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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Respondent Milliman, Inc., has no parent company, and no publicly held company holds 10% or more of its stock.

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INTRODUCTION

The Iowa liquidator's Petition should be denied. The liquidator sets up straw man arguments by misstating the findings, holdings, and analysis of the Iowa Supreme Court. The Iowa Supreme Court's construction of the Iowa state disavowal statute, Iowa Code § 507C.21(1)(k), which is the sole focus of both of the liquidator's Questions Presented, was made on independent and adequate state law grounds, and raises no reviewable federal question.[1]

The Iowa Supreme Court held that, under Iowa contract law and based on its definitive construction of the state's Liquidation Act, the liquidator is contractually required to arbitrate his claims against Milliman, and cannot disavow any provisions in Milliman's 2011 pre-insolvency agreement with the now-insolvent insurer (the "2011 Agreement"). The Iowa Supreme Court held that "the liquidator cannot use Iowa Code section 507C.21[(1)](*k*) (2017) to disavow a pre-insolvency agreement that the third-party contractor *already* performed." (App. 3a (emphasis added from App. 15a)). Because the liquidator's claims "arise out of and relate to the work Milliman completed pursuant to the 2011 Agreement" (App. 13a), the Iowa Supreme Court explained "[i]t is difficult to reconcile the ability of the liquidator to disavow the 2011 Agreement while still retaining the ability to assert claims against Milliman pursuant to the same contract." (App. 15a). The court further held that "the liquidator cannot pick and choose which provisions in the contract existed" (App. 16a); and, "the liquidator cannot now after-the-fact

[1] Petitioners are referred to herein as "liquidator" in accordance with the Iowa Supreme Court decision below.

cherry-pick his agreement with Milliman and decide he is bound only by the parts he likes." (App. 12a n.4).

The Iowa Supreme Court further held that there is no conflict between the forum selection provisions of the Iowa Liquidation Act and the FAA because "[n]owhere in the Iowa Liquidation Act is it required that the liquidator must bring claims in a public forum. The opposite of the liquidator's assertion is true . . . the Iowa Liquidation Act does not prohibit arbitration of the liquidator's claims against Milliman." (App. 19a–20a).

Seizing on one line of the Iowa Supreme Court's decision—in which the court states that "[t]o 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[(1)](*k*)" (Pet. at 7–8, citing App. 16a)—the liquidator argues that the Iowa Supreme Court "elevated" the governing arbitration clause for special treatment in violation of this Court's precedents. To the contrary, the Iowa Supreme Court held that ***all*** of the provisions in Milliman's 2011 Agreement remain in full force and effect under Iowa law, and further that the liquidator may not strip the arbitration and dispute resolution provisions out of the 2011 Agreement. Thus, what the Iowa Supreme Court actually did here was to explicitly place the arbitration and other conflict resolution clauses in the 2011 Agreement on ***equal*** footing with all of that contract's other provisions. That holding is entirely consistent with this Court's statement in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967), that "the purpose of Congress in 1925 was to

make arbitration agreements as enforceable as other contracts, but not more so."

A lynchpin of his Petition is the liquidator's erroneous and oft repeated assertion that the Iowa Supreme Court held that the FAA preempts the state disavowal statute. (Pet. at i, 7, 8, 14, 19, 26, 29; Supp. Brief at 3). The Iowa Supreme Court made no such holding. Underscoring that its construction of the state's disavowal statute was squarely predicated on its application of state law contractual principles to the 2011 Agreement and the liquidator's pleadings, the Iowa Supreme Court wrote: "Moreover, ***if*** section 507C.21[(1)](*k*) were interpreted to allow disavowal . . . this would raise serious questions as to its validity under the Supremacy Clause of the United States Constitution." (App. 16a) (emphasis added). Based on its construction of the state disavowal statute, however, the Iowa Supreme Court had no need to, and did not, address or decide these "serious questions" of possible FAA preemption of the state disavowal statute. The false assertion that the Iowa Supreme Court held the disavowal statute preempted by the FAA is the premise of both of the Petition's Questions Presented.

The portion of the Iowa Supreme Court's decision addressing the McCarran-Ferguson Act had nothing to do with the disavowal statute. The liquidator concedes that the Iowa Supreme Court made its McCarran-Ferguson Act ruling "without once mentioning" the disavowal statute, but labels what the Iowa Supreme Court did "misguided" and not "properly focused." (Pet. at 23, 26). The Iowa Supreme Court was neither careless, misguided, nor unfocused. Rather, the Iowa Supreme Court did not address whether the disavowal statute reverse-preempts the

FAA because the Iowa Supreme Court based its disavowal opinion on state contract law, not on a holding of FAA preemption. Therefore it had no need to address whether the state disavowal statute ***reverse*** preempts the FAA.

In a separate section of its opinion, the Iowa Supreme Court did consider and reverse the trial court's erroneous holdings that (i) the Iowa Liquidation Act's forum selection provisions and public policy considerations permitted the liquidator to refuse to arbitrate his claims against Milliman, and (ii) the Iowa Liquidation Act reverse preempted the FAA pursuant to the McCarran-Ferguson Act. This portion of the Iowa Supreme Court's decision directly conflicts with the Louisiana Supreme Court's decision in *Donelon v. Shilling*, — So.3d —, 2020 WL 2079362 (La. Apr. 27, 2020), which decision Milliman has petitioned this Court for certiorari to review. *See* Petition for a Writ of Certiorari, *Milliman v. Donelon*, No. 20-299 (Sept. 3, 2020). However, this portion of the Iowa Supreme Court's ruling is beyond the scope of the questions presented by the Iowa liquidator, which focus exclusively on the Iowa disavowal statute. There was no state disavowal statute at issue in *Donelon*. Furthermore, the Louisiana Supreme Court did not have an independent and adequate state law basis for its decision, as that court acknowledged that its holding under the federal McCarran-Ferguson Act was integral to its decision denying arbitration.

For all these reasons, the liquidator's petition for certiorari should be denied.

COUNTERSTATEMENT OF THE CASE

I. FACTS AND PROCEDURAL HISTORY

This action was brought against Milliman by the Iowa Commissioner of Insurance, acting as the liquidator of CoOportunity Health ("CoOportunity"), an insolvent health care co-operative insurer, or "co-op," created in 2012 and funded pursuant to the Patient Protection and Affordable Care Act. Milliman is one of the United States' leading actuarial firms, headquartered in Washington State. It provides actuarial and consulting services to insurers nationwide.

Milliman performed actuarial services between 2011 and 2014 for CoOportunity pursuant to the 2011 Agreement. The 2011 Agreement includes an unambiguous arbitration provision which states, in relevant part:

> In the event of any dispute arising out of or relating to the engagement of Milliman by Company, the parties agree that the dispute will be resolved by final and binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association.

(App. 6a). The arbitration clause has no exception should the insurer later become insolvent.

By Order dated March 2, 2015, CoOportunity was declared insolvent and placed into liquidation. (App. 4a). On July 26, 2017, the liquidator filed a first amended petition (the "FAP") against Milliman, two Milliman actuaries, and certain of CoOportunity's founders/officers. The FAP asserts six common law tort claims against Milliman that relate to and arise entirely out of the work Milliman performed for CoOportunity prior to its insolvency. (*See* App. 58a).

In the FAP the liquidator for the first time asserted that it was disavowing the entire 2011 Agreement, years after Milliman had already performed all of its work. (App. 61a).

Milliman moved to compel arbitration of the liquidator's claims. The Iowa district court denied Milliman's motion. Milliman appealed to the Iowa Supreme Court, which retained the appeal rather than assign it to the Iowa intermediate appellate court.

II. THE IOWA SUPREME COURT'S DECISION

On April 3, 2020, the Iowa Supreme Court reversed the Iowa district court decision. The Court held that, under Iowa law, the liquidator is bound by all of the terms of the 2011 Agreement, including the arbitration provision.

A. The Liquidator is Bound to the 2011 Agreement Under Iowa Contract Law

Following its prior holding in *Bullis v. Bear, Stearns & Co.*, 553 N.W.2d 599 (Iowa 1996), the Iowa Supreme Court stated that "[w]hether one is bound by an arbitration agreement that she did not sign depends on the general principles of contract law." (App. 8a). Under Iowa contract law, and based on the liquidator's own pleading, the Iowa Supreme Court held that the liquidator's "claims are a derivative of another party's claims, in this case, CoOportunity . . . and seek[ ] to recover damage for the financial loss to CoOportunity." (App. 9a–10a). Because the liquidator's "claims cannot be detached from the contractual relationship between Milliman and CoOportunity, pursuant to which all of the work was performed," the Iowa Supreme Court held that "under the principles of contract law, we conclude the liquidator stands in

CoOportunity's shoes; his claims are merely derivative of CoOportunity's claims. *See Roth [v. Evangelical Lutheran Good Samaritan Soc.*, 886 N.W.2d 601, 608 (Iowa 2016)]. Accordingly, the liquidator is bound by the preinsolvency arbitration agreement." (App. 14a).

The Iowa Supreme Court, quoting the 2011 Agreement's arbitration clause, explained that "[t]his written provision to resolve *any dispute* by arbitration is central to the issue before us." (App. 6a) (emphasis in original). The Iowa Supreme Court further explained that "[n]either the Iowa legislature nor the Iowa Insurance Commissioner has prohibited health insurance co-ops from including arbitration provisions in contracts with third-party contractors such as Milliman. *See, e.g.*, Iowa Code § 505.8. It is too late for the liquidator to impose such a provision in this case." (App. 12a n.4).

The liquidator does not contest these aspects of the Iowa Supreme Court's holding. (Pet. at 7 n. 2).

The Iowa Supreme Court also rejected the liquidator's argument that its tort claims do not arise from or relate to Milliman's work performed under the 2011 Agreement. The court held that "[w]ithout the 2011 Agreement, Milliman would not have performed any work that could give rise to claims by the liquidator. The liquidator, standing in CoOportunity's shoes, may not avoid a contractual arbitration agreement merely by casting its complaint in tort." (App. 11a) (citation omitted).

B. The State Disavowal Statute May Not Be Used to Defeat Milliman's Arbitration Rights

Construing its own state Liquidation Act, the Iowa Supreme Court rejected the liquidator's contention

that he can both continue to pursue his claims against Milliman that arise from the 2011 Agreement, and simultaneously disavow the remainder of the 2011 Agreement:

> The issue with the liquidator's position is that it attempts to disavow a contract that Milliman *already* performed. The 2011 Agreement does not vanish. Milliman rendered its consulting services under the 2011 Agreement, and the rights established under that contract still exist. It is difficult to reconcile the ability of the liquidator to disavow the 2011 Agreement while still retaining the ability to assert claims against Milliman pursuant to the same contract.
>
> Disavowing the entire 2011 Agreement, while allowing the liquidator to assert claims pursuant to the same agreement, amounts to nothing more than singling out the arbitration provision for evasion. The liquidator cannot pick and choose which provisions in the contract existed.

(App. 15a–16a) (citations omitted) (emphasis in original).

The Iowa Supreme Court made clear that, although its interpretation of the Iowa Liquidation Act's disavowal provision comports with federal law, its decision was not based or contingent upon FAA preemption. The Iowa Supreme Court stated only that "***if*** section 507C.21[(1)](*k*) were interpreted to allow disavowal of a preinsolvency arbitration agreement with a third-party contractor"—confirming that the statute itself does not permit disavowal here—"this would raise serious questions as to its validity under

the Supremacy Clause of the United States Constitution." (App. 16a) (emphasis added). But because the Iowa Supreme Court refused to allow the liquidator to disavow the 2011 Agreement, it neither needed to nor did it address any "serious issues" regarding possible FAA preemption.

C. The Iowa Supreme Court's McCarran-Ferguson Act Holding

The liquidator erroneously contends that the Iowa Supreme Court "addressed whether McCarran-Ferguson exempted the disavowal defense from federal preemption." (Pet. at 8). The Iowa Supreme Court neither cited that provision nor used any variant of the word "disavow" in the McCarran-Ferguson Act portion of its opinion. Having rejected the liquidator's construction of the disavowal statute based on Iowa law, the Iowa Supreme Court had no need to address disavowal in the context of reverse preemption. As the liquidator concedes, "[i]n 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." (Supp. Brief at 3).

Instead, the Iowa Supreme Court's McCarran-Ferguson Act analysis addressed issues beyond the scope of the two Questions Presented in the Petition; it held that neither the state policy and purposes behind the Iowa Liquidation Act (set forth at Iowa Code § 507C.1(4)(a)–(g)), nor the Act's forum selection provisions (*id.* § 507C.21(1)(l)), reverse preempt the FAA under the McCarran-Ferguson Act. (App. 16a–21a). The court addressed these issues because the trial court had held that "requiring arbitration under

the FAA would 'invalidate, impair, or supersede' operation of the Iowa Liquidation Act," and therefore the Iowa statute reverse-preempts the FAA pursuant to the McCarran-Ferguson Act. (App. 17a).

The Iowa Supreme Court first held that the McCarran-Ferguson Act does not apply in this case because there is "no conflict" between the Iowa Liquidation Act and the FAA with respect to whether the liquidator's claims against Milliman are arbitrable:

> The Iowa Liquidation Act authorizes the liquidator to "[c]ontinue to prosecute and to institute . . . any and all suits and *other legal proceedings*." Iowa Code § 507C.21(1)(*l*) (emphasis added). Pursuant to the Iowa Liquidation Act, the Final Order of Liquidation in this case expressly permits the liquidator to sue or defend CoOportunity in "any necessary forum," including "arbitration panels."

(App. 17a–18a). The Iowa Supreme Court found that there is no conflict between the FAA and the Iowa Liquidation Act because "[n]owhere in the Iowa Liquidation Act is it required that the liquidator must bring claims in a public forum." (App. 19a–20a).

The Iowa Supreme Court also held that arbitration of the liquidator's claims would not interfere with or impair the state's "regulation of the business of insurance," as that term is defined by federal law construing the McCarran-Ferguson Act, because, *inter alia*, "[r]equiring arbitration only alters the forum in which the liquidator may pursue his common law tort claims. The interests and rights of policyholders under Iowa's statutory scheme are not altered." (App. 20a–21a). The Iowa Supreme Court ruled consistently with *U.S.*

Dep't of Treasury v. Fabe, 508 U.S. 491 (1993), in holding that since "the interests and rights of policyholders under Iowa's statutory scheme are not altered" by an arbitration clause that merely affects the venue in which third-party claims brought by the liquidator are adjudicated, and since mere public-policy arguments are insufficient to defeat an otherwise valid arbitration agreement, reverse-preemption did not apply. (App. 21a).

REASONS FOR DENYING THE PETITION

Neither of the liquidator's Questions Presented—(1) whether the FAA preempts the Iowa Liquidation Act's disavowal provision (Iowa Code § 507C.21(1)(k)), and (2) whether that disavowal statute reverse preempts the FAA pursuant to the McCarran-Ferguson Act—were addressed or decided in the Iowa Supreme Court's decision. (Pet. at i). There is no federal question regarding the Iowa Supreme Court's disavowal decision to be reviewed here.

I. THE IOWA SUPREME COURT'S HOLDING THAT THE LIQUIDATOR CANNOT DISAVOW THE PARTIES' ARBITRATION AGREEMENT RESTS ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS

At the core of the Iowa Supreme Court's reasoning regarding Iowa Code § 507C.21(1)(k) is a common-sense approach to Iowa law. Section 507C.21(1)(k) authorizes the liquidator to "affirm or disavow contracts to which the insurer is a party." The Court held that the Act does not allow the liquidator to bring claims arising out of, and seeking monetary damages for alleged defective performance under, an agree-

ment, while ignoring provisions of that same contract relating to the resolution of such disputes.[2]

The Iowa Supreme Court's construction of Iowa Code § 507C.21(1)(k) that the liquidator may not, in whole or in part, disavow the fully-performed Agreement, is an independent and adequate state law ground on which the Iowa Supreme Court's decision was based. The single dissent's disagreement with the majority's decision argues with the majority's construction of the state disavowal law; it contends that the state statute allows a liquidator to exercise its disavowal power selectively and without regard to whether a contract has been fully performed. (App. 26a–27a).[3]

This Court therefore does not have jurisdiction to address the liquidator's Questions Presented. *See, e.g.*, *Michigan v. Long*, 463 U.S. 1032, 1040 (1983) (this Court does not "decide cases where there is an adequate and independent state ground"); *Herb v.*

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[2] While the liquidator disputes the Iowa Supreme Court's holding that the liquidator's claims arise from and relate to the 2011 Agreement, that aspect of the court's decision is likewise a state law (and common sense) determination that is beyond the scope of this Court's review.

[3] By finding in Iowa Code § 507C.21(1)(k) an implicit limitation to executory contracts, the Iowa Supreme Court both avoided an implausible and inequitable result and harmonized Iowa law with the National Association of Insurance Commissioners' ("NAIC") model law, which provides that "[t]he receiver may assume or reject any ***executory*** contract or unexpired lease of the insurer." NAIC Insurer Receivership Model Act § 114.A (2007) (emphasis added), *available at* https://content.naic.org/sites/default/files/inline-files/MDL-555.pdf. Moreover, since the NAIC in its model act recommends limiting disavowal to executory contracts, the "disavowal defense" issues the liquidator seeks to raise are unlikely to have national significance.

Pitcairn, 324 U.S. 117, 125–26 (1945) ("Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.").

The petition seeks to avoid this conclusion by characterizing the Iowa Supreme Court's reasoning as based on FAA preemption. (Pet. at 7–8, 13–14; *see also* Pet. at 26, 29 (asserting that "the basis for the Iowa Supreme Court's decision" was "that the FAA preempts the Liquidators' statutory disavowal authority")). But the Iowa Supreme Court made the point that its decision made it unnecessary to address whether the FAA preempts the state law. (App. 16a). That nod to harmony between a state law conclusion and federal law is far from unusual, and far from a finding of preemption. It does not convert the Iowa Supreme Court's interpretation of the Iowa statute into a federal ruling subject to this Court's review. *See, e.g.*, *California v. Freeman,* 488 U.S. 1311, 1313–15 (1989) (O'Connor, J.) (holding that a state court's discussion of supporting federal law considerations immediately after the state court construed a state statute did not convert the state statutory construction into a federal question under *Long*).

The liquidator argues that those references make the Iowa Supreme Court's interpretation of Iowa Code § 507C.21(1)(k) reviewable by this Court on the basis that it was "interwoven with the federal law." (*See* Supp. Brief at 5, *quoting Long*, 463 U.S. at 1040). However, this Court made clear in *Long* that this "interwoven with the federal law" concept ***only*** confers jurisdiction "when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." 463 U.S. at 1040–41 (emphasis added).

The Iowa Supreme Court noted that its decision was consistent with, not in conflict with or preempted by, the FAA. However, as discussed at length above, the Iowa Supreme Court's decision makes abundantly clear that its construction of the disavowal portion of its opinion rests solidly on its understanding of state law principles applied to the provisions of the 2011 Agreement.[4]

II. EVEN ASSUMING JURISDICTION, THE LIQUIDATOR IDENTIFIES NO FEDERAL LAW CONFLICT RELEVANT TO HIS QUESTIONS PRESENTED

A. Equal Footing Doctrine

The liquidator's first Question Presented contends that this Court must resolve whether the FAA preempts a state disavowal statute. However, because the Iowa Supreme Court did not hold that the FAA preempts the state's disavowal statute, there is no conflict between its decision and either federal circuit courts and/or state courts of last resort on this issue. In all events, the liquidator cites no decision in which a federal appellate court or state court of last resort relies on a state disavowal statute to vitiate an otherwise valid contractual arbitration clause.

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[4] Even if this Court were to conclude that there is sufficient ambiguity concerning the roles of state and federal law in the Iowa Supreme Court's decision for this Court to have ***jurisdiction*** to review it, the high likelihood is that, upon any remand, the Iowa Supreme Court would reaffirm the same result as a matter of state law. Moreover, the absence of any conflict among courts of appeals and state supreme courts regarding the interaction of the FAA with a statutory "disavowal defense," should dissuade this Court from exercising its ***discretion*** to grant certiorari of the Questions Presented.

Having failed to present a reviewable conflict on its Question Presented, the liquidator, in his Petition's argument section, asserts that the Iowa Supreme Court's rejection of the liquidator's disavowal of the 2011 Agreement conflicts with other courts' applications of the "equal footing doctrine." (Pet. at 19). Not so.

The state court cases the liquidator cites in support of this purported "split" (Pet. at 16–19) do not "conflict" with the Iowa Supreme Court decision. They differ in that those state courts construed their respective states' law to find against arbitration, while the Iowa Supreme Court construed its state law to affirm Milliman's arbitration rights. In *Cain v. Midland Funding, LLC*, 156 A.3d 807 (Md. 2017), *Perry Homes v. Cull*, 258 S.W.3d 580, 584 (Tex. 2008), and *Hales v. ProEquities, Inc.*, 885 So. 2d 100 (Ala. 2003), the courts relied on state law to hold that the movants had waived arbitration. In *Morgan v. Sanford Brown Institute*, 137 A.3d 1168, 1172 (N.J. 2016), the court held that the alleged arbitration agreement did not meet "the elements necessary for the formation of a contract under state law." And in *State ex rel. U-Haul Co. of West Virginia v. Zakaib*, 752 S.E.2d 586 (W. Va. 2013), the court held that, under state law, an addendum containing an arbitration clause had not been incorporated by reference into the parties' original contract. There is no federal law conflict between these decisions and the Iowa Supreme Court decision.

None of those decisions turned on whether the FAA "preempted" the state law "contract defenses" at issue, or rejected an otherwise enforceable arbitration agreement because holding otherwise would "elevate" an arbitration clause over other provisions in the same

contract.[5] Therefore, those state law holdings do not raise a federal issue sufficient to invoke this Court's jurisdiction here.

The liquidator argues that "this Court has ***most frequently*** employed" the equal footing doctrine "to preclude state-law defenses that single out arbitration clauses for adverse treatment." (Pet. at 12 (emphasis added)). However, the liquidator cites to no decision of this Court that has invoked the equal footing doctrine to overrule a state or federal appellate court decision granting arbitration, as the liquidator urges this Court to do here. This Court established the principle that arbitration provisions must be placed on "equal footing" with other provisions of a contract to ***protect*** arbitration. *See, e.g.*, *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 58 (2015) (the California Supreme Court's contractual interpretation rule singled out arbitration contracts and did not place them "on equal footing with all other contracts"); *see also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (Section 2 of the FAA "embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts."); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring

[5] In *Perry Homes*, the Texas court responded to the dissent's position that arbitration cannot be waived, stating that doing so would "favor arbitration too much." 258 S.W.3d at 597. And although the court in *McGill v. Citibank, N.A.*, 393 P.3d 85, 94 (Cal. 2017), held that the FAA did not preempt a waiver defense based on California law, there is no reviewable conflict with the Iowa Supreme Court's rejection of the liquidator's disavowal defense here because the Iowa Supreme Court's decision was based on its construction of Iowa law, not FAA preemption.

instead that such provisions be placed 'upon the same footing as other contracts.'"). The Iowa Supreme Court held that all of the provisions of the 2011 Agreement are to be treated on equal footing.

B. McCarran-Ferguson Act

The liquidator's second Question Presented likewise seeks review of a question that the Iowa Supreme Court did not need to address: whether the Iowa Liquidation Act's disavowal provision reverse-preempts the FAA under the McCarran-Ferguson Act. As discussed, the Iowa Supreme Court held that under Iowa state law, the liquidator could not disavow the 2011 Agreement. Therefore, as the liquidator concedes in his Supplemental Brief to this Court, absent a predicate holding of FAA preemption of the state disavowal statute, there was no reverse preemption issue for the Iowa Supreme Court to address. (Supp. Brief at 3). Accordingly, it did not address that issue.

What the Iowa Supreme Court did reverse was the trial court's erroneous holding that arbitration of the liquidator's pre-insolvency damages claims against Milliman would interfere with the Iowa Liquidation Act's forum selection provision and state public policy considerations, and "invalidate, impair or supersede" the liquidator's ability to "conduct an orderly dissolution." (App. 21a).

However, unlike the Louisiana Supreme Court's decision in *Donelon*, the independent and adequate state law grounds for the Iowa opinion do not warrant this Court's review of the Iowa Supreme Court's decision.

Finally, also unlike the Louisiana *Donelon* decision, the McCarran-Ferguson Act portion of the Iowa

Supreme Court's holding comports with unanimous federal appellate authority holding that "[a]pplication of the FAA" to an insurance liquidator's common law claims against a non-policyholder "does not impair the liquidator's substantive remedy under [state] law. Instead it simply requires the liquidator to seek relief through arbitration." *Bennett v. Liberty Nat. Fire Ins. Co.*, 968 F.2d 969, 972 (9th Cir. 1992); *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1382 (9th Cir. 1997) (same); *Suter v. Munich Reins. Co.*, 223 F.3d 150, 161 (3d Cir. 2000) (same); *Grode v. Mutual Fire, Marine and Inland Ins. Co.*, 8 F.3d 953, 959 (3d Cir. 1993) ("Simple contract and tort actions that happen to involve an insolvent insurance company are not matters of important state regulatory concern or complex state interests."); *see also AmSouth Bank v. Dale*, 386 F.3d 763, 783 (6th Cir. 2004) (forum selection provisions in state liquidation statute do not reverse-preempt federal law because receivers' pre-insolvency common law claims against non-policyholders do not implicate state regulation of the "business of insurance").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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