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

REPLY BRIEF FOR PETITIONERS

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With the shoe on the other foot, Respondent Milliman tries to duck review of an issue it simultaneously tells this Court to take up now. *See* Petition for Writ of Certiorari, *Milliman v. Donelon* (No. 20-299) (hereinafter "Milliman Pet."). It attempts to do so by distorting the reasoning of the Iowa Supreme Court, suggesting the court merely interpreted state law.

The opinion tells a different story. The Iowa Supreme Court grounded its rejection of the Liquidators' statutory disavowal defense squarely in federal law, including reliance on this Court's Federal Arbitration Act precedents. Further, as Milliman itself recognizes, had the Iowa Supreme Court's opinion truly been grounded in state law, the court would have had no reason to discuss the McCarran-Ferguson Act. But it did so. And the dissent certainly didn't understand the majority to be issuing a decision based on state law, nor did Milliman's own amicus when it asserted that the Iowa Supreme Court's decision—and this very Petition—bolstered the case for certiorari now.

Put simply, the entire Brief in Opposition is based on the opinion Milliman *wishes* it received, not the one it did. This Court should see through Milliman's attempt to distract from a cert-worthy issue by twisting the underlying opinion to manufacture a false jurisdictional impediment to review.

Notably, Milliman says very little to contest the dramatic and important splits in authority implicated by this Petition. The fleeting arguments it does make should be summarily rejected.

I. The Iowa Supreme Court Based Its Decision on an Erroneous View of the Federal Arbitration Act.

The Brief in Opposition spends little time justifying the Iowa Supreme Court's contravention of this Court's consistent FAA precedents or diffusing the patchwork confusion splitting state and federal courts on these issues. Instead, Milliman attempts to manufacture an artificial roadblock to review, claiming the court based its decision on adequate and independent state grounds. Milliman is wrong on both the facts and the law.

1. Milliman's assertion that the Iowa Supreme Court based its decision on the interpretation of state law is incorrect for at least five independent reasons.

First, the text of the opinion itself makes clear that the Iowa Supreme Court based its decision on federal law. Milliman myopically constrains its analysis to the lines of the opinion rejecting application of the disavowal defense when other provisions of the contract had already been performed. Br. in Opp. 11-12. That analysis ignores, however, the critical question for purposes of jurisdiction—*on what basis* did the court make that decision?

The portion of the opinion where the Iowa Supreme Court rejected application of the disavowal defense is only two paragraphs long (App.15a-16a), so it will not be difficult for this Court to confirm the court's clear reliance on federal law. The court began its analysis by appropriately framing the discussion under 9 U.S.C. § 2 and reciting the Liquidators' argument that disavowal is permitted because it is a generally applicable contract defense "for the

revocation of any contract." Pet.15a. This alone—the court's framing of the issue as one invoking the FAA's savings clause—is fatal to Milliman's argument. Even if it were not, the court then rejected that argument, not based on the text of the state statute or any interpretation of state law, but because allowing the disavowal defense would supposedly "run afoul of the FAA's mandate to place arbitration agreements on equal footing with other contracts." App.15a (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995)). Removing any doubt that this holding is clearly based upon the FAA, the court further invoked this Court's description of the equal-footing doctrine, claiming that permitting a disavowal defense in this circumstance would amount "to nothing more than singling out the arbitration provision for evasion," ultimately concluding 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." App. 16a (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

There is no plausible reading of this discussion that limits it to one based on state law. There is not even a mention of the actual statutory text, much less an analysis of Iowa law on statutory interpretation. Simply put, when a state supreme court holds that federal law dictates the limited scope of a statutory state-law defense, that is preemption, plain and simple. Milliman's suggestion to the contrary is a smokescreen.

Second, the authorities cited by the Iowa Supreme Court reinforce the holding's reliance on

federal law. After beginning the discussion by citing 9 U.S.C. § 2—the FAA's key provision regarding preemption and the preservation of generally applicable defenses—the court then cited two of this Court's cases analyzing the FAA and explaining the equal-footing doctrine, *Allied-Bruce* and *Doctor's Associates*. In fact, the *only* Iowa case the court cited in this discussion is not even one about statutory interpretation, about the disavowal defense, or about any other concept of state law. Rather, the Iowa Supreme Court cited one of its own prior opinions discussing the application of more federal law—"the Supremacy Clause of the United States Constitution"—recognizing that the decision implicated more federal law than just the FAA's equal-footing doctrine. App.16a (citing *Roth v. Evangelical Lutheran Good Samaritan Soc'y*, 886 N.W.2d 601, 611 (Iowa 2016)). Had the decision below been based simply on statutory interpretation of Iowa State law, it is inconceivable that the court would have done so without citing a single piece of Iowa authority or discussing any of the relevant statutory language.

Third, as Milliman admits, had the Iowa Supreme Court actually based its decision on the state law grounds Milliman suggests, there would have been no reason for the court to proceed to analyze McCarran-Ferguson. Br. in Opp. 9. Not only did the court do so, but it opened its discussion by stating: "We *must* also consider the McCarran-Ferguson Act." Add.16a (emphasis added). The court was correct that it needed to do so; since it had just found that the FAA preempted the disavowal defense, it then needed to analyze whether

McCarran-Ferguson exempted the relevant state statute from the FAA's preemptive effect.

Indeed, courts will first "put the McCarran-Ferguson Act's special anti-pre-emption rule to the side" while evaluating whether the federal statute preempts the state statute in the first place. *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 30 (1996). Only after confirming it does will the analysis turn to McCarran-Ferguson because, in the absence of any question of federal preemption, McCarran-Ferguson has no impact. *See id.* at 30, 37-38. The court followed that framework here (albeit, reaching the incorrect conclusion), and Milliman has no explanation whatsoever for why the Iowa Supreme Court spent such a significant portion of its opinion discussing a topic that Milliman admits would be irrelevant and superfluous under its misguided understanding.[1] The answer, of course, is that the McCarran-Ferguson discussion was neither irrelevant nor superfluous; it was a required analysis flowing naturally from the court's holding that the FAA preempted the Liquidator's invocation of the generally applicable disavowal defense.

Fourth, like the majority opinion, the dissent analyzed both FAA preemption and McCarran-Ferguson. The Brief in Opposition focuses on the dissent's rejection of Milliman's attempt to limit application of the disavowal defense to only

[1] Milliman suggests that the Iowa Supreme Court was addressing some different question under McCarran-Ferguson. Br. in Opp. 9-10. This is nonsensical. If the Iowa Supreme Court's decision is based on state law as Milliman suggests, *no* discussion of *any* issue under McCarran-Ferguson would have any impact on the analysis.

executory contracts, suggesting the inclusion of this discussion is proof the majority found to the contrary. Br. in Opp. 12. Not so. The dissent's text makes clear it is rejecting an argument set forth by *Milliman*—not the majority—using terminology like "Milliman suggests" and "Milliman cites" to frame its discussion, not once referring to the majority. App.43a, 45a, 46a. On the other hand, the dissent's discussion of preemption and McCarran-Ferguson specifically critiques the majority's opinion. *See* App.50a-55a. This juxtaposition is perfectly expected; to reach its conclusion that the district court's order should have been affirmed, the dissent had to dispel *both* the arguments of the majority and any other arguments of Milliman. The dissent further reinforces that the majority based its decision on federal law.

Fifth, Milliman's *own amicus* did not believe the Iowa Supreme Court's decision was based on state law or that this Petition raises an issue of state law. Writing in support of Milliman's petition, Milliman's amicus stated: "These competing petitions *on an issue of federal law* underscore the urgency of the conflict and the need for this Court's intervention." Brief of American Institute of Certified Public Accountants (No. 20-299), at 9 n.3 (Oct. 8, 2020). The Liquidators wholeheartedly agree.

There is no support for Milliman's attempted diversion. The Iowa Supreme Court based its decision on an erroneous view of federal law.

2. As the above discussion illustrates, the Iowa Supreme Court's decision is plainly based on federal law, and this Court need not resort to its precedents on "adequate and independent" state-law grounds. If

it does so, this Court's authority readily confirms jurisdiction. As Milliman recognizes, this Court has jurisdiction if the Iowa Supreme Court's decision rested "primarily on federal law" or was "interwoven with the federal law." *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). Despite the extensive discussion above describing the court's reliance on federal law, Milliman nonetheless suggests it is clear on the face of the opinion that the court decided this case on adequate and independent state grounds. Milliman bases this entire argument on the court's use of the word "if" when explaining its view that a contrary holding could run afoul of the Supremacy Clause. Br. in Opp. 8, 13 (citing App.16a). That argument misses the forest for the trees, however, by again ignoring the *reason* the Iowa Supreme Court reached its conclusion on the disavowal defense—the court's belief that the FAA's equal-footing doctrine compelled it. *See supra* 2-4; App.15a-16a.

Milliman is also incorrect about what is required on the face of an opinion to deprive this Court of jurisdiction. In order to invoke this doctrine, a decision must state "clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds." *Long*, 463 U.S. at 1041. The face of the opinion must contain "a clear statement that the decision rested on a state ground separate from" the federal law. *Florida v. Powell*, 559 U.S. 50, 58 (2010). Here, the decision was based on federal law (and, at the very least, was interwoven with it).[2] This Court has jurisdiction.

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[2] Milliman relies on an order denying a stay from Justice O'Connor, in which she ruled that a California Supreme Court

Milliman concludes with the suggestion that even if this Court has jurisdiction, it should still deny review because on remand the court would, as a matter of statutory interpretation, limit the disavowal defense to executory contracts. Br. in Opp. 14 n.4. This Court should reject that argument for two reasons.

First, it is far from certain that the Iowa Supreme Court would see fit to usurp legislative power and insert the word "executory" into a statute where it does not appear.[3] Milliman admits the statute does not contain such a limitation, claiming that such a ruling would be a proper "implicit limitation to executory contracts." *Id.* at 12 n.3. That reasoning is nothing more than legislating. Indeed, Milliman goes on to explain that the relevant model act *did* limit the disavowal authority to executory contracts, yet the Iowa legislature chose to omit that word when adopting its own statute. *Ibid.* It is not the judiciary's place to substitute its judgment for the legislature's. *See, e.g.*, *Lomax v. Ortiz-Marquez*, 140

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opinion was based on adequate and independent state grounds. *California v. Freeman*, 488 U.S. 1311 (O'Connor, Circuit Justice, 1989). There, however, the state supreme court addressed state and federal law in two distinct subsections, which were not interrelated at all. *Id.* at 1314. Here, to the contrary, in the relevant *single section* of the Iowa Supreme Court's opinion, the court does not quote the relevant statutory language or cite any state law of statutory interpretation; instead, it bases its interpretive decision on the perceived commands of the FAA. *Freeman* is wholly distinguishable.

[3] "The liquidator may . . . [e]nter into contracts as necessary to carry out the order to liquidate and affirm or disavow contracts to which the insurer is a party." Iowa Code § 507C.21(1)(k).

S. Ct. 1721, 1725 (2020) ("[T]his Court may not narrow a provision's reach by inserting words Congress chose to omit."); *see also* App.45a ("Our charge is to apply the law as we find it."). [4] Accordingly, it is far from certain the Iowa Supreme Court would seize legislative authority on remand and adopt the atextual statutory interpretation Milliman desires.

Second, Milliman's argument only reinforces why this Court should grant the Petition and reverse now. If the Iowa Supreme Court truly does want to alter the legislature's text, it should say so directly. This Court should not endorse state courts cloaking judicial legislating under a shroud of federal preemption. To be clear, that is not what the Liquidators believe happened here; the court squarely based its decision on FAA preemption. But even if Milliman is right, it provides yet another justification for grating review.

II. The Questions Presented Raise Important Conflicts This Court Should Resolve Now.

Milliman has comparatively little to say about the Questions Presented themselves, seemingly hanging its hat on the now dispelled myth that there is any jurisdictional impediment to review. And the brief objections Milliman does raise warrant summary rejection.

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[4] Justice Appel's dissent also identified four specific instances where the Iowa legislature used the term "executory" contract when it wanted to limit legislation accordingly (App.45a), further illustrating the Iowa Legislature knew how to do so had it wanted. *See, e.g.*, *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1739 (2020).

1. On the issue of FAA preemption, Milliman claims that the litany of cases cited by Liquidators (Pet. 17-19) are not actually in conflict on issues of federal law because those cases simply applied state-law defenses. Br. in Opp. 15-16. Milliman misses the point. Of course these cases were discussing state law; the retention of generally applicable state-law defenses is the entire purpose of 9 U.S.C. § 2. But each one of these cases explained that, because the defenses were generally applicable, the FAA did not preempt them by virtue of § 2 of the FAA. It is on that point that the Iowa Supreme Court's decision conflicts and should be reversed.

Even more substantially, the Iowa Supreme Court's decision runs afoul of this Court's equal-footing precedents. *See* Pet. 11-16. On this point, Milliman makes a truly striking argument, claiming the equal-footing doctrine applies *only* to protect arbitration, not in instances where equal footing would preclude arbitration. Br. in Opp. 16. In addition to being entirely contrary to the doctrine's name ("*equal* footing"), Milliman's suggestion certainly would have been news to this Court when it described that the purpose of the FAA "was to make arbitration agreements as enforceable as other contracts, *but not more so*." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (emphasis added).

Milliman's argument would have also been news to Congress, which expressly declared that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Indeed, the entire basis for this Court's

equal-footing jurisprudence is § 2 of the FAA, which explicitly calls for the preservation of generally applicable contract defenses, like the disavowal defense here. Milliman's suggestion that the equal-footing doctrine applies only to *reject* state-law defenses is inconsistent with this Court's precedents and the plain language of the FAA.

2. On the McCarran-Ferguson question, Milliman finds itself in an awkward position. Having already told this Court that the Iowa Supreme Court's decision was based on state, not federal, law, Milliman must try and explain why the court is even addressing McCarran-Ferguson. It ultimately settles on an argument that the court was addressing some separate, broader question under McCarran-Ferguson. Br. in Opp. 17. That explanation makes no sense, of course, because the McCarran-Ferguson inquiry necessarily follows directly from a holding that federal preemption applies. *See, e.g.*, *Barnett Bank*, 517 U.S. at 30. In other words, the Questions Presented here are logically intertwined, and they present the Court a clean opportunity to resolve substantial splits in authority.

Most important for this Court's task now, the Iowa Supreme Court's incorrect decision exacerbates a deep conflict among state and federal courts across the country. Pet. 19-25. Milliman even highlights one side of this split (Br. in Opp. 18), once again illustrating the importance and impact of these issues. That is especially so when weighed against the countervailing and majority view, including the very case in which Milliman is currently asking this Court to accept review. *See* Pet. 19-23; *Donelon v.*

Shilling, ___ So.3d ___, 2020 WL 2306075, at *1 (La. Apr. 27, 2020).

It is understandably difficult for Milliman to downplay the split in authority raised by this Petition when Milliman has already told the Court that the second Question Presented here is worthy of review because the decisions of the Iowa and Louisiana Supreme Courts "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. Indeed they do.

CONCLUSION

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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