No. 20-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 2020

MILLIMAN, INC.,

Petitioner

v.

JAMES J. DONELON, COMMISSIONER OF INSURANCE FOR THE STATE OF LOUISIANA, IN HIS CAPACITY AS REHABILITATOR OF LOUISIANA HEALTH COOPERATIVE, INC.,

Respondent

ON APPLICATION TO STAY THE MANDATE
OF THE LOUISIANA SUPREME COURT

APPLICATION FOR A STAY PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

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

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The opinion of the Louisiana Supreme Court will be reported at — So. 3d — and is included in the Appendix ("App.") at pages 3-16. The decision of the Louisiana Supreme Court to deny a stay of proceedings pending a decision by this Court on Milliman's forthcoming writ of certiorari is unreported, and is included at App. 18-19. The Louisiana First Circuit Court of Appeals' opinion unanimously granting Milliman's appeal to compel arbitration is unreported, and is included at App. 21-50. A transcript of the Louisiana 19th Judicial District Court's oral opinion denying Milliman's motion to compel arbitration is unreported, and is included at App. 52-55.

JURISDICTION

The Louisiana Supreme Court entered judgment on April 27, 2020. Applicant Milliman, Inc. ("Milliman") moved the Louisiana Supreme Court on May 15, 2020 for a stay of proceedings pending a decision by this Court on Milliman's forthcoming writ of certiorari. The Louisiana Supreme Court denied the stay on May 18, 2020. Milliman submits this application pursuant to 28 U.S.C. § 2101(f) and Supreme Court Rule 23 to stay proceedings in Louisiana state court "for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court."

To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

Pursuant to 28 U.S.C. § 2101(f) and Supreme Court Rule 23, Milliman, Inc. ("Milliman") applies to stay all ongoing Louisiana state court proceedings against it in this case pending a decision on Milliman's petition for a writ of certiorari and this Court's consideration of the merits.

The action below was brought against Milliman by the Louisiana Commissioner of Insurance, acting as the rehabilitator of Louisiana Health Cooperative, Inc. ("LAHC"), an insolvent health care insurer created in 2011 and funded pursuant to the Patient Protection and Affordable Care Act. After LAHC was declared insolvent in 2015, the Commissioner sued Milliman in state court, along with various other defendants, for contract and tort damages arising from Milliman's pre-insolvency performance of actuarial services for LAHC pursuant to an agreement that includes a broad arbitration clause. Milliman moved to compel arbitration.

Milliman's petition for certiorari, filed simultaneously with this Application, seeks review of the Louisiana Supreme Court's holding that the forum selection clause in the state's insurance insolvency statute reverse preempts the Federal Arbitration Act ("FAA") pursuant to the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), and therefore the state's insurance Commissioner may proceed with his pre-insolvency, contract-based damages claims against Milliman in state court, rather than in arbitration.

The question presented in Milliman's petition is whether state insurance commissioners, acting as rehabilitators/liquidators for an insolvent insurer, must arbitrate damages claims against a non-policyholder arising out of the insurer's pre-insolvency agreement containing a broad arbitration clause, here Milliman, or whether such claims implicate, or arbitration of such claims impairs or interferes with, the state's regulation of the "business of insurance" under Section 2(b) of the McCarran-Ferguson Act. 15 U.S.C. § 1012(b).

We respectfully refer the Court to the petition for a fuller discussion of the relevant case law and the entrenched conflicts exacerbated by the Louisiana Supreme Court decision. Briefly stated, there is an irreconcilable split between (1) decisions of the United States Courts of Appeals for the Third and Ninth Circuits holding that state insurance commissioners must arbitrate pre-insolvency damages claims against a non-policyholder, and that the McCarran-Ferguson Act does not reverse preempt the FAA with respect to the arbitration of these claims, *see, e.g.*, *Suter v. Munich Reins. Co.*, 223 F.3d 150, 161 (3d Cir. 2000); *Bennett v. Liberty Nat'l Fire Ins. Co.*, 968 F.2d 969, 972-73 (9th Cir. 1992); and (2) Louisiana and Kentucky Supreme Court holdings that arbitrating such claims would interfere with the state's regulation of the business of insurance, and therefore the commissioner is not required to arbitrate because the state's forum selection provision reverse preempts the FAA.

The Louisiana and Kentucky Supreme Court decisions also conflict with recent decisions by the Iowa Supreme Court and Nevada Supreme Court, and a

Kentucky federal district court, in parallel cases involving the same pre-insolvency arbitration agreement and substantively the same contract and tort claims against Milliman.[1] Each of those courts compelled the state insurance commissioners, who were acting as liquidators for insolvent insurers, to arbitrate their pre-insolvency damages claims against Milliman (the Nevada Supreme Court, finding "no clear error of law" in the trial court's decision compelling arbitration, refused interlocutory review). Those courts each concluded that the bringing of these claims by the state insurance commissioner is not the regulation of the "business of insurance," and further that arbitration of these claims does not interfere with or impair the state's regulation of the "business of insurance." *See Ommen v. Milliman*, 941 N.W.2d 310 (Iowa 2020); *State ex rel Richardson v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 454 P.3d 1260 (Nev. 2019); *Milliman, Inc. v. Roof*, 353 F. Supp. 3d 588 (E.D. Ky. 2018).

To add to this multi-state conflict, the New York Court of Appeals and the Ohio Supreme Court have held that their state insurance commissioners need not

[1] On Friday, August 28, Milliman received the Iowa liquidators' petition for certiorari seeking review of the Iowa Supreme Court's decision (*see Doug Ommen, in His Capacity as Liquidator of CoOportunity Health, et al., v. Milliman, Inc., et al.*, no. 20-249). That petition 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. The Iowa petition also challenges and seeks this Court's review (first question presented) of the Iowa Supreme Court's construction of Iowa state contract law and provisions of the Iowa insurance insolvency statute. Milliman will respond to the Iowa petition at the appropriate time for filing its response.

arbitrate pre-insolvency damages claims, in decisions that failed to discuss the FAA or the McCarran-Ferguson Act.

Review, and a stay pending this Court's review, is further warranted because the Louisiana Supreme Court is on the wrong side of this conflict. Its reasoning is inconsistent with this Court's, as well as federal circuit court, precedents. In *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 508-09 (1993) this Court reaffirmed that state statutes or actions regulate the "business of insurance" under the McCarran-Ferguson Act only to the extent that they "regulate policyholders." *Fabe* recognized that bringing additional funds into the estate of an insolvent insurer—which is what the Commissioner hopes to achieve here—while it could "indirect[ly]" benefit policyholders, does not constitute the "business of insurance" under the McCarran-Ferguson Act. Similarly, the choice of forum in which a commissioner brings pre-insolvency damages claims against non-policyholders does not impair or interfere with the state's regulation of the insurer-policyholder relationship. The Louisiana and Kentucky decisions, and both the New York Court of Appeals and Ohio Supreme Court holdings, are not consistent with either this Court's or federal circuit court precedents.

Nor is this a limited dispute. In a majority of U.S. states and territories, the forum selection clauses in the state insolvency statutes are written to require (like Kentucky) or permit (like Louisiana) state insurance commissioners to bring these pre-insolvency damages claims in state court, thereby nullifying pre-insolvency arbitration agreements. Because the core issue here—construction of the

McCarran-Ferguson Act as applied to the bringing of these pre-insolvency damages claims—is governed by federal law,[2] only this Court can provide the certainty of what should be a uniform national answer, binding both on federal and state courts, and on insurance commissioners and third party contractors doing business with insurers across the country.

The Louisiana Supreme Court denied Milliman's application for a stay. Absent a stay, Milliman will remain embroiled in a very large and expensive multi-defendant case, which the Louisiana Insurance Commissioner expeditiously revived in the wake of the Louisiana Supreme Court's decision (and refusal to grant Milliman a stay). And, absent a stay, Milliman's FAA-protected right to proceed in an efficient, less costly, single-defendant arbitration proceeding will be irreparably compromised before this Court can even consider, let alone rule on, the merits of Milliman's petition for certiorari.

Milliman therefore respectfully requests a stay of the district court proceedings pending the disposition of Milliman's Petition. Forcing Milliman to engage in further state court litigation, which in this case involves ten other defendants, costly, multi-party discovery, and a multi-year case schedule that will imminently be ordered, will irreparably deprive Milliman of its bargained-for right

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[2] *See S.E.C. v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65, 67, 69 (1959); *Trailer Marine Transp. Corp. v. Rivera Vazquez*, 977 F.2d 1, 13 (1st Cir. 1992), citing *Variable Annuity Life Ins. Co. of Am.*, 359 U.S. at 69 (a state's "classification does not control in deciding whether an activity is the 'business of insurance' under the McCarran-Ferguson Act.").

to resolve its claims efficiently and expeditiously through arbitration directly with the Louisiana Commissioner.

STATEMENT OF THE CASE

1. This action was brought against Milliman by the Louisiana Commissioner of Insurance, acting as the rehabilitator of Louisiana Health Cooperative, Inc. ("LAHC"), an insolvent health care co-operative insurer, or "co-op," created in 2011 and funded pursuant to the Patient Protection and Affordable Care Act (the "ACA").

2. Pursuant to a 2011 "Consulting Services Agreement" (the "Agreement"), LAHC engaged Milliman, one of the United States' leading actuarial firms, to provide it with "actuarial support." Milliman provided all of its actuarial services, fully performing its obligations to LAHC pursuant to the Agreement, from August 2011 to March 2014, prior to LAHC's insolvency.

The Agreement contains a broad, unambiguous arbitration clause requiring the arbitration of all claims arising out of or relating to the Agreement:

> Disputes: In the event of any dispute arising out of or relating to the engagement of Milliman by [LAHC], 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. 109). The arbitration clause has no exception should the insurer later become insolvent.

3. In 2015, LAHC became insolvent and was placed into rehabilitation. In November 2016, the Louisiana Insurance Commissioner, acting as Rehabilitator, filed an amended petition in Louisiana's 19th Judicial District Court (the "19th

JDC") against several third party contractors who performed pre-insolvency work for LAHC, as well as against LAHC's officers and directors. The petition pled two causes of action against Milliman, both of which arise out of and relate to Milliman's work under the Agreement: (1) "professional negligence and breach of contract," and (2) negligent misrepresentation.

4. On February 17, 2017, Milliman moved to compel arbitration of both claims. The trial court denied Milliman's motion.

5. Milliman appealed to the Louisiana First Circuit Court of Appeals, which *sua sponte* entered an order on March 15, 2018 staying all trial court proceedings, as to all parties, pending resolution of Milliman's appeal. On February 28, 2019, the Louisiana First Circuit Court of Appeals unanimously reversed the trial court's denial of Milliman's motion to compel arbitration, and ordered the Louisiana Commissioner to arbitrate these claims.

6. The Commissioner appealed to the Louisiana Supreme Court, which unanimously reversed the Louisiana First Circuit on April 27, 2020. The Louisiana Supreme Court acknowledged that the Commissioner's action "aris[es] out of an agreement between the cooperative and a third-party contractor" that contains an arbitration clause. (App. 4). However, it held that Louisiana Rehabilitation, Liquidation, and Conservation Act ("RLCA") Section 22:2004(A)—pursuant to which the state Insurance Commissioner "may" bring rehabilitation proceedings in the 19th JDC "or any court where venue is proper"—permits the Rehabilitator "to choose where and how to litigate an action." (App. 7). The court held that, "[b]y

using the permissive 'may,' the statute does not foreclose the option of arbitration, if provided in a contract, but effectively delegates the choice to the Commissioner." (*Id.*).

The court emphasized public policy arguments to support its decision, including the "purpose and spirit of the RLCA," (App. 8), the Commissioner's role as "a protector of public interests," (*id.*), and the "substantial public interest" in consolidating proceedings in one forum to "promote the efficient and cohesive management of the affairs of insolvent insurers." (App. 8). It further stated that binding the Commissioner to a private arbitration agreement "would clearly violate the exclusivity of the rehabilitation scheme provided by law" and contravene Louisiana "public policy." (App. 10).

The court then addressed whether the "FAA… preempts Louisiana law, thus compelling arbitration," or whether "state law reverse preempts the FAA by virtue of the McCarran-Ferguson Act." (App. 11). It concluded that the RLCA as a whole was "enacted for the purpose of regulating the business of insurance" and that "Section 2004 is part of a coherent policy to address that interest." (App. 14) (citations omitted). With respect to section 2004(A) specifically, the court reasoned that it was enacted to avoid piecemeal litigation in different fora that might exacerbate litigation costs and generate inconsistent outcomes. (App. 15). The court then concluded that:

> Forcing arbitration upon the Commissioner conflicts with the Louisiana law authorizing him to choose which forum to proceed in as rehabilitator. This conflict sufficiently impairs the

> Commissioner's rights under Section 2004 to trigger McCarran-Ferguson's reverse preemption effect.

(*Id.*).

7. The Louisiana Supreme Court remanded the case to the 19th JDC. The stay of all trial court proceedings was immediately lifted and discovery is ongoing.

8. On May 18, 2020, the Louisiana Supreme Court denied Milliman's motion for a stay pending resolution of Milliman's petition for a writ of certiorari. (App. 18-19).

REASONS FOR GRANTING THE STAY

28 U.S.C. § 2101(f) authorizes this Court to stay proceedings in state court pending the disposition of Milliman's petition for a writ of certiorari. In reviewing such a stay application, this Court considers the following factors: "First, there must be a reasonable probability that certiorari will be granted (or probable jurisdiction noted). Second, there must be a significant possibility that the judgment below will be reversed. And third, assuming the applicant's position on the merits is correct, there must be a likelihood of irreparable harm if the judgment is not stayed." *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1302 (2010) (Scalia, J., in chambers) (staying proceedings in Louisiana state court); *see also Deaver v. United States*, 483 U.S. 1301, 1302 (1987). "In close cases," the Court will further "balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam).

Each of these factors favors a stay in this case.

I. THERE IS A REASONABLE PROBABILITY THAT THIS COURT WILL GRANT CERTIORARI.

A. THE LOUISIANA SUPREME COURT'S DECISION DEEPENS A CONFLICT BETWEEN FEDERAL AND STATE APPELLATE COURTS, AND AMONG STATE COURTS OF LAST RESORT.

The circumstances are compelling for this Court to grant review. This case presents an entrenched conflict between two federal circuit courts and the Iowa Supreme Court, on the one hand, and two state supreme courts (including the Louisiana Supreme Court in this case), on the other hand, on an important and recurring question of federal law.

The Louisiana Supreme Court's ruling directly contravenes unanimous federal circuit authority holding that an insurance commissioner's arbitration of damages claims arising out of an insolvent insurer's pre-insolvency contract which requires arbitration does not implicate, nor does arbitration impair or interfere with, the state's regulation of the "business of insurance" under the McCarran-Ferguson Act. Accordingly, the FAA requires the insurance commissioners to arbitrate these claims, and the FAA is not reverse preempted by the state's forum selection provision pursuant to the McCarran-Ferguson Act. *See Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1381-82 (9th Cir. 1997) (California Commissioner compelled to arbitrate); *Bennett*, 968 F.2d at 972 (Montana Commissioner); *Suter*, 223 F.3d at 161 (New Jersey Commissioner); *Grode v. Mut. Fire, Marine and Inland Ins. Co.*, 8 F.3d 953, 959-61 (3d Cir. 1993) (Pennsylvania Commissioner); *see also AmSouth Bank v. Dale*, 386 F.3d 763, 781, 783 (6th Cir. 2004) ("[A]n ordinary suit

against a tortfeaser by an insolvent insurance company" does not implicate the state's regulation of the business of insurance under McCarran-Ferguson).

The Iowa Supreme Court followed this federal precedent, holding that "the McCarran-Ferguson Act does not permit reverse preemption of the FAA" with respect to the common law claims at issue, and that arbitration "does not impede the liquidator's ability to conduct an orderly dissolution" or otherwise impede "the state process designed to protect the interests of policyholders." *Ommen*, 941 N.W.2d at 320-21; *see also State ex rel Richardson*, 454 P.3d at 1260 (rejecting Nevada Insurance Commissioner's McCarran-Ferguson Act reverse preemption argument and finding no clear error of law with the trial court order granting Milliman's motion to compel arbitration); *Milliman v. Roof*, 353 F. Supp. 3d at 594, 604 (granting Milliman's motion to compel arbitration and holding that "the McCarran-Ferguson Act does not allow reverse-preemption of the FAA when the Liquidator… brings suit against a third-party independent contractor for tort or breach of contract claims.").

Milliman respectfully refers the Court to its petition for more detailed discussion of each of these federal decisions, as well as the decisions of the Iowa and Nevada Supreme Courts, and a Kentucky federal district court that reach the same conclusion.

The Louisiana Supreme Court is not the only state court of last resort to refuse to order the state's insurance commissioner to arbitrate these claims. In 2010, the Kentucky Supreme Court had held that Kentucky's insurer insolvency statute's

forum selection provision, by virtue of the McCarran-Ferguson Act, reverse-preempts the FAA and precludes arbitration of the commissioner's (acting as liquidator) common law claims brought against a third party. *Ernst & Young, LLP v. Clark*, 323 S.W.3d 682, at 692 (Ky. 2010). The Kentucky Supreme Court held that "[p]ursuant to the [statute], the federal policy favoring arbitration is subordinated to the state's superior interest in having matters relating to the rehabilitation of an insurance company adjudicated in the Franklin Circuit Court." *Id.*

The Ohio Supreme Court and the New York Court of Appeals have also held that their respective state insurance insolvency statutes preclude their state insurance commissioners from being compelled to arbitrate common law damages claims against a third party. In doing so, neither court analyzed whether the FAA preempted the state law. Rather, the Ohio Supreme Court held that its insurance commissioner acting as liquidator cannot be bound to an insolvent insurer's pre-insolvency arbitration agreement because he stands in a "public protection role." *Taylor v. Ernst & Young*, 958 N.E.2d 1203, 1210-13 (Ohio 2011). The New York Court of Appeals has also long held, without addressing federal law, that the Superintendent of Insurance cannot be compelled to arbitrate because the New York State Insurance Law does not expressly authorize the Superintendent to do so. *Corcoran v. Ardra Ins. Co., Ltd.*, 567 N.E.2d 969, 972-73 (N.Y. 1990); *Knickerbocker Agency, Inc. v. Holz*, 149 N.E.2d 885, 891 (N.Y. 1958).

There is no way to square the analyses and holdings of the U.S. Courts of Appeals for the Third and Ninth Circuits and the Iowa Supreme Court, on the one hand, with the Louisiana and Kentucky Supreme Court decisions, on the other hand, on the question presented. The courts of appeals and state supreme courts have fully developed the relevant arguments on both sides of the question, and the question presented is ripe for this Court's review.

B. THE QUESTION PRESENTED IS AN IMPORTANT AND RECURRING ONE THAT WARRANTS THE COURT'S REVIEW IN THIS CASE.

The question presented in this case is, and if this Court does not resolve the question will continue to be, a recurring one of substantial legal and practical importance. It is the subject of an irreconcilable split and extensive state and lower court litigation. *See* NAIC Receiver's Handbook for Insurance Company Insolvencies, pp. 499–500 (2018), available at https://www.naic.org/documents/prod_serv_fin_receivership_rec_bu.pdf (discussing split in authority concerning arbitrability of disputes involving insurance commissioners acting as liquidators). This federal question under the McCarran-Ferguson Act—whether state insurance insolvency forum selection provisions consolidating rehabilitation insolvency proceedings in a single state court may override federal statutes and contracts providing for arbitration—is the subject of considerably more litigation and conflict. Notably, the insolvency statutes in over

half of U.S. states and territories have forum selection provisions that are substantially similar to Louisiana's.[3]

A definitive ruling would have great impact on companies that regularly do business with insurers, particularly in light of the COVID-19 pandemic. There will likely be a wave of new insurer insolvencies nationwide as insurers bear many of the costs of this pandemic. *See, e.g.*, *COVID-19 puts insurers in tricky situation; risks range from litigation to insolvency*, ALPHASTREET (Apr. 8, 2020), https://news.alphastreet.com/covid-19-puts-insurers-in-tricky-position-risks-range-from-insolvency-to-litigation/. And there is every reason to expect that state insurance commissioners nationwide will react, as the Louisiana Commissioner did in this case, by looking for out-of-state deep-pockets—such as professional service firms—to sue on behalf of the insolvent insurers, and will seek to pursue those suits in their home state courts.

Every significant insurer contracts for the services of (frequently national) auditors, actuaries, accountants, and other diverse professional service firms. Professional services firms such as Milliman and Ernst & Young (the defendant in

[3] *See, e.g.*, Colo. Rev. Stat. Ann. § 10-3-504(5); Conn. Gen. Stat. Ann. § 38a-906(e); D.C. Code Ann. § 31-1303(e); Ga. Code Ann. § 33-37-4(e); Haw. Rev. Stat. Ann. § 431:15-104(g); Idaho Code Ann. § 41-3304(5); Ind. Code Ann. § 27-9-1-3(f); Iowa Code Ann. § 507C.4(5); Kan. Stat. Ann. § 40-3608(e); Ky. Rev. Stat. Ann. § 304.33-040(3)(a); Miss. Code. Ann. § 83-24-9(5); Mo. Ann. Stat. § 375.1154(6); Mont. Code Ann. § 33-2-1308; Neb. Rev. Stat. Ann. § 44-4804(5); N.J. Stat. Ann. § 17B:32-34(e); N.C. Gen. Stat. Ann. § 58-30-15(d); N.D. Cent. Code Ann. § 26.1-06.1-04(5); Ohio Rev. Code Ann. § 3903.04(E); 40 Pa. Stat. Ann. § 221.4(d); 26 P.R. Laws Ann. § 4004(5); 27 R.I. Gen. Laws Ann. § 27-14.3-4(e); S.C. Code Ann. § 38-27-60(f); S.D. Codified Laws § 58-29B-7; Tenn. Code Ann. § 56-9-104(e); Tex. Ins. Code Ann. § 443.005(g); Utah Code Ann. § 31A-27a-105(8); Vt. Stat. Ann. tit. 8, § 7032(e); 22 V.I. Code Ann. § 1269(a); Wis. Stat. Ann. § 645.04(3).

both the Ohio and Kentucky Supreme Court cases addressed above) insist on broad arbitration clauses in those contracts because arbitration is essential to limit their litigation costs and manage their risks. It is an essential element of the bargain between insurers and professional service firms that the professional services firm—particularly an out-of-state firm—will not be forced to defend itself in the insurer's home-state courts, before home-state judges and jurors. But under the law as it currently stands in the state courts of last resort in Louisiana, Kentucky, New York, and Ohio, that contract will not be honored when it is most important to do so—when the insurer goes into insolvency.

II. THERE IS A SIGNIFICANT POSSIBILITY THAT THIS COURT WILL REVERSE THE LOUISIANA SUPREME COURT'S DECISION.

If this Court grants certiorari, it will likely reverse the Louisiana Supreme Court's decision. Pages 22–29 of Milliman's petition explain, and we briefly summarize below, why that is so.

The McCarran-Ferguson Act was passed "to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation." *S.E.C. v. Nat'l Secs., Inc.*, 393 U.S. 453, 459-60 (1969) (emphasis added). Accordingly, "courts should narrowly construe the McCarran-Ferguson Act," *Riverview Health Inst. LLC v. Med. Mut. Of Ohio*, 601 F.3d 505, 513 (6th Cir. 2010), citing *Nat'l Secs., Inc.*, 393 U.S. at 460, the focus of which is on "the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship... are laws regulating the 'business of insurance.'" *Nat'l Secs., Inc.*, 393 U.S. at 460.

Thus, in *Fabe*, this Court held that to the extent the Ohio priority statute at issue "regulates policyholders, [it] is a law enacted for the purpose of regulating the business of insurance." 508 U.S. at 508. However, to the extent the same statute does not regulate policyholders "it is not a law enacted for the purpose of regulating the business of insurance." *Id*. The arbitration of these claims against Milliman does not implicate, impair or interfere with the state's regulation of the "business of insurance" under the McCarran-Ferguson Act.

Neither the RLCA's forum selection provision nor the Commissioner's claims against Milliman implicate, protect or regulate the insurer-policyholder relationship. Even if the Commissioner's suit against Milliman could indirectly benefit policyholders by increasing the size of LAHC's estate, such "indirect" benefits to policyholders do not constitute the "business of insurance" under the McCarran-Ferguson Act. *Fabe*, 508 U.S. at 508. "[E]very business decision made by an insurance company has some impact on its reliability… and its status as a reliable insurer." *Id.* at 508-09 (citation omitted). That does not make every business decision of an insurance company part of the "business of insurance" under the McCarran-Ferguson Act.

Arbitration of these pre-insolvency, contract-based claims against Milliman would not impair or interfere with the state's regulation of the "business of insurance." When assessing whether a general federal statute "impairs" the operation of a state law, the proper inquiry is whether the particular action being taken would impair state law. *See Humana Inc. v. Forsyth*, 525 U.S. 299, 311, 313

(1999) (analyzing effect of McCarran-Ferguson Act on RICO suit with respect to particular suit, rather than only general operation of statute). *See also AmSouth*, 386 F.3d at 783 (stating that McCarran-Ferguson "business of insurance" analysis must be "defined with respect to the particular cause of action" at issue), citing *Humana Inc.*, 525 U.S. at 311, 313.

The Commissioner's bringing of these claims against Milliman has no bearing on the administration, allocation between and among policy holders and creditors, or ownership, of LAHC's property or assets, which is the province of the insolvency action. These claims do not involve the assertion of a claim or an interest in LAHC assets or property. They will not alter any policyholder's legal rights or claims. Enforcing the Agreement's arbitration clause therefore will not "disrupt the orderly [rehabilitation] of" LAHC. *Quackenbush*, 121 F.3d at 1381; *see also AmSouth*, 386 F.3d at 780 (distinguishing claims by "angry creditors attempt[ing] to sue insolvent insurance companies in federal court to jump ahead in the queue of claims," from claims "where the insurance companies are themselves the natural plaintiffs").

As the Third Circuit explained in *Grode*:

> Insurance companies tend to issue identical policies to a large number of people, rendering a single forum necessary to dispose equitably of the company's limited assets so as to avoid a race to the courthouse. However, such a concern is not present in this case. This is not a suit against the insurance company or the Insurance Commissioner, or a claim on assets of the debtor…. The insolvent insurance company… is the plaintiff, not the defendant. As a result, there is not a large number of similarly situated plaintiffs competing for a limited amount of money. The insolvent insurer in liquidation is not called upon to dissipate its funds defending unconnected suits across the

> country. Rather, the insurance company is the only plaintiff and the defendants are not insolvent.

8 F.3d at 960.

The Louisiana Supreme Court also erred in holding that the Commissioner's choice of a state court forum for litigation is integral to the State's regulation of the "business of insurance." Arbitration does not alter "substantive rights," the scope of the relief available, or eliminate court review of the arbitration award; it merely regulates the choice of initial forum. *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 229-30 (1987). As the Iowa Supreme Court held in *Ommen*, arbitration "does not impede the [Commissioner's] ability to conduct an orderly dissolution.... The [Commissioner] can bring the same claims in arbitration as it asserted in district court, and the [Commissioner] has identified no procedural impediments to a full recovery in arbitration." *Ommen*, 941 N.W.2d at 320. Even where litigation generally is "integral to" the performance of an insurance contract, and thus implicates the business of insurance, "the choice of forum [is] not." *AmSouth*, 386 F.3d at 781; *Bennett*, 968 F.2d at 972 ("Application of the FAA does not impair the liquidator's substantive remedy under Montana law. Instead it simply requires the liquidator to seek relief through arbitration.").

The Louisiana Supreme Court's improper expansion of reverse preemption to protect purported state "policies" also contravenes this Court's holding that a court cannot rely on "policy considerations" to vitiate an otherwise valid arbitration agreement. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985) ("[C]ourts [should] enforce the bargain of the parties to arbitrate, and not substitute [their]

own views of economy and efficiency" (quotations omitted)); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 303 (2010) (stating that the U.S. Supreme Court has never "held that courts may use policy considerations as a substitute for party agreement" concerning arbitration).

Moreover, this Court has rejected the specific state "public policy" considerations underlying the Louisiana Supreme Court's decision as a basis to deny Milliman's right to arbitrate. The FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983) (emphasis in original). And an arbitration clause must be enforced as drafted even when arbitration would bifurcate proceedings, potentially leading to inefficiency and inconsistent results. *Dean Witter Reynolds*, 470 U.S. at 217.

III. MILLIMAN WILL SUFFER IRREPARABLE HARM IF PROCEEDINGS ARE NOT STAYED.

Milliman will suffer irreparable harm without a stay. Parties to an arbitration agreement contract for "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010). Here, the parties' Agreement "authorize[s]," but does not require, the arbitrators "to permit limited discovery," consistent with the Federal Rules of Civil Procedure. (App. 109). Whether any discovery is appropriate, and the scope of such discovery, is within the sole discretion of the arbitrators. In practice, experienced arbitrators police

discovery to ensure that it is genuinely relevant to the bilateral issues between the contracting parties, and not unduly burdensome.

In contrast, the state court proceedings, which immediately resumed following the Louisiana Supreme Court's ruling, involve multiple parties and an overwhelmingly burdensome, and increasing, volume of discovery.

The Commissioner has asserted claims against three contractor firms (two actuarial firms, including Milliman, and one of LAHC's third party administrators), six individual officers or directors, and five D&O insurers who provided excess coverage. Another two contractor firms, four individual officers or directors, and one primary D&O insurer have settled and been dismissed. The Commissioner alleges that each firm or individual's acts or omissions contributed to LAHC's insolvency, and seeks to hold all the defendants collectively liable "for all compensatory damages caused by their actionable conduct," including LAHC's losses of "more than $82 million," payment of all rehabilitation administrative costs, the return of fees and expenses, costs, and attorney's fees. (App. 71, 101). These realities compound the costs and burdens for litigation and particularly discovery, as distinct from an arbitration proceeding involving only the Commissioner and Milliman, and focused only on the Commissioner's liability and damages claims against Milliman, and Milliman's defenses to those claims. Each party will conduct its own discovery, hire its own experts, and depose its own witnesses.

Moreover, actions of the Louisiana Commissioner and the state court have exacerbated Milliman's discovery-related costs and burdens. For example, the trial

court has ordered Milliman (and the other defendants) to share the cost of a common e-discovery vendor with the Commissioner and the other parties for purposes of searching through and hosting the Commissioner's documents. Absent a stay from this Court, Milliman will therefore be compelled to subsidize the Commissioner's discovery costs for the next several months. All of this additional cost and expense to Milliman would be highly unlikely to occur in an AAA arbitration.

The industry context of the case and its parties creates further costs and burdens. Milliman and another defendant are direct competitors. Therefore, Milliman must vigilantly ensure that its proprietary and confidential trade secret information is appropriately protected. Arbitration proceedings would be entirely confidential and Milliman's competitor would not have access to Milliman's proprietary information except through more discrete non-party discovery.

Staying the state court proceedings against Milliman would also comport with FAA principles. By making available an immediate appeal when a court denies a stay in favor of arbitration, but not when a stay is granted, *see* 9 U.S.C. §§ 16(a)(1)(A), (b)(1), "Congress acknowledged that one of the principal benefits of arbitration, avoiding the high costs and time involved in judicial dispute resolution, is lost if the case proceeds in both judicial and arbitral forums." *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1251-52 (11th Cir. 2004) (holding that district court proceedings should be stayed in all non-frivolous appeals of denials of motions to compel arbitration); *accord Bradford-Scott Data Corp., Inc. v. Physician*

Computer Network, Inc., 128 F.3d 504, 505-06 (7th Cir. 1997); *Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 265-66 (4th Cir. 2011); *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 214-15 (3d Cir. 2007); *Hardin v. First Cash Fin. Servs., Inc.*, 465 F.3d 470, 474 (10th Cir. 2006). Absent a stay, if the Court were to reverse and compel arbitration, this principal benefit would be "eroded, and may be lost or even turned into net losses," since the parties would have continued to litigate in a more expensive and inefficient forum and would have to restart proceedings. *Bradford-Scott Data Corp.*, 128 F.3d at 505-06. Here, the costs to Milliman of proceeding as a party to the Louisiana proceedings pending this Court's decision could eclipse that of an entire arbitration by the time its rights are enforced—that is irreparable harm. *Alascom, Inc. v. ITT N. Elec. Co.*, 727 F.2d 1419, 1422 (9th Cir. 1984) (If a party "must undergo the expense and delay of a trial before being able to appeal, the advantages of arbitration—speed and economy—are lost forever.").

IV. THE EQUITIES FAVOR A STAY.

The equities heavily favor a stay of state court proceedings concerning Milliman. The Commissioner can be made whole for any delay through pre-judgment interest. On the other hand, Milliman will lose forever the benefits of its contracted-for and FAA-mandated arbitration rights if now forced to proceed in state court.

The public interest also favors a stay of proceedings. Public policy strongly favors arbitration. *See AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (section 2 of the FAA "reflect[s] a liberal federal policy favoring arbitration, and the fundamental principle that arbitration is a matter of contract" (citations omitted)).

It is contrary to that public policy to require the parties to burden the courts and the public by continuing to litigate the merits of this dispute while this Court decides the question of arbitrability.

CONCLUSION

The application for a stay of state court proceedings should be granted.

Respectfully submitted,

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