NO. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Arbitration Act ("FAA") declares arbitration agreements "valid, irrevocable, and enforceable." 9 U.S.C. §2. Federal courts thus have held repeatedly that the FAA preempts not only special state law barriers to the enforcement of a valid arbitration agreement, but also special state law barriers to the formation or recognition of an arbitration agreement. Nonetheless, a troubling trend has developed among the state courts of invoking novel "contract formation" principles to refuse to recognize that an arbitration agreement was ever formed. This is a case in point. It is black-letter law in Missouri (and elsewhere) that failure to read the terms of a contract before manifesting assent is not grounds for invalidation. Yet the decision below allowed respondents to escape the arbitration agreements on each package of petitioner's roofing shingles simply because respondents claimed not to have read those agreements before deciding to keep the shingles.

The question presented is:

Whether a state court can evade the preemptive force of the Federal Arbitration Act by framing its refusal to enforce an arbitration agreement as a product of supposed defects in "contract formation" that would not prevent the formation of any other contract.

PARTIES TO THE PROCEEDING

Petitioner TAMKO Building Products, Inc. was the defendant-appellant in the Missouri Court of Appeals. Respondents Lee Hobbs and Jonesburg United Methodist Church were plaintiffs-respondents in the Missouri Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

TAMKO Building Products, Inc. has no parent company, and no publicly held company owns more than 10% of its stock.

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State courts have a long and well-documented history of attempting to evade the Federal Arbitration Act ("FAA"). This case is but the latest chapter. As this Court has held repeatedly, the FAA preempts state efforts to employ special anti-arbitration rules to refuse to enforce valid arbitration agreements. And as the Courts of Appeals have recognized repeatedly, states may not evade that federal mandate by employing special anti-arbitration rules to refuse to recognize the formation of arbitration agreements in the first place. Yet that is precisely what happened here. According to the Missouri Court of Appeals, the arbitration agreements petitioner sought to enforce were no agreements at all because respondents deny having read those agreements before manifesting their assent. But it is black-letter contract law, both in Missouri and across the country, that failure to read a contract before accepting it does not vitiate assent. Missouri courts have reaffirmed that principle scores of times, including on materially indistinguishable facts. The decision below thus cannot be understood as anything other than an attempt to circumvent the preemptive force of the FAA by inventing a supposed defect in the contract formation process that purportedly prevented valid agreements from being reached in the first place.

Unfortunately, that tactic is not unique to this case. Indeed, it is not even the first time that this has happened in the Missouri courts. Both in Missouri and across the country, state courts—often over strident dissents—are increasingly refusing to enforce arbitration agreements under the pretense that no

agreement ever arose in the first place. Relying on the misguided premise that the FAA is powerless until a contract is formed under state law, these courts believe they have found a loophole that allows them to discriminate against arbitration agreements as long as they do so under the guise of state law rules of contract formation. They are mistaken. In the FAA context as in all others, preemption turns on substance, not labels. A state cannot avoid the FAA just by calling its refusal to enforce an arbitration agreement something other than what it plainly is.

Unless this Court steps in, however, that is precisely what state courts will continue to do. The decision below is not an isolated phenomenon. Indeed, the West Virginia Supreme Court of Appeals recently employed the same "contract formation" tactic to refuse to enforce an arbitration agreement that was materially indistinguishable from an arbitration agreement that this Court had summarily reversed that very same court for refusing to enforce. And the result of this dangerous trend will be continued erosion of the federal pro-arbitration policy that the FAA establishes, as special rules that disfavor arbitration, no matter what a state may call them, undermine the ability of private parties to opt for arbitral dispute resolution. That problem is particularly acute here, as the decision below threatens to eliminate arbitration from the retail context in Missouri by making it impossible for sellers to enforce licenses and warranties included with product packaging. Accordingly, the Court should grant certiorari and confirm that state courts cannot get around the FAA by labeling their refusal to enforce

a valid arbitration agreement as an application of novel state law "contract formation" rules.

OPINION BELOW

The opinion of the Missouri Court of Appeals is reported at 479 S.W.3d 147 and reproduced at App.1-9. The Missouri Supreme Court's order denying transfer is unreported and reproduced at App.10.

JURISDICTION

The Missouri Court of Appeals issued its opinion on October 26, 2015, and the Missouri Supreme Court denied transfer on January 26, 2016. This Court has jurisdiction under 28 U.S.C. §1257(a). *See Southland Corp. v. Keating*, 465 U.S. 1, 6 (1984).

STATUTORY PROVISION INVOLVED

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

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

STATEMENT OF THE CASE

A. Factual Background

Petitioner TAMKO Building Products, Inc. is a manufacturer of roofing shingles and other building products. TAMKO has manufacturing plants in seven different states and sells its shingles in all 48 contiguous states. Mo.App.55-56.[1] Respondents Lee Hobbs and Jonesburg United Methodist Church purchased 120 bundles and 246 bundles of TAMKO shingles, respectively. Mo.App.110-11. Printed on the outside of each bundle of shingles was a limited warranty, which provided a remedy for damages caused by manufacturing defects. App.3. The warranty included an arbitration provision, which stated, in relevant part:

> Mandatory Binding Arbitration: Every claim, controversy, or dispute of any kind whatsoever including whether any particular matter is subject to arbitration … between you and TAMKO … relating to or arising out of the shingles or this limited warranty shall be resolved by final and binding arbitration, regardless of whether the action sounds in warranty, contract, statute or any other legal or equitable theory.

Mo.App.53.

Respondents opened the packaging and installed the shingles on their roofs. App.3-4. Several years later, Hobbs discovered that his shingles were allegedly "warping, curling and beginning to fail."

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

App.4. As required by the limited warranty, Hobbs submitted a claim form to TAMKO describing the damage. *Id.*; Mo.App.58. TAMKO denied the claim for four independent reasons: The shingles had been improperly installed; the warranty's coverage for wind damage had expired; the wind speed in Hobbs' area exceeded the upper limit of the warranty's coverage; and Hobbs had not timely reported the damage. Mo.App.59-60.

Around the same time, Jonesburg discovered leaks in its ceiling that were allegedly "related to its shingles' failures." App.4. A Jonesburg representative submitted a warranty claim form to TAMKO. *Id.*; Mo.App.125. TAMKO accepted the warranty claim and agreed to provide Jonesburg with financial compensation and a certificate for replacement shingles. App.4; Mo.App.67-70.

B. Trial Court Proceedings

In April 2014, respondents filed a putative class action in the Circuit Court of Jasper County, Missouri, alleging negligence and violations of the Missouri Merchandising Practices Act. App.4. TAMKO, invoking the FAA and the arbitration provision that was printed on each bundle of shingles, filed a motion to compel arbitration and stay proceedings. *Id.* Respondents opposed the motion. They did not deny that the arbitration provision was printed on each bundle of shingles; nor did they deny that they opened the bundles and used the shingles. Instead, they averred that they never read the arbitration provision and that they would not have purchased the shingles had they known about the arbitration provision.

App.4-5. The trial court denied TAMKO's motion without explanation. App.2-3.

C. Appellate Proceedings

TAMKO appealed to the Missouri Court of Appeals, arguing that the trial court erred in refusing to compel arbitration. Invoking the FAA and its strong federal policy favoring arbitration, TAMKO argued that, under a straightforward application of settled Missouri contract law, respondents were bound by the arbitration provision printed on each bundle of shingles once they decided to keep the shingles. App.5-6. In particular, TAMKO explained that it offered its contractual terms (*i.e.* the warranty and the arbitration provision) to respondents by printing those terms on the outside of each bundle of shingles, and that respondents accepted TAMKO's offer by opening the bundles, using the shingles, and invoking their rights under the warranty. App.5-8.

The court disagreed and refused to compel arbitration, claiming that respondents had never agreed to arbitrate their disputes with TAMKO. App.6-8. Disregarding reams of precedent to the contrary, the court rejected the notion that respondents accepted the arbitration provision by opening the packages, using the shingles, and then invoking the warranty. App.7-8. According to the court, respondents could not have accepted the terms of the arbitration provision because they had not read the provision before using the shingles. App.7. The court thus found it irrelevant that the arbitration provision was clearly printed on every bundle of shingles and that respondents had ample opportunity to read the provision before opening the bundles.

Instead, the court treated as dispositive respondents' claim that they never in fact read the arbitration provision. As ostensible support for its holding, the court cited four other cases in which Missouri courts denied motions to compel arbitration for lack of mutual assent, App.6-7, but none of those cases suggests that failure to read a contract vitiates assent.

The court then purported to distinguish the cases on which TAMKO had relied, in which courts enforced contract terms included with computer software packaging, *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), computer hardware packaging, *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997), and consumer credit cards, *Pierce v. Plains Commerce Bank*, No. 11-1222, 2012 WL 5992730 (W.D. Mo. Nov. 29, 2012). The court claimed, without citation, that this case is different because "the packaging for shingles is not an item typically kept by a consumer after the shingles are unbundled and used." App.7. After reiterating that respondents did not read the arbitration provision before opening and installing the shingles, the court held that respondents' "retention and use of the shingles does not prove that they accepted the terms to arbitrate their disputes in this case." App.8.

The court also rejected TAMKO's argument that respondents accepted the terms of the arbitration provision by filing a claim—and, in Jonesburg's case, receiving benefits—under the limited warranty. The court was "unpersuaded," it explained, because respondents "stated that they became aware of the warranty and its terms only *after* they filed their claim with Tamko." App.8. Because TAMKO could not

disprove respondents' claims that they had not read the arbitration provision in the limited warranty before invoking that warranty, the court held that TAMKO "failed in its burden to prove a valid, enforceable agreement" and affirmed the trial court's order denying arbitration. App.9.

After TAMKO's motion for rehearing en banc was denied, TAMKO applied for transfer to the Missouri Supreme Court, arguing that the court of appeals "acted in violation of the Federal Arbitration Act" by applying "a different standard here because the case involved an arbitration provision." Def.'s Alt. App. for Transfer, at 7 n.1 (Mo. App. Nov. 10, 2015). The Missouri Supreme Court denied the application. App.10.

REASONS FOR GRANTING THE PETITION

The FAA's animating principle is one of non-discrimination: States may not single out arbitration agreements for special disfavored treatment. That non-discrimination principle applies no matter how states manifest their hostility toward arbitration. Accordingly, this Court has invalidated state laws that treat arbitration agreements differently from other contracts, has reversed state judicial decisions that apply neutral state laws unfavorably to arbitration agreements, and has turned back state court efforts to evade the FAA through procedural or other devices. The Courts of Appeals likewise have held repeatedly that the FAA preempts state efforts to devise special barriers to the formation of arbitration agreements.

Under a straightforward application of that non-discrimination rule, the decision below is plainly

preempted by the FAA. Missouri courts and courts around the country agree that contractual provisions included with product packaging become binding on both parties when the customer opens the packaging and keeps the product. Missouri courts have previously referred to this as "standard contract doctrine." The court below, however, departed from that standard contract doctrine so that it could deny effect to an arbitration agreement. The court's purported rationale—that respondents could have not accepted the arbitration agreement because they did not read it—is a recipe for disregarding all arbitration agreements, which are often included in the "fine print." Absolutely nothing in Missouri law suggests that Missouri courts in any other context would refuse to enforce a contract on the ground that it does not bind anyone but the admitted careful reader. The decision below thus singles out an arbitration agreement for suspect status and is therefore preempted by the FAA.

That conclusion is not altered by the state court's ostensible reliance on rules of contract *formation* rather than contract *enforceability*. Although this Court's cases have typically focused on the latter, federal courts have repeatedly recognized that state courts cannot evade the FAA by hiding their hostility to arbitration behind imagined defects in contract formation. Preemption turns on substance, not labels, and a state judicial decision that unjustly refuses to enforce an arbitration agreement is not insulated from the FAA simply because it purports to apply a state rule of contract formation. If evading the FAA were that easy, state courts could exempt themselves from decades of this Court's precedents simply by creating

arbitration-specific rules of assent, consideration, and capacity.

As outrageous as that proposition is, state courts across the country are embracing it. Ever in search of the newest "devices and formulas" they can use to deny arbitration, state courts are increasingly refusing to enforce arbitration agreements under the pretense of finding that no agreement to arbitrate ever arose in the first place. Only this Court's intervention can put an end to this troubling practice. The FAA's mandate that arbitration agreements must be placed on "equal footing" with all other agreements undoubtedly prohibits state court efforts to make valid arbitration agreements more difficult to form than other contracts.

The decision below also warrants certiorari on its own terms. If the rule applied below is allowed to stand, arbitration will be all but impossible in the retail context in Missouri. Countless manufacturers sell their products subject to arbitration agreements printed on or included with product packaging. If those sellers now must prove that their customers actually read the arbitration agreements before using the products, enforcement will become so burdensome that sellers will have no choice but to give up on arbitration. That result would destroy the prospect of speedy dispute resolution that the FAA was meant to protect, and it would obliterate sellers' ability to secure an arbitral forum for disputes with their customers. This Court should grant the petition and restore the FAA's preemptive effect.

I. The Decision Below Conflicts With A Well-Settled Body Of Law Establishing That The FAA Preempts State Efforts To Deny The Validity Or Enforceability Of Arbitration Agreements.

A. State Courts May Not Apply Special Rules That Uniquely Disfavor Arbitration Agreements.

In an effort to eradicate "widespread judicial hostility to arbitration agreements," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011), Congress passed the FAA and established an "emphatic federal policy in favor of arbitral dispute resolution," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985). The FAA's animating principle is one of non-discrimination: Courts must place arbitration agreements on "equal footing" with other contracts. *Concepcion*, 563 U.S. at 339; *see also, e.g.*, *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 443 (2006); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89 (2000); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Any state rule disfavoring arbitration agreements vis-à-vis other contracts therefore is preempted by the FAA. *See, e.g.*, *Preston v. Ferrer,* 552 U.S. 346, 353 (2008) ("The FAA's displacement of conflicting state law is 'now well-established.'").

The FAA preempts the full gamut of state efforts to deny effect to arbitration agreements. This includes both state laws that facially discriminate against arbitration and judicial decisions that apply neutral laws in a manner hostile to arbitration. As for the former, this Court has repeatedly held that the FAA

invalidates state laws that single out arbitration agreements for disfavored treatment. For example, the FAA preempts state laws that condition the enforceability of arbitration agreements on statutory notice requirements "that are not applicable to contracts generally." *Preston*, 552 U.S. at 356. The FAA likewise preempts state laws that require arbitration clauses to be "'typed in underlined capital letters on the first page of the contract'" if state law does not impose a like requirement on other types of contracts. *Casarotto*, 517 U.S. at 683. And the FAA preempts state laws that create a "categorical rule prohibiting arbitration of a particular type of claim." *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1204 (2012) (per curiam); *accord Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 269 (1995).

The FAA also preempts state judicial decisions that apply neutral state laws in a manner unfavorable to arbitration. As this Court has explained, a state court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what … the state legislature cannot." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). For example, in *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015), this Court held that the FAA preempted the California Court of Appeal's denial of a motion to compel arbitration. *Id.* at 471. While the California court had purported to apply neutral interpretive principles, this Court did not hesitate to look behind that claim and decide for itself whether the state court had applied those principles differently from how it would have had arbitration not been involved. *Id.* at 469-71. Because the decision in fact

resulted from just that kind of anti-arbitration bias, the Court held it preempted by the FAA. *Id.* at 471; *see also Allied-Bruce,* 513 U.S. at 281 (explaining that state courts may not "decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause").

As these decisions reflect, the FAA's non-discrimination policy is not easily evaded. Indeed, this Court has intervened numerous times to stop state courts from using procedural or other devices to avoid applying the FAA. For example, this Court summarily reversed the Oklahoma Supreme Court when it tried to sidestep the FAA by purporting to rely on "adequate and independent state grounds." *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 502 (2012) (per curiam). This Court also reversed the Florida Supreme Court for using state severability rules to decide a question that the parties had agreed to arbitrate. *Buckeye Check Cashing*, 546 U.S. at 449. And on other occasions, this Court has prevented states from avoiding application of the FAA by narrowly interpreting the statutory phrase "involving commerce," *Allied-Bruce*, 513 U.S. at 273-74; *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 58 (2003) (per curiam), by narrowly interpreting this Court's precedents, *see Preston*, 552 U.S. at 359, or by addressing only a non-arbitrable subset of the plaintiffs' claims, *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 26 (2011) (per curiam).

Applying those principles, federal courts have recognized repeatedly that the preemptive force of the FAA is not limited to arbitration-specific rules of

contract *enforcement*, but also preempts arbitration-specific rules designed to make it harder to create (or recognize the creation of) a valid arbitration agreement. For example, the Fourth Circuit has held that "[t]he FAA does not allow a state legislature to circumvent Congressional intent by enacting special rules to discourage or prohibit the formation of agreements to arbitrate." *Saturn Distribution Corp. v. Williams*, 905 F.2d 719, 723 (4th Cir. 1990); *see also id.* ("'[C]ommon sense dictates that a state should not be able to escape its enforcement duties under §2 by banning the formation of arbitration agreements.'"). The Second Circuit has similarly held that the FAA "preempts state law that treats arbitration agreements differently from any other contracts" regarding "whether the parties have entered into an agreement to arbitrate." *Chelsea Square Textiles, Inc. v. Bombay Dyeing & Mfg. Co.*, 189 F.3d 289, 295-96 (2d Cir. 1999). And the Sixth Circuit has explained that principles of assent must apply with the same force to "mandatory arbitration agreements" as they do to "any other agreement." *Seawright v. Am. Gen. Fin. Servs., Inc.*, 507 F.3d 967, 979 (6th Cir. 2007).

The clear lesson from these cases is that the FAA's non-discrimination principle controls no matter how states effectuate their anti-arbitration hostility. Indeed, the Congress that enacted the FAA was fully aware of the "'great variety' of 'devices and formulas'" state courts had employed to avoid arbitration, *Concepcion*, 563 U.S. at 342, and it accordingly designed the FAA to displace not just cases of anti-arbitration hostility, but also more creative efforts to deny effect to arbitration agreements. *See id.* Without exception, then, the FAA prohibits states from

"singling out arbitration provisions for suspect status." *Casarotto*, 517 U.S. at 687. That rule applies with full force to state-law rules that make it more difficult to form a "valid" arbitration agreement than to form any other type of agreement.

B. The Decision Below Uniquely Disfavors Arbitration Agreements.

1. The decision below does precisely what the FAA forbids: It singles out an arbitration agreement for suspect status. Whereas Missouri courts in any other context would have enforced an agreement like the one at issue here, the court below refused to enforce it because it was an arbitration agreement. Although the state court claimed it was applying neutral principles of contract law, its reasoning departed so fundamentally from both settled Missouri law and black-letter contract law that it cannot be explained by anything other than anti-arbitration hostility. The resulting decision is plainly and straightforwardly preempted by the FAA.

Under ordinary principles of Missouri contract law, this was an easy case. The elements of a contract in Missouri are offer, acceptance, and consideration. *Citibank (S.D.), N.A. v. Wilson*, 160 S.W.3d 810, 813 (Mo. Ct. App. 2005). The existence of an offer was undisputed, as TAMKO offered the limited warranty and arbitration provision to respondents by printing their terms on the packaging of all 366 bundles of shingles respondents purchased. Indeed, respondents' own counsel even brought a package of TAMKO shingles to a motions hearing and conceded that the arbitration provision was printed on the package. *See* Tr. of Mot. Hr'g.26-29 (Mo. Cir. Ct. July 29, 2014).

Acceptance was equally obvious: respondents, after ample opportunity to review the warranty and arbitration provision, opened the bundles and installed the shingles on their roofs. That conduct manifested their assent to the offered terms. *See, e.g.*, *Citibank*, 160 S.W.3d at 813 ("'If [a] party receives the benefit of the services in silence, when there was a reasonable opportunity to reject them, this party is manifesting assent to the terms proposed and thus accepts the offer.'"). Indeed, respondents themselves believed they had accepted the terms of the warranty, as they both filed claims under that warranty—with Jonesburg even receiving benefits under the warranty—before changing their tune and filing this lawsuit. *See* App.4.

As for consideration, respondents received the shingles in exchange for their promise and, in any event, the arbitration provision was bilateral. *See generally State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 858 (Mo. 2006).

Missouri courts undoubtedly would have enforced this agreement had it been for anything other than to arbitrate. The FAA's non-discrimination principle thus required the court below to order arbitration. The court below had other ideas. Harboring anti-arbitration hostility, but aware that outright refusing to enforce the arbitration agreement would invite summary reversal, *see, e.g.*, *Marmet Health Care*, 132 S. Ct. at 1204, the court below devised a different strategy. Instead of admitting that it was refusing to enforce the arbitration agreement, the court claimed that no agreement had arisen in the first place because respondents had not read the agreement

before manifesting their assent. Like other state courts that recently have employed this strategy, *see infra* Part II, the court below apparently believed that the FAA's non-discrimination policy was inapplicable so long as a state court purports to base its decision on defects in contract "formation" rather than defects pertaining to contract enforceability.

That rationale is plainly pretextual, designed to mask anti-arbitration hostility. Absolutely nothing in Missouri law suggests that Missouri courts in any other context would refuse to enforce a contract because a party later claimed he did not read it before manifesting his assent. To the contrary, the Supreme Court of Missouri has repeatedly explained that "failure to read or understand a contract is not … a defense to the contract." *Chochorowski v. Home Depot U.S.A.*, 404 S.W.3d 220, 228 (Mo. 2013); *accord 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, standing alone, a defense to the contract."); *Sanger v. Yellow Cab Co.*, 486 S.W.2d 477, 480-81 (Mo. 1972); *Repair Masters Constr., Inc. v. Gary*, 277 S.W.3d 854, 858 (Mo. Ct. App. 2009); *Dorsch v. Family Med., Inc.*, 159 S.W.3d 424, 436 (Mo. Ct. App. 2005).

Black-letter contract law confirms that principle. As this Court observed 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, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written." *Upton v. Tribilcock*, 91 U.S. 45, 50 (1875); *accord* Restatement

(Second) of Contracts §157 cmt.b (1981) ("[O]ne who assents to a writing is presumed to know its contents and cannot escape being bound by its terms merely by contending that he did not read them."); Richard A. Lord, 1 *Williston on Contracts* §4:19 (4th ed. 2007); Joseph M. Perillo, 7 *Corbin on Contracts* §29.8 (rev. ed. 2002).

Nor do the rules somehow change when the offer is printed on or included with product packaging. Indeed, just a few years ago, the Missouri courts had no trouble enforcing a forum-selection clause (as opposed to an arbitration clause) that appeared in the online equivalent of product packaging. *See Major v. McCallister*, 302 S.W.3d 227 (Mo. Ct. App. 2009). In that case, the forum-selection clause was accessible via hyperlink on the defendant's website. Although the plaintiff had not clicked the link or read the forum-selection clause, the Missouri Court of Appeals enforced the clause without hesitation, confirming that Missouri recognizes the "'standard contract doctrine'" that "'when 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.'" *Id.* at 230.

Courts around the country recognize the same "standard contract doctrine," regularly enforcing contracts printed on product packaging after customers keep and use the products. *See, e.g.*, *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 125 (2d Cir. 2012); *Cicle v. Chase Bank USA*, 583 F.3d 549, 555 (8th Cir. 2009); *Ariz. Cartridge Remfrs. Ass'n v. Lexmark Int'l, Inc.*, 421 F.3d 981, 987 (9th Cir. 2005);

Hill, 105 F.3d at 1149; *cf. Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-94 (1991).[2] Indeed, several federal courts have enforced the very arbitration agreement at issue here, correctly holding that TAMKO's customers accepted the arbitration agreements by opening and retaining the shingles. *See Am. Family Mut. Ins. Co. v. TAMKO Bldg. Prods., Inc.*, No. 15-02343, 2016 WL 1460322, at *3 (D. Colo. Apr. 13, 2016); *Hoekman v. TAMKO Bldg. Prods., Inc.*, No. 14-01581, 2015 WL 9591471, at *5 (E.D. Cal. Aug. 26, 2015); *Krusch v. TAMKO Bldg. Prods., Inc.*, 34 F. Supp. 3d 584, 590 (M.D.N.C. 2014).[3]

These courts recognize that when contractual provisions are printed on or included with product packaging, "the reasonable purchaser will understand that unless the goods are returned, he or she takes them subject to those provisions." *Schnabel*, 697 F.3d at 125. Accordingly, as long as the buyer has an opportunity to review the terms proposed by the seller (and the terms are not unconscionable), courts routinely enforce terms printed on product packaging.

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[2] Federal courts in Missouri, applying Missouri law, regularly enforce arbitration clauses included in product packaging or its online equivalent. *See Karzon v. AT&T, Inc.*, No. 13-2202, 2014 WL 51331, at *4 (E.D. Mo. Jan. 7, 2014); *Pierce*, 2012 WL 5992730, at *3; *Pleasants v. Am. Express Co.*, No. 06-1516, 2007 WL 2407010, at *3 (E.D. Mo. Aug. 17, 2007), *aff'd*, 541 F.3d 853 (8th Cir. 2008).

[3] The district court in *American Family* acknowledged that its holding was in conflict with the Missouri Court of Appeals' decision in this case, but found "the analysis of the [Missouri] decision superficial and thus simply unpersuasive." 2016 WL 1460322, at *3 n.5.

In fact, this case was even easier than all the cases above, because respondents filed claims under the very warranty they now seek to disavow. Even if failing to read a contract could somehow vitiate assent, Missouri law is clear that parties may not "'assume the inconsistent position of affirming a contract in part by accepting or claiming its benefits, and disaffirming it in part by repudiating or avoiding its obligations, or burdens.'" *Dubail v. Med. W. Bldg. Corp.*, 372 S.W.2d 128, 132 (Mo. 1963); *accord Netco, Inc. v. Dunn*, 194 S.W.3d 353, 360 (Mo. 2006). Because respondents affirmed the warranty by seeking its benefits—and, in the case of Jonesburg, receiving benefits—Missouri law makes clear that they cannot now repudiate the warranty's arbitration provision. Nonetheless, ignoring yet another aspect of standard contract doctrine, the court below denied arbitration.

2. The state court's drastic departure from all of this standard contract doctrine confirms that its decision was driven by hostility to arbitration. The decision is therefore preempted by the FAA. That conclusion is not altered by the state court's ostensible reliance on contract *formation* rules rather than contract *enforceability* rules. The FAA declares arbitration agreements "valid, irrevocable, and enforceable." 9 U.S.C. §2. States courts do not have license to invent purported defects in contract formation that supposedly prevented a valid arbitration agreement from being formed. Preemption turns on substance, not labels, and a state court's attempt to cover its tracks by inventing a new contract formation rule does not change the substance of its decision one iota.

This Court said as much in *National Meat Ass'n v. Harris*, 132 S. Ct. 965 (2012). That case concerned the preemptive reach of the Federal Meat Inspection Act's regulations on the production of meat for human consumption. Respondents claimed that a California law prohibiting the *sale* of certain types of meat should not be preempted because the FMIA regulates only the antecedent *production* process. This Court rejected that argument, recognizing that the sales ban was simply a veiled attempt to regulate the production process. If the sales ban were not preempted, "then any State could impose any regulation on slaughterhouses just by framing it as a ban on the sale of meat produced in whatever way the State disapproved. That would make a mockery of the FMIA's preemption provision." *Id.* at 973.

So too here. If states could evade the FAA through the simple expedient of dressing up enforceability rules as formation rules, they would be able to "make a mockery of" the FAA's non-discrimination principle. For example, whereas this Court has held that the FAA preempts a state rule declaring arbitration clauses unenforceable unless they are printed in capital letters, *see Casarotto*, 517 U.S. at 687, the supposed loophole relied on by the court below would allow a state to declare individuals incapable of assenting to arbitration clauses unless the clauses are printed in capital letters.

The FAA is not so easily evaded. The preemption inquiry turns not on what the state court says it is doing, but rather on what the state court actually does. That is why this Court did not take the Oklahoma Supreme Court at its word when it claimed

to rely on "adequate and independent state grounds" to deny arbitration. *Nitro-Lift*, 133 S. Ct. at 502. Instead, the Court looked past that label and determined that "the court's reliance on Oklahoma law was not 'independent'" because "it necessarily depended upon a rejection of [a] federal claim." *Id.* Likewise, the Court did not take the California Court of Appeal at its word when it claimed to apply neutral interpretive principles to deny arbitration. *Imburgia*, 136 S. Ct. at 471. Instead, the Court closely examined California law and found "nothing" suggesting the California courts would apply the same principles outside the context of arbitration. *Id.* at 469-70.

Indeed, this Court already has rejected the notion that the FAA is powerless until the existence of a contract is established beyond doubt. In *Buckeye Check Cashing,* respondents argued that the word "contract" in section 2 of the FAA limited that section's application to contracts that had already been determined valid under state law. 546 U.S. at 447. Respondents thus claimed that whether an agreement was void *ab initio* must be resolved by a court instead of an arbitrator because "an agreement void *ab initio* under state law is not a 'contract' … to which §2 can apply." *Id.* This Court rejected that argument outright, holding that the FAA's coverage "obviously includes putative contracts." *Id.* at 448; *see also Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 640 (1999) (using term "putative contract" to describe an offer that has not yet been accepted).

In sum, while state law certainly governs the threshold question of whether the parties agreed to arbitrate, that does not support the extraordinary

proposition that the FAA has absolutely nothing to say about state efforts to make it harder to form a valid arbitration agreement than to form any other type of agreement. To the contrary, the FAA applies the same way in this context as it does in any other: It preempts rules that single out arbitration agreements for unfavorable treatment. Because the decision below created a prerequisite to assent that does not apply to non-arbitration agreements, it is preempted.

II. This Court's Intervention Is Needed To Stem The Tide Of State Court Decisions That Use Novel "Contract Formation" Rules To Deny The Validity Of Arbitration Agreements.

Unfortunately, the decision below is but one instance of a growing trend among state courts. State courts are increasingly refusing to enforce arbitration agreements under the pretense that no agreement arose in the first place. This new strategy is transparently and indisputably aimed at undermining arbitration, but it has nonetheless gained traction because state courts are operating under the incorrect assumption that they can circumvent the FAA so long as they purport to apply state contract formation law. Seemingly freed of the obligation to place arbitration on "equal footing" with other methods of dispute resolution, *Concepcion*, 563 U.S. at 339, state courts across the country are undermining arbitration by purporting to apply state-law rules of assent, consideration, and capacity.

Indeed, this is not even the first time the Missouri courts have refused to enforce an arbitration agreement by manufacturing a "defect" in contract formation. In *Baker v. Bristol Care, Inc.*, 450 S.W.3d

770 (Mo. 2014), a narrow majority of the Missouri Supreme Court refused to enforce an arbitration agreement between an employee and his employer, ostensibly because their agreement lacked consideration. *Id.* at 777. The dissenting justices denounced the majority's effort to circumvent the FAA: "Decades of decisions … outside the context of arbitration promises show that [the majority's opinion] is, in reality, merely the application of a special rule regarding consideration in employment contracts involving arbitration promises." *Id.* at 792 (Wilson, J., dissenting). As the dissenters explained, "state law principles that purport to apply special rules for the formation of contracts containing promises to arbitrate are preempted by, and must be disregarded under, the FAA." *Id.* at 778-79.

The West Virginia courts have deployed the same tactic, most notably to sidestep this Court's decision in *Marmet Health Care*, 132 S. Ct. 1201. In *Marmet*, family members of former nursing home patients filed wrongful death suits against the nursing homes. *Id.* at 1203. The family members had all signed arbitration agreements on behalf of the patients, but the West Virginia courts refused to enforce them, citing public policy against enforcing "an arbitration clause in a nursing home admission agreement." *Id.* This Court summarily reversed, holding that West Virginia's purported public policy against enforcement was "contrary to the terms and coverage of the FAA." *Id.* at 1204.

The West Virginia Supreme Court of Appeals then pivoted to a new tactic: refusing to enforce arbitration agreements under the guise of applying state rules of

contract formation. Less than a year after *Marmet*, West Virginia's high court again confronted a wrongful death suit filed by the daughter of a former nursing home patient. *State ex rel. AMFM, LLC v. King*, 740 S.E.2d 66 (W. Va. 2013). As in *Marmet*, the daughter had signed an arbitration agreement on her mother's behalf and the nursing home had moved to compel arbitration. *Id.* at 70-71. In defiance of this Court's decision in *Marmet*, the West Virginia court again refused to enforce the arbitration agreement, this time purportedly because the daughter lacked authority to enter into arbitration agreements on her mother's behalf. *See id.* at 76. This, even though the court had expressed no concern during the *Marmet* litigation about the authority of children to enter arbitration agreements on behalf of their incapacitated parents, and even though the court continued to express no doubts about the daughter's authority to enter into other, non-arbitration contracts on her mother's behalf. According to the West Virginia court, the daughter had the authority to make life-or-death health care decisions on behalf of her mother, but no authority to agree to arbitration.

The Supreme Court of Kentucky followed West Virginia's lead, holding that a nursing home patient's attorney-in-fact lacked authority to waive the patient's "divine God-given right" to a jury trial. *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306, 329 (Ky. 2015). Three justices dissented at length, laying bare the majority's effort to circumvent the FAA: "[T]he express purpose of the rule the majority pronounces" is to "do indirectly" what "the United States Supreme Court has made absolutely clear [that] state law cannot do directly—disfavor

arbitration." *Id.* at 354 (Abramson, J., dissenting). The dissenters insisted (quite rightly) that the majority opinion "singles out arbitration agreements for disfavored treatment in the same vein as the statutes and judicially-created rules stricken by the United States Supreme Court, particularly … in *Marmet Health Care*." *Id.* at 345. The same pattern has repeated in South Carolina. *See Coleman v. Mariner Health Care, Inc.*, 755 S.E.2d 450, 457 (S.C. 2014) (Toal, J., dissenting) ("I recognize that the [capacity] defense asserted here … is a generally applicable defense to all contracts; however, the way the majority applies this defense 'takes its meaning precisely from the fact that a contract to arbitrate is at issue.'").

Meanwhile, the Supreme Court of Arkansas has refused to enforce multiple arbitration agreements on the dubious grounds that the agreements never arose for lack of "mutuality of obligation." *See, e.g.*, *Alltel Corp. v. Rosenow*, 2014 Ark. 375 (Ark. 2014). Just last month, it declared itself free to ignore the FAA because "this court considers in the first instance the doctrine of mutuality of obligation to determine whether there is a valid agreement to arbitrate." *Bank of Ozarks, Inc. v. Walker*, 2016 Ark. 116 (Ark. 2016). It then pronounced, quite remarkably, that an arbitration agreement never arose because its fee-shifting provision applied against only one party. *Id.* Justice Goodson forcefully dissented, explaining that under Arkansas contract law, "mutuality of obligation does not mean that the promisor's obligation must be exactly coextensive with that of the promisee." *Id.* By holding otherwise in the context of an arbitration

agreement, the majority opinion "undermine[s] our basic principles of contract law." *Id.*

The enthusiasm with which state courts have embraced this tactic suggests the worst is yet to come. Without this Court's intervention, state courts will continue to undermine the FAA by inventing new and increasingly restrictive prerequisites to contract formation that apply only to arbitration agreements. These state-law rules imposing special burdens on the formation of arbitration agreements are every bit as destructive of the FAA as state-law rules that impose special burdens on enforceability. This Court's intervention is thus urgently needed, else state courts remain free to chip away at the FAA at their pleasure.

III. The Decision Below Threatens To Eliminate Arbitration Agreements From Retail Sales.

The decision below is not only wrong; it poses a grave threat to the continued vitality of arbitration in Missouri. Countless retail products are sold subject to terms and conditions—including arbitration provisions—printed on or included with product packaging. *See, e.g.*, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1383 (2014) (noting contract terms "communicated to consumers through notices printed on the toner-cartridge boxes"). Buyers and sellers alike benefit from agreements formed via product packaging, as the reduced transaction costs allow sellers to reduce their prices. *See Carbajal v. H & R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004); *cf. Carnival Cruise Lines*, 499 U.S. at 593-94 ("[P]assengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares."). Customers

further benefit because they can read the terms at home and on their own time (or choose not to read them at all), rather than being forced to examine pages of contractual boilerplate while in the store. As Judge Easterbrook explained in the context of a transaction consummated via telephone:

> Practical considerations support allowing vendors to enclose the full legal terms with their products. Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff … had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rage over the waste of their time.… Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device. Competent adults are bound by such documents, read or unread.

Hill, 105 F.3d at 1149.

The decision below would severely hamper the ability of sellers in Missouri to utilize arbitration in disputes with their customers. The decision holds, ostensibly as a matter of Missouri law, that a seller cannot enforce an arbitration provision on product packaging unless it can somehow prove that its customer *actually read* the arbitration provision before manifesting his assent (*i.e.*, before purchasing and using the product). That is a truly colossal evidentiary hurdle. Companies that would prefer to

arbitrate disputes with their customers could no longer rely on form contracts to effectuate that preference; they would instead be forced to undertake the herculean task of gathering evidence that each and every one of their customers has read the arbitration provision. Satisfying that burden would likely require the cooperation of hundreds of retailers, many of whom might decline to carry a product (or would demand it at a lower price) if carrying the product comes with the obligation to, say, read the terms of service aloud to each purchaser. And even if manufacturers were able to locate willing retailers (not to mention customers willing to sit through lengthy recitations of contract terms), "oral recitation would not avoid customers' assertions (whether true or feigned) that the clerk did not read term X to them, or that they did not remember or understand it." *Id.* "Such a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution that arbitration … was meant to secure." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013).

The inevitable result is that manufacturers and other sellers of retail products in Missouri will be forced to give up on arbitration. Faced with the evidentiary hurdle of proving that a customer actually read an arbitration provision, the increased costs of finding retailers willing to assist in those efforts, and the competitive disadvantage vis-à-vis rival manufacturers who do not require customers to listen to a recitation of contract terms before purchase, manufacturers will be left no choice but to abandon arbitration clauses entirely. That result would destroy the prospect of speedy resolution that the FAA

was meant to protect, and it would obliterate sellers' ability to secure an arbitral forum for disputes with their customers.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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