No. 24-1028

IN THE

Supreme Court of the United States

PENNSYLVANIA PROFESSIONAL LIABILITY JOINT UNDERWRITING ASSOCIATION,
Petitioner,

v.

JOSH SHAPIRO, GOVERNOR OF PENNSYLVANIA, et al.,
Respondents.

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

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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April 25, 2025

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INTEREST OF AMICUS CURIAE[1]

The New England Legal Foundation (NELF) is a nonprofit, nonpartisan, public-interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of business corporations, foundations, law firms, and individuals who believe in NELF's mission.

As an integral part of its mission, NELF defends individual economic liberties and traditional property rights and advocates for limited government. The present case raises an issue of significant concern to NELF's members because Pennsylvania seeks to appropriate for its general fund about $300 million derived from the contributions of policyholders, a sum to which the State has contributed nothing and in which the State cannot reasonably claim an ownership interest. The case therefore implicates NELF's mission of protecting and defending both individual economic liberties and traditional property rights against government encroachment.

NELF has therefore filed this brief to assist the Court in deciding whether to grant the Petition. NELF urges the Court to do so.

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[1] Pursuant to Supreme Court Rule 37.2(a), on April 15, 2025 NELF gave ten-day notice to counsel of record for the parties at their respective email addresses as shown on the docket. Pursuant to Supreme Court Rule 37.6, NELF states that no party or counsel for a party authored this brief in whole or in part and no person or entity other than NELF made any monetary contribution to its preparation or submission.

SUMMARY OF REASONS FOR GRANTING REVIEW

In deciding the important question of how to distinguish a public entity from a private one, with hundreds of millions of dollars at stake, Third Circuit relied on this Court's decision in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). The lower court's reasoning, however, is rife with errors in the application of that case's guidance.

Dartmouth identified four marks of a public entity: (i.) it wields political power; (ii.) it participates in the administration of government; (iii.) it is publicly funded; and (iv.) in its operations, government is the only interested party. At every turn the lower court strained to fit the facts of this case into these pigeon holes.

In fact, the association wields no political power and needs none; it plays no role in the administration of government, however useful it may be to those do administer the government; and the government's purely external interest in the association pales in comparison to the legal and monetary interests of the thousands of policyholders.

If allowed to stand, the decision below, which conflicts with decisions in other circuits, will provide a road map for other courts to get equally lost on this issue, at the cost of hundreds of million dollars of private money.

REASONS FOR GRANTING REVIEW

Introduction

"[T]here are instances where the Government's self-enrichment may make it all the more evident a taking has occurred[.]" *Eastern Enterprises v. Apfel*, 524 U.S. 498, 543-544 (1998) (Kennedy, J., concurring in the judgment and dissenting in part). Justice Kennedy's observation fits the facts of this case. The Commonwealth of Pennsylvania is clearly attempting to reduce its budgetary problems by creating a scenario under which it can seize the JUA's funds, to which the State has contributed nothing and in which it has no property interest. It has attempted to justify this transfer by rewriting and then re-rewriting the statutory basis of the JUA *ex post facto*, so as to obscure the private nature of the JUA and recharacterize its surplus as a government-owned money. *See* Petition at 8-12.

Constitutionally the end result is clear: the state is attempting to confiscate the private property of a few—the JUA and its policyholders—in order to provide a public good that properly should be funded by society as a whole. As this Court has observed, the Takings Clause of the Fifth Amendment is "'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Armstrong v. United States*, 364 U.S. 40, 49 (1960).[2]

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[2] The Fifth Amendment provides that private property shall not be taken for public use without just compensation. That prohibition is made applicable to the states through the Fourteenth Amendment. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980) (citing *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 239 (1897)). As applicable here, "[i]t is . . . clear that a fund of money can be

I. The Third Circuit's Reasoning Departs From *Dartmouth*.

In ruling that the joint underwriting association (JUA) has been, from the start, a public, governmental entity and as such may not now assert claims against Pennsylvania, the circuit court relied on *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), but applied the Court's guidance erroneously.

In 1816, the New Hampshire legislature attempted to transform Dartmouth College, a privately funded institution, into a state-controlled public university. To that end, legislature altered the college's royal corporate charter so that the appointment of trustees was placed in the hands of the governor. In an attempt to regain authority over the college, the ousted trustees filed suit against the secretary and treasurer, William H. Woodward, for college's book of records, corporate seal, and other corporate property. The issue placed before this Court was whether the legislature's alteration of the college's government-issued charter was an unconstitutional impairment of the college's rights under a contract. The "point on which the cause essentially depend[ed]" was whether the charter had already in fact established the college as a public institution rather than a private one. *See* 17 U.S. at 624-629. *See also Texas Catastrophe Prop. Ins. Ass'n v. Morales*, 975 F.2d 1178, 1182 (1992) ("The relevant inquiry, then, is one of identity: the material question

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property protected under the Takings Clause." *Commonwealth Edison Co. v. U.S.*, 271 F.3d 1327, 1338 (Fed. Cir. 2001) (citing *Phillips v. Washington Legal Found.*, 524 U.S. 156, 160 (1998) and *Webb's*, 449 U.S. at 164-65).

is whether [the JUA] is a part of the state.") (citing *Dartmouth*, 17 U.S. at 629-30).

Writing for the Court, Chief Justice Marshall identified four indicia of a public, government entity.

> 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 of the college be public property, or if the state of New Hampshire, as a government, be alone interested in its transactions, 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 constitution of the United States.

Id. at 629-30.

The Third Circuit's reasoning in the present case tracks that fourfold analysis, but in doing so errs because it departs from the plain meaning of the guidance this Court gave in *Dartmouth*.

1. Political power. *Dartmouth* speaks first of "political power," which is described as the power exercised in "performing duties which flow from sovereign authority." *Id*. at 629, 634. The Third Circuit ruled that the JUA wields political power. "[T]he JUA," the lower court declared, "has held and exercised the coercive power of the state in its ability to require all [medical liability] insurers who choose to do business in the Commonwealth" to participate in the JUA. App. 28a.

The lower court's analysis was misdirected. The "coercive power" spoken of does *not* lie in the hands of the JUA and never has. For confirmation, we need to look no further than the Governor's own brief filed

below in opposition to the JUA. There the Governor, a respondent in this case, correctly states that insurers are "compelled by law" to participate in the JUA, and he cites the statutes that the General Assembly enacted to create the "coercive power" that the lower court wrongly attributed to the JUA. Brief for Appellant Governor of Pennsylvania at 25 (citing 40 P.S. §1303.731 ("The joint underwriting association shall consist of all insurers authorized to write insurance[.]")).

Similarly, insurers sell insurance because that is the business they are in as members of the JUA, as per statute (§731(b)(3) ("Offer medical professional liability insurance to health care providers in accordance with section 732"); they do not do it because the JUA itself supposedly exercises the "Commonwealth's power in requiring" them to do so, as the lower court fancifully found. App. 29a.

Indeed, when listing the "powers and duties" of the JUA's board, the statute explicitly lists only duties. *See* §731(b). Plainly the JUA's operations and its board's duties do not involve "sovereign" duties, either; they are thoroughly commercial and involve the sale of insurance; hence, the JUA neither needs nor possesses political power, least of all a "coercive power."

So where is the coercive political power wielded by the JUA in "performing duties which flow from sovereign authority" (*Dartmouth*, 17 U.S. at 634)?

2. Administration of government. As the next distinguishing feature, *Dartmouth* requires a public entity to be a "civil institution . . . employed in the administration of the government." *Id.* at 629. The Third Circuit found the JUA to be such an institution because it is "integral to the Commonwealth's

administration of a highly regulated, safe, and accessible health care system," although it is "not a state agency in the traditional sense." App. 30a.

The lower court erred because it failed to attend carefully to what the 1819 case's words mean. "Government" is "the administration of public affairs, according to established constitution, laws and usages, or by arbitrary edicts." 1 Noah Webster, *An American Dictionary of the English Language* (1828) (unpaginated) headword "GOVERNMENT." "[T]o administer is to direct the execution or application of laws." *Id*. headword "ADMINISTER." In no way, does the JUA, which essentially just sells insurance, do anything so grandiose as to "administ[er] . . . public affairs, according to established constitution, laws and usages, or by arbitrary edict." *Id.*

In its attempt to duck such an obvious conclusion, the lower court went astray and missed the proper contextual meaning of the phrase "employed in." Consider the lower court's statement, "The General Assembly thus *employed* the JUA to serve as an essential piece of its supervision of the Commonwealth's insurance market[.]" App. 30a. Evidently the lower court believed that the statement justified its classifying the JUA as a "civil institution . . . employed in the administration of the government." The court was wrong.

To be a civil institution "employed in the administration of the government" does *not* translate into being *used* (i.e., "employed") by someone else who is doing the actual administering "in" performance of a public duty, such as regulation the state's insurance industry. A "civil institution . . . employed in the administration of the government" means a civil institution that is itself actively engaged in some part

of the administration of government. *See* 1 Webster, *supra*, headword EMPLOY, sense 1 ("To occupy the time, attention and labor of [someone]; . . . A portion of time should be daily *employed in* reading the scriptures, meditation and prayer") (emphasis added). *See also Dartmouth*, 17 U.S. at 635 ("persons . . . by being *employed in* the education of youth, [do not] become members of the civil government") (emphasis added).

This engaged, active sense is demanded by the context in which the phrase occurs. *See id.* at 629, 634 ("administration of the government," "performing duties," "exercising any portion of those duties which belong to government," etc.). Again, in no way does the JUA *administer government* as those two words are used in *Dartmouth*. It should go without saying that for an entity to be the object of government regulation or to play a role in achieving a public policy goal, however important the object or the role, does not convert the entity into being a part of the government.

In sharp contrast to the present set of facts, in *Mississippi Surplus Lines Ass'n v. Mississippi*, a statutorily authorized entity was created solely to relieve the insurance commissioner of certain of his official duties by performing them on his behalf. 261 Fed. Appx. 781, 784, 785 (5th Cir. 2008) (per curiam) (*MSLA*). Although displaying some characteristics of a private service corporation, such as having its own employees and bearing its own losses, *id.* at 786, the association existed solely to discharge certain governmental duties associated with the commissioner's regulation of the insurance industry. Also, it was not permitted to make profit, was closely regulated by the legislature and commissioner in its performance of duties in lieu of the commissioner, and

could be dissolved at the government's "whim." *Id*. at 785-86. The Fifth Circuit ruled that the association was "public in nature." *Id*. at 785.

Similarly, the Seventh Circuit ruled that a non-profit corporation that acted as loan guarantor in the federal Graduate Student Loan Program was public in nature. *Great Lakes Higher Educ. Corp. v. Cavazos*, 911 F.2d 10 (7th Cir. 1990). By statute its role in the program could have been permissibly played, in the alternative, by an actual state agency, so that, like the association in *MSLA*, it performed functions that would otherwise have been performed by government officials within a statutory scheme. *Id*. at 12. As such, the extensive federal regulation to which it was subject suggested "its highly public nature." *Id*. at 14-15. The question was cinched for the court by the fact that its funding derived "substantially" from "federal advances, reinsurance payments, and administrative cost allowances," and was confined to being used for GSLP purposes. *Id*. at 12, 13-14.

Unlike the JUA, the entities of *MSLA* and *Great Lakes* are true examples of an entity "exercising any portion of those duties which belong to government" and being "employed in the administration of the government." *See Dartmouth*, 17 U.S. at 647 (distinguishing "institutes [that] do not fill the place, which would otherwise be occupied by government").

3. Public funding. Being funded by public property is the third feature *Dartmouth* identifies as marking a public entity. *Id*. at 629-30. The Third Circuit conceded that, "true enough, it is undisputed that the JUA has not drawn on the public fisc." App. 31a. "But an essential piece is missing from that reasoning," the court observed, for "the JUA's funds are not simply

private money" inasmuch as they "exist as the result of the Commonwealth's enforced acquisition of premiums for a public purpose." *Id*. Presumably the lower court was adverting to the fact that the JUA's member insurers are statutorily mandated to participate in JUA's the high-risk insurance market and therein collect premiums from policyholders. Astonishingly, to the lower court that fact alone seemed sufficient to oust the JUA from ownership of admittedly private funds earned from the sale of insurance policies.

The Supreme Court has long rejected the simplistic view that private property is transformed into public property if government played some coercive role in creating it. *See Webb's*, 449 U.S. at 160-01 ("But the State's having mandated the accrual of interest [on private funds held by a court] does not mean the State or its designate is entitled to assume ownership of the interest."); *Phillips*, 524 U.S. at 170-01. *See also Illinois Clean Energy Community Foundation v. Filan*, 392 F.3d 934, 937 (7th Cir. 2004) ("By forcing a transfer of private property from one private entity to another, the state did not destroy the private character of the property.").

When presented with the task of distinguishing government entities from private ones, the Fifth Circuit came to the same conclusion.

> That the state holds, and exercises, the coercive power to force private insurers doing business in Texas to cover certain risks does not mean that the money coming out of the companies' bank accounts is state money. It is private money directed to pay private claims.

Morales, 975 F.2d at 1182-83.

Least of all would it be true that Pennsylvania has a legitimate claim to the JUA's surplus merely because the General Assembly authorized the JUA's creation and mandated the insurers' membership in it.

> The fact that the state legislature authorized the creation of the plaintiff foundation does not make the foundation a state agency; for the legislature also authorizes the creation of business and professional corporations, not to mention religious and charitable corporations, without thereby acquiring a right to confiscate such entities' assets.

Filan, 392 F.3d at 935, 936-37 (noting also that in that case "authorized" "realistically" means "commanded").

4. State interest. Lastly *Dartmouth* looks to whether the state, "as a government, be *alone* interested in [the JUA's] transactions," 17 U.S. at 630 (emphasis added), or as we would probably say now its "operations."[3] The lower court decided this issue largely by speculating, favorably to the state, about the ownership of the JUA's surplus. App. 32a.

Justice Story's concurrence is particularly helpful on this point as it is expressed less narrowly in contractual and "eleemosynary" terms than is Chief Justice Marshall's opinion for the Court. Justice Story says:

> Another division of corporations is into public and private. Public corporations are generally

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[3] Webster, *supra*, headword "TRANSACTION" ("The doing or performing of any business; management of any affair."). *See also Dartmouth*, 17 U.S. at 669 (Story, J., concurring) (bank's "operations partake of a public nature").

> esteemed such as exist for public political purposes only, such as towns, cities, parishes and counties; and in many respects, they are so, although they involve some private interests; but strictly speaking, public corporations are such only as are founded by the government, for public purposes, where the *whole* interests belong also to the government. . . . For instance, a bank created by the government for its own uses, whose stock is exclusively owned by the government, is, in the strictest sense, [a] public corporation. . . . . But a bank, whose stock is owned by private persons, is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature. The same doctrine may be affirmed of insurance . . . companies.

Id. at 668-69 (Story, J., concurring).

Justice Story then cautioned:

> To be sure, *in a certain sense*, every charity, which is extensive in its reach, may be called a public charity[.]
>
> ****
>
> When, then, the argument assumes, that because the charity is public, the corporation is public, it manifestly confounds the popular, with the strictly legal, sense of the terms. . . . When the corporation is said, at the bar, to be public, it is not merely meant, that the whole community may be the proper objects of the bounty, but that the government have the sole right, as trustees of the public interests, to regulate, control and direct the corporation, and its funds and its franchises, at its own good

> will and pleasure. Now, such an authority does not exist in the government, *except* where the corporation, is *in the strictest sense*, public; that is, where its *whole* interests and franchises are the *exclusive property and domain of the government itself*.

Id. at 671-72 (emphasis added).

For at least two reasons the JUA fails this test for being public "in the strictest sense." First, the statutes that established the JUA took great care to insulate the state legally from the debts or liabilities of the JUA. *See* §731(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."). Similarly, if the JUA incurs a deficit, it is, once again, completely on its own; the state leaves it to borrow its way out of a fiscal shortfall and then later repay the loan with private money earned from the sale of insurance policies. §733.

Secondly, the JUA's "transactions" are commercial, i.e., the sale of insurance, and not the "perform[ance of] duties which flow from the sovereign authority." *Id*. at 634. Obviously, the government is not, "as a government, . . . alone interested" in the JUA's operations; quite the opposite is true. The thousands of insurance policies sold create a dense web of private contractual relationships, rights, obligations, duties, liabilities, etc., both monetary and legal. These relationships are the JUA's very *raison d'etre*. In that thicket of private "interests" the state is not a party; for decades, the state never wanted to be involved in any direct way, especially financially—until, that is to say, it needed money. Then, reluctantly, solely in response to losses

in the courtroom, it began to write and rewrite itself into the JUA "transactions" in more meaningful ways, and it did so solely as a legal springboard to get its hands on the JUA's money.

Even so, the state cannot proceed "at its own good will and pleasure" because its discretion is limited by the fact that the JUA represents, overwhelmingly, a dense web of existing legally protected private contractual relationships that the state may regulate only to a limited extent. The JUA is therefor far from being the "exclusive property and domain of the government itself" as spoken of by Justice Story.

II. The Issue Is Of Great Importance And Can Be Addressed Adequately Only By This Court.

Above, NELF has revealed the many flaws and missteps found in the appeals court's decision. As discussed in detail in the Petition, the decision has opened up a pernicious split among the circuits on an important question. Petition at 16-23. *See also* Brief of Amici Curiae the American Medical Association and Pennsylvania Medical Society at 15-16. If left uncorrected, the reasoning of the decision below may guide other court's into similarly finagling square pegs into round holes, thereby allowing government to shift the burden of public finances unfairly to an unlucky few. *See Armstrong*, 364 U.S. at 49.

This Court's guidance is needed for another pressing reason too. The lower courts are in disagreement about exactly what indicia they are to look for when distinguishing a public entity from a private one if government has played some role in their creation. *See* Petition at 24-28. In this brief NELF has followed the lower court in identifying and

relying on four indicia taken from this Court's 1819 decision in *Dartmouth*. While Amicus believes them to be sound, it would be no disparagement to the great jurist who authored the Court's opinion if Amicus were to observe that, after two hundred years, they should be restated in terms that better account for the greater variety of government-created or -authorized entities that now proliferate, a task only this Court has the power to accomplish.

CONCLUSION

For the reasons given here, the Petition should be granted.

Respectfully submitted,

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Dated: April 25, 2025