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 Writ of Certiorari to the Supreme Court of Oklahoma

REPLY BRIEF FOR PETITIONER

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The Federal Arbitration Act (FAA) precludes courts from "singl[ing] out arbitration agreements for disfavored treatment" and requires them to place such agreements "on equal footing with all other contracts." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1424-25 (2017). As *Kindred Nursing* made clear, the equal-footing doctrine is violated whether hostility to arbitration takes the form of special skepticism of arbitration or special solicitude for jury-trial rights. In this case, the Oklahoma Supreme Court found an agency relationship that empowered contractors buying shingles to bind homeowners to the terms of sale concerning matters such as price and delivery, but not arbitration—because of the importance of the jury-trial right. That decision blatantly violates the FAA's equal-footing principle. Indeed, it repeats the same error that this Court corrected in *Kindred Nursing*. And it conflicts with decisions from the Eleventh Circuit and other federal courts that examined *the exact same arbitration* agreement in materially identical circumstances and faithfully applied this Court's precedents to enforce the agreement. The decision below exemplifies state-court hostility to arbitration, and creates uncertainty for businesses operating in Oklahoma. This Court should either grant certiorari or summarily reverse.

Respondents' brief in opposition only reinforces the error and the conflicts. Respondents start by conceding that the case for certiorari and the similarities with *Kindred Nursing* have "surface-level appeal." BIO.1. In fact, the conflict between the decision below and the FAA and this Court's

precedents runs deep, as evidenced by the decision's repeated invocation of the jury-trial right to single out arbitration as the one issue on which respondents' agents lacked binding authority. Respondents cannot deny what is plain on the opinion's face, so they instead devote much of their submission to re-litigating state-law issues, suggesting that the Oklahoma Supreme Court was wrong to find an agency relationship and ruled in their favor on other issues for the wrong reasons. None of that matters. This Court does not even have jurisdiction to revisit the finding of an agency relationship under state law or to revise other state-law holdings. It does have jurisdiction to review the Oklahoma Supreme Court's decision that an agency relationship that extends to other terms of sale does not extend to arbitration because the jury-trial right is especially important.

On that question—*i.e.*, the question presented—respondents have little to offer. They concede a "degree" of tension with *Kindred Nursing*, and while they emphasize minor factual differences in district court cases enforcing this arbitration agreement, they are forced to acknowledge that the Eleventh Circuit enforced it on "similar" facts. BIO.1, 25. Respondents thus resort to arguing that jury-trial rights *should* be given special solicitude and invoking a parade of horribles that is not only wrong (restaurant goers can still sue for food poisoning in the Eleventh Circuit) but reflects the very hostility to arbitration that the FAA is designed to redress (an agreement to arbitrate disputes does not confer an "immunity from liability"). This Court should accordingly intervene to fulfill the FAA's promise, just as it has done in *Kindred Nursing* and other analogous situations.

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

The decision below flouts the FAA. It is settled law in Oklahoma that an agent has authority to take action incidental to or reasonably necessary to accomplish the principal's objective, and any knowledge or notice that the agent acquires while acting within the scope of his authority is charged to the principal. *See, e.g.*, *Tiger v. Verdigris Valley Elec. Coop.*, 410 P.3d 1007, 1012 (Okla. 2016); *Elliott v. Mut. Life Ins. Co. of N.Y.*, 91 P.2d 746, 747 (Okla. 1939). As the Oklahoma Supreme Court found below, "there was an agency agreement between [respondents] and [their] contractors," which authorized the latter to "buy and install shingles" on their home. Pet.App.8-9. The contractors thus plainly acted as respondents' agents and could bind them when it came to all the terms of sale for those shingles save one: the mandatory arbitration provision emblazoned on the wrapping. Pet.App.2. And the Oklahoma Supreme Court left no ambiguity as to why it created that one exception: "The Oklahoma Constitution preserves the right to trial by jury." Pet.App.9. Thus, "the scope of the contractor's authority did not include contracting away [respondents'] constitutional right to a jury trial." Pet.App.8. *Kindred Nursing* has already made crystal clear that this kind of special solicitude for the constitutional right to a jury trial violates the equal-footing doctrine just as plainly as avowed hostility to arbitration. Thus, the conflict with *Kindred Nursing* and the Eleventh Circuit's application of that case to this very arbitration agreement could hardly be plainer.

Confronted with that straightforward reality, respondents attempt to change the subject. They principally argue that the Oklahoma Supreme Court erred as a matter of state law on the threshold issue by finding that, under Oklahoma law, respondents' contractors qualified as agents (as opposed to independent contractors). BIO.2-3, 9-13. Respondents' reluctance to defend what the court below actually held is understandable, but their efforts to fight its agency finding are for naught, as this Court does not even have jurisdiction to second-guess the Oklahoma Supreme Court's resolution of that question of Oklahoma law. *Int'l Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 387 (1986); *see also Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976). Respondents' view that the Oklahoma Supreme Court erred in finding an agency relationship thus does not provide an alternative ground for affirmance in this Court. Respondents are instead stuck defending the Oklahoma Supreme Court's actual decision, not some hypothetical opinion that avoided discrimination against arbitration (or in favor of jury-trial rights) by finding no agency relationship for any purpose.

It is clear that the Oklahoma Supreme Court's actual decision runs afoul of the FAA. Respondents concede that "Oklahoma law recognizes that agents are implicitly authorized to perform acts 'incidental' or 'necessary' to the accomplishment of their primary objective." BIO.14. Accordingly, they do not dispute that, had their contractors agreed to purchase shingles at a particular price or to take delivery on a specified day, the contractors' agreement would have

bound respondents under principles of agency law. *See* Pet.17.

The Oklahoma Supreme Court did not single out arbitration for differential treatment because the arbitration agreement was less a term of the sale, or was somehow less incidental, necessary, or germane. Just as in the Eleventh Circuit case, respondents indisputably "delegated to their roofers the task of purchasing shingles," and "[p]urchasing a product necessarily and by definition encompasses accepting the terms of that purchase," one of which was the agreement to arbitrate. *Dye v. TAMKO Bldg. Prods., Inc.*, 908 F.3d 675, 685 (11th Cir. 2018). Instead, the Oklahoma Supreme Court quite explicitly treated agreements to arbitrate differently because it viewed the constitutional jury-trial right to be something that required a far more explicit waiver. *See, e.g.*, Pet.App.15. That is the precise rationale this Court found to violate the equal-footing doctrine in *Kindred Nursing*.

Indeed, the Oklahoma Supreme Court did the Kentucky Supreme Court one better, as it did not invoke the difficulty of waiving constitutional rights generally, but kept its focus on the jury-trial right. It explained that the right to waive a jury trial is treated differently and demands express waiver even in the context of attorney-client relationships. "How then could builders contracted to select and install shingles impliedly gain authority to abandon one's constitutional right to a jury trial?" Pet.App.9. This Court has already answered that question. That rule is simply "too tailor-made to arbitration agreements—subjecting them, by virtue of their defining trait, to

uncommon barriers." *Kindred Nursing*, 137 S. Ct. at 1427.

Respondents' lengthy detour concerning ratification and imputation goes nowhere. To the extent respondents quibble with the reasoning of the Oklahoma Supreme Court in rejecting petitioner's alternative arguments as to why they should have prevailed below, that is beside the point. Petitioner is not pursuing those alternative state-law arguments here. To the extent respondents are quibbling about "whether the[ir] contractors had actual knowledge of" the arbitration provision, BIO.19, that is likewise irrelevant. The Oklahoma Supreme Court framed the question as whether respondents are bound by the arbitration agreement that their agents "viewed." Pet.App.2. And under Oklahoma (and generally applicable) agency law, the test is whether an agent had "knowledge *or notice*" of the provision. *Tiger*, 410 P.3d at 1012 (emphasis added); *see also* Restatement (Third) Of Agency §5.03 (2006). The courts below took it as a given that the contractors were on notice of petitioner's "arbitration agreement printed … on the wrapping of each bundle of shingles." Pet.App.2.

In sum, respondents' meandering discussion of alternative state-law theories only underscores that, after recognizing the existence of an agency relationship, the Oklahoma Supreme Court carved out arbitration to protect the constitutional "right to a jury trial." Pet.App.15. That is an obvious violation of the equal-footing doctrine and the FAA. Correcting that error would justify this Court's intervention even apart from the clear conflict with the Eleventh Circuit when it comes to enforcing the very same arbitration

agreement in materially indistinguishable circumstances.

II. The Decision Below Conflicts With Multiple Decisions From Federal Courts Addressing The Very Same Arbitration Agreement.

Respondents fare no better in explaining away the clear split in authority when it comes to this very arbitration agreement. As the petition explains, the Oklahoma Supreme Court's decision squarely conflicts with the Eleventh Circuit's decision in *Dye* and the decisions of multiple federal courts that have examined and applied the very same arbitration agreement in the face of similar objections. Pet.21-28.

Respondents claim that "each federal court to consider" petitioner's arbitration agreement "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." BIO.23. But just two pages later, respondents concede that the Eleventh Circuit's decision in *Dye* is "factually similar to this case" and involved a "similar … record." BIO.25. There is simply no daylight between the legal question here and in *Dye*: "Where a roofing-shingle manufacturer displays on the exterior wrapping of every package of shingles the entirety of its product-purchase agreement—including, as particularly relevant here, a mandatory-arbitration provision—are homeowners whose roofers ordered, opened, and installed the shingles bound by the agreement's terms?" *Dye*, 908 F.3d at 678. The only material difference between the two cases is the answer to that common question.

Respondents' efforts to distinguish the district court decisions enforcing this arbitration agreement are less important, but no more successful. They emphasize that the contractors in *Krusch v. TAMKO Building Products, Inc.*, 34 F. Supp. 3d 584 (M.D.N.C. 2014), "obtained both a product brochure and a sample shingle tile with a notice about the warranty stamped on it," and speculate that "these marketing materials were much more likely to be passed along to the principal." BIO.24. But *Krusch* did not turn on such speculation; the court "charged" the principal "with knowledge of the limited warranty … even if [he] was not informed of it." 34 F. Supp. 3d at 590.

Respondents dismiss *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), on the ground that it involved "warranty" claims, whereas this case "sound[s] in tort." BIO.25. But nothing about arbitrability or agency authority turns on whether the underlying claims that a party seeks to litigate, but agreed to arbitrate, sound in warranty or tort.

Respondents next observe that, in *Hoekman v. TAMKO Building Products, Inc.*, No. 2:14-CV-01581-TLN-KJN, 2015 WL 9591471 (E.D. Cal. Aug. 26, 2015), and *American Family Mutual Insurance Co. v. TAMKO Building Products, Inc.*, 178 F. Supp. 3d 1121 (D. Colo. 2016), the principals "shopped for and selected [petitioner's] shingles personally" before their agents installed them (and thus "should have learned" about the arbitration provision), "whereas

[respondents] let their contractors choose the shingles to be installed." BIO.24. But *Hoekman* expressly concluded that, "[e]ven if [the principals] did not have notice of the terms of the [arbitration agreement] prior to purchase, the arbitration agreement is still enforceable" because it "accompanied the shingles delivered to the contractors." 2015 WL 9591471, at *4. *Hoekman* also endorsed the reasoning of both *Krusch* and *Overlook Terraces*, which involved "contractors [who] shopped for and eventually installed the shingles without the owner-plaintiffs ever seeing the marketing materials or the warranty." *Hoekman*, 2015 WL 9591471, at *7. And the *American Family* court never hinted in its agency law discussion that the person who selected the shingles has any legal significance.[1]

As all of that underscores, there are no *material* "factual and legal differences," BIO.23, between the decision below and comparable federal court decisions, including the Eleventh Circuit's decision in *Dye*. In reality, the true discrepancy is that the federal courts have faithfully applied this Court's precedents, while the decision below, like *Hobbs v. TAMKO Building Products, Inc.* 479 S.W.3d 147 (Mo. Ct. App. 2015), and numerous other state-court decisions, exhibits the

[1] *American Family* did make a passing observation about who "chose[]" the shingles when rejecting an unconscionability argument. BIO.24. But here, the Oklahoma Supreme Court's unconscionability analysis turned expressly on the fact that it was dealing with an "arbitration clause" that "requires the Homeowners to surrender their constitutional right to a jury trial." Pet.App.14. That is likely why respondents do not dispute that, if the court's agency-law holding violates the FAA, so too does its unconscionability finding. *See* Pet.19-20.

kind of hostility toward arbitration that prompted Congress to enact the FAA in the first place. *See* Pet.26-28 (collecting cases). This Court's intervention thus will not only address the clear split between the decision below and *Dye*, but send a much-needed message to state courts more broadly.[2]

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

As this Court stated in *Nitro-Lift Techs., LLC v. Howard*, "[i]t is a matter of great importance … that state supreme courts adhere to a correct interpretation of the [FAA]." 568 U.S. 17, 17-18 (2012); *see also* Center for the Rule of Law Amicus Br.10-13. That is no less true here. As a result of the decision below, businesses operating in Oklahoma have the enforceability of their arbitration agreements turn on whether someone installs her own roof or software, even as other states applying the same agency principles enforce the same agreements without regard to whether a homeowner or computer-owner enlists expert help. *See* Pet.28-31.

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[2] Respondents criticize petitioner for not discussing two other cases involving petitioner's arbitration agreement: *Nelson v. TAMKO Building Products, Inc.*, No. CIV.A. 15-1090-MLB, 2015 WL 3649384 (D. Kan. June 11, 2015), and *One Belle Hall Property Owners Association, Inc. v. Trammell Crow Residential Co.*, 791 S.E.2d 286 (S.C. Ct. App. 2016). BIO.25-26. But neither decision involved comparable questions of agency law. And the state court's rejection of an unconscionability challenge to the agreement in *Trammell* hardly strengthens respondents' case or vindicates the numerous state-court decisions flouting the FAA and its equal-footing doctrine.

Respondents speculate that the ramifications of this case are "likely … limited" to situations involving "implied agency to install roofing shingles." BIO.27. But even though there is a split on that specific question, the decision below is no more limited to shingles than *Kindred Nursing* was limited to nursing homes. Under the Oklahoma Supreme Court's reasoning, if a principal delegates a task to an agent, then the principal can evade all manner of arbitration agreements absent "an authorization to waive [the] constitutional right" to a jury trial. Pet.App.9. Nothing about that decision is limited to shingles. While it is hard to understand how it would extend to restaurant visits, *but see* BIO.29, its logic applies to any context where individuals enlist expert help to purchase and install products governed by arbitration agreements. *See, e.g.*, Center for the Rule of Law Amicus Br.12-13; 40 No. 12 Construction Litigation Reporter-NL 1 (2019).

Respondents seek to minimize the fallout by contending that companies like petitioner can "come up with" more "effective ways of communicating" arbitration terms, such as "[i]ncluding those terms in product brochures that contractors would be expected to share with customers" or "publi[shing] those terms in consumer magazines." BIO.27-28. But while petitioner has employed some of those means, the enforceability of an arbitration agreement prominently displayed on exterior packaging at the point of sale should not turn on such ancillary and extraordinary efforts. The entire point of the FAA is to place arbitration agreements "on equal footing with all other contracts." *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015). Requiring businesses to

overcome "uncommon barriers" gets the FAA exactly backwards. *Kindred Nursing*, 137 S. Ct. at 1427.

Finally, respondents warn that reversal of the decision below—and adoption of the Eleventh Circuit's view in *Dye*—would have "dangerous[]" effects. BIO.28. They posit a parade of horribles that includes "manufacturers of toxic drywall or lead-emitting pipe fittings" being allowed "to immunize themselves from liability for the harm their products cause," and an 'inspection clause' on product packaging waiving the homeowner's property right to exclude." BIO.28. But Congress has not enacted a federal law ensuring equal-footing for inspection clauses. It did enact the FAA, and equating the arbitration of disputes with "immuni[ty] … from liability," BIO.28, "reveals the kind of 'hostility to arbitration' that led Congress to enact the FAA," *Kindred Nursing*, 137 S. Ct. at 1428. To restore the FAA's full force, this Court should grant certiorari or summarily reverse.

CONCLUSION

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

Respectfully submitted,

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