No. 20-249

IN THE

Supreme Court of the United States

DOUG OMMEN, IN HIS CAPACITY AS LIQUIDATOR OF COOPORTUNITY HEALTH, INC., and DAN WATKINS, IN HIS CAPACITY AS SPECIAL DEPUTY LIQUIDATOR OF COOPORTUNITY HEALTH, INC.,
Petitioners,

v.

MILLIMAN, INC., ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Iowa

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Two days after this Court docketed the Petition in this case, Respondent Milliman, Inc. filed its *own* Petition for a Writ of Certiorari asking this Court to resolve the very same issue described in Petitioners' second question presented here. *See Milliman v. Donelon* (No. 20-299) (hereinafter "Milliman Petition"). Milliman even *relied* on the Petition in this case to support its argument that the Court should grant review, explaining that the Petition here highlighted "that the Iowa and Louisiana Supreme Court decisions deepen the existing conflicts" on the question presented. Milliman Petition at 4 n.1.

Less than two weeks later, Milliman waived its response in this case, despite its unequivocal statement that this question is worthy of this Court's review and its prior stated plan to "respond to the Iowa petition at the appropriate time for filing its response." *Ibid.* Milliman's waiver is irreconcilable with its own request for the Court to review the second question presented here. This Court should immediately call for a response.

Milliman's one-sentence discussion of the first question presented here (Milliman Pet. at 5 n.1) reveals a profound misstatement of the Iowa Supreme Court's opinion. If Milliman believes it can reconcile the Iowa Supreme Court's opinion with decades of this Court's arbitration precedents, it should clarify how—in full, in this case.

After calling for a response, this Court should grant the Petition, either on its own or consolidated with Milliman's petition.

I. Respondent Milliman Filed Its Own Petition for a Writ of Certiorari Seeking Review of a Question Identical to Petitioner's Second Question Presented Here.

Milliman's petition seeks this Court's review of the Louisiana Supreme Court decision that is directly at odds with the Iowa Supreme Court's decision here. Milliman admits that the arbitration clause at issue there is *identical* to the one in this case. *See* Milliman Pet. at 11 (noting that the contracts at issue are for "virtually identical services" and included "the same broad arbitration clause").

The question presented in Milliman's petition—whether the Federal Arbitration Act (FAA) preempts the state-law forum-selection statute at issue there, or whether McCarran-Ferguson operates to "reverse preempt" the FAA—is indistinguishable from the second question presented here. And Milliman acknowledged as much. It told the Court that the Petition in this case

> recognizes (in its second question presented) that the Iowa and Louisiana Supreme Court decisions deepen the existing conflicts concerning whether a state insurance commissioner, acting as rehabilitator or liquidator for an insolvent insurer, is bound to arbitrate the insurer's damages claims arising out of a pre-insolvency agreement with a broad arbitration clause.

Milliman Pet. at 4-5 n.1.

In light of Milliman's concession—and affirmative advocacy—that this is an issue worthy of this Court's review, a waiver in this case is mystifying. Milliman should at least confirm to the Court that it believes

the second question presented is worthy of review (or, if Milliman actually wants to argue it is not, explain why).

The waiver is also perplexing based on Milliman's statement in its petition that it "will respond to the Iowa petition at the appropriate time for filing its response." Milliman Pet. at 5 n.1. Perhaps Milliman decided it would be more advantageous for this Petition to be distributed and possibly adjudicated before its own petition on an identical issue is distributed; perhaps Milliman simply did not wish to dedicate additional resources to a response. No matter the reason for Milliman's about-face, it needs to confirm to the Court that the Petition here should be granted, or otherwise explain how its position is juxtaposed with its own petition.

This Court should immediately call for a response.

II. The First Question Presented Is Equally Worthy of Review Despite Milliman's Misinterpretation of the Iowa Supreme Court's Opinion.

In any case involving the application of McCarran-Ferguson, there is a predicate question: does the relevant federal statute preempt the state law in question? Without that question being answered in the affirmative, there is no reason to apply McCarran-Ferguson.

Accordingly, in this case, the Iowa Supreme Court found the FAA preempted the ability of Petitioners to disavow the applicable contract pursuant to their authority under the Iowa Liquidation Act. *See* Pet. at 7-8. That holding is directly contrary to this Court's consistent precedents making "arbitration

agreements as enforceable as other contracts, but not more so," *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), and the Iowa Supreme Court's contrary holding is before this Court in the first question presented.

In its petition, Milliman addresses this first question in only one sentence, confusingly claiming that the question seeks the Court's review "of the Iowa Supreme Court's construction of Iowa State contract law and provisions of the Iowa insurance insolvency statute." Milliman Pet. at 5 n.1. That characterization is incongruent with the Iowa Supreme Court's opinion, which began its analysis of whether Petitioners could disavow the contract by expressing concern that "permitting the liquidator to disavow the entire 2011 Agreement may run afoul of the FAA's mandate to place arbitration agreements on an equal footing with other contracts." App.15a (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995)). And after analyzing the nature of the agreement, the court confirmed its suspicion, holding that the Petitioners' disavowal "amounts to nothing more than singling out the arbitration provision for evasion." App.16a.

> To avoid treating the arbitration provision as "suspect status," and to place the provision on equal footing as other contracts, the liquidator cannot be permitted to disavow the 2011 Agreement under Iowa Code section 507C.21(k). *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 1656 (1996).

Ibid.

The Iowa Supreme Court so plainly based the decision on its incorrect belief of what the FAA

requires that it is difficult to understand how Milliman could characterize this decision as one simply interpreting state law. To the extent Milliman is laying groundwork for an argument that this Court should not accept review because the Iowa Supreme Court based its decision on an adequate and independent state ground, such an argument is plainly foreclosed by this Court's precedents:

> [W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Michigan v. Long, 463 U.S. 1032, 1040-41 (1983). Here, the Iowa Supreme Court's decision undoubtedly rested primarily on the FAA and, at the *very least* was "interwoven with the federal law."

So perhaps there is another reason for Milliman's characterization; in fairness, it has only been discussed in a single sentence in a footnote of Milliman's own petition in a separate case—yet another reason for the Court to immediately call for a response.

CONCLUSION

This Court should immediately call for a response.

After doing so, this Court should grant the Petition, either on its own, or consolidated with *Milliman v. Donelon* (No. 20-299).

Respectfully submitted,

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