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 IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Oklahoma Supreme Court correctly apply general principles of agency law that neither single out nor disfavor arbitration when it concluded that the contractors who Daniel and Barbara Williams hired for the limited purpose of installing roofing shingles on their home lacked the authority to bind them to contracts affecting their legal rights?

2. The Oklahoma Supreme Court concluded that any knowledge the Williamses' contractors obtained about the warranty printed on Tamko's shingle wrapper could not be imputed to the Williamses because the contractors were acting outside the scope of their authority. But given that the record contained no legible representation of the shingle wrapper that the Williamses' roofers would have seen when they installed the shingles in 2007, did Tamko even meet its burden of proving what the roofers knew or should have known about the wrapper's contents and the significance of opening it, a prerequisite for imputing their knowledge to the Williamses?

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INTRODUCTION

Petitioner's premise that the Oklahoma Supreme Court has exhibited anti-arbitration animus and that this Court must intervene stems from a false equivalency and a simplistic narrative. The false equivalency is that the opinion below is just like the Kentucky Supreme Court's opinion in *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2015) that this Court reversed in *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. C t. 1421 (2017). The simplistic narrative is that federal courts always enforce Tamko's arbitration agreement printed on its shingle wrappers, or arbitration agreements generally, while the opinion below epitomizes a rash of anti-arbitration state court decisions, and those recalcitrant state courts must be brought into line. Both the equivalency and the narrative may have some surface-level appeal, but neither withstands close scrutiny.

The Kentucky Supreme Court, like the Oklahoma Supreme Court here, analyzed agency principles to determine whether an agent's authority extended to entering an arbitration agreement on a principal's behalf. To that degree the cases are similar. But the two courts reached opposite conclusions. The Kentucky court noted that a broad grant of authority in a power of attorney would, under traditional agency principles, "implicitly" allow the agent to bind her principal to arbitration. *Whissman*, 478 S.W.3d at 327; *Kindred*, 137 S. Ct. at 1426 (describing lower court opinion).

Not liking where this application of general agency principles was leading, the Kentucky Supreme Court created a new rule that "the power to waive . . .

fundamental constitutional rights must be unambiguously expressed in the text of the power-of-attorney document in order for that authority to be vested in the attorney-in-fact." *Whissman*, 478 S.W.3d at 328. And it was this "adopt[ion of] a legal rule hinging on the primary characteristic of an arbitration agreement" that led this Court to reverse on FAA preemption grounds. *Kindred*, 137 S. Ct. at 1427. *See also id.* at 1429 (remanding as to another related case where it was unclear whether the Kentucky Supreme Court's opinion was based on its newly created "clear-statement rule" or its application of traditional agency law).

The opinion below created no new rule of law; though Petitioner repeatedly frames it as having done so, Petitioner never articulates what the supposed new rule is. Instead, the Oklahoma Supreme Court simply concluded that contractors who were hired to install shingles on a roof had a narrow scope of authority and that agreeing to binding contracts regarding the homeowners' legal rights fell outside that narrow scope. This conclusion is nothing more than an application of existing law regarding the scope of agent authority to a particular set of facts. And while the references to constitutional rights that are sprinkled throughout the opinion certainly provide Petitioner with rhetorical fodder, the only actual work they are doing in the opinion is to describe the set of facts to which the court applied existing law.

Moreover, several fact-based questions, primarily arising under state law, make this case far less straightforward than Petitioner suggests as a vehicle for assessing the interaction between agency principles and the FAA. For one thing, in the absence of any evidence

about the existence or scope of an agency relationship, Petitioner failed to establish that the roofers were agents at all, and the court should have treated them as independent contractors. *See Hall v. North Plains Concrete Service, Inc* 425 P.2d 941, 945 (Okla. 1966) (the "mere existence of a contract between a landowner and one whom he has contract with to make improvements on his land in nowise establishes agency").

Second, on this inadequate record, and in light of the evidence of shingle wrapper design submitted by Tamko in other cases, there is significant reason to doubt whether the contractors here knew or should have known that by opening the bundles to begin the installation process, they were binding the homeowners to arbitrate all future disputes with Tamko. Put another way, even if agency were established and even if its scope encompassed agreeing to the warranty terms, no imputation of knowledge can occur without agent knowledge. *Gamble v. Cornell Oil Co.*, 154 F. Supp. 581, 587-88 (W.D. Okla. 1957), aff'd, 260 F.2d 860 (10th Cir. 1958).

Finally, the narrative of misbehaving state courts is cynically underinclusive, for it ignores both those federal courts that have declined to enforce Tamko's arbitration agreements and the state courts that have enforced them. Nor does the Oklahoma Supreme Court's opinion have the sort of sweeping implications for vendors of other products besides roofing shingles that Petitioner ascribes to it. To the contrary, it is Petitioner's view of agency, which admits of no limitations on the rights that contractors should be able to surrender on behalf of those who employ them, that would have truly sweeping consequences.

According to Petitioner's view, roofers, drywall installers, and plumbers should be able without restriction to waive the legal rights of the people in whose homes they work—to limit manufacturer liability and damages and shorten statutes of limitations, as the Tamko warranty already does, and to abridge other consumer rights and grant manufacturers special entitlements that have not yet been contemplated. The Oklahoma Supreme Court rightly rejected this limitless view of product installer agency, and this Court should not disturb its decision.

STATEMENT OF THE CASE

1. Daniel and Barbara Williams had Tamko Heritage roofing shingles installed on their home in Panama, Oklahoma in June 2007. Record on Appeal ("ROA"), Petition ¶7. In April 2016, they noticed that the shingles were cracking over the roof's entire surface area, causing water to leak through and damage the eaves and wooden roofing beneath the shingles. *Id.* ¶8-9.

The Williamses complained to Tamko, who responded with a letter instructing them to complete a warranty claim form and submit photos of the damage along with sample shingles from the affected area. ROA, Plaintiffs' Response, Exhibit 1 at 16-20. That letter and claim form did not include a copy of Tamko's Limited Warranty. *Id.*

When the Willliamses sent in proof of their damages as requested, Tamko responded with a second letter, offering a certificate for one square of replacement shingles and a check for $100. ROA, Plaintiffs' Response, Exhibit 2 at 21-24, 27-28. This second letter included a brochure with a copy of Tamko's Limited Warranty, which was the first

time the Williamses had ever seen it. *Id.* at 25-26. The Williamses found this response wholly inadequate, as the extensive damage to their home required them to install a new roof at a cost of over $10,000. ROA, Petition ¶17.

2. The Williamses filed this action for products liability, negligent manufacture, and negligent failure to warn. App. 2. Tamko sought to stay the proceedings and compel arbitration, relying on an arbitration clause that it claimed was included in the Limited Warranty printed on the wrapper of each bundle of shingles installed on the Williams home.

Tamko submitted an unauthenticated version of that Limited Warranty with its motion, which purported to apply "to all "Tamko Fiberglass Shingles sold on or after April 9, 2007." ROA, Defendant's Brief in Support of Motion to Stay, Exhibit A at 10-11. In addition to the arbitration clause reproduced at page 5 of the Petition for Certiorari, this Limited Warranty also contained provisions stipulating that its obligations were "in lieu of" any other common-law or statutory obligations on Tamko's part; exempting Tammko from all liability for incidental or consequential damages (unless such exclusions were prohibited under the law of the jurisdiction where the shingles were installed); and shortening the applicable statute of limitations for any claims against Tamko to one year. *Id.* at 11. Relevant to the Oklahoma Supreme Court's finding of unconscionability, it also contained the following definition of the term "Owner":

> "Owner" means the owner of the building at the time the Shingles are installed on that building. If you purchase a new residence and are the

> first person to occupy the residence, TAMKO will consider you to be the Owner, even though the Shingles were already installed.

Id. at 10.

The Williamses opposed the motion to compel, arguing that they had never seen or agreed to, and did not know about, the Limited Warranty or its arbitration clause when the shingles were installed or when they completed the claim form at Tamko's request. App. 3, 18-19.

With its reply, Tamko submitted what it represented to be a true and correct copy of the wrapper that would have encased each bundle of shingles installed on the Williams home in 2007, authenticated by the affidavit of a Tamko technical systems specialist. ROA, Defendants' Reply, Exhibit B-1 at 7-9. But the appearance of Exhibit B-1 differed in material respects from the Limited Warranty introduced by Tamko as Exhibit A. *See* Appellants' Reply Brief at 7 (noting that Exhibit A had five columns of text and five circular seals while Exhibit B-1 had three columns of text and one circular seal). And because Exhibit B-1 was a scaled-down copy of the shingle wrapper, most of its text was illegible, a point Tamko conceded in its brief to the Oklahoma Supreme Court. Appellee's Answer Brief at 3-4 (explaining that Exhibit B-1 was created by reducing the image of the wrapper to fit on a single sheet of 8.5 x 11 paper and that "the length of the wrapper on the subject shingles was actually 42 inches").

3. The Williamses explained, through counsel, at the hearing before the trial court that contractors had selected the Tamko shingles and installed them on their

home, describing themselves as "passive participants" who simply "paid for what their contractor selected." Appellants' Reply Brief at 2 n.1. But the trial court's opinion did not discuss the contractors' role in the installation or address any of the doctrines of nonsignatory enforcement, like agency or equitable estoppel, that the Oklahoma Supreme Court opinion analyzed.

Instead, the trial court relied on Oklahoma's long-standing rule that "a consumer is charged with the knowledge of the contract even if he or she did not read them." App. 19. Analogizing this case about construction materials to situations involving consumer products, the court held that "when a consumer buys and uses the goods he/she has accepted the terms and a valid contract exists." *Id.*

4. The Oklahoma Supreme Court began its opinion by pointing out that the Williamses never had actual knowledge of the Limited Warranty or its terms—either when their shingles were installed or when problems arose in 2016—and observed that this lack of personal knowledge distinguished the instant case from three other Tamko cases where the plaintiffs were more directly involved in the purchasing process. App. 7 (citing *Am. Family Mut. Ins. Co. v. Tamko Bldg. Prods., Inc.*, 178 F. Supp. 3d 1121, 1124-25 (D. Colo. 2016), *Hoekman v. Tamko Bldg. Prods., Inc.*, No. 2:14-cv- 01581-TLN-KJN, 2015 WL 9591471 at *3-4 (E.D. Cal. Aug. 26, 2015) and *Krusch v. TAMKO Bldg. Prods., Inc.*, 34 F. Supp. 3d 584, 589 (M.D.N.C. 2014)).

Turning to the status of the contractors, the court set out generally-applicable principles of Oklahoma agency

law and concluded that the contractors who installed the shingles were acting on the Williamses' behalf through an implied agency. App. 8 (citing *Campbell v. John Deere Plow Co.* 172 P.2d 319, 320 (Okla. 1946). But the scope of that agency was limited, the court reasoned, to "buying and installing shingles." App. 8-9 (citing Restatement (Second) of Agency §34). The contractors' authority did not extend to agreeing to the terms of the Limited Warranty, which—as Petitioner quotes to the exclusion of all other language in the opinion—included waiver of the constitutional right to a jury trial. App. 9.

Next addressing the concept of ratification, the court again looked to Oklahoma law and concluded that the Williamses could not have ratified the contractors' unauthorized conduct because they did not know the material facts about the warranty terms. App. 10 (citing *Kincaid v. Black Angus Motel, 983 P.2d 1016, 1020 (Okla. 1999)).*

Nor could Tamko utilize the equitable estoppel doctrine to enforce the arbitration clause, the court reasoned, for Oklahoma's traditional equitable estoppel test requires a knowingly false representation or concealment of facts by the estopped party on which another party detrimentally relied, and the Williamses had made no such false representation. App. 12-13 (citing *Sulllivan v. Buckhorn Ranch P'Ship, 119 P.3d 192, 202 (Okla. 2005)).* If anything, the court noted, Tamko was the party who acted inequitably by soliciting a claim form from the Williamses when they complained of problems with their shingles but failing to provide a copy of the Limited Warranty until after they had submitted a claim, and then seeking to bind them to the arbitration clause

in that warranty through their act of submitting the very claim form Tamko had asked them to submit. App. 13.

Finally, the court found the arbitration clause unconscionable because the decision to print it on throw-away product packaging typically handled by builders "was made to both oppress and unfairly surprise the Homeowners." App. 13-14. The definition of "Owner" as extending to people who purchased a home after the shingles were installed added to the court's finding of adhesiveness, for this provision meant that the arbitration clause could "bind[] a purchaser of a home completed by a builder a year earlier . . . even though at the time the builder entered the contract with TAMKO the builder was not the Homeowner's agent." App. 14 n.2.

REASONS FOR DENYING THE PETITION

I. The Opinion Below Did Not Target Arbitration Expressly Or Covertly But Simply Applied General Agency Principles In A Case Involving Arbitration.

Petitioner posits that this case is an excellent vehicle for Supreme Court review because it involves only legal questions and there is no dispute about whether an agency existed or about the contents of the shingle wrappers. Pet. 31. This is deeply wrong.

The portion of the Oklahoma Supreme Court's opinion dealing with agency answered four questions: 1) were the contractors agents of the Williamses?; 2) were the contractors acting within the scope of that agency when they agreed to the warranty terms?; 3) assuming the answer to the scope question was "no," did the Williamses

nonetheless ratify the contractors' conduct?; and 4) can the contractors' knowledge of the warranty terms be imputed to the Williamses? App. 8-11. The second question on scope proved dispositive, but Respondents believe that the court answered the first question, on the existence of agency, incorrectly and so should never have reached the second. And while the court reached the right conclusion on the third and fourth, knowledge-related, questions, it did so, at least in part, for the wrong reasons.

At none of these steps did the court's actual analysis, or the analysis that Respondents suggest it should have followed instead, turn on the presence of an arbitration agreement. To be sure, the opinion below mentioned the constitutional right to a jury trial on several occasions, but it did not create a different rule for waivers of constitutional rights than for all other rights. *Kindred*, 137 S. Ct. at 1427. Had the opinion below held that the contractors' agency was broad enough to bind the Williamses to all of Tamko's warranty terms except the arbitration clause, then Petitioner would have a valid basis for comparing this case to *Kindred*. But that's not what happened.

Rather, what proved dispositive to the Oklahoma Supreme Court were the narrow scope of the contractors' authority and the Williamses' lack of knowledge. App. 9 ("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"; App. 10 ("There are no facts suggesting that the Homeowners knew of the arbitration clause, so the Homeowners could not ratify the arbitration provision."). And in light of the scant and conflicting information in the record about the wrappers containing the shingles

that were installed on the Williams home, assessing what the contractors knew or understood at the time they performed the installation about the warranty generally and the arbitration clause in particular makes the agency analysis even more difficult. These factual considerations, set against the backdrop of traditional agency principles, drove the Oklahoma Supreme Court's analysis. A desire to flout the FAA did not.[1]

A. Tamko Had The Burden Of Proving The Existence And Scope Of Any Agency And Failed To Meet That Burden.

The Oklahoma Supreme Court has held that "existence of agency cannot be presumed." *Sturm v. Green*, 398 P.2d 799, 804 (Okla. 1965). Instead, the party who relies upon such an agency must "prove the fact of agency and the scope of the agent's authority." *Id.* Here, Tamko advanced its agency argument before the trial court, even though that court did not address it. ROA, Brief in Support of Motion to stay at 6. But Tamko made no attempt to obtain evidentiary support for that argument, such as by requesting discovery from the Williamses.[2]

All the record has to say about a potential agency is that contractors installed the shingles on the Williamses'

1. Because this case arose in state court, there is cause to question whether the FAA applies at all. *See Kindred*, 137 S. Ct. at 1429-30 (Thomas, J., dissenting).

2. Tamko has produced such evidence in other cases, including one of the cases it raises before this Court in portraying the opinion below as an outlier. *See Krusch*, 34 F. Supp. 3d at 589 (describing affidavit from supplier produced by Tamko attesting to agency relationship).

roof. ROA, Petition ¶7. Before the Oklahoma Supreme Court, the Williamses clarified statements they had made in their trial court briefing about purchasing the shingles by explaining that they paid for the shingles but that their contractors selected them. Appellants' Reply Brief at 2 n.1 ("Plaintiffs were passive participants in that they paid for what their contractor selected"). Based on these two rather slender reeds, the Oklahoma Supreme Court found that an implied agency existed where "[t]he Homeowners authorized the contractors to select and install shingles on the Homeowner's roof." App. 8.

But it is unclear from this record that the Williamses exercised the amount of control over the contractors necessary to establish an agency relationship. *See Banning Transp., Inc. v. Vansickle*, 527 P.2d. 586, 588 (Okla. 1974) ("An agency relationship does not exist unless conduct of parties manifests that one of them is willing for the other to act for him subject to his control and that the other consents to so act.").[3] By contrast, the autonomy exercised by the contractors, in which they selected which shingles to install and the Williamses simply paid for them, is more indicative of an independent contractor arrangement. *See id.* ("an 'independent contractor' is one who, exercising an independent employment contract to do work according to his own methods and without being subject to control of his employer except as to result of work.").

Under Oklahoma law, a contractor who is hired to make improvements to property and is paid for that work is not automatically the homeowner's agent. *Hall v. North Plains Concrete Service, Inc.*, 425 P.2d 941, 945

3. Unless otherwise indicated, all internal quotations and citations are omitted.

(Okla. 1966) (contractor who agreed to move barn onto the homeowner's property and re-erect it, furnishing all materials used, "for a fixed price," was not the homeowner's agent). Other states are in accord. *Sanders v. Total Heat and Air, Inc.*, 248 S.W.3d 907, 914-17 (Tex. App. 2008) (general contractor was not agent of homeowner and lacked authority to bind her to contract with supplier of heating and air conditioning system).

At a minimum, there are not enough facts in the record from which the question of agency can be conclusively answered. The Oklahoma Supreme Court was wrong to proceed to the second step of the analysis and consider the scope of an agency that Tamko never proved to have existed.

B. The Oklahoma Supreme Court Correctly Concluded That Agreeing To Waive Legal Rights Is Not Incidental Or Reasonably Necessary To The Installation of Shingles.

The opinion below looked to the Restatement to determine whether binding the Williamses to the arbitration agreement in Tamko's warranty was within the scope of the contractors' authority. App. 8-9 (citing Restatement (Second) of Agency § 34 (1958)). Some of the circumstances the Restatement considers relevant are the relationship between the parties, the business in which they are engaged, and the formality or informality "with which an instrument evidencing the authority is drawn." *Id.* Applying these factors, the court concluded that the relationship of the parties (one-time transaction) and the nature of their business (selection and installation of shingles), combined with the lack of any formal agency

agreement, added up to a narrow scope of authority that did not extend to binding the Williamses to arbitrate. App. 9.

As Petitioner correctly observes, Oklahoma law recognizes that agents are implicitly authorized to perform acts "incidental" or "necessary" to the accomplishment of their primary objective. Pet. 17. But it certainly does not follow uncontroversially that binding someone else to warranty terms that give up a swath of legal rights, not just to access the courts and have a jury trial but also to pursue non-warranty claims and seek incidental or consequential damages, is "incidental" or "necessary" to completing a construction project.

Petitioner and its amicus cite *Elliott v. Mutual Life Ins. Co. of New York*, 91 P.2d 746 (Okla. 1939), a case about whether an agent had authority to cancel a life insurance policy by signing his principal's name. In concluding that he did, the Oklahoma Supreme Court noted that "the means and method adopted by [the agent] in carrying out the delegated authority were within the contemplation of the parties." *Id.* at 748. However, the existence of Tamko's warranty, and the notion that the contractors had agreed to its terms as part of the shingle installation process, was certainly not within the contemplation of the parties here. At the very least, it was not something the Williamses had contemplated. App. 10, 19.

Nor did the Oklahoma Supreme Court break with precedent or apply heightened scrutiny because an arbitration clause was at issue. Oklahoma courts have found agents to have exceeded their authority on numerous other occasions not involving arbitration. *See,*

e.g., *DeCorte v. Robinson*, 969 P.2d 358, 361-62 (Okla. 1998) (discussing how police officer could be acting within scope of his authority when initiating an arrest but then exceed that authority by assaulting the suspect); *Bank of McAlester v. Middlebrooks*, 241 P. 765, 767-68 (Okla. 1925) (wife acted as limited agent by collecting money from bank for husband on one occasion but could not bind husband to representations about commercial paper beyond the scope of this limited agency); *see also Mutual Oil Co. v. Roach*, 243 P. 504, 505 (Okla. 1926) (agent's "authority was to do a specific act, and he could not make an admission that would be binding upon his principal as to other matters of the transaction not included in his authority.").

And despite Petitioner's desire to tell a story in which law-abiding federal courts are pitted against rogue state courts, federal courts throughout the country have reached similar conclusions, even in cases involving arbitration. In *GGNSC v. Southaven*, 817 F.3d 169, 180 (5th Cir. 2016), for example, the fifth Circuit held that a fact question existed as to whether a son was authorized to act as his mother's agent and whether the scope of that agency included giving up her legal rights through an arbitration agreement, in addition to making medical and financial decisions for her.

In setting out the factors to be considered, the Fifth Circuit noted that "'the consequences that a particular act will impose on the principal may call into question whether the principal has authorized the agent to do such acts,' such as when acts 'create legal consequences for a principal that are significant and separate from the transaction specifically directed by the principal'." *Id.* at n.4 (quoting Restatement (Third) Of Agency § 2.02,

comment h). *See also Opp v. Wheaton Van Lines, Inc.*, 231 F.3d 1060, 1065 (7th Cir. 2000) (ex-husband did not have authority to sign bill of lading limiting movers' liability when all ex-wife had authorized him to do was open the door and let the movers in); *U.S. v. Flemmi*, 225 F.3d 78, 86 (1st Cir. 2000) (FBI agents did not have authority to offer immunity to informants because offering immunity was not incidental or reasonably necessary to their duty of investigating crime, opining that "[w]ere the law otherwise, the concept of 'incidental to duty' would stretch so interminably as to become entirely unworkable as a limiting principle.'").

Finally, Petitioner avers without support that the opinion below treated Tamko's arbitration provision more harshly than "other terms found on [the shingles'] packaging." Pet. 11. Tamko was only seeking to enforce its arbitration provision, not any of the other warranty terms, so the lower courts limited their opinions to the specific provision at issue.

Petitioner and its amicus make much of this silence, suggesting that the remainder of the warranty would have been enforced. But there is nothing in the opinion to substantiate that claim.

The opinion below found that roofers hired to handle a single installation job did not have authority to bind their principals to rights-limiting contract terms, a result consistent with decades-old Oklahoma law on the scope of agent authority. It created no new, arbitration-specific rule. Petitioner has tried to concoct one by quoting language about the lack of a formal agency agreement here, Pet. 19, taking that language out of context as a

proposed requirement instead of a mere statement of fact. This Court should not countenance such a transparent attempt to make this case seem more like *Kindred* than it actually is.

C. Neither Ratification Nor Imputation Is Possible Without Actual Notice, On The Face Of The Shingle Wrapper, Of The Contractual Significance Of Unwrapping The Bundle.

The Oklahoma Supreme Court noted that the Williamses could only ratify their contractors' act of agreeing to arbitration if they possessed "full knowledge of the facts." App. 9-10. And the court went on to note a tension with the concept that an agent's knowledge will be imputed to the principal, suggesting that if the principal was deemed to have knowledge through imputation, this could create an end-run around the rule that only a principal with knowledge of an agent's unauthorized acts will be bound by them through ratification. App. 10-11.

The concepts of imputation of agent knowledge and ratification of agent conduct both have a long history in Oklahoma law, and they are not usually in as much tension as the passage from the opinion below suggests. The imputation concept derives from the fact that "agency is a fiduciary relation" and agents owe duties of care and loyalty to their principals. *Douglas v. Steele*, 816 P.2d 586, 589 (Okla. Civ. App. 1991) (holding that travel agent "had a duty to act with the care, skill and diligence a fiduciary rendering that kind of service would reasonably be expected to use"). This duty required the travel agent to investigate the financial stability of the tour company she had recommended and inform her customers of its potential insolvency. *Id.* at 590.

Because agents are expected to share all relevant information with their principals on matters within the scope of their agency, principals can be charged with knowing anything the agent knows on those subjects. *See Aetna Cas. & Sur. Co. of Hartford, Conn. v. Local Bldg. & Loan Ass'n*, 19 P.2d 612, 616 (Okla. 1933) (recognizing an exception to the imputation rule for facts related to an agent's independent fraudulent activity, because "where the agent is committing a fraud it would be contrary to common sense to presume that he would communicate the facts to his principal").

The ratification doctrine arises in situations, like the fraud described in *Aetna*, where an agent has committed an unauthorized act. And it is rooted in the equitable notion that if the principal knows what the agent is doing and is benefitting from it, then the mere fact that the agent was acting outside his authority should not immunize the principal from liability. *See D. W. L., Inc. v. Goodner-Van Engineering Co.*, 373 P.2d 38, 42 (Okla. 1962) (finding ratification where principal, "who from the very beginning, was kept informed of [agent's] 'every move', had full knowledge of the transaction and retained all of its fruits.").

But there is another reason besides self-dealing or fraud that an agent might not share knowledge with its principal: it may have no knowledge to share. Although the opinion below did not discuss this limitation to the imputation rule, other courts both within and outside of Oklahoma have recognized it. *Gamble v. Cornell Oil Co.*, 154 F. Supp. 581, 587-88 (W.D. Okla. 1957 ("The basis for charging a principal with knowledge held by an agent rests in the presumption that all information actually

possessed by the agent will be conveyed to its principal. No such presumption can exist where the agent is without actual knowledge."), aff'd, 260 F.2d 860 (10th Cir. 1958); *see also Wycoff v. Motorola, Inc.*, 502 F. Supp. 77, 93 (N.D. Ill. 1980) ("only actual knowledge of an attorney or agent can be imputable to the client or principal"), aff'd, 688 F.2d 843 (7th Cir. 1982).

And there is considerable reason to question whether the Williamses' contractors had actual knowledge of Tamko's warranty terms. Nor is it only the terms themselves of which the contractors would need to have knowledge: Petitioner's theory of imputation requires them to have understood 1) that the act of opening and installing the shingles made the warranty terms take effect and become binding; and 2) that the link between unwrapping the shingles and triggering the warranty's binding effect applied not just to the contractors but also to the homeowners.

Indeed, without such knowledge, the contractors' act of opening the shingles wouldn't have bound the Williamses to anything and so would not have exceeded their authority, because acceptance by conduct is only effective if the offeree understands, or should understand, the contractual significance of his action. *See* Restatement (Second) of Contracts § 19 (1981) ("The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.").

Determining whether the shingle wrapper conveyed all of this information in a manner that would put a

reasonable contractor on notice requires an exemplar of what the wrapper of the Williamses' shingles looked like, but the record below contains no such exemplar that is legible.[4] One of the few lines of text legible on Exhibit B-1 is the admonition: "**IMPORTANT, READ CAREFULLY BEFORE OPENING BUNDLE**." But this notice does not specify whether reading is important because the wrapper contains information about safe installation practices, which would be pertinent to a roofer, or because it contains binding contractual provisions affecting the future legal rights of the homeowner and that unwrapping the shingles will constitute assent to those contract terms.

As Petitioner notes repeatedly, this is not the first time Tamko has litigated over its shingle wrapper warranty, and several of those earlier cases offer more robust records. In *Hoekman*, for example, where the subject shingles were installed in 2005 (only two years before the Williamses' shingles), Tamko supplied several

4. Tamko presented a full-sized exemplar shingle wrapper at the trial court hearing and belatedly conveyed a copy to the Oklahoma Supreme Court after the trial court clerk had already transmitted the record and the Williamses had already submitted a brief based on an official record that did not contain the full-sized exemplar wrapper. Amendment to Appellee's Answer Brief at 1; Appellants' Reply Brief at 1, 19-20. Moreover, the photocopy of the full-sized exemplar included in Tamko's briefing to the Oklahoma Supreme Court is folded so that only a portion is visible, so Respondents' counsel still has not seen the exhibit in its entirety. Amendment to Appellee's Answer Brief, Exhibit A. Complicating matters further, Tamko qualified that "the text on the [full-sized] exemplar wrapper is slightly modified from the text contained on the wrapper at the time of the Williams' purchase," but did not specify what content had changed. Appellee's Ansewr Brief at 3 n.2.

photographs depicting the wrapper's design, including the language that appeared beneath the admonition to "**READ CAREFULLY**." *Hoekman*, No. 2:14-cv-01581-TLN, (E.D. Cal.), Docket Entry 12-3. This portion of the *Hoekman* wrapper went on to say that "[b]y Opening this bundle You agree (a) to install shingles strictly in accordance with the Instructions printed on this wrapper; or (b) leaks and other roofing defects resulting from failure to follow the manufacturers Installation instructions printed on this wrapper are not covered by the limited warranty that is also printed on this wrapper." *Id.*

In other words, the *Hoekman* wrapper warned contractors that if they did not follow the installation instructions, they would not be protected by the warranty if a dispute about workmanship later arose between them and the homeowner. Perhaps the wrapper applicable to the Williams shingles did a better job of conveying the very different message that by opening the bundle the contractor would also be binding the homeowner to legal obligations in the warranty unrelated to the contractors' performance of their installation duties. On this record, it's impossible to tell.

If the notice on the Williamses' shingle wrappers proves inadequate, then a decision not to enforce the arbitration provision printed on that wrapper would be consistent with numerous federal court opinions denying enforcement to arbitration clauses for similar notice-based reasons. *See, e.g.*, *Nat'l Fed'n of the Blind v. The Container Store, Inc.*, 904 F.3d 70, 83-84 (1st Cir. 2018) (inadequate notice of arbitration provision displayed on point-of-sale device); *Dakota Foundry, Inc. v. Trombley Indus. Holdings, Inc.*, 737 F.3d 492, 494-97 (8th Cir. 2013)

(inadequate notice of "terms and conditions" referenced in price quote email); *Southern Energy Homes, Inc. v. Godwin*, 183 Fed. Appx, 441, 443 (5th Cir. 2006) (inadequate notice of arbitration provision in warranty section of mobile home "homeowner's manual").

Even if the Williamses' version of the wrapper contained additional information about the warranty's binding nature, combining that information with the warning about installation instructions present in *Hoekman* would have impeded the clarity of the notice in a way that would have made acceptance by performance impossible. *See Sgouros v. TransUnion Corp.*, 817 F.3d 1029 (7th Cir. 2016). In *Sgouros*, the plaintiff obtained a credit score from TransUnion through an online process where he had to submit identifying information and then click a button labeled "I Accept & Continue to Step 3," where a scrolling window above the "I Accept" button contained a Service Agreement including an arbitration provision, and a bold-face paragraph also above the "I Accept" button informed users that "by clicking on the 'I Accept & Continue to Step 3' button below," they were authorizing TransUnion to collect credit information about them from Experian and Equifax. *Id.* at 1031-33.

The Seventh Circuit ruled that the text about obtaining information from other credit bureaus "distracted the purchaser from the Service Agreement by informing him that clicking served a particular purpose unrelated to the Agreement." *Id.* at 1036. Moreover, this ambiguity about what the purchaser was agreeing to by clicking the button "undid whatever notice [TransUnion] was furnishing in its bold text block," rendering the notice ineffective and the arbitration provision in the Service Agreement unenforceable. *Id.*

On the current record rife with disputes and ambiguities, it is unclear how apt the comparison to *Sgouros* actually is. But where Tamko wants to imbue the act of ripping off shingle packaging with contractual significance, with the added wrinkle that the act will bind not only the people doing the ripping but also the people who hired them, it must provide adequate notice of this unusual means of contracting.

Without such notice, there is neither any agent knowledge to impute, nor any unauthorized act for the Williamses to ratify if they had known about it (which they didn't). The shingle wrapper would not be an offer to contract by proxy, but just a shingle wrapper. And this alternative reason that the Oklahoma Supreme Court reached the right result, like the lack of evidence of agency discussed in part I-A, has nothing to do with singling out or disfavoring arbitration.

II. Petitioner's Account Of Federal And State Cases Involving Its Shingles Is Exaggerated And Incomplete.

Layering hyperbole upon hyperbole, Petitioner charges that "every court to consider this agreement" has rejected "materially identical objections." Pet. 21, 31. But each federal court to consider Tamko's shingle wrapper warranties has done so in a distinct factual context in cases alleging distinct claims, and those factual and legal differences have influenced the reasoning of those opinions. They are not all carbon copies of one another. More to the point, to create a neater federal-state dichotomy, Petitioner simply ignores any federal court opinion that declined to enforce its warranty and

any state court opinion that did enforce it, a pattern the Petition repeats when it turns to supposed state court insubordination more generally.

As the Oklahoma Supreme Court noted, the plaintiffs in *American Family* and *Hoekman* both shopped for and selected Tamko shingles personally, whereas the Williamses let their contractors choose the shingles to be installed. Indeed, the primary holding of the court in *Hoekman* was that the plaintiffs should have learned about the warranty terms when comparison-shopping for shingles, with the alternative holding on agency relegated to the end of the opinion. *Hoekman*, 2015 WL 9591471, at *3-4 (knowledge through comparison-shopping); *id.* at *6-7 (discussing agency but adding that "Plaintiffs' connection to the Limited Warranty is even closer, because they personally shopped for and purchased the shingles."). *See also Am. Family*, 178 F. Supp. 3d at 1126 ("it was the [plaintiffs'] insureds who decided to purchase defendant's shingles"); *id.* at 1127-28 (argument about procedural unconscionability "might have more traction had [the agent] unilaterally chosen the shingles without input from the insureds").

The plaintiff in *Krusch* sued both Tamko and its distributor, and the distributor submitted an affidavit explaining that prior to purchase, the plaintiff's agent had obtained both a product brochure and a sample shingle tile with a notice about the warranty stamped on it. 34 F. Supp. 3d at 589. The Oklahoma Supreme Court noted that these marketing materials were much more likely to be passed along to the principal than throwaway packaging." App. 7. In this case, by contrast, the facts did not "show that [the Williamses] or their contractor received brochures mentioning a warranty." *Id.*

The Eleventh Circuit's opinion in *Dye v. Tamko Building Products, Inc.* is more factually similar to this case than *Hoekman* or *Krusch* in that there was no evidence that the plaintiffs comparison-shopped or that their contractors were given sample shingles with warranty information on them. *Dye* was also similar to this case in that the record contained no exemplar copy of the shingle wrapper that the plaintiffs' contractors would have seen, leading plaintiffs' counsel to make the same arguments about lack of notice advanced in this brief. The Eleventh Circuit found these arguments to have been insufficiently developed before the district court and deemed them waived. 908 F.3d 675, 681 n.5 (11th Cir. 2018). Given the Williamses' consistent argument in the state court that Tamko failed to meet its burden of producing a valid arbitration agreement, no waiver of the notice arguments occurred here.

Finally, the complaint in *Overlook Terraces, Ltd. v. Tamko Building Products, Inc.* included claims for breach of express and implied warranty, and the court there found that equity barred the plaintiff from seeking to enforce provisions of the warranty while seeking to avoid the arbitration provision in that same warranty. No. 3:14–CV–00241–CRS, 2015 WL 9906298, at *4 (W.D. Ky. May 21, 2015). The opinion below distinguished *Overlook* in its discussion of the third-party beneficiary doctrine, noting that the Williamses' claims sounded in tort and did not rely on any warranty terms. App. 11-12.

Petitioner rehashes its disagreement with the opinion in *Hobbs v. Tamko Building Products, Inc.*, 479 S.W.3d 147 (Mo. Ct. App. 2015), which this Court has already declined to review. Pet. 26-27 and n.4. Yet, it neglects to mention that the year after *Hobbs* was decided, another

state appellate court enforced Tamko's arbitration clause, rejecting an unconscionability challenge. *One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 791 S.E.2d 286 (S.C. App. 2016). Also missing from its laundry list is a federal court opinion that refused to enforce the clause because, as here, Tamko failed to include an authenticated version of it in the record. *Nelson v. Tamko Bldg. Prods., Inc.*, No. 15–1090–MLB, 2015 WL 3649384, at *2 (D. Kan. June 11, 2015). The fate of Tamko's arbitration clause is not as stratified along federal-state court lines as the Petition suggests.

This selectivity persists when Petitioner widens its view to canvas recent opinions from the "repeat FAA offenders" of Oklahoma, California and Missouri. Pet. 27-28. While Petitioner describes three opinions from appellate courts in those states that did not enforce arbitration agreements, a quick search reveals an equal number of opinions from the same states in the same time period that came out the other way. *Diaz v. Sohnen Enterprises*, 245 Cal. Rptr. 3d 827 (Cal. App. 2019) (plaintiff's continued employment after employer introduced new arbitration agreement constituted acceptance notwithstanding her verbal and written objections, and arbitration agreement was not unconscionable); *Ingrim v. Brook Chateau*, 586 S.W.3d 772, 776 (Mo. 2019) (attorney-in-fact had authority to admit plaintiff to residential care facility, and signing arbitration agreement was incidental to the admission process, citing *Kindred*); *Medeiros Revocable Trust v. Morgan Stanley Smith Barney LLC*, 446 P.3d 533, 536-37 (Okla. Civ. App. 2019) (receiver was bound to arbitrate as successor-in-interest to a signatory). And there are more where these come from.

Tamko sounded the same alarm about state court intransigence in its petition for certiorari in *Hobbs* four years ago. *TAMKO Bldg. Prods., Inc. v. Hobbs*, No. 15-1318 (U.S.). Its claims are no more true or less overblown in their second incarnation, and the result should be the same.

III. The Opinion Below Will Not Interfere With Commerce, But Embracing Petitioner's Radical View Of Agency Would Have Far-Reaching Consequences.

Petitioner suggests that this Court must intervene so that manufacturers will be able to continue enforcing arbitration provisions in Oklahoma. This formulation exaggerates the breadth of the opinion below and discounts the ability of manufacturers to come up with effective ways of communicating contract terms.

The Oklahoma Supreme Court held only that an implied agency to install roofing shingles did not authorize the agent to agree to arbitration. It said nothing about the scope of agency that purchasers of computer software have with Best Buy or members of its Geek Squad. Pet. 30. And the opinion below relied in part on the "industry custom" that construction materials are usually handled by someone besides the homeowner, with packaging thrown away afterwards. App. 9. The software industry has different customs, and the applicability of this opinion outside the construction context will likely be limited.

Moreover, the discussion of *Krusch* in the opinion below offered a blueprint for manufacturers of how to place end users of their products on notice of their

associated contract terms. Including those terms in product brochures that contractors would be expected to share with customers is one mechanism; publication of those terms in consumer magazines would be another. In short, there are a myriad of ways that Tamko could have informed consumers of its warranty terms, and then bound them to those terms through purchase of the product. All the Oklahoma Supreme Court said was that printing those terms on product packaging that consumers are unlikely to ever see, and then relying on agency to fill in the knowledge gap, is not a valid way of forming a contract. Many valid alternatives remain.

While the opinion below was narrow, Tamko's view of agency, is dangerously broad. The position that Tamko has already persuaded the Eleventh Circuit to adopt, and that it wants this Court to endorse, is that any contractor who is authorized to buy a product is an agent, and can bind the principal to any rights-limiting terms associated with that product that the product's manufacturer might want to impose. This rule would have sweeping consequences in the sphere of home construction and maintenance, for it could allow manufacturers of toxic drywall or lead-emitting pipe fittings to immunize themselves from liability for the harm their products cause by printing rights-limiting language on packaging and then relying on builders or plumbers to bind end users to that rights-limiting language through the act of installation. It would only be a matter of time before litigation ensues between homeowners,developers and contractors about whether the builder, plumber or other construction worker exceeded his authority by waiving some particular legal right.

And the rights at issue could go beyond consequential damages and jury trials. What would stop a manufacturer from including an "inspection clause" on product packaging waiving the homeowner's property right to exclude so that the manufacturer or its agents could enter the home at will to assess how the product is performing five or ten years later?

Finally, nothing in Petitioner's purchasers-as-agents theory is limited to home construction. Consider that theory applied to the market for food. Everyone who dines at a restaurant, Petitioner's logic suggests, expressly delegates to the restaurant's staff the authority to purchase food on the diners' behalf. If the restaurant purchases chicken tainted by salmonella and if anyone in the chicken's chain of production, from the grower to the processor to the wholesaler who sold the chicken to the restaurant, had attached a limitation of liability to the product, a diner would not be able to sue anyone except, perhaps, the restaurant, for damages from ingesting the contaminated meat because the restaurant, as the diner's food-purchasing agent, would be authorized to waive negligence and personal injury claims on the diner's behalf. This perverse result would be hazardous to public health, but it is a natural consequence of Petitioner's preferred rule, where any rights-limiting language can be printed on product packaging and agreed to by anyone in the supply chain, binding anyone downstream in that chain through principles of agency.

The Oklahoma Supreme Court was correct not to follow Petitioner down this treacherous path. Its opinion should remain intact.

CONCLUSION

The petition for a *writ of certiorari* should be denied.

Respectfully submitted,

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