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**

## PETITIONER'S SUPPLEMENTAL BRIEF

PAUL D. CLEMENT
*Counsel of Record*
ERIN E. MURPHY
MICHAEL D. LIEBERMAN
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

*Counsel for Petitioner*

May 16, 2017

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

**Cases**



**Statute**

## SUPPLEMENTAL BRIEF

The question presented in this case 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." Pet.i. This Court's decision in *Kindred Nursing Centers L.P. v. Clark*, No. 16-32 (May 15, 2017), squarely answers that question in the negative, holding that a state-law rule "selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made." Slip op. 8. Accordingly, the Court should grant the petition, vacate the decision below, and remand to the Missouri courts to reconsider in light of *Kindred Nursing* and enforce the parties' arbitration agreements.

In *Kindred Nursing*, the Kentucky courts below held that a power of attorney did not confer authority to enter into arbitration agreements because it did not specifically mention arbitration. The respondents defended that decision by arguing that the FAA "applies only *after* a court has determined that a valid arbitration agreement was formed." Slip op. 8. This Court disagreed, holding that the FAA "cares not only about the 'enforcement' of arbitration agreements, but also about their initial 'validity'—that is, about what it takes to enter into them." *Id.* (alterations omitted). Any other rule, the Court explained, "would make it trivially easy for States to undermine the Act." *Id.* Because the state court's

decision "specially impeded" the formation of arbitration agreements, this Court reversed that decision to the extent it relied on an arbitration-specific rule of contract formation. *Id.* at 9-10.

That is precisely what happened in this case. Here, respondents purchased, opened, and used 366 bundles of roofing shingles manufactured by TAMKO. Printed on the outside of each bundle was an arbitration provision stating that "[e]very claim, controversy, or dispute … relating to or arising out of the shingles or this limited warranty shall be resolved by final and binding arbitration." Pet.4. In Missouri, as elsewhere, "standard contract doctrine" holds that opening a package manifests acceptance of the terms printed on that package, even if the buyer never actually reads the terms. Pet.15-20; *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); *Citibank (S.D.), N.A. v. Wilson*, 160 S.W.3d 810, 813 (Mo. Ct. App. 2005). Thus, when respondents opened the packages of shingles, they accepted the terms of the arbitration provision under generally applicable Missouri contract law.

Because Missouri courts would have enforced those agreements had they been for anything other than to arbitrate, the FAA's non-discrimination principle required the court below to grant TAMKO's motion to compel arbitration. Pet.11-15; *see AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). The court below nonetheless refused to do so. Relying on the misguided premise that the FAA is inapplicable when a state court bases its decision on defects in contract *formation* rather than defects

pertaining to contract *enforceability*, the state court created an arbitration-specific rule of contract formation and held that no agreement ever was formed because respondents did not read the arbitration provision before manifesting their assent. Pet.6-8. That rationale was plainly pretextual, as nothing in Missouri law suggests that Missouri courts in any other context would refuse to enforce a contract because a party claimed he did not read it.

In its petition, TAMKO argued that the state court's application of an anti-arbitration rule violated the FAA, notwithstanding that court's ostensible reliance on rules of contract formation rather than rules of contract enforceability. Pet.20-23. The FAA, TAMKO argued, declares arbitration agreements "valid, irrevocable, and enforceable," 9 U.S.C. §2, and thus prohibits state courts from "invent[ing] purported defects in contract formation that supposedly prevented a valid arbitration agreement from being formed." Pet.20. Any other rule would allow states "to make a mockery of the FAA's non-discrimination principle" simply by "dressing up enforceability rules as formation rules." Pet.21.

That is exactly the conclusion this Court reached in *Kindred Nursing*, making clear that state courts may not circumvent the preemptive force of the FAA by inventing arbitration-specific burdens to forming valid agreements to arbitrate. Yet that is precisely what the court below tried to do, holding that respondents did not agree to arbitrate because they did not read the arbitration provisions—even though generally applicable Missouri law makes clear that failure to read the terms of a contract, signed or

otherwise, is not grounds for invalidation. Just like the state court in *Kindred Nursing*, the court below violated the FAA by applying an arbitration-specific rule of contract formation that is not applied in any other context. Accordingly, this Court should grant the petition, vacate the decision below, and remand for the Missouri courts to reconsider in light of *Kindred Nursing* and enforce the arbitration agreements.

## CONCLUSION

For the foregoing reasons, this Court should grant, vacate, and remand.

Respectfully submitted,

PAUL D. CLEMENT
*Counsel of Record*
ERIN E. MURPHY
MICHAEL D. LIEBERMAN
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

*Counsel for Petitioner*

May 16, 2017