

No. _____

In the
Supreme Court of the United States

CHUCK WILLIS,
Petitioner,
v.

TOWER LOAN OF MISSISSIPPI, LLC,
Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Ragab v. Howard*, 841 F.3d 1134 (10th Cir. 2016), the Tenth Circuit determined that two parties did not have a meeting of the minds with respect to arbitration due to four discrepancies between six agreements. Here, the Fifth Circuit determined that two parties did have a meeting of the minds with respect to arbitration despite seven discrepancies between two agreements. In its split decision, the Fifth Circuit relied heavily on now Justice Gorsuch's dissent in *Ragab v. Howard* and explained the “baseline intent to arbitrate” overcame the seven conflicts. Thus, the questions presented are:

1. If a party seeking to compel arbitration provides two arbitration agreements that differ as to the number of arbitrators, the selection of arbitrators, the notice required to arbitrate, the location of the arbitration, who pays the costs of arbitration, who would be entitled to attorneys' fees, and when arbitration need not be initiated, have the parties entered into an agreement that is sufficiently definite to enforce?; and
2. Does the reliance of the Fifth Circuit on the “baseline intent to arbitrate” elevate enforcement of purported contracts of arbitration above other contracts with multiple, material discrepancies?

**PARTIES TO THE PROCEEDING AND
RULE 29.6 STATEMENT**

The parties to the proceeding are those identified in the case caption. Petitioner is not a corporation, but on information and belief, believes the following entities may have an ownership interest in Tower Loan of Mississippi, LLC: Prospect Capital Corporation, which on information and belief, owns First Tower Holdings of Delaware, an owner of First Tower Finance Company LLC, an owner of First Tower, LLC, the owner of Tower Loan of Mississippi, LLC.

RULE 14.1(b)(iii) STATEMENT

The proceedings in state and federal trial and appellate courts related to this case are as follows:

Willis v. Tower Loan of Mississippi, LLC, dba Tower Loan of Crystal Springs, Adv. Proc. No. 17-00025-NPO (Bankr. S.D. Miss.) is the adversary proceeding initiated by Willis. An order was entered denying the motion to compel arbitration on December 12, 2017 as Docket 27. The bankruptcy case is *In re Willis*, Case No. 17-00160-NPO (Bankr. S.D. Miss.)

Tower Loan of Mississippi, LLC v. Chuck Willis, Case No. 3:17-cv-1024-CWR-FKB (S.D. Miss., April 11, 2018) is the district court record of the first appeal of Tower Loan. Docket 9 is the Order affirming the bankruptcy court's opinion.

Tower Loan of Mississippi, L.L.C. v. Chuck Willis, Case No. 18-60344 (5th Cir.) is the Fifth Circuit record of the appeal from the district court. On December 12, 2019, the Fifth Circuit entered an Order reversing the lower courts and compelling arbitration. On January 10, 2020, the petition on rehearing en banc was denied.

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OPINIONS BELOW

The opinion of the bankruptcy court was reported as *Willis v. Tower Loan of Miss., LLC (In re Willis)*, 579 B.R. 381 (Bankr. S.D. Miss. 2017).

The Fifth Circuit published its decision, and it is reported as *Tower Loan of Mississippi, LLC v. Willis (In re Willis)*, 944 F.3d 577 (5th Cir. 2019).

JURISDICTION

Chuck Willis seeks review of the December 12, 2019 opinion of the Fifth Circuit. Willis sought rehearing en banc, and his request was denied on January 10, 2020. Willis believes this Court has jurisdiction to hear this appeal via 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

9 U.S.C. § 2

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

On May 12, 2017, Chuck Willis filed an adversary proceeding against Tower Loan, alleging, *inter alia*, violations of the Truth in Lending Act.

Tower Loan filed a motion to compel arbitration, relying on an arbitration agreement pre-printed on the backside of the loan disclosures. Willis argued the existence of a second arbitration agreement, with different terms from the first, rendered no meeting of the minds between the parties. The differences between the agreements were:

1. the number of arbitrators,
2. the selection of arbitrators,
3. the notice required to arbitrate,
4. the location of the arbitration,
5. who pays the costs of arbitration,
6. who would be entitled to attorneys' fees and on what showing, and
7. when arbitration need not be initiated.

Tower Loan initially argued that the second agreement simply did not apply to this adversary proceeding. On appeal, Tower Loan argued it was not a party to the second agreement. Neither argument prevailed.

Tower Loan also argued the differences between the agreements were immaterial and inconsequential. The majority of the Fifth Circuit panel seemed to agree and described the differences as "procedural minutiae."

The basis for federal jurisdiction in the bankruptcy court, the court of first instance in this case, was

federal question jurisdiction pursuant to 28 U.S.C. § 1331, as the suit stemmed from the Truth in Lending Act.

REASONS FOR GRANTING THE WRIT

Chuck Willis believes two main reasons exist that would justify a grant a writ of certiorari in this matter. First, the circuit split between the Fifth Circuit and the Tenth Circuit on how to resolve multiple, specific conflicts between multiple arbitration provisions. Second, the Fifth Circuit's decision lowers the mutual assent requirements for contracts of arbitration – as opposed to any other contract – thus reaching beyond the intent and authority of the Federal Arbitration Act.

I. The Fifth Circuit decision creates a split from the 10th Circuit in *Ragab v. Howard*

In 2016, the 10th Circuit faced six agreements with conflicting provisions about arbitration. *Ragab v. Howard*, 841 F.3d 1134 (10th Cir. 2016). The conflicts involved, “(1) which rules will govern, (2) how the arbitrator will be selected, (3) the notice required to arbitrate, and (4) who would be entitled to attorneys’ fees and on what showing.” *Id.* at 1136.

As noted by Justice (then Judge) Gorsuch in his dissent, this was a commercial dealing where the Plaintiff “instructed his own counsel to draft *three* of [the six] agreements.” *Ragab* at 1139 (emphasis in original). Justice Gorsuch further reasoned: “Because the plaintiff asked for and received assent to three arbitration clauses he drafted and signed three others, all in a commercial setting and while represented by counsel, I just don’t see how he can now seriously claim

that he never intended to arbitrate..." *Id.* at 1141. The Tenth Circuit majority determined that its situation involved "multiple, specific, conflicting arbitration provisions, not one general or vague arbitration clause." *Id.* at 1138. Over Justice Gorsuch's dissent, the Tenth Circuit found no meeting of the minds due to the conflicts between the agreements. *Id.* at 1138.

In the present case, two arbitration agreements conflicted about seven terms. *Willis v. Tower Loan of Miss., LLC (In re Willis)*, 579 B.R. 381, 385-386 (Bankr. S.D. Miss. 2017). Neither agreement had a merger clause, or any other way to determine it would be superior to the other agreement where the dispute existed. *Id.* at 383-384. The bankruptcy court, after extensively reviewing the *Ragab* decision, found that the facts were analogous to *Ragab*, and concluded that there was no meeting of the minds. *Id.* at 388-390. The district court agreed.

The Fifth Circuit split its decision below. *Tower Loan of Mississippi, LLC v. Willis (In re Willis)*, 944 F.3d 577 (5th Cir. 2019). The majority concluded the differing terms were "over procedural details," but the parties were clear on "whether to arbitrate." *Id.* at 582. As such, the majority stated: "We will not shut our eyes to an agreement that demonstrates a baseline intent to arbitrate just because it contains inconsistent terms about procedural minutiae." *Id.* Accordingly, the majority reversed the decisions below and remanded for the trial court to issue an order compelling arbitration. *Id.* at 583.

The dissent believed the conflicting terms were "inappropriately downplay[ed] by the majority" as

differences over mere ‘procedural minutiae.’” *Id.* at 585. Further, the dissent asserted the “variances here are ... numerous and material, concerning terms that go to the heart of arbitration.” *Id.*

Two circuits – both with split, published decisions – have come to different conclusions about how to deal with multiple, conflicting arbitration provisions. In the Tenth Circuit and Fifth Circuit decisions, both the state laws being interpreted by federal courts require mutual assent. *Ragab* at 1137 (“Colorado requires evidence ‘that the parties agreed upon all essential terms’”), *Willis*, 944 F.3d at 581 (“Mississippi law requires... ‘mutual assent’...as to essential terms”). Accordingly, the split created by the decisions below does not come from a difference in the law – both states require parties agreeing on the essential terms – but rather from interpretation of that law by federal courts.

II. The Fifth Circuit decision improperly lowers the contractual threshold for arbitration agreements

As this Court has noted, the “basic purpose of the Federal Arbitration Act is to overcome courts’ refusals to enforce agreements to arbitrate.” *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270, 115 S. Ct. 834, 838 (1994)(internal citations omitted). In other words, the intent of the Federal Arbitration Act was to “place such agreements ‘upon the same footing as other contracts.’” *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474, 109 S. Ct. 1248 (1989) quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, 94 S. Ct. 2449 (1974).

The Fifth Circuit decision below is problematic because it creates a new standard for arbitration agreements, as opposed to any other agreement: the “baseline intent to arbitrate” standard. This standard erases the common law “mirror image” rule, which is one of the “grounds [that] exist at law” from 9 U.S.C. § 2 that revokes a contract. After all, 9 U.S.C. § 2 provides that “an agreement in writing to submit to arbitration...shall be valid...save upon such grounds exist at law or in equity for the revocation of any contract.” *Id.* The Fifth Circuit standard, if allowed to stand, would render arbitration agreements with conflicting terms exempt from the limitations already in existence under “law or equity.” Such a result reaches beyond the Federal Arbitration Act’s stated purpose of bringing arbitration agreements to the same footing as other agreements. But that is not all; such a result improperly lowers the formation threshold of arbitration agreements compared to *any* other contract.

Willis asks the Court to review this case so that the standard for mutual assent is not rendered different in arbitration cases as opposed to any other contractual formation case.

CONCLUSION

The Tenth Circuit and Fifth Circuit came to opposite conclusions on how to deal with multiple, specific, and conflicting terms in arbitration provisions. This Court can address and resolve that issue. Further, the Court can address the standard for mutual assent in the context of the Federal Arbitration Act, ensuring that Courts below do not treat potential arbitration agreements differently than any other contract. Willis

respectfully asks that the Court grant his petition for writ of certiorari.

Respectfully submitted,

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