No. _____

In The
Supreme Court of the United States

RONDA L. CORMIER,

Petitioner,

v.

DENIS McDONOUGH,
Secretary of Veterans Affairs,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents an intractable conflict between the rights of appellants in the Fifth Circuit to enjoy equal protection under the law and meaningfully access the courts and the Fifth Circuit's application of *Willis v. Cleco* to routinely abridge those constitutional rights. The Fifth Circuit applies *Willis* in a manner that results in any appellant who fails to challenge all grounds supporting the district court's decision having waived their appeal. Other courts of appeal apply this waiver principle on a case-by-case basis and do not automatically foreclose consideration of such appeals – allowing for exceptions to such waivers for the protection of fundamental rights.

The question presented is:

Did the Fifth Circuit's automatic application of *Willis v. Cleco*, to foreclose consideration of Petitioner's *pro se* appeal – in conflict with appellate courts that recognize that analysis of such waivers should be made on a case-by-case basis; and where the record demonstrated that the district court's alternative basis for summary judgment lacked sufficient explanation to allow for meaningful appellate review violate the *pro se* Petitioner's rights to equal protection and meaningful access to the courts?

The question presented arises repeatedly in the Fifth Circuit, the Circuit refuses to reconsider it, and it continues to deprive many appellants in the Circuit

QUESTION PRESENTED – Continued

of their rights to equal protection and meaningful access to the courts. The underlying cases are significant – often involving vulnerable, under-resourced appellants, those least able to procure expensive counsel who can research and draft appellate briefs to refute every potential ground upon which the district court's ruling could conceivably be affirmed no matter how flawed. To add insult to injury, in Petitioner's case the district court's alternative ruling was cursory at best, and lacked a sufficient statement of reasons to allow for meaningful appellate review.

In the case at bar, the Fifth Circuit held the claims properly presented in earlier complaints were "dead." Thus, Petitioner's newly discovered claims also failed. Petitioner, an African American, female, *pro se* appellant sought review of the district court's questionable ruling of the pleadings explicitly used to maintain the earlier claims through an incorporation statement. But by failing to brief a challenge to the district court's cursory, alternative finding, the Fifth Circuit found Petitioner waived her appeal and the claims deemed "live" would not survive summary judgment.

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those listed in the style of the case.

RELATED PROCEEDINGS

- *Ronda L. Cormier v. Denis McDonough, Secretary of Veterans Affairs*, No. 4:19-cv-4960, United States District Court for the Southern District of Texas. Judgment entered January 14, 2022.
- *Ronda L. Cormier v. Denis McDonough, Secretary of Veterans Affairs*, No. 22-20083, United States Court of Appeals for the Fifth Circuit. Judgment entered November 22, 2022.
- *Ronda L. Cormier v. Denis McDonough, Secretary of Veterans Affairs*, 22A701, United States Supreme Court. Motion for Extension of Time to File Petition for Writ of *Certiorari* granted February 2, 2023.

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The Order of the United States District Court for the Southern District of Texas adopting the memorandum and recommendation is unpublished and may be found at USDC Case No. 4:19-cv-4960 (January 14, 2022) (App. 5).

The Memorandum and Recommendation of the Magistrate Judge for the Southern District of Texas granting defendant's motion for summary judgment is unpublished and may be found at USDC Case No. 4:19-cv-4960 (December 7, 2021) (App. 10).

STATEMENT OF JURISDICTION

The Fifth Circuit's Opinion affirming the district court's judgment was entered on November 22, 2022. On February 7, 2023, Justice Alito extended the time for Petitioner to file her petition for writ of *certiorari* up to and including April 21, 2023.

This Court enjoys jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a federal plaintiff's constitutional rights under the First and Fifth Amendments.

The First Amendment provides in pertinent part:

> Congress shall make no law [] prohibiting [] or abridging the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

This case presents a square conflict over a question fundamental to an appellant's equal protection under the law and ability to meaningfully access the courts: whether failure to fully brief a challenge to a cursory, alternative basis for summary judgment automatically waives an appeal of that judgment on all grounds. The Fifth Circuit ruled failure to fully brief all challenges, on appeal of a summary judgment, automatically waives ones right to appeal. Such was the case here. The Fifth Circuit ruled Petitioner waived her right to appeal because she did not brief all challenges presented in the Respondent's summary judgment.

Other courts of appeal – including at least the Seventh, Eighth, Ninth, and Federal Circuits – recognize such waivers should be considered on a case-by-case basis, consistent with this Court's prior precedent. Under this form of analysis failures in technical proficiency in the briefing process by *pro se* and other appellants may be overlooked by the appellate court in the interest of justice.

In the proceeding below, however, the Fifth Circuit followed its longstanding practice of applying *Willis* in a manner that automatically forecloses consideration of an appeal when one of the bases for the district court's judgment is not challenged in an appellant's opening brief. The Fifth Circuit's conclusion that Petitioner's failure to challenge a cursory alternative basis for summary judgment in her opening brief is a categorical waiver that constitutes an extreme sanction. The result compared to the more forgiving standards that other courts of appeal apply in similar contexts. The sanction is particularly striking considering the absence of any statement of reasons or conclusions of law in support of the alternative basis.

The Court should grant review and resolve this split. This case readily satisfies the criteria for this Court's review. The conflict between the Fifth Circuit and other courts of appeal on the question presented is entrenched. Further exposure is unlikely to resolve the divide between the Fifth Circuit and at least the Seventh, Eighth, Ninth, and Federal Circuits. The question presented was dispositive in the Fifth Circuit and there are no obstacles to resolving it in this Court.

1. The underlying lawsuit was an employment discrimination case initiated by Petitioner against her previous employer, the Office of General Counsel ("OGC") of the Department of Veterans Affairs ("VA"), in Houston, Texas.

2. Petitioner filed her original Complaint in the district court on December 20, 2019. [DE #1]. On May 25, 2021, Petitioner filed her First Amended Complaint and a Second Amended Complaint followed on June 3, 2021.[DE #43 & #49]. Petitioner's Motion for Leave to File both amended complaints was granted on July 19, 2021. [DE #57].

3. Prior to the deadline to file dispositive motions, Petitioner filed her Motion for Summary Judgment on August 26, 2021. [DE #58]. A more concise amended Motion for Summary Judgment was filed on September 17, 2021. [DE #60].

4. On September 17, 2021, Defendant filed its Motion for Leave to File Motion for Summary Judgment Exceeding 20 pages. [DE #61]. A day later, Defendant filed its Supplemental Motion for Summary Judgment. [DE #62]. Subsequently, the Parties filed Responses and Replies. [DE #63, #64, and #65, respectively].

5. On December 7, 2021, the Honorable Frances H. Stacy, United States Magistrate Judge issued her Memorandum and Recommendation Granting Defendant's Motion for Summary Judgment [DE #68, App. 10]. Two weeks later, Petitioner filed her timely objections to the Memorandum and Recommendation. [DE

#69]. On January 14, 2022, the Honorable Andrew S. Hanen, United States District Judge for the Southern District of Texas, overruled Petitioner's objections and adopted the Memorandum and Recommendation, granting the Defendant Summary Judgment. [DE #70, App. 5].

6. The Fifth Circuit affirmed in an unpublished disposition. [App. 1]. The panel held that the appeal could be resolved entirely based on waiver, triggered by Petitioner's failure to challenge the alternative basis for the grant of summary judgment on the claims contained in her earlier complaints. *Id.*, at 3. Petitioner argued the merits of the district court's primary basis for summary judgment on the claims contained in the earlier complaints, a procedural ruling that those claims were not "live" because Petitioner failed to include them in the second amended complaint. *Id.*, at 1–3. The panel applied *Willis v. Cleco*, 749 F.3d 314, 319 (5th Cir. 2013), to find that in failing to challenge the alternative basis for summary judgment – despite its lack of a sufficient statement of reasons to allow for meaningful appellate review – Petitioner's "appeal of the claims is waived." *Id.*, at 3.

REASONS FOR GRANTING THE WRIT

The decision below deepens an intractable split over a key tenet in appellate waiver practice with implications for an appellant's rights to equal protection and meaningful access to the courts. As it stands, the

Fifth Circuit applies *Willis* in a manner which categorically forecloses any appeal whenever there is any basis upon which the district court's judgment may be affirmed. No matter how cursorily that alternative basis may have been addressed by the district court, it becomes grounds for automatic dismissal if not fully challenged in appellant's opening brief. This automatic waiver approach is in stark contrast with the approach taken by other courts of appeal, including at least the Seventh, Eighth, Ninth, and Federal Circuits. The positions on both sides are fully fleshed out; the question is cleanly presented; and this case offers an ideal vehicle for the Court to resolve it. This Court should grant the petition.

A. The Courts of Appeal Are Divided over Whether Failure to Challenge All Grounds Supporting a District Court Judgment Constitutes an Automatic Categorical Waiver of Appeal or If Such Waivers Should Be Considered on a Case-by-case Basis.

The Fifth Circuit is alone in applying an automatic categorical waiver of appeal to any appellant who fails to challenge all conceivable bases upon which a district court's judgment may be affirmed. *See Willis v. Cleco*, 749 F.3d 314, 319 (5th Cir. 2014). At least four other circuits recognize that such waivers should be considered on a case-by-case basis. *See Harris Corp. v. Ericsson Inc.*, 417 F.3d 1241, 1251 (Fed. Cir. 2005); *Correa v. White*, 518 F.3d 516 (7th Cir. 2008); *Hatley v. Lockhart*, 990 F.2d 1070, 1073 (8th Cir. 1993); *Sekiya v.*

Gates, 508 F.3d 1198 (9th Cir. 2007). There is also precedent from this Honorable Court indicating that appellate courts retain case-by-case discretion over whether to apply such waivers. *See Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976).

In *Willis v. Cleco*, the Fifth Circuit ostensibly applied Federal Rule of Appellate Procedure 28 to find that an appellant had waived a claim for failure to adequately brief that claim. 749 F.3d 314, 319 (5th Cir. 2014). The *Willis* panel concluded that "Willis fails to identify a theory as a proposed basis for deciding the claim, and does not explain, in any perceptible manner, why the facts would allow a reasonable jury to decide in his favor. This claim is inadequately briefed, and we hold that it is waived." *Id.* They went on to explain that to avoid application of this automatic, categorical waiver, an appellant must "press" his or her claims with technical proficiency. *Id.* This high standard presents a bias against disadvantaged appellants; those who may be unable to retain adequate counsel, familiar with the court's requirements, or affordable counsel are prejudiced.

The Fifth Circuit's application of *Willis* to disadvantaged appellants results in deprivation of any right to appeal, as it did in Petitioner's case. This is true because the Fifth Circuit does not allow for any exception to its harsh waiver policy and requires more than minimal briefing to satisfy its requirements for consideration of an appeal. *Id.*, at 319. In Petitioner's case, the Fifth Circuit determined Petitioner focused on the procedural issues instead of the merits. As a result, the

district court ruled that Petitioner did not restate or adequately incorporate those claims in her second amended complaint. Since the district court's primary basis for the denial of her claims suggested the original and first amended complaints were not "live" and the exclusion of those claims in her second amended complaint constituted an alternative basis for summary judgment, the court ruled the prior claims, if "live" would not survive summary judgment. As such, the court ruled Petitioner waived her entire appeal. *See* App. 3. The panel categorically rejected any basis for an exception to this waiver, despite Petitioner raising the conclusory nature of the alternative basis for summary judgment. *See* App. 3–4, n.1.

Other courts of appeal recognize that such waivers should be considered on a case-by-case basis. *See Harris Corp. v. Ericsson Inc*., 417 F.3d 1241, 1251 (Fed. Cir. 2005); *Correa v. White*, 518 F.3d 516 (7th Cir. 2008); *Hatley v. Lockhart*, 990 F.2d 1070, 1073 (8th Cir. 1993); *Sekiya v. Gates*, 508 F.3d 1198 (9th Cir. 2007). The Federal Circuit applied this Court's precedent in explicitly recognizing that it "retains case-by-case discretion over whether to apply waiver." *Harris Corp.*, 417 F.3d at 1251 (citing *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976)). The result of this recognition was that the appellant was allowed to proceed with the appeal, despite the reality that "Ericsson's claim construction theory on appeal is at least slightly different – in form if not in ultimate conclusion – from its position below." *Id.*, at 1251.

In *Correa v. White*, the Seventh Circuit – implicitly applying case-by-case analysis to a similar waiver – held that an exception to waiver for failure to comply with Federal Rule of Appellate Procedure 28 was warranted based on the appellant's disadvantaged status as a *pro se* litigant and due to the severity of the sanction which a finding of waiver would trigger. 518 F.3d 516, 518 (7th Cir. 2008). The *Correa* panel first found that "Ms. Correa's brief does not comply with this court's rules. However, it appears that this noncompliance is due more to her status as a *pro se* litigant than to any willful or reckless disregard of her obligations as a litigant in this court." They then concluded that "[u]nder these circumstances, dismissal of the appeal is too harsh a sanction. Rather, we believe that the proper course is to strike Ms. Correa's brief and to order her to file a brief that complies with Federal Rule of Appellate Procedure 28 and Circuit Rule 28." *Id.*

In *Hatley v. Lockhart*, the Eighth Circuit was faced with a similar basis for waiver – an unbriefed issue – and recognizing its discretion to consider issues not raised in the brief, ordered supplemental briefing on the unraised question. 990 F.2d 1070, 1073 (8th Cir. 1993). In considering the matter, the *Hatley* panel first determined that "Hatley failed to raise this issue in his brief to this court." *Id.* Next, they cited precedent indicating that "a party's failure to raise or discuss an issue in his brief is to be deemed an abandonment of that issue." *Id.* (citing *Jasperson v. Purolator Courier Corp.*, 765 F.2d 736, 740 (8th Cir. 1985)). Finally, after recognizing their "discretion to consider issues not raised in

the briefs," they elected to order supplemental briefing on the issue by the parties. *Id.*

In *Sekiya v. Gates*, the Ninth Circuit addressed waiver where the appellant filed a deficient opening brief. 508 F.3d 1198, 1200 (9th Cir. 2007). The *Sekiya* panel decided that "Sekiya's opening brief is so deficient that we are compelled to strike it in its entirety and dismiss the appeal." *Id.* Noting the harshness of the rule and that it could leave an appellant with a meritorious argument without a legal remedy, the panel concluded, "despite the abject deficiency of the brief, we have reviewed Sekiya's case on the merits based on a review of the district court record, and we are satisfied that the district court did not err." *Id.*

The conflict between the automatic, categorical waiver applied in the Fifth Circuit and the slightly varied applications of the case-by-case analysis of waiver applied in the Seventh, Eighth, Ninth, and Federal Circuits is entrenched and warrants this Court's attention. This is particularly true when the impact of the approaches is considered. The harshness of the automatic sanction applied by the Fifth Circuit upon a finding of waiver has undoubtedly deprived myriad disadvantaged and *pro se* appellants of a determination on the merits of their issues on appeal.

B. The Fifth Circuit's Approach Deprives Disadvantaged and *Pro Se* Appellants of Equal Protection and Meaningful Access to the Courts.

Disadvantaged and *pro se* appellants – like the Petitioner – are deprived of equal protection and meaningful access to the courts under the Fifth Circuit's approach to appellate waivers. "[T]he Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups." *Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) (citing *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954)). Although the rule and its application do not state a racial, class, or economic preference, its application is such that discriminatory impact and purpose may be inferred. "An equal protection violation need not appear on the face of the statute. The challenger may show that the law was enacted with an "invidious discriminatory purpose [that] may often be inferred from the totality of the relevant facts." *Davis*, 426 U.S. at 241–42, 96 S.Ct. 2040. This Court has also recognized a First Amendment right to access the courts. *See*, *e.g.*, *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977). That right is vitiated by the Fifth Circuit's application of its automatic waiver approach to disadvantaged and *pro se* appellants.

The denial of equal protection is clear from the publicly available data concerning the impact of the Fifth Circuit's application of its automatic waiver rule.

By accessing legal databases, including Lexis-Nexis, Westlaw, and Casetext, Petitioner found an alarming but unsurprising reality: certain classes were receiving extremely unfavorable outcomes under the rule. Specifically, since 2013, the Fifth Circuit has applied *Willis* to the disadvantage of African American women and other minorities. According to Casetext, of the 430 times *Willis* has been referenced, more than 173 cases involved employment discrimination. Rulings against appellants of color were adjudicated over 108 times.[1] Ironically, women of Caucasian descent received a favorable or partially favorable decision. Thus, it appears 78% of individuals pursuing employment discrimination cases who were *pro se* or of color or both received unfavorable determinations from the Fifth Circuit referencing *Willis* as its basis. This gives rise to the clear inference that the purpose of the Fifth Circuit's adoption of its automatic waiver rule is discriminatory. *See Davis*, 426 U.S. at 241–42, 96 S.Ct. 2040.

The Fifth Circuit's approach likewise denies disadvantaged, *pro se*, or minority appellants meaningful access to the appellate court. This is true because those classes of appellants are least likely to be able to hire experienced appellate counsel to draft comprehensive legal arguments and file technically compliant appellate briefs. As recognized by the other courts of appeal which apply a case-by-case approach to waiver, such appellants are most at risk of losing access to the courts through this harsh sanction of waiver. *See, e.g.*,

[1] The ethnicity of 28 parties was unidentifiable.

Correa v. White, 518 F.3d 516, 518 (7th Cir. 2008); *Sekiya v. Gates*, 508 F.3d 1198, 1200 (9th Cir. 2007).

C. This Case is an Ideal Vehicle for Reviewing this Important Question.

The question presented is of exceptional legal and practical importance. The circuit conflict has reached at least five circuits, with four recognizing their discretion to consider waivers on a case-by-case basis and only the Fifth Circuit applying an automatic waiver rule. Countless litigants are burdened by this rule and those without the means, legal acumen, or technical proficiency to effectively shoulder that burden by "pressing" their claims to the satisfaction of the Fifth Circuit are denied meaningful access to the courts and may be denied equal protection under the law. This will continue unless and until this Court provides review and brings the Fifth Circuit into conformity with those courts of appeal which properly consider waivers on a case-by-case basis and routinely grant those exceptions necessary to allow disadvantaged or *pro se* appellants to meaningfully access the court.

The consequences of the Fifth Circuit's complete disregard for disadvantaged or *pro se* appellant's rights are well demonstrated in Petitioner's case. Moreover, Petitioner's inability, as an experienced attorney, to satisfy the Fifth Circuit's requirements to avoid waiving her appeal is telling; what chance would a non-lawyer proceeding *pro se* have to do so? These realities

make this an ideal procedural vehicle for the court to take up the conflict.

The question raised by Petitioner turns on a pure question of law: may the Fifth Circuit apply an automatic waiver rule without consideration of its discretion to consider such waivers on a case-by-case basis? It has no factual or procedural impediments. There is no conceivable obstacle to deciding the threshold legal question.

The existence of other potential grounds for affirmance are not a barrier to this Court's review. The panel reached and resolved only one question on appeal: whether Petitioner waived her appeal by failing to challenge the alternative bases for summary judgment on the claims contained in her original and first amended complaints? [App. 1]. That holding was decisive. The panel provided no other justification for its affirmance in this case.

Further adjudication will not aid the Court's consideration of this important question. Petitioner's appeal would not have been waived in any of the other circuits which recognize that waivers should be considered on a case-by-case basis and exceptions granted to disadvantaged or *pro se* appellants, such as the Petitioner. Instead, Petitioner's appeal was considered waived by the Fifth Circuit based on its application of an automatic waiver rule under *Willis*. Although the issue presented may be the only one before the Court for a long time, it presents a clear issue and ideal vehicle for review.

To protect the rights of litigants under the Fifth Amendment Due Process Clause, which encompasses an equal protection component, and to ensure their right to access the Courts under the First Amendment, *certiorari* should be granted.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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