No. 19-959

In the Supreme Court of the United States

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

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

BRIEF *AMICUS CURIAE* OF CENTER FOR THE RULE OF LAW IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Center for the Rule of Law is an independent center dedicated to public education on issues related to the rule of law. Matters central to the interests and work of scholars at the Center include freedom of private contracts and the nature of dispute resolution processes, both in respect of government actions and private parties' disputes, interests that are directly relevant to the questions presented in this case. Affiliated scholars at the Center include long-time teachers and authors in the fields of administrative law and judicial decision-making who have written about dispute resolution and have served in various positions in government, including positions requiring dispute resolution. One scholar, Dean Ronald A. Cass, Dean Emeritus of Boston University School of Law, has served as an arbitrator in a variety of dispute resolution contexts, including commercial and international disputes, and was a presidentially appointed United States member of the International Centre for Settlement of Investment Disputes Panel of Conciliators.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae*, their members, or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties have received timely notice of *amicus curiae*'s intent to file and consented to the filing of this brief.

The Center for the Rule of Law is committed to promoting adherence to statutory requirements that preserve liberty under law and to the structure of judicial decision-making with respect to both federal and state courts. The Center specifically has a strong interest in the faithful and consistent application of this Court's Federal Arbitration Act (FAA) jurisprudence, in particular, the "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Because "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA]," *Nitro-Lift Techs., LLC v. Howard*, 568 U.S. 17, 17 (2012), *amicus* has a strong interest in ensuring the state courts' uniform, consistent, and proper application of the FAA as interpreted by this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the FAA in 1925 "to reverse the longstanding judicial hostility to arbitration agreements" and "to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Sadly, nearly a century later, the judicial hostility to arbitration agreements persists, particularly in the state courts. Despite repeated corrections from this Court, the state courts continue to conjure up "a great variety of devices and formulas" to avoid enforcing arbitration agreements. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011) (quotation omitted). Oftentimes, the state courts do so "covertly"—to hide their hostility to arbitration; but here, the

Oklahoma Supreme Court simply ran roughshod over directly applicable precedent. *Kindred Nursing Ctr. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017).

Petitioner manufactures and distributes roofing shingles and includes a mandatory arbitration agreement within a "Limited Warranty" on its product packaging. Respondents are homeowners who entered into an agency relationship with a roofing contractor "for the purpose of selecting and installing shingles" on the roof of their home. Pet. App. 8. As a matter of routine application of Oklahoma agency law, Respondents thus authorized their contractor not only to purchase and install roofing shingles but to take any acts "necessary, usual and proper [to] effectuat[e] the main authority conferred." *Elliott v. Mut. Life Ins. Co. of N.Y.*, 91 P.2d 746, 747 (Okla. 1939). In other words, Respondents plainly authorized their contractor to agree to the terms and conditions of purchase and delivery of roofing shingles—including a limited warranty and its arbitration provision. Yet, the Oklahoma Supreme Court refused to enforce the arbitration provision because "the Oklahoma Constitution preserves the right to trial by jury." Pet. App. 9.

Amicus agrees with Petitioner that "[t]he Oklahoma Supreme Court's decision flagrantly flouts the FAA." Cert. Pet. at 2. *Amicus* further agrees that the decision below uniquely disfavors arbitration agreements in violation of the FAA's "equal-footing" rule by refusing to enforce them under the guise of special solicitude for jury-trial rights.

Amicus writes separately to explain that the decision below runs directly contrary to this Court's decision in *Kindred Nursing*, which held that the FAA preempted a Kentucky rule that required a "clear statement" before an agent could bind a principal to a contractual waiver of jury-trial rights. As the Court emphasized in *Kindred Nursing*, the Kentucky rule "single[d] out arbitration agreements for disfavored treatment" by adopting a 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." 137 S. Ct. at 1425, 1427. The decision below does just the same, invalidating an arbitration agreement because it exhibits the "defining feature[]" of every arbitration agreement—it disallows trial by jury. *Id.* at 1426. The decision below warrants correction because it directly contravenes the FAA's equal-footing rule, effectively nullifies (at least in Oklahoma) this Court's *Kindred Nursing* precedent, and exhibits the very same judicial hostility to arbitration that the FAA was intended to remedy.

Moreover, swift corrective action is warranted to ensure proper operation of the Supremacy Clause. As this Court has recognized, "state supreme courts[']adhere[nce] to a correct interpretation of the [FAA]" is "a matter of great importance," *Nitro-Lift Techs., LLC*, 568 U.S. at 17-18. That is because state courts' refusal to enforce arbitration agreements undermines the FAA's purpose of providing efficient and effective dispute resolution according to the parties' negotiated terms. This Court thus regularly intervenes when state courts fail to faithfully apply the FAA and this Court's precedents; indeed, the Court has summarily reversed

state court decisions running afoul of the FAA several times in recent years. *See, e.g., id.* at 17-22; *Marmet Health Care Ctr. Inc. v. Brown*, 565 U.S. 530, 531 (2012) (per curiam); *KPMG LLP v. Cocchi*, 565 U.S. 18, 22 (2011) (per curiam); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-58 (2003) (per curiam). Summary reversal is particularly warranted here because this is not the first time the Oklahoma Supreme Court has disregarded this Court's FAA precedent. *Nitro-Lift Techs., LLC*, 568 U.S. at 18. The Oklahoma Supreme Court should have gotten the message that it is bound by and must follow the Court's FAA precedent the first time. To make that message unequivocally clear, the Court should summarily reverse the decision below.

ARGUMENT

I. The Oklahoma Supreme Court Singled Out Arbitration Agreements for Disfavored Treatment in Contravention of the FAA's Equal-Footing Principle.

In 1925, Congress responded to "centuries of judicial hostility to arbitration agreements," *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974), by enacting the FAA, thereby codifying a "national policy favoring arbitration" and "plac[ing] arbitration agreements on an equal footing with all other contracts," *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *see also Gilmer*, 500 U.S. at 24 ("[The FAA's] purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.").

Section 2 is the heart of the FAA. *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24. It makes written arbitration agreements "valid, irrevocable, and enforceable" as a matter of federal law, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Section 2 thus "create[s] a body of federal substantive law of arbitrability," *Perry v. Thomas*, 482 U.S. 483, 489 (1987), that preempts contrary state law, *see Preston v. Ferrer,* 552 U.S. 346, 353 (2008), except to the extent preserved by its savings clause. The savings clause preserves state law only if it serves as a ground "for the revocation of *any contract*." 9 U.S.C. § 2 (emphasis added). The "any contract" limitation is a reference to state laws of general applicability. Accordingly, the FAA preempts any state-law rule that "singl[es] out arbitration provisions for suspect status." *Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 687 (1996). For good reason, this rule is sometimes called the "equal-footing principle." *Kindred Nursing*, 137 S. Ct. at 1428.

Under the equal-footing principle, a court "may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Kindred Nursing*, 137 S. Ct. at 1426 (quoting *Concepcion*, 563 U.S. at 339). The principle operates in two ways. First, the rule prevents states from adopting novel laws or rules that apply only to arbitration. "A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [the text of Section 2]." *Perry,*

482 U.S. at 492 n.9; *see Doctor's Assocs.,* 517 U.S. at 687 ("Courts may not … invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.") (emphasis in original); *Oblix, Inc. v. Winiecki,* 374 F.3d 488, 492 (7th Cir. 2004) ("[N]o state can apply to arbitration (when governed by the Federal Arbitration Act) any novel rule.").

Second, it bars the manipulation of generally applicable contract defenses in a "fashion that disfavors arbitration." *Concepcion*, 563 U.S. at 341; *see also Iberia Credit Bureau, Inc. v. Cingular Wireless LLC,* 379 F.3d 159, 167 (5th Cir. 2004) ("[S]tate courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny."). This includes state-law rules that "derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339. In other words, under its equal-footing principle, the FAA "displaces any rule that covertly [discriminates against arbitration] by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Kindred Nursing*, 137 S. Ct. at 1426.

The Oklahoma Supreme Court plainly violated the equal-footing principle, and in so doing ran roughshod over the Court's decision in *Kindred Nursing*. To begin with, there is no question that Respondents authorized their roofing contractor to act as their agent. Indeed, the Oklahoma Supreme Court acknowledged that the facts demonstrated that Respondents had entered into "an agency agreement" with their contractor "to select and install shingles on [Respondents'] roof." Pet. App. 8. In other words, the court acknowledged that this

agency relationship authorized the contractor to make decisions on the purchase price and quality of the roofing shingles. *Id.* Naturally, then, Respondents' contractor would have been authorized to agree to a limited warranty. Indeed, the court did not suggest otherwise.

Yet, the Oklahoma Supreme Court refused to enforce the arbitration agreement contained within the limited warranty on the sole ground that a mandatory arbitration agreement waives a right protected by the state constitution—the right to a jury trial. *See* Pet. App. 15 ("The Homeowners are not bound to the arbitration agreement. The Oklahoma Constitution protects the right to a jury trial. An implied agent whose sole authority is to select and install shingles does not have the authority to waive the principal's constitutional rights."); *see also* Pet. App. 9 ("A one-time selection and installation of shingles by a contractor without a formal agency agreement does not indicate an authorization to waive a constitutional right.").

In doing so, the Oklahoma Supreme Court did precisely what is barred by the equal-footing principle. The waiver of a jury-trial right is the defining feature of every arbitration agreement. A rule that suspends the normal operation of state agency law for arbitration agreements solely because they amount to a waiver of the right to a jury trial thus improperly "derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339; *see also id.* at 341 (the equal-footing rule bars any state-law rule that

"rel[ies] on the uniqueness of an agreement to arbitrate" as the basis for nonenforcement).

Worse still, the decision below directly contravenes this Court's recent *Kindred Nursing* precedent. Just a few Terms ago, the Court held that the FAA's equal-footing principle preempted a Kentucky rule that required a clear statement in a power of attorney in order to authorize the attorney-in-fact to waive the principal's state constitutional right to a jury trial. *Kindred Nursing*, 137 S. Ct. 1425. As the Court explained there, any rule barring enforcement of arbitration agreements that hinges on the fact of their waiver of jury-trial rights is an attack on the "primary characteristic" or "defining trait" of arbitration. *Id.* at 1427. Although the rule did not discriminate against arbitration on its face, the Court emphasized the jury-trial right is "the one right that just happens to be correlative to the right to arbitrate." *Id.* Tying nonenforcement of arbitration agreements to their waiver of jury-trial rights thus made clear the "arbitration-specific character of the rule" and the fact that it singled out arbitration agreements for disfavored treatment. *Id.* at 1428.

As Petitioner put it, the Oklahoma Supreme Court "repeat[ed] virtually verbatim the reasoning that this Court rejected in *Kindred Nursing*." Cert. Pet. at 10. In each case, the state supreme court refused to enforce an arbitration agreement because arbitration waives the state constitutional right to a jury trial. And in each case, the lower court emphasized the special solicitude afforded jury-trial rights by the state constitution. And in each case, the rule crafted by the

state court was "too tailor-made to arbitration agreements … to survive the FAA's edict against singling out those contracts for disfavored treatment." *Kindred Nursing*, 137 S. Ct. at 1427. Indeed, given that both rules hinged upon the jury-trial right, the only difference between the Kentucky Supreme Court's and the Oklahoma Supreme Court's arbitration-specific rules is that this Court held the Kentucky rule was preempted by the FAA two years before the Oklahoma Supreme Court adopted essentially the same FAA-preempted rule. In other words, the Oklahoma Supreme Court should have known better. The decision below blatantly violates the FAA's equal-footing principle and this Court's *Kindred Nursing* precedent.

II. Because State-Court Fidelity to Federal Arbitration Law Is of Paramount Importance, Summary Reversal Is Warranted.

When state courts fail to apply this Court's governing precedents, the Court has not hesitated to intervene. *See, e.g.*, *Marmet Health*, 565 U.S. at 530 ("When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established." (citing U.S. Const., Art. VI, cl. 2.)). This is especially important with regard to the FAA, which is unique in its reliance on state-court enforcement. In light of its "nonjurisdictional cast," *Vaden v. Discover Bank*, 556 U.S. 49, 59 (2009), "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA]," *Nitro-Lift Techs., LLC*, 568 U.S. at 17. And because state supreme court decisions often represent the final say in the enforcement of arbitration agreements, this Court's

superintendence of the state courts is of utmost importance in the context of this Court's FAA jurisprudence. *See id.* at 17-18 ("It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation.").

To that end, the Court recently has ordered summary reversals of several state court decisions that failed to abide by its FAA precedents. *See, e.g.*, *id.* at 20 (reversing the Oklahoma Supreme Court for "disregard[ing] this Court's precedents on the FAA"); *Marmet Health*, 565 U.S. at 531 (reversing the West Virginia Supreme Court of Appeals for "misreading and disregarding the precedents of this Court interpreting the FAA"); *KPMG*, 565 U.S. at 132 S. Ct. at 22 (reversing Florida appellate court ruling that "failed to give effect to the plain meaning of the [FAA] and to [this Court's] holding in" *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213 (1985)); *Citizens Bank*, 539 U.S. at 56-58 (reversing Alabama Supreme Court's "misguided" approach to FAA's "involving commerce" requirement in light of this Court's decision in *Allied-Bruce Terminix Co., Inc. v. Dobson,* 513 U.S. 265 (1995)).

This is one of those cases in which the Court's intervention is amply justified. The relevant law "is well settled and stable, the facts are not in dispute, and the decision below is clearly in error." Eugene Gressman et al., Supreme Court Practice 350 (9th ed. 2007) (quoting *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)); *see also id.* at 352 ("[T]he Court has shown no reluctance to reverse

summarily a state court decision found to be clearly erroneous.").

Moreover, summary reversal is especially warranted given the judicial hostility to arbitration exhibited by the court below. As explained above, the Oklahoma Supreme Court singled out arbitration agreements for disfavored treatment, thus contravening the FAA's "principle of rigorous equality," *Secs. Indus. Ass'n v. Connolly,* 883 F.2d 1114, 1119 (1st Cir. 1989), embodied in its equal-footing principle, *Kindred Nursing*, 137 S. Ct. at 1428. And it did so in the face of the Court's directly contrary precedent in *Kindred Nursing*.

This judicial hostility to arbitration directly undermines the goals of the FAA. Because a "prime objective [of arbitration] is to achieve 'streamlined proceedings and expeditious results,'" *Preston*, 552 U.S. at 357, Congress instructed the courts "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible," *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 22. Yet despite a binding arbitration agreement in this case, the parties' dispute has stalled in the courts for several years, with no end in sight.

Moreover, if left uncorrected, the decision below would threaten to undermine the enforcement of arbitration agreements throughout the State of Oklahoma. Worse still, decisions like the one below, if left unchecked, allow judicial hostility to arbitration to persist elsewhere and may green-light other state courts to engage in similar hostility against the FAA. *See, e.g.*, *OTO, LLC. v. Kho*, 447 P.3d 680, 689-701 (Cal.

2019) (refusing to enforce arbitration agreement because of arbitration-specific rule); *see id.* at 723 (Chin, J., dissenting) (criticizing the majority opinion as "violat[ing] … the FAA and its equal-treatment principle"). This would upset the uniform, faithful application of the FAA that is critical to *amicus* and many others.

On top of all that, this is not the first time the Oklahoma Supreme Court has thumbed its nose at this Court's FAA jurisprudence. Not long ago, this Court admonished the Oklahoma Supreme Court for "fail[ing] to" "adhere to a correct interpretation of the [FAA]." *Nitro-Lift Techs., LLC*, 568 U.S. at 17-18. As this Court emphasized then, "the Oklahoma Supreme Court must abide by the FAA, which is 'the supreme Law of the Land,' … and by the opinions of this Court interpreting that law.'" *Id.* at 21 (citing the Supremacy Clause). Indeed, "[i]t is this Court's responsibility to say what a statute means, and once the Court has spoken," it remains "the duty of [the Oklahoma Supreme Court] to respect that understanding of the governing rule of law." *Id.* (quotation omitted). Summary reversal is needed to bring an end to the Oklahoma Supreme Court's recalcitrance.

CONCLUSION

Amicus curiae respectfully requests that the Court grant the petition for certiorari and summarily reverse the judgment of the Supreme Court of Oklahoma.

Respectfully submitted,

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