No. 24-1028

In the Supreme Court of the United States

PENNSYLVANIA PROFESSIONAL LIABILITY JOINT UNDERWRITING ASSOCIATION,

Petitioner,

v.

GOVERNOR OF PENNSYLVANIA, ET AL.,

Respondents.

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

BRIEF OF AMICI CURIAE THE AMERICAN MEDICAL ASSOCIATION AND PENNSYLVANIA MEDICAL SOCIETY IN SUPPORT OF PETITIONER

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INTERESTS OF THE AMICI CURIAE[1]

The American Medical Association (AMA) is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all physicians, residents, and medical students in the United States are represented in the AMA's policy-making process. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty area and in every state, including Pennsylvania. In support of its mission, the AMA regularly participates as amicus curiae in state and federal courts.

The Pennsylvania Medical Society (PAMED) is a Pennsylvania nonprofit corporation that represents physicians of all specialties and is the Commonwealth of Pennsylvania's largest physician organization. Among its services, and a top priority, is advocacy for physicians at the state government level on matters involving medical professional liability ("MPL") insurance and advocacy for physicians and Commonwealth residents and patients, in advancing public policy and public health measures. PAMED regularly participates as amicus curiae in state and federal courts on substantial issues of state and federal law impacting PAMED and its members.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity aside from *amici* and their counsel funded its preparation or submission.

The AMA and PAMED, individually and on behalf of their members that include policyholders of the Pennsylvania Professional Liability Joint Underwriting Association ("JUA") and Pennsylvania physicians, have a significant interest in the outcome of this litigation. If not reversed the decision by the United States Court of Appeals for the Third Circuit will result in an overhaul of the JUA and potential transfer of its operations, which could destroy the contractual relationship with existing policyholders and result in JUA's funds being used to remedy statutory budget deficits instead of being used to further its non-profit purpose, as required under Pennsylvania law.

The AMA and PAMED appear for themselves and as representatives of the Litigation Center of the AMA and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of all states and the District of Columbia. The mission of the Litigation Center is to represent the interests of patients and physicians in the courts of the United States, according to policies of the AMA.

STATEMENT OF FACTS

A. Background on JUA.

The JUA is a non-profit unincorporated association that provides private insurance in Pennsylvania. The federal government recognizes the JUA as a 26 U.S.C. § 501(c)(6) nonprofit entity.

The Commonwealth of Pennsylvania established the JUA in 1975 when it passed the Pennsylvania Health Care Services Malpractice Act. P.L. 390, No.

111 (Oct. 15, 1975). The Commonwealth established the JUA in response to the growing statewide MPL insurance crisis that caused physicians to leave the Commonwealth, or refuse to perform life-saving, but high-risk, procedures. Many states created non-profit associations to provide medical professional liability insurance during this same time period.

Premiums again began to rise in the 1990s/2000s, leading physicians to once again reduce or eliminate high-risk procedures or leave the state to practice in more physician-friendly MPL markets. Several insurers also left the market or became insolvent, including MIIX Insurance Company, St. Paul Companies, Princeton Insurance Company, and PHICO Insurance Company. This reduction in available insurers further exacerbated the MPL insurance crisis.

In 2002, the Commonwealth passed the Medical Care Availability and Reduction of Error Act, P.L. 154 No. 13 (Mar. 20, 2002), in which the Commonwealth retained the JUA. 40 Pa. Stat. & Cons. Stat. Ann. § § 1303.731-.733 ("MCARE Act"). The MCARE Act required all physicians to obtain MPL insurance and required the JUA to offer MPL insurance to healthcare providers who cannot obtain MPL insurance through ordinary means at rates that are not in excess of similarly situated medical professionals. In other words, JUA insureds are those who practice in high-risk specialties, those who have gaps in coverage, those reentering the profession, or those who have a history of malpractice claims. Through the present-day JUA, qualified healthcare providers have access to affordable MPL insurance

which would be unavailable to them in the regular MPL insurance market. Without the JUA, otherwise qualified healthcare providers would cease practicing high-risk and specialty procedures, or leave the Pennsylvania as they did in the 1990s/2000s.

JUA was initially funded by its insurer members. App.31a. All insurers must be members of JUA in order to write professional liability insurance for healthcare providers in Pennsylvania. *Id.* § 1303.731(a). JUA has a 14-member board and is staffed by private employees hired and paid by JUA's board.

Just like any insurer, JUA writes insurance policies directly to its insured health care providers, including AMA and PAMED members. Those insured health care providers pay their premiums directly to the JUA. These premiums paid by medical providers, including AMA and PAMED members, and related investment income, are the exclusive sources of JUA's funds. JUA also maintains a contingency fund to allow JUA to fulfill its insurance obligations and pay out claims even in the event of higher-than-expected liabilities. This surplus is what the Commonwealth seeks to invade in this case.

B. The Cyclical Medical Malpractice Crises in Pennsylvania.

The MPL insurance market in Pennsylvania is cyclical, fluctuating between what is known as a "hard market" and "soft market". In a "hard market", insurance premiums rise, underwriting standards are tightened, capacity is reduced, high-risk specialists' coverage is dropped, and there is less competition

among insurers. All of which leads to increased premiums and decreased coverage for high-risk specialty procedures.

The late 1990s/early 2000s saw what is called a "hard market" due to insurers poor returns and rising claims. This caused several major insurers to become insolvent and/or leave the state, further tightening the market. This led the Commonwealth to enact several legislative solutions, including the JUA in its current form. The legislative changes, including the JUA, largely worked and the 2010s brought upon a long period of a "soft market". However, as discussed *infra*, the MPL insurance market in Pennsylvania is no longer in a "soft market" and is currently entering a "hard market."

It is precisely during these "hard market" periods when the JUA is needed the most, as traditional insurers begin to tighten underwriting, reduce capacity, and drop high-risk coverages. Without the JUA, otherwise qualified healthcare providers would cease practicing high-risk and specialty procedures, or leave the state as they did in the past.

C. Pennsylvania General Assembly Attempts to Take JUA's $300 Million

Since its creation JUA has operated for fifty years as a private nonprofit association separate and apart from the Commonwealth. As previously discussed, JUA is governed by a private board, funded by premiums paid by health care providers, staffed by private sector employees who enjoy no state health or pension benefits, headquartered in privately leased

office space, and subject to taxation like any other non-governmental, nonprofit entity.

Despite all this, the Commonwealth has launched no fewer than three raids on JUA's coffers to make up for its own budgetary shortfalls. In 2017, the Commonwealth passed a law demanding JUA pay "$200,000,000.00 to the State Treasurer for deposit into the General Fund" or the JUA would be abolished and its assets transferred to the Insurance Commissioner. 72 Pa. Stat. & Cons. Stat. Ann. §§ 203-D, 207-D ("Act 44"). After JUA successfully challenged ACT 44, the Commonwealth struck again at JUA's surplus.

In 2018, a new law passed by the Commonwealth declared JUA to be an "instrumentality of the Commonwealth . . . operat[ing] under the control, direction and oversight of the [Insurance] department." 40 Pa. Stat. & Cons. Stat. Ann.§ 323.12-A(a) ("Act 41"). Act 41 also installed a new executive director and a state-controlled board of directors with authority to manage the assets how it saw fit. *Id.* at §323.12-A. Once again, JUA successfully challenged this law as a violation of the Takings Clause.

Undeterred, the Commonwealth enacted its third attempted hostile takeover of JUA. 71 Pa. Stat. & Cons. Stat. Ann. § 420.1 *et seq.* ("Act 15") Act 15 would require, *inter alia*, JUA be funded through General Assembly appropriations, submit budget proposals to the Commonwealth, and comply with various laws applicable to legitimate governmental entities. *Id.* at §§ 420.2-420.3, 420.4.

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Third Circuit concluded that the JUA was a public, rather than a private, institution. Therefore, the Third Circuit held that the JUA lacks standing to assert constitutional claims against the Commonwealth. As set forth below, however, the Third Circuit erred in its analysis of the factors set forth in *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819), particularly with regard to its finding that no one other than the Commonwealth has an interest in JUA and its funds.

To the contrary, every current policyholder, as well as all medical professionals who are likely to become policyholders as the MPL insurance market hardens, has strong interest in the JUA and its funds. Without the JUA, otherwise qualified healthcare providers would be forced to cease practicing high-risk and specialty procedures, or leave Pennsylvania as they did in the 1990s/2000s. Additionally, all medical professionals (and potential claimants) have an interest because the JUA is an unincorporated non-profit association, and Pennsylvania law requires that its funds be used to further its non-profit purpose (*i.e.*, acting as an insurer of last resort for all medical professionals in the state).

The Third Circuit concluded that JUA was a public entity despite the fact that the Third Circuit conceded that the JUA is not a state agency, is privately funded, privately controlled, and performs a private function (*i.e.*, MPL insurance). This decision also creates a clear Circuit split with the First, Fifth,

and Seventh Circuits, all of which have held that privately funded and privately controlled entities that perform private function are not public entities, even if created by the state.

ARGUMENT

A. Pennsylvania is Entering a "Hard Market" for MPL Insurance for the First Time in Over a Decade.

The legislative changes that the Commonwealth made in the early 2000s, including the JUA, brought upon one of the longest "soft markets" in the MPL insurance market. It was during this "soft market" – 2017, 2018, and 2019 – that the Commonwealth initiated attempts to confiscate the JUA's contingency surplus. However, the landscape in Pennsylvania's MPL insurance market has changed.

A study by the AMA concluded that 94.1% of premiums saw in increase from 2023 to 2024. Alan Hardiman, *Upward Trajectory of Medical Liability Premiums Persist for Sixth Year in a Row*, AMERICAN MEDICAL ASSOCIATION, at Exhibit 2 (2024). This study also noted that this was the second consecutive year in which Pennsylvania "underwent a notable surge in premium[s]." *Id.* at p.3

There are several factors leading to the current "hard market" for MPL insurance in Pennsylvania. This includes a January 2023 revision to Pennsylvania's Rules of Civil Procedure regarding venue that permit a plaintiff to file a malpractice lawsuit in any county where the healthcare provider operates. This has led to a sharp increase in

malpractice lawsuits filed in Philadelphia County, one of the most plaintiff-friendly jurisdictions in the entire country.[2] Since 2023, Philadelphia juries have awarded medical malpractice verdicts in the amounts of $183 million, $45 million, and $14 million, with several other awards in excess of $1 million.

Additionally, the immediate economic uncertainty, including heightened risk of recession, rise in inflation and increased assessments owed to the MCARE Fund, have further increased the overall cost and availability of MPL insurance in Pennsylvania in recent years. It is precisely during these "hard market" periods when the JUA is needed the most, as traditional insurers begin to tighten underwriting, reduce capacity, and drop high-risk coverages. Without the JUA, otherwise qualified healthcare providers would cease practicing high-risk and specialty procedures, or leave the state as they did in the past.

B. JUA Is a Private Entity

1. The *Dartmouth College v. Woodward*, 17 U.S. 518 (1819) Factors.

The Third Circuit purported to apply this Court's precedent in *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819), by analyzing four questions: "(1) whether the JUA's organic act granted

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[2] *See* Pennsylvania Coalition for Civil Justice Reform, *One Year In and the Medical Liability Venue Rule Change Has Had Major Impact*, *available at* https://paforciviljusticereform.org/2024/01/28/one-year-in-and-the-medical-liability-venue-rule-change-has-had-major-impact/

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."

First, the Third Circuit recognized that the Commonwealth did not grant the JUA "political power, in the traditional sense." App.28a. The Third Circuit nonetheless concluded that this factor weighed in favor of finding the JUA to be a public entity because "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." *Id.* The Third Circuit also noted that the Commonwealth created the JUA and "granted the JUA its power." App.29a.

However, "[t]he coercive element in the history of the authorizing statute is irrelevant." *See Ill. Clean Energy Cmty. Found. v. Filan,* 392 F.3d 934, 937 (7th Cir. 2004) ("The coercive element in the history of the authorizing statute is irrelevant."). Likewise, the mere fact that the Commonwealth created the JUA and granted it power is insufficient to render it public, as this Court explained in *Dartmouth*. *See Dartmouth*, 17 U.S. at 638-39; *see also Filan,* 392 F.3d at 936-37 ("[T]hat 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.").

Second, the Third Circuit asked whether the JUA was created as a civil institution to be employed in the administration of government. App.29a. The Third Circuit concluded that this factor weighed in favor of finding JUA public even though the Third Circuit conceded that JUA "is not a state agency in the traditional sense," simply because the JUA served as an essential piece of the Commonwealth's insurance market and health care system. App.29-30a. That same conclusion could be drawn for every insurer and/or medical institution in the state. Surely, being an essential component of the healthcare system cannot render an entity a public institution.

Third, the Third Circuit analyzed whether the JUA's funds are public or private. App.30a. Here, it is undisputed that the JUA's current surplus is derived from the premiums paid by its insureds, including AMA and PAMED members, and the investment income derived from those premiums. There is no public funding source whatsoever.

Moreover, the JUA was initially capitalized by private funds of its members, not public money. Although the Commonwealth required insurers to provide funds to initially capitalize JUA back in 1975, that coercive element is immaterial. *See Filan,* 392 F.3d at 937 ("The coercive element in the history of the authorizing statute is irrelevant.").

Fourth, the Third Circuit concluded its analysis by considering "whether anyone but the Commonwealth has an interest in the JUA" and its funds. App.32a. The Third Circuit held that this weighed in favor of finding JUA to be public because it concluded that "only the Commonwealth has a

legally protected interest in the JUA." App.35a. This is not so.

Most notably, other individuals interested in the JUA would of course be the policyholders themselves, which include AMA and PAMED members. These policyholders (and their patients) undoubtedly have an interest in the JUA and its funds. Without the JUA, MPL insurance in Pennsylvania would be too cost prohibitive, or completely unavailable, leading to a lower supply of medical professionals and a demonstrated reduced willingness to engage in high-risk specialties.

While the Commonwealth may claim that it will take over the JUA's role as the insurer of last resort in the Commonwealth, there are reasonable grounds to believe that the Commonwealth will not have the technical and industry expertise to properly perform these insurance-related functions, including developing rates, policy forms, riders, and borrowing and investing funds. The risk that the Commonwealth mirror its current inability to budget effectively and will not be able to pay out on all claims, leaving the policyholder to cover the liability would only be exacerbated if the Commonwealth first depletes JUA's surplus and leaves itself no room for error as insurers now enter a "hard market" for MPL insurance.

Additionally, with MPL insurance moving into a "hard market," there will undoubtedly be far more medical professionals that would need access to the support of JUA. As explained *supra*, Pennsylvania has experienced "a notable surge in premium[s]" each of the last two years. This, combined with increasing jury awards and overall inflationary pressures, will

inevitably cause insurers to reduce capacity and drop high-risk specialists. These medical professionals who would need to resort to the JUA have a strong interest in the JUA and its funds.

2. JUA's Non-profit Status

The Third Circuit recognized that the JUA is an unincorporated non-profit association, subject to 15 Pa. C.S. § 9101 et seq. App.33a. (citing 15 Pa. C.S.A. §9135(1)-(5). Under that statute, and the common law, JUA is a recognized independent entity capable of holding property in its name as an unincorporated non-profit association. *See* 15 Pa. C.S.A. §§ 9114, 9115; *Krumbine v. Lebanon Cnty. Tax Claim Bureau*, 663 A.2d 158, 160 (Pa. 1995) (recognizing that at common law an unincorporated association's legal existence may be provided by statutory authority).

As an unincorporated non-profit association, JUA's profits "must be used or set aside for the nonprofit purposes of the nonprofit association." 15 Pa. C.S.A. § 9114(d). Here, that non-profit purpose is to provide insurance as a last resort for healthcare providers who cannot obtain affordable medical professional liability insurance through ordinary means, *i.e.*, those who practice in high-risk specialties, those who have gaps in coverage, those reentering the professional, or those who have a history of malpractice claims. Thus, all medical professionals, including AMA and PAMED members, that may potentially fall into one these categories now or in the future also have an interest in JUA's funds. JUA's funds should be used to support its non-profit

goals, as JUA directs. It should not be used to balance the state's budget at medical professionals' expense.

Indeed, just because JUA currently has a large surplus does not mean that this has always been, or forever will be, the case. The MPL insurance market is now entering a "hard market" after one of the longest "soft markets" in recent memory. There is also a growing crisis in Pennsylvania and across the country, regarding gaps in malpractice insurance caused by a surge in recent hospital closures and staffing company bankruptcies. These failures often happened with little warning, leaving thousands of physicians uncertain about their malpractice insurance status.

For example, in 2019 and 2020, former residents and fellows at Hahnemann University Hospital in Philadelphia, Pennsylvania were informed that their employer would no longer provide them with necessary "tail" malpractice insurance as the hospital worked through bankruptcy. The JUA offered to use $25 million of its surplus to fund the needed insurance, consistent with its private, non-profit purpose.[3] The rise in private equity investment in healthcare has led to an increase of situations like the one at Hahnemann Hospital, including large national

[3] Nina Feldman, *Hahnemann won't pay residents' medical malpractice insurance, so they find their own way*, *available at* https://whyy.org/articles/hahnemann-wont-pay-residents-medical-malpractice-insurance-so-they-find-their-own-way/

providers such as Steward Healthcare and Prospect Medical Holdings.[4]

The JUA was created to ensure that there is adequate and affordable malpractice insurance for all medical professionals. Its surplus should be used for that non-profit purpose, not to balance a budget its Legislature failed to balance.

C. The Circuits Are Split

The Third Circuit's decision that a privately funded and privately controlled entity that was created by the state and that performs a private function is a public entity creates a Circuit split with the First, Fifth, and Seventh Circuits. Amici join in with the robust argument made by JUA.

In *Texas Catastrophe Property Insurance Association v. Morales*, the Fifth Circuit held that a state-created association of property insurers (CATPOOL) was not a public entity, based upon this Court's *Dartmouth* precedent. 975 F.2d 1178, (5th Cir. 1992), Like JUA, CATPOOL was created by a state statute that required all property insurers in the state to join. *Id.* at 1179. Also like the JUA, the Fifth Circuit explained that although the state forced and coerced insurers to participate and initially fund CATPOOL, the money still remained private money that was directed to pay private claims. *Id.* at 1182-83.

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[4] Larry Bereford, *Another Failed Physician Mgmt. Company Leaves ED Staff Dangling*, ACEP NOW, *available at* https://www.acepnow.com/article/another-failed-physician-mgmt-company-leaves-ed-staff-dangling/

In *Ill. Clean Energy Cmty. Found. v. Filan*, 392 F.3d 934, 936-38 (7th Cir. 2004), the Seventh Circuit likewise concluded that a state-created non-profit foundation was not public. 392 F.3d at 936-38. The Seventh Circuit noted that the foundation was created by a state statute and five of its six board seats were appointed by public officials. *Id.* at 935, 937. This was insufficient to render the foundation "public".

Relying on *Dartmouth*, the Seventh Circuit emphasized the fact that the foundation's funds were private funds, and the state did not control its operation. The Seventh Circuit explained that it did not matter that the state had forced the private funds to be transferred to the foundation. *Id*. at 937 ("[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."). It explained that the "coercive element in the history of the authorizing statute is irrelevant." *Id.*

Finally, in *Asociación de Subscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza*, the First Circuit concluded that a state-created automobile insurance association was not a public entity. 484 F.3d 1, 20 (1st Cir. 2007).

Contrary to the Third Circuit's decision, each of the entities at issue were confirmed as private entities, despite being created by the state. The First, Fifth, and Seventh Circuit's holdings permitted the entities to vindicate their rights. This Court's intervention is required so JUA too can vindicate its rights against the Commonwealth.

D. The Question Presented Is Extremely Important

Pennsylvania medical professionals, as well as Pennsylvania residents could be left without options if JUA is shuttered and its surplus stripped. While JUA's surplus funds may seem large to some, the Pennsylvania MPL insurance market is just exiting one of the longest "soft market" periods in history. That is all now changing as Pennsylvania heads into a "hard market" that could last for an unknown duration.

As this "hard market" begins to take shape, insurers will start to reduce capacity, tighten underwriting standards, and drop high-risk specialties. Premiums have already begun to increase. *See* Hardiman, *Upward Trajectory of Medical Liability Premiums Persist for Sixth Year in a Row*, AMERICAN MEDICAL ASSOCIATION, at p.3 and Exhibit 2 (2024) (noting that 94.1% of premiums saw in increase from 2023 to 2024 and that this was the second consecutive year in which Pennsylvania "underwent a notable surge in premium[s]."). This, in turn, will undoubtedly create more demand for JUA's policies and more potential liabilities that need to be adequately covered. There is no assurance that the Commonwealth will be able to replicate the JUA's insurance functions and adequately and affordably provide MPL insurance for this increased demand.

Thus, without the JUA, otherwise qualified healthcare providers would cease practicing high-risk and specialty procedures, or leave the state as they did in the past. The JUA was created to ensure that there

is adequate and affordable malpractice insurance for all medical professionals. Its surplus should be used for that non-profit purpose, not to balance the state's budget.

Moreover, it is unlikely the Commonwealth will stop once it has wet its beak. Across the country, legislatures have consistently tried to raid insurance-related funds. *See Wisc. Medical Soc'y v. Morgan*, 787 N.W. 2d 22, 47 (Wis. 2010) (striking down legislature's transfer of $200,000,000.00 from Injured Patients and Families Compensation Fund); *Tuttle v. N.H. Med. Malpractice Joint Underwriting Assoc.*, 992 A.2d 624, 648-49 (N.H. 2010) (striking down Act requiring $110,000,000.00 transfer from plaintiff to general fund.); *Alliance of Am. Ins. v. Chu*, 571 N.E.2d 672, 681-82 (N.Y. 1991). This Court's intervention is necessary to prevent the dissipation of the JUA's surplus funds and to reinforce the private status of JUA.

CONCLUSION

For all the foregoing reasons, Amici respectfully request that the Court grant the Pennsylvania Professional Liability Joint Underwriting Association's Petition for Writ of Certiorari.

Respectfully submitted,

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Date: April 7, 2025