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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

Respondents do not dispute that the Federal Arbitration Act prevents state courts from subjecting arbitration agreements to more onerous rules of contract formation. Yet they defend the decision below even though that is precisely what it accomplishes. According to respondents, the decision below correctly held that they did not enter into enforceable arbitration agreements with petitioner because they lacked "reasonable notice" of the terms of those agreements when they manifested their assent. And respondents claim to have lacked "reasonable notice" because petitioner supplied the arbitration agreement on the packaging of its products instead of affirmatively asking respondents for their assent. Respondents do not and cannot deny, however, that Missouri courts routinely deem the acts of keeping and using a product sufficient to manifest assent to contractual terms printed on its packaging—in other words, under Missouri law, the packaging itself supplies all the "notice" to which the purchaser is entitled. Thus, while respondents accept the premise (as they must) that the FAA preempts the application of special rules that make it harder to form an arbitration agreement than to form other contracts, they ultimately concede (as they must) that the decision below applies just such a rule. Respondents should not be allowed to have it both ways.

Unfortunately, this is but the latest in a string of cases employing the same tactic to evade the preemptive force of the FAA. As evidenced by the scathing dissents issued by state supreme court justices across the country, the decision below is just

one of many in which state courts have circumvented the FAA by applying special rules that make forming an arbitration agreement more difficult than forming any other contract. And unless and until this Court confirms that courts may not evade their obligation to enforce arbitration agreements by simply writing those agreements out of existence, decisions like this one will only embolden state courts to do more of the same. Accordingly, the Court should grant certiorari and put an end to this troubling trend.

I. The Decision Below Is Irreconcilable With The Federal Arbitration Act.

The FAA's animating principle is one of non-discrimination: States may not single out arbitration agreements for special disfavored treatment. Any state rule disfavoring arbitration agreements vis-à-vis other contracts is therefore preempted by the FAA. *See, e.g.*, *Preston v. Ferrer*, 552 U.S. 346, 353 (2008). This non-discrimination principle sweeps broadly and applies no matter how creatively states effectuate their anti-arbitration hostility. For that reason, this Court has made clear that the FAA preempts state laws that facially discriminate against arbitration, *see Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996), judicial decisions that apply facially neutral laws in a manner hostile to arbitration, *see DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015), and the variety of other devices that states or their courts have used to avoid enforcing arbitration agreements, *see Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500 (2012) (per curiam). And because the same latent hostility to arbitration that prompted the FAA gives state courts continuing incentives to apply more demanding rules

to arbitration contracts, enforcing this non-discrimination principle requires vigilance from this Court.

In direct defiance of those principles, the court below refused to enforce an arbitration agreement on grounds that would not prevent the enforcement of any other type of contract. In Missouri, as elsewhere, it is "standard contract doctrine" that opening a package manifests acceptance of the terms printed on the package, even if the buyer never actually reads those terms. *See Cicle v. Chase Bank USA*, 583 F.3d 549, 555 (8th Cir. 2009); *Major v. McCallister*, 302 S.W.3d 227, 230 (Mo. Ct. App. 2009). Applying that rule fairly and squarely to arbitration contracts would make this an easy case: Respondents plainly entered into valid and enforceable arbitration agreements with petitioner. Respondents purchased and received 366 bundles of shingles, and every single bundle had the arbitration provision printed on its outside packaging. Mo.App.55-56.[1] That provision stated that "[e]very claim, controversy, or dispute of any kind whatsoever … relating to or arising out of the shingles or this limited warranty shall be resolved by final and binding arbitration." Pet.4. Respondents opened and used the shingles, thereby accepting the terms of the warranty and the arbitration provision under generally applicable Missouri contract law. Pet.16.

Indeed, there is little doubt that if *respondents* had sought to enforce the substantive terms of the warranty to their *benefit*, Missouri courts would have

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

enforced the warranty against petitioner. But because petitioner sought to enforce the *arbitration* provision against respondents, the court below cast aside "standard contract doctrine" and claimed that no agreement had ever been formed. The court justified its decision by reasoning that respondents could not have accepted the arbitration agreement because they had not read it and thus "were not aware" of it when they decided to keep the shingles. Pet.App.7; *see id.* at 8 ("[T]hey became aware of the warranty and its terms only *after* they filed their claim."). But the question here and under standard Missouri contract law is not whether respondents bothered to read the packaging before removing it and accepting petitioner's products. Under settled law, all that matters is that they kept and used the products, which they unquestionably did. In fact, they not only kept and used the products, but they even sought benefits under the very warranty they now seek to disavow. Pet.20.

Respondents conspicuously decline to defend the decision below on its own terms. Instead, they insist that what the court really meant was that respondents "did not have *reasonable notice* that they'd be agreeing to arbitration … by keeping the shingles and having them installed." Opp.16 (emphasis added); *see also* Opp.i, 1, 2, 3, 14-16, 23, 24, 25, 37 (same). That presumably would come as quite a surprise to the court below, which (as respondents quietly concede in a footnote, *see* Opp.16 n.3) never once in the entirety of its opinion used the word "notice," much less the phrase "reasonable notice." *Cf. Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 814-15 (2011) ("[w]e take the Court of Appeals at its word," notwithstanding respondents' "wishful

interpretation" of what the court "meant to say"). It also would come as a surprise to anyone who read respondents' brief in the court below, which never once argued that they should be excused from the arbitration agreement for lack of "reasonable notice." *See* Br. for Respondents (Mo. Ct. App. Mar. 19, 2015). That presumably explains why the only purported problem that the court below actually identified was respondents' professed lack of *actual* knowledge of the arbitration agreement to which they manifested their assent.

But setting aside that rather glaring problem with respondents' post-hoc arguments, their efforts to resuscitate the decision below succeed only in underscoring its incompatibility with the FAA. After all, the whole point of the rule that keeping and using a product evinces assent to any contractual terms printed on its packaging is that the packaging provides all the "notice" to which the purchaser is entitled. A person has reasonable notice that his conduct will constitute acceptance if "a person of ordinary intelligence" would draw that inference. Restatement (Second) of Contracts §19(2) (1981); *see* Opp.13. And under well-settled law both in Missouri and elsewhere, a person of ordinary intelligence is deemed to understand that opening, keeping, and using a product binds him to the terms that are printed on its packaging. *See McCallister*, 302 S.W.3d at 230; *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 125 (2d Cir. 2012) ("[T]he reasonable purchaser will understand that unless the goods are returned, he or she takes them subject to those provisions."). Thus, respondents' belated claim that they lacked "reasonable notice" is just another way of resisting the

premise that arbitration agreements are subject to the same rule as any other agreement printed on a product's packaging: If you keep the product, then you are bound by the terms of that agreement.

Respondents fare no better with their efforts to distinguish this case on its facts. They first claim that the record evidence is insufficient to prove notice because "[t]here's no shingle wrapper in the record." Opp.15. Respondents neglect to mention, however, that petitioner attached to its motion to compel arbitration "[t]rue and accurate copies of the limited warranties," which include the arbitration provision "contained on every package of TAMKO Heritage Series Shingles, including the shingles purchased by plaintiffs." Mo.App.55-57, 65-66, 71-72; *see also* Pet.App.4-5. Respondents never disputed that the copy of the arbitration provision in the record accurately reflects the arbitration provision printed on each and every package of petitioner's shingles. Nor could anything but their own self-serving say-so substantiate any suggestion that all 366 of their bundles of shingles somehow lacked the packaging that comes standard on every package that petitioner sells.

Respondents alternatively suggest that the problem is not that their shingles lacked the standard packaging, but that they never *personally* saw the arbitration agreement because their *contractors* are the ones who opened the packages. *See* Opp.15 ("[S]hingles are typically installed by contractors, and neither Hobbs nor the Church officials saw the shingles before they were installed."). Respondents have never before mentioned contractors at any stage

of this litigation: not in their complaint, not in their trial court briefs, and not in their appellate court briefs. Nor did the decision below.[2] Respondents cannot plausibly seek to defend the decision below by pointing to purported facts that the court was never even asked to consider, let alone to find. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 39 (1989) (absent exceptional circumstances, respondents cannot defend judgment on a ground that "has not been raised below").

At any rate, respondents had good reason for declining to press this novel argument below: because the involvement of contractors would make no legal difference whatsoever. It is "[a] fundamental principle in agency law" that a principal is bound by any "valid contract … entered into by an agent." *Hamilton Music, Inc. v. Gordon A. Gundaker Real Estate Co.*, 666 S.W.2d 840, 845 (Mo. Ct. App. 1984); *see also Sequa Corp. v. Cooper*, 128 S.W.3d 69, 76 (Mo. Ct. App. 2003) ("Knowledge of an agent with regard to any business over which his authority reaches is notice, or knowledge, of the principal."). Thus, whether it was respondents or their contractors who manifested assent by opening the packages and using the shingles, the result remains the same: Under ordinary principles of contract law, those actions bound respondents to the terms of the arbitration

[2] The only mention of a contractor in the proceedings below was when the trial court judge recounted her own personal experience that "when a roof is put on," "my contractor buys the shingles," and "I never see anything." Tr. of Mot. Hr'g at 12 (Mo. Cir. Ct. July 29, 2014).

agreement. *See, e.g.*, *Krusch v. TAMKO Bldg. Prods., Inc.*, 34 F. Supp. 3d 584, 589-90 (M.D.N.C. 2014).

In the end, then, there is no escaping the conclusion that the decision below is the product of the same impermissible hostility toward arbitration that gave rise to the FAA. The only facts that should have mattered were not in dispute: The arbitration provision was printed on each package of shingles, and respondents (or their agents) opened the packages and used the shingles. Under settled Missouri law, those two undisputed facts—an offer and an acceptance—establish the formation of a binding agreement. The state court's refusal to accept that those two undisputed facts gave rise to an *arbitration* agreement cannot be understood as anything other than an attempt to circumvent the preemptive force of the FAA by inventing a supposed defect in contract formation that would not be applied in any other context. Respondents' efforts to prove otherwise succeed only in confirming that they, too, seek to "singl[e] out arbitration provisions for suspect status" in violation of the FAA. *Casarotto*, 517 U.S. at 687.

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 no outlier. Across the country, state courts have repeatedly refused to enforce arbitration agreements under the pretense that no agreement arose in the first place. *See* Pet.23-27. Those courts, by relying on purported defects in contract formation—*e.g.*, assent, consideration, or capacity—believe they have found a

way to deny effect to arbitration agreements while sidestepping this Court's cases prohibiting arbitration-specific barriers to contract enforcement.

Respondents attempt to deny this trend by citing a handful of state court decisions enforcing arbitration agreements. *See* Opp.28-36. But the relevant question for purposes of certiorari is not whether state courts have refused to enforce *every* arbitration agreement, but whether the refusals that do occur result from the sound application of generally applicable legal principles, or from hostility toward arbitration. While respondents insist that the latter category comprises a null set, members of both this Court and state supreme courts have disagreed.

At the outset, the proposition that state courts have a tendency to disregard the FAA is hardly a novel one. This Court has summarily reversed several state court decisions for doing exactly that. In *Nitro-Lift*, summary reversal was warranted because "the state court ignored a basic tenet of the Act's substantive arbitration law." 133 S. Ct. at 501. In *KPMG LLP v. Cocchi*, the state court refused "to give effect to the plain meaning of the Act." 132 S. Ct. 23, 26 (2011) (per curiam). And in *Marmet Health Care Center, Inc. v. Brown*, the state court's "interpretation of the FAA was both incorrect and inconsistent with clear instruction in the precedents of this Court." 132 S. Ct. 1201, 1203 (2012) (per curiam). Only by ignoring these decisions can respondents suggest that state courts invariably comply with the FAA. *See* Opp.31-36.

Respondents further excoriate petitioner for not "substantiating" its "charge" that state courts are

discriminating against arbitration agreements under the guise of state law rules of contract formation. Opp.32. But that same "charge" has been levied by numerous dissenting justices on the very state courts in which respondents have such unshakable faith. In *Extendicare Homes, Inc. v. Whisman*, for instance, the Supreme Court of Kentucky held that a nursing home patient's attorney-in-fact had authority to enter into any kind of contract *except* an agreement to arbitrate. 478 S.W.3d 306 (Ky. 2016), *pet. for cert. filed sub nom. Kindred Nursing Ctrs. Ltd. P'ship v. Clark,* No. 16-32 (filed July 1, 2016).[3] The majority claimed that the FAA was not implicated because "the disputes are about the formation of the arbitration agreements; and specifically, whether the agent purporting to sign the arbitration agreement on behalf of his principal had the authority." *Id.* at 320.

The principal dissent criticized the majority's "dislike of federally imposed arbitration," and correctly pointed out that the majority's holding that the parties never formed an agreement to arbitrate "singles out arbitration agreements for disfavored treatment." *Id.* at 344-45, 355 (Abramson, J., dissenting). Several other state supreme court justices have identified the same problem—*i.e.*, the very problem that respondents say does not exist. *See, e.g.*, *Schumacher Homes of Circleville, Inc. v. Spencer*, 774 S.E.2d 1, 14 (W. Va. 2015) (Loughry, J.,

[3] The petition in *Kindred Nursing Centers* presents similar issues to those presented here. Accordingly, if the Court grants certiorari in that case, it should either also grant this case and consider them together or hold this case until it issues a decision in *Kindred Nursing Centers*.

dissenting) ("Once again, a majority of this Court reveals its biases and blatant 'judicial hostility' toward arbitration."), *cert. granted, judgment vacated*, 136 S. Ct. 1157 (2016); *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 792 (Mo. 2014) (Wilson, J., dissenting) ("[The majority's holding] is, in reality, merely the application of a special rule regarding consideration in employment contracts involving arbitration promises."); *Coleman v. Mariner Health Care, Inc.*, 755 S.E.2d 450, 457 (S.C. 2014) (Toal, C.J., dissenting) ("[T]he majority's interpretation is inconsistent with the clear instructions of the Supreme Court.").

"State courts rather than federal courts are most frequently called upon to apply the Federal Arbitration Act," so it is "a matter of great importance … that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift*, 133 S. Ct. at 501. Yet instead of discharging their duty to faithfully apply federal law, state courts are increasingly taking advantage of this latest "clever contribution" to the genre of FAA evasion. *Whisman*, 478 S.W.3d at 355 (Abramson, J., dissenting). Only this Court's intervention can put an end to that troubling practice before it leaves contracting parties without a clue as to whether they can count on their arbitration agreements being treated as the valid and enforceable contracts that they are. This Court should grant certiorari or summarily reverse, as it has done in other cases evincing such blatant disregard for the equal treatment of arbitration agreements that the FAA demands.

CONCLUSION

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

Respectfully submitted,

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