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 TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

COLIN WALSH
WILEY WALSH, P.C.
1011 San Jacinto Boulevard,
Suite 401
Austin, Texas 78701
(512) 271-5527

ROBERT J. WILEY
Counsel of Record
AUSTIN CAMPBELL
ROB WILEY, P.C.
2613 Thomas Avenue
Dallas, Texas 75204
(214) 528-6500
rwiley@robwiley.com

Counsel for Petitioner

305953

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CONTENTS. i

TABLE OF CITED AUTHORITIES iii

A. The Questions Presented were raised below. . . .1

1. Petitioner clearly raised the issue below of whether Congress intended to prohibit enforcement of mandatory employment arbitration agreements in 41 U.S.C. § 4712. 1

2. Petitioner also clearly raised the issue below of whether arbitration was consistent with the administrative scheme set up by Congress under § 4712 5

3. There is a difference between underlying statutory purpose and the effect of a statute's structure and sequencing. Petitioner has not raised an issue regarding the underlying statutory purpose 7

B. Because of the potentially significant impact of mandatory arbitration on the ability of executive agencies to enforce orders through § 4712's administrative scheme, the United States has a strong and acute interest in these issues and its views should be requested 8

Table of Contents

Page

C. This case presents important questions of federal law that should be settled by this Court because the answers will shape how Congress drafts legislation and executive agencies enforce administrative orders 10

CONCLUSION 12

TABLE OF CITED AUTHORITIES

Page

CASES:

CompuCredit Corp. v. Greenwood,
565 U.S. 95 (2012) 5, 8

Daly v. Citigroup Inc.,
939 F.3d 415 (2d Cir. 2019) 8

STATUTES AND OTHER AUTHORITIES:

41 U.S.C. § 4712 . . . . *passim*

41 U.S.C. § 4712(c) 3, 4, 5

41 U.S.C. § 4712(c)(7) 2, 3, 4, 6

41 U.S.C. § 4712(c)(2) 3

Bloomberg Government, Turn Opportunities into Action, BGOV200 – Federal Industry Leaders 2020, available for download at https://about.bgov.com/reports/bgov-200-federal-industry-leaders-2021/?bbgsum-cta=DG-WS-BGOV-GC-H177314 (last visited July 13, 2021) 9

Press Release, Dep't of Justice, Justice Department Recovers over $3 Billion from False Claims Act Cases in Fiscal Year 2019 (Jan. 9, 2020), https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019 (last visited July 13, 2021) 9

Page

Press Release, Dep't of Justice, Justice Department Recovers Over $2.2 Billion from False Claims Act Cases in Fiscal Year 2020 (Jan. 14, 2021), https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020 (last visited July 13, 2021) 9

S. Ct. R. 10(c) 10

REPLY TO BRIEF IN OPPOSITION

Respondent's Brief in Opposition erroneously argues that Petitioner has not preserved the Questions Presented and wholly fails to address Petitioner's suggestion that this Court should invite the Solicitor General to express the views of the United States on this important issue. As shown below, Petitioner has, in fact, preserved the Questions Presented. Further, because the Fifth Circuit's ruling would disrupt the administrative scheme set up by Congress for executive agencies to enforce orders issued through their administrative processes, this Court should invite the Solicitor General to express the views of the Unites States. Finally, Respondent uses the exact same waiver argument to claim there is no clear record and that this Court should not consider this case absent a circuit split, but ignores the actual basis of the petition under Rule 10(c).

A. The Questions Presented were raised below.

Respondent argues that "Petitioner raises the bulk of his arguments for the first time before this Court." BIO 1. That is simply not the case.

1. Petitioner clearly raised the issue below of whether Congress intended to prohibit enforcement of mandatory employment arbitration agreements in 41 U.S.C. § 4712.

Contrary to Respondent's brief, Petitioner raised at both the district court and the appellate court the issue of whether Congress intended to prohibit enforcement of mandatory arbitration agreements. Indeed, Petitioner

first did so in his response to Respondent's motion to compel arbitration.

In that response, Petitioner pointed out that "41 U.S.C. § 4712(c)(7) explicitly prohibits the waiver of any right as a condition of employment," and that the right to a de novo federal jury trial is "not waivable by any agreement or condition of employment." D. Ct. Dkt. 14 at 2. In Petitioner's objections to the Magistrate's recommendation, Petitioner discussed this issue at length, addressing the plain text of the statute, legislative history, and distinguishing the cases relied upon by the Magistrate. D. Ct. Dkt. 18 at 10–17. Those same positions were raised before the appellate court as well, and often in a very similar fashion. *Compare* Appellant's Br., 5th Cir. Dkt. 515285367 at 14–21, *with* Plaintiff's Objections, D. Ct. Dkt. 10–17.

Here, the petition for certiorari again makes those same arguments. The petition goes through the terms and sequencing of § 4712: "The right and remedy of going to federal court if relief is denied is consistent with the text, structure, and sequencing of the rest of the statute." Pet. 19. In Petitioner's reply to the Fifth Circuit, Petitioner made the same argument: "Here, the NDAA's plain language (including the terms used and the statute's sequencing), along with the legislative history establish that Congress intended to prohibit arbitration agreements required as a condition of employment." Appellant's Reply Br., 5th Cir. Dkt. 515285367 at 10.

Both the Fifth Circuit briefing and the instant petition raise the same issue regarding the placement of the right and remedy of a federal jury trial within the same

subsection as the nonwaiver provision. The Fifth Circuit brief states:

> The "exhaustion of remedies" subsection, 41 U.S.C. § 4712(c)(2), expressly provides complainants the right and remedy of a de novo federal jury trial . . . . Under subsection (c)(7), that right and remedy of a federal jury trial is not waivable by any kind of mandatory employment agreement . . . .

Appellant's Br., 5th Cir. Dkt. 515285367 at 34–35. The petition before this Court states:

> Subsection (c) then provides all of the remedies available. It is explicitly titled "Remedy and Enforcement Authority." *Id.* at § 4712(c). Contrary to the Fifth Circuit's restricted reading, this section provides for much more than just the exhaustion of administrative remedies. Subsection (c), among other things, provides for (1) the types of damages and relief that the executive agency can order, (2) when exhaustion of administrative remedies occurs, (3) a de novo private cause of action in federal court (including the ability to request a jury), (4) making IG determinations and agency orders admissible, (5) district court enforcement of agency orders, (6) setting the burden of proof as contributing factor, and (7) appellate court review of agency orders. *Id.* at § 4712(c). After providing for all of those things, only then does the statute, in subsection (c)(7), prohibit waiver of the rights and remedies *just provided for in that section. Id.*

Pet. 23 (emphasis in original). Sometimes, the language between the Appellate briefing and the petition is even quite similar. For example, the petition states:

> Thus, the question then becomes whether or not a federal jury trial is a right or remedy provided for in the statute. If it is a right or remedy provided for in the statute, then it cannot be waived by "any agreement, policy, form, or condition of employment" under the nonwaiver provision of § 4712(c).

Pet. 18. In Petitioner's reply brief to the Fifth Circuit, Petitioner made the same point:

> The primary issue in determining the scope of the NDAA's nonwaiver provision is whether or not the jury trial expressly provided for by the statute is a judicial remedy. If it is a "remedy provided for," the nonwaiver provision applies to mandatory arbitration agreements because it prohibits waiver as a condition of employment of any remedies provided for in the statute. *See* 41 U.S.C. § 4712(c)(7) . . . .

Appellant's Reply Br., 5th Cir. Dkt. 515285367 at 15.

Therefore, based on all of the above, Petitioner clearly raised the issue of whether Congress intended to prohibit mandatory arbitration under § 4712.

2. Petitioner also clearly raised the issue below of whether arbitration was consistent with the administrative scheme set up by Congress under § 4712.

The first Question Presented—regarding whether the administrative scheme is consistent with arbitration—was also raised in both the district court and the Fifth Circuit. Specifically, in Petitioner's objections to the Magistrate's recommendation, Petitioner expressly discussed the statutory scheme and how it differed from other statutory schemes like the Credit Reporting Organization Act and the Age Discrimination in Employment Act. Plaintiff's Objections, D. Ct. Dkt. 15–16. At the Fifth Circuit, Petitioner did the same thing:

> Here, though, the statute at issue expressly creates the right and remedy of a federal jury trial for violations of the statute. 41 U.S.C. § 4712(c). The statute expressly creates federal question jurisdiction for a lawsuit, creates deadlines for filing the lawsuit, administrative remedies that must be engaged in prior to the right and remedy of a federal jury trial, and sets the burden of proof as contributing factor. *Id.* Then after doing all of that, the statute explicitly says, "rights or remedies provided for in this section may not be waived by any agreement . . . or condition of employment." *Id.* at (c)(7). Because none of those things are present in the CROA section examined by *CompuCredit*, that case does not apply.

5th Cir. Dkt. 515189942 at 41. In the Fifth Circuit brief, Petitioner then expressly discusses how other statutory

schemes like those of the ADEA and the Employee Polygraph Protection Act are consistent with arbitration because of their encouragement of alternative dispute resolution methods, flexible approach to remedies, and creation of concurrent jurisdiction. *Id.* at 42–45. Under § 4712, there is no such flexibility:

> Here, none of the factors that would encourage a "flexible" approach to resolution are present. Section 4712 does not mention informal dispute resolution methods or establish concurrent jurisdiction. *See* 41 U.S.C. § 4712. Instead, the statute lays out a very specific scheme of rights and remedies that includes federal question jurisdiction, deadlines for filing the federal lawsuit, administrative remedies, the right and remedy of a federal jury trial, and setting the burden of proof as contributing factor, a much lower standard of proof than most retaliation statutes. *Id.* Unlike the ADEA, nothing in § 4712 shows any preference for informal or out-of-court resolution, and nothing indicates flexibility of rights or remedies. *Id.* In fact the plain text conclusively shows that Congress did not intend flexibility of rights or remedies because the plain language explicitly prohibits waiver of any of those rights or remedies. S*ee* 41 U.S.C. § 4712(c)(7).

Id. at 43–44.

That is the same issue presented in the petition currently before this Court:

> Reading the statute as a whole, it is clear that prohibiting an employee from going to court compromises the administrative scheme set up by Congress. That is because if the nonwaiver provision stating that "the rights and remedies provided in this section" means only "some" rights and remedies may not be waived, then the statue allows for parallel proceedings. But if the nonwaiver provision prohibiting waiver of "the rights and remedies provided in this section" means "all" rights and remedies provided in this section, then the statutory enforcement scheme is the only scheme that may be followed and parallel proceedings with potentially conflicting rulings would not occur.

Pet. 7. Then Petitioner, just as he did in the Fifth Circuit briefing, goes through how § 4712's scheme is different from other administrative schemes and why that shows arbitration is not consistent with § 4712. *Id.* at 7–14.

Therefore, Petitioner raised both Questions Presented below.

3. There is a difference between underlying statutory purpose and the effect of a statute's structure and sequencing. Petitioner has not raised an issue regarding the underlying statutory purpose.

Respondent argues that Petitioner has waived his argument concerning the impact of arbitration on § 4712's administrative scheme by plucking out of context a line from the Fifth Circuit's opinion stating that Petitioner "hasn't advanced any argument on statutory purpose

and thus has forfeited the issue." Pet. App. 6a n.1. In the context of the Fifth Circuit opinion, that statement comes in a footnote discussing whether or not arbitration can be prohibited based on an "inherent conflict" between arbitration and the underlying purpose of a statute. *Id.* (discussing Sotomayor's concurrence in *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 109 (2012)). That is not what Petitioner is arguing.

Petitioner is not claiming that the underlying purpose or motivation behind § 4712 inherently conflicts with arbitration. It is clear that federal whistleblower statutes can be amenable to arbitration. *See, e.g.*, *Daly v. Citigroup Inc.*, 939 F.3d 415, 423 (2d Cir. 2019) (holding Dodd-Frank whistleblower claims arbitrable). Instead, Petitioner is arguing that based on the unambiguous statutory language, arbitration disrupts the statutory scheme set up by Congress to address and remedy whistleblower retaliation under § 4712. Arbitration takes a wrench to the administrative scheme and would create unnecessary confusion and potentially conflicting rulings. That, in conjunction with the statute's explicit provision of the right and remedy of a federal jury trial and the nonwaiver provision prohibiting waiver of rights and remedies, shows Congress meant to prohibit mandatory arbitration.

B. Because of the potentially significant impact of mandatory arbitration on the ability of executive agencies to enforce orders through § 4712's administrative scheme, the United States has a strong and acute interest in these issues and its views should be requested.

Respondent wrongly diminishes the importance of the Questions Presented. Whistleblowers play a crucial role for

the federal government in exposing fraud, waste, abuse, and mismanagement of government money, programs, and services. As former Assistant Attorney General Jody Hunt stated in 2019, "Whistleblowers continue to play a critical role identifying new and evolving fraud schemes that might otherwise remain undetected." *See* Press Release, Dep't of Justice, Justice Department Recovers over $3 Billion from False Claims Act Cases in Fiscal Year 2019 (Jan. 9, 2020), https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019 (last visited July 13, 2021). Mr. Hunt explained that "[t]axpayers have benefited greatly from these individuals who are often required to make substantial sacrifices to bring these schemes to light." *Id.*

Indeed, since 1986, the federal government has recovered over $64 billion dollars under the False Claims Act alone. *See* Press Release, Dep't of Justice, Justice Department Recovers Over $2.2 Billion from False Claims Act Cases in Fiscal Year 2020 (Jan. 14, 2021), https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020 (last visited July 13, 2021).

As the amount of money the federal government spends on federal contractors increases, whistleblowers' ability to expose fraud and waste will become even more important. According to Bloomberg Government's BGOV200 Federal Industry Leader rankings, which ranks the top 200 federal contractors, the United States Government spent an "unprecedented" $682 billion dollars on federal contractors in fiscal year 2020. *See* Bloomberg Government, Turn Opportunities into Action, BGOV200 – Federal Industry Leaders 2020, page 2 (2020), available

for download at https://about.bgov.com/reports/bgov-200-federal-industry-leaders-2021/?bbgsum-cta=DG-WS-BGOV-GC-H177314 (last visited July 13, 2021). According to that same report, 65 percent of governmental obligations were won by the top 200 companies. *Id.* at 5. "Looking forward to next year's BGOV200, fiscal year 2021 looks to be another year of exceptionally high federal contract spending." *Id.* at 6.

Thus, the government's interest in ensuring that potential whistleblowers have the necessary protections and incentives to come forward is paramount. One way to ensure the proper protections and incentives is by allowing full enforcement of the laws Congress has provided for them. As explained in detail in the petition, allowing enforcement of mandatory employment arbitration agreements contrary to the statutory text potentially severely disrupts the administrative scheme executive agencies rely on to enforce whistleblower protections for federal contractors. Therefore, this Court should invite the Solicitor General to express the views of the United States on this matter of utmost importance.

C. This case presents important questions of federal law that should be settled by this Court because the answers will shape how Congress drafts legislation and executive agencies enforce administrative orders.

Finally, Respondent claims that because there is no circuit split, this Court should deny the petition and wait for a case with a clearer record. BIO 13. But that ignores Rule 10(c), which is the underlying basis for the Court to grant certiorari here. S. Ct. R. 10(c). Indeed, this is just

Respondent's waiver argument repackaged, since it is premised on the idea that "the courts below had no cause to consider whether arbitration disrupts a Congressionally designed scheme." BIO 13–14. The entire basis of Respondent's implication that the record below is cloudy on the arbitration issue relies on this Court ignoring all of the evidence in section A, *supra*, showing the Questions Presented were raised below. *See* BIO 13–14.

Contrary to Respondent' brief, the record on this issue is clear and the relevant facts are undisputed. Pet. App. 2a–3a. Intratek conditioned Robertson's employment on signing a mandatory pre-dispute arbitration policy. *Id.* If § 4712 prohibits enforcement of mandatory arbitration agreements required as a condition of employment, then Robertson's whistleblower claims cannot be compelled to arbitration. If § 4712 does not prohibit such agreements, then his claims can be compelled to arbitration.

This is an important question of statutory construction that the United States should express its views on and that this Court should resolve now. Given the critical importance of whistleblowers in exposing fraud, waste, and abuse of government money, answering this question either way will give whistleblowers full knowledge and confidence in the legal protections, processes, and consequences of their actions in revealing misconduct. Deciding this question now either way will also provide that same knowledge and confidence to executive agencies who issue administrative orders under § 4712. This question is important enough that there is no need to wait for a split, which could discourage whistleblowers from coming forward.

CONCLUSION

For the foregoing reasons and those stated in the petition for writ of certiorari, this Court should grant the petition. Further, this Court should invite the Solicitor General at this stage to state the views of the United States.

Respectfully submitted,

Colin Walsh
Wiley Walsh, P.C.
1011 San Jacinto Blvd.,
Suite 401
Austin, Texas 78701
(512) 271-5527

Robert J. Wiley
Counsel of Record
Austin Campbell
Rob Wiley, P.C.
2613 Thomas Ave.
Dallas, Texas 75204
(214) 528-6500
rwiley@robwiley.com

Counsel for Petitioner