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

REPLY BRIEF FOR PETITIONER

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Petitioner Chuck Willis ("Willis") asserts two main reasons exist that would justify a grant of certiorari in this case: the split between this case and *Ragab v. Howard*, 841 F.3d 1134 (10th Cir. 2016), as well as the Fifth Circuit overstepping the bounds of 9 U.S.C. § 2. In its brief in opposition, Respondent Tower Loan of Mississippi, LLC ("Tower Loan") argues this case is solely one of state law interpretation, there is no split from the Tenth Circuit because this is state law interpretation, and the Fifth Circuit did not erase the common law "mirror image" rule in contravention of 9 U.S.C. § 2.

ARGUMENT

I. The tension between "same footing" and the limitations in 9 U.S.C. § 2 created the split between the Fifth and Tenth Circuits

Tower Loan argues this case is solely an issue of state law interpretation, and this Court ought to defer to the Fifth Circuit's interpretation of Mississippi law. But by creating a novel standard, the Fifth Circuit reached beyond the purposes and scope of the Federal Arbitration Act ("FAA"), while simultaneously creating a split in authority over what constitutes a meeting of the minds when faced with multiple, conflicting arbitration agreements.

Of the purposes of the FAA, one substantial purpose is putting arbitration agreements on the "same footing" as other agreements. *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). Zealously seeking to attain that same footing for arbitration agreements as other contracts, however, comes with the limiting statutory principle 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." 9 U.S.C. § 2. Swinging the pendulum too far the other way, by treating arbitration agreements *differently* (even in a favorable way) than other contracts, is also impermissible. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 87 (2002)(THOMAS, J., concurring in judgment)(Courts should enforce arbitration agreements "just as they would ordinary contracts....").

The circuit split here indicates the problem courts face with balancing the pendulum between giving arbitration agreements their equal due, but also not elevating them above other contracts. The latter is at issue here. Tower Loan dismisses this circuit split as merely indicative of two appeals courts applying two different states' substantive law differently. As was already indicated by Willis in his petition, and uncontested by Tower Loan, the substantive law in both the *Ragab v. Howard*, 841 F.3d 1134 (10th Cir. 2016) decision and the decision here is the same. And yet, those two circuits came to opposite conclusions. Accordingly, one of the issues present here is the interplay between the FAA and the interpretation of existing state law. As will be shown, the Fifth Circuit made two grave errors below: it created a new standard nonexistent in Mississippi law and ignored existing Mississippi law. Those errors go hand in hand with the tension identified above.

II. This Court should not accept the Fifth Circuit's erroneous application of Mississippi law

Mississippi law requires that an agreement be "sufficiently definite" with respect to material terms. *Rootenberry v. Hooker*, 864 So.2d 266, 270 (Miss. 2003). The court interpreting the purported contract must be able to ascertain its terms. *Hunt v. Coker*, 741 So.2d 1011, 1014 (Miss. 1999), *Jones v. McGahey*, 187 So.2d 579, 584 (Miss. 1966). The court considers the general circumstances of the parties and relevant extrinsic evidence if necessary. *McGahey* at *Id.* Furthermore, a court will not enforce a purported contract when it is "riddled" with "indefinite and unresolved terms." *Duke v. Whatley*, 580 S.2d 1267, 1273 (Miss. 1991) discussing *Giglio v. Saia*, 140 Miss. 769, 775 (Miss. 1926).

Importantly, the Mississippi Supreme Court identified, and then reaffirmed, the importance of having consistency between purported agreements when asking a court to compel performance. *Duke* at 1274 quoting *Welsh v. Williams*, 85 Miss. 301, 303-304, 37 So. 561 (1904). As the rule in *Welsh* is called the "exegesis" of this law in *Etheridge v. Ramzy*, 276 So.2d 451, 455 (Miss. 1973), Willis quotes it here:

> The elementary general rule, as frequently enunciated in reference to the enforcement of specific performance of contracts…is that the contract must be specific and distinct in its terms, plain and definite in its meaning, and must show with certainty that the **minds of the parties had met** and mutually agreed **as to all**

> **details** upon the offer made upon the one hand and accepted upon the other.

Welsh at *Id*.(emphasis added).

So, while no Mississippi Court has addressed multiple competing arbitration agreements, the Mississippi Supreme Court has repeatedly emphasized the importance of "mutually agree[ing]" between all details to compel performance. *Id*. This line of case law –labeled for ease as the "mirror image rule"– bolsters the bankruptcy judge's opinion below, in which the judge found it more appropriate to use the mirror image rule, as opposed to the knock-out rule proposed by Justice Gorsuch in *Ragab*. *Willis v. Tower Loan of Miss., LLC (In re Willis)*, 579 B.R. 381, 394-395 (Bankr. S.D. Miss. 2017).

By contrast to the *Welsh* rule, the majority on the Fifth Circuit panel swept the seven inconsistencies between the two agreements underneath the proverbial rug as "procedural minutiae." *Tower Loan of Mississippi, LLC v. Willis (In re Willis)*, 944 F.3d 577, 582 (5th Cir. 2019). In the same sentence, the Fifth Circuit explained why: "We will not shut our eyes to an agreement that demonstrates a baseline intent to arbitrate…" *Id* (emphasis added). The Fifth Circuit enjoys a "great deference to the interpretation and application of state laws." *Pembaur v. Cincinnati*, 475 U.S. 469, 484 (1986). But that deference does not allow a court of appeals to create the law it is ostensibly interpreting. The phrases "baseline intent" or "baseline intent to arbitrate" simply do not appear in Mississippi law.

Furthermore, deference to the interpretation or application by the majority of the split panel below may be mistaken. Please note this language in the dissent:

> …[T]he variances here are…numerous and material, concerning terms that go to the heart of arbitration.
> …
> I simply cannot agree with my colleagues' conclusion that these inconsistencies relate to only "non-essential" provisions. For instance, the matter of who pays for the arbitration is more akin to the essential term of price than it is to a mere "procedural detail" of the arbitration. *See Leach v. Tingle*, 586 So.2d 799, 803 (Miss. 1991).

Willis at 944 F.3d at 584-585 and 586. (DENNIS, J., dissenting).

While the general rule is to defer to courts of appeals in the interpretation and application of substantive law, the pointed dissent as noted above should give this Court pause. Taken in conjunction with the bankruptcy court and district court below, and the clear rule in *Welsh*, the "normal practice" of deference to the court of appeals might not be as applicable in this case. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1414 (2019)(internal citations omitted). Interpretation and application of Mississippi law, while certainly present in this case, is not all that is at issue here; a larger issue is the underlying tension between the purpose of the FAA and state law requirements of contract formation.

The Fifth Circuit ruling below reaches beyond the FAA and its purpose of "same footing" with other contracts. Any number of arbitration agreements could exist, differing in terms such as price, and they would be enforceable under the Fifth Circuit standard, but not under Mississippi law. See *Intrepid, Inc. v. Bennett*, 176 So.3d 775, 779 (Miss. 2015)("while courts may supply reasonable terms which the parties omitted in the contracting process, such as time for performance, essential terms such as price cannot be left as open-ended questions in contracts which anticipate some future agreement.")(internal citations omitted). Accordingly, the Fifth Circuit went beyond permissible limits contained in Mississippi law and 9 U.S.C. § 2.

Under the Fifth Circuit's new standard, when a proposed arbitration agreement is placed against another contract, it is easier to form a meeting of the minds than any other agreement. As noted by this Court, arbitration is a matter of agreement, and must be enforced according to the terms of the arbitration agreement. *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 233 (2013). Willis submits that courts should not ignore those written terms, even when it means there was no agreement under the state law. By ignoring those terms, those courts reach beyond the statutory limitations on arbitration agreements, ostensibly for the purpose of placing arbitration agreements on the same footing as other contracts.

This is not a case where the state law ought to be preempted because it "stands as an obstacle to the accomplishment and execution of the full purposes and

objectives" of the FAA. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011). Rather, this is a case where the state law is being avoided (See *Welsh*) and new law is created ("baseline intent" standard). All this when Tower Loan, at oral argument below, conceded it could not say where the court ought to compel the parties to go for arbitration because of the internal confusion from the two agreements Tower Loan created and provided to Willis.

CONCLUSION

Willis asks this Court to grant certiorari in this matter so it can resolve the dispute between the circuits and so this Court can address the disparate treatment of arbitration agreements from any other contract.

Respectfully submitted,

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