No. 20-794

In the
Supreme Court of the United States

SERVOTRONICS, INC.,
Petitioner,
v.

ROLLS-ROYCE PLC AND THE BOEING COMPANY,
Respondents.

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

BRIEF OF THE INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF THE INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, INC. AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF SERVOTRONICS, INC.

The International Institute for Conflict Prevention & Resolution, Inc. ("CPR") respectfully submits this amicus curiae brief in support of the petition for writ of certiorari filed herein by Servotronics, Inc.[1]

INTEREST OF AMICUS CURIAE

CPR is an independent, 501(c)(3) not-for-profit organization formed in 1977, among other things, to identify alternatives to litigation and resolve legal conflicts more effectively and efficiently. The mission of CPR is to manage conflict to enable purpose. CPR does this by spearheading innovation and promoting excellence in dispute prevention and resolution through two arms: the CPR Institute and CPR Dispute Resolution.

The CPR Institute is a think tank whose members include arbitrators, mediators, companies, law firms, government practitioners, and academics, and who share best practices and develop innovative tools and

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[1] No counsel for any party authored this brief in whole or in part, no party or party's counsel has made a monetary contribution intended to fund the preparation and submission of this brief, and no person or entity, other than the amicus curiae or its counsel, made a monetary contribution to the preparation or submission of this brief. Amicus curiae notified the parties of its intention to file this brief more than ten days before the due date, and all parties have given written consent to the filing of this brief.

resources for dispute prevention and resolution. Among its efforts, CPR and its Arbitration Committee, which comprises former judges, in-house counsel, law firm attorneys, arbitrators, and academics, have developed administered and non-administered arbitration rules for both international and domestic disputes, model clauses, best practice guides and tools focused on ensuring the efficiency, fairness and cost-effectiveness of arbitrations, with the objective of fostering resolution. Among the many tools are:

- CPR Protocol on Disclosure of Documents & Presentation of Witnesses in Commercial Arbitration;
- CPR Corporate Counsel Manual for Cross-Border Dispute Resolution;
- 2019 CPR Rules for Administered Arbitration of International Disputes;
- 2018 CPR International Non-Administered Arbitration Rules; and
- CPR Fast Track Rules For Administered Arbitration of International Disputes.

CPR Dispute Resolution provides neutrals for and administers ADR proceedings, such as arbitration, mediation, early neutral evaluation, dispute review boards and minitrials. CPR's arbitrators and mediators conduct arbitrations and mediations pursuant to the rules, procedures and protocols generated by the CPR Institute.

A complete overview of the CPR Institute's initiatives and conflict resolution tools, and CPR Dispute Resolution's services, can be found at www.cpradr.org.

As both a global thought leader in conflict management and as an administrator of international arbitrations, CPR has a strong interest in ensuring the continued use, efficiency and effectiveness of international arbitration.

Specifically, the CPR Institute has members who engage in arbitration throughout the world; CPR Dispute Resolution itself is an administrator of international arbitrations, with about one-quarter of the 600-plus members of its Panel of Distinguished Neutrals being located outside of the United States. Consequently, the question of whether United States district courts may entertain applications for judicial assistance in obtaining evidence for presentation in arbitral proceedings before international tribunals is one of great relevance to CPR and its constituents. More specifically, when the district court's jurisdiction is unclear in the district where the party in possession of the sought-after evidence is located, forum shopping and extended costly litigation over that issue can unnecessarily delay the arbitration's merits hearing and increase costs significantly. This disruption is contrary to the effective and efficient resolution arbitration is intended to provide.

As a global thought leader on conflict management, CPR and its members have great concern that the current circuit split regarding the availability of 28 U.S.C. § 1782(a) for discovery before international

arbitral tribunals undermines CPR's goal of fostering efficient and effective resolution of cross-border business disputes through international commercial arbitration.

In particular, the uncertainty whether Section 1782 discovery for use in a private international arbitration is or is not available under United States law itself leads to extensive, time-consuming and tremendously expensive litigation over the threshold issue of simply whether district courts can entertain an application to obtain evidence from a United States party. The mere existence of the uncertainty regarding the district court's jurisdiction over Section 1782 applications inevitably imposes unacceptably high costs for resolving the dispute, frequently embroiling the third-parties from which the evidence is sought into the dispute over whether Section 1782 applies.

Given that the Second, Fifth and Seventh Circuits have decided that Section 1782 does not apply with respect to international arbitral proceedings while the Fourth and Sixth Circuits have come to the opposite conclusion, with additional decisions imminent in both the Third and Ninth Circuits, the only way for this conflict to be resolved is for the Supreme Court to take up this case. CPR therefore urges the Court to establish clarity on the applicability of Section 1782 to international arbitration and further urges the Court to hear the case this term in order to ensure the case does not become moot.

INTRODUCTION AND SUMMARY OF ARGUMENT

CPR takes no position on the merits of the question presented by the petition of Servotronics, Inc. for a writ of certiorari. Rather, CPR's sole purpose for submitting this amicus brief is to support the petitioner's request that the Court take up the case and grant certiorari so that the circuit split that now exists can be promptly resolved.

As set forth in the petitioner's Question Presented, there is a clear circuit split on the question of whether the phrase "foreign or international tribunal" in Section 1782(a) includes private international arbitral tribunals. The Second, Fifth and Seventh Circuits have decided the question in the negative while the Fourth and Sixth Circuits have decided the question in the affirmative. In fact, the decision of the Seventh Circuit in this very case conflicts with the decision of the Fourth Circuit six months earlier in what is essentially the same case involving the same parties before the same arbitration tribunal seated in London.

The current existence of opposite rules on whether district courts have jurisdiction to render assistance under Section 1782 in gathering evidence for international arbitral tribunals creates both the opportunity for blatant forum shopping and the likelihood of protracted litigation on the threshold jurisdictional question in each of the seven remaining regional circuits that have not decided the question.[2]

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[2] There are three cases pending in the Third and Ninth Circuits that have recently been argued addressing the question presented

This most certainly creates a compelling reason for this Court to grant certiorari on this important question of federal law that has significant implications both for United States parties and for foreign parties involved in commercial disputes with United States parties.

There, however, is another important issue relating to the current certiorari petition. The reason why it took over twenty years for the question presented here to make it to the Supreme Court is that the delays resulting from protracted litigation over the district court's jurisdiction for Section 1782 applications can and frequently do result in the underlying arbitral case proceeding to hearing and final award before the Section 1782 court proceedings are complete, frequently precluding an appeal. Obviously, once an award in the underlying arbitral proceeding has been issued, any unresolved Section 1782 proceeding becomes moot. This is especially significant when the case is litigated for six or more months before the

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herein. Third Circuit: *EWE Gasspeicher GmbH v. Halliburton Co.*, No. 20-1830; and *In re: Storag Etzel GmbH v. Baker Hughes Holdings LLC*, No. 20-1833 (both argued on December 9, 2020); and Ninth Circuit: *In re: HRC-Hainan Holding Co., LLC*, No. 20-15371 (argued on September 14, 2020). Although these cases could be decided at any time, it is certainly plausible that one or both of these courts of appeals would defer issuing its decision until after this Court decides whether to grant certiorari and, if it does so, until after the court issues its decision on the merits. (Third Circuit Judge McKee suggested during the consolidated oral arguments for the *EWE* and *Storag* cases held on December 9, 2020 that deferring a decision pending the Supreme Court's decision in the *Servotronics* case might be the most appropriate course for that court to take. *See*, Doc. 68, Third Circuit Case No. 20-1830, Tr. at pp. 4-5.)

district court and then appealed to a circuit court of appeals which typically will take another six or more months for a decision. Of the ten Section 1782 cases involving an international arbitration decided by circuit courts of appeal or still pending before them, listed below, the average length from the initial filing of the Section 1782 application until decision on the application (or to date if still pending) was 16.8 months.[3]

The arbitration hearing on merits of Rolls-Royce's claims against Servotronics in the case before the London arbitral tribunal underlying this case is

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[3] *See,* Second Circuit: *National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.,* 165 F.3d 184 (2d Cir. 1999) (18 months), and *In re: Guo v. Deutsche Bank Securities Inc.*, 965 F.3d 96 (2d Cir. 2020) (19 months); Third Circuit: *EWE Gasspeicher GmbH, supra.* (filed April 26, 2019, and ongoing), and *In re Storag Etzel GmbH, supra.* (filed: August 29, 2019, and ongoing); Fourth Circuit: *Servotronics Inc. v. The Boeing Co.*, 954 F.3d 209 (4th Cir. 2020) (filed October 26, 2018 and ongoing); Fifth Circuit: *Republic of Kazakhstan v. Biedermann Int'l.*, 68 F.3d 880 (5th Cir. 1999) (5 months), and *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 Fed. Appx. 31 (5th Cir. 2009) (13 months); Sixth Circuit: *Abdul Latif Jameel Trans. Co. Ltd. V. FedEx Corp.*, 939 F. 3d 710 (6th Cir. 2019) (16 months); Seventh Circuit: *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689 (7th Cir. 2020) (filed: October 26, 2018, and ongoing); Ninth Circuit: *HRC-Hainan Holding Co., LLC v. Hu, supra.,* (filed November 13, 2019 and ongoing); and Eleventh Circuit: *In re Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987 (11th Cir. 2012), vacated and superseded by 747 F.3d 1262 (11th Cir. 2014) (23 months).

currently scheduled to begin on May 10, 2021.[4] While it is certainly unrealistic to expect that this Court could grant certiorari and resolve the case in petitioner's favor by May 2021, the arbitral hearing will certainly take a number of weeks with issuance of any award many weeks later. In other words, even if the current hearing schedule is retained, the arbitration proceedings will almost certainly remain extant well through the end of this Court's current term. However, unless the hearing is postponed for a significant number of months, it is also quite likely that the underlying arbitration proceedings will conclude and a final award issued before this Court decides this case if its argument is set over until the next term.

Hence, unless set for argument this term, CPR is greatly concerned that this Section 1782 proceeding is at risk of becoming moot prior to the time this case would be decided by this Court. Importantly, there also is the potential risk that any future case presenting the current question coming before this Court, including the three cases having been argued before the Third and Ninth Circuits, could also become moot either before an appeal to the Supreme Court

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[4] This date is set forth at ¶ 27 the Amended Order for Directions, Dated 10 July 2020, issued by the arbitral tribunal in London. A copy of that order was appended to a joint Supplemental Memorandum of Respondents Rolls-Royce and Boeing filed on July 21, 2020 in Servotronics' ongoing Section 1782 case pending before the District of South Carolina, Case No. 2:18-mc-00364-DCN at Doc. No. 32-3, p. 4 of 4 (on remand from the Fourth Circuit).

could be lodged or, if appealed, while such case remains pending before the Court.[5]

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[5] The Second Circuit decided the *Guo* case on July 8, 2020. Evidently because the Chinese-seated arbitration underlying the *Guo* case proceeded with its scheduled hearing before a China International Economic and Trade Arbitration Commission (CIETAC) tribunal two weeks later on July 21, 2020, no certiorari petition was filed foreclosing any potential review in that case by this Court. With respect to the Third Circuit cases, the arbitration hearing in the *EWE* case before the German Arbitration Institute ("DIS") tribunal is scheduled to begin in May 2021 according to oral submissions of counsel at argument on December 9, 2020 in *EWE Gasspeicher* and *In re: Storag Etzel* (*See*, Tr. of Argument at p. 5, Doc. 68 in the *EWE* case and Doc. 54 in the *Storag* case.) In the *Storag* case, for which the underlying arbitration is also pending before a DIS tribunal in Germany, the case record does not indicate when the final hearing will be held. However, according to correspondence from applicant's counsel to the Third Circuit clerk dated October 30, 2020, the tribunal in the *Storag* case issued a partial award against the applicant on October 17, 2020. And, according to a second letter to the clerk, *Storag's* counsel informed the Third Circuit that it will be filing an annulment proceeding in a German state court this month. *See*, Docs. 46 and 48 in *Storag* case. Similarly, according to the applicant's counsel, the arbitration hearing in the case before the Ninth Circuit, *HRC-Hainan Holding Co., LLC v. Hu,* has already been held by a CIETAC tribunal in China and evidently remains as a viable case only by virtue of the parties' stipulation and the continuing pendency of a proceeding related to the arbitration before a Chinese court.

ARGUMENT

I. The Sixth Circuit's September 2019 decision creating the circuit split on the question of whether Section 1782(a) allows district courts to render assistance for private international arbitral tribunals presents a highly important issue of federal law that can only be resolved by the Supreme Court.

In *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), this Court addressed the question of whether the Directorate-General for Competition of the Commission of the European Communities was a "tribunal" within the meaning of the phrase "foreign or international tribunal" in Section 1782(a). Citing to the law review article by the reporter to the Congressionally established Commission on International Rules of Judicial Procedure that had drafted the 1964 amendments to Section 1782(a), Justice Ginsburg's opinion included the following quotation from Professor Smit's article that stated "[t]he term 'tribunal' . . . includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional court civil, commercial, criminal, and administrative courts."[6] 542 U.S. at 258. The *Intel* Court went on to hold that the Directorate-General, which is not a court, would nonetheless properly be considered to be a "tribunal" within the meaning of Section 1782(a).

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[6] *International Litigation under the United States Code*, 65 Columbia L. Rev. 1015, 1026-27, n. 71 (1965), Prof. Hans Smit.

Notwithstanding the earlier decisions in *National Broadcasting Co., Inc. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999), and *Republic of Kazakhstan v. Biedermann Int'l.*, 168 F.3d 880 (5th Cir. 1999), which cases had held that Section 1782's reference to "tribunal" did not include private international tribunals, some lower federal courts began interpreting *Intel* as indicating that private international tribunals should be considered as "tribunals" within the meaning of the term in Section 1782(a). *See, e.g.*, *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006); and *In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951 (D. Minn. 2007). Then, in 2012, the issue reached the Eleventh Circuit in *In re Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987 (11th Cir. 2012), in which the appeals court affirmed the Southern District of Florida allowing discovery under Section 1782(a) for obtaining evidence for private arbitral tribunals.

However, that decision was short lived because the Eleventh Circuit *sua sponte* (and without explanation) withdrew its 2012 opinion 18 months later and issued a new decision that completely changed the substance of its earlier decision. In its new opinion, at 747 F.3d 1262 (11th Cir. 2014), the Eleventh Circuit still affirmed the district court but based its affirmance entirely on the alternative ground of there being the expectation that formal civil and criminal proceedings in Ecuador were "reasonably contemplated," saying nothing about the existence of the private international arbitration upon which its earlier decision was based. Consequently, what had been a circuit split with the Second and Fifth Circuits disappeared.

It was not until 2019 that the next case reached a circuit court of appeals. In May 2018, an application under Section 1782(a) was filed in the Western District of Tennessee in Memphis by a Saudi party to a private international arbitration pending in Dubai seeking discovery from FedEx Corp. Upon denial of the application by the district court, the Saudi party, Abdul Latif Jameel Transportation Company, Limited ("ALJ"), appealed to the Sixth Circuit, which reversed. *Abdul Latif Jameel Trans. Co. v. FedEx Corp.*, 939 F.3d 710 (6th Cir. 2019). Encouraged by the Sixth Circuit's detailed analysis of the meaning of the statute's term "tribunal," more applications under Section 1782 seeking discovery for arbitration cases were being filed, albeit with mixed results.[7] In addition, the international arbitration community was flooded with scores of comments in articles, legal blogs and law firm "alerts" commenting on the circuit split and the need for Supreme Court review.[8] Two articles were

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[7] A Westlaw search for district court decisions for cases brought under Section 1782 for discovery in cases based on an underlying private international arbitration shows that there were at least 14 new cases filed after the Sixth Circuit's decision. This is in comparison to a total of some 65 cases decided in district courts prior to September 19, 2019, the date the Sixth Circuit issued its decision in the *ALJ* case.

[8] *See, e.g.*, *Using the U.S. Courts to Obtain Discovery Here and Abroad for Foreign and International Proceedings*, Frederick Acomb, 99 Mich. B.J. 32 (Sept. 2020); *Practicalities and Commercial Realities: § 1782 and its Applications to Private Commercial Arbitration*, Jenifer Sandlin, 44 J. Legal Prof. 223 (Spring 2020); *Compelling U.S. Discovery in International Franchise Arbitrations: The (F)utility of Section 1782 Applications,* Matthew J. Soroky, 39 Franchise L. J. 185 (Fall 2019); *Circuit*

published by the undersigned in CPR's *Alternatives to the High Cost of Litigation* newsletter.[9]

The Sixth Circuit's decision was soon followed by the Fourth Circuit in the first *Servotronics* case, decided on March 30, 2020. *Servotronics, Inc. v. The Boeing Co.*, 954 F.3d 209 (4th Cir. 2020). The Fourth Circuit's decision agreed with the Sixth Circuit, widening the circuit split with the Second and Fifth Circuits' respective 1999 decisions in *NBC* and *Biedermann* cases. There was some commentary suggesting that *Guo* case which was then before the Second Circuit and had been argued on February 28, 2020 might follow two Southern District of New York decisions finding that *Intel*, which had been subsequently decided, had implicitly overruled *NBC*, leading the Second Circuit to fall in line with Fourth

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Split on 28 U.S.C. § 1782: Are U.S. Courts Trending Against Discovery for Foreign Private Arbitrations?, Dana MacGrath, Nilufar Hossan, Kluwer Arbitration Blog, Oct. 4, 2020; and *Second Circuit Rules in Hanwei Guo that Section 1782 Does Not Apply to Private Commercial Arbitrations*, Dana C. MacGrath, ICC Dispute Resolution Bulletin, 2020, Issue 3, Global Developments.

[9] *Will the Supreme Court Take Up Allowing Discovery under Section 1782 for Private International Arbitrations?,* 38 Alternatives to the High Cost of Litigation 103, July-Aug. 2020; and *Update: The Section 1782 Conflict Intensifies as the International Arbitration Issues Goes to the Supreme Court*, 38 Alternatives to High Cost Litigation 125, Sept. 2020, John B. Pinney

and Sixth Circuits.[10] However, that thought ended when the Second Circuit issued is decision reaffirming *NBC* on July 9, 2020. *In re Guo v. Deutsche Bank Securities Inc.*, 965 F.3d 96 (2d Cir. 2020). The *Guo* decision also ended any hope that a consensus might be reached regarding the applicability of Section 1782(a) to private international arbitration without Supreme Court review.[11]

This journey of jurisprudence through the various circuits not only reflects the need for clarity on the question but underscores the resources that are being invested, quite apart from the resolution of the underlying legal dispute, by parties in Section 1782 litigation. As noted above, almost 17 months pass on average between filing an application for Section 1782 discovery until the matter is resolved (or to date if still pending). While it is hard to tell how much of this time is spent on the threshold question of whether courts might order discovery in aid of private arbitral tribunal processes – as opposed to on the question of what discovery may be allowed, no doubt a significant portion of the time is being invested litigating the jurisdictional issue. And, this time unquestionably could better be invested in the dispute's resolution or in other productive matters.

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[10] *In re Children's Invest. Fund Found. (UK)*, 363 F. Supp. 3d 361, 370-71 (S.D.N.Y. 2019); and *In re Kleimar N.V.*, 220 F. Supp. 3d 517, 521-22 (S.D.N.Y. 2016).

[11] Neither losing party in either the Fourth Circuit's *Servotronics* decision or the Second Circuit's *Guo* filed for certiorari in this Court.

That the legal community is eager for resolution of the threshold question is an understatement. There also have been four law review articles written addressing the topic, including Yanbai Andrea Wang, *Exporting American Discovery*, 87 U. Chi. L. R. 2089 (Nov. 2020); Case Note; *Statutory Interpretation – Textualism – Sixth Circuit Holds That Private Commercial Arbitration is a Foreign or International Tribunal – In re: Application to Obtain Discovery for Use in Foreign Proceedings, 939 F.3d 710 (6th Cir. 2019)*, 133 Harv. L. Rev. 2627 (June 2020); Comment, *Authorization of Discovery in International Commercial Arbitration: Demystifying the Sixth Circuit's Statutory Construction of 28 U.S.C. § 1782(a)*, Jason Arendt, 9 Am. Univ. Bus. L. Rev. 417 (2020); and Alejandro A. Nava Cuenca, Note, *Debunking the Myths: International Commercial Arbitration and Section 1782(a)*, 45 Yale J. Int'l. L. (forthcoming Jan. 2021). In addition, an entire chapter of the recently issued treatise on Section 1782 practice is devoted to the applicability of Section 1782 to private international arbitrations.[12]

As perhaps the most interesting showing of how important those in the international arbitration community view the issue was the inclusion of a mock Supreme Court argument on Section 1782's applicability for private international arbitrations sponsored by the Fordham University School of Law

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[12] *Obtaining Evidence for Use in International Tribunals under 28 U.S.C. § 1782*, Edward M Mullins and Lawrence W. Newman, editors, JurisNet, LLC (2020), Chapter 8, Use of Section 1782 in Aid of Arbitration, David Zaslowsky and Kristina Fridman.

held as part of this fall's "New York Arbitration Week." On November 20, 2020, there was a mock argument before "Supreme Court Justices" Paul D. Clement (former Solicitor General), Nicole A. Saharsky (former Assistant Solicitor General), and Fordham Prof. Pamela Bookman that was broadcast worldwide over the internet on a Zoom platform, followed by a panel discussion of the issue.[13]

The point is that it cannot be overstated that the international arbitration community is anxiously awaiting the Supreme Court's definitive resolution of this important issue of federal law that has significant implications globally for the resolution of disputes arising from cross-border business transactions.

The present case in which Servotronics has petitioned for certiorari comes to this Court from the Seventh Circuit's decision on September 22, 2020, rejecting the Fourth and Sixth Circuits' decisions in *Servotronics* and *ALJ* and following the decisions in *NBC*, *Biedermann* and *Guo*. *Servotronics, Inc. v. Rolls-Royce, PLC*, 975 F.3d 689 (7th Cir. 2020). The effect of the Seventh Circuit's decision was not only to widen further the circuit split and uncertainty in the seven circuits that have yet to address this issue, but also to create a direct circuit split in the very same case.

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[13] *Available at* https://nyarbitrationweek.com/fordham-conference-on-international-arbitration-and-mediation/

II. The Court Should Set the Case for Argument This Term to Avoid the Likelihood that It Will Become Moot Prior to Decision.

The current petition by Servotronics is the first case involving Section 1782(a) for which review by the Court has been sought since *Intel* in 2003.[14] The apparent reason for this is quite simple. By definition, cases brought under Section 1782 are collateral to an underlying case, whether the underlying case is a litigation matter before a foreign court, a criminal matter before an investigating magistrate or an arbitration before a private international arbitral tribunal. The purpose for which any Section 1782(a) application is made is to obtain evidence for use in the underlying case. That means, as a practical matter, that there commonly is an established case schedule for gathering evidence that may or may not be flexible constraining the amount of time available to obtain the desired evidence prior to commencement of the merits hearing or other final determination of the matter. Moreover, in almost every case, the applicant will have a limited budget that it can reasonably devote to litigating over the United States court's jurisdiction for compelling production of the expected evidence it is seeking for use in the foreign proceeding. Each of these factors make it the rare case that as a practical matter can be appealed beyond the district court to a circuit

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[14] Prior to *Intel*, there was only one prior Section 1782 case for which a party sought certiorari. That case was *United Tech. Intern., v. Malev Hungarian Airlines*, 506 U.S. 861 (1992). The *Malev* case involved the plaintiff in a Hungarian lawsuit seeking discovery from a United States-based jet engine supplier.

court of appeals, let alone that can seek further review by this Court.

Consequently, it is not only important that this Court grant Servotronics' petition, but that it also schedule argument this term in order to avoid the case becoming moot prior to this Court's issuance of its decision. The underlying arbitration case brought by Rolls-Royce against Servotronics is set for final hearing commencing on May 10, 2021.[15] While the conduct of the arbitration, including the scheduling of the final hearing, is within the sole discretion of the London arbitral tribunal, CPR submits there is a high likelihood that this case will become moot before this Court issues its decision if argument is held over until the October 2021 term.

Given the paucity of other Section 1782 cases that can even make it to an appellate court and also where the losing party in the court of appeals can then petition for certiorari, it is certainly unclear when another case might make it to the Supreme Court. Hence, the uncertainty resulting from the current circuit split could well remain unresolved for many years to come. To illustrate, of the four recent cases decided by the Second, Fourth, Sixth and Seventh Circuits, only the Seventh Circuit's *Servotronics* has been appealed to this Court.[16] As also explained at

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[15] *See*, footnote 4, *supra.*

[16] Second Circuit: the CIETAC arbitration hearing commenced 13 days after issuance of the decision in the *Guo* case; Fourth Circuit: even though Boeing represented to both the Fourth Circuit and the South Carolina district court that it would be filing for certiorari,

note 5 above, there is no assurance that any of three cases that have been argued in the Third and Ninth Circuits[17] will ever be appealed to this Court. Moreover, for the reasons stated, any of those three cases could easily become moot by the time the courts of appeals issue their respective decisions or the losing party might simply decide not to seek certiorari for economic or timing reasons, making it uncertain whether any of the other cases in the current decisional pipeline will ever be appealed to the Supreme Court. And finally, even if one or more of these cases is appealed to this Court, there can be no assurance that the case will not become moot prior to this Court's decision on the merits.[18]

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the time for filing expired on August 27, 2020; Sixth Circuit: the *ALJ v. FedEx* case was promptly settled on remand to the district court.

[17] The German arbitrations underlying the *EWE* and *Storag* cases pending before the Third Circuit may well be completely resolved this year, and the final hearing CIETAC arbitration in the Ninth Circuit's case, *HRC-Hainan Holding Co., LLC v. Hu*, has already been held.

[18] It is important to note that cases based on Section 1782 do not appear to fall within the doctrine on the exception to mootness based on cases that repeat but evade review. Under *United States. v. Sanchez-Gomez*, 138 S.Ct. 1532, 1540 (2018), that doctrine was most recently explained as follows: "(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there will be a reasonable expectation that the same complaining party will be subjected to the same action again." Even if this or a related exception to mootness doctrine might apply here, the significant risk that the underlying

CONCLUSION

As a leading voice supporting effective and efficient methods for resolution of legal conflict for more than 40 years, CPR urges the Court to grant Servotronics' petition for certiorari to resolve the current circuit split that can only be accomplished by this Court. Given the intensity of interest in the international arbitration community and the indisputable need for avoidance of unnecessary and costly litigation over the jurisdiction of district courts, this Court must put to rest the question presented by taking up this case and deciding this case on its merits.

Moreover, and equally important, CPR urges that this case be set for argument this term. Even if certiorari is granted, setting argument over to the October 2021 term creates an unacceptably high risk that the arbitration tribunal in London will proceed with its final hearing and issue its award in the arbitration underlying this case prior to the end of 2021 so as to moot this case before any decision is rendered.

Dated: January 5, 2021

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arbitration case will be finally resolved prior to issuance of this Court's merits decision counsels in favor of resolution this term on this important issue of federal law.

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