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

SUPPLEMENTAL BRIEF

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ARGUMENT

THE COURT SHOULD VACATE THE DECISION OF THE COURT OF APPEALS AND REMAND THE CASE FOR FURTHER CONSIDERATION IN LIGHT OF THE POSITION PRESENTED BY THE SOLICITOR GENERAL

The Solicitor General explains in detail that the Fifth Circuit erred when it construed section 4712(c)(2) to permit a federal contractor or grantee to require its employees to arbitrate their retaliation claims under that statute. Brief for the United States as Amicus Curiae, 7-14; *see* 41 U.S.C. § 4712(c)(2). On some past occasions, this Court has remanded litigation between private parties for further consideration in light of a brief filed in this Court by the Solicitor General.[1] The generally confidential nature of arbitration proceedings will preclude whistleblowers arbitrating § 4712(c)(2) claims from disclosing to federal officials information about contractor or grantee misconduct that is discovered in the course of those arbitral proceedings. For that reason, it is important that the court of appeals further review the interpretation of § 4712(c)(2) in light of the position of the United States.[2] Remanding this case will accord the Fifth

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1. *E.g., Raquel v. Education Management Corp.,* 531 U.S. 952 (2000); *Statewide Reapportionment Advisory Committee v. Theodore,* 508 U.S. 968 (1993); *Oberly v. Baltimore & Ohio R. Co.,* 479 U.S. 980 (1986); *Crosslin v. Mt. States Tel. and Tel. Co.*, 400 U.S. 1004 (1971).

2. The Solicitor General advises the Court that "the VA has informed this Office that its Inspector General did not understand Robertson to be asserting a claim of retaliation under Section 4712."

Circuit an opportunity to reconsider its earlier decision in light of the arguments of the United States, and it is likely to result in correction of the Fifth Circuit's error without consuming this Court's limited time and resources.

(1) Whether a § 4712 plaintiff could disclose to the government information about misconduct discovered in the course of litigation is particularly important because a private party, utilizing traditional discovery methods in either a judicial or arbitration proceeding, has a substantially greater ability than an Inspector General to unearth misconduct by a contractor or grantee.

An Inspector General investigating misconduct by a federal contractor or grantee has no ability to compel contractors, grantees, or their employees to answer questions under oath or otherwise. The Inspector General Act only authorizes the issuance of subpoenas to private parties to obtain documents and does not empower an Inspector General to use a subpoena to compel testimony.[3] The Strategic Plan of the Department of

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Brief for the United States as Amicus Curiae, 4 n. 1. On July 13, 2016, counsel for Robertson sent to the office of the Inspector General of the Veterans Administration an email expressly stating that § 4712 was the basis of Robertson's complaint.

> Mr. Robertson's initial complaint and subsequent investigation was brought under 41 U.S.C. § 4712, which is the Pilot Program for the enhancement of contractor protection from reprisal for disclosure of certain information.

Email of Colin Walsh to Michael Lombard (OIG), July 13, 2016.

3. 5 U.S.C. App. 3 § 6(a)(4). The Department of Defense is the only agency that has the authority to compel testimony by an employee of a contractor.

Veterans Affairs expressly points out the inability of the Department's Inspector General to compel anyone outside the Department to answer questions. "[T]he OIG is limited by its lack of subpoena power to compel testimony from former VA employees and others outside of VA who may have information relevant to its work."[4] Within the last year, the Chairperson of the Council of the Inspectors General on Integrity and Efficiency warned about that critical limitation on the ability of an Inspector General to investigate misconduct by contractors and grantees.

> IGs can also face difficulty accessing key information during an inquiry into other individuals or entities with whom the Federal government does business. Examples include contractors [and] grantees . . . that . . . are suspected of defrauding a federally funded program. In these cases, IGs have limited recourse if these individuals refuse to provide information to the IG.[5]

The Inspector General of the Department of Justice also recently described that serious problem.

> Without th[e] authority [to subpoena witnesses], OIGs are unable to obtain potentially critical

4. U. S. Department of Veterans Affairs, Office of Inspector General, Strategic Plan 2022-2026, 10.

5. Statement of Allison C. Lerner, Chairperson, Council of the Inspectors General on Integrity and Efficiency, Inspector General, National Science Foundation, before the Senate Homeland Security and Governmental Affairs Committee concerning "Safeguarding Inspector General Independence and Integrity," October 21, 2021 (available at the Committee website).

> evidence from former federal employees, employees of federal contractors and grant recipients, and other nongovernment witnesses unless they voluntarily agree to be interviewed. . . . [A]n OIG's inability to compel testimony from federal contractors and grant recipients can result in the OIG being unable to gather sufficient evidence to hold the contractor or grant recipient accountable for waste, fraud, and abuse in connection with the use of federal funds, and therefore affects our ability to recover misused federal funds. In addition, an OIG's access to relevant testimony from witnesses who are . . . employees of contractors and grant recipients, is often essential in order for OIGs to conduct complete investigations of employees, including conducting effective whistleblower retaliation investigations. [6]

On the other hand, a plaintiff under Rule 30 of the Federal Rules of Civil Procedure can require an official of the federal contractor or grantee to submit to a deposition under oath, and under Rule 30(b)(6) can compel the contractor or grantee to designate a particular official who can testify on behalf of the contractor with regard to the § 4712 claim and the alleged underlying wrongdoing. Although the scope and/or amount of discovery in an arbitral proceeding may not be identical to what is authorized by Rule 30, those proceedings almost always

6. Statement of Michael E. Horowitz, Inspector General, U.S. Department of Justice before the U.S. Senate Committee on Homeland Security and Governmental Affairs concerning "Safeguarding Inspector General Independence and Integrity," October 21, 2021, available at the Committee website.

permit a claimant to obtain testimony under oath, through a deposition, at a hearing, or both.[7]

(2) In § 4712(a)(2) litigation, whether in court or in arbitration, the whistleblower will usually seek to discover and adduce evidence that the defendant had engaged in misconduct within the scope of that section.

A plaintiff asserting a retaliation claim under § 4712(a)(2) must prove that his or her complaint contained

> information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant.

41 U.S.C. § 4712(a)(1). A § 4712 plaintiff is always better off if he or she can obtain and adduce evidence that the contractor or grantee had violated federal law, engaged in gross mismanagement, or engaged in any of the other types of misconduct within the scope of § 4712(a)(1). A whistleblower's contention that his or her belief was reasonable would be supported by evidence that the contractor or grantee had indeed engaged in gross waste or abuse of authority, and created a danger to public health or safety, or violated the applicable law, rule, or regulation.

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7. *See* American Arbitration Association, Employment Arbitration Rules and Mediation Procedures, Rule 9; JAMS Employment Arbitration Rules and Procedures, Rule 17(b).

Evidence of actual contractor misconduct would also be important when, as is often the case, there is a dispute as to what the plaintiff actually knew at the time of the asserted protected activity. The complaint in this case alleges that an Intratek official *told the plaintiff* that the Lockheed Corporation, based on unlawful non-public information that Intratek had improperly obtained from the Department of Veterans Affairs, had opened a special office in Los Angeles to disseminate that non-public information to other Lockheed subcontractors.[8] In the likely event that that Intratek official denies having made that inculpatory statement, the trier of fact would have to decide whether the plaintiff or that official was telling the truth. Plaintiff thus would have every reason to substantiate his account through discovery of evidence showing that Intratek and Lockheed had indeed improperly acquired such non-public government information, and that Lockheed had actually established a special office to disseminate that information to subcontractors.

Discovery of evidence of actual wrongdoing will often be important to respond to possible defenses. The lower courts have in some instances regarded the absence of actual wrongdoing, or of the type of harm to the public required by § 4712(a)(1), as tending to undermine by itself a whistleblower's claim of reasonable belief. *E.g., Ivie v. Astrazeneca Pharmaceuticals*, LP, 2021 WL 1198306, at *14 (D. Or. March 28, 2021) (emphasizing that wrongdoing in question had not occurred, and that there had been no substantial and specific danger to public health). Conversely, proof that actual wrongdoing *did* occur would

8. Complaint, ¶¶ 36-38.

make it more difficult for a contractor to argue that the whistleblower was unreasonable in believing (correctly) that wrongdoing had occurred. Defendants may also be able to defeat a claim of reasonable belief by pointing to exculpatory information which a whistleblower may not have actually had, but which the whistleblower "could reasonably have learned" had he or she looked into the matter further. *Craine v. National Science Foundation*, 687 Fed. App'x 682, 691 (10th Cir 2017).[9] A plaintiff could respond effectively to that sort of evidence with proof of misconduct that undermines the allegedly overlooked exculpatory facts.

(3) If a § 4712 plaintiff discovered evidence of contractor or grantee misconduct in the course of a judicial proceeding, he or she could of course disclose it to federal officials. But if a § 4712 plaintiff were to unearth such evidence in an arbitral proceeding, he or she often would be barred from doing so.

This Court noted in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.,*559 U.S. 662, 686 (2010), that there is a "'presumption of privacy and confidentiality' that applies in many bilateral arbitrations." (*quoting* Addendum to Brief for American Arbitration Association as Amicus Curiae 10a); *see Epic Systems Corp. v. Lewis,* 138 S. Ct. 1612, 1648 (2018) (Ginsburg, J., dissenting) ("Arbitration agreements often include provisions requiring that outcomes be kept confidential or barring arbitrators

9. *See Busselman v. Batelle Memorial Institute,* 2018 WL 10374692, at *6 (E.D. Wa. Oct. 10, 2018) ("the essential facts known to and reasonably available by the employee"); *Kappouta v. Valiant Integrated Services, LLC,* 2021 WL 4806437, at *3 (S.D. Cal. Oct 14, 2021) (same).

from giving prior proceedings precedential effect."); *American Exp. Co. v. Italian Colors Restaurant,* 570 U.S. 228, 246 (2013) (Kagan, J., dissenting) ("[the arbitration agreement's "confidentiality provision prevents Italian Colors from informally arranging with other merchants to produce a common expert report."). There were, for example, confidentiality provisions in the arbitration agreements in *Epic Systems Corp. v. Lewis*[10] and in *American Exp. Co. v. Italian Colors Restaurant*.[11] Arbitration agreements frequently adopt by reference the arbitration rules of the American Arbitration Association[12] or JAMS[13], both of which include confidentiality provisions. In a number of jurisdictions, state law requires that arbitration be confidential, rendering unnecessary the inclusion of an express confidentiality provision in an arbitration agreement.[14]

10. App. to Pet. for Cert. in No. 16–285, p. 34a (Epic's agreement); App. in No. 16–300, p. 46 (Ernst & Young's agreement).

11. *See In re American Express Merchants' Litigation,* 554 F.3d 300, 318 (2d Cir. 2009); Oral argument, *American Express Co. v. Italian Colors Restaurant*, 22-23, available at 2013 WL 705521.

12. *See* American Arbitration Association, Employment Arbitration Rules and Mediation Procedures Rule 23 (2009) ("The Arbitrator shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality, unless the parties agree otherwise or the law provides to the contrary.").

13. *See* JAMS Employment Arbitration Rules and Procedures, Rule 26 (2021) ("JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award . . . .").

14. *See, e.g.*, Ark. Code Ann. § 16-7-206; Cal. Evid. Code 703.5; Mo. Rev. Stat. § 435.014(2).

Earlier this year, the House Judiciary Committee identified secrecy as a general requirement in arbitration proceedings.

> Unlike the judicial system—in which courts' decisions are generally public . . . –the results of arbitration disputes are often kept secret. For example, the arbitration protocols of the American Arbitration Association state that arbitrators of consumer disputes must "maintain the privacy of the hearing to the extent permitted by applicable law." Further, a coalition of state attorneys general—representing all 50 states, the District of Columbia, and several U.S. territories—have similarly noted that arbitration's required "veil of secrecy" applies to sexual harassment claims . . . . The coalition referred to this phenomenon as a "'culture of silence' that protects perpetrators at the cost of their victims."

H.R. Rep. 117-234, 117th Cong., 2d Sess., 4 (report on the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, January 28, 2022).

A whistleblower, or the whistleblower's attorney, could be sanctioned by the arbitrator if he or she violated a confidentiality requirement (whatever its source) by disclosing to federal officials evidence of contractor wrongdoing that had been obtained in the course of a confidential arbitration proceeding. The anti-reprisal provision in § 4712(a)(1) would not provide protection from such sanctions, because § 4712(a)(1) only limits actions

by contractors, not by arbitrators, and because it only protects contractor employees, not former employees or attorneys for employees or former employees. Disclosure to the government might do nothing to advance the interests of the plaintiff, and a request for permission to do so might cause the arbitrator to suspect, or the defendant to assert, that counsel was using discovery, or seeking to make that disclosure, for some improper purpose. Requiring a litigant to request prior permission before disclosing wrongdoing to an Inspector General would be inconsistent with the need for and promise of confidentiality that are essential aspects of the Inspector General system. And the United States would not be in a position to itself seek access to evidence of contractor or grantee misconduct that was unearthed in arbitration, because the government would be unaware that the inculpatory material even existed.

(4) The Fifth Circuit's erroneous decision enables contractors and grantees, by requiring their employees to arbitrate § 4712 claims, to prevent those employees from providing to federal officials discovery-based information concerning contractor or grantee misconduct that those federal officials could not obtain on their own.

Such a precedent could not come at a worse time, because within the last two years the national government has made hundreds of millions of dollars in grants and contracts under the $2.2 trillion Coronavirus Aid, Relief and Economic Security Act[15] and the $1.9 trillion American Rescue Plan Act of 2021.[16] Substantial

15. Pub. L. 116-136.

16. Pub. L. 117-2.

additional expenditures remain to be made under those laws, particularly the latter. In addition, almost all of the recently enacted $1.2 trillion Infrastructure Investment and Jobs Act[17] will be disbursed as grants and contracts. There is a compelling public interest in removing any potential obstacle to the ability of the federal government to prevent and detect waste, mismanagement, abuse, and illegality in the expenditure of these billions of dollars in contracts and grants. Action by this Court to correct the Fifth Circuit's decision, if delayed for years to await possible further developments in the circuit courts, will come too late to protect the current public interest in disclosure of contractor and grantee misconduct.[18]

Before the decision of the Fifth Circuit becomes an established precedent that invites contractors and grantees to use arbitration to obstruct disclosure of misconduct to federal officials, the court of appeals should

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17. Pub. L. 117-58.

18. Delay to await further developments in the courts of appeals is particularly inappropriate because an atypically long time is likely to pass before appeals of the question presented again reach the circuit courts. A district court decision ordering arbitration cannot be appealed when issued if the court merely stays the related civil action. *Green Tree Fin. Corp.-Ala. v. Randolph,* 531 U.S. 79, 87 n. 2 (2000). A stay is the remedy specifically contemplated by the Federal Arbitration Act, 9 U.S.C. § 9, and is clearly the more common district court action when arbitration is ordered. The instant case was appealable only because it was one of the small minority of instances in which the district court actually dismissed the related civil action. App. 25a. In theory a plaintiff ordered to arbitrate a claim could ultimately appeal that order if, following an adverse decision by the arbitrator, the district court finally dismissed the case; in practice, however, plaintiffs virtually never do so.

be directed to further consider this issue in light of the brief of the Solicitor General. The Solicitor General argues that the court of appeals misread the text of section 4712 (*compare* Brief for the United States, 12-14 *with* App. 5a-7a, 9a-12a) and misunderstood this Court's decisions regarding the Federal Arbitration Act. *Compare* Brief for the United States, 7-12 *with* App. 7a-9a. Vacating and remanding this case for reconsideration in light of the position of the United States would be likely to result in correction of the Fifth Circuit's error and would do so without consuming this Court's limited time and resources.

CONCLUSION

For the above reasons, the Court should grant certiorari, vacate the decision of the court of appeals, and remand the case for further consideration in light of the position of the Solicitor General.

Respectfully submitted

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