "[o]fficial action and deliberations by a quorum of the members of an agency shall take place at a meeting open to the public[.]" 65 Pa. C.S.A. § 704.

Commonwealth Attorneys Act[19] and other state statutes. *Id.* Finally, Act 15 requires the JUA to share a list of its employees with the Commonwealth, conduct operations in Commonwealth-owned facilities, and meet the requirements of the Department of Revenue for employees with access to tax information. *Id.*

Predictably, the JUA again sued the Governor and the General Assembly, this time seeking declaratory and injunctive relief for violations of substantive and procedural due process, the Takings Clause, the Contract Clause, and the First Amendment. Unlike in *JUA I* and *JUA II*, the District Court denied the JUA's preliminary injunction and TRO motions because "Act 15 posed no threat of imminent and irreparable harm." *JUA III*, 509 F. Supp. 3d at 221. The parties then filed cross-motions for summary judgment.

In its summary judgment opinion, the District Court once more repeated its holding from *JUA I* that the JUA is a private entity with private property. *Id.* at 222. It described Act 15 as "test[ing] the outer bounds of [the *JUA I* and *JUA II]* holdings, tasking [the Court] to consider what degree of authority, if any, the Commonwealth may assert over the [JUA]." *Id.* The answer largely went against the Commonwealth, again.

The District Court held that Act 15's funding of the JUA through the Commonwealth budget, as well as the

19. The Commonwealth Attorneys Act requires the Pennsylvania Attorney General to represent all Commonwealth agencies "in any action brought by or against the Commonwealth or its agencies[.]" 71 P.S. § 732-204(c).

requirement that the JUA submit and testify to its planned expenses, constituted a regulatory taking. *Id.* at 223-27 ("By prohibiting the [JUA] from spending its private funds as it might choose, Act 15 deprives the [JUA] of ... essential property rights."). The District Court also held that the categorization of the JUA as a Commonwealth agency for purposes of the Commonwealth Attorneys Act violated the JUA's First Amendment right to consult with and hire civil counsel of its choice. *Id.* at 228-31. The Court accordingly granted a permanent injunction against the implementation of those portions of the Act. *Id.* at 235.

The District Court did, however, rule for the Defendants on the provisions of Act 15 having to do with the JUA's disclosures to the public and the Commonwealth.[20] Those provisions did not constitute a violation of substantive due process. *Id.* at 231-34. Clarifying its earlier decisions, the Court said: "In holding that the [JUA] is a private entity and its funds private property, we rejected defendants' claim that the [JUA] is the state itself. We have never denied, however, that the [JUA] is a unique creature — a state-created private entity that furthers the General Assembly's public-health objectives." *Id.* at 232. While reasserting that the JUA's property and operations are

20. In addition to upholding the disclosure provisions of Act 15, the District Court also ruled for the Defendants on the JUA's Contract Clause claim, which it deemed to be moot. *JUA III*, 509 F. Supp. 3d at 227 n.6. Those rulings coincide with paragraph five of the District Court's separate judgment order, in which it granted summary judgment in favor of the Defendants as to the JUA's substantive due process (Count I) and Contract Clause (Count III) claims. We will affirm that portion of the District Court's order.

private, the Court acknowledged that the "*mission* [of the JUA] is indisputably public[,]" so the Commonwealth's oversight and support in the form of the remaining provisions of Act 15 survived rational-basis review. *Id.* at 232-33. Both sides timely appealed the Court's order. (C.A. Nos. 21-1099, 21-1112, & 21-1155.)

We consolidated the appeals from the three *JUA* cases and held oral argument. We then stayed the appeals and certified to the Pennsylvania Supreme Court the question of whether the JUA is, under Pennsylvania law, a public or private entity. That court declined to answer the question, saying the issue is "principally one of federal law." *Pa. Pro. Liab. Joint Underwriting Ass'n v. Governor of the Commonwealth*, 310 A.3d 74, 76 (Pa. 2024). We now decide the merits of the appeals.

II. Discussion[21]

On appeal, the Defendants argue that the District Court erred in holding that the JUA is a private entity

21. The District Court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1291. We exercise plenary review over the District Court's grant of summary judgment and apply the same standard as the District Court. *Hayes v. N.J. Dep't of Hum. Servs.*, 108 F.4th 219, 221 (3d Cir. 2024). Summary judgment is appropriate if, when viewed in the light most favorable to the non-moving party, there is no genuine issue of material fact and "the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (citing Fed. R. Civ. P. 56(c)). We may affirm on any ground supported by the record. *Hughes v. Long*, 242 F.3d 121, 122 n.1 (3d Cir. 2001).

with constitutional rights it can assert against its creator, the Commonwealth. They argue, as they repeatedly have, that the JUA is a "creature of the state" and without such rights. In response, the JUA maintains that it is a private entity and that its assets and operations are largely beyond the reach of the Commonwealth. It further says that the way the Commonwealth created and has regulated the JUA over decades has "created ... conditions under which [it] *acquired* the right to protection from uncompensated takings." (C.A. 18-2297 Answering Br. at 31 (emphasis added).) While the case presents complexities that the District Court addressed with great care, we conclude that the Commonwealth has the better of the arguments.

A. *Dartmouth College* provides the analytical approach for determining whether the JUA is a public or private entity.

The crux of this protracted litigation is the status of the JUA: whether it is a public entity akin to a state agency or is instead a private entity with the ability to sue the Commonwealth for the violation of constitutional rights. To make that determination, we first must identify the proper analytical approach.

We begin by looking back more than two centuries to a case all the parties rely on: *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 4 L. Ed. 629 (1819). There, the Supreme Court considered whether Dartmouth College, a privately founded institution incorporated by charter from the British government, could be converted to a public institution by an act of the New Hampshire

legislature some fifty years after the College's founding. *Id.* at 552-55, 626. When the state tried to take it over, the College, through its trustees, sued, alleging a violation of the Constitution's Contract Clause. *Id.* at 626-27.

In considering whether Dartmouth College was a creature of the state subject to public control, the Supreme Court inferred nothing from the fact that the King of England granted a charter to incorporate the college. *Id.* at 638. Instead, the Court postulated a series of conditions that would qualify the College as a public institution.

> If the act of incorporation be a grant of political power, if it create a civil institution, to be employed in the administration of the government, or if the funds ... be public property, or if the state ... , as a government, be alone interested in its transactions, [then] the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power imposed by the [C]onstitution of the United States.

Id. at 629-30.

We take the cited conditions to be four guiding questions in the identification of a public entity subject to the control of the legislature. The first two questions, about the act of incorporation, ask whether the entity was granted political power or was created to be employed in the administration of government. The third asks whether

the funds of the entity are public property, and the fourth and final question examines whether only the state has an interest in the entity. In short, the ends and means of the institution, as of the time it was established, are strong indicators of whether it is public or private.

Because an individual benefactor founded Dartmouth College as a private charitable corporation, endowed by private funds, the founder "could scarcely be considered as a public officer, exercising any portion of those duties which belong to the government[.]" *Id.* at 634. Although the purpose of the institution was education, "an object of national concern," the state could not "have supposed[] that [the founder's] private funds, or those given by others, were subject to legislative management," nor were the professors considered public officers merely by being employed to educate the youth. *Id.* at 634-35. Dartmouth College, at its creation and incorporation, was founded for private purposes — "[t]he particular interests of New Hampshire never entered the mind of the donors, never constituted a motive for their donation" — so, the Court concluded, the College was not created as a "civil institution, participating in the administration of government[.]" *Id.* at 640-41. The only power bestowed by the act of incorporation was the trustees' perpetual power to promote the purpose of the College. *Id.* at 636, 641. That power did not assume a political character merely because the government granted a charter for Dartmouth to operate. *Id.* at 636-38.

In examining whether only New Hampshire had an interest in Dartmouth College, the Court reasoned that

while the original founder, land donors, and "fluctuating" student population maintained no "vested interest" assertable in court, the private corporation itself, as an "assignee of [the] rights" of the donors, did. *Id.* at 641-42. It stood in the founders' place and "distribute[d] their bounty, as they would themselves have distributed it[.]" *Id.* at 641-42. The corporation also served as a trustee for the students by exercising, asserting, and protecting their interests. *Id.* at 643. The corporation, administered by its trustees, thus held the "whole legal interest[,]" *id.* at 645, and those trustees were capable of guiding and governing the institution as needed, outside of the "correcting and improving hand of the legislature," *id.* at 648; *see id.* at 653 (explaining that the trustees were acting as assignees of the donors and founders, but also in their own interests as potential professors or leaders of the college).

Having considered the questions it posed for itself, the Supreme Court ruled in favor of the College. Because Dartmouth was founded as a private charity with private funds, without being granted political power or exercising it, and New Hampshire was not alone interested in it, the Supreme Court held that the state's attempt to convert it to a public institution implicated and violated the Contract Clause. *Id.* at 650, 654.

One of our sister circuits has applied *Dartmouth College* to determine whether an entity like the JUA could assert constitutional rights against its creator. In *Texas Catastrophe Property Insurance Ass'n v. Morales*, 975 F.2d 1178 (5th Cir. 1992), the Fifth Circuit was asked whether a state-created property insurance association

had a right to retain counsel in civil cases and could assert that right against the state. The Texas legislature established the association to provide property insurance in designated regions, and all property insurers in the state were required to join it. *Id.* at 1179. The association received no funds from the government, and it wrote its own policies and paid its own claims. *Id.* When the legislature amended the association's organic statute to require the association to use the Texas Attorney General as legal counsel, the association sued, alleging a violation of its constitutional rights. *Id.* at 1180.

Relying on the guidance of *Dartmouth College*, the Fifth Circuit examined the "identity" of the association to determine if it could bring the claim. *Id.* at 1182. The Fifth Circuit emphasized that the association's statutory scheme allowed its members to receive distributions from its profits and, if a deficit occurred, to be assessed. *Id.* ("When [the association] loses, the bank accounts of its members are depleted, not the public treasury."). Because the member companies were "vitally interested" in protecting their money — and that protection related to their ability to choose the association's counsel — "the State of Texas [was] not alone interested in the [association's assets]." *Id.* at 1183 (citing *Trs. of Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 629-30)). The Fifth Circuit also concluded that the act creating the association was not a grant of political power, nor was the association employed in the administration of government. *Id.* The association thus was not "truly a part of the state" and could sue Texas for the alleged deprivation of a constitutional right. *Id.*

In *JUA I*, the District Court likewise rejected the argument that the JUA was a creature of the state because, applying *Dartmouth College*, it determined that the relationship between the JUA and the Commonwealth was not "sufficiently analogous" to that of a state and its municipalities.[22] 324 F. Supp. 3d at 530. In *JUA II*, the District Court again dismissed the idea that the JUA is a "governmental instrument" under *Dartmouth College*, saying it "does not neatly fit into any of the categories of public entities described" therein. 381 F. Supp. 3d at 337. The Court declared that the state has "never been 'alone interested in [the JUA's] transactions.'" *Id.* On appeal, all of the Defendants urge us to adopt *Dartmouth College*'s guiding questions to determine whether the JUA is a public institution. The JUA also cites *Dartmouth College* but argues that it embodies a holistic analysis, correctly reflected in the District Court's decisions.

Unlike the District Court, we do not read *Dartmouth College* as prescribing categories into which an entity must entirely fall to be considered public. Whether

22. That "sufficiently analogous" language comes from *Pocono Mountain Charter School v. Pocono Mountain School District*, 908 F. Supp. 2d 597 (M.D. Pa. 2012). *JUA I*, 324 F. Supp. 3d at 530-31. In *Pocono Mountain*, the district court considered whether a charter school could sue the state under § 1983 by asking whether the school was "sufficiently analogous to a municipality." 908 F. Supp. 2d at 606. The court considered the school's relationship with the school district and state, *id.* at 611, and held that the school could not file suit because it operated within the authorization of the school district for a limited purpose, *id.* at 612. In *JUA I*, the District Court noted that "no case has extended *Pocono Mountain* beyond its charter school context." 324 F. Supp. 3d at 530.

labeled holistic or not, the analysis should indeed follow *Dartmouth College*, and that is best done by considering the four questions just discussed. Tailored to the case before us, they ask (1) whether the JUA's organic act granted it political power, (2) whether the JUA was created to be employed in the administration of government, (3) whether the JUA's funds are drawn from public property, and, finally, (4) whether anyone but the Commonwealth has an interest in the JUA.

B. The JUA is a public entity without the ability to assert constitutional claims against the Commonwealth.

We take up *Dartmouth College*'s four guiding questions in turn.

First, we ask whether the JUA's organic act granted it political power.[23] *Trs. of Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 629. Although not a grant of political power in the traditional sense, since its inception, the JUA has held and exercised the coercive power of the state in its ability to require all MPL insurers who choose to do business in the Commonwealth to take certain actions.[24] Insurers have to become members of the JUA whether they like it or not, and the organic act for the JUA required the members to share the initial costs of the organization's

23. The District Court did not consider this aspect of *Dartmouth College* in any of its JUA decisions.

24. Recall that "MPL" is an acronym for medical professional liability.

operation among themselves. PHCSM Act, P.L. 390, No. 111, § 802 (repealed 2002). The JUA also exercises the Commonwealth's power in requiring the member-companies to provide affordable MPL insurance to providers who would otherwise be unable to conveniently obtain it in the "ordinary insurance market." *Id.* § 801; 40 P.S. § 1303.732(a). The Commonwealth granted the JUA its power, which is vested in and exercised by the JUA's Board of Directors, 40 P.S. § 1303.731(a), to carry out the public purposes of the original legislation and its successor statute, the MCARE Act, *id.* § 1303.102; PHCSM Act, § 102. The exercise of such power on behalf of the Commonwealth for a public purpose suggests that the JUA is a public entity.

Second, we consider whether the JUA was created as a civil institution to be employed in the administration of government. *Trs. of Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 629. The District Court concluded that the JUA was not created or employed as such. *JUA II*, 381 F. Supp. 3d at 337. We disagree. While the JUA is not a state agency in the traditional sense, Pennsylvania established the entity in 1975 to ensure that health care providers could obtain MPL insurance at a reasonable cost and that victims of medical negligence would promptly receive fair compensation. PHCSM Act, § 102. The General Assembly reiterated those two goals in 2002 with the enactment of the MCARE Act, the purpose of which is to make medical care available in the Commonwealth through a "comprehensive and high-quality health care system." 40 P.S. § 1303.102(1). In addition to affordable MPL insurance and fair compensation for victims of

medical negligence, the health care system must include "[a]ccess to a full spectrum of hospital services and to highly trained physicians in all specialties ... across th[e] Commonwealth." *Id.* §§ 1303.102(2)-(4). Recognizing and furthering those goals are "essential to the public health, safety[,] and welfare of all the citizens" of the Commonwealth. *Id.* § 1303.102(6).

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 in the Commonwealth, where obtaining required insurance coverage would otherwise be cost-prohibitive. *Id.* § 1303.732(a). The General Assembly thus employed the JUA to serve as an essential piece of its supervision of the Commonwealth's insurance market and health care system, supporting the public good by serving as a safety net for both medical providers and the patients they serve. We are, of course, not suggesting that entities involved in the insurance or health care markets are, by that fact alone, necessarily public institutions, even when the government may have a hand in their formation. There can be gradations of government involvement, so a fact-specific determination is required. 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.

Third, we ask whether the JUA's funds are drawn from public property. *Trs. of Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 629-30. In considering this aspect of

Dartmouth College, the District Court concluded that the JUA has "never been funded by or endowed with 'public property'[.]" *JUA II*, 381 F. Supp. 3d at 337. And, true enough, it is undisputed that the JUA has not drawn on the public fisc. *Id.* at 328. Taking account of "the nature of the funds in dispute[,]" the District Court thus held that the JUA's surplus is private property. *JUA I*, 324 F. Supp. 3d at 537-38. But an essential piece is missing from that reasoning: 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. Although not public in the traditional sense, the JUA's funds exist only to support the goals of the Commonwealth as set forth in the JUA's organic act and, later, the MCARE Act — to make available a comprehensive and high-quality health system in the Commonwealth, one aspect of which is to ensure access to affordable MPL insurance. 40 P.S. §§ 1303.102(1), (3). To the extent the JUA's surplus could be considered profits, the JUA must use the funds for its nonprofit purpose, which is to provide MPL insurance as dictated by the MCARE Act. 15 Pa. C.S.A. § 9114(d). As discussed *infra*, the JUA's obviously excessive surplus provides no profits or dividends to anyone, and no private party risks damage to its bank account should that surplus be reduced to a reasonable level. The funds exist as the result of the Commonwealth's enforced acquisition of premiums for a public purpose, which, again, indicates that the JUA is public in nature. That the premiums thus received are augmented by returns on those same funds once invested does not change that.

Finally, fourth, we consider whether anyone but the Commonwealth has an interest in the JUA. *Trs. of Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 630. In *JUA II*, the District Court explained that the JUA's members have an interest in the JUA because they may be assessed if the JUA suffers a deficit. 381 F. Supp. 3d at 339 n.7. That statement is the only support for the District Court's finding that the state has "never been 'alone interested in [the JUA's] transactions.'" *Id.* at 337. The Governor and Insurance Commissioner have a persuasive riposte. They asked: "Suppose one sought to purchase [the] JUA. To whom would they write the check?" (Exec. Def. C.A. 18-2297 Opening Br. at 33.) And the answer, they said, is not 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?

Both in its Answering Brief and at oral argument, the JUA resisted engaging with that hypothetical. It said that, as an unincorporated nonprofit association, the JUA "exists for the benefit of its purpose" and "it cannot be bought or sold in any traditional sense." (C.A. 18-2297 Answering Br. at 57.) That, of course, avoids rather than answers the question. But the Defendants' point remains even if we shift the hypothetical from selling the JUA to dissolving it by operation of law or at the request of its members, as allowed by its plan of operations. Its assets would then be "distributed in such a manner as the Board may determine subject to the approval of the Commissioner." (C.A. No. 21-1099 J.A. at 180.) It is difficult to imagine where the assets, including the surplus, would go except to the

Commonwealth, as the JUA has no private stakeholders, no property in trust, and no charitable purpose. *Cf.* 15 Pa. C.S.A. § 9135(1)-(5) (explaining the requirements for winding up a nonprofit association). Even if the Board directed that the property be distributed to the JUA's members, it seems most unlikely that the Commissioner would approve that plan. *But see JUA I*, 324 F. Supp. 3d at 538 (finding "no merit" in this possibility because it rested on too many assumptions). At oral argument, the JUA said that the General Assembly theoretically could dissolve the JUA, and the surplus would somehow go to its nonprofit purpose, which it did not specify but conceded was to benefit the public.

The JUA argues that the member assessments to which the District Court referred in *JUA II* are enough to create a nonstate interest in the JUA.[25] *See JUA II*, 381 F. Supp. 3d at 339 n.7. According to the JUA's prior plan of operations, in the case of a deficit, the Board could issue assessments to members in proportion to their participation in the insurance pool. But the JUA's CEO testified that the JUA has never assessed its members, "never intend[s] to" assess its members, and has been told by the Insurance Department to remove the assessment language from its plan; she further stated frankly that she did not "believe that [the JUA has] the statutory power

25. The JUA also makes a general argument that its members have a reputational interest in "minimizing public criticism of the [MPL insurance] industry[,]" which, the JUA says, represents a pecuniary interest. (Answering Br. C.A. 18-2297 at 55-56.) The JUA offers no evidentiary support for its assertion that its members would suffer monetary losses from public criticism if the JUA did not exist.

to assess the members." (C.A. No. 18-2297 J.A. at 1318, 1470-72.) In fact, as the JUA conceded at oral argument, the plan of operations as amended in 2018 excluded the member-assessment language.[26]

The Governor and Insurance Department argue that whether the JUA's members have a true possibility of being assessed — and thus perhaps have an interest in the JUA's funds — is a disputed fact that should be viewed in the light most favorable to them on summary judgment. The JUA responds that the prior plan said what it said, despite its own CEO's testimony indicating that there is no reason to believe any assessments will ever occur. Neither side has it right, and, in particular, the Defendants' categorization of the assessments as a disputed fact is incorrect. Instead, as the JUA's CEO indicated in her testimony regarding the legal authority of the JUA to issue assessments, the question is one of law — whether the JUA has statutory authority to assess its members.

The statute does not include any language about assessments. 40 P.S. § 1303.733. It merely says that, if the JUA were to experience a deficit, it could be authorized to borrow funds — but not from whom. *Id.* § 1303.733(b). The JUA's authority to assess costs from its members

26. The JUA stated at oral argument, however, that, although the JUA complied with the Commissioner's mandate to remove the language permitting the Board to assess its members, the 2018 plan still somehow gives the Board broad power to "levy assessments[.]" (*Compare* C.A. No. 18-2297 J.A. at 233 *with* C.A. No. 21-1099 J.A. at 177.)

is at best ambiguous, and, given that the JUA has never sought to assess its members, and "never intend[s]" to do so, setting up possible assessments as evidence of a valid non-state interest vastly exaggerates the hypothetical assessments' importance. (C.A. No. 18-2297 J.A. at 1470.)

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.

In sum, 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. In doing so, it imbued the JUA with the coercive power of state government to compel private insurance companies to take specific actions. The 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. We thus hold that, under *Dartmouth College*'s guidance, the JUA is a public institution and is without the ability to maintain the constitutional claims it has asserted against the Commonwealth.[27]

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27. Pursuant to the principles of federalism, the Commonwealth can amend and repeal its JUA-related legislation as it sees fit, free from interference by federal courts. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546, 105 S. Ct. 1005, 83 L. Ed.

C. The District Court relied on cases that are distinguishable.

Finally, for completeness, we consider the District Court's reliance on certain out-of-circuit precedents that the Defendants argue are distinguishable from the present case. We agree with that critique.

1. *Asociación, Arroyo-Melicio,* and *Morales*

First, the District Court discussed *Asociación De Subscripción Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1 (1st Cir. 2007),

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2d 1016 (1985) ("The genius of our government provides that ... the people — acting not through the courts but through their elected representatives — have the power to determine as conditions demand, what services and functions the public welfare requires.") (quoting *Helvering v. Gerhardt*, 304 U.S. 405, 427, 58 S. Ct. 969, 82 L. Ed. 1427, 1938-1 C.B. 246 (1938) (Black, J., concurring)). As the District Court observed, however, the Commonwealth's freedom to experiment is not without limits. *JUA II*, 381 F. Supp. 3d at 340-41. A party with standing may object to the constitutionality of the Commonwealth's actions and may seek redress in federal court. *Bond v. United States*, 564 U.S. 211, 222, 131 S. Ct. 2355, 180 L. Ed. 2d 269 (2011) ("[F]ederalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake."); *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 598, 127 S. Ct. 2553, 168 L. Ed. 2d 424 (2007) (explaining that a federal court "must refrain from passing upon the constitutionality of an act" unless "the question is raised by a party whose interests entitle him to raise it") (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 474, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982)) (cleaned up).

wherein the First Circuit concluded that Puerto Rico's association for automobile liability insurance could bring a takings claim against the territory, because the association was "private in nature" and thus had standing to allege a constitutional violation. *Id.* at 9, 20. That conclusion relied on the First Circuit's earlier decision in *Arroyo-Melecio v. Puerto Rican American Insurance Co.*, 398 F.3d 56, 62 (1st Cir. 2005), which the District Court categorized as "expound[ing] the nature of the association's relationship with the government." *JUA I*, 324 F. Supp. 3d at 533. **[C.A. No. 18-2297 J.A. at 31.]**

But the discussion in *Arroyo-Melecio* is just that — a discussion of the characteristics of an insurance arrangement within a specific statutory scheme, all for the purpose of considering federal antitrust claims. 398 F.3d at 60-62. The 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," 26 L.P.R.A. §§ 8055(a), (g), and was "for-profit," Off. of Comm'r of Ins., P.R. Reg. No. 6254(2)(c) (2000). The plaintiffs in *Arroyo-Melecio* did not dispute the association's private status. The First Circuit's statement that the association "is not an agency of" Puerto Rico resulted merely from reading the statute and regulations creating it, not from any analysis of its characteristics. *Arroyo-Melicio*, 398 F.3d at 60-62. The District Court's reliance on *Asociación* and *Arroyo-Melecio* was thus misplaced.

Second, the District Court discussed *Texas Catastrophe Property Insurance Ass'n v. Morales*, 975 F.2d at 1183. *JUA I*, 324 F. Supp. 3d at 533. As discussed in Section II.A., *supra*, the Fifth Circuit applied *Dartmouth College* in that case to determine whether a state-created property insurance association could assert a constitutional claim against its creator. *Morales*, 975 F.2d at 1182. The analysis fundamentally focused on the fact that Texas was not alone interested in the association's assets because the association's member companies shared in its profits and losses. *Id.* at 1183 (citing *Dartmouth*, 17 U.S. (4 Wheat.) at 629-30). The Fifth Circuit mentioned the other aspects of the association as background, *id.* at 1179-80, but, as in *Arroyo-Melecio*, the insurance scheme in *Morales* differed from the JUA in a particularly significant way: as established by the association's organic statute, the member companies shared in the profits and losses of the association. *Morales*, 975 F.2d at 1182; *see also Arroyo-Melecio*, 398 F.3d at 62. The entities at issue in both cases are thus expressly subject to the interests of their members — differentiating them from a public institution under *Dartmouth College*. *See supra* Section II.A. Those cases therefore do not answer the "public-versus-private entity" question on the facts before us.

2. *MMIA* and *MSLA*

The District Court also discussed the treatment of an unincorporated insurance association in *Medical Malpractice Insurance Ass'n v. Superintendent of Insurance of State of New York*, 72 N.Y.2d 753, 533 N.E.2d 1030, 537 N.Y.S.2d 1 (N.Y. 1988) ("*MMIA*"). *JUA I*, 324 F.

Supp. 3d at 533-34. There, the New York Court of Appeals considered whether a legislative scheme requiring an MPL insurance underwriting association to run at a deficit was a confiscation of property in violation of the Takings Clause. *MMIA*, 533 N.E.2d at 1036. Because those deficits were "expressly contemplated in the enabling legislation[,]" the court rejected the association's claim that the deficit was confiscatory.[28] *Id.* at 1037.

In *JUA I*, the District Court discussed *MMIA*, contrasting what it called the "exhaustive statutory framework dictating the composition of [the association's] board and its plan of operations and authorizing the superintendent of insurance to unilaterally order amendments to the plan" at issue there with the Pennsylvania legislature's choice not to "tightly circumscribe the [JUA's] operations and composition of its board[.]" *JUA I*, 324 F. Supp. 3d at 534, 538. The District Court reiterated those differences in *JUA II*, stating, "[i]n stark contrast to *MMIA*, the [JUA] is subject to minimal supervision by the Commissioner, in a manner not meaningfully different from private insurers." 381 F. Supp. 3d at 340.

But the court in *MMIA* did not address the question before us. It assumed the insurance association could

28. The members, who were required to "make up" a deficit incurred by the association, were not parties to the suit, so the court did not consider whether the statutory scheme was confiscatory as to them. *Med. Malpractice Ins. Ass'n v. Superintendent of Ins. of State of N.Y.* (*MMIA)*, 72 N.Y.2d 753, 767, 533 N.E.2d 1030, 537 N.Y.S.2d 1 (N.Y. 1988).

bring federal constitutional claims against its creator, then considered the characteristics of that association's funds for the purposes of ruling on the substance of those constitutional claims. *MMIA*, 533 N.E.2d at 1036-37. Although the court identified the association as a "creature of statute," *id.* at 1036, it did not engage with the threshold issue of whether that creature was public and had the ability to assert constitutional claims against the state, so *MMIA* is inapposite.

Finally, the District Court discussed *Mississippi Surplus Lines Ass'n v. Mississippi*, 261 F. App'x 781 (5th Cir. 2008) ("*MSLA*"). In that case, upon the request of the state's Insurance Commissioner, a group of private individuals formed a nonprofit association to assist the Commissioner with regulating the surplus line insurance market. *Id.* at 783. The statute allowed the association to levy fees on premiums, subject to approval by the Commissioner, which the association then used for operating expenses. *Id.* at 784. When the association accumulated excess funds through those fees, the state amended its code to authorize the transfer of $2 million to the state. *Id.* The Fifth Circuit, in determining whether the *funds* were private or public property, explained that "the [association] and its funds exist at the whim of the legislature and are public in nature[,]" so the association had no right to the funds. *Id.* at 785, 788.

Like the court in *MMIA*, the Fifth Circuit in *MSLA* did not wrestle with whether the association itself was public or private for the purpose of determining whether it could assert constitutional claims against the state. Although

it acknowledged that "the private or public nature of the organization is a necessary step in an inquiry when an entity acting for a state initiates legal action against the state[,]" *id.* at 785 (discussing *Morales*, 975 F.2d at 1182), it did not conduct that analysis nor determine whether the association could bring a claim against the state in the first place. Rather, the court considered whether the funds were public or private only for the purpose of ruling on the merits of the association's constitutional claims. *Id.* at 787-88 ("Because [the association] did not have a property right in the $2 million in excess fees that the State appropriated, the legislature did not deprive them of a property right without due process of law."). In short, the court in *MSLA* did not engage with the question central in each of the *JUA* cases: whether the entity in question is public or private for the purpose of determining whether it can bring a constitutional claim against its creator.

In sum, given the facts we have here, the cases relied on by the District Court appear to give little guidance, so we decline to endorse the conclusions the District Court reached based on them.

III. Conclusion

For the foregoing reasons, we will reverse in part, affirm in part (as stated in footnote 20, *supra)*, and remand for further proceedings consistent with this opinion.

APPENDIX B — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT, FILED MARCH 22, 2024

[J-67-2023]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

PENNSYLVANIA PROFESSIONAL LIABILITY JOINT UNDERWRITING ASSOCIATION,

Appellant,

v.

GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA, THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellees.

PENNSYLVANIA PROFESSIONAL LIABILITY JOINT UNDERWRITING ASSOCIATION,

Appellant,

v.

GOVERNOR OF PENNSYLVANIA; THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA; PRESIDENT PRO TEMPORE PENNSYLVANIA SENATE; MINORITY LEADER PENNSYLVANIA SENATE; SPEAKER PENNSYLVANIA

Appendix B

HOUSE OF REPRESENTATIVES; MINORITY LEADER PENNSYLVANIA HOUSE OF REPRESENTATIVES; INSURANCE COMMISSIONER OF PENNSYLVANIA,

Appellees.

PENNSYLVANIA PROFESSIONAL LIABILITY JOINT UNDERWRITING ASSOCIATION,

Appellant,

v.

GOVERNOR OF PENNSYLVANIA; GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellees.

No. 7 EAP 2023

Petition for Certification of Question of Law from the United States Court of Appeals for the Third Circuit at Nos. 18-2297 and 18-2323; Nos. 19-1057 and 19-1058; and Nos. 21-1099, 21-1112 and 19-1155

ARGUED: November 29, 2023

Filed March 22, 2024

Appendix B

ORDER

PER CURIAM **DECIDED: February 21, 2024**

This Court granted the Petition for Certification of Question of State Law filed by the United States Court of Appeals for the Third Circuit (Third Circuit) to address the following issue, as stated by the Third Circuit: "Under Pennsylvania law, is the Commonwealth's Joint Underwriting Association [(JUA)] a public or private entity?" *See Pa. Pro. Liab. Joint Underwriting Ass'n v. Governor,* 293 A.3d 1219 (Pa. 2023) (per curiam). Upon review of the parties' briefs, after considering the parties' oral arguments, and after reviewing existing Pennsylvania law, we have determined that we improvidently granted this certification request.

As pointed out by the Third Circuit in its certification petition, the question currently before the Third Circuit "is one *of federal law*: whether the plaintiff, [JUA], is an entity that can assert federal constitutional rights against the Commonwealth." (Certification Petition at 4 (emphasis added).) The question, which the Third Circuit certified to us and which we accepted, however, is devoid of context and presents this Court with a generally stated binary choice – *i.e.*, the JUA is either "public" or it is "private." Without question, this Court has, from time to time, considered whether certain entities should be treated as governmental, or quasi-governmental. For example, in *Pennsylvania State University v. Derry Township School District,* 731 A.2d 1272 (Pa. 1999), we addressed whether the Pennsylvania State University

should be exempt from local property taxes as a public entity. Additionally, in *Sphere Drake Insurance Company v. Philadelphia Gas Works,* 782 A.2d 510 (Pa. 2001), we addressed whether Philadelphia Gas Works should be entitled to governmental immunity as a local agency. These, however, were context-driven decisions.

A determination of whether a particular entity is "public" or "private," generally speaking, is not a concept moored in our current state law jurisprudence. Context matters. In the federal litigation from which this matter originates, the context, as the Third Circuit noted, "is one of federal law." Whether the JUA is a "private" entity that can assert federal constitutional rights against the Commonwealth is a matter of federal constitutional jurisprudence, not Pennsylvania law. *See, e.g., Goldman v. Se. Pa. Transp. Auth.,* 57 A.3d 1154, 1169-85 (Pa. 2012) (applying federal jurisprudence to determine whether entity was "arm of the Commonwealth" for purposes of Eleventh Amendment immunity); *Manhattan Cmty. Access Corp. v. Halleck,* 587 U.S. __, 139 S. Ct. 1921, 1928-34 (2019) (applying state-action doctrine to determine that private entity operating public access channels on cable system was not state actor subject to Free Speech Clause of Fourteenth Amendment); *Edison v. Douberly,* 604 F.3d 1307, 1308-10 (11th Cir. 2010) (concluding that private prison management corporation operating state prison was not public entity subject to liability under Americans With Disabilities Act simply because it contracted with public entity to provide service); *Patrick v. Floyd Med. Ctr.,* 201 F.3d 1313, 1315-17 (11th Cir. 2000) (applying nexus/joint action test to determine whether

interdependence between private and public/state entities constituted sufficient state involvement to sustain cause of action under 42 U.S.C. § 1983); *see also Perkins v. Londonderry Basketball Club,* 196 F.3d 13, 18 (1st Cir. 1999) ("[T]he public/private dichotomy remains embedded in our constitutional jurisprudence. This dichotomy distinguishes between state action, which must conform to the prescriptions of the Fourteenth Amendment, and private conduct, which generally enjoys immunity from Fourteenth Amendment strictures." (internal citations omitted)).

In light of the foregoing, although Pennsylvania law may prove helpful and informative, the question currently before the Third Circuit is principally one of federal law. Given this context, we respectfully decline to answer the general question posed to us by the Third Circuit. *See* Pa.R.A.P. 3341(c) ("The Supreme Court may accept certification of a question of Pennsylvania law . . . .").

AND NOW, this 21st day of February, 2024, the matter is DISMISSED as having been improvidently granted and returned to the Third Circuit.

Justice Wecht did not participate in the consideration or decision of this matter.

Judgment Entered 02/21/2024

APPENDIX C — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, FILED DECEMBER 22, 2020

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:19-CV-1121

PENNSYLVANIA PROFESSIONAL LIABILITY JOINT UNDERWRITING ASSOCIATION,

Plaintiff,

v.

TOM WOLF, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA, AND THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA,

Defendants.

Filed December 22, 2020

MEMORANDUM

For more than four years, the General Assembly of the Commonwealth of Pennsylvania has had the Pennsylvania Professional Liability Joint Underwriting Association ("Joint Underwriting Association" or "Association") in its

sights. We have now twice declared unconstitutional the General Assembly's attempts to take the Association's assets as violative of the Fifth Amendment's Takings Clause. Both times, we reasoned that the Association's statutory origin and public purpose do not give the Commonwealth *carte blanche* over the Association's private property.

The General Assembly has now tried a different tack, one it describes as "giving" rather than "taking." (*See* Doc. 54 at 13). Act 15 of 2019 purports to fund the Association's operating budget with state appropriations and resource it with state attorneys and office space in exchange for the Association's compliance with various oversight and accountability statutes. *See* Act of June 28, 2019, P.L. 101, No. 15, § 7 ("Act 15" or "the Act"). The Association resists these measures, seeking a declaration that Act 15 is unconstitutional *in toto* and a permanent injunction against its enforcement. We conclude that certain aspects of Act 15—specifically, its attempt to force the Association to operate using Commonwealth funding and to litigate using Commonwealth lawyers—once more transgress the United States Constitution. The balance of the Act, however, is an appropriate exercise of state authority over a private entity charged with carrying out a critical public-health mission. We will accordingly grant in part and deny in part the parties' cross-motions for summary judgment.

I. *Factual Background and Procedural History*

The factual backdrop of this litigation is outlined at length in our opinions in *Pennsylvania Professional*

Liability Joint Underwriting Association v. Wolf, No. 1:17-CV-2041 (M.D. Pa.) ("*JUA I*"), and *Pennsylvania Professional Liability Joint Underwriting Association v. Wolf*, No. 1:18-CV-1308 (M.D. Pa.) ("*JUA II*"), as well as the preliminary injunction opinion issued in this case, (*see* Doc. 16). The parties have stipulated that the factual records developed in *JUA I* and *JUA II* constitute part of the record in this case for purposes of their cross-motions for summary judgment. We reiterate salient facts for context below.

A. The Joint Underwriting Association

The Joint Underwriting Association is a nonprofit association organized under the laws of the Commonwealth of Pennsylvania. *See JUA I*, 324 F. Supp. 3d 519, 523 (M.D. Pa. 2018); *JUA II*, 381 F. Supp. 3d 324, 326 (M.D. Pa. 2018). The Association was initially established by the Pennsylvania Health Care Services Malpractice Act, P.L. 390, No. 111 (1975), and later reestablished by the Medical Care Availability and Reduction of Error (MCARE) Act, 40 PA. STAT. AND CONS. STAT. ANN. § 1303.101 *et seq.*

The General Assembly conceived of the Association in 1975 in response to declining availability of medical malpractice insurance in the Commonwealth. *See JUA I*, 324 F. Supp. 3d at 523; *JUA II*, 381 F. Supp. 3d at 326. Through the MCARE Act, the General Assembly tasked the Association to offer medical professional liability ("MPL") insurance to healthcare providers and entities that "cannot conveniently obtain" it through ordinary methods at ordinary market rates. *See* 40 PA. STAT.

AND CONS. STAT. ANN § 1303.732(a). Membership in the Association is mandatory for insurers authorized to write MPL insurance in the Commonwealth. *Id.* § 1303.731(a).

The MCARE Act assigns four "duties" to the Association, requiring it to (1) submit a plan of operations to the Commonwealth's Insurance Commissioner, (2) submit rates and any modifications for approval by the Insurance Department, (3) offer insurance as described above, and (4) file its schedule of occurrence rates with the Commissioner. *Id.* § 1303.731(b)(1)-(4). The Association, like other insurers licensed to operate within the Commonwealth, is "supervised" by the Insurance Department. *Id.* § 1303.731(a); *see JUA I*, 324 F. Supp. 3d at 525; *JUA II*, 381 F. Supp. 3d at 328. The MCARE Act otherwise provides that all "powers and duties" of the Association "shall be vested in and exercised by a board of directors." 40 PA. STAT. AND CONS. STAT. ANN § 1303.731(a).

The Association's plan of operations, developed with and approved by the Insurance Department, establishes a 14-member board of directors comprised of the Association's current president, nine directors chosen by the Association's members, and four directors appointed by the Insurance Commissioner. *See JUA I*, 324 F. Supp. 3d at 525; *JUA II*, 381 F. Supp. 3d at 328. The plan provides that the Association may be dissolved (1) "by operation of law" or (2) at the request of its members, subject to Commissioner approval. *JUA I*, 324 F. Supp. 3d at 525; *JUA II*, 381 F. Supp. 3d at 328. The plan also provides that, "[u]pon dissolution, all assets of the Association, from whatever source, shall be distributed in such manner as

the Board may determine subject to the approval of the Commissioner." *JUA I*, 324 F. Supp. 3d at 525; *JUA II*, 381 F. Supp. 3d at 328.

Susan Sersha is the Association's President and Chief Executive Officer. (*See* Doc. 40-1 ¶ 25; Doc. 56 ¶ 25). Sersha testified that the Association currently maintains a staff of between four and five employees. (*See* Doc. 40-1 ¶ 25; *see also* Doc. 40-1, Ex. A, Sersha Dep. 103:10-105:18). The Association hires and pays its own employees, who do not participate in the State Employees' Retirement System or receive any other Commonwealth employee benefits. *See JUA I*, 2017 U.S. Dist. LEXIS 193276, 2017 WL 5625722, at *3 (M.D. Pa. Nov. 22, 2017). The Association operates from a privately leased office in Blue Bell, Pennsylvania. (*See* Doc. 40-1 ¶¶ 26, 54; Doc. 56 ¶¶ 26, 54). Its lease will expire in October 2021. (*See* Doc. 40-1 ¶ 26; Doc. 56 ¶ 26).

The Association is obligated under the insurance policies it issues to supply legal counsel for its policyholders. (*See* Doc. 43 ¶ 51; Doc. 53 ¶ 51; Doc. 58 ¶ 51). It also has an "ongoing need" for advice and representation from corporate counsel, as well as a need "from time to time," as in this case, for litigation counsel. (*See* Doc. 43 ¶¶ 52-53; Doc. 53 ¶¶ 52-53; Doc. 58 ¶¶ 52-53). The Association independently vets, selects, and retains private counsel for these purposes. (*See* Doc. 43 ¶¶ 51-53; Doc. 53 ¶¶ 51-53; Doc. 58 ¶¶ 51-53).

Since its inception, the Association has functioned much like a private insurance company. The Association writes insurance policies directly to its insureds, who pay

premiums directly to the Association. *JUA I*, 324 F. Supp. 3d at 525; *JUA II*, 381 F. Supp. 3d at 328. The Association is funded exclusively by policyholder premiums and investment income, which it holds in private accounts in its own name. *JUA I*, 324 F. Supp. 3d at 525; *JUA II*, 381 F. Supp. 3d at 328. The Commonwealth has never funded the Association, nor has it ever been responsible for the Association's debts. *JUA I*, 324 F. Supp. 3d at 525; *JUA II*, 381 F. Supp. 3d at 328. Indeed, prior to recent legislative enactments, the MCARE Act expressly disclaimed Commonwealth responsibility for claims against and liabilities of the Association. *See JUA I*, 324 F. Supp. 3d at 537-38; *JUA II*, 381 F. Supp. 3d at 328.

The Association maintains two pools of assets: its "reserves," which represent funds designated for payment of anticipated claims during the calendar year, and its "surplus," which represents all funds not earmarked as reserves. *See JUA I*, 324 F. Supp. 3d at 525-26; *JUA II*, 381 F. Supp. 3d at 328-29. The surplus serves as a safety net or "backstop" of sorts to ensure that the Association can continue to meet its obligations in the event its actuaries underestimate claim maturation or other market factors. *See JUA I*, 2017 U.S. Dist. LEXIS 193276, 2017 WL 5625722, at *3; *JUA I*, 324 F. Supp. 3d at 526; *JUA II*, 381 F. Supp. 3d at 329. Sersha testified during a March 2020 deposition that the Association's surplus is approximately $298,276,876. (*See* Doc. 47 ¶ 6; Doc. 55 ¶ 6; *see also* Doc. 40-1 ¶ 28; Doc. 56 ¶ 28).

B. Prior Legislative Acts and Lawsuits

The legal tug-of-war underlying this lawsuit began in 2016, with the General Assembly's first attempt to access

the Joint Underwriting Association's assets. Act 85 of 2016 directed the Association to make a $200,000,000 loan to the Commonwealth from the Association's surplus. *See* Act of July 13, 2016, No. 85, § 18 ("Act 85"). Next came Act 44 of 2017, in which the General Assembly repealed Act 85, declared the Association to be "an instrumentality of the Commonwealth," and ordered the Association, under threat of abolishment, to pay $200,000,000 to the State Treasurer for deposit into the General Fund. *See* Act of October 30, 2017, No. 44, §§ 1.3, 13 ("Act 44"). Act 41 of 2018, enacted the following year, took the most drastic steps to date, attempting to fold the Association into the Department, shift control of the Association to a board of political appointees, oust the Association's president, and mandate transfer of all of the Association's assets to the Department within 30 days. *See* Act of June 22, 2018, No. 41, § 3 ("Act 41").

The Association answered each enactment with a lawsuit raising constitutional challenges to the legislation and seeking declaratory and injunctive relief. The first of those lawsuits, concerning Act 85, has been held in abeyance at the parties' request pending the outcome of litigation as to Act 44 and Act 41. *See Pa. Prof'l Liab. Joint Underwriting Ass'n v. Albright*, No. 1:17-CV-886, Doc. 34 (M.D. Pa. June 14, 2018). In the second lawsuit, *JUA I*, we preliminarily and later permanently enjoined enforcement of Act 44 against the Association, holding that notwithstanding its statutory origin, the Association is a private entity, its funds are private property, and the Takings Clause of the Fifth Amendment prohibits Act 44's attempt to take those funds without just compensation.

See JUA I, 324 F. Supp. 3d at 532-40. In the third lawsuit, *JUA II*, we preliminarily and later permanently enjoined Act 41, concluding that the legislation was an attempt to do indirectly what *JUA I* told the General Assembly it could not do directly—take the Association's funds. *See JUA II*, 381 F. Supp. 3d at 341-42. The General Assembly and Governor Wolf appealed in both cases, and the court of appeals has held the matters in abeyance pending resolution of the instant case.

C. Act 15

On June 28, 2019, Governor Wolf signed Act 15 into law.[1] Unlike its predecessors, Act 15 does not take the Association's funds directly, alter its governance structure or board composition, replace its employees, or otherwise wrest full control of its operations. Rather, Act 15 purports to provide state funding and other resources to the Association and to subject it to various government oversight and transparency statutes. The pertinent provisions of Act 15 are as follows:

- Section 1502-B provides that the Association's "operations . . . shall be funded through appropriations determined by the General Assembly," Act 15, § 1502-B;

1. Act 15 includes multiple sections, with Section 7 addressing the Joint Underwriting Association. Section 7 itself includes multiple subsections. For ease of reference, we cite directly to those subsections, using the following convention: Act 15, §§ 1501-B, 1502-B, 1503-B, 1504-B, 1505-B, 1506-B.

- Section 1503-B(a) requires the Association to "submit written estimates to the Secretary of the Budget as required of administrative departments, boards and commissions under section 615 [of the Administrative Code," at least once per year and "from time to time as requested by the Governor," *id.* § 1503-B(a);

- Section 1503-B(b) requires an agent of the Association to appear at a public hearing of the Pennsylvania Senate's Banking and Insurance Committee and the Pennsylvania House of Representatives' Insurance Committee to testify concerning the estimate within 30 days after its submission, and requires the Association to appear annually before the Appropriations Committees of both chambers of the General Assembly to testify as to its fiscal status and to request appropriations, *id.* § 1503-B(b);

- Section 1504-B requires the Association to hold quarterly public meetings under the state's open meetings law, known as the Sunshine Act, to discuss its actuarial and fiscal status, *id.* § 1504-B;

- Section 1505-B declares the Association "a Commonwealth agency" for purposes of the Commonwealth Attorneys Act, the Right-to-Know Law, the PennWATCH Act, and

the Commonwealth Procurement Code, *id.* § 1505-B; and

- Section 1506-B requires the Association to (1) transmit a list of all employees to the Auditor General, State Treasurer, Secretary of the Budget, and Legislative Data Processing Center; (2) conduct its operations in Commonwealth-owned facilities; and (3) coordinate with the Department of Revenue to ensure that Association employees with access to federal tax information meet that department's requirements for access to such information, *id.* § 1506-B.

Act 15 took effect immediately upon signing on June 28, 2019. In the interim, the Association has not been asked to terminate its lease or move its operations to Commonwealth office space, (*see* Doc. 40-1 ¶ 54; Doc. 56 ¶ 54), and it continues to be represented here and in the pending appeals by its preferred private counsel, (*see* Doc. 43 ¶ 54; Doc. 53 ¶ 54; Doc. 58 ¶ 54). The Association has complied with the Sunshine Act and Right-to-Know Law. (*See* Doc. 43 ¶¶ 43, 64; Doc. 53 ¶¶ 43, 64; Doc. 58 ¶¶ 43, 64). At the request of the Senate and House Appropriations Committees, Sersha appeared and provided testimony in March 2020 but did not request an appropriation. (*See* Doc. 43 ¶ 40; Doc. Doc. 53 ¶ 40; Doc. 58 ¶ 40).

D. Procedural History

The Joint Underwriting Association initiated this lawsuit with the filing of a verified complaint on July 1,

2019, just three days after Act 15 was signed into law. The Association asserts that Act 15 violates its rights under the Substantive Due Process Clause (Count I), the Takings Clause (Count II), the Contract Clause (Count III), and the Procedural Due Process Clause and First Amendment (Count IV). It also pleads a request (Count V) for declaratory and permanent injunctive relief. The verified complaint names Governor Wolf and the General Assembly as defendants.

The Association immediately moved for a temporary restraining order and preliminary injunction. We denied the request for a temporary restraining order but expedited proceedings on the request for a preliminary injunction, hearing argument on the Association's motion on July 12, 2019. In an opinion issued July 17, 2019, we denied the Association's motion, holding that, unlike Acts 41 and 44, Act 15 posed no threat of imminent and irreparable harm. We promptly convened a case management conference and set a schedule for fact discovery and dispositive motions. The parties have now filed and fully briefed their cross-motions for summary judgment, which are ripe for disposition.

II. *Legal Standard*

Through summary adjudication, the court may dispose of those claims that do not present a "genuine dispute as to any material fact" and for which a jury trial would be an empty and unnecessary formality. FED. R. CIV. P. 56(a). The burden of proof tasks the nonmoving party to come forth with "affirmative evidence, beyond the allegations of

the pleadings," in support of its right to relief. *Pappas v. City of Lebanon*, 331 F. Supp. 2d 311, 315 (M.D. Pa. 2004); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The court is to view the evidence "in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor." *Thomas v. Cumberland County*, 749 F.3d 217, 222 (3d Cir. 2014). This evidence must be adequate, as a matter of law, to sustain a judgment in favor of the nonmoving party on the claims. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-57, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-89, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Only if this threshold is met may the cause of action proceed. *See Pappas*, 331 F. Supp. 2d at 315.

Courts may resolve cross-motions for summary judgment concurrently. *See Lawrence v. City of Philadelphia*, 527 F.3d 299, 310 (3d Cir. 2008); *see also Johnson v. FedEx*, 996 F. Supp. 2d 302, 312 (M.D. Pa. 2014); 10A Charles Alan Wright et al., Federal Practice and Procedure § 2720 (3d ed. 2015). When doing so, the court is bound to view the evidence in the light most favorable to the nonmoving party with respect to each motion. Fed. R. Civ. P. 56; *Lawrence*, 527 F.3d at 310 (quoting *Rains v. Cascade Indus., Inc.*, 402 F.2d 241, 245 (3d Cir. 1968)).

III. *Discussion*

The history of the *JUA* trilogy is known well to the parties and the court, and we need not retell it at length here. It is sufficient for purposes of the instant motions

to reiterate the pertinent holdings of the predecessor cases. In *JUA I*, we held that the Joint Underwriting Association is a private entity, its assets are private property, and the Fifth Amendment prohibits the Commonwealth from taking that property for public use without just compensation. *See JUA I*, 324 F. Supp. 3d at 538. Then in *JUA II*, we held that the same constitutional concerns barred the General Assembly from taking the Association's assets indirectly, by recapturing it as an "instrumentality of the Commonwealth." *See JUA II*, 381 F. Supp. 3d at 341, 342-43. As we observed at the preliminary injunction stage in this case, Act 15 tests the outer bounds of those holdings, tasking us to consider what degree of authority, if any, the Commonwealth may assert over the Association.

Before we turn to the discrete and nuanced issues in this case, we address the Association's threshold argument that the challenged sections of Act 15 must be scrutinized—and, thus, rise or fall—as a whole. (*See* Doc. 45 at 16-19). Not only is this assertion inconsistent with settled principles of statutory construction and the presumption of severability, *see* 1 Pa. Cons. Stat. § 1925 ("The provisions of every statute shall be severable."); *Barr v. Am. Ass'n of Pol. Consultants*, 591 U.S. __, 140 S. Ct. 2335, 2350, 207 L. Ed. 2d 784 (2020) ("The Court presumes that an unconstitutional provision in a law is severable from the remainder of the law or statute."), it is inconsistent with the Association's approach to this lawsuit.

The complaint catalogues the Association's claims into individual allegations of constitutional harm flowing

from specific sections of Act 15. The Takings Clause claim, for example, targets only the appropriations and budget-estimate sections which, due to their functional interrelationship, are properly analyzed together. (*See* Doc. 1 ¶¶ 39-47). The Contract Clause claim challenges these same provisions,[2] (*see id.* ¶¶ 48-60), and the claim under the Procedural Due Process Clause and First Amendment contests solely the Act's requirement that the Association use Commonwealth counsel, (*see id.* ¶¶ 61-67). Only the claim under the Substantive Due Process Clause encompasses all components of Act 15. (*See id.* ¶¶ 30-38). Given the severability presumption and the nature of the Association's constitutional theories, we will assess the

2. We note that the Association's Contract Clause claim has winnowed. The Association's complaint posited that "Section 7 of Act 15 impairs contracts in two ways": first, by impairing its plan of operations, (Doc. 1 ¶¶ 51, 52-56), and second, by impairing its lease agreement, (*id.* ¶¶ 51, 57-59). The Association appears to have abandoned the claim pertaining to its lease: both defendants move for summary judgment on that claim, (*see* Doc. 41 at 35, 37-38; Doc. 48 at 30), and the Association fails to defend the claim in its brief opposing those motions, (*see* Doc. 57 at 18-22). The Association's briefs on its own summary judgment motion are likewise silent concerning Act 15's perceived impact on its lease. (*See* Doc. 45 at 27-32; Doc. 64 at 17-20). Under the circumstances, we construe the Association's nonresponse as an abandonment of this claim. *See Malibu Media, LLC v. Doe*, 381 F. Supp. 3d 343, 361 (M.D. Pa. 2018) (Conner, C.J.) (citing *Stauffer v. Navient Sols., LLC*, 241 F. Supp. 3d 517, 519 n.3 (M.D. Pa. 2017) (Conner, C.J.) (collecting cases))); *Reeves v. Travelers Cos.*, 296 F. Supp. 3d 687, 692 (E.D. Pa. 2017) (quoting *Campbell v. Jefferson Univ. Physicians*, 22 F. Supp. 3d 478, 487 (E.D. Pa. 2014)). Hence, we limit the Contract Clause claim to purported interference with the Association's plan of operations.

provisions of Act 15 individually, through the prism of the Association's four claims.

A. Takings Clause

Our analysis starts in now-familiar territory, with the Fifth Amendment's Takings Clause. *See* U.S. CONST. amend. V. We have previously articulated the fundamental principles of takings law, *see JUA I*, 324 F. Supp. 3d at 528-29; *JUA II*, 381 F. Supp. 3d at 332, and those principles apply equally here.

The Takings Clause of the Fifth Amendment prohibits the government from taking private property for public use without just compensation. U.S. CONST. amend. V. The Takings Clause is made applicable to the states by the Fourteenth Amendment. *See* U.S. CONST. amend. XIV; *Murr v. Wisconsin*, 582 U.S. __, 137 S. Ct. 1933, 1942, 198 L. Ed. 2d 497 (2017) (citing *Chi., B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1897)). It applies to protect not only the property itself, but also the "valuable rights" that inhere in property, including the rights to "possession, control, and disposition" thereof. *See Phillips v. Wash. Legal Found.*, 524 U.S. 156, 160, 164-65, 118 S. Ct. 1925, 141 L. Ed. 2d 174 (1998); *see also Webb's Fabulous Pharms., Inc. v. Beckwith*, 449 U.S. 155, 164-65, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980).

Takings claims generally fall into two categories—physical and regulatory. *See Yee v. City of Escondido*, 503 U.S. 519, 522-23, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992). The Association's claims in *JUA I* and *JUA II*

alleged a physical taking, and we found a physical taking in each case; both Act 44 and Act 41 attempted to take the Association's private funds and move them directly into sovereign coffers. *See JUA I*, 324 F. Supp. 3d at 528-29; *JUA II*, 381 F. Supp. 3d at 341. No comparable physical taking is alleged here, nor could it be: Act 15 does not "take" anything for the Commonwealth in the literal sense. Instead, the Association posits a regulatory taking, asserting that Act 15's appropriations and budget-estimate provisions restrict its ability to possess, control, and dispose of its private funds as it sees fit. (*See* Doc. 45 at 19-27).

The Supreme Court of the United States first embraced the concept of a regulatory taking nearly a century ago, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922). As Justice Holmes explained, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Mahon*, 260 U.S. at 415. To be sure, there are few bright-line rules in regulatory takings jurisprudence; *per contra*, "[t]his area of law has been characterized by 'ad hoc, factual inquiries, designed to allow careful examination and weighing of all relevant circumstances.'" *See Murr*, 137 S. Ct. at 1942 (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002)). Nevertheless, the Supreme Court has offered "guidelines" for assessing whether a challenged regulation "is so onerous that it constitutes a taking." *Id.* (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001)). First, a

regulation generally effects a taking if it denies the owner "all economically beneficial or productive use" of the property. *Id.* at 1942-43. Second, even if a regulation leaves some beneficial use for the owner, a court may still find a taking "based on 'a complex of factors,' including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Id.* at 1944.

The Association's takings claim challenges two provisions of Act 15: Section 1502-B, which funds the Association's operating budget with state appropriations, and Section 1503-B, which establishes procedures by which the Association will tell the General Assembly about its operations and fiscal needs.[3] *See* Act 15, §§ 1502-B,

3. Unsurprisingly, the General Assembly has offered no authority establishing that it can do what it has attempted to do in Sections 1502-B and 1503-B, namely, force a private entity to accept Commonwealth funding that the entity does not want or need. It has made no meaningful effort to persuade us that it can. Counsel simply reiterates the General Assembly's view, rejected in *JUA I* and *JUA II*, that, because it created the Association, it can do with the Association as it pleases. (*See, e.g.*, Doc. 54 at 20). Counsel provided examples during our preliminary injunction hearing of appropriations to private or quasi-private higher education institutions, but to date has offered no support for the proposition that the state can force *any* private entity to accept public funding. We need not tarry on this point, though, because even if forced funding of private entities is somehow lawful, we conclude *infra* that these sections interfere with the Association's control of its private funds so substantially as to independently effect a taking.

1503-B. The Association argues that these dual provisions diminish its autonomy and thus its "status" as a private entity, claim a financial interest in the Association for the state, and divest it of control over its private funds. (*See* Doc. 45 at 22-27). Defendants, for their part, depict Act 15 as a gift horse: a munificent infusion of Commonwealth funding with no strings attached. (*See* Doc. 45 at 13-14). A plain reading of Act 15, however, reveals this gift horse to be of the Trojan variety. As we will explain, by ordaining state appropriations as the Association's exclusive source of operative funding, Act 15 can only be read to prohibit the Association from spending its own private funds.[4]

Our interpretation of Sections 1502-B and 1503-B begins, as it must, with the statutory language. *See In re Phila. Newspapers, LLC*, 599 F.3d 298, 304 (3d Cir. 2010); *see also* 1 Pa. Cons. Stat. § 1921(b). We must presume that the legislature "says in a statute what it means and means in a statute what it says there." *In re Phila. Newspapers, LLC*, 599 F.3d at 304 (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992)). If the language employed is unambiguous, our inquiry goes no further. *See id.* In determining whether language is unambiguous, we "read the statute in its ordinary and natural sense." *Da Silva v. AG United States*, 948 F.3d 629, 635 (3d Cir. 2020) (quoting *In re Phila. Newspapers*, 599 F.3d at 304).

4. Because we agree with the Association that Sections 1502-B and 1503-B impermissibly interfere with its ability to control and dispose of its private property, we need not resolve its separate claims that those sections "provide[] the state with an ownership interest in JUA" and "diminish[] JUA's autonomy." (*See* Doc. 45 at 22, 27).

Appendix C

Section 1502-B states, in full: "Notwithstanding any provision of law to the contrary, the operations of the [Joint Underwriting Association] shall be funded through appropriations determined by the General Assembly." Act 15, § 1502-B. Section 1503-B(a) then establishes a budget-estimate requirement, providing that the Association "shall submit written estimates to the Secretary of the Budget as required of administrative departments, boards and commissions under section 615 [of the Administrative Code]." *Id.* § 1503-B(a). Section 615 of the Administrative Code, in turn, explains what an estimate must entail, namely, that it must identify "the amount of money required and the levels of activity and accomplishment for each program carried on by each department, board or commission," and must include "[a] ll available Federal funds and funds from other sources." 71 Pa. Stat. and Cons. Stat. Ann. § 235(a). Section 615 also includes procedures for "approval or disapproval" of the estimate by the Secretary of the Budget, *see id.*, as well as a broad prohibition barring covered entities from "expend[ing] any appropriation, Federal funds or funds from other sources . . . except in accordance with such estimate," *see id.* § 235(b).

The parties initially dispute whether Act 15 incorporates all or just part of Section 615. The Association reads the reference to Section 615 as sweeping in not only the estimate-submission requirement, but also the requirement of state budget approval and the restrictions on using funds in any manner inconsistent with the approved budget. (*See* Doc. 45 at 25-26). The General Assembly posits that Act 15 does not explicitly

bar the Association from using its private funds toward its operations, (*see* Doc. 63 at 3), and that the only way to arrive at such a restrictive reading is to incorporate the full text of Section 615 into the Act against the General Assembly's will, (*see* Doc. 54 at 16-19; *see also* Doc. 63 at 3-4).

We read Section 1503-B as the General Assembly does, to require nothing more of the Association than submission of a budget estimate. Section 615 of the Administrative Code addresses multiple aspects of the Commonwealth's budget procedures, ranging from budget-estimate submission, to revision, to approval, to implementation, to enforcement. *See* 71 PA. STAT. AND CONS. STAT. ANN. §§ 235(a)-(d). Yet the General Assembly included just one aspect, budget-estimate submission, in Section 1503-B. We must assume that by doing so, it deliberately excluded all others. *See NLRB v. SW Gen., Inc.*, 580 U.S. _, 137 S. Ct. 929, 940, 197 L. Ed. 2d 263 (2017) (explaining familiar canon *expressio unius est exclusio alterius*); *Atcovitz v. Gulph Mills Tennis Club, Inc.*, 571 Pa. 580, 812 A.2d 1218, 1223 (Pa. 2002) (same). Moreover, later sections of Act 15 assure us that, when the General Assembly intended to subject the Association to an entire statutory framework, it did so explicitly. *See* Act 15, § 1505-B (subjecting the Association to the Commonwealth Attorneys Act, Right-to-Know Law, PennWATCH Act, and Commonwealth Procurement Code). The legislature could have designated the Association an "administrative department[], board[] [or] commission[]" for purposes of Section 615, *see* 71 PA. STAT. AND CONS. STAT. ANN. § 235(a), but it did not. We read Section 1503-B to mean what just it says: that the

Association shall submit an estimate at least once annually to the Secretary of the Budget.

The trouble for defendants is that the Joint Underwriting Association does not need Section 615 to establish its claim—Act 15 effects an unconstitutional taking on its own. Section 1503-B(a) requires the Association to submit an estimate outlining its expected expenditures, presumably so the legislature can assess its fiscal needs, and Section 1503-B(b) requires a representative of the Association to appear before various legislative committees to testify about its estimate and its fiscal status. *See* Act 15, § 1503-B(a)-(b). Section 1502-B then taps the legislative power of the purse and identifies "appropriations determined by the General Assembly" as the sole source of funding for the Association's operations. *See* Act 15, § 1502-B. This edict has a severe consequence for Fifth Amendment purposes: in forcing the Association to operate using only state funds, Act 15 strips the Association of the right to control its private funds—premium dollars paid by insureds—as it sees fit.

The General Assembly claims that there is no such prohibition "in the Act's text," arguing that nothing in Act 15 expressly prohibits the Association "from spending its purportedly 'private' funds." (Doc. 63 at 3). In advocating an expansive reading of Section 1502-B, the General Assembly jettisons the same principles of construction that supported a narrow reading of Section 1503-B. The General Assembly cannot have its cake and eat it too. The language of Section 1502-B is plain: it contemplates just one source of funding ("appropriations determined by

the General Assembly") for the Association. *See* Act 15, § 1502-B; *see also* 1 Pa. Cons. Stat. § 1921(b). We must assume that by identifying state appropriations alone as the Association's source of operational funding, the General Assembly deliberately excluded, by negative implication, use of any other funds for that purpose. *See SW Gen.*, 137 S. Ct. at 940; *Atcovitz*, 812 A.2d at 1223. Indeed, to adopt the General Assembly's permissive interpretation of Section 1502-B would require us to read in an entire disjunctive clause—"shall be funded by appropriations determined by the General Assembly *or by any other funds available to the Association*"—that is nowhere to be found in the Act itself. Had the General Assembly intended Act 15 to authorize the Association to operate using both private *and* public funds, surely, it would have said so. *See supra* at 17-18.

We find that there is only one reasonable interpretation of Section 1502-B: going forward, the Joint Underwriting Association must use state appropriations, and *only* state appropriations, to fund its operations. The necessary implication is that the Association is prohibited from using its private funds for that purpose. And because the Association is organized as a nonprofit with a limited operational mission, *see* 15 Pa. Cons. Stat. § 9114(d); *see also* 40 Pa. Stat. and Cons. Stat. Ann § 1303.732(a), the ultimate effect of Act 15 is to deny the Association the ability to use its private funds at all.[5]

5. Other than remonstrating broadly that Act 15 does not "prevent[] the JUA from spending its purportedly 'private' funds," (Doc. 63 at 3), the General Assembly offers no explanation of exactly *how* it thinks the Association *could* spend its private funds

This direct sovereign interference with the Association's use of its existing and anticipated private funds effects a regulatory taking. The Supreme Court has long acknowledged that "possession, control, and disposition are . . . valuable rights that inhere in . . . property." *Phillips*, 524 U.S. at 170 (citing *Hodel v. Irving*, 481 U.S. 704, 715, 107 S. Ct. 2076, 95 L. Ed. 2d 668 (1987)). Moreover, it is a "fundamental maxim of property law that the owner of a property interest may dispose of all or part of that interest as he sees fit." *Id.* at 167-68 (citing *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377-78, 65 S. Ct. 357, 89 L. Ed. 311 (1945)). By prohibiting the Association from spending its private funds as it might choose, Act 15 deprives the Association of these essential property rights.

As we intimated at the preliminary-injunction stage, Act 15's prohibition on the Association's use of its own funds "run[s] headlong" into our holdings in *JUA I* and *JUA II* that the Association is a private entity and that its funds are private property in which the Commonwealth does not have, and cannot take, an interest. (*See* Doc. 16 at 10). Sections 1502-B and 1503-B not only give the Commonwealth control of the Association's operational expenditures going forward, they also prohibit the Association from using its private funds for that purpose. The result is to deprive the Association of its right to possess, control, and dispose of its private property as it

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under Act 15. The closest it comes is acknowledging, in a related argument, that Commonwealth funding could result in "extra padding" for the Association, since the premiums and investment income that currently fund its operations would be relegated to its surplus. (*See* Doc. 54 at 13 n.5).

sees fit. *See Phillips*, 524 U.S. at 167-68, 170 (citing *Hodel*, 481 U.S. at 715; *Gen. Motors Corp.*, 323 U.S. at 377-78).

Finally, we address the General Assembly's assertion that, even if Act 15 "*does* grant the Commonwealth some control over JUA spending, it would still be constitutional." (Doc. 54 at 20). The legislature's argument here is grounded entirely in a perception of the Association and its funds that we have now twice rejected: that because the Association "was created by the General Assembly to perform a statutory mission," and its "'operations' advance that mission," then the General Assembly "is within its right to both 'fund' those activities and dictate how those funds are used." (*Id.*) As we explained in *JUA I* and *JUA II*, the General Assembly "made a choice when it created the Association in 1975, and . . . its choice has present-day constitutional consequences." *See JUA II*, 381 F. Supp. 3d at 333 (citing *JUA I*, 324 F. Supp. 3d at 538). When it chose to meet its public-health objectives through a private, nonprofit association "in which the state is not alone or, indeed, at all interested, and over which the state retains virtually no control," the General Assembly relinquished any sovereign claim to the Association or its assets. *Id.* at 341. The consequence of that choice is that the General Assembly may not interfere with the Association's control of its private funds, and Act 15's attempt to do so in Sections 1502-B and 1503-B is an unconstitutional regulatory taking. Accordingly, we will grant the Association's motion for summary judgment and declaratory judgment with respect to Count II.[6]

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6. The Association's remaining Contract Clause claim challenges only these two provisions of the Act 15. (Doc. 1 ¶ 55

B. First Amendment and Procedural Due Process

The balance of the Association's claims take us to new territory, informed but not answered by our Fifth Amendment analysis in *JUA I* and *JUA II*. We first address the Association's contention that Section 1505-B(1) of Act 15 violates the First Amendment and Procedural Due Process Clause by subjecting it to the Commonwealth Attorneys Act, in violation of its constitutional right "to hire counsel of its choice to represent it in civil litigation." (*See* Doc. 45 at 44).

The Commonwealth Attorneys Act ("Attorneys Act") establishes the Office of Attorney General and Office of

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(citing Act 15, §§ 1502-B, 1503-B)). Although the Association suggests throughout its briefing that other subsections of Act 15 may likewise violate the Contract Clause, (*see, e.g.*, Doc. 45 at 30), these new claims are not fairly encompassed in the complaint and thus are not properly before the court. *See Diodato v. Wells Fargo Ins. Servs., USA, Inc.*, 44 F. Supp. 3d 541, 559 (M.D. Pa. 2014) (Conner, C.J.) ("It is well-settled that [a plaintiff] may not amend his complaint in his brief in opposition to a motion for summary judgment." (quoting *Bell v. City of Philadelphia*, 275 F. App'x 157, 160 (3d Cir. 2008) (nonprecedential) and collecting cases)); *Ward v. Noonan*, 147 F. Supp. 3d 262, 280 & n.17 (M.D. Pa. Nov. 25, 2015) (Caputo, J.) (explaining that a plaintiff cannot "expand his claims to assert new theories for first time in response to a summary judgment motion" (citations omitted)); *see also Pennsylvania ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 181 (3d Cir. 1988) ("[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss." (citation omitted) (alteration in original)). Because we will enter summary judgment and declaratory judgment in the Association's favor as to Section 1502-B and Section 1503-B, the balance of the Association's Contract Clause claim is moot.

General Counsel and, *inter alia*, outlines the roles and responsibilities of each. *See* 71 PA. STAT. AND CONS. STAT. ANN. § 732-101 *et seq.* Pertinent here, the Attorneys Act states that "[t]he Attorney General shall represent the Commonwealth and all Commonwealth agencies . . . in any action brought by or against the Commonwealth or its agencies." *Id.* § 732-204(c). The Attorneys Act authorizes the Attorney General, "upon determining that it is more efficient or otherwise is in the best interest of the Commonwealth, [to] authorize the General Counsel . . . to initiate, conduct or defend any particular litigation or category of litigation in [the Attorney General's] stead." *Id.*

The Association contends that this violates its perceived right to counsel of choice in two ways: first, by interfering in its legal defense of its insureds, which it describes as its "primary need for legal services," (*see* Doc. 45 at 46), and second, by interfering with its "ongoing need" for advice and representation by corporate and regulatory counsel, and its "periodic need" for litigation counsel, as in this lawsuit and its predecessors, (*see id.*). We can dispense with the first theory in short order. The plain text of the Attorneys Act mandates state representation *only* for suits that are "brought by or against the Commonwealth or its agencies," *see* 71 PA. STAT. AND CONS. STAT. ANN. § 732-204(c), so it would not apply when the Association is not party to the suit—as when it supplies counsel for its insureds. This aspect of the Association's claim simply has no bearing on the *Association's* right to counsel. The Association's second claim—that Act 15 violates its own right to counsel of choice—is a bit more complex.

Preliminarily, we must address defendants' claim that no such right exists. The General Assembly and Governor Wolf defend their decision to foist Commonwealth representation upon the Association by invoking our court of appeals' decision in *Kentucky West Virginia Gas Co. v. Pennsylvania P.U.C.*, 837 F.2d 600 (3d Cir.), *cert. denied*, 488 U.S. 941, 109 S. Ct. 365, 102 L. Ed. 2d 355 (1988). Defendants cling tightly to the court's statement that "[t]he Supreme Court has not recognized a constitutional right to counsel in a civil case," *see id.* at 618, claiming that, because there is no "right to counsel" in civil lawsuits, it follows that "there is likewise no subsidiary right to counsel-of-choice," (*see* Doc. 63 at 23; *see also* Doc. 65 at 8-9). Thus, according to defendants, *Kentucky West Virginia Gas* extinguishes any claim that the state can violate the Constitution by interfering with one's selection of civil counsel. Taken to its logical end, defendants' position would allow a state to force its attorneys upon *anyone*, since, they say, civil litigants have no constitutional interest in who represents them.

Kentucky West Virginia Gas is a much narrower decision than defendants believe it to be. In that case, a state agency directed a utility to retain counsel "separate and independent" from its affiliate based on the potential for a conflict if the parties continued with joint representation. *See Ky. W. Va. Gas*, 837 F.2d at 617. The court of appeals identified the question before it as whether the utility had a due-process right to joint representation that was violated by the separate-counsel order. *See id.* at 618. At the outset of its analysis, the court noted that "[t]he Supreme Court has not recognized a constitutional

right to counsel in a civil case or in civil matters before an administrative agency." *Id.* The court then observed that the utility had a statutory right to counsel and that, "where the right to counsel exists," the Fifth Amendment's due process clause "provide[s] some protection for the decision to select a particular attorney." *Id.* This due-process right, the court explained, is limited, going "no further than preventing arbitrary dismissal of a chosen attorney, and providing a fair opportunity to secure counsel of one's choice." *See id.* The court concluded that the order to retain separate counsel "violate[d] neither due process nor the [Administrative Procedures Act]" given the potential conflict of interest. *Id.*

Defendants select an isolated phrase from *Kentucky West Virginia Gas* (that "[t]he Supreme Court has not recognized a constitutional right to counsel in a civil case"), sever it from crucial context, and wield it as the end-all of counsel-related rights. (*See* Doc. 63 at 23; Doc. 65 at 8). If the court of appeals had intended such a sweeping foreclosure, it would have left no room for doubt. We read the quoted statement as nothing more than an affirmation that the Supreme Court has not guaranteed counsel to civil litigants in the same manner it has to criminal defendants. *See Ky. W. Va. Gas*, 837 F.2d at 618; *cf. Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). Contrary to defendants' interpretation, *Kentucky West Virginia Gas* stands only for the narrow proposition that a civil litigant has no due-process right to insist on counsel of their choosing "where there exists a potential for conflict." *See Ky. W. Va. Gas*, 837 F.2d at 618. It does not hold, and cannot fairly be read to hold,

that there exists no constitutional right to hire counsel of one's choice *at all*.

The general right to hire and consult with counsel of choice in civil litigation falls within the ambit of the First Amendment.[7] The Supreme Court has not explicitly delineated the contours of this right, but it has recognized that the First Amendment's freedoms of speech, assembly, and petition protect a union's right to collectively hire an attorney to assist in legal affairs. *See United Mine Workers of Am. v. Ill. State Bar Ass'n*, 389 U.S. 217, 221-22, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967); *see also United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 585-86, 91 S. Ct. 1076, 28 L. Ed. 2d 339 (1971). The First Amendment interest implicated in those cases "was primarily the right to associate collectively for the common good," *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 335, 105 S. Ct. 3180, 87 L. Ed. 2d 220 (1985), but the Court has said that its underlying concern "that

7. The General Assembly argues that *Kentucky West Virginia Gas* defeats the Association's counsel-related claims whether framed as procedural-due-process *or* First-Amendment violations. (Doc. 63 at 23 n.1). Assuming *arguendo* that the court of appeals intended a wholesale rejection of any due-process right to counsel of choice—and we are not convinced that it did—the decision said nothing of First Amendment rights. Although the plaintiff utility raised both First-Amendment and due-process claims before the district court, the question presented to the court of appeals was narrow: the utility argued "that joint representation of different entities which share a substantial interest is protected by the due process clause of the Fifth Amendment," *see Ky. W. Va. Gas*, 837 F.2d at 618, and the court of appeals explored the claim solely through a due-process lens, *see id.* at 618-19.

the aggrieved receive information regarding their legal rights and the means of effectuating them . . . applies with at least as much force to aggrieved individuals as it does to groups," *Bates v. State Bar of Ariz.*, 433 U.S. 350, 376 n.32, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977).

Several courts of appeals have interpreted these Supreme Court cases as acknowledging a First Amendment right, grounded in its freedoms of speech, association, and petition, "to hire and consult an attorney." *See Denius v. Dunlap*, 209 F.3d 944, 953-54 (7th Cir. 2000) (citing *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990); *Martin v. Lauer*, 686 F.2d 24, 32, 222 U.S. App. D.C. 302 (D.C. Cir. 1982)); *Mothershed v. Justices of Sup. Ct.*, 410 F.3d 602, 611 (9th Cir. 2005) (citing *United Mine Workers*, 389 U.S. at 221-22; *Denius*, 209 F.3d at 953; *DeLoach*, 922 F.2d at 620).[8] District courts within the Third Circuit have too. *See, e.g., Neuberger v. Gordon*, 567 F. Supp. 2d 622, 635 (D. Del. 2008) (citing *Denius*, 209 F.3d at 953; *Mothershed*, 410 F.3d at 611; *DeLoach*, 922 F.2d at 620; *Martin*, 686 F.2d at 32); *Ober v. Miller*, No. 1:04-CV-1669, 2007 U.S. Dist. LEXIS 93236, 2007 WL 4443256, at *14

8. Our court of appeals has not squarely addressed the issue. In a nonprecedential opinion issued earlier this month, the panel suggested that whether the right exists is an open question in this circuit. *See Jacobs v. City of Phila.*, 836 Fed. Appx. 120, 2020 U.S. App. LEXIS 37459, 2020 WL 7040966, at *2 n.2 (3d Cir. 2020) (*per curiam*) (citing *Mothershed*, 410 F.3d at 611). Other courts of appeals have recognized a similar right sounding in due process. *See Tex. Catastrophe Prop. Ins. Ass'n v. Morales*, 975 F.2d 1178, 1180-81 (5th Cir. 1992) (citing, *inter alia*, *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 257 (1st Cir. 1986)).

(M.D. Pa. Dec. 18, 2007) (Conner, J.) (quoting *Cipriani v. Lycoming Cty. Hous. Auth.*, 177 F. Supp. 2d 303, 323-24 (M.D. Pa. 2001) (citing *Denius*, 209 F.3d at 953)). We agree with the *ratio decidendi* of these courts and conclude that, while a civil litigant may not have a due-process right to *appointed* counsel, the First Amendment generally protects their right to consult with and *hire* counsel of their choosing.

By applying the Attorneys Act to the Joint Underwriting Association, Act 15 interferes directly with this First Amendment right. The General Assembly claims that the Association is free to consult with and hire its preferred private attorneys, and that the Attorneys Act "merely reserves the Commonwealth a seat at the trial table during any JUA-related litigation." (Doc. 41 at 27-28). Governor Wolf likewise intimates that the Association could be allowed to keep its current counsel. (*See* Doc. 48 at 32; Doc. 59 at 19). It is unclear from where defendants are deriving this authorization for private counsel: the Attorneys Act states unequivocally that "[t]he Attorney General shall represent . . . all Commonwealth agencies" in actions by or against those agencies and gives the Attorney General discretion to delegate such representation "to . . . *the General Counsel*" in certain circumstances. *See* 71 PA. STAT. AND CONS. STAT. ANN. § 732-204(c) (emphasis added). Although the Attorneys Act permits the Attorney General to authorize "counsel for an independent agency" to handle "any particular litigation or category of litigation," *see id.* § 732-204(c), Act 15 clearly designates the Association a "Commonwealth agency," *see* Act 15, § 1505-B, not an "independent agency," *see* 71 PA. STAT. AND CONS. STAT.

ANN. § 732-102. Even if we were to credit defendants' assertion that the Attorneys Act allows Commonwealth agencies to hire private litigation counsel, their assertions come with a significant catch—the Association's decision to hire private counsel, defendants explain, would be subject to "Commonwealth permission." (Doc. 41 at 27-28; *see also* Doc. 54 at 34; Doc. 59 at 19).

Compelling the Joint Underwriting Association to accept Commonwealth representation effectively vitiates its First Amendment right to consult with and hire civil counsel of its choice. Defendants have offered no meaningful argument to the contrary, other than their claim that this constitutional right does not exist. We find that it does, and that Section 1505-B(1) of Act 15 violates it. We will grant summary and declaratory judgment to the Association on Count IV.

C. Substantive Due Process

The Association lastly claims that Act 15, on the whole, violates its right to substantive due process. Because we have already held that Section 1502-B and Section 1503-B violate the Takings Clause and that Section 1505-B(1) violates the First Amendment, we focus our analysis here on the sections of Act 15 that remain. They are Section 1504-B, which requires the Association to hold quarterly public meetings subject to the Sunshine Act; Section 1505(B)(2) through (B)(4), which considers the Association a "Commonwealth agency" strictly for purposes of the Right-to-Know Law, PennWATCH Act,

and Commonwealth Procurement Code[9]; and Section 1506-B, which requires the Association to provide certain employee-related information to the state, to conduct its operations rent-free in state-owned office space, and to coordinate with the Department of Revenue concerning access to certain tax information.

The Due Process Clause of the Fourteenth Amendment prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Our court of appeals has differentiated challenges to legislative acts and challenges to nonlegislative acts in its substantive-due-process jurisprudence. *See Nicholas v. Pa. State Univ.*, 227 F.3d 133, 139 (3d Cir. 2000). When, as here, a plaintiff challenges a legislative enactment and does not claim that the enactment burdens a fundamental right, rational-basis review applies. *See Am. Express Travel Related Servs. v. Sidamon-Eristoff*, 669 F.3d 359, 366 (3d Cir. 2012) (quoting *Nicholas*, 227 F.3d at 139).

The rational-basis test grants the legislature "considerable latitude." *Heffner v. Murphy*, 745 F.3d 56, 79

9. The Right-to-Know Law requires Commonwealth agencies to make their records available to the public. *See* 65 PA. STAT. AND CONS. STAT. ANN. § 67.101 *et seq.* The PennWATCH Act requires Commonwealth agencies to disclose spending information, including employee salaries, which is then posted to a public database and website. *See* 72 PA. STAT. AND CONS. STAT. ANN. § 4664.1 *et seq.* The Commonwealth Procurement Code requires Commonwealth agencies to procure goods and services through the state's procurement processes and bidding procedures. *See* 62 PA. STAT. AND CONS. STAT. ANN. § 101 *et seq.*

(3d Cir. 2014) (citing *FCC v. Beach Communications*, 508 U.S. 307, 315, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993)). The legislation must stand, even if it burdens some cognizable interest, if the defendant can show "(1) the existence of a legitimate state interest that (2) could be rationally furthered by the statute." *Sidamon-Eristoff*, 669 F.3d at 366 (citing *Nicholas*, 227 F.3d at 139). Stated differently, to prevail on a substantive-due-process claim, like the instant one, that does not implicate a fundamental right, a plaintiff must "negative every conceivable basis which might support" the legislature's choice. *See id.* (quoting *Beach Commc'ns*, 508 U.S. at 315). Rational-basis review, while not "toothless," *id.* (quoting *Mathews v. Lucas*, 427 U.S. 495, 510, 96 S. Ct. 2755, 49 L. Ed. 2d 651 (1976)), requires courts to afford "significant deference to the legislature's decision-making and assumptions," *id.* (citing *Sammon v. New Jersey Bd. of Medical Examiners*, 66 F.3d 639, 645 (3d Cir. 1995)).

The parties dispute whether the Association has identified a life, liberty, or property interest on which to premise a Fourteenth Amendment claim. The Association contends that Act 15 interferes with its "right as a private entity to engage in its business of selling MPL insurance without unreasonable government interference." (*See* Doc. 45 at 32 (citing *Greene v. McElroy*, 360 U.S. 474, 492, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959); *Meier v. Anderson*, 692 F. Supp. 546, 551-52 (1988))). The General Assembly does not deny that such a private right exists. It simply reiterates its view that, because the Association was created by the Commonwealth to solve a public-health crisis, "it is essentially an 'instrumentality of the state'"

not possessed of that right. (*See* Doc. 63 at 18 (citation omitted)). We need not determine whether the Association has the liberty interest it claims because, even if it does, the General Assembly has sufficiently justified Act 15's interference with that interest.

It is important for purposes of our substantive-due-process analysis to briefly revisit, and appropriately cabin, our decisions in *JUA I* and *JUA II*, because the Association relies so heavily on those decisions in resisting any Commonwealth oversight and support. (*See, e.g.*, Doc. 57 at 24 (quoting *JUA II*, 381 F. Supp. 3d at 337)). Given the nature of the legislation at issue in those cases, and the nature of a Fifth Amendment takings claim, our chief inquiry was actually quite narrow: whether the Association's reserves and surplus were private property belonging to the Association or public property belonging to the Commonwealth. In holding that the Association is a private entity and its funds private property, we rejected defendants' claim that the Association is the state itself. We have never denied, however, that the Association is a unique creature—a state-created private entity that furthers the General Assembly's public-health objectives. *See JUA I*, 324 F. Supp. 3d at 523-24; *JUA II*, 381 F. Supp. 3d at 326-27.

Despite the fact that the Joint Underwriting Association's property and operations are decidedly private, its *mission* is indisputably public. The Association is an integral part of a medical care availability and insurance framework that the legislature has deemed "essential to the public health, safety and welfare of all

citizens of the Commonwealth." 40 PA. STAT. AND CONS. STAT. ANN. § 1303.102. There can be no dispute on this point—the Association's own plan of operations opens with recognition of its statutory origin and its purpose "to offer [MPL] insurance to health care providers in accordance with" the MCARE Act. (*See* Doc. 4-2 ¶ 2). Against this backdrop, we have little difficulty concluding that Act 15's application of oversight and support measures to the Association, the state's designated MPL insurer of last resort, is supported by a rational basis.

Defendants explain that Act 15 furthers important transparency and accountability objectives by subjecting the Association to certain oversight laws, and that lowering its operational expenses, for example, by providing free office space, furthers the public's interest in ensuring the Association remains afloat. (*See* Doc. 41 at 23-25; Doc. 48 at 27-29; Doc. 54 at 22-26; Doc. 59 at 14-15). What is more, the Association *concedes* that "prevent[ing] the JUA from failing in its work of assuring availability of MPL insurance" is a "possible legitimate justification" for these measures. (*See* Doc. 45 at 34). We agree that assuring continued viability of the state's MPL insurer of last resort is a legitimate justification for Act 15.[10]

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10. The Association repeatedly emphasizes our statement from *JUA II* that, when it created the Association, the General Assembly chose to meet its public-health objectives through "a private entity . . . in which the state is not alone or, indeed, at all interested." (*See, e.g.*, Doc. 64 at 10, 12, 25 (quoting *JUA II*, 381 F. Supp. 3d at 341)). As should be clear from context, that statement referred only to the Commonwealth's lack of a *pecuniary* interest in the Association. *See, e.g., JUA II*, 381 F.

Appendix C

Recognizing that defendants have articulated a "legitimate state interest," the Association focuses on challenging the rationality between end and means. Its argument is threefold: that Act 15's measures are unnecessary given the size of the Association's surplus, (*see, e.g.*, Doc. 57 at 26-28); that they are mere pretext for another state takeover attempt, (*see, e.g., id.* at 27); and that the claimed rationale finds no explicit support in the text of Act 15 itself, (*see, e.g.*, Doc. 45 at 33-34). We address these arguments *seriatim*.

As to the first argument, there is no need for "mathematical precision" when the legislature acts in furtherance of an identified interest. *See Concrete Pipe*

Supp. 3d at 333 (emphasizing lack of state funding and statutory disclaimer of responsibility for Association's debts and liabilities (citing *JUA I*, 324 F. Supp. 3d at 537-38)). We also reject any suggestion that Act 15 improperly attempts to reconstitute the Association as a Commonwealth agency or otherwise "alter[s] JUA's private nature." (*See, e.g.*, Doc. 45 at 15-16). It does not, and it could not: *JUA II* holds squarely that "[t]he Commonwealth cannot legislatively recapture this private association." *See JUA II*, 381 F. Supp. 3d at 343. Unlike Act 41's attempt to claim the Association as a Commonwealth agency, Act 15 merely treats it like one for limited purposes. *See* Act 15, § 1505(B) ("The [Association] shall be *considered* a Commonwealth agency *for purposes of*" the Right-to-Know Law, PennWATCH Act, and Commonwealth Procurement Code (emphasis added)); *see also Harristown Dev. Corp. v. Commonwealth*, 532 Pa. 45, 614 A.2d 1128, 1131 (Pa. 1992) (holding that the General Assembly could designate private entity that did large volume of business with the state a Commonwealth "agency" for purposes of the Sunshine Act and Right-to-Know Law).

& Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal., 508 U.S. 602, 639, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993). That the Act may seem "needless" or "wasteful" in the eyes of the Association does not matter. *See Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 487, 75 S. Ct. 461, 99 L. Ed. 563 (1955). "[I]t is for the legislature," not the Association or this court, "to balance the advantages and disadvantages" of Act 15. *See id.* Our sole inquiry is whether the General Assembly could have rationally concluded that the public interest would be furthered by applying oversight and support to the Association. *See Sidamon-Eristoff*, 669 F.3d at 366. Since the Association itself has taken the position that every dollar counts—informing the Insurance Department that its "surplus is not excessive" and that divesting "any of the Association's surplus . . . could adversely affect [its] ability . . . to fulfill its mandate," *JUA I*, Doc. 7-3 (M.D. Pa. Nov. 8, 2017)—the legislature's conclusion is sufficiently rational.

The Association's second argument is perhaps reasonable, particularly in light of the legislature's successive and creative attempts to access the Association's surplus, but nonetheless without merit. The Association remonstrates that "the state wants [its] money" and implies that, by applying new oversight and support to the Association, defendants are laying the groundwork to reclaim the Association—and its surplus—for the Commonwealth. (*See* Doc. 57 at 27; *see also* Doc. 45 at 16-19, 20-21). That may well be. But we cannot "second-guess legislative choices or inquire into whether the stated motive *actually* motivated the legislation." *Heffner*, 745 F.3d at 79 (emphasis added) (citing *United States*

R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980)). Whether the General Assembly has an ulterior motive is of no moment, so long as there is at least one legitimate motive to sustain Act 15.

Third, the Association argues that the challenged provisions of Act 15 are irrational because they bear no relation to the Act's stated purpose of "provid[ing] for the administration of the 2019-2020 Commonwealth budget." (Doc. 45 at 33 (quoting Act 15, § 1(1))). There is no requirement, however, that the Commonwealth's legitimate objectives appear in the enactment itself. Legislation will survive under rational-basis scrutiny if it "rationally furthers *any* legitimate state objective," even if the court must "hypothesize the motivations." *Sidamon-Eristoff*, 669 F.3d at 367 (quoting *Malmed v. Thornburgh*, 621 F.2d 565, 569 (3d Cir. 1980)). We need not hypothesize in this case. Defendants have articulated "a legitimate state interest" in overseeing the Association and ensuring its success, and that interest is "rationally furthered" by Act 15. *See id.* at 365. Accordingly, the Association has failed to establish a substantive-due-process violation, and defendants are entitled to summary judgment on Count I.

D. Legislative Immunity

As in *JUA I*, Governor Wolf again invokes legislative immunity. The doctrine of legislative immunity shields legislators from liability for "all actions taken 'in the sphere of legitimate legislative activity.'" *Baraka v. McGreevey*, 481 F.3d 187, 195-96 (3d Cir. 2007) (quoting *Bogan v. Scott-Harris*, 523 U.S. 44, 54, 118 S. Ct. 966,

140 L. Ed. 2d 79 (1998)). Legislative immunity extends beyond legislators and protects any public officials, including governors and others outside of the legislative branch, when they perform "legislative functions." *See id.* It applies, for example, when the public official's sole connection to challenged legislation is promoting it, passing it, or signing it into law. *See id.* at 196-97.

Governor Wolf contends that he "solely signed Act 15 into law" and has no other connection to the Association's claims or to the Act. (*See* Doc. 48 at 16-18). As before, we disagree. *See JUA I*, 2017 U.S. Dist. LEXIS 193276, 2017 WL 5625722, at *7. Governor Wolf did sign Act 15 into law. But he is also authorized under Act 15 to initiate a budget-estimate request under Section 1503-B(a) upon which appropriations under Section 1502-B would be determined. *See* Act 15, § 1503-B. Additionally, the Attorneys Act contemplates scenarios in which the Governor's attorney, the Office of General Counsel, would either represent the Association or determine who should. *See* 71 PA. STAT. AND CONS. STAT. ANN. § 732-204(c). Governor Wolf is not so attenuated from Act 15's problematic provisions as his counsel suggests. We thus decline to apply legislative immunity.[11]

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11. We also reject the argument that the Association does not have standing and has failed to establish an actual case or controversy as to Governor Wolf. (*See* Doc. 48 at 18-20). This argument rests on the view, rejected above, that Governor Wolf is a party to this lawsuit based solely on his "[g]eneral authority to enforce the laws of the state." (*See id.* (citing *1st Westco Corp. v. Sch. Dist. of Phila.*, 6 F.3d 108, 113 (3d Cir. 1993))).

E. Permanent Injunction

Before the court may grant permanent injunctive relief, the Joint Underwriting Association must prove, first, that it will suffer irreparable injury absent the requested injunction; second, that legal remedies are inadequate to compensate that injury; third, that balancing of the respective hardships between the parties warrants a remedy in equity; and fourth, that the public interest is not disserved by an injunction's issuance. *See eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006) (citations omitted). Defendants contest the Association's request for permanent injunctive relief.

We conclude that the Joint Underwriting Association is entitled to a permanent injunction specifically limited, however, to the unconstitutional sections of Act 15. Sections 1502-B and 1503-B of Act 15 constitute a regulatory taking and threaten imminent and irreparable injury to the Association. Through Act 15, the General Assembly intends to be the sole source of funding for the Association's operations. As we have explained, if this occurs, the Association would be instantly divested of its right to use its existing, private funds as it sees fit. No remedy at law could adequately compensate for that loss of control. As to Section 1505-B(1), it is well settled that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976); *Ctr. for Investigative Reporting v. SEPTA*, 975 F.3d 300, 317 (3d Cir. 2020) (quoting *Elrod*,

427 U.S. at 373). There is further urgency with respect to this provision, given Governor Wolf's statement that, while the Act would not apply within this series of lawsuits, the Association, "on a moving-forward basis, would have to use [the Attorney General's] office." (Doc. 33 at 34:24).

Defendants, for their part, have articulated no reciprocal harm to the Commonwealth or the public from enjoining enforcement of the unconstitutional components of Act 15. Nor have they alleged a public interest in enforcing those sections; rather, their public-interest arguments focus almost entirely on defending the oversight provisions that we have already held survive constitutional scrutiny. We find that defendants will not be harmed by a permanent injunction narrowly tailored to the unconstitutional provisions of Act 15, nor will the public interest be disserved thereby. We will thus grant the Association's request for a permanent injunction only to the extent that we will enjoin enforcement of Sections 1502-B, 1503-B, and 1505-B(1).

IV. *Conclusion*

We will grant in part and deny in part the parties' cross-motions for summary judgment as more fully articulated herein. An appropriate order shall issue.

/s/ Christopher C. Conner
Christopher C. Conner
United States District Judge
Middle District of Pennsylvania

Dated: December 22, 2020

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, FILED DECEMBER 22, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:19-CV-1121
(Judge Conner)

PENNSYLVANIA PROFESSIONAL LIABILITY JOINT UNDERWRITING ASSOCIATION,

Plaintiff,

v.

TOM WOLF, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA, AND THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA,

Defendants.

Filed December 22, 2020

ORDER

AND NOW, this 22nd day of December, 2020, upon consideration of the cross-motions (Docs. 40, 42, 46) for summary judgment pursuant to Federal Rule of Civil Procedure 56, and for the reasons stated in the accompanying memorandum, it is hereby ORDERED that:

Appendix D

1. The motion (Doc. 42) for summary judgment by the Pennsylvania Professional Liability Joint Underwriting Association ("Association") is GRANTED as to Counts II and IV of the Association's complaint and to the extent that the court will enter declaratory judgment on Counts II and IV as requested in Count V. The motion is otherwise DENIED.

2. The motions (Docs. 40, 46) for summary judgment by the General Assembly of the Commonwealth of Pennsylvania and by Governor Wolf are GRANTED as to Counts I and III of the Association's complaint. The motions are otherwise DENIED.

3. It is ORDERED and DECLARED that Section 1502-B and Section 1503-B of the Act of June 28, 2019, P.L. 101, No. 15, § 7 ("Act 15") are unconstitutional in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and enforcement thereof is hereby and permanently ENJOINED.

4. It is further ORDERED and DECLARED that Section 1505-B(1) of Act 15 is unconstitutional in violation of the First and Fourteenth Amendments to the United States Constitution, and enforcement thereof is hereby and permanently ENJOINED.

5. The Clerk of Court shall enter summary judgment in favor of the Association as to Counts II and IV and in favor of defendants as to Counts I and III. The Clerk of Court shall enter declaratory judgment on Count V as set forth in paragraphs 3 and 4.

6. The Clerk of Court shall thereafter close this case.

/s/
Christopher C. Conner
United States District Judge
Middle District of Pennsylvania

APPENDIX E — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, FILED DECEMBER 18, 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA

CIVIL ACTION NO. 1:18-CV-1308
(Chief Judge Conner)

PENNSYLVANIA PROFESSIONAL LIABILITY
JOINT UNDERWRITING ASSOCIATION,

Plaintiff,

v.

TOM WOLF, IN HIS OFFICIAL CAPACITY AS
GOVERNOR OF THE COMMONWEALTH OF
PENNSYLVANIA, *et al.*,

Defendants.

Filed December 18, 2018

MEMORANDUM

In May of this year, we entered judgment in *Pennsylvania Professional Liability Joint Underwriting Ass'n v. Wolf* ("*JUA I*"), No. 1:17-CV-2041 (M.D. Pa.), declaring portions of Act 44 of 2017, P.L. 725, No. 44

("Act 44"), to be violative of the Takings Clause of the Fifth Amendment to the United States Constitution and permanently enjoining enforcement of the Act's operative provisions. Finding the Pennsylvania Professional Liability Joint Underwriting Association (the "Joint Underwriting Association" or "Association") to be a private entity and its assets to be private property, we concluded that the state cannot expropriate to its own use funds held in the Association's coffers.

The General Assembly responded by enacting Act 41 of 2018, P.L. 273, No. 41 ("Act 41"), on June 22, 2018. Act 41 deploys *JUA I* as a blueprint, endeavoring to avoid the constitutional infirmities that felled Act 44. Specifically, Act 41 purports to transform the Joint Underwriting Association into a governmental entity housed within the Commonwealth's Insurance Department ("Department") and operating under the control and oversight of the Commonwealth's Insurance Commissioner ("Commissioner"). It also seeks to accomplish indirectly what *JUA I* forbade the state from doing directly—forcing the transfer of the Association's assets to the Department. By order of July 18, 2018, we preliminarily enjoined enforcement of Act 41 pending merits review of the Joint Underwriting Association's constitutional claims. The parties' cross-motions for summary judgment are now before the court.

Appendix E

I. Factual Background & Procedural History[1]

The factual backdrop of this litigation is outlined *in extenso* in this court's summary judgment opinion in *JUA I* and our preliminary injunction opinion in this action, familiarity with which is presumed. *See generally JUA I*, 324 F.Supp.3d 519 (M.D. Pa. 2018); *Pa. Prof'l Liab. Joint Underwriting Ass'n v. Wolf* ("*JUA II*"), 328 F.Supp.3d 400 (M.D. Pa. 2018). We reiterate salient facts for context in addressing the parties' Rule 56 arguments.

A. The Joint Underwriting Association

The Joint Underwriting Association was established by statute as a nonprofit association organized under the laws of the Commonwealth of Pennsylvania. The General Assembly created the Association in 1975 in response to a decline in the availability of medical malpractice insurance in the Commonwealth. (Doc. 33 ¶ 3). The Association was

1. Local Rule 56.1 requires that a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 be supported "by a separate, short, and concise statement of the material facts, in numbered paragraphs, as to which the moving party contends there is no genuine issue to be tried." Local Rule of Court 56.1. A party opposing a motion for summary judgment must file a separate statement of material facts, responding to the numbered paragraphs set forth in the moving party's statement and identifying genuine issues to be tried. *Id.* Unless otherwise noted, the factual background herein derives from the parties' Rule 56.1 statements of material facts. (*See* Docs. 33, 38, 41, 45, 52, 55, 56, 58). To the extent the parties' statements are undisputed or supported by uncontroverted record evidence, the court cites directly to the statements of material facts.

initially established and organized by the Pennsylvania Health Care Services Malpractice Act of 1975, P.L. 390, No. 111 (the "CAT Fund Statute").

The CAT Fund Statute authorized the Commissioner to either "establish and implement" or "approve and supervise" a "plan" for ensuring that medical professional liability insurance is made "conveniently and expeditiously" available to providers in the Commonwealth who cannot obtain insurance on the open insurance market. *See* CAT Fund Statute, § 801 (codified prior to repeal at 40 PA. STAT. AND CONS. STAT. ANN. § 1301.801). Section 801 provided that the plan "may be implemented by a joint underwriting association," *id.*, and Section 803 permitted insurers to consult and agree with each other as to "organization, administration and operation of the plan" and rates for coverage, *id.* § 803(a) (codified prior to repeal at 40 PA. STAT. AND CONS. STAT. ANN. § 1301.803). An "Ad Hoc Industry Committee" of insurers submitted the Joint Underwriting Association's original proposed plan of operations to the then-Commissioner, who approved same on December 30, 1975. (Doc. 33 ¶¶ 7-8). The plan established a 12-member board of directors, one member of which was appointed by the Commissioner, and vested authority in the board to "decide all matters of policy and have authority to exercise all reasonable and necessary powers relating to the operation of the Association which are not specifically delegated by the plan to others or reserved to members of the Association." (*Id.* ¶¶ 9, 11). The statute authorized the Commissioner to dissolve the plan if he deemed it unnecessary and authorized the Association to borrow funds from the state in the event of a deficit.

CAT Fund Statute, §§ 803(b), 808 (codified prior to repeat at 40 PA. STAT. AND CONS. STAT. ANN. §§ 1301.803(b), -.808). The Association was granted Section 501(c)(6) status by the Internal Revenue Service in 1976 and has since maintained that status. (Doc. 33 ¶¶ 12-14).

The General Assembly repealed the CAT Fund Statute on March 20, 2002, replacing it with the current statutory framework, the Medical Care Availability and Reduction of Error Act ("MCARE Act"), 40 PA. STAT. AND CONS. STAT. ANN. § 1303.101 *et seq.* The MCARE Act is a sweeping piece of legislation, with an overarching goal of ensuring a "comprehensive and high-quality health care system" for the citizens of the Commonwealth. *Id.* § 1303.102(1). Among other things, the MCARE Act establishes the Medical Care Availability and Reduction of Error Fund ("the MCARE Fund"), *id.* §§ 1303.711-.716, as a "special fund" within the state treasury to be administered by the Department, *id.* §§ 1303.712(a), -.713(a). The Fund offers a secondary layer of medical professional liability coverage for physicians, hospitals, and other health care providers and is funded primarily by annual assessments on those providers as a condition to practice in the Commonwealth. *See id.* § 1303.712(d)(1).

The MCARE Act continued operation of the Joint Underwriting Association. *Id.* § 1303.731(a). Unlike the MCARE Fund, the Association was not established as a "special fund" or a traditional agency within the Commonwealth's governmental structures. *See id.*; *cf. id.* §§ 1303.712(a), -.713(a). Instead, the General Assembly "established" the Association as "a nonprofit

joint underwriting association to be known as the Pennsylvania Professional Liability Joint Underwriting Association." *Id.* § 1303.731(a). Like its predecessor, the MCARE Act mandates membership in the Association for insurers authorized to write medical professional liability insurance in the Commonwealth. *Id.*

The MCARE Act requires the Association to offer medical professional liability insurance to health care providers and entities who "cannot conveniently obtain medical professional liability insurance through ordinary methods at rates not in excess of" rates applicable to those similarly situated. *Id.* § 1303.732(a). The Act sets forth broad parameters for achieving this objective, tasking the Association to ensure that its insurance is conveniently and expeditiously available, offered on reasonable and not unfairly discriminatory terms, and subject only to the payment of a premium for which payment plans must be made available. *Id.* § 1303.732(b)(1)-(5). The MCARE Act prescribes four "duties" for the Association. *Id.* § 1303.731(b). It requires the Association to (1) submit a plan of operations to the Commissioner for approval, (2) submit rates and any rate modifications for Department approval, (3) offer insurance as described *supra*, and (4) file its schedule of occurrence rates with the Commissioner. *See id.* § 1303.731(b)(1)-(4).

The Association, like other insurers licensed to operate within the Commonwealth, is "supervised" by the Department through the Commissioner. *Id.* § 1303.731(a); *see*, *e.g.*, *id.* §§ 221.1-a to -.15-a, 1181-99. The MCARE Act otherwise provides that all "powers

and duties" of the Association "shall be vested in and exercised by a board of directors." *Id.* § 1303.731(a). The board's composition, and all of the Association's operative principles, are set forth in a plan of operations developed by the Association with Department assistance and approval. (*See* Doc. 33 ¶¶ 38-41); *JUA I*, 324 F.Supp.3d at 536. The existing plan establishes a 14-member board of directors, which consists of the current Association president; eight representatives of member companies chosen by member voting; one agent or broker elected by members; and four health care provider or general public representatives who may be nominated by anyone and are appointed by the Commissioner. (Doc. 33 ¶ 38). Under the plan, the Association may be dissolved (1) "by operation of law" or (2) at the request of its members, subject to Commissioner approval. (*Id.* ¶ 40). The plan provides that, "[u]pon dissolution, all assets of the Association, from whatever source, shall be distributed in such manner as the Board may determine subject to the approval of the Commissioner." (*Id.* ¶ 41).

The Joint Underwriting Association writes insurance policies directly to its insured health care providers, and those policyholders pay premiums directly to the Association. (*See id.* ¶ 52). The Association is funded exclusively by policyholder premiums and investment income generated therefrom. (*Id.* ¶¶ 46, 49, 50-51). It is not and has never been funded by the Commonwealth, (*id.* ¶ 49), and it has historically held all premiums and investment funds in private accounts in its own name, (Doc. 41 ¶¶ 8-9; Doc. 52 ¶¶ 8-9; *see also* Doc. 58 ¶¶ 8-9). Prior to enactment of Act 41, the MCARE Act insulated the

Commonwealth from the Association's debts and liabilities. *See* 40 Pa. Stat. and Cons. Stat. Ann. § 1303.731(c); (Doc. 33 ¶ 32). The Association has never borrowed money to fund its operations, either in its current form or under the CAT Fund Statute which authorized the Association to borrow from the state. (Doc. 33 ¶¶ 19, 50). In the event of a deficit, the Association's plan of operations contemplates assessments on members in the form of a loan as one method of keeping the Association afloat. (*See* Doc. 33-6 at 3). The Association has never assessed its members under this provision. (Doc. 33 ¶ 46).

The Association maintains contingency funds—its "reserves" and its "surplus"—which allow the Association to fulfill its insurance obligations in the event of greater-than-anticipated claims or losses. *See JUA I*, 324 F.Supp.3d at 525-26; (*see also* Doc. 33 ¶¶ 60, 62, 64, 72-74). An insurer's "reserves" are the "best estimate of funds . . . need[ed] to pay for claims that have been incurred but not yet paid." (*See* Doc. 33 ¶ 72). Its "surplus" represents "capital after all liabilities have been deducted from assets." (*See id.* ¶ 73). The surplus operates as a "backstop" to ensure that unforeseen events do not impede an insurer's ability to meet obligations to its insureds. (*See id.* ¶ 74). As of December 31, 2016, the Joint Underwriting Association maintained a surplus of $ 268,124,502. (*Id.* ¶ 58).

B. Recent Legislative Acts Concerning the Association

On July 13, 2016, Governor Wolf signed into law Act 85 of 2016, P.L. 664, No. 85 ("Act 85") (codified prior to

repeal at 72 PA. STAT. AND CONS. STAT. ANN. § 1726-C). Act 85 is wide-ranging in scope, but its principal effect was to amend the General Appropriation Act of 2016 and balance the Commonwealth's budget. Act 85, § 1. Among other things, Act 85 provided for certain transfers to the Commonwealth's General Fund. *See id.* § 1(7). Pertinent here, Section 18 of Act 85 amended the Commonwealth's Fiscal Code to require a $ 200,000,000 transfer to the General Fund from the Joint Underwriting Association, repayable over a five-year period that was to begin in July 2018. *Id.* § 18.

The Association did not transfer funds to the Commonwealth pursuant to Act 85. (Doc. 33 ¶ 93). On May 18, 2017, the Association commenced a lawsuit, also pending before the undersigned, challenging the constitutionality of Act 85. *See Pa. Prof'l Liab. Joint Underwriting Ass'n v. Albright*, No. 1:17-CV-886, Doc. 1 (M.D. Pa. May 18, 2017). At the parties' request, that litigation has been held in abeyance pending resolution of appeals filed in *JUA I*.

On October 30, 2017, Governor Wolf signed Act 44 into law in another attempt to bring balance to the state budget. Act 44, § 1. Therein, the General Assembly expressly repealed Act 85. *Id.* § 13. Act 44, *inter alia*, purported to amend the Commonwealth's Fiscal Code to include certain "findings" concerning the Joint Underwriting Association's relationship to the Commonwealth and the nature of its unappropriated surplus. *Id.* § 1.3. Specifically, the General Assembly "found" that the Association is an "instrumentality of the Commonwealth" and "[m]oney

under the control of the [Association] belongs to the Commonwealth." *Id.* Act 44 then mandated a monetary transfer from the Association to the state—$ 200,000,000 to the State Treasurer for deposit in the General Fund—for appropriation to the Department of Human Services. *Id.* Act 44 contained a "sunset" clause threatening to abolish the Association if it failed to make the transfer. *Id.*

The Association responded with a second lawsuit, *JUA I*, challenging the constitutionality of Act 44. We preliminarily enjoined enforcement of Act 44 and accelerated proceedings on the merits of the Association's claims. *JUA I*, No. 1:17-CV-2041, 2017 WL 5625722 (M.D. Pa. Nov. 22, 2017). On May 17, 2018, we issued a memorandum opinion concluding that the Association is a private entity and its surplus funds are private property that the Commonwealth cannot take without just compensation. *JUA I*, 324 F.Supp.3d at 538. We entered judgment in favor of the Association, declaring Act 44 to be violative of the Fifth Amendment and permanently enjoining enforcement of the provisions thereof relevant to the Association. Both the Commonwealth and the General Assembly appealed our judgment to the Third Circuit Court of Appeals. *See Pa. Prof'l Liab. Joint Underwriting Ass'n v. Wolf*, No. 18-2323 (3d Cir.). The appeals remain pending.

On June 22, 2018, Governor Wolf signed into law the legislation subject to this lawsuit. Act 41 is the General Assembly's third attempt in as many years to gain access to the Association's funds. The Act endeavors to fundamentally reshape the Joint Underwriting

Association and alter its governance structure to give the Commonwealth direct control of the Association's assets and operations. *See* Act 41, §§ 3-5. Specifically, Act 41 does the following:

(1) Finds that "placing the Association within the Department will give the Commissioner more oversight of expenditures and ensure better efficiencies in the operation of the Association";

(2) Declares that the Association "shall continue as an instrumentality of the Commonwealth" and "shall operate under the control, direction and oversight of the Department";

(3) Replaces the Association's current member-led board with a state-controlled board, consisting of three gubernatorial appointees and one member appointed by each of the president *pro tempore* and the minority leader of the Pennsylvania Senate and the speaker and the minority leader of the Pennsylvania House of Representatives, with the chair of the board to be appointed by the Governor;

(4) Installs a new executive director to be hired by the Commissioner and compensated by the Commonwealth, to whom authority to act on behalf of the Association will be

transferred within 30 days of the Act's effective date;

(5) Assumes Commonwealth liability for any claims or liabilities of the Association arising under its insurance policies;

(6) Mandates that the new board prepare and submit a new plan of operations to the Commissioner for approval within 60 days of the Act's effective date;

(7) Articulates with specificity the duties and responsibilities of and the authority granted to the new board; and

(8) Provides that all documents, papers, and assets in the Association's possession shall be transferred to the Department within 30 days of the Act's effective date.

Id. § 3. Act 41 was scheduled to take effect on July 22, 2018. *Id.* § 7.

C. Procedural History

The Joint Underwriting Association commenced this lawsuit with the filing of a verified complaint on June 28, 2018, subsequently filing an amended complaint on July 3, 2018. Therein, the Association challenges the constitutionality of Act 41 under 42 U.S.C. § 1983. The Association asserts that Act 41 violates the Substantive

Due Process Clause (Count I), the Takings Clause (Count II), and the Contract Clause (Count III). It seeks declaratory and injunctive relief pursuant to Section 1983 and the Declaratory Judgment Act, 28 U.S.C. § 2201 (Count IV). The amended complaint identifies two groups of defendants: Tom Wolf, Governor of the Commonwealth, and Jessica K. Altman, Insurance Commissioner of Pennsylvania, whom we will refer to as the "executive defendants," and a group we refer to as the "legislative defendants," comprising Joseph B. Scarnati, President *Pro Tempore* of the Senate; Jay Costa, Minority Leader of the Senate; Michael Turzai, Speaker of the House of Representatives; and Frank Dermody, Minority Leader of the House of Representatives.[2] All defendants are sued in their official capacities.

The Association moved for a temporary restraining order and preliminary injunction contemporaneously with the commencement of this case. We denied the request for temporary restraining order and expedited proceedings on the request for a preliminary injunction. Following oral argument on July 6, 2018, we granted the Association's motion and preliminarily enjoined enforcement of Act

2. The amended complaint also names the General Assembly of the Commonwealth of Pennsylvania as a defendant. The General Assembly waived service, rendering its answer due by August 27, 2018. (Doc. 16). To date, counsel has not entered an appearance on behalf of the General Assembly and no answer has been filed on its behalf. All filings by the legislative defendants have been made solely under the names of the four individual elected leaders and cannot be fairly construed as having been filed on behalf of the General Assembly itself.

41 pending merits review of the Association's claims. *See generally JUA II*, 328 F.Supp.3d 400. Cross-motions for summary judgment filed by the Joint Underwriting Association, the executive defendants, and the legislative defendants are ripe for disposition.

II. Legal Standard

Through summary adjudication, the court may dispose of those claims that do not present a "genuine dispute as to any material fact" and for which a jury trial would be an empty and unnecessary formality. FED. R. CIV. P. 56(a). The burden of proof tasks the non-moving party to come forth with "affirmative evidence, beyond the allegations of the pleadings," in support of its right to relief. *Pappas v. City of Lebanon*, 331 F.Supp.2d 311, 315 (M.D. Pa. 2004); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). This evidence must be adequate, as a matter of law, to sustain a judgment in favor of the non-moving party on the claims. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-57, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-89, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Only if this threshold is met may the cause of action proceed. *See Pappas*, 331 F.Supp.2d at 315.

Courts are permitted to resolve cross-motions for summary judgment concurrently. *See Lawrence v. City of Phila.*, 527 F.3d 299, 310 (3d Cir. 2008); *see also Johnson v. Fed. Express Corp.*, 996 F.Supp.2d 302, 312 (M.D. Pa. 2014); 10A CHARLES ALAN WRIGHT ET AL., FEDERAL

PRACTICE AND PROCEDURE § 2720 (3d ed. 2015). When doing so, the court is bound to view the evidence in the light most favorable to the non-moving party with respect to each motion. FED. R. CIV. P. 56; *Lawrence*, 527 F.3d at 310 (quoting *Rains v. Cascade Indus., Inc.*, 402 F.2d 241, 245 (3d Cir. 1968)).

III. Discussion

The Joint Underwriting Association raises four claims in its amended complaint. The Association asserts *first*, that Act 41 violates its right to substantive due process; *second*, that Act 41 is an unconstitutional taking of private property; *third*, that Act 41 substantially interferes with the Association's contracts with its insureds and its members; and *fourth*, that it is entitled to a declaration that Act 41 is unconstitutional for each of the above reasons pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201. As in *JUA I*, we begin and end our analysis with the Association's Takings Clause claim.

A. The Association's Takings Clause Claim

Section 1983 of Title 42 of the United States Code creates a private cause of action to redress constitutional wrongs committed by state officials. 42 U.S.C. § 1983. The statute is not a source of substantive rights, but serves as a mechanism for vindicating rights otherwise protected by federal law. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284-85, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002); *Kneipp v. Tedder*, 95 F.3d 1199, 1204 (3d Cir. 1996). To state a Section 1983 claim, plaintiffs must show a deprivation of

a "right secured by the Constitution and the laws of the United States . . . by a person acting under color of state law." *Kneipp*, 95 F.3d at 1204 (quoting *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1141 (3d Cir. 1995)). Defendants do not dispute that they are state actors. We must thus determine whether Act 41 deprives the Association of rights secured by the Fifth Amendment to the United States Constitution.

We have previously articulated the fundamental principles of takings law, *see JUA I*, 324 F.Supp.3d at 528-29, and those principles have equal application here. The Takings Clause of the Fifth Amendment prohibits the government from taking private property for public use without just compensation. U.S. Const. amend. V. The Takings Clause is made applicable to the states by the Fourteenth Amendment. *See* U.S. Const. amend. XIV; *Murr v. Wisconsin*, 582 U.S. —, 137 S.Ct. 1933, 1942, 198 L.Ed.2d 497 (2017) (citing *Chi., B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897)). It applies not only to the taking of real property, but also to government efforts to take identified funds of money. *See*, *e.g.*, *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 160, 164-65, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998); *Webb's Fabulous Pharms., Inc. v. Beckwith*, 449 U.S. 155, 164-65, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980). Takings claims generally fall into two categories—physical and regulatory. *See Yee v. City of Escondido*, 503 U.S. 519, 522-23, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992).

Our decision in *JUA I* applied these settled principles in the context of the unique constitutional question then

before us. Because the parties' summary judgment motions concenter upon *JUA I*, we briefly revisit the *ratio decidendi* undergirding that decision.

1. *JUA I*

JUA I rejected arguments by Governor Wolf and the General Assembly that the Joint Underwriting Association is either the state itself or an arm thereof with no constitutional rights against its creator. We found Governor Wolf's reliance on the United States Supreme Court's decision in *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995), which supplied "guideposts" for courts to assess whether a defendant is a government actor subject to Section 1983 liability, to be misplaced. *JUA I*, 324 F.Supp.3d at 531-32. And we disagreed with the General Assembly that, by virtue of its statutory roots, the Association is akin to a political subdivision with "no privileges or immunities" against its state creator. *Id.* at 530-32 (quoting *Williams v. Mayor of Balt.*, 289 U.S. 36, 40, 53 S.Ct. 431, 77 L.Ed. 1015 (1933)).

Drawing on a body of illustrative federal and state court decisions,[3] we observed that courts typically look to

3. Those decisions are *Mississippi Surplus Lines Ass'n v. Mississippi*, 261 F. App'x 781 (5th Cir. 2008) (nonprecedential), *Asociación de Subscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1 (1st Cir. 2007), *Arroyo-Melecio v. Puerto Rican American Insurance Co.*, 398 F.3d 56 (1st Cir. 2005), *Texas Catastrophe Property Insurance Ass'n v. Morales*, 975 F.2d 1178 (5th Cir. 1992), *Medical*

a number of nonexhaustive considerations in assessing the public-versus-private nature of state-affiliated insurance associations, including "the nature of the association's function, the degree of control reserved in the state (or the level of autonomy granted the association), and the statutory treatment, if any, of the entity, in addition to the nature of the funds implicated." *Id.* at 535. We carefully examined the Association's enabling legislation, the nature of the Association's function and the manner in which it performed that function, its governance and operational structure, the relative lack of Commonwealth control and the total dearth of Commonwealth responsibility, and the private source of the Association's funds before holding that both the Association and its assets are overwhelmingly private in nature. *Id.* at 535-38.

As to the Association itself, we determined that it is "at its core, an insurance company," funded exclusively by privately-paid premiums and largely indistinguishable from other private insurers in the Commonwealth. *Id.* at 535-36. Of greater import than the Association's function was its near-total independence from the state. We rejected defendants' assertion that the Commonwealth retained authoritative control over the Association, observing that the MCARE Act vested all "powers and duties" of the Association "in and [to be] exercised by" its member-led board of directors. *Id.* (alteration

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Malpractice Insurance Ass'n v. Cuomo, 74 N.Y.2d 651, 543 N.Y.S.2d 364, 541 N.E.2d 393 (1989), and *Medical Malpractice Insurance Ass'n v. Superintendent of Insurance*, 72 N.Y.2d 753, 537 N.Y.S.2d 1, 533 N.E.2d 1030 (1988). We reexamine several of these decisions in detail *infra*.

in original) (quoting 40 Pa. Stat. and Cons. Stat. Ann. § 1303.731(a)). We found that a limitation on rate-setting and a requirement that the Commissioner approve deficits were not meaningfully distinguishable from regulations applicable to other private insurers in the Commonwealth. *Id.* at 536-37. And we noted that it was not the MCARE Act but the Association's own plan of operations which set procedures for dissolution. *Id.* at 537. Hence, we held that the Association is no more a Commonwealth entity "than any other private insurer authorized to write insurance in the state." *Id.*

Turning to the nature of the Association's surplus funds, we noted that the Association has never received public funding and that the MCARE Act (as it then-existed) expressly disclaimed state responsibility for the Association's debts and liabilities. *Id.* at 537-38 (citing 40 Pa. Stat. and Cons. Stat. Ann. § 1303.731(c)). We also underscored that the Association is sustained exclusively by private premiums, "paid by private parties in exchange for private insurance coverage," as well as investment income and interest generated on those premiums. *Id.*

For these many reasons, we held as a matter of law that the Joint Underwriting Association is a private entity and that its surplus funds are private property. *Id.* at 538. We observed that the Commonwealth made a choice when it created the Association in 1975, and that its choice has present-day constitutional consequences:

> The legislature had the option to tightly circumscribe the Association's operations

> and composition of its board, to establish the Association as a special fund within the state's treasury, or to retain meaningful control in any number of other ways. That the General Assembly chose to achieve a public health objective through a private association has a perceptible benefit: it assures availability of medical professional liability coverage throughout the Commonwealth at no public cost. By the same token, it also has a consequence: the General Assembly cannot claim *carte blanche* access to the Association's assets.

Id. (citations omitted). The result, we said, is that the Commonwealth cannot take private property acquired by the Association without just compensation. *Id.*

The *essentia* of our holding in *JUA I* is that the state "released the Association from any residual sovereign mooring" when it relinquished control of the Association to the board and disclaimed responsibility therefor. *JUA II*, 328 F.Supp.3d at 410 (quoting *JUA I*, 324 F.Supp.3d at 538). The question raised in the matter *sub judice* is whether the Commonwealth, through Act 41, can reclaim the Association as a purely governmental entity and gain access to its surplus funds. The Association asks the court to assign *res judicata* effect to our judgment in *JUA I* and answer this inquiry in the negative. Defendants rejoin that the answer is an unequivocal "yes," insisting that the court either reconsider and abandon *JUA I* or find it to be distinguishable given the new statutory landscape brought by Act 41.

2. Issue Preclusion

The Joint Underwriting Association invokes the doctrine of issue preclusion, also referred to as collateral estoppel. Federal law of issue preclusion derives from the Restatement (Second) of Judgments, which provides that "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. —, 135 S.Ct. 1293, 1303, 191 L.Ed.2d 222 (2015) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. LAW INST. 1980)); *Nat'l R.R. Passenger Corp. v. Pa. Pub. Util. Comm'n*, 288 F.3d 519, 525 (3d Cir. 2002) (same). Four elements are prerequisite to application of issue preclusion: "(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigating the issue was fully represented in the prior action."[4] *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458

4. The executive defendants articulate a somewhat different formulation, quoting from the Third Circuit's decision in *Gregory v. Chehi*, 843 F.2d 111, 122 (3d Cir. 1988). (Doc. 57 at 3-4). The court in *Gregory* was applying Pennsylvania law to determine the preclusive effect of a Pennsylvania state court judgment. *Id.* at 116, 122. Because *JUA I* is a federal court decision on a federal question, we apply federal law of preclusion. *See Doe v. Hesketh*, 828 F.3d 159, 171 (3d Cir. 2016) (citing *Paramount Aviation Corp. v. Agusta*, 178 F.3d 132, 145 (3d Cir. 1999)).

F.3d 244, 249 (3d Cir. 2006) (citation omitted). The Third Circuit has also considered two additional elements, to wit: "whether the party being precluded 'had a full and fair opportunity to litigate the issue in question in the prior action,'" and "whether the issue was determined by a final and valid judgment." *Id.*

The Joint Underwriting Association contends that resolution of the dispositive issue in this case begins and ends with *JUA I*. But collateral estoppel generally will not apply when "controlling facts or legal principles have changed significantly since the [prior] judgment." *Karns v. Shanahan*, 879 F.3d 504, 514 (3d Cir. 2018) (alteration in original) (quoting *Montana v. United States*, 440 U.S. 147, 155, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979)). We are here presented with a different legislative act and a different constitutional question than were before us in *JUA I*. At issue there was whether the Joint Underwriting Association was a public or private entity, and whether its funds were public or private property. *See JUA I*, 324 F.Supp.3d at 529-38. We held that both the Association and its funds were private in nature and that the state could not take those funds without just compensation. *See id.* at 538.

The issue now before the court is different. As we have already framed it, the dispositive inquiry is "[w]hether the Commonwealth can now recapture the Association through *post hoc* legislation—irrespective of private rights and interests accrued by the Association over more than four decades"—without constitutional consequence. *See JUA II*, 328 F.Supp.3d at 410-11. Our disposition of the Fifth Amendment issue raised by Act 41 is assuredly

informed by *JUA I*. And many of the same constitutional concerns are implicated by this newest legislation. But the enactment of Act 41 alters the legal landscape, compelling scrutiny anew. Accordingly, we cannot find that the issues raised in *JUA I* are "identical" to the issues presently before the court.

3. Merits

We turn to the merits and begin from a simple premise: the Association, as it existed on May 17, 2018, is a private entity, and its funds are private property that cannot be taken by the government without just compensation. *See JUA I*, 324 F.Supp.3d at 538. From there, the parties' arguments take three divergent tacks. The executive defendants contend that Act 41 merely complies with *JUA I* by implementing criteria set forth therein to reconstitute the Association as a public entity. The legislative defendants assert that the holding in *JUA I* is in error, that the Joint Underwriting Association is a public entity in which the Commonwealth alone is interested, and that the state can do with the Association what it pleases. And the Association maintains that Act 41, like its predecessor Act 44, effects an unconstitutional taking of its private property. The court addresses each argument *seriatim*.

a. Executive Defendants: Answering *JUA I*

The executive defendants rely on Act 41 itself as the answer to the constitutional inquiry before the court.

They remonstrate that Act 41 checks each of the boxes drawn by *JUA I* to transform the Association into a Commonwealth entity. (*See* Doc. 44 at 6-11). They answer the court's inquiry of whether the state can retrospectively recapture a private entity and assume ownership of its private property with a firm but wholly unsupported "yes." (*Id.* at 6-9).

We expressed skepticism at the preliminary injunction stage with respect to this contention, which we construed as intimating that "with a legislative vote and the stroke of the Governor's pen, what were private funds yesterday may become public funds tomorrow." *JUA II*, 328 F.Supp.3d at 410. We further observed that, notwithstanding the "wide leeway" rightly accorded to legislative prerogative, the executive defendants had offered no jurisprudential support for their claim that the Commonwealth could transfigure into public property what the court had already declared to be private. *Id.* at 410 (quoting *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71, 99 S.Ct. 383, 58 L.Ed.2d 292 (1978)).

The executive defendants offer no meaningful response to our expressed concerns. They move through the components parts of Act 41, explaining how each "answers" and satisfies the public-entity hallmarks found to be lacking in *JUA I*. (*See* Doc. 44 at 6-9). But they fail to provide any authority for the proposition that the state can declare public what it created as—and a court has confirmed to be—a private entity. The law is to the contrary. Indeed, the Supreme Court's takings jurisprudence expressly rejects the suggestion that the

state, by legislative say-so, may make public what was previously private, admonishing that "a State, by *ipse dixit*, may not transform private property into public property without just compensation." *Webb's Fabulous Pharms., Inc.*, 449 U.S. at 164, 101 S.Ct. 446. Accordingly, we will deny the executive defendants' motion for summary judgment on the Joint Underwriting Association's takings claim.

b. Legislative Defendants: Revisiting *JUA I*

The legislative defendants do not engage with the constitutionality of Act 41 directly. They approach this case similarly to *JUA I*, reviving their assertion that the General Assembly created the Joint Underwriting Association, and that only the Commonwealth is interested in the Association, such that the Association necessarily is a public entity and its funds public property. No change in law, fact, or perspective supports the requested departure from *JUA I*. It is this court's view that the legislative defendants' assertions of error are most appropriately raised in the pending direct appeal of *JUA I*. Nonetheless, for the sake of completeness, we respond to those arguments herein.[5]

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5. The General Assembly defendants also resurrect their political subdivision standing doctrine argument. Specifically, defendants challenge this court's determination in *JUA I* that the extension of that doctrine recognized in *Pocono Mountain Charter School v. Pocono Mountain School District*, 908 F.Supp.2d 597 (M.D. Pa. 2012), does not apply to an entity like the Joint Underwriting Association which has no municipal characteristics

The legislative defendants turn first to the Supreme Court's decision in *Trustees of Dartmouth College v. Woodward* ("*Dartmouth*"), 17 U.S. (4 Wheat.) 518, 4 L.Ed. 629 (1819), which they claim reinforces their assertion that the General Assembly retains "absolute discretion over the entities it creates." (Doc. 37 at 17). Defendants hold *Dartmouth* up for their view that a state's power over entities it creates turns exclusively on the "presence or absence of non-state interests." (*Id.* at 18 (emphasis omitted)). We agree that the existence of non-state interests is to be considered in assessing whether the state may wield its power, unrestrained by the federal Constitution, over an entity. We disagree, however, that this is the only relevant consideration, or that our decision in *JUA I* in any way conflicts with *Dartmouth*.

Dartmouth arose under the Contract Clause of the United States Constitution. In 1754, Reverend Eleazer Wheelock established Dartmouth College at his own and other private benefactors' expense, named trustees thereof, and applied to the crown for a charter of incorporation. *Id.* at 631. The charter was granted and Dartmouth College was born. *Id.* at 631-32. In 1816, the legislature of New Hampshire attempted to amend the charter to seize control of the college as a public institution. *See id.* at 626-27. The *Dartmouth* lawsuit followed.

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or powers. We again conclude that the relationship between the Commonwealth and the Association is not "sufficiently analogous" to that between a state and its municipalities to support invocation of the political subdivision standing doctrine. We incorporate and reaffirm our analysis in *JUA I* on this subject. *See JUA I*, 324 F.Supp.3d at 530-31.

Appendix E

The Supreme Court rejected the attempted takeover as a violation of the Contract Clause. The decision establishes that the United States Constitution does not bar the state from regulating its own public institutions but *does* protect private corporations as against the state. *See id.* at 630-31, 638. Whether an entity is a public or private institution turns not on the commercial or charitable nature of the services provided, *see id.* at 669-73 (Story, J., concurring), but on the entity's status *vel non* as an "instrument[] of government," *see id.* at 638 (Marshall, C.J.). The Court stated that a government charter is a "grant of political power" and establishes a public entity "if it create a civil institution, to be employed in the administration of the government, or if the funds of the [entity] be public property, or if the state . . . , as a government, be alone interested in its transactions." *Id.* at 629-30. Where it creates such an institution, the government "may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States." *Id.* at 630.

Concurring justices endeavored to put a finer point on the distinction. Justice Washington compared governmental entities, which he described as "the mere creature of public institution, created exclusively for the public advantage, without other endowments than such as the king, or government, may bestow upon it, and having no other founder or visitor than the king or government," with private institutions, those "endowed and founded by private persons, and subject to their control, laws and visitation, and not to the general control of the government." *Id.* at 661 (Washington, J., concurring).

Justice Story added that a public entity exists solely for a "public purpose[]" and "its whole interests and franchises are the exclusive property and domain of the government itself." *Id.* at 668-69, 672 (Story, J., concurring). By contrast, he said, where "the foundation be private, though under the charter of the government, the corporation is private." *Id.* at 668-69.

The legislative defendants posit that the Joint Underwriting Association is precisely the governmental instrument contemplated by *Dartmouth*, maintaining that the Commonwealth and only the Commonwealth is interested in its business. (Doc. 53 at 8). But as three lawsuits, more than a thousand pages of briefing, and multiple judicial opinions evince, the constitutional question *sub judice* is quite different from that presented in *Dartmouth*. Yes, the General Assembly did create the Association in response to a medical malpractice insurance crisis in the Commonwealth. But in the same act that created the Association, the legislature relinquished near-total control thereof and renounced responsibility therefor, establishing the Association as a nonprofit with its own statutory rights, disclaiming liability for its debts and obligations, and vesting all powers and duties in its member-led board. *See JUA I*, 324 F.Supp.3d at 536. We discern no tension between *Dartmouth* and *JUA I*. The Association does not neatly fit into any of the categories of public entities described in *Dartmouth*: it is not, as defendants submit, "a civil institution . . . employed in the administration of the government"; it has never been funded by or endowed with "public property"; and the state has never been "alone interested in its transactions." *See Dartmouth*, 17 U.S. (4 Wheat.) at 629-30.

It is for this reason that we looked to other cases involving constitutional claims brought by state-created insurance associations. The legislative defendants also oppugn our assessment of those opinions, which included the Fifth Circuit's decision in *Texas Catastrophe Property Insurance Ass'n v. Morales*, 975 F.2d 1178 (5th Cir. 1992); the First Circuit's decisions in *Asociación de Subscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1 (1st Cir. 2007), and *Arroyo-Melecio v. Puerto Rican American Insurance Co.*, 398 F.3d 56 (1st Cir. 2005); and the New York Court of Appeals' decision in *Medical Malpractice Insurance Ass'n v. Superintendent of Insurance* ("*MMIA*"), 72 N.Y.2d 753, 537 N.Y.S.2d 1, 533 N.E.2d 1030 (1988). In each of those cases, we determined, the courts "holistically examined the entity's relationship to the state," by examining such considerations as the "nature of the association's function, the degree of control reserved in the state (or the level of autonomy granted to the association), and the statutory treatment, if any, of the entity, in addition to the nature of the funds implicated." *JUA I*, 324 F.Supp.3d at 535 (citations omitted).

The legislative defendants asseverate that these cases stand, at most, for the proposition that "a state-created entity may *sometimes* assert constitutional claims on behalf of private citizens," but only when the individual rights of those private citizens are themselves implicated. (Doc. 37 at 24 (emphasis added)). For example, in *Morales*, the Fifth Circuit held that the statutorily-established Texas Catastrophe Property Insurance Association (CATPOOL) was not in fact "part of the

state" and had standing to sue Texas for deprivation of its right to counsel. *See Morales*, 975 F.2d at 1182-83. In *Asociación*, the First Circuit concluded that Puerto Rico's statutorily-established joint underwriting association could assert a takings claim against the government. *See Asociación*, 484 F.3d at 20 (quoting *Arroyo-Melecio*, 398 F.3d at 62). Defendants assert that these results obtained solely because member companies shared in the respective associations' profits and losses, such that the state alone was not interested in the associations' success or failure. (Doc. 53 at 12-14). According to defendants, the Constitution protected the "private interests" of the associations' members but did not protect the insurance associations themselves. (*Id.* at 12).

We disagreed with defendants' narrow characterization of these decisions in *JUA I*, and we do so again now. The *Morales* court did note that CATPOOL's members shared in its profits and losses. *Morales*, 975 F.2d at 1182-83. But it *also* observed, as we did in *JUA I*, that the state treasury was not liable for CATPOOL's debts or losses; that the state chose not to fund CATPOOL with taxpayer dollars and had elected not to organize and control it within the state government itself; and that the nature of the funds in question was entirely private, to wit: "private money directed to pay private claims." *Id.* Channeling *Dartmouth*, the *Morales* court concluded that "[t]he act creating CATPOOL is not a 'grant of political power,' as in the case of a municipality or other political subdivision," nor is CATPOOL "'employed in the administration of the government.'" *Id.* at 1183 (citing *Dartmouth*, 17 U.S. (4 Wheat.) at 629-30). The court held that CATPOOL was not

"truly a part of the state" and thus possessed and could sue for violation of its right to counsel. *Id.*

The First Circuit reasoned similarly in determining that Puerto Rico's statutorily-created joint underwriting association is private in nature and has standing to assert a constitutional claim against its creator. *See Asociación*, 484 F.3d at 20 (citing *Arroyo-Melecio*, 398 F.3d at 62). The court in *Asociación* drew on its earlier decision in *Arroyo-Melecio*, an antitrust case, which discussed at length the relationship between the underwriting association and the government. *See id.* The court recognized that the legislature created the association, dictated its form and purpose, exempted the association's profits from income taxes, and held approval power over its operating plan. *See Arroyo-Melecio*, 398 F.3d at 61-63. It nonetheless found that the association was not a governmental entity, highlighting that the association's members, not the government, shared in its profits and losses and bore its insurance risk alone; that the association managed its own affairs; that it had "general corporate powers" to sue and be sued, enter contracts, and hold property; that it was designated by statute as "private in nature, for profit"; and that, although the association was "under some direction by the commonwealth," the commissioner was neither a member of its board nor involved in its "day-to-day affairs." *See id.* Each of these factors, not just member financial interest, informed the First Circuit's conclusion that the association is more akin to an ordinary private insurer than it is part of the state. *See id.* The court accordingly allowed the association to bring a Section 1983 takings claim against government officials. *See Asociación*, 484 F.3d at 20 (citing *Arroyo-Melecio*, 398 F.3d at 62).

Appendix E

Defendants cite to the New York Court of Appeals' decision in *MMIA*, the only case where a court found that a statutorily-created insurer could not sue the state. The appeals court looked to the statutory scheme creating New York's Medical Malpractice Insurance Association ("MMIA") and determined that the MMIA could not directly assert a takings claim against the superintendent of insurance. *See MMIA*, 537 N.Y.S.2d 1, 533 N.E.2d at 1036-37. In reaching that result, the court underscored many of the same factors that we weighed in *JUA I*: it noted that the state and the superintendent of insurance tightly controlled the association[6]; that the statutory framework comprehensively outlined the association's rights, duties, and obligations; that the MMIA "may operate only for fixed periods of time" and only if the superintendent of

6. Defendants note that, when *MMIA* was decided, the New York statute gave private insurer members an eight-seat majority on the MMIA board, reserving only seven seats for state appointees. (Doc. 37 at 27-28). Defendants intimate that the ceding of control to the insurer members blurs any meaningful distinction between the Commonwealth's Joint Underwriting Association and New York's MMIA. (*Id.*) Defendants misapprehend the court's prior analysis. We observed in *JUA I* that the New York statute creating the MMIA "dictat[ed] the composition of its board and its plan of operation." *JUA I*, 324 F.Supp.3d at 534, 536. We did so as part of a broader analysis contrasting the "exhaustive statutory framework" governing the MMIA with the skeletal treatment accorded the Association in the MCARE Act. *See id.* Our point was not about who controlled the MMIA's board at any given time, but rather that the New York legislature had dictated the board's composition by statute (expressly reserving at least some seats for state appointees), whereas the MCARE Act left the question of board composition to the Association itself.

insurance deemed its function necessary; and that its "operations are subject to the Superintendent's extensive and direct control." *Id.* The court held that the association was part of the state and could not raise a takings claim. *Id.*

In closing, the court noted what it was not deciding: whether the regulations at issue may be confiscatory as to "the individual insurance companies which are members of MMIA and are required to make up any deficit which may be incurred by MMIA." *Id.*, 537 N.Y.S.2d 1, 533 N.E.2d at 1037. The legislative defendants invoke this afterthought as support for their view that a state-created institution cannot claim constitutional protection against its creator unless it is defending "*individual* property interests" in a representative capacity. (Doc. 53 at 15). We are unpersuaded that the *MMIA* court intended its *obiter dictum*, offered only after extensive discussion of MMIA's statutory framework and the extensive degree of state control, as the ultimate and singular delimiter of constitutional capacity to sue.[7]

7. We note that, even if we were to adopt the legislative defendants' construction that member interest is the lone prerequisite to suit, the record establishes that the Joint Underwriting Association's members *do* have some interest in the Association. The Association is organized as a nonprofit, and, by law, member companies do not share in profits as they did in *Asociación* and *Morales*. The Association's reserves and its surplus are its first line of financial defense in the event it suffers a loss. (*See* Doc. 33 ¶¶ 72-74). But thereafter, it is the Association's member insurance companies, *not* the Commonwealth, that would be held to account: under the Association's current plan of operations, members may be assessed to make up any loss until

As in *JUA I*, we again reject the suggestion that a statutorily-created insurance association may bring suit against the state only if the association's members have some personal stake in the entity—and then only on behalf of those members. We simply do not read the applicable authorities as espousing such a rule. Consequently, we maintain our holding from *JUA I* that a holistic approach, one which thoroughly examines the association's relationship to the state through the prism of, *inter alia*, its function, autonomy, and statutory treatment as well as the nature (including the source) of its funds, best answers whether a statutorily-created nonprofit is private or public for constitutional purposes.

The Joint Underwriting Association, since its inception, has been a private institution. It has operated just like a private insurance company for decades.[8] It is

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the Association can borrow sufficient funds to satisfy its deficit, repay borrowed funds, and reimburse members for assessments. (Doc. 33-6 at 3). Although the degree of member interest is not as enduring or direct as the member interest in *Asociación* and *Morales*, it is member interest nonetheless and belies defendants' assertion that the state is "alone" interested in the Association.

8. The legislative defendants insist throughout their briefing that the public-private distinction should not be drawn based on "the commercial or charitable nature" of the entity's services. (*See*, *e.g.*, Doc. 37 at 18-19). Drawing on Justice Story's concurring opinion in *Dartmouth* for the proposition that state-created entities can include commercial endeavors such as colleges, hospitals, and banks, the legislative defendants urge that "the 'commercial' purpose of a state-created entity does not remove it from [state] control." (*Id.* at 19 (citing *Dartmouth*, 17 U.S. (4

privately funded and organized and has never received public funding. Until Act 41, the Commonwealth explicitly disclaimed any responsibility for the Association's debts and liabilities. The Association covers its own operating expenses and bears its own aggregate insurance risk. Its plan of operations contemplates borrowing and reimbursable member assessments, not state financial support, in the event of a deficit. In stark contrast to *MMIA*, the Association is subject to minimal supervision by the Commissioner, in a manner not meaningfully different from private insurers. Given all of this, we will deny the legislative defendants' request that we reconsider and abandon our analysis and holding in *JUA I*.

We lastly address the legislative defendants' suggestion that this court's decision in *JUA I* conflicts with principles of federalism and deference to state legislative action. Defendants charge that "federal courts should not wield the federal constitution like a ruler, rapping knuckles

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Wheat.) at 669 (Story, J., concurring)). To be quite clear, *JUA I* did not hold that a commercial purpose renders an institution private rather than public. Rather, we determined that an entity's function, and particularly the manner in which it accomplishes that function in relation to the state, is but one factor to consider in assessing public-versus-private status. When we examined the Joint Underwriting Association's function, we considered not only its commercial purpose, but how it effected that purpose, including the source of the funds, where its risk was borne, and its mode of operation anent the state. Each of these elements informed our overall assessment of the Association's relationship to the Commonwealth. We neither held nor intended to imply that the Association is a private entity solely because it engaged in commercial activities.

whenever they disagree with state governance." (Doc. 37 at 16). We agree, as we have at each stage of these lawsuits, that the legislature has wide discretion to experiment with its police powers. The Supreme Court observed as much in *Dartmouth*, stating that federal courts charged with constitutional review of state legislative acts must approach their task with "cautious circumspection." *Dartmouth*, 17 U.S. (4 Wheat.) at 625. That deference is not without limitation, however, and federal courts also have an obligation to hear the constitutional cases properly brought before them. *See id.* As the Supreme Court aptly noted, "however irksome the task may be, this is a duty from which we dare not shrink." *Id.* Our holdings in *JUA I* and here today flow not from our disagreement with exercise of legislative prerogative but from what the Fifth Amendment deems to be an unconstitutional abuse thereof.

c. The Instant Takings Claim

The only inquiry that remains is whether the Joint Underwriting Association is entitled to judgment as a matter of law on its Takings Clause claim. We conclude that no genuine disputes of material fact persist and that the Association is entitled to summary and declaratory judgment. Act 41 is a repackaged and more intricate version of Act 44. The new legislation endeavors to do indirectly what *JUA I* told the Commonwealth it could not do directly. The only difference is that Act 41 amplifies its predecessor: where Act 44 purported to take only a portion of the Association's surplus funds, *see* Act 44, § 1.3, Act 41 attempts to take all of the Association's assets and

to extinguish it as presently—privately—constituted, *see* Act 41, §§ 3-5.

The executive defendants reprise their argument that Act 41 does not contravene the Fifth Amendment because it does not "take" anything from the Joint Underwriting Association. (Doc. 44 at 9 n.1). They aver that the Association will continue to exist as a statutory entity within the Department, "albeit as a new legislative manifestation," such that "the funds are not being taken by a new owner." (*Id.*) We rejected this argument at the preliminary injunction stage, and we reject it again now. Act 41 transfers complete control of the Association to the Commonwealth and grants ownership and authority over the Association's assets thereto. The Act dismantles a private entity as it currently exists and transfers its assets *in toto*, as well as its administration, to the Commonwealth. There is, in this court's view, no genuine dispute as to whether Act 41 impermissibly takes the private property of a private entity without just compensation.

We acknowledge that the instant constitutional question is both novel and complex. The General Assembly must be afforded a wide berth to enact and to amend legislation in furtherance of its preferred objectives. But when it chooses to create a private entity to meet those objectives, in which the state is not alone or, indeed, at all interested, and over which the state retains virtually no control, that legislative discretion is bounded by the federal Constitution. This is precisely the case with the Joint Underwriting Association. We hold that the Fifth Amendment prohibits the Commonwealth from taking

the private assets of the Association, either directly as in Act 44 or through the hostile takeover effected by Act 41, without just compensation.

B. Permanent Injunctive Relief

Before the court may grant permanent injunctive relief, the Joint Underwriting Association must prove: *first*, that it will suffer irreparable injury absent the requested injunction; *second*, that legal remedies are inadequate to compensate that injury; *third*, that balancing of the respective hardships between the parties warrants a remedy in equity; and *fourth*, that the public interest is not disserved by an injunction's issuance. *See eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006) (citations omitted). Only the executive defendants dispute the remaining prerequisites for a permanent injunction. The legislative defendants do not address the issue and ostensibly yield the point. We find permanent injunctive relief to be both appropriate and necessary.

That Act 41 works an immediate and irreparable harm upon the Association is hardly debatable. And that harm cannot be remedied by monetary damages. *See JUA II*, 328 F.Supp.3d at 411. As we previously observed, and as the record bears out, Act 41 redoubles the harm of Act 44, "dismantling the Association as presently constituted, ousting its board and president to be replaced by political appointees, and forcing it to transfer *all* of its assets to the Commonwealth." *Id.* (citing Act 41, § 3). Sovereign immunity would foreclose an award of monetary damages

in this suit against the Commonwealth, *see Edelman v. Jordan*, 415 U.S. 651, 663, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Christ the King Manor, Inc. v. Sec'y U.S. Dep't of Health & Human Servs.*, 730 F.3d 291, 319 (3d Cir. 2013), such that equity alone provides the appropriate remedy, *see Temple Univ. v. White*, 941 F.2d 201, 214-15 (3d Cir. 1991).

The public interest generally favors vindication of constitutional rights. The executive defendants counter, as they have before, that the public also has a considerable interest in legislative discretion and an unencumbered lawmaking process reflecting the public will. Defendants proffer no concrete harm (to the government or to the public) beyond this bare assertion. Their claim of abstract injury to public interest does not outweigh the actual constitutional injury to the Association. We do not doubt that the legislative and executive defendants had the public interest in mind when enacting Act 41 and continue to act in the name of that interest. We do not question that the public interest favors a balanced budget and the free and representative exercise of the legislative prerogative. But as we have stated both in this case and its predecessor, the Commonwealth cannot achieve a legitimate end through unconstitutional means. *See JUA II*, 328 F.Supp.3d at 412; *JUA I*, 324 F.Supp.3d at 540. We will grant the Association's request for permanent injunctive relief.

IV. Conclusion

The executive defendants assert, and the legislative defendants imply, that our decisions in *JUA I* and

today are "tantamount to holding that the legislative and executive branches are barred from amending . . . legislation related to the [Association]." (Doc. 57 at 29; *see also* Doc. 37 at 15-17). We resolutely disagree. This court does not hold, and has never held, that the General Assembly cannot repeal or amend the statute designating the Association as the state's insurer of last resort for medical professional liability coverage and assume the task of providing that coverage itself through a special fund within the Department or through a separate entity in which the state and the state alone has an interest. Counsel for the Association concedes that the General Assembly has authority to do all of these things. What happens to the Association and to its private funds at that hypothetical juncture is not before this court. We do not speculate whether the Association might, for example, continue as a private insurer and offer ordinary medical professional liability or other types of insurance. We hold only that the Commonwealth cannot take the Association's private property in the manner contemplated by Act 41.

We reiterate what we observed in closing in *JUA I*: when it created the Joint Underwriting Association, the General Assembly chose to solve a public health problem through a private, nonprofit association, over which the Commonwealth retained limited control, in which the Commonwealth had no financial interest, and for which the Commonwealth bore no responsibility. The Commonwealth cannot legislatively recapture this private association for the purpose of accessing its assets. The provisions of Act 41 which attempt to accomplish that objective are violative of the Takings Clause of the Fifth Amendment to the United States Constitution.

Appendix E

We will grant summary and declaratory judgment and permanent injunctive relief to the Joint Underwriting Association. An appropriate order shall issue.

/s/_____
Christopher C. Conner, Chief Judge
United States District Judge
Middle District of Pennsylvania

Dated: December 18, 2018

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, FILED DECEMBER 18, 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:18-CV-1308
(Chief Judge Conner)

PENNSYLVANIA PROFESSIONAL LIABILITY JOINT UNDERWRITING ASSOCIATION,

Plaintiff,

v.

TOM WOLF, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Defendants.

Filed December 18, 2018

ORDER

AND NOW, this 18th day of December, 2018, upon consideration of the cross-motions (Docs. 36, 39, 43) for summary judgment pursuant to Federal Rule of Civil Procedure 56, and for the reasons stated in the accompanying memorandum, it is hereby ORDERED that:

Appendix F

1. The motion (Doc. 39) for summary judgment by the Pennsylvania Professional Liability Joint Underwriting Association ("the Association") is GRANTED as to the Association's Takings Clause claim. The balance of the Association's motion (Doc. 39) is denied as moot.

2. The motion (Doc. 36) for summary judgment by Joseph B. Scarnati, President *Pro Tempore* of the Senate; Jay Costa, Minority Leader of the Senate; Michael Turzai, Speaker of the House of Representatives; and Frank Dermody, Minority Leader of the House of Representatives (together, "the legislative defendants"), is DENIED.

3. The motion (Doc. 43) for summary judgment by Tom Wolf, Governor of the Commonwealth, and Jessica K. Altman, Insurance Commissioner of Pennsylvania (together, "the executive defendants"), is DENIED.

4. It is ORDERED and DECLARED that Sections 3, 4, and 5 of Act 41 of 2018, P.L. 273, No. 41 ("Act 41"), are unconstitutional in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and enforcement thereof is hereby and permanently ENJOINED.

5. The Clerk of Court shall enter declaratory judgment in favor of the Association and against the legislative and executive defendants as set forth in paragraph 4.

6. The Association shall address *the nonappearance and failure to plead or otherwise respond of the General Assembly of the Commonwealth of Pennsylvania*, (*see* Doc. 59 at 11 n.2), by separate filing within seven (7) days of the date of this order.

/s/_____
Christopher C. Conner, Chief Judge
United States District Judge
Middle District of Pennsylvania

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, FILED MAY 18, 2018

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:17-CV-2041

PENNSYLVANIA PROFESSIONAL LIABILITY JOINT UNDERWRITING ASSOCIATION,

Plaintiff,

v.

TOM WOLF, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA,

Defendants.

Filed May 18, 2018

(Chief Judge Conner)

ORDER

AND NOW, this 18th day of May, 2018, upon consideration of the court's memorandum and order of May 17, 2018, wherein the court granted in part the motion for summary judgment filed by the Pennsylvania Professional Liability Joint Underwriting Association,

and upon the parties' request for clarification of the scope of the court's order, it is hereby ORDERED that paragraph 4 of the court's order (Doc. 88) and the text of the accompanying declaratory judgment (Doc. 89) are AMENDED to read as follows:

> It is ORDERED and DECLARED that Section 1.3 and Section 13 of Act 44 of 2017, P.L. 725, No. 44 (Oct. 30, 2017), to the extent those sections pertain to the Pennsylvania Professional Liability Joint Underwriting Association, are unconstitutional in violation of the Fifth and the Fourteenth Amendments to the United States Constitution, and enforcement thereof is hereby and permanently ENJOINED.

/s/ Christopher C. Conner
Christopher C. Conner, Chief Judge
United States District Court
Middle District of Pennsylvania

APPENDIX H — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, FILED MAY 17, 2018

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:17-CV-2041

(Chief Judge Conner)

PENNSYLVANIA PROFESSIONAL LIABILITY JOINT UNDERWRITING ASSOCIATION,

Plaintiff,

v.

TOM WOLF, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA,

Defendant.

Filed May 17, 2018

MEMORANDUM

On October 30, 2017, defendant Tom Wolf, in his capacity as Governor of the Commonwealth of Pennsylvania, signed into law Act 44 of 2017, P.L. 725, No. 44 ("Act 44"). The Act, *inter alia*, mandates that the Pennsylvania Professional Liability Joint Underwriting

Association ("Joint Underwriting Association" or "Association") transfer $200,000,000 of its "surplus" funds for deposit into the Commonwealth's General Fund by Friday, December 1, 2017. Act 44 includes a "sunset" provision purporting to abolish the Association should it fail to comply with its deadline. The Association seeks a declaration that Act 44 violates the United States Constitution.

I. *Factual Background & Procedural History*[1]

The Joint Underwriting Association is a nonprofit association organized under the laws of the Commonwealth of Pennsylvania. (*See* Doc. 60 ¶ 1; Doc. 72 ¶ 1; Doc. 74 ¶ 1). The General Assembly created the Association in 1975 in response to a "hard market"[2] for medical malpractice

1. Local Rule 56.1 requires that a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 be supported "by a separate, short, and concise statement of the material facts, in numbered paragraphs, as to which the moving party contends there is no genuine issue to be tried." LOCAL RULE OF COURT 56.1. A party opposing a motion for summary judgment must file a separate statement of material facts, responding to the numbered paragraphs set forth in the moving party's statement and identifying genuine issues to be tried. *Id.* Unless otherwise noted, the factual background herein derives from the parties' Rule 56.1 statements of material facts. (*See* Docs. 60, 63, 65, 72, 74, 76, 77). To the extent the parties' statements are undisputed or supported by uncontroverted record evidence, the court cites directly to the statements of material facts.

2. The cyclical nature of insurance markets is described in academic literature as follows: "Property/liability insurance markets alternate between hard and soft markets in a phenomenon

insurance in the Commonwealth. (*See* Doc. 63 ¶ 1; Doc. 65 ¶ 2). The Association was initially established and organized by the Pennsylvania Health Care Services Malpractice Act of 1975, P.L. 390, No. 111 ("Act 111"). The General Assembly repealed Act 111 on March 20, 2002, enacting in its place the Medical Care Availability and Reduction of Error Act ("MCARE Act"), 40 Pa. Stat. § 1303.101 et seq.

A. The MCARE Act and the Joint Underwriting Association

The MCARE Act is a sweeping piece of legislation. The Act's overarching goal is to ensure a "comprehensive and high-quality health care system" for the citizens of the Commonwealth. *Id.* § 1303.102(1). In pursuit of this objective, the Act seeks to guarantee that medical professional liability insurance is "obtainable at an affordable and reasonable cost," to ensure prompt and fair resolution of medical negligence cases, and to reduce and eliminate medical errors. *Id.* § 1303.102(3)-(5). The Act includes patient safety rules and reporting obligations, *see id.* §§ 1303.301-.315, establishes requirements

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known as the underwriting cycle. In soft markets, underwriting standards are relaxed, prices and profits are low, and the quantity of insurance increases. In hard markets, underwriting standards become restrictive, and prices and profits increase. There are many policy cancellations or non-renewals, and policy terms (deductibles and policy limits) are tightened as the quantity of insurance coverage generally decreases." Seungmook Choi *et al., The Property/Liability Insurance Cycle: A Comparison of Alternative Methods*, 68 S. Econ. J. 530, 530 (2002).

relating to reduction and prevention of health care associated infections, *see id.* §§ 1303.401-.411, and develops standards for medical professional liability litigation and compensation, *see id.* §§ 1303.501-.516.

The MCARE Act also establishes a Medical Care Availability and Reduction of Error Fund ("the MCARE Fund"). *See id.* §§ 1303.711-.716. The General Assembly designed the MCARE Fund as a "special fund" within the state treasury to be administered by the Insurance Department of Pennsylvania ("the Department"). *Id.* §§ 1303.712(a), -.713(a). The Fund provides a secondary layer of medical professional liability coverage for physicians, hospitals, and other health care providers in the Commonwealth. *See id.* § 1303.711(g). It is funded primarily by annual assessments ("MCARE assessments") on health care providers as a condition of practicing in the Commonwealth. *See id.* § 1303.712(d)(1).

Additionally, the MCARE Act continues operation of the Joint Underwriting Association. *Id.* § 1303.731(a). Unlike the MCARE Fund, the General Assembly did not establish the Association as a "special fund" or a traditional agency within the Commonwealth's governmental structures. *See id.*; *cf. id.* §§ 1303.712(a), -.713(a). Instead, the General Assembly "established" the Association as "a nonprofit joint underwriting association to be known as the Pennsylvania Professional Liability Joint Underwriting Association." *Id.* § 1303.731(a). Like its predecessor, *see* Act 111, § 802, the MCARE Act mandates membership in the Association for insurers authorized to write medical professional liability insurance in the Commonwealth, 40

PA. STAT. § 1303.731(a). Currently, the Association has 621 member insurance companies. (Doc. 60 ¶ 43).

The Association is charged by statute with offering medical professional liability insurance to health care providers and entities who "cannot conveniently obtain medical professional liability insurance through ordinary methods at rates not in excess of those applicable to [those] similarly situated." 40 PA. STAT. § 1303.732(a). The MCARE Act sets forth broad parameters for achieving this objective, to wit:

> The [Joint Underwriting Association] shall ensure that the medical professional liability insurance it offers does all of the following:
>
> (1) Is conveniently and expeditiously available to all health care providers required to be insured under section 711.
>
> (2) Is subject only to the payment or provisions for payment of the premium.
>
> (3) Provides reasonable means for the health care providers it insures to transfer to the ordinary insurance market.
>
> (4) Provides sufficient coverage for a health care provider to satisfy its insurance requirements under section 711 on reasonable and not unfairly discriminatory terms.

(5) Permits a health care provider to finance its premium or allows installment payment of premiums subject to customary terms and conditions.

Id. § 1303.732(b)(1)-(5). The Association insures "all comers" who certify that they cannot obtain coverage at competitive rates. (P.I. Hr'g Tr. 11:3-13:8; Doc. 60 ¶ 42). According to the Association, its insureds generally fall into four categories: (1) providers with a history of malpractice occurrences, (2) providers practicing high-risk specialties, (3) providers who have gaps in coverage, or (4) providers reentering the medical profession after loss or suspension of license or voluntary withdrawal from practice. (Doc. 60 ¶ 42).

The Association, like other insurers in the Commonwealth, is "supervised" by the Department through the Insurance Commissioner ("Commissioner"). 40 Pa. Stat. § 1303.731(a); *see, e.g.*, *id.* §§ 221.1-A to -.15-A, 1181-99. The MCARE Act prescribes four "duties" to the Association. *Id.* § 1303.731(b). It requires the Association to submit a plan of operations to the Commissioner for approval. *Id.* § 1303.731(b)(1). It tasks the Association to submit rates and any rate modifications for Department approval. *Id.* § 1303.731(b)(2) (incorporating 40 PA. STAT. §§ 1181-99). It requires the Association to "[o]ffer medical professional liability insurance to health care providers" as described above. *See id.* § 1303.731(b)(3). And it directs the Association to file its schedule of occurrence rates with the Commissioner, which she uses to set a "prevailing primary premium" for calculating the annual

MCARE assessments for all health care providers in the Commonwealth. *Id.* § 1303.731(b)(4) (incorporating 40 Pa. Stat. § 1303.712(f)). The Act insulates the Commonwealth from the Association's debts and liabilities. *Id.* § 1303.731(c).

The MCARE Act provides that all "powers and duties" of the Association "shall be vested in and exercised by a board of directors." *Id.* § 1303.731(a). The board's composition, and all of the Association's operative principles, are set forth in a plan of operations developed by the Association with Department assistance and approval. (Doc. 60 ¶ 44; Doc. 63 ¶¶ 13-16); *see also* 40 PA. STAT. § 1303.731(b)(1). The plan establishes a 14-member board of directors, which consists of the current Association president; eight representatives of member companies chosen by member voting; one agent or broker elected by members; and four health care provider or general public representatives who may be nominated by anyone and are appointed by the Commissioner. (Doc. 60 ¶ 45). Under the plan, the Association may be dissolved (1) "by operation of law," or (2) at the request of its members, subject to Commissioner approval. (*Id.* ¶ 46). The plan provides that, "[u]pon dissolution, all assets of the Association, from whatever source, shall be distributed in such manner as the Board may determine subject to the approval of the Commissioner." (*Id.* ¶ 47).

The Joint Underwriting Association writes insurance policies directly to its insured health care providers. (*See* Doc. 63 ¶ 27; Doc. 65 ¶ 19). Policyholders pay premiums directly to the Association. (*See* Doc. 60 ¶ 65). The Association is funded exclusively by policyholder

premiums and investment income. (*Id.* ¶ 54). It is not and has never been funded by the Commonwealth, and it holds all premiums and investment funds in private accounts in its own name. (*Id.* ¶¶ 51, 54, 65-69). The Association currently insures approximately 250 policyholders. (Doc. 63 ¶ 26; Doc. 65 ¶ 20). The typical medical professional liability policy issued by the Association covers a one-year period, with a limit of $500,000 per claim and aggregate limits of $1,500,000 for individuals and $2,500,000 for hospitals. (Doc. 63 ¶ 27).

The Association maintains contingency funds—its "reserves" and its "surplus"—which allow the Association to fulfill its insurance obligations in the event of greater-than-anticipated claims or losses. (*See* Doc. 60 ¶¶ 108-12). An insurer's "reserves" are the "best estimate of funds . . . need[ed] to pay for claims that have been incurred but not yet paid." (*Id.* ¶ 109). Its "surplus" represents "capital after all liabilities have been deducted from assets." (*Id.* ¶ 111). The surplus operates as a "backstop" to ensure that unforeseen events do not impede an insurer's ability to meet obligations to its insureds. (*Id.* ¶ 112). As of December 31, 2016, the Joint Underwriting Association maintained a surplus of approximately $268,124,500. (*See id.* ¶ 115; Doc. 63 ¶ 32; Doc. 65 ¶¶ 23, 30).

B. Act 85 of 2016

On July 13, 2016, Governor Wolf signed into law Act 85 of 2016, P.L. 664, No. 85 ("Act 85"). Act 85 is wide-ranging in scope, but its principal effect was to amend the General Appropriation Act of 2016 and balance the Commonwealth's

budget. Act 85, § 1. Among other things, Act 85 provides for certain transfers to the Commonwealth's General Fund. *See id.* § 1(7). Pertinent *sub judice*, Section 18 of Act 85 amends the Commonwealth's Fiscal Code to require a $200,000,000 transfer to the General Fund from the Joint Underwriting Association. The relevant language states:

> Notwithstanding Subchapter C of Chapter 7 of [the MCARE Act], the sum of $200,000,000 shall be transferred from the unappropriated surplus of the Pennsylvania Professional Liability Joint Underwriting Association to the General Fund. The sum transferred under this section shall be repaid to the Pennsylvania Professional Liability Joint Underwriting Association over a five-year period commencing July 1, 2018. An annual payment amount shall be included in the budget submission required under Section 613 of the Act of April 9, 1929 (P.L. 177, No. 175), known as the Administrative Code of 1929.

Id. § 18 (codified prior to repeal at 72 PA. STAT. § 1726-C).

The Association did not transfer funds to the Commonwealth pursuant to Act 85. (Doc. 60 ¶ 96). On May 18, 2017, the Association commenced a lawsuit—also pending before the undersigned—challenging the constitutionality of Act 85. *See Pa. Prof'l Liab. Joint Underwriting Ass'n v. Albright*, No. 1:17-CV-886, Doc. 1 (M.D. Pa.). The lawsuit names as the sole defendant Randy Albright in his capacity as the Commonwealth's Secretary

of the Budget. *Id.*, Doc. 12. Secretary Albright moved to dismiss the Association's complaint on August 22, 2017. *Id.*, Doc. 14. That motion is held in abeyance pending resolution of the Association's claims herein.

C. Act 44 of 2017

Governor Wolf signed Act 44 into law on October 30, 2017, in another attempt to bring balance to the state budget. Act 44, § 1. Therein, the General Assembly expressly repeals Act 85. *Id.* § 13. Act 44, *inter alia*, amends the Fiscal Code to include certain "findings" concerning the Joint Underwriting Association's relationship to the Commonwealth and the nature of its unappropriated surplus. *Id.* § 1.3. The General Assembly in Act 44 specifically "finds" as follows:

> (1) As a result of a decline in the need in this Commonwealth for the medical professional liability insurance policies offered by the joint underwriting association under Subchapter B of Chapter 7 of the MCARE Act, and a decline in the nature and amounts of claims paid out by the joint underwriting association under the policies, the joint underwriting association has money in excess of the amount reasonably required to fulfill its statutory mandate.
>
> (2) Funds under the control of the joint underwriting association consist of premiums paid on the policies issued under Subchapter B of Chapter 7 of the MCARE Act and income

> from investment. The funds do not belong to any of the members of the joint underwriting association nor any of the insureds covered by the policies issued.
>
> (3) The joint underwriting association is an instrumentality of the Commonwealth. Money under the control of the joint underwriting association belongs to the Commonwealth.
>
> (4) At a time when revenue receipts are down and the economy is still recovering, the Commonwealth is in need of revenue from all possible sources in order to continue to balance its budget and provide for the health, welfare and safety of the residents of this Commonwealth.
>
> (5) The payment of money to the Commonwealth required under this article is in the best interest of the residents of this Commonwealth.[3]

Id. Following these findings, Act 44 mandates the monetary transfer at the heart of this litigation: "On or before December 1, 2017, the joint underwriting association shall pay the sum of $200,000,000 to the State

3. Act 44 twice references Subchapter *B* of Chapter 7 of the MCARE Act in describing the Association's function. The court notes that it is Subchapter *C* of Chapter 7 of the MCARE Act that establishes and defines the Association and its mission. *See* 40 PA. STAT. §§ 1303.731-.733.

Treasurer for deposit into the General Fund." *Id.* Per the Act, the funds shall be appropriated by the General Assembly to the Department of Human Services "for medical assistance payments for capitation plans." *Id.*

Act 44 contains two additional pertinent provisions. Its "no liability" clause purports to immunize the Association as well as its officers, board of directors, and employees from liability arising from the transfer mandated by Act 44. *Id.* It also contains a "sunset" clause which threatens to abolish the Association if it fails to meet the Act's demands. *Id.* Specifically, that clause states that if the Association fails to transfer the $200,000,000 by the Act's deadline, the provisions of the MCARE Act creating it will immediately expire, the Association will be abolished, and its assets will be transferred to the Insurance Commissioner for administration of the Association's functions. *Id.* Act 44 then directs the Insurance Commissioner to transfer the $200,000,000 for deposit into the Commonwealth's General Fund "as soon as practicable after receipt." *Id.*

D. Procedural History

The Association commenced the instant litigation on November 7, 2017, challenging the constitutionality of Act 44. In its verified complaint, the Association asserts that Act 44 violates the Substantive Due Process Clause, the Takings Clause, and the Contract Clause, as well as the doctrine of unconstitutional conditions. The Association seeks declaratory and injunctive relief pursuant to Section 1983 and the Declaratory Judgment Act, 28 U.S.C. § 2201. The verified complaint names Tom Wolf, in his

official capacity as Governor of the Commonwealth of Pennsylvania, as defendant. With the court's leave, the General Assembly of the Commonwealth of Pennsylvania joined this litigation as intervenor defendant.

The Joint Underwriting Association sought both a temporary restraining order and preliminary injunction. We denied the temporary restraining order but accelerated proceedings on the Association's request for a preliminary injunction. Following extensive briefing by the parties and *amicus*, an evidentiary hearing, and oral argument, we preliminarily enjoined enforcement of Act 44 pending full merits review of the Joint Underwriting Association's claims. Cross-motions for summary judgment by the Joint Underwriting Association, Governor Wolf, and the General Assembly are presently before the court and ripe for disposition.

II. *Legal Standard*

Through summary adjudication, the court may dispose of those claims that do not present a "genuine dispute as to any material fact" and for which a jury trial would be an empty and unnecessary formality. FED. R. CIV. P. 56(a). The burden of proof tasks the non-moving party to come forth with "affirmative evidence, beyond the allegations of the pleadings," in support of its right to relief. *Pappas v. City of Lebanon*, 331 F. Supp. 2d 311, 315 (M.D. Pa. 2004); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). This evidence must be adequate, as a matter of law, to sustain a judgment in favor of the non-moving party on the claims. *Anderson*

v. Liberty Lobby, Inc., 477 U.S. 242, 250-57, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-89, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Only if this threshold is met may the cause of action proceed. *See Pappas*, 331 F. Supp. 2d at 315.

Courts are permitted to resolve cross-motions for summary judgment concurrently. *See Lawrence v. City of Phila.*, 527 F.3d 299, 310 (3d Cir. 2008); *see also Johnson v. Fed. Express Corp.*, 996 F. Supp. 2d 302, 312 (M.D. Pa. 2014); 10A Charles Alan Wright et al., Federal Practice and Procedure § 2720 (3d ed. 2015). When doing so, the court is bound to view the evidence in the light most favorable to the non-moving party with respect to each motion. Fed. R. Civ. P. 56; *Lawrence*, 527 F.3d at 310 (quoting *Rains v. Cascade Indus., Inc.*, 402 F.2d 241, 245 (3d Cir. 1968)).

III. *Discussion*

The Joint Underwriting Association levies a fourfold objection to Act 44 through the prism of Section 1983. It contends *first*, that Act 44 violates its right to substantive due process; *second*, that Act 44 is an unconstitutional taking of private property; *third*, that Act 44 substantially interferes with the Association's contracts with its insureds and its members; and *fourth*, that Act 44 impermissibly conditions the Association's exercise of constitutional rights. The Association asks the court to declare Act 44 unconstitutional and permanently enjoin its enforcement. Our analysis begins and ends with the Association's Takings Clause claim.

Appendix H

A. The Association's Takings Clause Claim

Section 1983 of Title 42 of the United States Code creates a private cause of action to redress constitutional wrongs committed by state officials. 42 U.S.C. § 1983. The statute is not a source of substantive rights, but serves as a mechanism for vindicating rights otherwise protected by federal law. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284-85, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002); *Kneipp v. Tedder*, 95 F.3d 1199, 1204 (3d Cir. 1996). To state a Section 1983 claim, plaintiffs must show a deprivation of a "right secured by the Constitution and the laws of the United States . . . by a person acting under color of state law." *Kneipp*, 95 F.3d at 1204 (quoting *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1141 (3d Cir. 1995)). Governor Wolf does not dispute that he is a state actor. We must thus assess whether Act 44 deprives the Association of rights secured by the Fifth Amendment to the United States Constitution.

The Fifth Amendment's Takings Clause prohibits the government from taking private property for public use without just compensation. U.S. Const. amend. V. The Takings Clause is made applicable to the states by the Fourteenth Amendment. *See* U.S. Const. amend. XIV; *Murr v. Wisconsin*, 582 U.S. __, 137 S. Ct. 1933, 1942, 198 L. Ed. 2d 497 (2017) (citing *Chi., B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1897)). It applies not only to the taking of real property, but also to government efforts to take identified funds of money. *See, e.g.*, *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 160, 164-65, 118 S. Ct. 1925, 141 L. Ed. 2d 174 (1998);

Webb's Fabulous Pharms., Inc. v. Beckwith, 449 U.S. 155, 164-65, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980). Takings claims generally fall into two categories—physical and regulatory. *See Yee v. City of Escondido*, 503 U.S. 519, 522-23, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992). The Association's claim concerns an alleged physical taking, to wit: that Act 44 is an unlawful attempt to expropriate $200,000,000 from the Association's private coffers.[4]

Governor Wolf and the General Assembly rejoin that the Association is a creature of statute—a public entity having no constitutional rights against its creator. Defendants alternatively contend, assuming *arguendo* that we deem the Association and its funds to be private in nature, that the Association has no interest in its surplus and, therefore, no "just compensation" is due. Defendants further submit that even if the Association prevails on the

4. Because this case concerns a *per se* physical taking, defendants' reliance on the Third Circuit's decision in *American Express Travel Related Services, Inc. v. Sidamon-Eristoff* ("*Amex*"), 669 F.3d 359 (3d Cir. 2012), is misplaced. The court in *Amex* addressed a regulatory taking—a statutory amendment that retroactively reduced the presumptive abandonment period for unclaimed travelers checks from fifteen to three years. *Id.* at 364-66. The court opined that "[t]hose who do business in [a] regulated field" cannot claim that a later amendment to the relevant statutory framework "interferes with its investment-backed expectations" as required for a regulatory takings claim. *Id.* at 371 (quoting *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227, 106 S. Ct. 1018, 89 L. Ed. 2d 166 (1986)). Act 44 is not a regulatory taking. It directly targets and endeavors to take money from the Joint Underwriting Association alone. *See* Act 44, § 1.3. *Amex* has no application under these circumstances.

merits, it is not entitled to permanent injunctive relief. We address defendants' arguments *seriatim*.

1. *Taking of "Private Property"*

Defendants collectively adjure that the Joint Underwriting Association is a state entity and thus cannot assert a takings claim against the Commonwealth. Their respective positions take several forms. The General Assembly invokes the political subdivision standing doctrine, which originated in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 4 L. Ed. 629 (1819). Governor Wolf urges the court to look to principles governing state actor liability developed in *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1995). Defendants then jointly remonstrate that, regardless of the doctrine applied, the Association—or at minimum its surplus funds—are public in nature. We begin with the General Assembly's argument.[5]

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5. Preliminarily, the General Assembly asserts that Act 44's *ipse dixit* statement that the Association is an "instrumentality" of the Commonwealth is enough to make it so. We rejected this argument in our preliminary injunction opinion, (*see* Doc. 41 at 22), and we reject it again now. The General Assembly's citation to *Harristown Development Corp. v. Commonwealth*, 532 Pa. 45, 614 A.2d 1128 (Pa. 1992), does not persuade us otherwise. The legislature invokes *Harristown* for the Pennsylvania Supreme Court's statement that an entity "is an agency if the General Assembly says it is." (Doc. 71 at 2-3 (quoting *Harristown*, 614 A.2d at 1131)). This selective quotation of *Harristown* divorces the decision from critical context. The plaintiff in *Harristown* sought declaratory judgment that the state could not apply open records

Appendix H

a. *The Association as a "Political Subdivision"*

Counties, municipalities, and other subdivisions owing their existence to the state generally cannot assert constitutional claims against their creator. *Trs. of Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 660-61. Such entities are creatures of the state, developed "for the better ordering of government." *Williams v. Mayor of Balt.*, 289 U.S. 36, 40, 53 S. Ct. 431, 77 L. Ed. 1015 (1933) (collecting cases). A political subdivision accordingly "has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator." *Id.* The doctrine applies equally to all of a state's "political subdivisions," barring any federal claim against the state thereby. *Williams v. Corbett*, 916 F. Supp. 2d 593, 598 (M.D. Pa. 2012) (citations omitted), *aff'd sub nom. Williams v. Gov. of Pa.*, 552 F. App'x 158 (3d Cir. 2014) (nonprecedential).

The General Assembly recognizes that the Joint Underwriting Association is not a political subdivision in the usual sense. (*See* Doc. 62 at 8-11; Doc. 71 at 12-14). It nonetheless maintains that the doctrine is "not *limited* to municipalities and subdivisions" and in fact extends to *any* state-created entity. (Doc. 62 at 9-10). The General

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and open meetings laws to it based solely on the volume of business it did with the state. *Id.* at 1129-31. The court determined that the General Assembly could define "agency"—"*as that term appears in the Sunshine Act and the Right to Know Law*"—as it saw fit. *Id.* (emphasis added). No court has extended the quoted passage from *Harristown* beyond its open records and open meetings context.

Assembly is correct that, in appropriate circumstances, courts apply the doctrine to bar Section 1983 suits by entities similar in kind to traditional political subdivisions. *See Pocono Mountain Charter Sch. v. Pocono Mountain Sch. Dist.*, 908 F. Supp. 2d 597, 606-14 (M.D. Pa. 2012); *see also Palomar Pomerado Health Sys. v. Belshe*, 180 F.3d 1104, 1107-08 (9th Cir. 1999).[6] None of these cases supports the General Assembly's suggestion that the Commonwealth is insulated from suit by *any* entity it creates.

The central inquiry in the cases cited by the General Assembly is whether a relationship between plaintiff and defendant is "sufficiently analogous" to that between a state and its municipalities. In *Pocono Mountain*, for example, the court held that the link between a public charter school and its chartering public school district was sufficiently similar to that between a municipality and the state for purposes of barring the charter school's Section 1983 lawsuit against the district. *Pocono Mountain*, 908 F. Supp. 2d at 611. In addition to the formation component, the court noted the school district's narrow circumscription

6. Both the General Assembly and Governor Wolf also identify the Eleventh Circuit's decision in *United States v. State of Alabama*, 791 F.2d 1450 (11th Cir. 1986), as a bar to the Association's lawsuit. In *State of Alabama*, the Eleventh Circuit Court of Appeals opined without analysis that the political subdivision standing doctrine applicable to cities and counties "extends logically to other creatures of the state such as state universities." *Id.* at 1456. This thin holding concerning an indisputably public university offers precious little insight to aid our analysis of a private nonprofit's relationship to the state.

of the charter school's authority, highlighting the degree of control reserved by the district, as well as the charter school's inherently municipal function. *Id.* at 611-12. Courts consistently apply *Pocono Mountain* to foreclose charter schools' suits against their chartering school districts. *See, e.g.*, *I-Lead Charter Sch.-Reading v. Reading Sch. Dist.*, No. 16-2844, 2017 U.S. Dist. LEXIS 94491, 2017 WL 2653722, at *3-4 (E.D. Pa. June 20, 2017), *appeal filed*, No. 17-2570 (3d. Cir.); *Reach Acad. for Boys & Girls, Inc. v. Del. Dep't of Educ.*, 8 F. Supp. 3d 574, 578 (D. Del. 2014). But no case has extended *Pocono Mountain* beyond its charter school context.

The General Assembly's reliance on *Palomar* is farther afield. Indeed, *Palomar* supports the Association's position that the political subdivision standing doctrine should *not* apply to it. *Palomar* involved a health care district established by a California statute as a "public corporation." *Palomar*, 180 F.3d at 1107. The district was imbued by statute with distinctly governmental functions. *See id.* at 1107-08. For example, the state statutorily authorized the district to levy taxes and issue bonds. *Id.* at 1107. The state also granted to the health care district the power of eminent domain. *Id.* The Ninth Circuit Court of Appeals had no difficulty determining that the health care district was a political subdivision of the state. *Id.* at 1108.

The Joint Underwriting Association is neither a political subdivision nor "sufficiently analogous" to one for Section 1983 purposes. The Association is not empowered with governmental authority: it has no power, for example, to tax, to issue bonds, or to exercise eminent domain.

Its mission, while beneficial to the public, is inherently nongovernmental. In the vernacular, it is an insurance business, possessing none of the traditional characteristics of a political subdivision. We are also cognizant that the Third Circuit has observed that support for the political subdivision doctrine "may be waning with time." *Amato v. Wilentz*, 952 F.2d 742, 755 (3d Cir. 1991). For all of these reasons, we decline the General Assembly's invitation to declare the nonprofit Joint Underwriting Association a "political subdivision" of the Commonwealth.

b. *The Association as the "Government Itself"*

Governor Wolf's reliance on *Lebron* fares no better. The Supreme Court in *Lebron* supplied "guideposts" for federal courts to assess whether a defendant is a government actor subject to Section 1983 liability. *See Sprauve v. W. Indian Co.*, 799 F.3d 226, 229-30, 63 V.I. 1032 (3d Cir. 2015) (citing *Lebron*, 513 U.S. 374, 115 S. Ct. 961, 130 L. Ed. 2d 902). Lebron sued the National Railroad Passenger Corporation, widely known as "Amtrak," alleging that Amtrak's rejection of his political billboard display violated the First Amendment. *See Lebron*, 513 U.S. at 376-77. Tasked to decide whether Amtrak was a proper Section 1983 defendant, the Supreme Court bypassed traditional analyses concerning whether and when private action is attributable to the state and instead asked whether Amtrak was itself a "government entity," and thus a "state actor" for purposes of Section 1983. *See id.* at 378, 383, 394-400.

The Court jettisoned Amtrak's assertion that its enabling statute—which disclaimed it as a federal agency—was dispositive. *Id.* at 392-93. Concluding that Amtrak was in fact a government entity subject to Section 1983 liability, the Court underscored two factors: *first*, that Amtrak was "established by a special statute for the purpose of furthering governmental goals," and *second*, that Amtrak was subject to extensive governmental control. *See Sprauve*, 799 F.3d at 231 (citing *Lebron*, 513 U.S. at 397-98). The Court found an "important measure of control" to be the fact that "a majority of the governing body of the corporation was appointed by the federal or state government." *See id.* To find that Amtrak was not a state actor, the Court concluded, would be to allow the government "to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." *Lebron*, 513 U.S. at 397.

As a threshold matter, an essential aspect of *Lebron*—that the federal government "retain[ed] for itself permanent authority to appoint a majority of [Amtrak's] directors," *Lebron*, 513 U.S. at 400—is indisputably lacking *sub judice*. More importantly, application of *Lebron* to the Association would betray the Court's *ratio decidendi*. The Court sought to ensure that government could not shirk constitutional *liability* by delegating its legislative prerogatives to a private corporate entity. Governor Wolf rejoins that whether a party asserts or disclaims constitutional liability is "an empty distinction," (Doc. 82 at 3 n.3), but his claim is accompanied by no citation, and the court has separately found no support therefor. Indeed, the only authority exploring Governor

Wolf's argument flatly refutes it. *See Ill. Clean Energy Comm. Found. v. Filan*, 392 F.3d 934, 938 (7th Cir. 2004) (rejecting state's reliance on *Lebron* to foreclose takings claim when state demanded that state-authorized trust turn $125 million over to state). *Lebron* has no application in this posture.[7]

c. *The Association as a "Public Entity"*

We thus come to the *essentia* of defendants' argument: that the Joint Underwriting Association is nonetheless

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7. For the same reason, we reject the General Assembly's repeated reliance on Justice Ginsburg's majority opinion in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 115 S. Ct. 394, 130 L. Ed. 2d 245 (1994), and Justice Brennan's concurrence in *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 110 S. Ct. 1868, 109 L. Ed. 2d 264 (1990). This pair of cases concerns the amenability of the Port Authority Trans-Hudson Corporation ("PATH"), a bistate railway created under the Constitution's Compact Clause, to suit in federal court. Both opinions express the unremarkable maxim that "ultimate control of every state-created entity resides with the State, for the State may destroy or reshape any unit it creates." *Hess*, 513 U.S. at 47; *see also Feeney*, 495 U.S. at 313 (Brennan, J., concurring) (noting that "political subdivisions exist solely at the whim and behest of their State"). The Justices make this point, however, in the context of explaining that such ultimate authority—which is true of *any* state-created entity—renders state control nondispositive to an Eleventh Amendment inquiry. *See Hess*, 513 U.S. at 47-48; *Feeney*, 495 U.S. at 313 (Brennan, J., concurring) (observing that political subdivisions are too far removed from the state to receive Eleventh Amendment protection "*even though* these political subdivisions exist solely at the whim and behest of their State" (emphasis added)). The General Assembly's theory that state creation is determinative finds no support in *Hess* or *Feeney*.

a public "entity" or "instrumentality" and cannot state a constitutional claim against the Commonwealth. Fortunately, in resolving this question, we do not write upon a blank slate. The Association is not the only state-created insurer-of-last-resort. Nor is the Association the first state-affiliated insurer to resist state action impacting its constitutional rights. As is often the case, examples are our best teachers. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001).

i. The Jurisprudential Landscape and Characteristics Examined

Defendants insist that we need not look beyond the fact of state creation to define the Joint Underwriting Association's relationship with the state. But for all of the ink spilled on the issue, neither defendant identifies a single decision that turns *exclusively* on the fact that an association was created by statute. Our research reveals no support for this uncritical proposition. *Per contra*, at least two federal courts have rejected defendants' position.

The First Circuit Court of Appeals, for example, dismissed the Commonwealth of Puerto Rico's contention that Puerto Rico's joint underwriting association, being "a state-created entity," lacked standing to challenge actions taken by its creator. *See Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 20 (1st Cir. 2007). The court in *Asociacion* relied on an earlier First Circuit decision that expounded the nature of the association's relationship

with the government. *Id.* (citing *Arroyo-Melecio v. Puerto Rican Am. Ins. Co.*, 398 F.3d 56, 62 (1st Cir. 2005)). The court underscored several factors, to wit: that the association's members, not the government, shared in its profits and losses; that the association, through its members, bore the risk of insuring Puerto Rico's high-risk drivers; that the association managed its own day-to-day affairs; that it had "general corporate powers" to sue and be sued, enter contracts, and hold property; and that it was designated by statute as "private in nature, for profit," and subject to Puerto Rico's insurance code. *See Arroyo-Melecio*, 398 F.3d at 61-63.

The court found that the association was not a public entity, even though it was "under some direction by the Commonwealth." *Asociacion*, 484 F.3d at 20 (quoting *Arroyo-Melecio*, 398 F.3d at 62). Indeed, the court acknowledged that the legislature created the association, dictated its form and purpose, offered tax exemptions to compensate for the association's assumption of public risks, and held approval power over the association's plan of operations. *See Arroyo-Melecio*, 398 F.3d at 61-63. On balance, the association and its funds were overwhelmingly "private in nature," *id.* at 62, and the association was held to be a proper Section 1983 plaintiff. *See Asociacion*, 484 F.3d at 20 (citing *Arroyo-Melecio* , 398 F.3d at 62).

The Fifth Circuit Court of Appeals reasoned similarly in finding that the Texas Catastrophe Property Insurance Association had standing to sue the state attorney general under Section 1983. *Tex. Catastrophe Prop. Ins. Ass'n v. Morales*, 975 F.2d 1178, 1181-83 (5th Cir. 1992). The state

of Texas established the association as an assigned risk pool to write windstorm, hail, and fire insurance policies in parts of the state, and required all property insurers to join as a condition of operating in Texas. *Id.* at 1179. The association wrote its own policies and paid its own claims, which were funded first by policyholder premiums and, as needed, from member assessments. *Id.* The state subsidized the association's losses with tax credits. *Id.* Its plan of operations was adopted by the state's board of insurance with input from the association's board of directors, a majority of which was comprised of member company representatives. *Id.* The association's board was statutorily "responsible and accountable" to the state's board of insurance. *Id.*

The association hired its own legal counsel for decades. *Id.* at 1179-80. The legislature eventually amended the relevant statute to proclaim that the association "is a state agency" and to require the association to use the state's attorney general for legal representation. *Id.* at 1180. When the association brought suit claiming a violation of its right to counsel, the attorney general rejoined that the association, as a creature of statute, is necessarily "a state agency" with no constitutional rights as against its creator. *Id.* at 1180, 1181. The Fifth Circuit disagreed. It emphasized that the state government did not contribute to the association, nor did it share in the association's losses, which were borne by the association's members alone. *Id.* The association's monies, in sum, were wholly private—"private money directed to pay private claims." *Id.* at 1183. The court observed that although the state could deprive *itself* of any constitutional right it chooses,

the association was not "truly a part of the state" for that purpose. *Id.*

The General Assembly directs the court to two cases that reached a contrary result. The first originates from the same medical malpractice insurance crisis from which the Joint Underwriting Association arose. *See Med. Malpractice Ins. Ass'n v. Superintendent of Ins. of State of N.Y.*, 72 N.Y.2d 753, 533 N.E.2d 1030, 1031, 537 N.Y.S.2d 1 (N.Y. 1988) ("*MMIA*"), *cert. denied*, 490 U.S. 1080, 109 S. Ct. 2100, 104 L. Ed. 2d 661 (1989). New York state created the Medical Malpractice Insurance Association, a nonprofit unincorporated association, to offer insurance that was "no longer readily available in the voluntary market." *Id.* The association was governed by an exhaustive statutory framework dictating the composition of its board and its plan of operation and authorizing the superintendent of insurance to unilaterally order amendments to the plan. *See* McKinney's Insurance Law §§ 5503, 5508 (1988). When the superintendent set new rates that would require the association to operate at a loss, the association challenged the reasonableness of his approach. *MMIA*, 533 N.E.2d at 1032. Pertinent here, the association complained that the rate change effected a "confiscatory" taking in violation of the state and federal constitutions. *See id.* at 1032-33.

The New York Court of Appeals dismissed the association's argument in short order. The court stated that the association "is a creature of statute, and all of its rights, obligations and duties have been defined by the Legislature." *Id.* at 1036. It noted that the statute

authorized the association to operate only during "fixed periods of time" as the superintendent deemed necessary. *Id.* And it emphasized that the association's operations were "subject to the [s]uperintendent's extensive and direct control." *Id.* The court further noted that the association was separate and distinct from its members and held and invested its funds separately from its members. *Id.* at 1037. The court accordingly rejected the association's claim that the superintendent's actions were confiscatory. *Id.* at 1036-37. In a later decision, the same court held that, based on its decision in *MMIA*, the state could order the association to transfer its reserve funds without implicating the Takings Clause. *See Med. Malpractice Ins. Ass'n v. Cuomo*, 74 N.Y.2d 651, 541 N.E.2d 393, 393-94, 543 N.Y.S.2d 364 (N.Y. 1989).

The General Assembly also identifies as support the Fifth Circuit's unpublished decision in *Mississippi Surplus Lines Association v. Mississippi*, 261 F. App'x 781 (5th Cir. 2008), *aff'g* 442 F. Supp. 2d 335 (S.D. Miss. 2006) ("*MSLA*"). Mississippi's insurance law required the state's insurance commissioner to regulate all insurance companies doing business in the state, including unlicensed "surplus lines insurers." *Id.* at 783. The commissioner was tasked to determine whether these insurers met various requirements of state law, to review applications and collect fees from agents seeking to place insurance with those insurers, to review biannual surplus lines premium reports, and to collect a premium tax on all surplus lines premiums received. *Id.*

The statute permitted the commissioner to delegate its surplus lines responsibilities to a "duly constituted

association of surplus lines agents," and to allow the association to levy a one percent examination fee on the insurers for its services. *Id.* The commissioner did so, asking a group of "private individuals" to form a nonprofit to "assist him with his duties," and the Mississippi Surplus Lines Association was born. *Id.* at 784. The association collected the examination fees as authorized by statute and invested the surplus. *See id.* In response to budget shortfalls several years later, the legislature amended the statute and ordered the association to transfer $2 million of the fee surplus to the insurance department for eventual transfer to the state's budget fund. *Id.* The association sued, challenging the amendment as an unconstitutional taking. *Id.*

The Fifth Circuit panel looked to both the nature of the association and the nature of its funds before concluding that both were "public in nature." *Id.* at 785. The court acknowledged that the association had some private features—noting, for example, that the association hired its own employees and bore its own losses—but found that the association did not have "overwhelmingly private characteristics" sufficient to establish it as a private entity. *Id.* at 785-86. In particular, the court observed that the association's mission was "wholly to serve the state" and that it "operate[d] under conditions imposed by state law." *Id.* at 786. The court further concluded that the funds in question were public monies, having been accrued as a direct result of an explicit statutory provision authorizing collection of the fees and for the "sole purpose" of supporting the insurance commissioner's work. *Id.* at 786-87. The court contrasted the association's funds with

those at issue in *Morales*, finding that the latter were appropriately deemed private funds where premiums paid into the risk pool "had a private end use—insuring businesses against risk and paying those businesses' claims." *Id.* at 787 (quoting *Morales*, 975 F.2d at 1183).

ii. Characteristics of the Joint Underwriting Association and Its Funds

The General Assembly posits that several features distinguish this case from *Asociacion* and *Morales* and align it with *MMIA* and *MSLA*. It contends that, in the former cases, the members' financial interests were implicated by the legislatures' actions, whereas the Joint Underwriting Association's members share neither in its profits nor its losses. (Doc. 71 at 9-10 & n.6). It also holds up as conclusive that the enabling statute for Puerto Rico's joint underwriting association explicitly identified the association as "private" and "for profit." (*Id.* at 9-10). We agree with the General Assembly's assertion that these facts differentiate the instant case from *Asociacion* and *Morales*. But we disagree with the General Assembly's assertion that these factual distinctions are dispositive.

No decision cited by the General Assembly supports its contention that an entity's public or private status turns on for-profit versus nonprofit nature or a statutory designation. Nor has any court suggested, as the state legislature intimates, that the fact of state creation (and the attendant possibility of state abolition) is alone determinative. Instead, all courts facing our present

inquiry have holistically examined the entity's relationship with the state. *See Asociacion*, 484 F.3d at 20 (adopting *Arroyo-Melecio* , 398 F.3d at 60-63); *Morales*, 975 F.2d at 1181-83; *MSLA*, 261 F. App'x at 784-86; *MMIA*, 533 N.E.2d at 1031, 1036-37. These courts have considered a variety of factors, including the nature of the association's function, the degree of control reserved in the state (or the level of autonomy granted to the association), and the statutory treatment, if any, of the entity, in addition to the nature of the funds implicated. Viewed through this prism, we are compelled to find that the Joint Underwriting Association is a private entity as a matter of law.

The Association's function is inherently private. It is, at its core, an insurance company. The Association is comprised of private insurer members, governed by a private board, and supported by private employees. It is funded by privately-paid premiums and is tasked to provide medical malpractice coverage to private persons practicing medicine within the Commonwealth. It does not "exist wholly to serve the State," nor is it engaged in work otherwise tasked by statute to the state's insurance commissioner. *Cf. MSLA*, 261 F. App'x at 785-86. That the Association's private operations work an incidental public benefit does not render its function a public one.

The Association is subject to *de minimis* Commonwealth supervision, and its statutory treatment indicates that the Association is private rather than public. *In toto*, three statutory sections are dedicated to the Association. *See* 40 Pa. Stat. §§ 1303.731-.733. The first "establishe[s]" the Association as a nonprofit, sets forth "duties" largely

applicable to all insurers, and defines its membership to include all insurers writing medical malpractice insurance within the state. *Id.* § 1303.731(a)-(b). It also disclaims Commonwealth responsibility for the Association's debts and liabilities. *See id.* § 1303.731(c). The second section describes the particular type of insurance to be offered—medical professional liability insurance for providers and entities otherwise unable to obtain coverage at reasonable rates. *Id.* § 1303.732(a). It sets forth broad-based policy objectives to that end, *i.e.*: that coverage be "conveniently and expeditiously available," and that the Association "provide[] sufficient coverage" on "reasonable and not unfairly discriminatory terms." *Id.* § 1303.732(b). Its third and final provision requires the Association's board to file any deficit with the Commissioner for approval before borrowing funds to satisfy the deficit. *Id.* § 1303.733.

Defendants' assertion that the statute subjects the Association to imperious control is belied by the statutory language and the record. The statute merely states that the Association is "supervised" by the Commissioner. *Id.* § 1303.731(a). But the Commissioner wields regulatory authority over all Commonwealth insurers, and the MCARE Act does not articulate a uniquely prescriptive role for the Commissioner in overseeing the Joint Underwriting Association. To the contrary, the Act grants nearly unfettered autonomy to the Association's board—all of its "powers and duties" are "vested in and [to be] exercised by a board of directors." *Id.* Importantly, the statute is silent as to the composition or operations of the board. *Cf. MMIA*, 533 N.E.2d at 1036-37. Board composition is instead defined by the Association's plan

of operations, which provides for a board of directors comprised predominantly of representatives elected by the Association's members. *See supra* at p. 6; (*see also* Doc. 60 ¶ 45).

The General Assembly asserts that the MCARE Act ties the Association's hands with respect to a key function—setting its rates. The statute does require the Association to submit its rates and any rate modification to the Department for approval—in accordance with rate-setting provisions applicable equally to every insurer in the Commonwealth. 40 PA. STAT. § 1303.731(b)(2) (incorporating 40 PA. STAT. §§ 1181-99). The legislature also argues that the Commissioner holds "revisionary power" over the Association's rates and can "unilaterally 'adjust [the JUA's] prevailing primary premium.'" (Doc. 71 at 19 (quoting 40 PA. STAT. § 1303.712(f))). This assertion is simply incorrect. The provision the legislature cites concerns the Commissioner's authority to determine the *MCARE assessment* levied on each health care provider in the state. 40 PA. STAT. § 1303.712(d), (f). That assessment is calculated based upon the "prevailing primary premium" submitted for approval by the Association. *Id.* The statute permits the Commissioner to adjust the prevailing primary premium for the purpose of calculating MCARE assessments; it does not authorize the Commissioner to unilaterally reset the Association's rates. *See id.* § 1303.712(f).

Both defendants asseverate that the Association may be dissolved "by operation of law," positing that this "alone, establishes absolute governmental control." (Doc. 66 at

19-20; *see also* Doc. 62 at 7-9). Preliminarily, it is not the MCARE Act but the Association's own plan of operations, developed by the board with the Commissioner's approval, which sets procedures for dissolution. The Act's silence on this point hardly indicates legislative intent to retain control over the Association. Moreover, neither defendant identifies support for the claim that the state's ability to dissolve a nonprofit confers total control thereof to the state. Nor could they. *Any* nonprofit in the Commonwealth may be dissolved by operation of law. *See* 15 PA. CONS. STAT. § 9134(a)(5) ("A nonprofit association may be dissolved . . . under law other than this chapter."). The Commissioner also has the authority to dissolve private insurers in the Commonwealth under certain circumstances, and even private insurers must secure Commissioner approval to voluntarily dissolve. *See* 15 PA. STAT. § 21205(a); 40 PA. STAT. §§ 221.1-.52. Surely, these provisions do not divest all such entities of their constitutional rights anent the Commonwealth.

The MCARE Act meaningfully circumscribes the Association's authority in only two ways: by requiring it to file any deficit with the Commissioner for approval thereby to borrow funds, *see id.* § 1303.733, and by subjecting its plan of operations to Commissioner approval, *see id.* § 1303.731(b)(1). These provisions are similar in kind to those applicable to other insurers: all insurers in the Commonwealth, for example, are subject to some level of Department review in the event of severe financial impairment, *see* 40 PA. STAT. & CONS. STAT. ANN. §§ 221.6-A to -221.9-A, and all insurers must submit material amendments to their articles of incorporation,

including proposed changes to the scope of their business, to the Department for approval, *see* 15 PA. STAT. § 21204. With minor and immaterial exceptions, the Joint Underwriting Association is no more closely managed by the Commonwealth than any other private insurer authorized to write insurance in the state.

We must also consider the nature of the funds in dispute. *See MSLA*, 261 F. App'x at 785, 786-87. The General Assembly likens the Association's surplus to the fees collected on the commissioner's behalf in *MSLA*, positing that the surplus here, too, was "collected under the auspices of the state for the purpose of funding MSLA's operation on behalf of the state." (*See* Doc. 62 at 15 (quoting *MSLA*, 442 F. Supp. 2d at 344)). Beyond this selective quotation, the General Assembly finds no footing in *MSLA*. The court in *MSLA* distinguished the case before it—which concerned fees collected by a nonprofit association performing the commissioner's statutory duties—from *Morales*—where a nonprofit association offered catastrophe insurance at the direction of the legislature. *MSLA*, 261 F. App'x at 787 (citing *Morales*, 975 F.2d at 1179, 1183). The funds in the former case had a "public end use" and were not private property for Fifth Amendment purposes. *Id.* The latter, however, were indisputably private—"[i]t was private money directed to pay private claims," and thus "had a private end use—insuring businesses against risk and paying those businesses' claims." *Id.* So too is it here.

The Association has never received Commonwealth funding. The only provision of the MCARE Act that

concerns the Association's finances *distances* the Commonwealth therefrom, expressly disclaiming state responsibility for the Association's debts and liabilities. 40 PA. STAT. § 1303.731(c). The Association is funded exclusively by private premiums—paid by private parties in exchange for private insurance coverage—and any interest generated on those premiums. As a nonprofit association, Pennsylvania law authorizes the Association to "acquire, hold[,] or transfer . . . an interest in" the funds, *see* 15 PA. CONS. STAT. § 9115(a), and to "use[] or set aside" those funds "for the nonprofit purposes" of the Association, *see id.* § 9114(d). We find that the Association's surplus is the private property of the Association.

Defendants lastly contend that the surplus will inevitably escheat to the state. Specifically, the General Assembly avers that it could dissolve the Association by statute and order the Commissioner to refuse any proposed distribution of assets offered by the Association's board. (Doc. 62 at 17-18; *see* Doc. 73 at 19, 22 n.8). It submits that, in this scenario, the Association's assets would sit "unclaimed" until the funds escheat to the state by operation of law. (Doc. 62 at 17-18). This argument rests on several assumptions: *first*, that the General Assembly succeeds in passing a law to dissolve the Association, and, *second*, that the Commissioner rejects every proposed asset distribution submitted by the board. The General Assembly further assumes, without explanation, that the hierarchical statutory windup framework governing nonprofit dissolution "does not otherwise apply" to justify its invocation of the last-resort escheat alternative. (*Id.* at 17). We find no merit in this argument. Moreover, even if

the legislature's hypothetical actualized in the future, it would not deprive the Association of its *present* possessory right in the surplus.

The Joint Underwriting Association is created by statute. But in the same legislation that created the Association, the General Assembly relinquished control thereof, for all material intents and purposes, to the Association's board of directors. The legislature had the option to tightly circumscribe the Association's operations and composition of its board, *cf. MMIA*, 533 N.E.2d at 1036-37 (citing McKINNEY'S INSURANCE LAW § 5501 *et seq.*); to establish the Association as a special fund within the state's treasury, *cf.* 40 PA. STAT. § 1303.712(a); or to retain meaningful control in any number of other ways. That the General Assembly chose to achieve a public health objective through a private association has a perceptible benefit: it assures availability of medical professional liability coverage throughout the Commonwealth at no public cost. By the same token, it also has a consequence: the General Assembly cannot claim *carte blanch* access to the Association's assets. We hold that the Joint Underwriting Association is a private entity, and its surplus funds are private property. The Commonwealth cannot take those funds without just compensation.

2. *For "Public Use" and Without "Just Compensation"*

We turn to the final two elements of the Joint Underwriting Association's takings claim: that the private property is taken "for public use" and "without just

compensation." U.S. CONST. amend. V. The parties do not dispute that Act 44 seeks to repurpose the Association's surplus for public use. The General Assembly will utilize the funds to remedy the Commonwealth's budget deficits. *See* Act 44, § 1.3(4). Act 44 explains that the state "is in need of revenue from all possible sources in order to continue to balance its budget and provide for the health, welfare and safety of the residents of this Commonwealth." *Id.* In pursuit of this objective, the General Assembly earmarks the anticipated transfer "for medical assistance payments for capitation plans." *Id.* Act 44 thus purports to take the surplus funds for "public use."

There is also no genuine dispute that Act 44 fails to provide "just compensation" for its *per se* taking of the Association's funds. U.S. CONST. amend. V. In determining what compensation the Constitution requires, we examine not the value gained by the government but the loss to the property owner. *See Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235-36, 123 S. Ct. 1406, 155 L. Ed. 2d 376 (2003) (quoting *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195, 30 S. Ct. 459, 54 L. Ed. 725 (1910)). For this reason, the Supreme Court has long held that "even if there was technically a taking" of private property, there can be no recovery under the Fifth Amendment when "nothing of value" is taken from the property owner. *Marion & Rye Valley Ry. Co. v. United States*, 270 U.S. 280, 281, 46 S. Ct. 253, 70 L. Ed. 585, 62 Ct. Cl. 756 (1926).

The General Assembly intimates that the Joint Underwriting Association cannot prevail on its takings claim because it will not "actually *feel* . . . pain" from the

forced transfer of $200,000,000 of its surplus. (Doc. 71 at 20-21). It submits that the funds subject to Act 44 constitute "excess" surplus which is both unnecessary to preserve the Association's insurance function and is unable to be put to other use given the Association's narrow nonprofit purpose. (*See id.*) In other words, the General Assembly posits that because the Joint Underwriting Association has not identified a present need or intended use for the $200,000,000 subject to Act 44, the Fifth Amendment requires no compensation for the Act's proposed transfer thereof.

The parties dispute whether the $200,000,000 targeted by Act 44 is in fact "excess" surplus. Competing expert reports debate this question at length. This dispute, genuine though it may be, is ultimately immaterial. Even if the surplus funds are "excess" and unnecessary to maintain the Association's solvency in a forthcoming hard market, the funds remain the private property of the Association. Pennsylvania law firmly establishes that profits earned by a nonprofit association may "be used or set aside for the nonprofit purposes" thereof. *See* 15 Pa. Cons. Stat. § 9114(d). Neither defendant identifies authority supporting their self-serving proposition that the Association's failure to identify a present purpose for the funds dilutes the value thereof to zero. Nor is there any support for Governor Wolf's view that, because the Association cannot articulate an immediate plan for divesting of its surplus, the General Assembly is free to take those funds for use toward what it deems a better purpose. (*See* Doc. 73 at 22-23). Accordingly, we reject defendants' claim that the $200,000,000 surplus targeted by Act 44 is "valueless."

There are no genuine disputes of material fact *sub judice*. The Rule 56 record leads inescapably to the following conclusions. The Joint Underwriting Association is a private entity, and monies in its possession are private property. Act 44 endeavors to take a substantial portion of these funds—$200,000,000—for the public purpose of remedying longstanding imbalances in the Commonwealth's budget. Act 44 not only fails to provide "just" compensation; it fails to provide *any* compensation whatsoever. We find Act 44 to be an unconstitutional taking of private property in contravention of the Fifth Amendment to the United States Constitution.

B. Permanent Injunctive Relief

Our inquiry does not end with a determination that the Joint Underwriting Association has prevailed on the merits of its Fifth Amendment claim. Before the court may grant permanent injunctive relief, the Association must prove: *first*, that it will suffer irreparable injury absent the requested injunction; *second*, that legal remedies are inadequate to compensate that injury; *third*, that balancing of the respective hardships between the parties warrants a remedy in equity; and *fourth*, that the public interest is not disserved by an injunction's issuance. *See eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006) (citations omitted).

We have already determined that the constitutional injury effected by Act 44 is irreparable. (*See* Doc. 41 at 25). Sovereign immunity forecloses an award of monetary damages against the Commonwealth in this litigation. *See*

Edelman v. Jordan, 415 U.S. 651, 663, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974); *Christ the King Manor, Inc. v. Sec'y U.S. Dep't of Health & Human Servs.*, 730 F.3d 291, 319 (3d Cir. 2013). We reject the General Assembly's eleventh hour suggestion that we allow the unconstitutional taking to occur and force the Association to try its luck in state court. (*See* Doc. 62 at 33-34). For the same reason, we find that there is no adequate legal remedy to compensate plaintiff's injury. The Third Circuit Court of Appeals has explicitly stated that "the Eleventh Amendment bar to an award of retroactive damages against the Commonwealth clearly establishes that any legal remedy is unavailable and that the only relief available is equitable in nature." *Temple Univ. v. White*, 941 F.2d 201, 214-15 (3d Cir. 1991). A combination of declaratory and injunctive relief is the only way to ensure that the Association does not suffer an irreparable injury.

The remainder of the factors also favor the Association's request. Act 44 effects a direct loss of $200,000,000 to the Association as well as the indirect loss of both the interest on those funds and the cost of liquidating its investment portfolio. It inflicts a considerable and irreparable constitutional injury which far surpasses the General Assembly's frustration in returning to the budgetary drawing board. As concerns the public interest, we do not doubt that the General Assembly's intention was as stated—to achieve the estimable goals of balancing the state's budget and providing "for the health, welfare and safety of the residents of this Commonwealth." Act 44, § 1.3. As we have already held, the General Assembly cannot achieve this legitimate end through illegitimate

means. (*See* Doc. 41 at 26-27). The public interest is furthered—not disserved—by permanently enjoining enforcement of a plainly unconstitutional statute. *See Jamal v. Kane*, 105 F. Supp. 3d 448, 463 (M.D. Pa. 2015) (Conner, C.J.). We will grant the Association's request for permanent injunctive relief.

IV. *Conclusion*

Through Act 44, the General Assembly attempts to take by legislative requisition the private property of a private association to remedy its perpetual budgeting inefficacies. This it cannot do. Act 44 is plainly violative of the Takings Clause of the Fifth Amendment to the United States Constitution. We will grant summary judgment, declaratory judgment, and permanent injunctive relief to the Joint Underwriting Association. An appropriate order shall issue.

/s/ Christopher C. Conner
Christopher C. Conner, Chief Judge
United States District Court
Middle District of Pennsylvania

Dated: May 17, 2018

APPENDIX I — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, FILED MAY 17, 2018

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:17-CV-2041

(Chief Judge Conner)

PENNSYLVANIA PROFESSIONAL LIABILITY JOINT UNDERWRITING ASSOCIATION,

Plaintiff,

v.

TOM WOLF, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA,

Defendant.

Filed May 17, 2018

ORDER

AND NOW, this 17th day of May, 2018, upon consideration of the cross-motions (Docs. 58, 61, 64) for summary judgment pursuant to Federal Rule of Civil Procedure 56 filed by the Pennsylvania Professional Liability Joint Underwriting Association ("the

Association"), the General Assembly of the Commonwealth of Pennsylvania ("General Assembly"), and Tom Wolf, in his official capacity as Governor of the Commonwealth of Pennsylvania ("Governor Wolf"), and for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that:

1. The Association's motion (Doc. 58) for summary judgment is GRANTED as to the Association's Takings Clause claim and is otherwise denied as moot.

2. The General Assembly's motion (Doc. 61) for summary judgment is DENIED.

3. Governor Wolf's motion (Doc. 64) for summary judgment is DENIED.

4. It is ORDERED and DECLARED that Act 44 of 2017, P.L. 725, No. 44 (Oct. 30, 2017) is unconstitutional in violation of the Fifth and the Fourteenth Amendments to the United States Constitution, and enforcement thereof is hereby and permanently ENJOINED.

5. The Clerk of Court shall enter declaratory judgment in favor of the Association and against the General Assembly and Governor Wolf.

6. The Clerk of Court shall thereafter close this case.

/s/ Christopher C. Conner
Christopher C. Conner, Chief Judge
United States District Court
Middle District of Pennsylvania

APPENDIX J — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED JANUARY 15, 2025

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18-2297 and 18-2323

PENNSYLVANIA PROFESSIONAL LIABILITY JOINT UNDERWRITING ASSOCIATION,

Plaintiff,

v.

GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA, THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA,

(Intervenor in District Court),

GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellant in 18-2297,

THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellant in 18-2323.

Appendix J

Nos. 19-1057 and 19-1058

PENNSYLVANIA PROFESSIONAL LIABILITY JOINT UNDERWRITING ASSOCIATION

v.

GOVERNOR OF PENNSYLVANIA; THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA; PRESIDENT PRO TEMPORE PENNSYLVANIA SENATE; MINORITY LEADER PENNSYLVANIA SENATE; SPEAKER PENNSYLVANIA HOUSE OF REPRESENTATIVES; MINORITY LEADER PENNSYLVANIA HOUSE OF REPRESENTATIVES; INSURANCE COMMISSIONER PENNSYLVANIA

PRESIDENT PRO TEMPORE PENNSYLVANIA SENATE; MINORITY LEADER PENNSYLVANIA SENATE; SPEAKER PENNSYLVANIA HOUSE OF REPRESENTATIVES, MINORITY LEADER PENNSYLVANIA HOUSE OF REPRESENTATIVES,

Appellants in 19-1057,

GOVERNOR OF PENNSYLVANIA, INSURANCE COMMISSIONER PENNSYLVANIA,

Appellants in 19-1058.

Appendix J

Nos. 21-1099, 21-1112, and 21-1155

PENNSYLVANIA PROFESSIONAL LIABILITY
JOINT UNDERWRITING ASSOCIATION

v.

GOVERNOR OF PENNSYLVANIA;
GENERAL ASSEMBLY OF THE
COMMONWEALTH OF PENNSYLVANIA

GENERAL ASSEMBLY OF THE
COMMONWEALTH OF PENNSYLVANIA,

Appellant in 21-1099,

GOVERNOR OF PENNSYLVANIA,

Appellant in 21-1112,

PENNSYLVANIA PROFESSIONAL LIABILITY
JOINT UNDERWRITING ASSOCIATION,

Appellant in 21-1155.

On Appeal from the United States District Court
For the Middle District of Pennsylvania
(D.C. Nos. 1:17-cv-2041, 1:18-cv-1308, and 1:19-cv-1121)
District Judge: Honorable Christopher C. Conner

Filed January 15, 2025

Appendix J

SUR PETITION FOR REHEARING

Present: CHAGARES, *Chief Judge*, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, and CHUNG, *Circuit Judges*

The petition for rehearing filed by Appellee/Cross Appellant Pennsylvania Professional Liability Joint Underwriting Association in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is DENIED.

BY THE COURT

s/ Kent A. Jordan
Circuit Judge

DATE: January 15, 2025

APPENDIX K — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS INVOLVED

Contract Clause
(U.S. Const. art. I, § 10)

No State shall … pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

First Amendment
(U.S. Const. amend. I)

Congress shall make no law … abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Takings Clause
(U.S. Const. amend. V)

[N]or shall private property be taken for public use, without just compensation.

Due Process Clause
(U.S. Const. amend. XIV, § 1)

[N]or shall any State deprive any person of life, liberty, or property, without due process of law.

Appendix K

STATUTORY PROVISIONS INVOLVED

40 Pa. Stat. & Cons. Stat. Ann. § 323.1-A
Declaration of policy

The General Assembly finds and declares as follows:

(1) The commissioner's review of the association's plan of operation and rate filings has identified a decrease in the number of claim payments and the decline in the need in this Commonwealth for the types of medical professional liability insurance policies offered by the association under Chapter 7 of the Mcare Act. The review has identified a need to modernize the association in order to produce needed economical and administrative efficiencies.

(2) Ensuring the future availability of and access to quality health care is a fundamental government goal, and it is essential to the public health, safety and welfare of all residents of this Commonwealth that access to a full spectrum of hospital services and to highly trained physicians in all specialties is available.

(3) In order to accomplish the goals under paragraph (2), medical professional liability insurance must continue to be obtainable at an affordable and reasonable cost in every geographic region of this Commonwealth. Placing the association within the department will give the commissioner more oversight of expenditures and ensure better efficiencies in the operation of the association.

Credits

1921, May 17, P.L. 789, No. 285, art. IX-A, § 901-A, added 2018, June 22, P.L. 273, No. 41, § 3, effective in 30 days [July 23, 2018].

40 Pa. Stat. & Cons. Stat. Ann. § 323.2-A
Definitions

The following words and phrases when used in this article shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Association." The Pennsylvania Professional Liability Joint Underwriting Association established in section 731 of the Mcare Act.

"**Board."** The Joint Underwriting Association Board described in section 912-A(a).

"Commissioner." The Insurance Commissioner of the Commonwealth.

"Department." The Insurance Department of the Commonwealth.

"Health care provider." As defined in section 702 of the Mcare Act.

"Mcare Act." The act of March 20, 2002 (P.L. 154, No. 13), known as the Medical Care Availability and Reduction of Error (Mcare) Act.

"Plan." A plan of operation submitted to and approved by the commissioner under section 731(b)(1) of the Mcare Act or this article.

Credits

1921, May 17, P.L. 789, No. 285, art. IX-A, § 902-A, added 2018, June 22, P.L. 273, No. 41, § 3, effective in 30 days [July 23, 2018].

40 Pa. Stat. & Cons. Stat. Ann. § 323.11-A
Association oversight and additional duties

(a) Oversight.—The association shall continue as an instrumentality of the Commonwealth and shall operate under the control, direction and oversight of the department.

(b) Additional duties.—In addition to the duties described under Subchapter C of Chapter 7 of the Mcare Act, the association shall do all of the following:

(1) Submit monthly reports to the commissioner of premiums collected and claims paid during the immediately preceding month.

(2) Provide to the commissioner additional documents and information regarding the association's operations as the commissioner may request.

(3) Within 60 days following the effective date of this section, prepare and submit a new plan for approval by the commissioner under section 731(b)(1) of the Mcare Act. The new plan shall contain provisions not inconsistent with this article. The plan may be amended at the direction of the board or the commissioner.

(4) Submit to examinations under Article IX.

(c) Claims.—The following shall apply:

(1) No member of the association or any health care provider insured by a policy provided by the association shall have a claim against the current or future funds, profits, investments or losses of the association, including upon dissolution.

(2) A claim against or a liability of the association under a policy provided by the association under the Mcare Act shall be considered a liability of the Commonwealth.

Credits

1921, May 17, P.L. 789, No. 285, art. IX-A, § 911-A, added 2018, June 22, P.L. 273, No. 41, § 3, effective in 30 days [July 23, 2018].

40 Pa. Stat. & Cons. Stat. Ann. § 323.12-A
Board

(a) Membership and purpose.—The membership of the Joint Underwriting Association Board is statutorily established. The board shall govern the operations of the association and shall consist of the following members:

(1) Three members appointed by the Governor.

(2) One member appointed by each of the following:

(i) The President pro tempore of the Senate.

(ii) The Minority Leader of the Senate.

(iii) The Speaker of the House of Representatives.

(iv) The Minority Leader of the House of Representatives.

(b) Chair.—The Governor shall appoint the chair of the board from among the board members.

(c) Term and vacancy.—A member of the board shall serve at the will of the member's appointing authority for a term of four years or until the member's successor has been appointed and is qualified. A vacancy on the board shall be filled by the same appointing authority as the outgoing member.

(d) Quorum.—A majority of the members of the board shall constitute a quorum. The vote of a majority of the members attending a meeting of the board shall be required for all actions of the board.

(e) Compensation.—Members of the board shall not be compensated for service as board members but shall be entitled to reimbursement of expenses under rules governing the reimbursement of expenses to Commonwealth executive agency personnel.

(f) Executive director and administrative support.—The day-to-day operations of the board shall be managed by an executive director hired by the commissioner whose annual salary and other benefits of employment shall be determined by the commissioner. The department shall provide the board with other administrative support as the department, in consultation with the executive director, deems necessary and appropriate. The executive director and other staff hired to support the work of the board shall be considered Commonwealth employees.

(g) Powers and duties.—The board shall administer the plan, decide all matters of policy and have authority to exercise all reasonable and necessary powers relating to the operation of the association. In furtherance of the

board's powers and duties, the board may do all of the following:

(1) Adopt bylaws and guidelines.

(2) Appoint committees and retain experts and advisors, consultants and agents to render services as the board deems necessary to carry out the operations of the board and the association.

(3) Enter into agreements and contracts as may be necessary for the administration of the plan and consistent with this act and the applicable provisions of the Mcare Act.

(4) Develop rates, rating plans, rating and underwriting rules and standards, rate classifications, rate territories, policy forms and riders in accordance with applicable laws and subject to the commissioner's approval under sections 712(f) and 731(b)(2) and (4) of the Mcare Act.

(5) Invest, borrow and disburse funds, budget expenses, levy assessments, receive contributions, reinsure liabilities of the association and perform all other duties necessary or incidental to the proper administration of the plan.

(6) If the board deems it to be in the best interests of the policy holders and the Commonwealth, subject to the commissioner's approval, place a portion of the funds of the association in a restricted receipt account in the Treasury Department. The State Treasurer shall create a restricted receipt account at the request of the board. Money in the account is appropriated for the purposes required in the Mcare Act, this article and as may otherwise be directed by the board.

(7) Authorize the executive director to participate in the scheduling conferences and other provisions of Article IX on behalf of the board.

Credits

1921, May 17, P.L. 789, No. 285, art. IX-A, § 912-A, added 2018, June 22, P.L. 273, No. 41, § 3, effective in 30 days [July 23, 2018].

40 Pa. Stat. & Cons. Stat. Ann. § 323.13-A
Dissolution

(a) General.—The association may be dissolved as follows:

(1) At the request of a majority of the members of the association and as approved by the commissioner.

(2) By act of the General Assembly.

(b) Distribution of assets.—Upon dissolution of the association under this section, all assets of the association, from whatever source, shall be distributed as the board may determine, subject to the approval of the commissioner.

Credits

1921, May 17, P.L. 789, No. 285, art. IX-A, § 913-A, added 2018, June 22, P.L. 273, No. 41, § 3, effective in 30 days [July 23, 2018].

40 Pa. Stat. & Cons. Stat. Ann. § 323.21-A
Administration and construction

The following shall apply:

(1) Within 30 days following the effective date of this section, all paper and electronic documents and files

and other assets of the association in the possession of the association, its executive director and employees shall be transferred to the department.

(2) Within 30 days following the effective date of this section, authority to act on behalf of the board shall be transferred to the executive director hired by the commissioner under section 912-A(f). The commissioner may appoint an acting executive director to act until an executive director has been hired.

Credits

1921, May 17, P.L. 789, No. 285, art. IX-A, § 921-A, added 2018, June 22, P.L. 273, No. 41, § 3, effective in 30 days [July 23, 2018].

40 Pa. Stat. & Cons. Stat. Ann. § 1303.102
Declaration of policy

The General Assembly finds and declares as follows:

(1) It is the purpose of this act to ensure that medical care is available in this Commonwealth through a comprehensive and high-quality health care system.

(2) Access to a full spectrum of hospital services and to highly trained physicians in all specialties must be available across this Commonwealth.

(3) To maintain this system, medical professional liability insurance has to be obtainable at an affordable and reasonable cost in every geographic region of this Commonwealth.

(4) A person who has sustained injury or death as a result of medical negligence by a health care provider

must be afforded a prompt determination and fair compensation.

(5) Every effort must be made to reduce and eliminate medical errors by identifying problems and implementing solutions that promote patient safety.

(6) Recognition and furtherance of all of these elements is essential to the public health, safety and welfare of all the citizens of Pennsylvania.

Credits

2002, March 20, P.L. 154, No. 13, § 102, imd. effective.

40 Pa. Stat. & Cons. Stat. Ann. § 1303.731
Joint underwriting association

(a) Establishment.—There is established a nonprofit joint underwriting association to be known as the Pennsylvania Professional Liability Joint Underwriting Association. The joint underwriting association shall consist of all insurers authorized to write insurance in accordance with section 202(c)(4) and (11) of the act of May 17, 1921 (P.L. 682, No. 284), known as The Insurance Company Law of 1921, and shall be supervised by the department. The powers and duties of the joint underwriting association shall be vested in and exercised by a board of directors.

(b) Duties.—The joint underwriting association shall do all of the following:

(1) Submit a plan of operation to the commissioner for approval.

(2) Submit rates and any rate modification to the department for approval in accordance with the act of

June 11, 1947 (P.L. 538, No. 246), known as The Casualty and Surety Rate Regulatory Act.

(3) Offer medical professional liability insurance to health care providers in accordance with section 732.

(4) File with the department the information required in section 712.

(c) Repealed by 2018, June 22, P.L. 273, No. 41, § 4(2), effective in 30 days [July 23, 2018].

Credits

2002, March 20, P.L. 154, No. 13, § 731, imd. effective. Affected 2018, June 22, P.L. 273, No. 41, § 4, effective in 30 days [July 23, 2018].

40 Pa. Stat. & Cons. Stat. Ann. § 1303.731 (2017)
Joint underwriting association

(a) Establishment.—There is established a nonprofit joint underwriting association to be known as the Pennsylvania Professional Liability Joint Underwriting Association. The joint underwriting association shall consist of all insurers authorized to write insurance in accordance with section 202(c)(4) and (11) of the act of May 17, 1921 (P.L. 682, No. 284), known as The Insurance Company Law of 1921, and shall be supervised by the department. The powers and duties of the joint underwriting association shall be vested in and exercised by a board of directors.

(b) Duties.—The joint underwriting association shall do all of the following:

(1) Submit a plan of operation to the commissioner for approval.

(2) Submit rates and any rate modification to the department for approval in accordance with the act of June 11, 1947 (P.L. 538, No. 246), known as The Casualty and Surety Rate Regulatory Act.

(3) Offer medical professional liability insurance to health care providers in accordance with section 732.

(4) File with the department the information required in section 712.

(c) Liabilities.—A claim against or a liability of the joint underwriting association shall not be deemed to constitute a debt or liability of the Commonwealth or a charge against the General Fund.

Credits

2002, March 20, P.L. 154, No. 13, § 731, imd. effective.

40 Pa. Stat. & Cons. Stat. Ann. § 1303.732
Medical professional liability insurance

(a) Insurance.—The joint underwriting association shall offer medical professional liability insurance to health care providers and professional corporations, professional associations and partnerships which are entirely owned by 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, professional corporations, professional associations or partnerships.

(b) Requirements.—The joint underwriting association shall ensure that the medical professional liability insurance it offers does all of the following:

(1) Is conveniently and expeditiously available to all health care providers required to be insured under section 711.

(2) Is subject only to the payment or provisions for payment of the premium.

(3) Provides reasonable means for the health care providers it insures to transfer to the ordinary insurance market.

(4) Provides sufficient coverage for a health care provider to satisfy its insurance requirements under section 711 on reasonable and not unfairly discriminatory terms.

(5) Permits a health care provider to finance its premium or allows installment payment of premiums subject to customary terms and conditions.

Credits

2002, March 20, P.L. 154, No. 13, § 732, imd. effective.

40 Pa. Stat. & Cons. Stat. Ann. § 1303.733
Deficit

(a) Filing.—In the event the joint underwriting association experiences a deficit in any calendar year, the board of directors shall file with the commissioner the deficit.

(b) Approval.—Within 30 days of receipt of the filing, the commissioner shall approve or deny the filing. If

approved, the joint underwriting association is authorized to borrow funds sufficient to satisfy the deficit.

(c) Rate filing.—Within 30 days of receiving approval of its filing in accordance with subsection (b), the joint underwriting association shall file a rate filing with the department. The commissioner shall approve the filing if the premiums generate sufficient income for the joint underwriting association to avoid a deficit during the following 12 months and to repay principal and interest on the money borrowed in accordance with subsection (b).

Credits

2002, March 20, P.L. 154, No. 13, § 733, imd. effective.

71 Pa. Stat. & Cons. Stat. Ann. § 420.1
Definitions (Adm. Code § 1501-B)

The following words and phrases when used in this article shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Joint underwriting association." The Pennsylvania Professional Liability Joint Underwriting Association established under section 731 of the act of March 20, 2002 (P.L. 154, No. 13), known as the Medical Care Availability and Reduction of Error (Mcare) Act.

Credits

1929, April 9, P.L. 177, No. 175, art. XV-B, § 1501-B, added 2019, June 28, P.L. 101, No. 15, § 7, imd. effective.

71 Pa. Stat. & Cons. Stat. Ann. § 420.2
Appropriations (Adm. Code § 1502-B)

Notwithstanding any provision of law to the contrary, the operations of the joint underwriting association shall be

funded through appropriations determined by the General Assembly.

Credits

1929, April 9, P.L. 177, No. 175, art. XV-B, § 1502-B, added 2019, June 28, P.L. 101, No. 15, § 7, imd. effective.

71 Pa. Stat. & Cons. Stat. Ann. § 420.3
Reports and hearings (Adm. Code § 1503-B)

(a) Budget estimates.—The joint underwriting association shall submit written estimates to the Secretary of the Budget as required of administrative departments, boards and commissions under section 615. Estimates shall be submitted from time to time as requested by the Governor, but in no event less than once every fiscal year.

(b) Testimony.—The following shall apply:

> **(1)** Within 30 days after the submission of an estimate under subsection (a), an agent of the joint underwriting association shall appear at a public hearing of the Banking and Insurance Committee of the Senate and the Insurance Committee of the House of Representatives to testify about the estimate.
>
> **(2)** The joint underwriting association shall annually appear before the Appropriations Committee of the Senate and the Appropriations Committee of the House of Representatives to testify as to the fiscal status of the joint underwriting association and to make requests for appropriations.

Credits

1929, April 9, P.L. 177, No. 175, art. XV-B, § 1503-B, added 2019, June 28, P.L. 101, No. 15, § 7, imd. effective.

71 Pa. Stat. & Cons. Stat. Ann. § 420.4
Board meetings (Adm. Code § 1504-B)

The board of directors of the joint underwriting association shall hold quarterly public meetings, subject to the requirements of 65 Pa.C.S. Ch. 7 (relating to open meetings), to discuss the actuarial and fiscal status of the joint underwriting association.

Credits

1929, April 9, P.L. 177, No. 175, art. XV-B, § 1504-B, added 2019, June 28, P.L. 101, No. 15, § 7, imd. effective.

71 Pa. Stat. & Cons. Stat. Ann. § 420.5
Construction (Adm. Code § 1505-B)

The joint underwriting association shall be considered a Commonwealth agency for purposes of:

(1) the act of October 15, 1980 (P.L. 950, No. 164), known as the Commonwealth Attorneys Act;

(2) the act of February 14, 2008 (P.L. 6, No. 3), known as the Right-to-Know Law;

(3) the act of June 30, 2011 (P.L. 81, No. 18), known as the Pennsylvania Web Accountability and Transparency (PennWATCH) Act; and

(4) 62 Pa.C.S. Pt. I (relating to Commonwealth Procurement Code).

Credits

1929, April 9, P.L. 177, No. 175, art. XV-B, § 1505-B, added 2019, June 28, P.L. 101, No. 15, § 7, imd. effective.

71 Pa. Stat. & Cons. Stat. Ann. § 420.6
Requirements (Adm. Code § 1506-B)

The joint underwriting association shall:

(1) transmit to the Auditor General, the State Treasurer, the Secretary of the Budget and the Legislative Data Processing Center a list of all employees of the joint underwriting association required under section 614;

(2) conduct the association's operations in facilities owned by the Commonwealth; and

(3) coordinate with the Department of Revenue to ensure that any employee of the joint underwriting association with access to Federal tax information has met all of the requirements of the Department of Revenue to gain access to that information.

Credits

1929, April 9, P.L. 177, No. 175, art. XV-B, § 1506-B, added 2019, June 28, P.L. 101, No. 15, § 7, imd. effective.

72 Pa. Stat. & Cons. Stat. Ann. § 201-D
Findings

The General Assembly finds as follows:

(1) As a result of a decline in the need in this Commonwealth for the medical professional liability insurance policies offered by the joint underwriting association under Subchapter B of Chapter 7 of the

Mcare Act, and a decline in the nature and amounts of claims paid out by the joint underwriting association under the policies, the joint underwriting association has money in excess of the amount reasonably required to fulfill its statutory mandate.

(2) Funds under the control of the joint underwriting association consist of premiums paid on the policies issued under Subchapter B of Chapter 7 of the Mcare Act and income from investment. The funds do not belong to any of the members of the joint underwriting association nor any of the insureds covered by the policies issued.

(3) The joint underwriting association is an instrumentality of the Commonwealth. Money under the control of the joint underwriting association belongs to the Commonwealth.

(4) At a time when revenue receipts are down and the economy is still recovering, the Commonwealth is in need of revenue from all possible sources in order to continue to balance its budget and provide for the health, welfare and safety of the residents of this Commonwealth.

(5) The payment of money to the Commonwealth required under this article is in the best interest of the residents of this Commonwealth.

Credits

1929, April 9, P.L. 343, No. 176, art. II-D, § 201-D, added 2017, Oct. 30, P.L. 725, No. 44, § 1.3, imd. effective.

Appendix K

72 Pa. Stat. & Cons. Stat. Ann. § 202-D
Definitions

The following words and phrases when used in this article shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Commissioner." The Insurance Commissioner of the Commonwealth.

"Department." The Insurance Department of the Commonwealth.

"Joint underwriting association." The Pennsylvania Professional Liability Joint Underwriting Association established under section 731 of the Mcare Act.

"Mcare Act." The act of March 20, 2002 (P.L. 154, No. 13), known as the Medical Care Availability and Reduction of Error (Mcare) Act.

Credits

1929, April 9, P.L. 343, No. 176, art. II-D, § 202-D, added 2017, Oct. 30, P.L. 725, No. 44, § 1.3, imd. effective.

72 Pa. Stat. & Cons. Stat. Ann. § 203-D
Payment

On or before December 1, 2017, the joint underwriting association shall pay the sum of $200,000,000 to the State Treasurer for deposit into the General Fund.

Credits

1929, April 9, P.L. 343, No. 176, art. II-D, § 203-D, added 2017, Oct. 30, P.L. 725, No. 44, § 1.3, imd. effective.

Appendix K

72 Pa. Stat. & Cons. Stat. Ann. § 204-D
Use of amounts deposited

Amounts deposited in the General Fund under section 203-D shall be available for expenditures in accordance with appropriations by the General Assembly to the Department of Human Services for medical assistance payments for capitation plans.

Credits

1929, April 9, P.L. 343, No. 176, art. II-D, § 204-D, added 2017, Oct. 30, P.L. 725, No. 44, § 1.3, imd. effective.

72 Pa. Stat. & Cons. Stat. Ann. § 205-D
No liability

The joint underwriting association and its officers, board members and employees shall not be liable nor subject to suit for complying with the provisions of this article and making the required payment of money to the State Treasurer.

Credits

1929, April 9, P.L. 343, No. 176, art. II-D, § 205-D, added 2017, Oct. 30, P.L. 725, No. 44, § 1.3, imd. effective.

72 Pa. Stat. & Cons. Stat. Ann. § 206-D
Exclusive jurisdiction

The Supreme Court shall have exclusive jurisdiction to hear any challenge to or to render a declaratory judgment concerning the constitutionality of this article or to enforce the provisions of this article.

Credits

1929, April 9, P.L. 343, No. 176, art. II-D, § 206-D, added 2017, Oct. 30, P.L. 725, No. 44, § 1.3, imd. effective.

72 Pa. Stat. & Cons. Stat. Ann. § 207-D
Sunset

In the event the payment required under section 203-D is not made by December 1, 2017, the provisions of Subchapter C of Chapter 7 of the Mcare Act shall expire on December 1, 2017. In that event, the following shall apply:

(1) The joint underwriting association shall be abolished and the money in the possession or control of the joint underwriting association shall be transferred to the commissioner who shall deposit it in a special account within the department to be used and administered by the department in the same manner as the joint underwriting association was authorized or required to use and administer it prior to the expiration of Subchapter C of Chapter 7 of the Mcare Act.

(2) Notwithstanding paragraph (1), the commissioner shall transfer $200,000,000 of the money received under paragraph (1) to the State Treasurer for deposit into the General Fund as soon as practicable after receipt. Thereafter, the commissioner shall annually transfer from the special account established under paragraph (1) to the General Fund any money the commissioner determines is in excess of the money needed to administer the funds as required under Subchapter C of Chapter 7 of the Mcare Act.

Credits

1929, April 9, P.L. 343, No. 176, art. II-D, § 207-D, added 2017, Oct. 30, P.L. 725, No. 44, § 1.3, imd. effective.