No. 19-1165

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

RESPONDENT'S BRIEF IN OPPOSITION

PAUL H. STEPHENSON, III
MICHAEL O. GWIN
Counsel of Record
WATKINS & EAGER PLLC
400 E. Capitol Street
Jackson, MS 39201
601-965-1900
pstephenson@watkinseager.com
mgwin@watkinseager.com

Counsel for Respondent Tower Loan of Mississippi, LLC

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Chuck Willis ("Willis") acknowledges that the loan agreement he executed with Tower Loan of Mississippi, LLC ("Tower Loan") includes his agreement to arbitrate. But Willis asserts he also separately agreed to arbitrate with Tower Loan in a different contract and that "discrepancies" between his two arbitration agreements somehow means he has no agreement to arbitrate at all.

In "deciding whether the parties agreed to arbitrate," the courts look to the law of the "relevant state," applying "state-law principles [governing] the formation of contract." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 983, 944 (1995). Addressing "whether the parties agreed to arbitrate" this Court observed: "as with any other contract, the parties' intentions control. . . ." *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

Accordingly, the question presented is whether under Mississippi state-law contract principles, Willis – who twice contractually expressed his intent to arbitrate any dispute as to Tower Loan – can avoid his agreement to arbitrate because of non-essential inconsistencies between two separate arbitration agreements.

CORPORATE DISCLOSURE STATEMENT

Tower Loan of Mississippi, LLC is a wholly-owned subsidiary of First Tower, LLC, which is a wholly-owned subsidiary of First Tower Holdings, LLC. The majority owner of First Tower Holdings, LLC is First Tower Holdings of Delaware, LLC, which is owned by Prospect Capital Corporation, a publicly traded company.

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STATEMENT OF THE CASE

Chuck Willis borrowed $4,481.98 from Tower Loan. Willis executed a loan agreement which contained an arbitration provision. After declaring bankruptcy, Willis sued Tower Loan on his loan agreement, attaching it as an exhibit to his complaint. Willis claimed the loan agreement failed to make proper disclosures required under the Truth in Lending Act.

Tower Loan answered the complaint, attached a more complete copy of Willis' loan agreement and moved to compel arbitration. Willis responded to the motion with his affidavit admitting that he "entered into a loan agreement with Tower Loan," but stating that he was "unaware" that the loan agreement contained an arbitration provision.

The U.S. Bankruptcy Court conducted a hearing on the motion to compel arbitration. At the hearing Willis abandoned his "unaware" contention and for the first time presented another document, an endorsement to an insurance policy. The endorsement contained an arbitration provision. The insurance policy was not between Willis and Tower Loan, but between Willis and two insurance companies – American Federated Life Insurance Company and American Federated Insurance Company. Willis now argued, "we have two arbitration agreements," asserting this second arbitration agreement was "in the same packet of paperwork that came from Tower Loan." Willis claimed that this second arbitration agreement "makes it complicated to say there was ever actually a meeting of the minds."

Tower Loan rebutted pointing out that it was not a party or signatory to either the insurance policy or its endorsement. Tower Loan made clear it relied solely on the arbitration provision in the loan agreement, not the separate contract injected into these proceedings by Willis.

Even so, the insurance endorsement contained Willis' agreement to arbitrate "all disputes and claims between Borrower and the [insurance companies]" as well as other entities, including expressly Tower Loan. The differences between the two arbitration agreements do not relate to *whether* Willis agreed to arbitrate, only procedural details about *how* to arbitrate, correctly characterized by the Fifth Circuit as "innocuities." *Tower Loan of Mississippi, LLC v. Willis (In re Willis)*, 944 F.3d 577, 582 (5th Cir. 2019).

The Bankruptcy Court nevertheless denied the motion to compel based on these inconsistencies. The District Court simply adopted the Bankruptcy Court's opinion and, in the words of the Fifth Circuit, "added nothing on the merits." *Id*. at 579. After extensive briefing and oral argument, the Fifth Circuit reversed and directed the suit to arbitration, stating:

> The parties' intentions were unmistakable: They wished to arbitrate any dispute that might arise between them. Not once but twice they stated that any dispute arising from the loan Willis purchased should be arbitrated. Both agreements broadly cover "all claims and disputes between" Willis and Tower Loan, and both embrace any federal-law claim that

> Willis brings. The parties thus "evidently intended to enter into a binding contract." 1 WILLISTON § 4:21. We have more than enough to ascertain the terms. *See Leach*, 586 So.2d at 802.
>
> The conflicting provisions do not change that result. Though the agreements differ over procedural details, they speak with one voice about *whether to arbitrate.* We thus find good company in Justice Gorsuch: 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. *See Ragab*, 841 F.3d at 1139-41 (Gorsuch, J., dissenting). *Id.* at 582 (italics in original).

REASONS FOR DENYING THE PETITION

I. The issues presented involve solely the application of state contract law.

Whatever else can be said of Willis' indiscriminate use throughout his petition of contract catchphrases such as "meeting of the minds," sufficiently "definite," "material discrepancies," "mutual assent," "essential" terms and even the "mirror image" rule – all of these differing concepts are solely state-law contract principles. As required by the Federal Arbitration Act, the Fifth Circuit made clear that its extensive analysis of whether the parties created a valid contract to arbitrate was conducted "as a matter of Mississippi law." *Willis*, 944 F.3d at 580. The interpretation of an

arbitration agreement, including whether the parties agreed to arbitrate, is "ordinarily a matter of state law to which we defer." *Direct TV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015).

This Court consistently declines to review applications of state law by the Courts of Appeals. In an FAA case decided just last year, the Court adhered to its "normal practice" of deferring to the Courts of Appeals' "interpretation and application of state law." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1414 (2019), citing *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1149 (2017). "We generally accord great deference to the interpretation and application of state law by the courts of appeals." *Pembaur v. Cincinnati*, 475 U.S. 469, 484 n. 13 (1986). "This deference is warranted to render unnecessary review of their decisions in this respect and because lower federal courts are better schooled in and more able to interpret the laws of their respective States." *Expressions Hair Design*, 137 S. Ct. at 1149 (internal quotation marks omitted).

Willis contends that extracting his arbitration agreement from one contract and construing it together with his arbitration agreement from a different contract creates such "conflicts" between certain clauses that the net result is that no agreement to arbitrate was ever formed. Under Mississippi law, however, conflicting clauses create ambiguity and ambiguity is resolved by standard contract principles – not by invalidating the entire contract altogether. *Dalton v. Cellular South Inc.*, 20 So.3d 1227, 1232 (Miss. 2009) ("[W]hen the clauses are read together, the clauses

conflict. A conflict within the whole meets the very definition of ambiguity"; nevertheless upholding the contract under a "three-tiered approach to contract construction."). In the lower courts, Willis attacked contract validity by raising issues such as whether the contract was sufficiently "definite" and whether purported conflicting terms are "essential." The Fifth Circuit interpreted Mississippi law on precisely these issues, citing: "*Intrepid, Inc. v. Bennett*, 176 So.3d 775, 778-79 (Miss. 2015) ("Without a definite agreement as to the amount of rental, there can be no binding lease contract."); *Duke v. Whatley*, 580 So.2d 1267, 1273 (Miss. 1991) (refusing to enforce a first-refusal contract with a missing price); *Etheridge v. Ramzy*, 276 So.2d 451, 454 (Miss. 1973) (recognizing that time for payment isn't an essential term); *Smith v. Mavar*, 21 So.2d 810, 811 (Miss. 1945) (noting that time for performance isn't an essential term)." *Willis*, 944 F.3d at 582 n. 17 & 18. Willis conceded in the lower courts that under Mississippi law terms about "time for performance and time for payment" are "non-essential." *Id.* at 582. The Fifth Circuit correctly found the asserted "inconsistencies" to be "non-essential." *Id*.[1]

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[1] Both this Court and the Mississippi appellate courts have refused to invalidate an arbitration agreement based on speculative possible future disagreements by the parties over procedural matters (such as allocation and payment of costs, arbitrator selection and the like) which concern *how*, not *whether*, the arbitration will be conducted. *See Green Tree Financial Corp.–Ala. v. Randolph*, 531 U.S. 79, 91 (2000) ("The 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement."); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 274 (2009) ("Resolution of this question at

Of course, what is essential in analyzing *whether* the parties agreed to arbitrate is focusing on the contractual expression to arbitrate, not procedural matters about *how* the parties would arbitrate. "[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." *Mitsubishi Motors Corp.*, 473 U.S. at 626. The Fifth Circuit properly applied Mississippi law to the issue. This Court should decline the invitation to overturn the Fifth Circuit's well-considered interpretation of Mississippi contract law.

II. There is no "circuit split" of federal law. The questions presented rarely occur even under state law.

There can be no "circuit split" on issues of federal law when two separate federal courts are instead applying state-law contract principles from two different states. The fifty states have considerable variance in their interpretation and application of their respective precedent in developing state contract law. In applying the FAA this Court did not supplant each state's law on the fundamental determination of whether a contract was made. On the contrary, this Court has

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this juncture would be particularly inappropriate in light of our hesitation to invalidate arbitration agreements on the basis of speculation."); *Louisiana Extended Care Centers v. Bindon*, 180 So.3d 791, 801 (Miss. App. 2015) (declining to find an arbitration agreement unenforceable and refusing to "speculate as to the course of action [plaintiff] will take once this case is back" because of possible events regarding the future selection of an arbitrator).

instructed that, in general, when deciding whether the parties have agreed to arbitrate, courts "should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc.*, 514 U.S. at 944 (1995). Consistent with this Court's deference to the Courts of Appeals' interpretation of state law: "[T]he interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Volt Information Sciences, Inc. v. Board of Trustees for the Leeland Stanford, Jr. University*, 489 U.S. 468, 474 (1989). *See Direct TV, Inc.*, 136 S. Ct. at 468 ("[W]e must decide not whether [the state court's] decision is a correct statement of [state] law but whether (assuming it is) that state law is consistent with the Federal Arbitration Act."). Here, pursuant to the FAA, the Fifth Circuit correctly applied Mississippi contract law to find there was an agreement to arbitrate under the unique facts and documents in this case. By contrast, the Tenth Circuit in *Ragab v. Howard*, 841 F.3d 1134, 1137 (10th Cir. 2016) was expressly applying principles of Colorado contract law. There is no "circuit split" on an issue of federal law necessitating review by this Court.

Besides, the state-law contract questions presented are rarely litigated, unlikely to arise frequently and bear little importance to anyone other than the parties to the dispute. Even in the two courts constituting the asserted "circuit split," the issue of purported "conflicting" arbitration agreements had never before arisen in the history of those states. *Willis*, 944 F.3d at 581 ("Mississippi courts have not addressed whether conflicting

terms in an arbitration agreement prevent a contract from forming."); *Ragab*, 841 F.3d at 1138 ("No Colorado court has addressed whether parties can be compelled to arbitrate given conflicting arbitration provisions. . . ."). Indeed, it is quite likely the issue only arose in Mississippi because of Willis' strained effort to force the facts of this case to replicate *Ragab*. In *Ragab* the six separate contracts were all indisputably between the same parties, unlike here. *Willis*, 944 F.3d at 579 ("Tower Loan didn't sign the second agreement. . . ."). The federal and state courts are well-equipped to resolve the issue under the contract law of the various states should it arise again. The questions presented do not warrant review by this Court.

III. The Fifth Circuit properly noted Willis' "baseline intent to arbitrate" evidenced by his two agreements to arbitrate.

The Fifth Circuit unsurprisingly observed that the two arbitration agreements placed in issue by Willis reflect a "baseline intent to arbitrate." It is unimaginable how this rather obvious conclusion creates an entirely "new standard for arbitration agreements." Willis' petition provides little explanation except to dramatically predict the erasure of the "mirror image" rule, presumably from Mississippi contract law. Interestingly the term "mirror image" rule is not found frequently, if ever, in Mississippi case law. But more important, the Fifth Circuit never mentions the concept in its opinion, undoubtedly because Willis never raised the "mirror image" rule in the lower courts,

whatever inexplicable relevance it may have. The common law concept applies to contractual offer and acceptance, elements of a contract Willis has never contested in advocating his "two arbitration agreements" (Willis Pet. 4) found in two contracts he admittedly signed, i.e., accepted.

This Court and the Mississippi Supreme Court have noted the importance of considering the intentions of the contracting parties for both arbitration agreements and other contracts. *Stolt–Nielsen S.A. v. Animal–Feeds International*, 559 U.S. 662, 682 (2010) ("Whether enforcing an agreement to arbitrate or construing an arbitration clause . . . as with any other contract, the parties' intentions control."); *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 626 (1985) ("Thus, as with any other contract, the parties' intentions control. . . ."); *Union Planters Bank Nat. Assn. v. Rogers*, 912 So.2d 116, 120 (Miss. 2005) (determining whether the parties agreed to arbitrate, stating: "A cardinal rule of construction of a contract is to ascertain the mutual intentions of the parties."). In short, noting a "baseline intent to arbitrate" when considering whether the parties agreed to arbitrate is neither a "new standard" nor is it inconsistent with either the FAA or Mississippi law. This issue provides no basis for review by this Court.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

Counsel for Respondent Tower Loan of Mississippi, LLC

MICHAEL O. GWIN
Counsel of Record

PAUL H. STEPHENSON, III
MICHAEL O. GWIN
WATKINS & EAGER PLLC
400 E. Capitol Street
Jackson, MS 39201
601-965-1900
pstephenson@watkinseager.com
mgwin@watkinseager.com