No. 20-299

IN THE

Supreme Court of the United States

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 Petition for a Writ of Certiorari to the Louisiana Supreme Court

BRIEF OF *AMICUS CURIAE* THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS IN SUPPORT OF PETITIONER

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October 8, 2020

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2, the American Institute of Certified Public Accountants ("AICPA") respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioner. All parties were timely notified of the AICPA's intent to file an *amicus* brief. Petitioner consented to the filing of that brief, by email dated September 15, 2020. Respondent, however, refused to consent on the sole ground that *amicus*'s brief supports Petitioner, making this motion necessary.

The AICPA is the national organization of the certified public accounting profession. The AICPA's over 418,000 members work in all sectors of business and financial services, including public accounting, financial planning, tax, business and industry, law, consulting, education, and government. The AICPA's principal purposes are (i) developing and maintaining high professional standards of practice, (ii) facilitating the availability of professional accountancy services to companies and individuals across the country, and (iii) promoting a legal regime that effectively and fairly resolves disputes between accountants and their clients.

The AICPA has a direct and immediate interest in any issue that affects the enforceability of accountants' engagement agreements with their clients. As set forth in the attached brief, the ruling below and others like it significantly impact the ability of accountants to rely on arbitration and other dispute-resolution provisions in their engagement agreements. The AICPA and its members thus have a keen interest in this case and its consequences. Because of its role as the voice of the accounting profession, *amicus* respectfully submits that it offers the Court a perspective distinct from that of Petitioner, and that this brief will be of substantial assistance to the Court as it considers whether this case warrants review.

Accordingly, *amicus* requests leave to file the attached brief in support of Petitioner.

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QUESTION PRESENTED

Whether the Federal Arbitration Act (the "FAA") preempts the state's forum selection clause and requires the insurance commissioner to arbitrate these pre-insolvency damages claims against a non-policyholder, or whether the arbitration of these claims impairs or interferes with the state's regulation of the business of insurance, such that the state's forum selection clause reverse preempts the FAA pursuant to Section 2(b) of the McCarran-Ferguson Act.

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INTEREST OF *AMICUS CURIAE*[1]

The American Institute of Certified Public Accountants ("AICPA") is the national organization of the certified public accounting profession. The AICPA's over 418,000 members work in all sectors of business and financial services, including public accounting, financial planning, tax, business and industry, law, consulting, education, and government. The AICPA's purposes include (i) developing and maintaining high professional standards of practice, (ii) facilitating the availability of professional accountancy services to companies and individuals across the country, and (iii) promoting a legal regime that effectively and fairly resolves disputes between accountants and their clients. As the voice of the accounting profession, and in light of its historical role in formulating professional standards, the AICPA routinely appears as *amicus curiae* in appeals relating to legal matters that impact the profession.

This litigation raises issues of vital importance to the accounting profession by deepening an existing split between courts across the country on the

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[1] All parties, including counsel for Respondent, received timely notice of the AICPA's intent to file this brief under Rule 37(2)(a). This brief was not authored in whole or in part by counsel for any party. Neither a party nor a party's counsel contributed money intended to fund the preparation or submission of this brief. No person, other than *amicus curiae*, its members, or its counsel, contributed money intended to fund the preparation or submission of this brief.

application of the FAA to engagement agreements between professional services firms and their clients. Relying on a longstanding federal policy in favor of arbitration, and for reasons of efficiency, economy, and fairness, accountants and their clients routinely agree to resolve their disputes through arbitration rather than litigation. The Louisiana Supreme Court refused to enforce an otherwise valid arbitration agreement between a professional services firm and its insurance company client in a case brought by a rehabilitator standing in the shoes of the insurance company. In so doing, the court disagreed with multiple federal courts and courts in at least two other states, but joined the highest courts in three states.

The accounting profession is stuck in the middle of this conflict, which has far-reaching legal and economic consequences. Almost all large insurance companies are required to retain an accounting firm. Whether those accounting firms can count on the arbitration provisions in their engagement agreements now depends entirely on the jurisdiction in which a dispute arises. Left intact, the Louisiana Supreme Court's decision—which not only subverts the FAA and this Court's application of it, but also disregards fundamental contractual freedoms—pushes accountants and their insurance company clients further into this jurisprudential quagmire. For these reasons, and those described below, this Court should grant a writ of certiorari to resolve the conflict and reverse the Louisiana Supreme Court's decision.

SUMMARY OF ARGUMENT

The Court should grant the petition for certiorari and reverse the lower court's decision refusing to enforce an otherwise valid arbitration agreement between a professional services firm (Petitioner) and its insolvent insurance company client. The Louisiana Supreme Court determined that a rehabilitator standing in the shoes of the insurance company could avoid the insurance company's contractual obligation to arbitrate because a state statute allowing the rehabilitator to select his forum for a dispute relates to the regulation of the business of insurance and, therefore, reverse preempts the FAA under the McCarran-Ferguson Act. As set forth in the Petition, that holding conflicts with the decisions of the Ninth, Third, and Sixth Circuits and other state courts. See Pet. at 13–19. The holding also has far-reaching legal and economic consequences beyond the parties to this dispute. The Louisiana Supreme Court's decision broadly impacts the accounting profession and its clients in at least three ways.

First, the split of authority on the interplay between two federal statutes and a common state statute results in a lack of uniformity that is problematic for the accounting profession. Accounting firms regularly confront the issue presented in the Petition because accountants and their insurance clients routinely include arbitration provisions in their engagement agreements, and at least 29 states or territories have forum selection statutes (like the one in Louisiana) or exclusive forum statutes. In light of the decision below and the split of authority it exacerbates, accountants must guess whether their bargained-for contractual rights to arbitrate insurance rehabilitators' claims are protected under federal law. Because of the current conflict, the answer to that question in otherwise identical disputes differs based on the jurisdiction in which the case is brought.

Second, the decision below and others like it unfairly deprive accountants of their bargained-for right to arbitrate. This Court has repeatedly enforced the federal policy in favor of arbitration—a policy embodied in the FAA and rooted in a fundamental deference to contracts. Accountants and their clients rely on this policy when they agree to arbitration rather than litigation to resolve disputes. And there are good reasons for such a contractual dispute resolution regime: arbitration can enhance the likelihood that complex disputes about accounting services will be resolved faster and more efficiently, by a decisionmaker with appropriate expertise and experience in accounting matters, in a fair, unbiased manner. The Petition should be granted to protect the basic contracting freedom of accountants and their clients to arrange dispute resolution mechanisms as they see fit.

Third, if the decision below is allowed to stand, it risks further increasing the costs of accounting services and making those services less available.

Accountants are frequent targets of litigation, often without regard to their actual culpability. And a catastrophic liability verdict is an existential threat to every accounting firm. Accounting firms manage this risk in part through bargained-for arbitration provisions in their engagement agreements. When accountants cannot rely on those provisions in their agreements with insurance clients, accounting services become more expensive and less competitive, adversely impacting insurance companies and their consumers.

REASONS FOR GRANTING THE PETITION

I. This Court's Review Is Necessary To Provide Predictability And Uniformity In The Enforcement of Agreements to Arbitrate Between Professional Services Firms and Their Clients.

The decision below presents an opportunity for this Court to resolve a firmly entrenched split of authority between at least three federal courts of appeals and two state courts, on the one hand, and at least four state supreme courts, on the other. Left unchecked, this jurisdictional conflict—which has existed for over a decade and has worsened in recent years—will persist and deepen, exacerbating the widespread uncertainty and lack of uniformity in this area of the law.

Virtually every large insurance company must engage an accounting firm. According to the National Association of Insurance Commissioners, every state requires insurance companies (with some exemptions based on size) to file annual audited financial statements. See *NAIC Guide to Compliance with State Audit Requirements* at i (2004); see also *NAIC Model Laws, Regulations, Guidelines & Other Resources*, MDL-205 § 2 (2015) (every insurer with more than $1,000,000 in premiums or 1,000 policyholders must file with the state insurance department "an annual audit of financial statements reporting the financial position and the results of operations . . . by independent certified public accountants").[2] Each non-exempt insurance company, in other words, must engage an independent accounting firm to audit the company's financial statements.

Consistent with general practice (as described in section II, *infra*), accounting firms and their insurance clients routinely include arbitration provisions in their engagement agreements. The validity of such provisions is tested when insurance companies become insolvent and their rehabilitators pursue claims. And state forum selection statutes like the one in this case, or exclusive forum statutes, are common; indeed, as set forth in the Petition, at least

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[2] The Guide to Compliance is available at https://www.naic.org/documents/prod_serv_fin_receivership_cpa_zu.pdf. Model Rule 205 is available at https://www.naic.org/store/free/MDL-205.pdf.

29 U.S. states or territories have such statutes on the books. Pet. at 21–22. That is hardly surprising given that the Insurer Receivership Model Act developed by the National Association of Insurance Commissioners includes an exclusive forum provision and, in a drafting note, suggests that the exclusive forum for disputes should be the court in the "county where the office of the insurance commissioner is located." *NAIC Model Laws, Regulations, Guidelines & Other Resources*, MDL-555 § 105.G (2007).

The question presented in the Petition has come up and will continue to come up as accountants and their insurance company clients continue to choose arbitration as the desired mechanism to resolve their disputes, and a subsequent rehabilitator standing in the shoes of the insurance company argues that a state forum statute trumps the FAA and the parties' agreement. The recurrence of this context makes a uniform rule imperative.

Ernst & Young, LLP v. Clark, 323 S.W.3d 682 (Ky. 2010) illustrates the unpredictability facing accounting firms today. Ernst & Young was the independent auditor of a workers' compensation self-insurance group in Kentucky. *Id.* at 685. In each engagement agreement, the firm and the self-insurance group agreed that any related disputes would be arbitrated. *Ibid.* When the self-insurance group became insolvent, the Kentucky Insurance Commissioner was appointed as the group's rehabilitator and, in that capacity, sued Ernst &

Young in state court for professional negligence. *Id.* at 686. Although the rehabilitator stood in the shoes of the self-insurance group and did not dispute the facial validity of the arbitration agreements, the rehabilitator sought to avoid arbitration on the basis that a state statute requiring that all matters relating to insurance company liquidation be litigated in a single state court. That statute, the rehabilitator argued, related to the "business of insurance" as that phrase is used in the McCarran-Ferguson Act and, accordingly, reverse preempted the FAA. *Id.* at 687–89. The Kentucky Supreme Court agreed, finding that the intent of the Kentucky General Assembly and Insurance Department trumped the FAA: "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 a single state court. *Id.* at 692. As a result, Ernst & Young—through no fault of its own—was not allowed to arbitrate the rehabilitator's claim pursuant to the contractual agreement it negotiated when it accepted the engagement.

Had the same claim been brought against an accounting firm by an insurance rehabilitator in at least four other states, even where those states have similar exclusive forum statutes, the insurance commissioner would have been compelled to arbitrate its claim. See, *e.g.*, *Bennett v. Liberty Nat'l Fire Ins. Co.*, 968 F.2d 969, 973 (9th Cir. 1992) (liquidator for insolvent insurance company is bound by company's agreement to arbitrate notwithstanding state forum statute); *Grode v. Mut. Fire, Marine, & Inland Ins. Co.*, 8 F.3d 953, 960 (3d Cir. 1993) (contract action initiated by insurance commissioner on behalf of insolvent insurance company had "nothing to do with [state]'s regulation of insurance"); *Suter v. Munich Reins. Co.*, 223 F.3d 150, 161 (3d Cir. 2000) (state forum statute does not reverse preempt the FAA in case brought by liquidator for insolvent insurance company against reinsurer); *Ommen v. Milliman, Inc.*, 941 N.W.2d 310, 320–21 (Iowa 2020) (state forum statute does not reverse preempt FAA in case brought by liquidator of insolvent insurance company against professional services firm). Put differently, accounting firms sued in those states, unlike Kentucky and Louisiana, could obtain the benefit of their bargain to arbitrate.[3]

Unless this Court steps in, contradictory outcomes under federal law will continue to create uncertainty for accounting firms (and others) providing services to insurance companies. This Court's review is thus necessary to resolve the conflict and provide clarity to professional services firms and their clients. See *Braxton v. United States*, 500 U.S. 344, 347 (1991).

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[3] In a second petition for certiorari currently before the Court, the insurance commissioner for the state of Iowa seeks review of the Iowa Supreme Court's ruling ordering the insurance commissioner to arbitrate claims against a professional services firm pursuant to the plain terms of a valid arbitration agreement. *Ommen v. Milliman, Inc.*, No. 20-249. These competing petitions on an issue of federal law underscore the urgency of the conflict and the need for this Court's intervention.

II. The Decision Below Upsets Accountants' Bargained-For Contractual Expectations.

The decision below and others like it disrupt the efficient, agreed-to dispute resolution regime that accountants and their clients routinely choose. "Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). The Louisiana Supreme Court's decision and others like it deprive accountants of that freedom to contract. For many accountants, an arbitration agreement is a key condition to accepting a client engagement. Indeed, accountants and clients alike recognize that, in complex disputes relating to accounting services, arbitration has at least three advantages.

First, as this Court has observed, arbitration generally has the benefit of "lower costs [and] greater efficiency and speed" when compared to litigation in state or federal courts. *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 559 U.S. 662, 685 (2010). This is especially important in complex matters like accounting disputes, which are often bogged down in discovery and expert issues for years in traditional courts. Thus, many accounting firms and their clients have determined it is in their collective interest to select the "streamlined proceedings and expeditious results" that generally come with arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* *Inc.*, 473 U.S. 614, 633 (1985). The more focused discovery process associated with arbitration also reduces the risk that litigation costs will become grossly disproportionate to the accountant's fees.

Second, by agreeing to arbitrate their disputes, accountants and their clients ensure that those disputes will be resolved by decisionmakers with the right expertise and experience. Again, as this Court has noted, one of the key "benefits of private dispute resolution" is "the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen*, 559 U.S. at 685. That benefit is magnified in accounting disputes, which are by definition specialized in nature. In cases against auditors, for example, the decisionmaker must understand, at a minimum: (i) whether the underlying insurer's financial statements were misleading; (ii) if so, whether the auditor failed to comply with the relevant auditing standards and/or failed to exercise appropriate professional judgment; and (iii) if the auditor's conduct was deficient, whether any losses are attributable to that deficiency. Having decisionmakers with experience and expertise on issues of this nature makes for more efficient proceedings and fairer outcomes. Indeed, the U.S. Chamber of Commerce—an organization of accounting firm clients—has stated that it is "simply not reasonable to expect juries and nonexpert judges to properly evaluate arcane accounting judgments and auditing methodologies." U.S. Chamber of Commerce, *Auditing: A Profession at Risk* at 11

(January 2006), available at https://tinyurl.com/y5cghmp7 ("Auditing Profession Report").

Experienced, skilled arbitrators also reduce the risk that a dispute will be decided based on a misunderstanding of what accountants do—that is, the widely held misconception that, if a company's financial statements are misstated, the company's outside accountants must, *ipso facto*, be culpable. This problem is particularly pernicious in the audit context. As the Third Circuit has explained, a financial statement audit "does not guarantee that a client's accounts and financial statements are correct any more than a sanguine medical diagnosis guarantees well-being; indeed, even an audit conducted in strict accordance with professional standards countenances some degree of calibration for tolerable error which, on occasion, may result in a failure to detect a material omission or misstatement." *In re IKON Office Sols., Inc.*, 277 F.3d 658, 673 (3d Cir. 2002); see also *Pub. Emps. Ret. Ass'n of Colo. v. Deloitte & Touche LLP*, 551 F.3d 305, 316 (4th Cir. 2009) ("It is not an accountant's fault if its client actively conspires with others in order to deprive the accountant of accurate information about the client's finances."); Commission on the Regulation of U.S. Capital Markets in the 21st Century, *Report and Recommendations* at 100 (March 2007) ("Commission Report"), available at https://tinyurl.com/yy83j6kf. (describing the "large gap between what many investors expect of auditors and the job they actually are charged with performing and have the capacity to perform"). The right arbitrator will understand the role of the accountant, enhancing the likelihood of a fair outcome.

Third, arbitration can alleviate a party's reasonable concerns regarding a potential "home court" bias. This case illustrates the point: the claim was brought by a state official in state court based on the collapse of a state insurance company. A jury's sympathies in such a case may lie with the local "victim" rather than a distant and faceless professional services firm. As the Court has recognized, juries may "use their verdicts to express biases against big businesses, particularly those without strong local presences." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (citation omitted). When a local business fails, local constituencies and regulators may view the business's accountant as the only deep pocket left standing to make the community whole. In recognition of these potential biases, parties reasonably believe that arbitration is the best way to ensure a dispute will be resolved based only on the merits.

Given these advantages, there is widespread consensus that arbitration is well suited to disputes over accounting services. To give but one example, the Chamber of Commerce has stated that "the use of arbitration clauses and similar alternative dispute resolution (ADR) agreements by audit firms and their clients should be encouraged to manage the costs of civil liability and audit practice protection."

Commission Report at 114. Accountants bargain for arbitration provisions in their engagement agreements for these reasons. The decision below and others like it upset accountants' reasonable contractual expectations and, in so doing, dismantle a widely-used and accepted regime for resolving disputes.

III. The Decision Below Poses A Significant Economic and Structural Threat To The Accounting Profession and Insurance Industry.

Depriving the accounting profession of a key tool in managing litigation risk has consequences, including increasing the cost of accounting services and making those services less available.

Managing litigation risks is critical to the accounting profession. As courts have observed, "[a]ccountants are regularly sued for huge amounts and the legal fees alone for the defense of even non-meritorious cases can easily consume all or a large fraction of the amount of fees that [the accounting firm] had earned for its work on behalf of [its client]." *Simons v. Dynacq Healthcare, Inc.*, No. H-03-5825, 2005 WL 1801946, at *3 (S.D. Tex. July 28, 2005). The business community has also noted a risk of "overlitigation" against accountants, who face "a difficult litigation and regulatory enforcement environment, where [mere] business losses by a client can result in lawsuits." Auditing Profession Report at

4, 7. The reason for that environment is well-documented: accountants are frequently the "deep pocket" targets in litigation "without regard to their actual culpability." H.R. Rep. No. 104-369, at 31 (1995). Even when an accounting firm has done its job, litigation can result in ruinous damages if an unsophisticated judge or jury misunderstands the role of an accountant or the complicated claims it faces, and/or is determined to assign blame when the accountant's client is insolvent and the accountant is the only party left from which to recover. See Auditing Profession Report at 7–8. As the Chamber of Commerce put it, "[t]he biggest threat facing audit firms today is that a single mega-claim or several such civil claims in succession could destroy an audit firm." Commission Report at 104.

But accountants have found ways to manage this litigation risk, in part through arbitration provisions. And those provisions benefit accounting firms and their clients alike. Indeed, in the Chamber's words, "[a]rbitration as an alternative dispute resolution mechanism can be an effective way for audit firms to manage litigation costs" because "[k]eeping potential defense expenses down with agreements to arbitrate benefits not only the audit firms, but also their clients and shareholders by keeping the cost of an audit from increasing." *Id.* at 114.

If, however, courts like the Louisiana Supreme Court below refuse to enforce arbitration provisions in engagement agreements, accountants, their clients, and their clients' investors, customers, and creditors will suffer. That is true for at least two reasons.

First, the risk of greater litigation costs and potential exposure will lead to an increase in the cost of accounting services, which could, in turn, prevent new and small insurance companies from obtaining such services. The Court has acknowledged this concern. See, *e.g.*, *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994) ("[E]xcessive litigation can have ripple effects. For example, newer and smaller companies may find it difficult to obtain advice . . . [and] the increased costs incurred by professionals because of the litigation and settlement costs . . . may be passed on to their client companies."); *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 164 (2008) ("contracting parties might find it necessary to protect against [unfair liability] threats [by] raising the costs of doing business").

Second, the increased litigation risk to accounting firms will lead to fewer market choices for insurance companies. Accounting firms that are unable or unwilling to pass along the costs of increased litigation risk to their clients, or that for other reasons determine the risks of litigation are too great, will stop performing services for insurance companies and focus on other client groups. Small and mid-sized accounting firms are most likely to leave the market as they may lack the power to raise their rates. The result will be decreased competition for the accounting services that insurance companies need to satisfy regulatory requirements to file financial statements audited by independent accounting firms. That diminished competition and the accompanying increase in accounting fees paid by insurers is inevitably passed on to insurance consumers.

The risk of a "mega-claim" is especially acute in the exact context of this case. When an insurance company becomes insolvent, the company's accountant may be the only solvent party left for a rehabilitator to sue. It is in those situations that jury awards are often outsized and disconnected from the scope of services actually provided by the accountant. *Thabault v. Chait*, 541 F.3d 512 (3d Cir. 2008) illustrates the point. There, the receiver for an insolvent insurance company sued the company's auditor, claiming the auditor's negligence deepened the company's insolvency. *Id*. at 519. After more than two decades of litigation and the death or dissolution of other defendants or potential defendants, the auditor was the only defendant left standing when the case went to trial. *Id.* at 518. The jury awarded the receiver $183 million in damages, but apportioned only 40% of the fault to the auditor. *Ibid.* Because of joint and several liability, however, the auditor was liable for the entire amount. *Ibid.*

The decision below jeopardizes accountants' risk management tools when they need them the most. By depriving accountants of the contractual right to arbitrate claims in this context, the decision below is a significant threat to the accounting profession and the insurance company clients that rely on the profession.

CONCLUSION

The petition for certiorari should be granted.

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