No. 15-1318

In The
Supreme Court of the United States

TAMKO BUILDING PRODUCTS, INC.,

Petitioner,

v.

LEE HOBBS AND JONESBURG UNITED METHODIST CHURCH, individually and on behalf of all others similarly situated,

Respondents.

On Petition For Writ Of Certiorari To The Missouri Court Of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Like that of most other states, Missouri's law of contract formation distinguishes between contracts that are signed by the parties, and contracts where manifestation of assent is inferred from conduct. In the latter situation, Missouri law (as with other states) provides that unless a party has actual knowledge of the contract terms, the party's conduct does not signify assent unless there was reasonable notice of the terms and the conduct that would be deemed to manifest assent to them.

The question presented is:

Does the Federal Arbitration Act preempt the lower court's application of this rule to a case where the evidence suggests that the arbitration clause was not presented in a way that would give the consumer notice of its existence or the fact that keeping the product would supposedly constitute agreement to arbitration?

CORPORATE DISCLOSURE STATEMENT

Jonesburg United Methodist Church is a non-profit corporation. It has no parent company, and no publicly held company owns more than 10% of its stock.

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INTRODUCTION

Petitioner TAMKO Building Products, Inc. seeks review of a Missouri Court of Appeals ruling declining to enforce an arbitration clause that it claims Respondents Lee Hobbs and Jonesburg United Methodist Church "accepted" by having TAMKO's shingles installed on their roofs. The court below held that TAMKO failed to provide sufficient evidence that Respondents had notice that they would become bound by the arbitration clause. On that basis, the court held that Respondents did not manifest assent to arbitration.

This conclusion is a straightforward application of "the foundational FAA principle that arbitration is a matter of consent." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010). It's also indistinguishable from myriad decisions by federal courts of appeals holding that, absent reasonable notice, no agreement to arbitrate was formed.

Arbitration clauses, like other contracts, need not be signed to be enforced; an offeree can manifest assent by action or, in some circumstances, even inaction. But it is black-letter law that a party's conduct does not manifest assent to contract terms unless that party knew or had reason to know of both the terms and the conduct that would be deemed to manifest assent to them. This makes sense: on its own, an act such as keeping a product one previously purchased does not signify assent to anything.

TAMKO does not dispute that, at the time of purchase, Respondents were not told about the arbitration clause – all they'd seen were marketing materials promising that "Heritage 30" shingles were guaranteed to last for 30 years. Instead, TAMKO claims the clause was included in a warranty which was contained among several square feet of fine print on the wrappers of bundles of shingles that were delivered to Respondents' property, where they were opened and installed by contractors. According to TAMKO, federal law compels the conclusion that by having the shingles installed, and failing to object to the arbitration clause, Respondents "agreed" to the clause. But even if Respondents had opened the shingles themselves, there's no evidence that the wrapper provided notice that they would be agreeing to arbitration or could reject arbitration by returning the shingles. TAMKO did not even put the wrapper at issue into the record. And neither the copy of the arbitration clause TAMKO submitted nor the language of a shingle wrapper that was shown to the trial court provided any such notice. The evidence shows that TAMKO did not send a copy of the arbitration clause to Respondents until *after* their shingles had failed.

Based on these facts, the court held that Respondents' act of keeping and installing the shingles they'd purchased did not manifest assent to the arbitration clause.

The reasonable notice requirement is hardly a novel rule – or a high burden. Courts always require proof of an agreement before enforcing arbitration

clauses, and other companies have no difficulty providing it. Indeed, TAMKO itself has met its burden in some other cases.

TAMKO does not (and cannot) argue that the FAA preempts the well-established notice requirement. Instead, TAMKO re-casts the decision below as having held something else entirely: that the arbitration clause could not be enforced because Respondents claimed not to have read it. Pet. i. As re-framed by TAMKO, the decision below would conflict with the "failure to read" doctrine of contract law.

The problem for TAMKO is that that's not what the court actually held. The "failure to read" rule – a party who *signs* an agreement cannot later avoid its enforcement because he failed to read it – is a rule about *signed* contracts. This makes sense: when a party signs a document, it's clear that she is manifesting assent to particular terms. But in a case like this, where the question is whether a party's *action* manifested assent to a contract, the court must determine whether the party actually knew about the contract, or, if not, whether a reasonable person in her shoes would have been on notice of it. This is especially true where the action is something the party would likely have done anyway – such as keep a product she previously paid for.

Here, had the evidence in the record shown that reasonable notice was provided, the court would have

enforced TAMKO's arbitration clause even though Respondents hadn't personally read it. But that's not what the evidence showed.

TAMKO suggests that what actually transpired was much more complex and nefarious: the Missouri Court of Appeals, desperate to avoid enforcing a perfectly valid arbitration clause, but conscious that it needed to "hid[e] [its] hostility to arbitration" and carry out its plot without appearing to run afoul of the FAA, devised a "new contract formation rule" that would allow it to refuse to enforce TAMKO's clause under the "pretense that no agreement ever arose in the first place." Pet. 1-2, 9, 20, 23. The court concocted this scheme, according to TAMKO, based on a "misguided premise that the FAA is powerless until a contract is formed under state law." Pet. 2.

In essence, TAMKO accuses the Missouri Court of Appeals of disobeying the law and writing a dishonest opinion to "cover its tracks." Pet. 20.

This is a serious accusation. But the petition offers no facts to back it up – only hyperbole. And actual Missouri law does not bear out TAMKO's theory.

TAMKO argues, for example, that Missouri courts would have enforced its clause if it had been for something other than arbitration. Pet. 16. But the petition fails to provide a single example of a Missouri court enforcing a non-arbitration contract where the consumer wasn't told about the term at the time of purchase and there's no evidence that the packaging notified consumers that they would become bound by

the terms by keeping the product or could reject the terms by returning it. And there are numerous examples of Missouri courts enforcing validly formed arbitration clauses – and refusing to enforce non-arbitration contracts where there is insufficient evidence of a validly-formed agreement.

According to TAMKO, courts fall into two categories: federal courts, which respect "the preemptive force of the FAA" and thus reliably enforce arbitration clauses; and state courts, which are "[e]ver in search of the newest 'devices and formulas' they can use to deny arbitration" in violation of the FAA. Pet. 10, 13.

But the actual cases don't break down into "good" federal courts and "bad" state courts. Instead, the divide is intensely factual: cases where there is sufficient evidence that an agreement was validly formed, and cases where there's not. The smallest detail of how information is presented can make all the difference. For that reason, it's common to see the same federal court of appeals enforce one company's arbitration clause, but decline to enforce the next – simply because the same law applied to different facts yields different results.

If this Court nonetheless believes that there are instances where some state court somewhere is defying the FAA, that problem would be better addressed in a case that squarely raises it – not in this case, where the Missouri Court of Appeals applied straightforward law to unique facts and got it right.

The petition should be denied.

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STATEMENT OF THE CASE

1. TAMKO sells roofing shingles that are named for the number of years they are guaranteed to last. TAMKO marketed its "Heritage 30" shingles as being durable, reliable, and free from defects for at least 30 years. Relying on TAMKO's sales and marketing materials, Respondents purchased Heritage 30 shingles from building supply stores in July 2005 and September 2007. LF 14-15, 101-02, 104-05; App-3.[1]

The marketing materials Respondents relied on did not mention arbitration, and neither Hobbs nor the Church received a copy of the arbitration clause at the time of purchase. LF 101, 104; App-3. The terms of sale Hobbs was given when he bought the shingles said nothing about arbitration, but provided that returns would be subject to a handling charge, and expressly prohibited returns without the store's consent as well as all returns after 30 days. LF 124.

Respondents didn't take the shingles when they bought them. LF 101, 104; App-3. Rather, as is customary, the shingles were subsequently delivered to Hobbs' home and the Church, where they were unwrapped and installed by contractors. Neither Hobbs nor the Church officials saw the shingles or their packaging before they were installed.

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[1] "LF" refers to the Legal File in the Missouri Court of Appeals.

In 2013, Hobbs discovered the TAMKO shingles he had purchased were warping, curling, and beginning to fail. That same year, Church officials discovered a large stain in the sanctuary caused by a leak in the roof and found that their TAMKO shingles were cracked. LF 14-15, 126. Respondents contacted TAMKO to ask for information on how to submit warranty claims. LF 14-15, 59, 101, 104; App-4. TAMKO responded by sending them claim forms and instructions. Those materials did not include the arbitration clause or mention arbitration. LF 59, 126; App-4. Respondents filled out the claim forms and submitted them.

TAMKO denied Hobbs' claim altogether. LF 60-61. While TAMKO agreed that the defects in the Church's shingles were covered by the warranty, it offered to replace only some of the damaged shingles and offered nothing to cover labor costs. LF 68-71. It was in the company's responses to these claims that TAMKO first provided Respondents a copy of the warranty containing the arbitration clause. LF 62-63, 72-73, 101, 104.

2. In April 2014, Hobbs and the Church filed a putative statewide class action lawsuit in Missouri court, alleging that TAMKO knew its representations about the quality of its Heritage shingles were false but failed to correct the defective design of the shingles. LF 10-11. Respondents alleged violations of the Missouri Merchandising Practices Act and negligence, and sought damages and a declaration requiring TAMKO to notify its customers of the defects and to pay for inspections and repairs. LF 24-28.

TAMKO filed a motion to compel arbitration, citing an arbitration clause in a limited warranty the company claims is "printed on the outside of the wrapper of every bundle of shingles sold by TAMKO." LF 36. This wrapper is not in the record. Instead, TAMKO provided "copies of the limited warranties" that it claims "apply to the [shingles] purchased by both plaintiffs." LF 57. These copies appear to be of an eight-sided brochure, foldable at each seam, with a one-paragraph arbitration clause on Page 5. LF 62-63.

TAMKO did not dispute that there is no arbitration clause in the company's sales and marketing materials. Nor did TAMKO claim that customers are provided copies of an arbitration clause at the time of purchase. Rather, according to TAMKO, when their contractors opened the wrapper and installed the shingles, Hobbs and the Church "manifest[ed] acceptance" of the arbitration clause "by retaining the product in question and failing to object to arbitration." LF 44, 46. But there is no evidence in the record that anything provided to Respondents would have put them on notice that, by opening the package or installing the shingles, they would be agreeing to arbitration. And there is certainly no language anywhere informing customers that they can "object to arbitration," let alone instructing them how to do so. *See* LF 62-63.

TAMKO also argued that the fact that Hobbs and the Church submitted the warranty claim forms they received from the company "demonstrates their acceptance of TAMKO's agreement to arbitrate." LF 47. But as the record shows, the warranty claim form

TAMKO sent to Respondents did not contain an arbitration clause and said nothing whatsoever about arbitration. LF 59, 126; App-4.

Respondents opposed TAMKO's motion to compel arbitration, explaining that they had never agreed to arbitrate any dispute with TAMKO. LF 79, 82-87. They submitted sworn affidavits stating that they had not received a copy of the warranty at the time of purchase and had only learned that the warranty contained an arbitration clause after submitting the claim forms TAMKO sent them. LF 101-02, 104-05; App-4-5.

The trial court held a hearing on TAMKO's motion for arbitration. At the hearing, counsel for Respondents showed the court an actual wrapped bundle of Heritage 30 shingles. *See* Transcript. of Mot. Hr'g. 26-29 (Mo. Cir. Ct. July 29, 2014). Although this wrapper is not in the record, it is clear from counsel's description that it – like the warranty copies TAMKO submitted – did not provide any notice that customers would become bound by an arbitration clause by opening or installing the shingles, nor that they could object to arbitration by returning the shingles within some specified time. On the contrary, the only notice on the wrapper said that customers who did not install the shingles in accordance with the instructions would risk losing the benefit of the warranty. *Id.* at 28.

Based on the hearing and the evidence in the record, the trial court denied TAMKO's motion to compel arbitration.

3. TAMKO appealed, and the Court of Appeals unanimously affirmed the trial court's order. The court recognized that a party may manifest acceptance of offered contract terms through action, so long as the party had sufficient notice of the terms and the means of accepting them. But the court found no evidence that TAMKO had provided the required notice.

First, the court noted that, "[a]t the time of purchase, Respondents were only shown Tamko's representations and marketing materials identifying the shingles as durable, reliable and free from defects for at least 30 years." App-3. Because they were not made aware of any arbitration clause, the court explained, Respondents' act of purchasing the shingles could not have demonstrated assent to the term. App-6.

Second, the court reasoned that Respondents did not accept the arbitration clause when they kept and used the shingles. The court distinguished the "shrink-wrap" cases on which TAMKO relied, noting that the packaging in those cases, unlike TAMKO's wrapper, provided notice to customers that they would be deemed to have accepted the arbitration clause by keeping the product and that they could reject the clause by returning the product. App-7. Given the lack of notice, the court reasoned that "Plaintiffs' retention and use of the shingles does not prove that they accepted" the arbitration clause. App-8.

Finally, the court was unpersuaded by TAMKO's argument that, because Respondents had the "opportunity" to discover the arbitration clause by searching

on TAMKO's web site, they therefore had agreed to arbitration by submitting the warranty claim forms the company sent them. App-8. The court declined to reach TAMKO's argument that Respondents were estopped from denying they agreed to arbitration because they had sought benefits under the warranty allegedly containing the arbitration clause. *Id.*

The Missouri Supreme Court denied TAMKO's application for transfer, and TAMKO's petition for certiorari followed.

REASONS FOR DENYING THE PETITION

I. The Decision Below is Correct on the Merits and is Consistent with Numerous Decisions of the Federal Courts of Appeals Interpreting the FAA.

The FAA expressly provides that a court may order arbitration only "upon being satisfied that the making of the agreement for arbitration . . . is not in issue." 9 U.S.C. § 4. Consent is a particularly "fundamental" requirement of whether an arbitration agreement was validly formed. *Stolt-Nielsen*, 559 U.S. at 681.

This Court has described the requirement of consent as "the first principle that underscores all of our arbitration decisions." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010); *accord E.E.O.C. v.*

Waffle House, Inc., 534 U.S. 279, 294 (2002) ("Arbitration under the FAA is a matter of consent, not coercion.").[2] Consent is so basic to the notion of arbitration that the policy in favor of enforcing arbitration does not come into play until and unless a court first finds that there is an agreement to arbitrate. *Granite Rock*, 561 U.S. at 302.

Accordingly, where one party contests the existence of an alleged arbitration agreement, the court must determine "whether the parties agreed to arbitrate" the matter in question, applying "ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). "[W]here evidence of the parties' agreement to arbitrate . . . is lacking," the court must deny the motion to compel arbitration. *Granite Rock*, 561 U.S. at 300.

Under Missouri law, as elsewhere, the party seeking to enforce a contract bears the burden of presenting sufficient evidence to establish its existence. *U.S. Bank v. Lewis*, 326 S.W.3d 491, 495 (Mo. Ct. App. 2010).

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[2] Internal citations and quotation marks are omitted throughout unless otherwise indicated.

A. The Missouri Court of Appeals Correctly Held that TAMKO Failed to Prove Notice and Assent.

Contracts don't need to be signed to be validly formed. Under certain circumstances, a party can accept a contractual offer by "words or silence, action or inaction." *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 120 (2d Cir. 2012). However, "[t]he conduct of a party is not effective as a manifestation of his assent unless he . . . knows or has reason to know that the other party may infer from his conduct that he assents" to specific contract terms. Restatement (Second) of Contracts § 19(2) (1981).

If the party actually knows of the terms and the means of assent, it's an easy case – there is no need for evidence of the reasonableness of the notice provided. Thus, where customers "conceded that they had notice" of a forum selection clause before they entered into a contract for passage and thus "retained the option of rejecting the contract with impunity," this Court declined to "address the question whether respondents had sufficient notice" of the clause. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 590, 595 (1991); *see also Major v. McCallister*, 302 S.W.3d 227, 230 (Mo. Ct. App. 2009) ("[W]hen a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit *with knowledge of the terms of the offer*, the taking constitutes an acceptance of the terms. . . .") (emphasis added).

Where the party does not have actual knowledge, however, the court must assess whether a reasonable person in the party's shoes would have been on notice of the terms and the conduct that would signify assent. This is necessarily a "fact-intensive inquiry." *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1034-35 (7th Cir. 2016) (holding that no agreement to arbitrate was formed where TransUnion failed to provide reasonable notice that clicking an online button to purchase a product would bind customers to an arbitration clause in a service agreement available elsewhere on the webpage).

As the Second Circuit, among other courts, has stressed, notice is particularly crucial where contract terms are not presented at the time of purchase but are sent later, and where the action taken – such as keeping a product or service – is something the offeree might have done anyway, regardless of whether she accepted contract terms. *See Schnabel*, 697 F.3d at 120 ("[W]here the purported assent is largely passive, the contract-formation question will often turn on whether a reasonably prudent offeree would be on notice of the term at issue.").

1. There is insufficient evidence of reasonable notice in the record.

TAMKO argued that Respondents accepted the arbitration clause by keeping the shingles. But the evidence in the record shows that the only information Respondents had seen at the time they purchased the

shingles was marketing material that didn't mention arbitration. They weren't told that TAMKO's warranty contained an arbitration clause when they paid for the shingles. And since they didn't receive the shingles at the time of purchase, they didn't see the wrapper.

Thus, TAMKO's notice argument hinges on the wrappers that were on the shingles when they were subsequently delivered and installed. TAMKO claims that each wrapper included a copy of the limited warranty, which included an arbitration clause. But shingles are typically installed by contractors, and neither Hobbs nor the Church officials saw the shingles before they were installed. And more importantly, there is no evidence that the wrapper – if Respondents had personally seen it – provided notice that, by opening the package and installing the shingles, they would be agreeing to arbitration, let alone that they could reject arbitration by returning the shingles. There's no shingle wrapper in the record – only a copy of a foldable brochure with a warranty that TAMKO claims applies, devoid of any context to show how and where any of the information appeared amidst the fine print on the several-foot-long shingle package. And that brochure doesn't have any language providing notice.

The trial saw an actual shingle wrapper at a hearing, but the transcript of that hearing makes clear that the only notice on that warned that failure to install the shingles in accordance with the printed instructions would result in loss of warranty coverage.

Based on these facts, the court concluded that Respondents did not have reasonable notice that they'd be agreeing to arbitration – and thus that they did not manifest assent to the arbitration clause – by keeping the shingles and having them installed. Given the evidence in the record, it's difficult to see how the court could have reached any other conclusion.[3]

TAMKO's other argument – that the court below should have held that Respondents were estopped from arguing they didn't agree to arbitration because they "filed claims under the very warranty they now seek to disavow" – is equally baseless. Pet. 20.[4] While it's certainly true that a party cannot avoid one part of

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[3] While the Court of Appeals did not use the phrase "reasonable notice," it's clear that notice (or the lack thereof) is what the court was analyzing – and its approach closely tracks that taken by numerous other courts making the reasonable notice determination. *See, e.g.*, *Sgouros*, 817 F.3d at 1034-36.

[4] The court declined to reach TAMKO's estoppel argument. App-8 n.6. The court below did, however, properly reject TAMKO's argument that Respondents were bound by the arbitration clause because they could have found it on the company's web site. App-8. As several federal courts have recognized, offerees do not have a duty to search for contract terms that might apply to them. *See, e.g.*, *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156, 161-62 (3d Cir. 2009) (attorney who was never given copy of employee handbook was not bound by arbitration clause in handbook simply because she had benefitted from other bylaws in handbook); *Trujillo v. Apple Comp., Inc.*, No. 07-4946, 2008 WL 2787711, at *3 (N.D. Ill. Apr. 18, 2008) (rejecting argument that consumer was bound by arbitration clause that was "available . . . only if the customer goes and looks for it elsewhere (including online)").

a contract while deliberately affirming another part, that isn't what happened here.

As explained above, there's no evidence that Respondents were on notice that they would become bound by an arbitration clause by having TAMKO's shingles installed. That leaves Respondents' submission of the warranty claims. But Respondents' act of submitting those claims *couldn't* have signified their assent to arbitration, because it's undisputed that the documents TAMKO sent them made no reference at all to arbitration. It was only later, in response to those claims, that TAMKO sent them the warranty document containing the arbitration clause. Given that Respondents were never given notice of the arbitration clause until *after* they sent in the claim forms, there would have been no basis for ruling that Respondents were estopped from contesting the arbitration clause. This is a far cry from the estoppel cases TAMKO cites, where non-parties intentionally took advantage of a contract. Pet. 20. *See Netco v. Dunn*, 194 S.W.3d 353, 360-62 (Mo. 2006) (company that conceded it accepted benefits of membership could not deny it was bound by terms of the membership); *Dubail v. Medical West Bldg. Corp.*, 372 S.W.2d 128, 132 (Mo. 1963) (corporation that knowingly accepted legal services and money under contract could not avoid obligations imposed by other terms).

TAMKO suggests that because a handful of courts have enforced its arbitration clauses in other cases, the decision below can only be explained by the "anti-arbitration hostility" of state courts. Pet. 17, 19. But in

those cases, unlike this one, TAMKO established notice and assent through admissible evidence. In *American Family Mutual Insurance Co. v. TAMKO Building Products, Inc.*, No. 15-02343, 2016 WL 1460322, at *2-3 (D. Colo. Apr. 13, 2016), for example, the record established that the wrapper in evidence "conspicuously provided that opening the package would constitute acceptance of the terms of the Limited Warranty, including the arbitration clause," and that customers could reject the arbitration clause by returning the shingles for a refund. *See also One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, No. 2014-002115, 2016 WL 3079042, at *4 (S.C. Ct. App. June 1, 2016) (state court enforced clause based on similar evidence); *Krusch v. TAMKO Bldg. Prods., Inc.*, 34 F. Supp. 3d 584, 586, 589 (M.D.N.C. 2014) (enforcing clause where the company "produced evidence" that sample shingles obtained by the plaintiff's contractor had a notice molded onto them explaining that purchase would be subject to terms and conditions, and the plaintiff sued for breach of the warranty containing the arbitration clause).[5]

In contrast, federal courts have *refused* to enforce TAMKO's clause where, as here, the company failed to "submit[] evidence sufficient to establish an enforceable agreement to arbitrate." *Nelson v. TAMKO Bldg.*

[5] As is evident from these cases, TAMKO has used different wrapper language on different makes of shingles over time, and the arbitration clauses in those cases were presented to customers in different ways. TAMKO has not argued that the facts of this case are identical to the facts of other cases where its clause was found enforceable.

Prods., Inc., No. 15-1090, 2015 WL 3649384, at *2 (D. Kan. June 11, 2015). The fact that a state court found TAMKO's arbitration clause validly formed, while a federal court did not, disproves TAMKO's narrative about federal courts obeying the FAA and state courts defying it. The differing outcomes in these cases depend on the facts and evidence in each case – nothing more.

Here, as set forth above, TAMKO did not even put the shingle wrapper with the supposed contract offer it claims Respondents "accepted" into evidence. And the wrapper the trial court viewed did not notify customers that they would become bound by an arbitration clause by keeping the shingles, or inform them they could reject the clause. Instead, the evidence in the record confirms that Respondents received no notice of the arbitration clause until *after* they contacted TAMKO and filled out the claim forms TAMKO sent them.

As the other decisions enforcing TAMKO's arbitration clause show, TAMKO sometimes puts evidence before trial courts to support its claim that a customer validly agreed to arbitration. Having chosen not to do so here, it is unfair for TAMKO to blame its failure to satisfy its burden of proof on the supposed bad faith of Missouri courts.

2. The court did not hold that "failure to read" is a valid reason not to enforce an arbitration clause.

TAMKO claims that the court below refused to enforce its arbitration clause "because respondents claimed not to have read [it] before deciding to keep the shingles" and thereby created a new rule that arbitration clauses do "not bind anyone but the admitted careful reader." Pet. i, 9. While provocative, this incomplete reading of the lower court's reading leads to a false conclusion.

First, while it's true that there is a "failure to read" principle of contract law (in Missouri and everywhere), TAMKO leaves out a critical element of this rule: it's about *signed* contracts. As this Court explained long ago, "it will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it *when he signed it*. . . ." *Upton v. Tribilcock*, 91 U.S. 45, 50 (1875) (emphasis added).

This makes sense: when a party signs a document, it's clear exactly what terms she has agreed to. The signature on the contract, unless it was procured by fraud, makes clear that the signer had an opportunity to review the contract and chose to manifest her assent.

In contrast, when a party allegedly signified assent to contract terms not with a signature, but by taking an *action*, the same assumption does not apply. An action without context does not signify assent to anything. For this reason, courts have explained that the

"duty to read" principle "do[es] not nullify the requirement that a consumer be on notice of the existence of a term before he or she can be legally held to have assented to it" through conduct. *Schnabel*, 697 F.3d at 124. "A person can assent to terms even if he or she does not actually read them," but only where the offeror "ma[de] clear to a reasonable consumer both that terms are being presented and that they can be adopted through the conduct that the offeror alleges constituted assent." *Id.* at 123; *see also Sgouros*, 817 F.3d at 1034-35 (explaining that, while "a party who signs a contract is presumed to have notice of all the contract's terms," the same presumption does not apply in the context of assent manifested by conduct).

Thus, the fact that Missouri courts have repeatedly affirmed that "[a] *signer's* failure to read or understand a contract is not . . . a defense to the contract" is entirely consistent with the decision below. *Chochorowski v. Home Depot U.S.A.*, 404 S.W.3d 220, 228 (Mo. 2013).[6] In fact, the Missouri Court of Appeals has

[6] TAMKO's quote of *Chochorowski* omits the reference to "a signer." Pet. 17. And a signature was the decisive fact in every single Missouri failure-to-read case TAMKO cites. *Id. See Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 509 n. 4 (Mo. 2012) ("The law is clear that a *signer's* failure to read or understand a contract is not . . . a defense to the contract.") (emphasis added); *Sanger v. Yellow Cab Co., Inc.*, 486 S.W.2d 477, 481 (Mo. 1972) ("The rule is that the one who *signs* a paper, without reading it, . . . cannot be relieved from the obligation contained in the paper thus *signed*. . . .") (emphasis added); *Repair Masters Constr., Inc. v. Gary*, 277 S.W.3d 854, 858 (Mo. Ct. App. 2009) ("The failure to read a document prior to *signing* it is not a defense, and does not make a contract voidable, absent fraud.") (emphasis added); *Dorsch v.*

repeatedly applied the same rule to enforce signed arbitration agreements despite the signer's failure to read them. *See, e.g.*, *Grossman v. Thoroughbred Ford, Inc.*, 297 S.W.3d 918, 922 (Mo. Ct. App. 2009); *Young v. Prudential Sec., Inc.*, 891 S.W.2d 842, 844 (Mo. Ct. App. 1995). The reason the court didn't apply the failure-to-read rule to this case is not that it was looking for a way to disobey settled law. It's because there is no signed contract.

TAMKO myopically focuses on the fact that the court below mentioned that Respondents denied having seen the arbitration clause. But it makes sense that the court would have noted this fact – not because it was dispositive on its own, but because it is relevant to the court's notice inquiry. As explained above, when determining whether an offeree's conduct manifested assent to contract terms, a court naturally must inquire whether the party had *actual knowledge* of the terms. Here, if the evidence had shown that Respondents knew about the arbitration clause, the court would not have needed to go further and determine whether a reasonable person in Respondents' position would have been on notice of it. *See* Restatement (Second) of Contracts § 19(2) (1981); *Carnival Cruise Lines*, 499 U.S. at 590.

But because the evidence showed that Respondents did *not* have actual knowledge of the arbitration

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Family Med., Inc., 159 S.W.3d 424, 436 (Mo. Ct. App. 2005) ("[T]he law presumes that [he] had knowledge of the contents of this contract when he *signed* it.") (emphasis added).

clause, the court proceeded to analyze the factors relevant to notice, because it recognized that the arbitration clause could still be enforceable. If TAMKO was right – and Respondents' lack of actual knowledge had been dispositive, there would have been no reason for the court to continue.

In sum, TAMKO's attempt to portray the decision below as being about the failure-to-read rule is wrong on both the facts and the law.

B. The Federal Courts of Appeals Agree that a Party's Conduct Manifests Assent to Arbitration Only if the Party Had Notice of the Terms and the Means of Signifying Assent.

TAMKO argues that federal courts around the country, including courts applying Missouri law, "regularly enforc[e] contracts printed on product packaging after customers keep and use the products." Pet. 18. That's true. But in every case, a finding of reasonable notice – based on evidence not present here – was dispositive.

In *Cicle v. Chase Bank USA*, 583 F.3d 549 (8th Cir. 2009), for instance, the Eighth Circuit noted that the credit card customer had received a "notice specifically stat[ing]" that the arbitration clause in her contract was being amended, and that she could opt out of the changes in writing within 30 days. Because she continued to use her credit card, she was bound by the new terms. *Id.* at 554-55; *see also Ariz. Cartridge Remfrs.*

Ass'n Inc. v. Lexmark, 421 F.3d 981, 987 (9th Cir. 2005) (defendant "presented sufficient unrebutted evidence" to support finding that customers had notice of terms and opportunity to reject them); *Karzon v. AT&T, Inc.*, No. 13-2202, 2014 WL 51331, at *1-2 (E.D. Mo. Jan. 7, 2014) (employee who received notice stating "Action Required: . . . If you do not opt out by the deadline, you are agreeing to the arbitration process set forth in the Agreement" manifested assent by clicking button confirming he reviewed Agreement and continuing employment without opting out by deadline); *Pleasants v. Am. Express Co.*, No. 06-1516, 2007 WL 2407010, at *1, *3 (E.D. Mo. Aug. 17, 2007), *aff'd*, 541 F.3d 853 (8th Cir. 2008) (customers who received notice with their credit cards stating, "By accepting and retaining the Card, signing the Card or using the Card, you agree to all the terms and conditions in this participant agreement," manifested assent by using card).

Without reasonable notice, in contrast, the same courts have held that a party's action or inaction (such as keeping a product) does *not* signify assent to a particular contract. *See, e.g.*, *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1178-79 (9th Cir. 2014) (no agreement formed where hyperlink to terms on website was "insufficient to give rise to constructive notice"); *Dakota Foundry, Inc. v. Tromley Indus. Holdings, Inc.*, 737 F.3d 492, 496 (8th Cir. 2013) (where evidence showed that buyer was not on notice of arbitration clause and thus "did not have a reasonable opportunity to reject it," seller "cannot establish the necessary consent to bind" buyer to clause).

This pattern can be seen again and again in the federal courts: where the court finds reasonable notice, it rules there is an enforceable agreement. Absent reasonable notice, the court rules that no agreement was validly formed.

For example, where a car buyer applied for and received a warranty with an arbitration clause, and the warranty clearly stated that he could return it within 10 days for a full refund if he was unhappy with the terms, the Sixth Circuit held that he manifested acceptance of the arbitration clause by not returning the warranty. *Higgs v. Auto. Warranty Corp. of Am.*, 134 Fed. Appx. 828, 829-31 (6th Cir. 2005). In contrast, the Sixth Circuit held that an employee who received an employee handbook with an arbitration clause did not manifest assent by continuing to work, where she "had no reason to believe that [doing so] would constitute her acceptance of *anything*." *Hergenreder v. Bickford Senior Living Grp., LLC*, 656 F.3d 411, 419 (6th Cir. 2011). The court rejected the employer's argument that the employee could become bound by a document she didn't realize contained an offer by "unwittingly tak[ing] actions that the document says will constitute acceptance of the offer," explaining that there is "no support for this proposition in Michigan law." *Id.* at 420.

Likewise, the Seventh Circuit found that a customer agreed to the terms of a shrinkwrap software license agreement by keeping and using the software, where the evidence showed that notice of the license appeared on "[e]very box," the license was "encoded on

the CD-ROM disks as well as printed in the manual," and the program "splashed the license" on the buyer's screen "every time" he used the software program and "would not let him proceed without indicating acceptance." *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450, 1452 (7th Cir. 1996).

But the same court held that customers did *not* agree to the terms of a service agreement – including an arbitration clause – by clicking an "I Accept" button to make a purchase on TransUnion's web page. *Sgouros*, 817 F.3d at 1031-35. It was undisputed that the customers clicked the button and that the terms of the agreement could be seen by scrolling through a text box on the webpage. *Id.* at 1035. But the court concluded that the text box "f[e]ll short of providing notice. . . ." *Id.* And a block of text near the "I Accept" button didn't mention the service agreement, but instead stated that clicking the button would authorize TransUnion to obtain users' personal credit information. *Id.* The court concluded that a reasonable person would not realize that clicking the button constituted acceptance of the service agreement or its arbitration clause. *Id.* at 1035-36.

These differences in outcome can only be explained by the presence or absence of notice. As the Ninth Circuit has explained, courts consistently refuse to enforce contracts "where there is no evidence that the [customer] had actual knowledge or that a reasonably prudent [customer] would have been on inquiry notice that a terms of use agreement existed." *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 569 (9th Cir.

2014) (collecting cases); *see also Hancock v. AT&T Co.*, 701 F.3d 1248, 1255 (10th Cir. 2012) (whether arbitration agreement was validly formed under Florida and Oklahoma law is determined by whether company "provides sufficient notice of and an opportunity to agree to the terms of service"); *Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 407 F.3d 546, 557-59 (1st Cir. 2005) (no agreement to arbitrate formed under Massachusetts law, where employer's email was insufficient to "put a reasonable employee on inquiry notice of an alteration to the contractual aspects of the employment relationship"); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1374-75 (11th Cir. 2005) (employees agreed to arbitration policy under Georgia law by continuing employment, where employer distributed letter announcing that beginning or continuing employment "shall be deemed to be acceptance" of the policy and that the policy was "a condition of continued employment," and distinguishing the First Circuit's decision in *Campbell* on factual grounds); *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 29-30 (2d Cir. 2002) ("[A] consumer's clicking on a . . . button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the . . . button would signify assent to those terms.").

Contrary to TAMKO's narrative of "federal courts good, state courts bad," it's worth noting that the illustrative cases where courts have refused to enforce arbitration clauses for lack of sufficient notice came from federal courts of appeals in seven circuits – not state courts.

TAMKO points out that the Missouri Court of Appeals "had no trouble enforcing a forum-selection clause . . . that appeared in the online equivalent of product packaging," implying that the reason for this outcome is that an arbitration was not involved. Pet. 18 (citing *Major*, 302 S.W.3d 227). But it's obvious from the decision that the *Major* court enforced the term because there was sufficient evidence of notice: immediately "[n]ext to the button" users clicked to manifest assent was a "hyperlink to the website terms and this notice: 'By submitting you agree to the Terms of Use.'" 302 S.W.3d at 229. Additional hyperlinks were visible on every other webpage. *Id.* at 230. Based on that evidence, the court concluded that "a reasonably prudent internet user" would have been on notice of the terms and the fact that clicking the button would manifest assent to them. *Id.* at 230-31.

* * *

In sum, TAMKO's "failure to read" argument is meritless. The actual holding of the court below – that Respondents did not manifest assent to the arbitration clause because TAMKO had not put them on notice of it – is supported by the record and is perfectly in line with numerous federal court decisions. There is therefore no reason for this Court to grant review.

II. Missouri Courts Do Not Discriminate Against Arbitration.

TAMKO insists that "Missouri courts undoubtedly would have enforced [its] agreement if it had been for

anything other than arbitration," and thus that the decision below can only be the product of anti-arbitration animus. Pet. 16. But other than its "failure to read" argument – which, as explained above, is a straw man – TAMKO fails to muster any support for its theory. And there is plenty of evidence to the contrary.

1. Missouri courts routinely enforce arbitration clauses where there is sufficient evidence that an agreement was formed and reject meritless challenges to both the formation and the enforceability of arbitration clauses.[7]

For example, the Missouri Supreme Court just this year enforced a car dealer's arbitration clause, rejecting the plaintiffs' state law contract-formation defenses – that the contract containing the arbitration agreement was fraudulent and lacked consideration – as preempted by the FAA. *Ellis v. JF Enters., LLC*, 482 S.W.3d 417, 420 (Mo. 2016) (en banc).

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[7] TAMKO devotes several pages of its petition to reiterating various uncontested rules of FAA preemption. *E.g.*, Pet. 21 (pointing out that "the FAA preempts a state rule declaring arbitration clauses unenforceable unless they are printed in capital letters" and citing *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). But this does nothing to support its argument that the court below – or Missouri state courts generally – discriminate against arbitration. In fact, the Missouri Court of Appeals reached the same conclusion this Court did in *Casarotto* – three years earlier. *See McCarney v. Nearing, Staats, Prelogar & Jones*, 866 S.W.2d 881, 887-88 (Mo. Ct. App. 1993) (arbitration clause that failed to comply with state statute requiring special notice in ten-point capital letters was enforceable under FAA).

In *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798 (Mo. 2015), similarly, the Missouri Supreme Court enforced an arbitration clause in an employment contract, again rejecting numerous contract-formation challenges. *See id.* at 808-09 (rejecting argument that term lacked mutuality and holding that mutual promise to arbitrate was sufficient); *id.* at 810-11 (holding that missing terms could be supplied by Missouri's arbitration statute); *id.* at 814-15 (holding that agreement was binding on nonsignatories because plaintiff treated signatory and nonsignatory defendants as a single unit). And in *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 859 (Mo. 2006), the Missouri Supreme Court explicitly refused to create a special rule of consideration for arbitration, holding that lack of mutuality did not render the arbitration clause invalid.

2. Nor are Missouri courts applying special rules to refuse to enforce arbitration clauses. On the contrary, Missouri courts regularly refuse to enforce non-arbitration contracts for the same reason as the decision below: the party seeking to enforce the contract fails to meet its burden of demonstrating it was validly formed. *See, e.g.*, *Building Erection Servs. Co. v. Plastic Sales Mfg. Co., Inc.*, 163 S.W.3d 472, 477-79 (Mo. Ct. App. 2005) (no valid contract formed between installer and manufacturer where there was no mutual assent or a meeting of the minds as to essential term of project); *White v. Pruiett*, 39 S.W.3d 857, 862 (Mo. Ct. App. 2001) (construction contractor failed to meet his burden of proving the existence of a valid oral contract with homeowner); *Around The World Importing, Inc. v.*

Mercantile Trust Co., N.A., 795 S.W.2d 85, 90-91 (Mo. Ct. App. 1990) (evidence was "not sufficient to establish existence of valid and enforceable contract" where terms of loan agreement between start-up company and lender were "uncertain, vague and ambiguous").

If anything, Missouri courts are enforcing arbitration clauses *more* rigorously than other contracts. *Compare, e.g.*, *Hewitt*, 461 S.W.3d at 810-11 (agreement to arbitrate was validly formed despite being "silent as to certain necessary matters," because missing terms could be supplied by statute); *with Wallace v. St. Francis Med. Ctr.*, 415 S.W.3d 705, 707 (Mo. Ct. App. 2013) (no valid employment contract formed because essential terms were not specified); *Fedynich v. Massood*, 342 S.W.3d 887, 892 (Mo. Ct. App. 2011) (no valid agreement to divide business assets formed because essential terms of the alleged agreement were never determined); *and Olathe Millwork Co. v. Dulin*, 189 S.W.3d 199, 204 (Mo. Ct. App. 2006) (no valid contract for home construction was formed because essential terms were left for future determination).

TAMKO's claim that Missouri is singling out arbitration for special rules or treatments doesn't survive scrutiny.

III. There is No Evidence that Other State Courts Are Discriminating Against Arbitration.

If TAMKO is to be believed, the decision below is only the latest in a "dangerous trend" of state courts

that are dead set on discriminating against arbitration agreements, that are intentionally violating federal law in order to "circumvent the preemptive force of the FAA," and that will not stop until they "mak[e] it impossible for sellers to enforce" arbitration clauses on their product packaging and "destroy the prospect of speedy dispute resolution that the FAA was meant to protect." Pet. 1, 2, 10. State courts, according to TAMKO, are ever in search of "loophole[s]" to avoid enforcing validly formed arbitration agreements, and now believe they've found a way to thwart the FAA "under the guise of state law rules of contract formation." Pet. 2.

One would expect a charge this serious to be substantiated. But the actual law in those states tells a different story: courts carefully applying the FAA, rejecting baseless contract-formation challenges, and even finding their own state's laws preempted by the FAA.

For example, TAMKO complains about a supposed "pattern" of South Carolina courts singling out arbitration clauses for disfavored treatment. Pet. 26. But the company's only support for that claim is a single decision by the state's high court that a nursing home resident's relative who had a power of attorney limited to "health care" lacked legal authority to waive the resident's right to sue in court. *See* Pet. 26 (citing *Coleman v. Mariner Health Care, Inc.*, 755 S.E.2d 450 (S.C.), *cert. denied*, 135 S. Ct. 477 (2014)). While TAMKO takes it as self-evident that that decision violated the FAA, this Court denied certiorari in the case. And, again contrary

to TAMKO's narrative of "federal courts are good, state courts are dishonest and defiant," the U.S. Court of Appeals for the Eighth Circuit rejected a nursing home arbitration agreement based on similar facts. *GGNSC Omaha Oak Grove, LLC v. Payich*, 708 F.3d 1024, 1026 (8th Cir. 2013).

Furthermore, South Carolina courts don't hesitate to enforce validly-formed arbitration clauses. In fact, the South Carolina Court of Appeals recently enforced an arbitration clause in a TAMKO warranty, where (unlike in this case) the evidence in the record demonstrated that the wrapper provided clear notice to customers that they could return the shingles if they were not satisfied with the terms. *One Belle Hall*, 2016 WL 3079042.

By the same token, South Carolina courts regularly reject unfounded contract-formation challenges to arbitration clauses. *See, e.g.*, *Wachovia Bank, N.A. v. Blackburn*, 755 S.E.2d 437, 443 (S.C. 2014) (holding that arbitration clause in signed promissory note was enforceable despite consumers' testimony that they weren't aware the note waived their right to a jury trial, citing failure-to-read rule); *Cape Romain Contractors, Inc. v. Wando E., LLC*, 747 S.E.2d 461, 467 (S.C. 2013) (under state contract principles, nonsignatory could enforce arbitration clause where contract explicitly required participation of a person "substantially involved in a common question of law or fact whose presence is required [for] complete relief"); *Towles v. United HealthCare Corp.*, 524 S.E.2d 839, 845

(S.C. Ct. App. 1999) (employee who signed acknowledgement form stating that he agreed to submit all disputes to arbitration could not argue he did not have notice of arbitration clause).

TAMKO's grievance with Kentucky, likewise, is based on a single decision it dislikes. Pet. 25-26. But TAMKO fails to account for numerous decisions by that state's courts finding arbitration clauses validly formed. *See, e.g.*, *Energy Home, Div. of S. Energy Homes, Inc. v. Peay*, 406 S.W.3d 828, 834 (Ky. 2013) (holding that arbitration agreement was enforceable even though it was entered after the relevant purchase agreement and the purchase agreement contained a merger clause, on grounds that merger clauses apply only to agreements made before the relevant contract); *MHC Kenworth-Knoxville/Nashville v. M & H Trucking, LLC*, 392 S.W.3d 903, 906-07 (Ky. 2013) (rejecting argument that defendant failed to present sufficient evidence of existence of arbitration agreement and holding that FAA preempts Kentucky law requiring arbitration to take place in Kentucky); *N. Fork Collieries, LLC v. Hall*, 322 S.W.3d 98, 103-04 (Ky. 2010) (holding plaintiff who sought damages for breach as third-party beneficiary of a contract he did not sign was estopped from disavowing the contract's arbitration clause); *Bardstown Med. Inv'rs, Ltd. v. Dukes*, No. 2013-001783, 2015 WL 300677, at *3 (Ky. Ct. App. Jan. 23, 2015) (holding that nursing home resident's husband had authority to agree to arbitration on her behalf because his power of attorney authorized him to enter contracts

of any kind, and distinguishing cases involving narrower powers of attorney).

Arkansas courts, likewise, have no problem enforcing arbitration agreements where the basic requirements of contract formation are met. Pet. 26-27. *See, e.g.*, *Searcy Healthcare Ctr., LLC v. Murphy*, 2013 Ark. 463, 2013 WL 6047164, at *5-6 (2013) (holding that nursing home resident's beneficiaries were required to arbitrate their wrongful death claim because wrongful death claims in Arkansas are derivative, and explaining that to hold otherwise "would be treating an arbitration agreement differently than we do other contracts"); *Pest Mgmt., Inc. v. Langer*, 250 S.W.3d 550, 555-56 (Ark. 2007) (rejecting argument that there was no agreement to arbitrate disputes about a termite inspection graph because a later-formed contract for insect treatment, which contained an arbitration clause, explicitly stated that the inspection graph was part of the contract); *Asbury Auto. Grp., Inc. v. McCain*, 2013 Ark. App. 338, 2013 WL 2285373, at *6 (2013) (holding that arbitration clause in car dealership contract was validly formed even though no representative of dealership signed the contract, because dealership indicated its assent through performance).

In sum, TAMKO's tale of state courts scheming to undermine the FAA is baseless. Like the Missouri courts, state courts in Kentucky, South Carolina, and Arkansas are faithfully applying the FAA and are declining to enforce arbitration clauses only where generally-applicable state contract law so requires. There

is thus no "tide" of rogue state court rulings for this Court to stem. Pet. 23.

IV. Requiring TAMKO to Meet the Same Burden of Proof as Other Parties Seeking to Enforce Arbitration Clauses Will Not Have Dire Consequences.

Given that the court below didn't actually break with settled law, TAMKO's claim that allowing the decision below to stand will effectively "eliminate arbitration clauses from retail sales" and force manufacturers to "abandon arbitration clauses entirely" unless they can "somehow prove that [their] customer[s] *actually read* the arbitration provision" rings hollow. Pet. 27-29. There's no evidence that TAMKO or other manufacturers have abandoned arbitration (or the sale of retail goods) in the First, Second, Sixth, Seventh, Eighth, Ninth, Tenth, or Eleventh Circuits because those jurisdictions require proof of notice before enforcing an arbitration clause on the basis of a party's conduct. The only impact the decision below will have is that TAMKO will be held to the same standard of proof as every other party seeking to enforce a contract, and that it has already been held to in other state and federal jurisdictions. Surely TAMKO can't contend that that's a problem worthy of this Court's intervention.

V. This Case is Not a Good Vehicle for Review.

Even if this Court were inclined to take up the question of whether the FAA preempts state contract law in cases involving whether a party had reasonable notice of contract terms and the conduct that would manifest assent, this case presents a poor vehicle for review.

First, the question of whether reasonable notice was provided in a particular case is a fact-specific inquiry that depends on the evidence in the record. But in this case, the document TAMKO claims provided notice of its contract terms – the shingle wrapper – is not even in the record. Essentially, TAMKO is asking this Court to hear and decide a case about whether Hobbs and the Church received adequate notice of an arbitration clause, without having an evidentiary record that includes the single most important piece of evidence that this Court would need to evaluate. Therefore, this Court's inquiry – like that of the court below – would be limited to whether, given that there's no evidence in the record showing that TAMKO provided reasonable notice, TAMKO met its burden of proving the existence of a validly-formed agreement to arbitrate.

Second, one Justice has expressed the view that the FAA "does not apply to proceedings in state courts." *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (Thomas, J., dissenting) (collecting cases).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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