No. 20-1229

IN THE

Supreme Court of the United States

JAMES W. ROBERTSON, SR.,

Petitioner,

v.

INTRATEK COMPUTER, INCORPORATED,

Respondent.

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

BRIEF IN OPPOSITION

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RULE 29.6 DISCLOSURE

Intratek Computer, Inc., a California for-profit corporation, has no parent corporation, and no publicly held company otherwise directly or indirectly owns 10% or more of Intratek Computer, Inc.'s stock.

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INTRODUCTION

Nothing about this case recommends it as a candidate for review by this Court. For starters, Petitioner raises the bulk of his arguments for the first time before this Court. Indeed, Petitioner never raised the first Question Presented before the lower courts at all. It therefore has been waived—as the Fifth Circuit called out in its opinion. App. 6a. n.1. Standing alone, this is a sufficient reason to deny the petition.

If that were not enough, there is no compelling reason for granting the petition. There is no split among the circuits. These are concededly issues of first impression in any circuit. They have not percolated in the lower courts either to ascertain whether any difference of opinion develops, or to sharpen any future disagreement for resolution by this Court. Moreover, this is hardly a situation of immediate national importance with any sort of special call upon this Court's scarce resources.

Furthermore, the Fifth Circuit's decision is consistent with this Court's precedent, including especially Justice Scalia's opinion for the Court in *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012). There, the Court emphasized that when Congress intends to create a statutory exception to the Federal Arbitration Act (FAA), it does so expressly—a point that was emphatically reinforced by the Court only three terms ago in *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1627 (2018).

In short, Petitioner presents a question that was not raised below, was not considered below, on issues of first impression as to which there is no disagreement among the circuits, and where the decision below accords with the statutory text, and a long line of

this Court's decisional authority declining to find exceptions to the intentionally-expansive reach of the FAA where Congress has not expressly provided for one. The petition should be denied.

STATEMENT OF THE CASE

A. Relevant Factual Background

Petitioner is a former employee of Respondent Intratek Computer, Inc. (Intratek). Intratek required Petitioner, as a condition of his employment, to sign an arbitration agreement that provided:

> I hereby agree, pursuant to the policy, to submit to binding arbitration any employment related controversy, dispute or claim between me and [Intratek], its officers, agents or other employees, including but not limited to . . . tort claims . . . and claims for violation of any federal, state, or other government law, statute, regulation, or ordinance, except claims for worker's compensation and unemployment insurance benefits.
>
> I understand that by agreeing to arbitration, I am waiving the right to a trial by jury of the matters covered by the Arbitration policy.

App. 2a.

During Petitioner's employment, Intratek provided information and technology services to the United States Department of Veterans Affairs (VA). Petitioner alleges that Intratek's CEO improperly paid the dining, travel, and entertainment expenses of certain VA officials in an effort to garner preferential treatment for Intertek from those officials.

Petitioner alleges that Intratek terminated Petitioner's employment in September 2015, shortly after he claims to have told Intratek's CEO and others at Intratek that he believed that these alleged payments were unlawful. Petitioner sued Intratek under 41 U.S.C. § 4712, alleging that he was terminated from his employment in retaliation for his having reported his concerns about these alleged improper payments to Intratek's management.[1]

B. Proceedings in the District Court

Invoking the arbitration agreement, Intratek (and its CEO) moved to stay the suit and compel arbitration of Petitioner's claims against them. As relevant here, Intratek moved to compel arbitration of Petitioner's § 4712 "whistleblower" claim. Petitioner responded that the arbitration agreement was subject to the statute's anti-waiver provision, § 4712(c)(7), and therefore was unenforceable. The motion was referred to a magistrate judge for a report and recommendation.

The entirety of Petitioner's argument on this point consisted of three paragraphs on a single page. Notably, Petitioner failed to raise most of the arguments that he now seeks to press in his Petition to this Court—including the entirety of Petitioner's first Question Presented. Petitioner's conclusory argument to the magistrate judge can be summarized as follows: (a) 41 U.S.C. § 4712(c)(2) provides that the cause of action provided by that subsection "shall, at the request of either party to the action, be tried . . . with a jury," (b) the anti-waiver provision in subsec-

[1] Petitioner also alleged state tort claims against Intratek, its CEO, Allan Fahami, and Roger Rininger, a VA employee. Those claims are not before the Court.

tion § 4712(c)(7), which provides that "[t]he rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment," prohibits arbitration of Petitioner's whistleblower claim, and, therefore, (c) the arbitration agreement is unenforceable to compel arbitration of his § 4712 claim because it was a condition of employment that that required Petitioner to waive his right to a jury trial. (ECF No. 14 at 2).

Relying on a long line of this Court's precedent, the magistrate judge emphasized that the enactment of the FAA, 9 U.S.C. § 1, *et seq.*, in 1925 established a strong federal public policy favoring arbitration and that this policy is equally applicable to federal statutory claims—except where "the FAA's mandate has been 'overridden by a contrary congressional command.'" App. 29a. (quoting *CompuCredit*, 565 U.S. at 98). Turning to Petitioner's assertion that § 4712(c)(7) constitutes such a "contrary congressional command" that precludes enforcement of the parties' arbitration agreement, the magistrate judge again looked to the precedents of this Court, especially *CompuCredit's* conclusion that statutory silence on the issue of arbitrability was insufficient to evidence a clear congressional intent to enact an exception to the FAA's strong policy favoring arbitration, as well as *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) ("Throughout such an inquiry, it should be kept in mind that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.").

The magistrate judge further drew from this Court's jurisprudence in rejecting Petitioner's argument that § 4712(c)(2)'s reference to a jury trial created a non-waivable substantive "right" within the contemplation

of § 4712(c)(7)'s anti-waiver language because "the 'right' to a jury trial or the 'right' to a judicial forum are not substantive rights but, rather procedural rights which can be validly waived by an arbitration clause." 38a-39a (citing *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265-66 (2009) ("The decision to resolve ADEA claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace age discrimination; it waives only the right to seek relief from a court in the first instance.") and *Gilmer*, 500 U.S. at 26 ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.") Because the magistrate judge concluded that § 4712's anti-waiver provision does not expressly speak to arbitration, he concluded that statutory silence on the issue of arbitrability was insufficient to evidence a clear congressional intent to enact an exception to the FAA's strong federal policy favoring arbitration.[2]

Following Petitioner's timely objections, the district court undertook a *de novo* review of the entire case file, approving and accepting the report and recommendation for substantially the same reasons as those given by the magistrate judge. Like the magistrate judge, the district court, relying on this Court's precedents, agreed that Congress had not clearly prohibited arbitration in § 4712(c)(7), and therefore

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[2] The magistrate judge also found support for his conclusion in the legislative history of 41 U.S.C. § 4712, which demonstrates that a prior Senate version contained language that would have expressly precluded most arbitration—language that was removed from the as-enacted statute.

that the arbitration agreement was enforceable.[3] App. 22a-23a.

C. The Fifth Circuit Appeal

As relevant here, Petitioner assigned error as follows to the district court's ruling compelling arbitration: "Under the plain language of the 41 U.S.C. § 4712(c)(7), did the District Court err by compelling arbitration and enforcing an arbitration agreement that expressly waived Robertson's right and remedy of a federal jury trial as a condition of employment?" Again, Petitioner made no attempt to argue that compelling arbitration would "disrupt the administrative scheme set up by Congress to remedy and enforce violations of 41 U.S.C. § 4712," i.e., the first Question Presented in the Petition. Indeed, the Fifth Circuit expressly noted that Petitioner "hasn't advanced any argument on statutory purpose and thus has forfeited the issue." App. 6a, n.1.

The Fifth Circuit affirmed the district court's determination that § 4712(c)(7) does not prohibit enforcement of the parties' arbitration agreement to compel arbitration of Petitioners' § 4712 claim.[4] That court succinctly summarized its ruling on this issue as follows:

> The principal question on appeal is one of first impression in our Circuit: whether Robertson

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[3] The district court also found that Petitioner's separate state law claims were subject to the arbitration agreement, dismissed the case without prejudice, and entered final judgment, from which Petitioner appealed.

[4] Separately, the Fifth Circuit reversed the district court's holding that the arbitration agreement bound Petitioner to arbitrate his state law claims against defendant Rininger.

> can use 41 U.S.C. § 4712 to escape the arbitration agreement he signed. Statutory text says no. So does Supreme Court precedent. And the legislative history is irrelevant.

App. 5a.

The Fifth Circuit acknowledged that, pursuant to the FAA and this Court's *CompuCredit* decision, "federal law requires federal courts to enforce arbitration agreements" according to their terms "unless "the FAA's mandate has been overridden by a contrary congressional command." App. 5a. Citing this Court's *Gilmer* opinion, the court wrote that, to show a "contrary statutory command," the party opposing arbitration must show that Congress intended to preclude a waiver of a judicial forum" for the claims at issue. App. 6a (citing *Gilmer*, 500 U.S. at 26). The Fifth Circuit noted that more recently, in *Epic Sys. Corp.*, 138 S. Ct. at 1627, this Court had "stressed that the absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the Arbitration Act," reiterating that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." App. 6a. (cleaned up).

Recognizing that this Court has "heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes," ranging from the Sherman and Clayton Acts to the Age Discrimination in Employment Act (ADEA), the Fifth Circuit cautioned that "the party opposing arbitration—and arguing a congressional command contrary to the FAA—faces a high bar." App. 7a (citing *Epic Sys. Corp*, 138 S. Ct at 1627). Faithfully applying the teachings of this Court to the plain language of the statute—that makes no

mention of arbitration—the Fifth Circuit declared that "Robertson cannot hurdle it with 41 U.S.C. § 4712."

The Fifth Circuit emphasized that a "long line of Supreme Court precedent," including *14 Penn Plaza* and *CompuCredit*, confirmed its interpretation of § 4712. App. 9a. The court stated that, in *14 Penn Plaza*, Pyett, the plaintiff, had argued that the ADEA provided "a '[substantive] right' to proceed in court" and that anti-waiver language in the ADEA precluded Pyett from having to arbitrate his age discrimination claim. *14 Penn Plaza*, 556 U.S. at 259 (alteration in original; quoting 29 U.S.C. § 626(f)(1)). The Fifth Circuit noted that this Court had taken "pains" to clarify that "[t]he decision to resolve ADEA claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace age discrimination; it waives only the right to seek relief from a court in the first instance." App. 10a. (citing *14 Penn Plaza*, 556 U.S. at 265-66). Thus, "the 'right' to a judicial forum was not a 'right' protected by the waiver limitation at all." App 10a.

The Fifth Circuit opined that *CompuCredit*, which determined whether arbitration could be compelled for claims under the Credit Repair Organizations Act (CROA), "teaches the same lesson." App. 11a. That court observed that the CROA provides a private cause of action to those aggrieved by the conduct of credit repair organizations and also has an anti-waiver provision, and emphasized that "the notion that CROA 'provide[d] consumers with a "right" to bring an action in court'" was rejected by this Court. App. 11a (citation omitted). Quoting *CompuCredit*, the Fifth Circuit continued: "It is utterly commonplace for statutes that create civil causes of action to describe the details of those causes of action, including the relief

available, in the context of a court suit." App. 11a (citation omitted). So "[i]f the mere formulation of the cause of action in this standard fashion were sufficient to establish the contrary congressional command overriding the FAA, valid arbitration agreements covering federal causes of action would be rare indeed." App. 11a-12a (citing *CompuCredit*, 565 U.S. at 100-01).

The Fifth Circuit thus rejected Robertson's argument that language in the "Exhaustion of Remedies" provision of § 4712(c)(2)—"[s]uch an action shall, at the request of either party to the action, be tried by the court with a jury"—provides him a freestanding "right" or "remedy" to a jury trial that could not be waived by enforcing his arbitration agreement. Again hewing to this Court's precedents, the Fifth Circuit explained that "Robertson confuses the rights and remedies created by § 4712 with the means it provides to secure them." App. 9a. The court recognized that "Section 4712 creates whistleblower rights" and "an administrative apparatus to review whistleblowers' complaints and to afford them administrative remedies." App. 9a. The Fifth Circuit concluded that "the text and structure of § 4712 make clear that a jury trial is one way to vindicate a whistleblower's statutory *rights* after the whistleblower exhausts administrative *remedies*" but that "the jury trial is not itself a 'right' or 'remedy' created by § 4712." App. 9a (original emphasis).

The Fifth Circuit concluded that, in light of this Court's "dogged insistence that Congress speak with great clarity when overriding the FAA," Congress has shown that it knows how to override the Arbitration

Act when it wishes and "[i]t didn't do that with 41 U.S.C. § 4712." App. 12a.[5]

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to grant review of an issue that it never raised below. Nothing in Petitioner's arguments below even hints at their first Question Presented—that compelling arbitration would disrupt the administrative scheme set up by Congress to remedy and enforce violations of 41 U.S.C. § 4712. As a result, the courts below had no opportunity to address this argument. This Court is a court of review, not of first view, and a petition for certiorari that presents a question neither pressed nor passed on below should be dead on arrival.

On top of that, there is no split among the circuits on the questions presented for review. Indeed, this case presents an issue of first impression. Therefore, granting review in this case would be premature. Other circuit courts of appeals, if confronted with the same question, will likely reach the same answer. Nevertheless, before this Court grants review, the issue should first be allowed to percolate through the lower courts.

Finally, the writ should be denied because the decisions below do not rest on an issue of national importance that needs to be settled by this Court. On the contrary, the Fifth Circuit's interpretation of 41 U.S.C. § 4712 is consistent in all material respects

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[5] Unlike the district court, the Fifth Circuit found that, while legislative history may be a potential "data point" in the inquiry, the legislative history of § 4712, was too "murky" to provide any guidance, and did nothing to change that court's reading of the plain text of § 4712. App. 13a.

with the decisions of this Court that have addressed the arbitrability of federal causes of action, and did so with regard to a "whistleblower" statute that appears seldom to have been invoked in the courts since its initial enactment as a "pilot" program in 2012.

I. THIS PETITION IS A POOR CANDIDATE FOR CERTIORARI.

No fewer than four threshold issues make this petition an exceptionally poor candidate for certiorari.

A. The Main Question Presented Was Not Raised Below.

First, the petition seeks review of an issue that Petitioner failed to raise below. That fatal flaw is dispositive here. Petitioner never once argued—not even in a footnote in its briefing before the district court or even the Fifth Circuit—that compelling arbitration would "disrupt the administrative scheme set up by Congress to remedy and enforce violations of 41 U.S.C. § 4712," i.e., the first question presented in the petition. Indeed, the Fifth Circuit expressly noted that Petitioner "hasn't advanced any argument on statutory purpose and thus has forfeited the issue." App. 6a, n.1. Such waiver alone is enough to render the petition unfit for certiorari. *See*, e.g., *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) ("Because th[at] argument was not raised below, it is waived."); *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1978 (2016) ("we normally decline to entertain such forfeited arguments."); *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 398 (2015) ("Absent unusual circumstances—none of which is present here—we will not entertain arguments not made below."); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 75-76 (2010)

(argument "not mentioned below" is "too late, and we will not consider it"); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958) ("Only in exceptional cases will this Court review a question not raised in the court below.").

Petitioner makes no attempt to argue that any exceptional or unusual circumstances exist that could excuse his waiver of this issue. Accordingly, Petitioner cannot raise this issue for the first time here after waiving it in the lower courts.

B. The Question Presented Was Not Addressed Below.

The second threshold issue follows from the first: Because Petitioner failed to raise this issue below, the courts below had no opportunity to take up the arguments that Petitioner now advances. That is likewise a sufficient reason to deny the petition. As this Court has explained many times, it is "a court of review, not of first view," and so finds it "generally unwise to consider arguments in the first instance" that the lower courts "did not have occasion to address." *Byrd v. United States*, 138 S. Ct. 1518, 1527 (2018); *see*, e.g., *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1652 n.4 (2017) ("[I]n light of ... the lack of a reasoned conclusion on this question from the Court of Appeals, we are not inclined to resolve it in the first instance."); *City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1773 (2015) ("The Court does not ordinarily decide questions that were not passed on below."); *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("Because these [arguments] were not addressed by the Court of

Appeals, and mindful that we are a court of review, not of first view, we do not consider them here.").

C. The Fifth Circuit's Decision Is One of First Impression, Does Not Conflict with the Decisions of Other Circuits, and the Issues Should Be Allowed to Further Percolate in the Lower Courts.

Petitioner concedes that, as a case of first impression in the federal courts, there is no split among the circuits. Thus, even if Petitioner had preserved the question of whether compelling arbitration would disrupt an administrative scheme set up by Congress, this case epitomizes one where it would be wise to permit the issue to be further developed in future cases in the lower courts before this Court undertakes to resolve a circuit split—should one ever develop. This Court has long recognized the benefits of such percolation as a reason for denying certiorari. To quote Justice Frankfurter, writing for the Court: "A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time for ripening." *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 918 (1950).

Issues are best presented where the record is clear, and courts have struck fundamentally different stances on a key legal question. When cases present that clear record, and circuits have affirmatively taken inconsistent stances, this Court will have the benefit of the analysis and cross-commentary of multiple courts—sharpening the disputed issue for review by this Court. This is not such a case. Because Petitioner waived the primary issue he presses before this

Court, the courts below had no cause to consider whether arbitration disrupts a Congressionally designed scheme. And insofar as the courts below did address the second question presented—whether Congress intended to except causes of action under 41 U.S.C. § 4712 from presumptive arbitrability by implication—no other circuit has had the opportunity to weigh in. Further development in the lower courts is therefore especially appropriate here.

D. Petitioner Overstates the Importance of the Questions Presented.

Finally, Petitioner argues that the second question presented—whether Congress must explicitly prohibit arbitration agreements in the text of a statute to preclude a waiver of judicial remedies—is one of national importance. Respondent concedes that the question of arbitrability is important. But its importance does not merit review because, as the Fifth Circuit explained throughout its opinion, the answer to this question was already apparent from this Court's extant decisions in *CompuCredit*, *14 Penn Plaza*, *Gilmer* and *Epic Sys. Corp*. It is unnecessary for this Court to devote its limited resources to answering essentially the same question yet again.

II. THE FIFTH CIRCUIT'S HOLDING IS CORRECT AND CONSISTENT WITH THIS COURT'S TEACHINGS REGARDING CONGRESSIONALLY-CREATED EXCEPTIONS TO THE FAA.

As detailed above, this case is a poor vehicle for review of the questions presented by the petition. But even if it were possible to overlook those problems, the questions presented still would not warrant review.

In essence, Petitioner is reduced to arguing, by implication, that longstanding and well-settled law concerning the broad scope of the Federal Arbitration Act is so wrong or incomplete that this Court should revisit its precedents and change course. But there is no persuasive reason for this Court to consider doing so.

Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (cleaned up); *see also American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 232-33 (2013) ("Congress enacted the FAA in response to widespread judicial hostility to arbitration.") (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). And, as this Court has emphasized repeatedly, courts must enforce arbitration agreements according to their terms "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overriden by a contrary congressional command.'" *CompuCredit*, 565 U.S. at 98 (citing *Shearson/Amer. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987)). Thus, when Congress legislates, it does so against the backdrop of the emphatic public policy favoring arbitration that it created with the enactment of the FAA in 1925.

Recognizing that Congress established this strong policy favoring arbitration—and that it did so in large part to overcome historical judicial hostility to arbitration—this Court for decades has been loath to assume that anti-waiver provisions in statutes are meant to effect exceptions to the FAA when Congress has not said so explicitly. As Justice Gorsuch wrote for

the Court in 2018, "we've stressed that the absence of any specific statutory discussion of arbitration . . . is an important and telling clue that Congress has not displaced the Arbitration Act." *Epic Sys. Corp.*, 138 S. Ct. at 1627; (citing *CompuCredit*, 565 U. S. at 103–104; *McMahon*, 482 U. S. at 227; and *Italian Colors*, 570 U. S. at 234).[6]

Here, the Fifth Circuit confronted an anti-waiver provision that makes no mention of arbitration—"an important and telling clue that Congress has not displaced the Arbitration Act" by this Court's lights. *CompuCredit*, 565 U. S. at 103–104. And the Fifth Circuit's refusal to read into § 4712(c)'s language an exception to the FAA by necessary implication also hews to this Court's jurisprudence. The Fifth Circuit's determination that the reference to a right to a jury trial in a civil action created by statute is not itself a "right" or "remedy" created by the statute accords with the "long line" of decisions of this Court discussed at length by that Court. App. 9a-12a. As the Fifth Circuit emphasized:

> These cases reflect the Supreme Court's dogged insistence that Congress speak with great clarity when overriding the FAA. *See, e.g., Epic Sys.*, 138 S. Ct. at 1627. That long line of decisions has also given Congress even more reason to use pellucid language in antiwaiver provisions. *Cf. CompuCredit*, 565 U.S. at 104 n.4 (observing that a line of cases

[6] This Court's reluctance to read exceptions to existing federal statutory schemes where Congress has not expressly said it intended to create one is not limited to the FAA. *See*, e.g., *FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293, 302 (2003) (when Congress has intended to create exceptions to bankruptcy law requirements, "it has done so clearly and expressly").

> dating back decades gave Congress reason to write clear antiwaiver provisions); *id.* at 116 (Ginsburg, J., dissenting) ("Our decisions have increasingly alerted Congress to the utility of drafting antiwaiver prescriptions with meticulous care."). As the Court observed in *Epic Systems*, Congress has "shown that it knows how to override the Arbitration Act when it wishes." 138 S. Ct. at 1626. It didn't do that with 41 U.S.C. § 4712.

Section 4712's silence regarding arbitration is not a neutral factor that generates statutory ambiguity. It is "telling" evidence that Congress did not intend to displace the FAA. *Epic Sys. Corp.*, 138 S. Ct. at 1626-27. Where a federal enactment "does not even hint at a wish to displace the Arbitration Act" it surely does not "accomplish that much clearly and manifestly, as [this Court's] precedents demand." *Id*. at 1624.

The Fifth Circuit's decision thus is on all fours this Court's precedents in finding that, taken together, the absence of any statutory mention of "arbitration" in 41 U.S.C. § 4712, and the fact that arbitration does not result in the waiver of any substantive rights conferred by the statute, militates against reading the statute to overcome the otherwise-paramount presumption of arbitrability. This is all the more so given that § 4712 was enacted in 2012, months after this Court's *CompuCredit* decision issued. Moreover, as initially enacted, § 4712 was a pilot program that was made permanent in 2016—at which time Congress amended certain portions of the statute, but left the

anti-waiver provision, and its lack of any mention of "arbitration," untouched.[7]

The text of § 4712 does not exist in a vacuum. It exists alongside the FAA's strong policy favoring enforcement of arbitration agreements. It also must be viewed with due regard to the judicial gloss that this Court has placed upon the interplay of the FAA's pro-arbitration policy with the interpretation of statutory anti-waiver provisions. The Fifth Circuit's opinion considered and properly balanced these factors, and in doing so was faithful to this Court's settled precedent in this area.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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July 2, 2021

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[7] Further, while the Fifth Circuit found the legislative history too murky to factor into its decision, the magistrate judge believed that the removal of language from a prior senate draft expressly prohibiting waiver "*by any predispute arbitration agreement, other than an arbitration provision in a collective bargaining agreement*," 158 Cong. Rec. S6142 § 844 (Sept. 11, 2012) (Senate amendments to H.R. 4310) (emphasis added), "further demonstrates that Congress did not intend to prohibit arbitration of whistleblower claims under the statute." App. 38a.