No. _____

In the
Supreme Court of the United States

TAMKO BUILDING PRODUCTS, INC.,
Petitioner,
v.
DANIEL WILLIAMS and BARBARA WILLIAMS,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Arbitration Act (FAA) "requires courts to place arbitration agreements 'on equal footing with all other contracts.'" *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1424 (2017). Pursuant to that principle, courts may not refuse to enforce arbitration agreements on the basis of rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 1426.

In the decision below, the Oklahoma Supreme Court refused to enforce an arbitration agreement under ordinary principles of Oklahoma agency law because "[t]he Oklahoma Constitution preserves the right to trial by jury." App.9. That decision to apply a heightened standard to the waiver of a jury-trial right not only plainly flouts the FAA's equal-footing principle and this Court's precedent, but conflicts with decisions from multiple federal courts that have examined the same arbitration agreement in materially identical factual and legal circumstances. It also perpetuates the judicial hostility to arbitration that the FAA sought to eradicate and has far-reaching practical consequences.

The question presented is:

Whether the Federal Arbitration Act permits state courts to craft state principles of agency law that uniquely disfavor arbitration (in the guise of uniquely protecting jury-trial rights) and use those principles to refuse to enforce arbitration agreements.

PARTIES TO THE PROCEEDING

Petitioner is TAMKO Building Products, Inc. Petitioner was defendant in the trial court and appellee in the Oklahoma Supreme Court.

Respondents are Daniel and Barbara Williams. Respondents were plaintiffs in the trial court and appellants in the Oklahoma Supreme Court.

CORPORATE DISCLOSURE STATEMENT

Petitioner TAMKO Building Products, Inc. is privately owned and has no parent corporation. No publicly held corporation owns 10% or more of TAMKO's stock.

STATEMENT OF RELATED PROCEEDINGS

Williams v. TAMKO Bldg. Prods., Inc., No. 117-190 (Okla.) (opinion issued and judgment entered October 1, 2019; mandate issued October 30, 2019).

Williams v. TAMKO Bldg. Prods., Inc., No. CJ-2017-184 (Okla. D. Ct.) (order granting motion to stay proceeding and compel arbitration issued June 11, 2018; petition in error filed July 11, 2018).

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

Congress passed the Federal Arbitration Act (FAA) nearly a century ago to "place arbitration agreements 'on equal footing with all other contracts.'" *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1424 (2017). Practically ever since, this Court has been intervening in state-court cases that impermissibly "single[] out arbitration agreements for disfavored treatment." *Id.* at 1425. This Court has enforced this equal-footing principle by reversing state courts applying special rules to contract formation, *id.*, and by rejecting special hostility to arbitration in the guise of special solicitude for the jury-trial right, *id.* The decision below should suffer the same fate, whether by summary reversal or plenary review.

Petitioner is a manufacturer of roofing shingles that conspicuously prints mandatory arbitration agreements on the exterior of its product packaging. Respondents are homeowners who authorized their roofing contractor (as their agent) to purchase and install shingles on their home. Respondents' contractor selected and installed petitioner's shingles. After some of those shingles purportedly caused damage a decade later, respondents filed suit against petitioner in Oklahoma state court. Petitioner moved to compel arbitration on the basis of the arbitration agreement clearly emblazoned on the shingle packages that the contractor had purchased, and the trial court followed the lead of numerous federal courts that have enforced this same agreement in granting that motion.

In the decision below, however, the Oklahoma Supreme Court reversed. The court candidly

acknowledged that respondents had entered into an agency relationship with their contractor for the purpose of purchasing and installing shingles. Under well-established principles of agency law in Oklahoma (as elsewhere), an agent has authority to take action reasonably necessary to accomplish the principal's objective, and any actual or constructive knowledge that he acquires while acting within the scope of his authority is imputed to the principal. Thus, the contractor plainly acted as respondents' agent when it came to matters of price or delivery terms. But the Oklahoma Supreme Court viewed arbitration as a different matter. Repeatedly invoking the special solicitude afforded the jury-trial right by the Oklahoma constitution, the Oklahoma Supreme Court ruled that respondents' agent could not waive respondents' constitutional jury-trial right through an arbitration agreement. Indeed, it concluded that enforcing the arbitration agreement in these circumstances would be unconscionable.

The Oklahoma Supreme Court's decision flagrantly flouts the FAA and the equal-footing principle that it establishes. The FAA prohibits singling out arbitration for special disabilities, and it equally prohibits singling out jury-trial rights for special solicitude when doing so means disregarding an otherwise enforceable agreement to arbitrate. The decision conflicts with decisions from numerous federal courts—including one from the Eleventh Circuit—that have honored the *very same arbitration agreement* in the face of materially identical objections. Absent this Court's review, businesses operating in Oklahoma will have no certainty that they can enforce their arbitration agreements,

notwithstanding that those same arbitration agreements are enforced according to their terms in other jurisdictions.

Through the FAA, Congress established an emphatic national federal policy in favor of arbitration. To preserve that policy, this Court should grant certiorari and reverse the transparently anti-arbitration decision below. In fact, given that the Oklahoma Supreme Court's decision violates the FAA in such an obvious and familiar manner, this Court may wish to summarily reverse. It would not be the first time the Court has done so in an FAA case arising out of the Oklahoma Supreme Court. *See Nitro-Lift Techs., LLC v. Howard*, 568 U.S. 17 (2012) (per curiam).

OPINIONS BELOW

The Oklahoma Supreme Court's opinion is reported at 451 P.3d 146 and reproduced at App.1-15. The trial court's opinion is unreported but available at 2018 WL 10086693 and reproduced at App.16-20.

JURISDICTION

The Oklahoma Supreme Court issued its opinion on October 1, 2019. On December 6, 2019, Justice Sotomayor extended the time for filing a petition for a writ of certiorari to and including January 29, 2020. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the U.S. Constitution, art. VI, cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance

> thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act, 9 U.S.C. §2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

A. Factual and Procedural Background

Petitioner TAMKO Building Products, Inc. is a family-owned Missouri company that manufactures and sells roofing shingles throughout the United States. App.1. Petitioner sells its shingles in bundles, and each bundle is encased in plastic wrapping. App.2, 17. The exterior of each wrapper alerts the purchaser, in capitalized letters, that it is "IMPORTANT" to "READ CAREFULLY BEFORE OPENING BUNDLE." As relevant here, each wrapper includes a "Limited Warranty" that contains

a mandatory arbitration agreement. That clause, which is also printed in capitalized letters, states:

> MANDATORY BINDING ARBITRATION: EVERY CLAIM, CONTROVERSY, OR DISPUTE OF ANY KIND WHATSOEVER INCLUDING WHETHER ANY PARTICULAR MATTER IS SUBJECT TO ARBITRATION (EACH AN "ACTION") BETWEEN YOU AND TAMKO (INCLUDING ANY OF TAMKO'S EMPLOYEES AND AGENTS) RELATING TO OR ARISING OUT OF THE SHINGLES OR THIS LIMITED WARRANTY SHALL BE RESOLVED BY FINAL AND BINDING ARBITRATION REGARDLESS OF WHETHER THE ACTION SOUNDS IN WARRANTY, CONTRACT, STATUTE OR ANY OTHER LEGAL OR EQUITABLE THEORY.

App.3.

Respondents Daniel and Barbara Williams are Oklahoma residents who authorized their roofing contractor to select and install shingles on their home in June 2007. App.2, 8. The contractor selected and installed petitioner's shingles, and each bundle of shingles purchased was emblazoned with the mandatory arbitration agreement printed above. App.2. Nearly a decade after the purchase and installation, in April 2016, respondents claimed that the shingles began to "crack[] and de-granulat[e]," thereby creating "structural problems" for the home. App.2. Respondents alerted petitioner of the purported problems, and after petitioner requested

that they submit a warranty claim, petitioner sent respondents replacement shingles and a monetary certificate to cover installation costs. App.2.

Dissatisfied with petitioner's response, and undeterred by the mandatory arbitration agreement, respondents filed suit against petitioner in Oklahoma state court, asserting claims for products liability and negligence. App.2. Petitioner filed a motion to stay proceedings and compel arbitration. *See* App.2; *see also* Okla. Stat. Ann. tit. 12, §1858. Respondents opposed that motion, contending in relevant part that "[t]hey never signed any document containing the limited warranty and … never saw the limited warranty language on the packaging nor otherwise were notified of the existence of this limited warranty until after this controversy arose." App.18-19. They also characterized the arbitration agreement as unconscionable. App.19.

The trial court granted petitioner's motion. App.16-20. The court recognized that the FAA's substantive provisions governed the dispute, and it observed that, "[u]nder the FAA, a court must compel arbitration if (1) a valid, enforceable arbitration agreement exists, and (2) the asserted claims are within the scope of that agreement." App.18. The court explained that "[t]here is not an issue" as to whether respondents' claims fall within the scope of the arbitration agreement, and therefore noted that the "dispositive" question is whether a valid and enforceable arbitration agreement exists. App.18.

The trial court concluded that one does, explaining that "ordinary state law principles that govern the formation of contracts" compelled that

conclusion. App.18. It also emphasized that several federal courts had examined and enforced the same arbitration agreement in similar circumstances. App.19 (citing *Am. Family Mut. Ins. Co. v. TAMKO Bldg. Prods., Inc.*, 178 F. Supp. 3d 1121 (D. Colo. 2016); *Krusch v. TAMKO Bldg. Prods., Inc.*, 34 F. Supp. 3d 584 (M.D.N.C. 2014)). The court thus disagreed with another state court decision that had reached the opposite conclusion. App.19 (citing *Hobbs v. TAMKO Bldg. Prods., Inc.*, 479 S.W.3d 147 (Mo. Ct. App. 2015)). The court then rejected respondents' other arguments, including their argument that the arbitration agreement was unconscionable. App.19.

B. The Decision Below

The Oklahoma Supreme Court reversed.[1] The court began by emphasizing that respondents did not have "actual knowledge" of the arbitration agreement because "they did not personally purchase the shingles, nor were they given a copy of materials containing the arbitration terms." App.7. But the court recognized that "[t]he contractors were agents of [respondents] for the purpose of selecting and installing shingles." App.8; *see also* App.8 ("The facts reflect that there was an agency agreement between [respondents] and [the] contractors.").

The court proceeded to hold, however, that "the scope of the contractor's authority did not include

[1] While the FAA does not permit automatic appeals from decisions compelling arbitration, *see* 9 U.S.C. §16, Oklahoma law includes no such prohibition, *see* Okla. Stat. Ann. tit. 12, §1879; App.5.

contracting away [respondents'] constitutional right to a jury trial." App.8. In reaching that conclusion, the court emphasized that "[t]he Oklahoma Constitution preserves the right to trial by jury," and it explained that, in the absence of "a formal agency agreement," "[a] one-time selection and installation of shingles by a contractor … does not indicate an authorization to waive a constitutional right." App.9. The court found it "[e]specially" significant that "the waiver is on material that per industry custom is opened by someone other than the consumer and then discarded." App.9.

The court further reasoned that "[t]he power to waive a principal's constitutional right is usually found in a power of attorney agreement," and found it "[t]elling[]" that "an attorney in law representing a client does not have the power to waive a trial and settle a case without the principal's consent." App.9. The court thus asked: "How then could builders contracted to select and install shingles impliedly gain authority to abandon one's constitutional right to a jury trial?" App.9. The court answered the question by stating that "[t]he opening of the shingles' wrapping did not expand the authority of the contractors." App.9. The court also rejected petitioner's argument that respondents "had imputed knowledge of the arbitration clause," reasoning that an "agent who enters a contract with both authorized and unauthorized provisions [cannot] suddenly bind[] his principal to the unauthorized portions of the contract." App.10.

After concluding that petitioner could not invoke ordinary principles of Oklahoma agency law to enforce

its arbitration agreement against respondents, the court further held that the agreement was "unconscionable." App.13. In reaching that conclusion, however, the court repeated many of the same reasons that it had just provided in its discussion of agency law. For instance, the court found it problematic that the "arbitration clause … requires [respondents] to surrender their constitutional right to a jury trial," and that it "is intentionally printed on material that will be opened and discarded by the contractor." App.14.

After offering that analysis, the court summarized its reasoning for holding that respondents "are not bound to the arbitration agreement." App.15. According to the court, "[t]he Oklahoma Constitution protects the right to a jury trial," and "[a]n implied agent whose sole authority is to select and install shingles does not have the authority to waive the principal's constitutional rights." App.15. Moreover, "the intentional printing of an agreement to waive a constitutional right on material that is destined for garbage and not the consumer's eyes is unconscionable." App.15. The court therefore held that the dispute must proceed in Oklahoma state court instead of an arbitral forum. App.15.[2]

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[2] The court also rejected various other independent arguments for affirmance of the trial court's judgment, including that respondents ratified the arbitration agreement; that respondents are third-party beneficiaries of the contract; and that respondents are estopped from challenging the arbitration agreement. *See* App.9-13.

REASONS FOR GRANTING THE PETITION

This case presents the question whether the FAA permits state courts to refuse to apply ordinary principles of state agency law to enforce an arbitration agreement. The Oklahoma Supreme Court's resolution of that question is profoundly wrong, conflicts with multiple federal-court decisions concerning the same agreement, perpetuates the state-court hostility to arbitration that the FAA sought to eliminate, and has immense real-world consequences. The need for this Court's intervention is clear.

First, the Oklahoma Supreme Court blatantly violated first principles of the FAA. Only a few Terms ago, this Court reiterated that the FAA prohibits a state from "adopt[ing] a legal rule hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial." *Kindred Nursing*, 137 S. Ct. at 1427. There is no other way to describe what the Oklahoma Supreme Court did here. A straightforward application of longstanding principles of Oklahoma agency law makes crystal clear that respondents are bound by their agent's actions in procuring shingles, including the various terms of purchase, such as the arbitration agreement. The court below concluded otherwise only because it viewed arbitration as different. It held that those ordinary agency rules do not apply to waiving a jury-trial right enshrined in the state constitution—indeed, that adhering to ordinary agency rules would be unconscionable. That holding repeats virtually verbatim the reasoning that this Court rejected in *Kindred Nursing*. A special

solicitude for jury-trial rights is just a dressed-up version of hostility to arbitration, at least where the special solicitude is the excuse for applying a double standard to invalidate an arbitration agreement. Either way a court puts it, such special rules violate the equal-footing principle at the heart of the FAA.

While it is plain on the face of the decision below that it flouts the FAA, that conclusion is reinforced by the numerous decisions from federal courts that have enforced *the very same arbitration agreement* in the face of materially identical objections. Basic principles of agency law do not differ from state to state, and states generally protect a citizen's jury-trial right in their constitutions. Nonetheless, the Eleventh Circuit and district courts in Colorado, North Carolina, California, and Kentucky have all concluded that purchasers like respondents are bound by petitioner's arbitration agreement by virtue of their agents' conduct. Only one other state court has taken an approach similar to that taken by the Oklahoma Supreme Court (and that was before the Eleventh Circuit's more recent decision). As this conflict reveals, state courts continue to refuse to obey this Court's admonition to place arbitration agreements on equal footing with all other contracts.

This Court has previously acknowledged that state-court fidelity to the FAA is critically important, and the stakes in this case are especially high. Without this Court's intervention, businesses operating in Oklahoma that print arbitration agreements on or within product packaging will be unable to enforce those agreements, even when *other* terms found on that packaging are enforceable,

thereby depriving them of the well-recognized benefits of arbitration. Meanwhile, those businesses will be able to enforce those same agreements in other jurisdictions where the same general rules of agency and contracting apply. That result is patently inconsistent with Congress' efforts to achieve a national arbitration policy that respects actual differences in state law, while rejecting deviations from baseline principles that reflect only hostility to arbitration. The Court should grant certiorari so as to restore the FAA's core promise of equal treatment. Indeed, given that the Oklahoma Supreme Court's decision so plainly flouts a basic tenet of the FAA, this case may be an appropriate candidate for summary reversal.

I. The Oklahoma Supreme Court's Decision Blatantly Violates The Federal Arbitration Act And This Court's Precedents.

This Court has repeatedly stated that the FAA forbids courts from "singl[ing] out arbitration agreements for disfavored treatment." *Kindred Nursing*, 137 S. Ct. at 1425. That principle is equally violated whether the singling out is expressed candidly as a rule especially disfavoring arbitration or dressed up as a rule especially protecting the jury-trial right. The Oklahoma Supreme Court plainly applied the latter rule and in doing so clearly violated a core guarantee of the FAA. Its decision cannot stand.

1. Congress enacted the FAA in 1925 "in response to a perception that courts were unduly hostile to arbitration." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018). Section 2 is the statute's "primary substantive provision," *Moses H. Cone Mem'l Hosp. v.*

Mercury Constr. Corp., 460 U.S. 1, 24 (1983), and it provides that "[a] written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract … 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.

As this Court has emphasized, the FAA "places arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). Pursuant to the equal-footing principle, state courts may refuse to enforce arbitration agreements on the basis of "generally applicable contract defenses, such as fraud, duress, or unconscionability," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011), but "Congress precluded States from singling out arbitration provisions for suspect status," *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). State courts thus may not concoct rules "that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339; *see also Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) ("Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable[.]"). That principle holds firm regardless of whether the rule "discriminates on its face against arbitration" or "covertly accomplishes the same objective" either by making jury-trial rights especially difficult to waive or "by disfavoring contracts that (oh so coincidentally) have the defining

features of arbitration agreements." *Kindred Nursing*, 137 S. Ct. at 1426.

As this Court has explained, "[s]tate courts rather than federal courts are most frequently called upon to apply the Federal Arbitration Act." *Nitro-Lift*, 568 U.S. at 17. Yet state courts continue to harbor hostility to arbitration in general and have often refused to heed the equal-footing principle in particular. This Court has routinely reprimanded state courts for ignoring the core principles reflected in the FAA. *See, e.g.*, *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 469 (2015) (reversing California Court of Appeal decision where "nothing in … [its] reasoning suggests that a California court would reach the same interpretation … in any context other than arbitration"); *Preston v. Ferrer*, 552 U.S. 346, 356 (2008) (reversing California Court of Appeal decision that impermissibly deferred to state statute that "impose[d] prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally"); *Doctor's Assocs.*, 517 U.S. at 687 (reversing Montana Supreme Court decision that refused to enforce arbitration agreement under state statute that "condition[ed] the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally").

This Court did so most recently in *Kindred Nursing*, a decision that is highly instructive here. There, the Court considered a Kentucky Supreme Court decision that had "declined to give effect to two arbitration agreements executed by individuals holding 'powers of attorney'—that is, authorizations to

act on behalf of others." *Kindred Nursing*, 137 S. Ct. at 1424-25. According to the Kentucky Supreme Court, "a *general* grant of power [of attorney] (even if seemingly comprehensive)" "does not permit" the recipient "to enter into an arbitration agreement for someone else"; instead, the Kentucky Supreme Court concluded, "the representative must possess *specific* authority to 'waive his principal's fundamental constitutional rights to access the courts [and] to trial by jury.'" *Id.* at 1425 (emphasis added). Or put differently, "an agent's authority to waive his principal's constitutional right to access the courts and to trial by jury must be clearly expressed by the principal." *Id.* at 1427.

Applying the FAA, this Court resoundingly rejected the Kentucky Supreme Court's reliance on this "clear-statement rule." *Id.* at 1426-27. As it explained, the Kentucky Supreme Court had "adopt[ed] a legal rule hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial." *Id.* at 1427. The Court deemed that rule "too tailor-made to arbitration agreements—subjecting them, by virtue of their defining trait, to uncommon barriers—to survive the FAA's edict against singling out those contracts for disfavored treatment." *Id.* It did not matter that Kentucky's special rule went to contract-formation, rather than contract-interpretation, and it did not matter that the court framed the rule in terms of providing special protections for the jury-trial right, rather than expressly disfavoring arbitration.

Nor could the Kentucky Supreme Court "salvage" its decision through its "sometime-attempt to cast the rule in broader terms"—*i.e.*, the suggestion that the clear-statement rule applied to *all* "'fundamental constitutional rights' held by a principal," rather than just the right to a trial by jury. *Id.* As this Court explained, "[n]o Kentucky court … ha[d] ever before demanded that a power of attorney explicitly confer authority to enter into contracts implicating constitutional guarantees," and the Kentucky Supreme Court's decision did not "indicate that such a grant would be needed for the many routine contracts—executed day in and day out by legal representatives—meeting that description." *Id.* In short, because the Kentucky Supreme Court "specially impeded the ability of attorneys-in-fact to enter into arbitration agreements," its decision could not stand, as it "flouted the FAA's command to place those agreements on an equal footing with all other contracts." *Id.* at 1429.

2. The Oklahoma Supreme Court's decision suffers the same basic flaw and cannot be reconciled with the FAA or this Court's precedent. Although the Congress that enacted the FAA knew full well that states employed a "'great variety' of 'devices and formulas'" to avoid arbitration, *Concepcion*, 563 U.S. at 342, the decision below involves a tried-and-true device—indeed, the same one deployed in *Kindred Nursing*. Specifically, the court below invoked special protections for the jury-trial right and applied them to "specially impede[]" the ability of agents to enter into arbitration agreements in Oklahoma. *Kindred Nursing*, 137 S. Ct. at 1429.

The Oklahoma Supreme Court acknowledged that "there was an agency agreement" between respondents and their contractor, pursuant to which respondents delegated to the contractor the "authori[ty]" to "select and install shingles" on respondents' roof. App.8. Under well-established principles of Oklahoma agency law, "every delegation of authority includes by implication … all such incidental authority as is necessary, usual and proper as a means of effectuating the main authority conferred." *Elliott v. Mut. Life Ins. Co. of N.Y.*, 91 P.2d 746, 747 (Okla. 1939); *Ivey v. Wood*, 387 P.2d 621, 625 (Okla. 1963) ("An agent's authority will be implied, where necessary to carry out the purpose expressly delegated to him."); *Elam v. Town of Luther*, 787 P.2d 1294, 1296 (Okla. Civ. App. 1990) ("an agent has … implied authority to perform such acts as are incidental to, or reasonably necessary to accomplish the intended result."). Thus, under Oklahoma law, respondents' agent could agree to purchase shingles at a particular price or take delivery on a specified day and could have bound respondents as respondents' agent.

Oklahoma law makes that much clear. To take an example, an agent employed as a cook has implied authority to obtain groceries. *See Claxton v. Page*, 124 P.2d 977, 978-81 (Okla. 1942). And it is black-letter agency law in Oklahoma that "knowledge or notice possessed by an agent while acting within the scope of authority is the knowledge of, or notice to the principal." *Tiger v. Verdigris Valley Elec. Coop.*, 410 P.3d 1007, 1012 (Okla. 2016); *see also Newsom v. Watson*, 177 P.2d 109, 111 (Okla. 1947) ("It is a generally recognized rule of law that the knowledge of

the agent is imputed to the principal in connection with any transaction conducted by, or participated in by, the agent in behalf of the principal."). That is why, for instance, service of process on a registered agent is sufficient to provide notice of a lawsuit to the principal. *See Williams v. Meeker N. Dawson Nursing, LLC*, No. 115,360, 2019 WL 6872333, at *5 (Okla. 2019).[3]

Those principles should have made this an exceedingly straightforward case. Respondents' agent was plainly delegated the authority to purchase and install roofing shingles, and thus could agree to the terms of purchase—either expressly or through "performance." *Langdon v. Saga Corp.*, 569 P.2d 524, 528 (Okla. Civ. App. 1976); *see also* Restatement (Second) of Contracts §19 (1981) ("The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act."). If the agent can agree to price and terms of delivery, there is no reason to treat the arbitration provision differently. And if the agent has actual or constructive knowledge of the terms of the arbitration agreement, then that is the equivalent of "knowledge of, or notice to the principal." *Tiger*, 410 P.3d at 1012.

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[3] Those are the basic rules elsewhere too, as the Oklahoma Supreme Court's citation of the Restatement of Agency makes clear. *See* App.9; Restatement (Second) Of Agency §35 (1958) ("authority to conduct a transaction includes authority to do acts which are incidental to it, usually accompany it, or are reasonably necessary to accomplish it"); *id.* §9(3) ("A person has notice of a fact if his agent has knowledge of the fact, reason to know it or should know it, or has been given a notification of it[.]").

Rather than honor these generally applicable rules of agency law, however, the court below seized on the fact that enforcing petitioner's arbitration agreement would impinge upon respondents' "constitutional right to a jury trial." App.8. Indeed, "[i]n ringing terms, the court affirmed the jury right's unsurpassed standing in the State Constitution." *Kindred Nursing*, 137 S. Ct. at 1427; *see, e.g.*, App.9 ("The Oklahoma Constitution preserves the right to trial by jury."); App.15 ("The Oklahoma Constitution protects the right to a jury trial."). And it stated that while an agent has implied authority to do all manner of other things, it *cannot* have "implied[] … authority to abandon [a principal's] constitutional right to a jury trial." App.9; *accord* App.15 ("An implied agent whose sole authority is to select and install shingles does not have the authority to waive the principal's constitutional rights."). Instead, the court concluded that a principal would have to provide a more explicit "indicat[ion]" that he wished to relinquish a jury-trial right, perhaps through a "formal agency agreement." App.9. Because no such indications or agreements existed here, the court continued, the usual rules of "imputed knowledge" did not apply. *See* App.10.

The Oklahoma Supreme Court then doubled down on its hostility to arbitration when it further concluded that petitioner's arbitration agreement is "unconscionable." App.13. That was not an independent ground for its decision, but rather was a repeat of the same basic error. Just as with its refusal to honor agency law, the court found the arbitration agreement unconscionable because it "require[d] [respondents] to surrender their constitutional right to a jury trial" and was "printed on material that will

be opened and discarded by the contractor" (*i.e.*, the agent) and "not the owner" (*i.e.*, the principal). App.14. In other words, the court concluded that contracting practices that are perfectly lawful and enforceable in any other context somehow become unconscionable when they involve an agreement to arbitrate.

This reasoning is precisely what this Court has "barred" in its FAA cases. *Kindred Nursing*, 137 S. Ct. at 1427. It makes no difference that the Oklahoma Supreme Court framed its rule in terms of special solicitude for jury-trial rights as opposed to special hostility to arbitration. Nor does it matter that the Oklahoma Supreme Court invoked "a doctrine normally thought to be generally applicable, such as … unconscionability." *Concepcion*, 563 U.S. at 341. What matters is that the Oklahoma Supreme Court "adopt[ed] a legal rule hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial." *Kindred Nursing*, 137 S. Ct. at 1427. Just as in *Kindred Nursing*, such a rule is "too tailor-made to arbitration agreements … to survive the FAA's edict against singling out those contracts for disfavored treatment." *Id.* And just as in *Kindred Nursing*, the Oklahoma Supreme Court's "sometime-attempt," *id.*, to apply its rule to all "constitutional rights" held by a principal, App.15, cannot save it. Indeed, in contrast to the Kentucky Supreme Court in *Kindred Nursing*, the Oklahoma Supreme Court here never even attempted to offer examples of other constitutional rights to which its novel rule might apply. Under these circumstances, the "arbitration-specific nature

of the rule" is "clear," *Kindred Nursing*, 137 S. Ct. at 1428—and clearly preempted by the FAA.

In fact, the Oklahoma Supreme Court's reasoning so plainly flouts the FAA and this Court's precedent that the decision below is a candidate for summary reversal. This Court has followed that path when reviewing other state-court decisions that involve elementary violations of the FAA—including previous efforts from the Oklahoma Supreme Court. *See Nitro-Lift*, 568 U.S. at 17, 20 (vacating Oklahoma Supreme Court decision that "ignored a basic tenet" of FAA and "disregard[ed] this Court's precedents on the FAA"); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 531 (2012) (per curiam) (vacating West Virginia Supreme Court decision that failed to follow "basic principle" of the FAA); *KPMG LLP v. Cocchi*, 565 U.S. 18, 19 (2011) (per curiam) (vacating Florida state court decision when "a fair reading of the opinion" indicated a violation of the FAA). There is no impediment to doing so here too.

II. The Decision Below Conflicts With Multiple Decisions From Federal Courts Addressing The Very Same Arbitration Agreement And Perpetuates State-Court Hostility To Arbitration.

The Oklahoma Supreme Court's decision not only departs from this Court's clear precedent; it squarely conflicts with numerous decisions from other courts. The conflict here is unusually stark. Multiple federal courts have examined the *very same arbitration agreement* in the face of materially identical objections, and all have enforced it according to its terms. On the other hand, one state court has joined

the Oklahoma Supreme Court in refusing to enforce petitioner's arbitration agreement after disregarding the FAA's equal-footing principle. Other state courts have committed similar transgressions even in the short window since this Court decided *Kindred Nursing*, underscoring the need for this Court's intervention.

1. The Eleventh Circuit recently addressed and enforced the arbitration agreement at issue here in *Dye v. TAMKO Building Products, Inc.*, 908 F.3d 675 (11th Cir. 2018). In *Dye*, the court considered the following question: "Where a roofing-shingle manufacturer displays on the exterior wrapping of every package of shingles the entirety of its product-purchase agreement—including … a mandatory-arbitration provision—are homeowners whose roofers ordered, opened, and installed the shingles bound by the agreement's terms?" *Id.* at 678. In a unanimous opinion by Judge Newsom, the court concluded that the answer is yes. In doing so, the Eleventh Circuit rejected arguments virtually identical to those that the Oklahoma Supreme Court embraced here.

In particular, the court squarely rejected the plaintiffs' argument that they could not be bound by the arbitration agreement because "they never saw the shingle packaging and thus never had a reasonable opportunity to consider [petitioner's] purchase terms—arbitration clause included." *Id.* at 684. Applying Florida law, the court held that this theory had no merit, as Florida (like Oklahoma) recognizes the rule that "a grant of agency authority also necessarily implies the authority to do acts that are incidental to it, usually accompany it, or are

reasonably necessary to accomplish it." *Id.* (quotation marks omitted). As the Eleventh Circuit explained, the plaintiffs had conceded "that they contracted with their roofers to buy shingles," and "accepting purchase terms" is "part and parcel of that purchase." *Id.* at 685; *see also id.* ("accepting purchase terms is 'incidental to,' 'usually accompany[ing],' and 'reasonably necessary to' the act of purchasing"); *id.* at 685 n.10 (explaining that, "[t]o the extent that the homeowners argue that their roofers may bind them to some purchase terms, but not those pertaining to arbitration, the contention is foreclosed by" *Kindred Nursing*).

The Eleventh Circuit additionally explained that "it is axiomatic under Florida law—and more generally—that knowledge or notice that an agent acquires while acting within the course and scope of his authority is generally imputed to his principal." *Id.* Accordingly, because petitioner's "purchase terms were printed on the shingle packaging, which the homeowners agree[d] their roofers opened," and "[b]ecause the notice that their roofers acquired while acting within the scope of their authority to purchase and install the shingles is properly imputed to them, the homeowners cannot now plead ignorance of the offer's existence." *Id.* at 686.

Several federal district courts have reached the same conclusion in decisions that were not immediately appealable to courts of appeals and thus stood as the final word of the federal courts. *See* 9 U.S.C. §16(b) (permitting appeals from orders compelling arbitration only to the extent authorized by 28 U.S.C. §1292(b)). For example, as the trial court

recognized below, *see* App.3, a federal district court in Colorado enforced this very agreement in *American Family Mutual Insurance Company v. TAMKO Building Products., Inc.*, a case that implicated Colorado law. *See* 178 F. Supp. 3d at 1125. There, the court considered a situation in which principals had hired a general contractor to install petitioner's shingles, and that general contractor subcontracted the job to another company. *See id.* at 1124. The subcontractor "thus became an agent of both" the principals and the general contractor. *Id.* at 1126. As a result, whether the principals "themselves actually consented to the arbitration clause" was "irrelevant," as the "actual or constructive notice of the terms of the agreement [was] imputable to the … principals," and the subcontractor's "acceptance of the terms of the offer by its conduct b[ound] the … principals to the contract." *Id.* "Contrary to plaintiff's argument," the court continued, "there is nothing unconscionable in this result." *Id.* at 1127.

A district court in North Carolina reached the same result in another case highlighted by the trial court below. *See* App.19. In *Krusch v. TAMKO Building Products, Inc.*, the court applied North Carolina law in a case in which a homeowner had hired a contractor to purchase and install shingles, and the contractor proceeded to select petitioner's shingles. *See* 34 F. Supp. 3d at 588-89. The homeowner argued "that he cannot be compelled to arbitrate because he never agreed to the limited warranty as part of the sales transactions." *Id.* at 588. The court rejected that theory: The "unrebutted evidence" demonstrated that the contractor "acted as [an] agent" of the homeowner "at least for purposes of

investigating roofing choices," which "necessarily mean[t] that information" that the contractor "learned in the course of his duties as agent can be imputed to [the homeowner]." *Id.* at 589; *see also id.* at 590 ("[T]he court finds that [the homeowner], having constructive notice of the limited warranty, which included an arbitration provision, agreed to purchase Shingles that were expressly subject to that arbitration provision. This suffices as mutual assent and thus binds [the homeowner] to the agreement to arbitrate.").

The list goes on. In *Hoekman v. TAMKO Building Products, Inc.*, No. 2:14-cv-01581-TLN-KJN, 2015 WL 9591471 (E.D. Cal. Aug. 26, 2015), a federal district court in California, applying California law, considered whether homeowners who had hired a contractor to install petitioner's shingles on their home had to arbitrate their claims. *See id.* at *6-*7. The court answered in the affirmative, as there was an "implied agency between [the homeowners] and their contractors," and "[i]t is … well-settled law … that notice given to or possessed by an agent within the scope of his employment and in connection with, and during his agency is notice to the principal." *Id.* at *6; *see also id.* at *7-*9 (rejecting unconscionability argument). The same result was reached in *Overlook Terraces, Ltd. v. TAMKO Building Products, Inc.*, No. 3:14-CV-00241-CRS, 2015 WL 9906298 (W.D. Ky. May 21, 2015), *report and recommendation adopted,* No. 3:14-CV-241-CRS, 2015 WL 13746723 (W.D. Ky. July 27, 2015). In that case, a federal district court in Kentucky disposed of the argument that petitioner "failed to give adequate notice of the mandatory arbitration provision" to the ultimate owner, because

"such notice … is imputed to the owner who will be deemed to have constructive knowledge of the agreement through his or her contractor when the owner has authorized said contractor to purchase shingles." *Id.* at *5.

2. The Oklahoma Supreme Court's decision cannot be squared with these decisions. As all of these decisions reflect, basic principles of agency law do not materially differ from state to state. And Oklahoma does not guard the jury-trial right any more jealously than its sister states. *See, e.g.*, Cal. Const. art. I, §16; Fla. Const. art. I, §22; Ky. Const. §7; N.C. Const. art. I, §25. Indeed, the Oklahoma Supreme Court did not suggest otherwise. Instead, it simply decided that it need not follow ordinary principles of agency law, because to do so would result in an "abandon[ment]" of respondents' "constitutional right to a jury trial." App.8-9. In other words, the Oklahoma Supreme Court used its special solicitude for universally applicable jury-trial rights to concoct special, anti-arbitration principles of agency law and refuse to enforce petitioner's arbitration agreement, while federal courts faithfully applying the FAA enforced the self-same agreement.

Unfortunately, this is not the first time a state court has refused to heed the FAA's equal-footing principle in a case involving petitioner's arbitration agreement. As the trial court acknowledged, *see* App.19, the Missouri Court of Appeals did so too in *Hobbs v. TAMKO Building Products, Inc.* Although Missouri law recognizes the general rule that "failure to read or understand a contract is not ... a defense to the contract," *Chochorowski v. Home Depot U.S.A.*,

404 S.W.3d 220, 228 (Mo. 2013), the *Hobbs* court refused to enforce petitioner's arbitration agreement on the theory that the purchasers "were not aware of the arbitration provision," 479 S.W.3d at 150.[4]

Nor is this an isolated phenomenon, even in the wake of the clear teaching of *Kindred Nursing*. In the less-than-three years since that decision, state courts have repeatedly disregarded that principle. Perhaps not surprisingly, those decisions have emanated largely from state courts that, like the Oklahoma Supreme Court, are repeat FAA offenders. *See, e.g.*, *OTO, LLC. v. Kho*, 447 P.3d 680, 689-701 (Cal. 2019) (refusing to enforce arbitration agreement on basis of unconscionability rule that applies only to arbitration agreements); *id.* at 723 (Chin, J., dissenting) (explaining that the majority's "analysis and conclusion … violate, and are thus preempted by, the FAA and its equal treatment principle, which preclude a court from 'construi[ing an arbitration] agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law'"); *St. Louis Reg'l Convention & Sports Complex Auth. v. Nat'l Football League*, 581 S.W.3d 608, 613-16 (Mo. Ct. App. 2019) (refusing to enforce arbitration agreement after ignoring ordinary state-law contract rule that allowed for incorporation of third-party rules by reference); *Ramos v. Superior Court*, 239 Cal. Rptr. 3d 679, 691-702 (Cal. Ct. App. 2018) (refusing to

[4] Petitioner unsuccessfully sought review of the Missouri Court of Appeals' decision in this Court, *see TAMKO Bldg. Prods., Inc. v. Hobbs*, No. 15-1318 (U.S.), but *Hobbs* did not involve a decision of a state supreme court and pre-dated the Eleventh Circuit's decision to enforce the same agreement.

enforce arbitration agreement after relying upon "minimum requirements" rule that applies only to arbitration agreements). Thus, notwithstanding *Kindred Nursing*, the judicial hostility to arbitration that the FAA and this Court's decisions applying it have sought to eliminate remains alive and well. This Court should not tolerate that result.

III. The Question Presented Has Considerable Practical Impact And Warrants Review Now.

The question presented is one of considerable legal and practical significance. As this Court recognized in *Nitro-Lift* when summarily reversing another decision from the Oklahoma Supreme Court, "[i]t is a matter of great importance … that state supreme courts adhere to a correct interpretation of the [FAA]." 568 U.S. at 17-18. Through the FAA, Congress established an "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 631 (1985). And Congress did so because arbitration has much to offer, including "the promise of quicker, more informal, and often cheaper resolutions for everyone involved." *Epic*, 138 S. Ct. at 1621. Novel anti-arbitration rules erected by a state high court plainly undermine congressional intent and preclude private parties from realizing these benefits.

This is a case in point. All manner of products are sold subject to terms and conditions—including arbitration provisions—printed on or included with product packaging. *See, e.g.*, *Dye*, 908 F.3d at 678 ("You've undoubtedly heard of—and for that matter probably accepted the terms of—a 'shrinkwrap'

agreement, which binds a software (or small-electronics) purchaser to an inside-the-box contract if she opens the product and retains it for some specified time. In this cyber age, you've also almost certainly assented to the terms of a 'clickwrap' or 'scrollwrap' agreement—for instance, by hitting 'I accept' when installing the latest operating system for your smartphone."); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 121 (2014) (noting contract terms "communicated to consumers through notices printed on the toner-cartridge boxes"). The "[p]ractical considerations" for doing so are obvious. *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997); *see id.* ("Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff … had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rage over the waste of their time.").

According to the decision below, however, if an agent purchases or installs one of these products on behalf of (and with permission from) a principal, the arbitration agreement is utterly unenforceable unless the principal clearly "indicate[s]" to the agent "an authorization to waive [her] constitutional right" to a jury trial beforehand, which may require a "formal agency relationship." App.9. That, of course, will never happen: The average citizen typically does not engage in debates about the merits and demerits of a jury trial with anyone, much less before engaging a contractor or similar agent. Thus, it will be next to impossible for businesses like petitioner to enforce their arbitration agreements in Oklahoma.

Further complicating matters, most manufacturers do not engage in direct-to-consumer sales. Forcing them to change their business models in hopes of enforcing arbitration agreements in Oklahoma is too much to ask and undesirable anyways, as it would introduce significant extra costs for manufacturers and create substantial inconveniences for consumers, who hire contractors and other agents to eliminate such hassle. *See, e.g.*, 40 No. 12 Construction Litigation Reporter NL 1 (discussing the decision below and explaining that, "[i]f … the manufacturer had delivered the shingles to the work site and required the owners to sign an invoice that clearly announced an arbitration requirement, the result might have been very different. But doing so is more costly for the manufacturer, compared to allowing the contractor to come to the store and pick up the materials itself.").

As these problems reveal, the inevitable effect of the decision below is that businesses operating in Oklahoma will be unable to enforce their arbitration agreements in many circumstances. In Oklahoma, the enforceability of an arbitration agreement prominently displayed on software shrinkwrap will turn on whether an intrepid tech-savvy consumer installed the product herself or brought in the geek squad. Meanwhile, those same businesses will be able to enforce the same agreement either way in other jurisdictions—even though the same basic rules of agency law apply. The FAA does not tolerate such balkanization. It tolerates true variations in state law (which apply neutrally to all contracts), but it does not tolerate the variation that comes when most states

apply neutral rules and a few create anti-arbitration (or pro-jury-trial) exceptions.

This is an excellent vehicle in which to confirm as much. There is no dispute in this case that respondents' contractor served as their agent with respect to purchasing and installing shingles. There is no dispute that the contractor purchased and installed shingles that were wrapped in packaging emblazoned with petitioner's mandatory arbitration agreement. Nor is there any dispute that the agreement would be enforceable in the Eleventh Circuit or other federal courts. The only question here is a purely legal one: whether the FAA permits courts to apply rules of agency law that uniquely protect jury-trial rights and uniquely disfavor arbitration agreements. The court below deviated from the answer supplied by the FAA and every federal court to consider this agreement. This Court should not let that result stand.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari. In the alternative, the Court should summarily reverse the decision below.

Respectfully submitted,

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