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 A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether 28 U.S.C. § 1782(a), which permits district courts to order discovery "for use in a proceeding in a foreign or international tribunal," authorizes discovery for use in a private, contract-based arbitration.

RULE 29.6 STATEMENT

The Boeing Company does not have any parent corporation, and no publicly held company owns 10% or more of its stock.

The parent corporations of Rolls-Royce PLC are Rolls-Royce Holdings PLC and Rolls-Royce Group PLC. Rolls-Royce Holdings PLC and Rolls-Royce Group PLC hold 100% of the stock of Rolls-Royce PLC.

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BRIEF IN OPPOSITION

Respondents The Boeing Company and Rolls-Royce PLC respectfully submit that the petition for a writ of certiorari should be denied.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–16a) is reported at 975 F.3d 689. The opinion of the district court (Pet. App. 17a–25a) is not reported but is available at 2019 WL 9698535.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 2020. The petition for a writ of certiorari was filed on December 7, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1782(a) provides in relevant part:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . . . The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. . . .

STATEMENT

Petitioner Servotronics, Inc. filed an *ex parte* application seeking the district court's permission to serve a subpoena under 28 U.S.C. § 1782(a) for doc-

ument discovery on Boeing for use in a private arbitration in the United Kingdom between Servotronics and Rolls-Royce. The district court and the Seventh Circuit rejected that request, concluding that a private foreign arbitration is not a "foreign or international tribunal" within the scope of Section 1782(a).

1. This case stems from a fire that occurred during ground testing of an aircraft engine in January 2016. *See* Pet. App. 2a–3a. Rolls-Royce manufactured the engine, which was installed on a Boeing aircraft in production. *Id.* at 2a. Boeing sought compensation for the resulting damage from Rolls-Royce, which settled the claim with participation from its insurers. *Id.* at 3.

Servotronics had supplied an engine component to Rolls-Royce pursuant to their supply agreement. Pet. App. 3a. As Servotronics acknowledged below, "due to a manufacturing error in the [component], an unwanted wafer of metal became lodged in the [component]," ultimately resulting in a "tail pipe fire in the Engine." Dkt. Entry 4, at 2–3.

Rolls-Royce sought reimbursement from Servotronics for the amounts it had paid to Boeing, which Servotronics refused to provide. Pet. App. 3a. The agreement between Servotronics and Rolls-Royce states that, if they cannot resolve a given dispute by negotiation or mediation, "[t]he dispute shall be referred to and finally resolved by arbitration in Birmingham, England, under the rules of the Chartered Institute of Arbitrators [('CIArb')]." Dkt. Entry 4, at 3; *see also* Pet. App. 3a. Following unsuccessful negotiations between Servotronics and Rolls-Royce, the parties agreed to arbitration in London rather than Birmingham, as a matter of convenience. Pet. App. 3a.

2. Servotronics maintains that "Rolls-Royce and Boeing refused to produce materials that are critical to Servotronics' causation defense" in the arbitration. Pet. 4. In fact, Rolls-Royce has obtained from Boeing and produced to Servotronics all documents that the arbitral panel has determined are necessary "for the fair resolution of this arbitration." Rolls-Royce Rule 28(j) Letter ("Rule 28(j) Letter") Ex. A, at 4 (May 8, 2020). The arbitral panel has acknowledged its authority to order Rolls-Royce to demand that Boeing produce relevant documents. *See id.* at 2–3 (noting Rolls-Royce's contractual right to obtain documents "'that are reasonably necessary'" for "'an indemnity or subrogation claim'"). The documents that have not been produced are those categories that the arbitral panel concluded were "excessively broad," "insufficiently focused," "not necessary for the fair disposal of the arbitration," or "not directed to relevant documents." *Id.* at 3–6.

Nonetheless, Servotronics filed an *ex parte* application in the United States District Court for the Northern District of Illinois on October 26, 2018, seeking permission to serve broad document discovery on Boeing under Section 1782(a). Pet. App. 3a. The document requests are nearly identical to those that Servotronics served in the arbitration. *See* Rule 28(j) Letter at 1. That same day, Servotronics also applied *ex parte* for three deposition subpoenas—directed to current and former Boeing employees—in the United States District Court for the District of South Carolina. *Id.* at 19a.

Servotronics did not serve either application on Boeing or Rolls-Royce. The district court initially granted the Illinois application without comment, in a minute order dated November 19, 2018. Pet. App.

17a. Rolls-Royce intervened and moved to quash the subpoena. Boeing separately intervened and submitted a response supporting Rolls-Royce's motion to quash. *Ibid.*

On April 22, 2019, the district court determined that "the London Arbitration for which Servotronics seeks discovery is a private arbitral proceeding that does not qualify as a 'foreign or international tribunal' under the statute." Pet. App. 22a. Accordingly, the district court "grant[ed] the motion [to quash], vacate[d] [its] previous order, and quash[ed] Servotronics's subpoena on Boeing." *Id.* at 25a. Servotronics appealed that decision to the United States Court of Appeals for the Seventh Circuit.

The district court in South Carolina separately denied Servotronics's application to serve deposition subpoenas on current and former Boeing employees, concluding—like both courts below—that Section 1782(a) "does not apply to private international arbitrations." *In re Servotronics, Inc.*, No. 2:18-mc-00364-DCN, 2018 WL 5810109, at *2 (D.S.C. Nov. 6, 2018). Servotronics appealed that decision to the United States Court of Appeals for the Fourth Circuit.

3. The Fourth Circuit panel issued its opinion on March 30, 2020, reversing the South Carolina district court and concluding that "the UK arbitral panel charged with resolving the dispute between Servotronics and Rolls-Royce" is a "foreign or international tribunal" under Section 1782(a). *Servotronics, Inc.* v. *Boeing Co.*, 954 F.3d 209, 214 (4th Cir. 2020). The Fourth Circuit did not hold that all private foreign arbitrations are necessarily "foreign or international tribunal[s]," but rather that arbitration in the United Kingdom is "a product of 'government-conferred au-

thority'" given "governmental regulation and oversight" of the arbitration process. *Ibid.*

The Seventh Circuit, by contrast, affirmed the Illinois district court's order on September 22, 2020. The court noted, in passing, that the Fourth Circuit was "mistaken" because "[t]he source of a private arbitral panel's adjudicative authority is found in the parties' contract, not a governmental grant of power." Pet. App. 8a n.2. The source of an arbitral panel's authority mattered, the court continued, because "a 'foreign or international tribunal' within the meaning of [Section] 1782(a) is a state-sponsored, public, or quasi-governmental tribunal." *Id.* at 15a. The Seventh Circuit concluded that Section 1782(a) was unavailable for Servotronics to obtain discovery for use in a CIArb proceeding because the CIArb is not a "state-sponsored, public, or quasi-governmental" entity. Servotronics then filed this petition for a writ of certiorari seeking review of the Seventh Circuit's decision.

ARGUMENT

Section 1782(a) provides that "[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal." 28 U.S.C. § 1782(a). The Seventh Circuit correctly held that a private, contract-based arbitration conducted abroad is not a "foreign or international tribunal" within the meaning of the statute. *See* Pet. App. 1a–2a.

In so holding, the Seventh Circuit joined the Second and Fifth Circuits. *See* Pet. App. 2a. In *National Broadcasting Co.* v. *Bear Stearns & Co.*, the Second Circuit held that Section 1782(a) does not "apply to

an arbitral body established by private parties." 165 F.3d 184, 191 (2d Cir. 1999). And in *Republic of Kazakhstan* v. *Biedermann International*, the Fifth Circuit agreed that Section 1782 "does not apply to private international arbitrations." 168 F.3d 880, 881 (5th Cir. 1999). In the only decision by this Court interpreting Section 1782, *Intel Corp.* v. *Advanced Micro Devices, Inc.*, the Court held that Section 1782(a) authorizes discovery for use before "the European Union's primary antitrust law enforcer," the Directorate-General for Competition. 542 U.S. 241, 250 (2004). Both the Second Circuit and the Fifth Circuit reaffirmed their prior holdings after this Court's decision in *Intel*. *See In re Guo*, 965 F.3d 96, 109 (2d Cir. 2020) (reaffirming *Nat'l Broad. Co.*); *El Paso Corp.* v. *Comision Ejecutiva Hidroelectrica del Rio Lempa*, 341 F. App'x 31, 33–34 (5th Cir. 2009) (reaffirming *Biedermann*).

As the Seventh Circuit noted, "a split has recently emerged" on this issue following "many years" of circuit agreement. Pet. App. 7a–8a. The Sixth Circuit concluded in 2019 that the "word 'tribunal' includes private commercial arbitral panels established pursuant to contract and having the authority to issue decisions that bind the parties." *Abdul Latif Jameel Transp. Co.* v. *FedEx Corp.* ("*ALJ*"), 939 F.3d 710, 723 (6th Cir. 2019). And last year, the Fourth Circuit applied Section 1782(a) to the request for depositions in the arbitration underlying this case, but did so on a theory—that private arbitration in the United Kingdom is "a product of 'government-conferred authority'"—that no other court of appeals has adopted (and, indeed, that no party argued in that case). *See Servotronics, Inc.* v. *Boeing Co.*, 954 F.3d 209, 214 (4th Cir. 2020).

As this summary of the case law shows, while there is a minor circuit conflict, it is not significant enough at this juncture to warrant granting the petition. The conflict consists of only the Sixth Circuit's decision to reject long-settled precedent from the Second and Fifth Circuits (which has now been confirmed by the Seventh Circuit), and the Fourth Circuit's somewhat incongruous approach. This Court would be best served by permitting the courts of appeals to further consider this issue and decide whether to follow the well-reasoned approach that the Second Circuit first established more than two decades ago, which two other circuits have since embraced. Until more courts have spoken, this Court's review would be premature.

Moreover, the Court should not grant certiorari in this case because the case likely will become moot before the Court can decide it, given that the arbitral panel has scheduled its hearing for May 2021. The Court's decision in this case would have little effect on the arbitration, in any event, because the arbitral panel has already considered and rejected Servotronics's request for disclosure of any documents that have not already been produced. Accordingly, this case offers a poor vehicle for resolving the question presented.

I. THE SEVENTH CIRCUIT'S DECISION BELOW, ADOPTING THE SECOND AND FIFTH CIRCUITS' APPROACH, IS WELL-REASONED AND CORRECT.

The Seventh Circuit held that "a 'foreign or international tribunal' within the meaning of [Section] 1782(a) is a state-sponsored, public, or quasi-governmental" entity, and therefore that Section 1782(a) "does not authorize the district courts to

compel discovery for use in private foreign arbitrations." Pet. App. 15a–16a; *see also Nat'l Broad. Co.*, 165 F.3d at 190 (statute "cover[s] governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies"); *Biedermann*, 168 F.3d at 882 (statute "facilitate[s] discovery for international government-sanctioned tribunals"). This interpretation does not categorically exclude arbitration from the statute's scope: As the Seventh Circuit noted, "state-sponsored" arbitration might constitute a "foreign or international tribunal" under Section 1782(a). Pet. App. 10a.

By contrast, a privately convened arbitral body—such as the arbitral panel in the dispute between Servotronics and Rolls-Royce—derives its authority not from the government, but from "the parties' agreement to forego the legal process and submit their disputes to private dispute resolution." *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010). An arbitration before such a body therefore is not a "proceeding in a foreign or international tribunal" under Section 1782(a), and a request for discovery to be used in such a private arbitration does not qualify for judicial assistance under the statute.

A. STATUTORY TEXT AND CONTEXT

The statutory phrase at issue here—"foreign or international tribunal," 28 U.S.C. § 1782(a)—is properly understood as referring to a body that derives its authority from the government, and not a panel of arbitrators convened by private contractual agreement.

In 1964, when Congress amended Section 1782(a) to include that phrase, the word "tribunal"

was principally defined either as the seat of a judge or as an adjudicatory body acting with governmental authority. *See*, *e.g.*, Webster's New International Dictionary of the English Language 2707 (2d ed. 1955) (defining "tribunal" as "the seat of a judge" or "a court or forum of justice"); Black's Law Dictionary 1677 (4th ed. 1951) ("[t]he seat of a judge" or "[t]he whole body of judges who compose a jurisdiction; a judicial court"); *see also* Pet. App. 9a–10a. Applying that definition, the phrase would have excluded private arbitration, which derives its authority from the contractual consent of the parties and is not imbued with governmental powers. *See*, *e.g.*, Brief for United States as *Amicus Curiae* at 14, *Intel*, 542 U.S. 241 (2004) (No. 02-572) ("[T]he term 'tribunal' in Section 1782 is not limited to courts but includes, more broadly, governmental bodies that exercise adjudicative functions.").[1]

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[1] The Seventh Circuit believed that "canvassing dictionary definitions is inconclusive" because "the phrase 'foreign or international tribunal' can be understood to mean only state-sponsored tribunals, but it also can be understood to include private arbitration panels." Pet. App. 10a. Yet the court agreed that, "in 1964 when the present-day version of the statute was adopted," the contemporaneous definition of "tribunal" would "appea[r] to [have] exclude[d] private arbitral panels." *Id.* at 9a. The court concluded that further inquiry was required to—and did—confirm this understanding because "[t]oday the legal definition of 'tribunal' is broader." *Ibid.* No further inquiry was necessary, however, because "words generally should be interpreted as taking their ordinary, contemporary, common meaning . . . *at the time Congress enacted the statute*." *Wisc. Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2074 (2018) (emphasis added; omission in original; citation omitted). The Seventh Circuit's analysis thus demonstrates that the relevant (*i.e.*, contemporaneous) definitions alone are sufficient to show that a privately con-

[Footnote continued on next page]

That Congress had this definition in mind is confirmed by the provision's reference to a "*foreign or international* tribunal," 28 U.S.C. § 1782(a) (emphasis added), because those terms are best understood as specific references to entities with different sources of governmental authority. A "foreign . . . tribunal" is an entity that derives its authority from a single government, while an "international tribunal" is an entity that derives its authority from a group of governments. *See Nat'l Broad Co.*, 165 F.3d at 190 ("'an international tribunal owes both its existence and its powers to an international agreement'" (quoting Hans Smit, Assistance Rendered by the United States in Proceedings Before International Tribunals, 62 Colum. L. Rev. 1264, 1267 (1962))). Together, the two categories cover the gamut of government-empowered adjudicatory entities that are not purely domestic—and exclude dispute-resolution bodies, such as private arbitral panels, that derive their authority from a non-governmental source.

This understanding of "foreign or international tribunal" is supported by the statutory context. As the Seventh Circuit noted, the identical phrase "foreign or international tribunal" appears in both Section 1782(a) and two related statutes—28 U.S.C. §§ 1696 and 1781—that govern district courts' provision of judicial assistance in international contexts. *See* Pet. App. 12a. Section 1696 addresses service of process in foreign litigation, and Section 1781 addresses letters rogatory, both of which "are matters of comity between governments." Pet. App. 12a–13a. "Identical words or phrases used in different parts of

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[Footnote continued from previous page]
vened arbitration cannot be a "foreign or international tribunal" under Section 1782(a).

the same statute (or related statutes) are presumed to have the same meaning." *Id.* at 12a (citing *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 86 (2006)). Accordingly, the usage in Sections 1696 and 1781 "suggests that the phrase 'foreign or international tribunal' as used in this statutory scheme means state-sponsored tribunals and does not include private arbitration panels." Pet. App. 13a.

Neighboring language in Section 1782(a) itself further confirms this interpretation. Several sentences after the phrase authorizing the district court to order discovery "for use in a proceeding in a foreign or international tribunal," the same subsection provides that a district court issuing a discovery order "may prescribe the practice and procedure, which may be in whole or part the practice and procedure of *the foreign country or the international tribunal*, for taking the testimony or statement or producing the document or other thing." 28 U.S.C. § 1782(a) (emphasis added). Pointing to this subsequent sentence in Section 1782(a), the Seventh Circuit properly concluded that the provision—read as a whole—refers to governmental entities and not private arbitral bodies:

> Harmonizing this statutory language and reading it as a coherent whole suggests that a more limited reading of [Section] 1782(a) is probably the correct one: a "foreign tribunal" in this context means a governmental, administrative, or quasi-governmental tribunal operating pursuant to the foreign country's "practice and procedure." Private foreign arbitrations, in other words, are not included.

Pet. App. 13a. The Seventh Circuit's approach follows this Court's precedents, which provide that a court's task in construing a statute is to "fit, if possible, all parts into an harmonious whole." *Roberts* v. *Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012). Only the reading of "foreign or international tribunal" adopted by the Second, Fifth, and Seventh Circuits accomplishes this objective.

B. THE FEDERAL ARBITRATION ACT

As the Second, Fifth, and Seventh Circuits have acknowledged, construing "foreign or international tribunal" in Section 1782(a) as excluding private arbitration is also necessary to avoid a serious conflict with the FAA and the pro-arbitration policies it embodies. *See* Pet. App. 13a–15a; *Nat'l Broad. Co.*, 165 F.3d at 190–91; *Biedermann*, 168 F.3d at 882–83. Federal courts have a "duty to interpret Congress's statutes as a harmonious whole rather than at war with one another." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1618 (2018). But interpreting Section 1782(a) to authorize judicial assistance in connection with private arbitration proceedings would create just such disharmony by authorizing discovery that the FAA does not contemplate.

Section 7 of the FAA authorizes *arbitrators*—not litigants—"to summon witnesses before the panel to testify and produce documents and to petition the district court to enforce the summons." Pet. App. 13a (citing 9 U.S.C. § 7). This FAA-authorized discovery is more limited than Section 1782(a) discovery in three ways. *First*, "while [an] arbitration panel may subpoena documents and witnesses, litigants have no comparable privilege." *St. Mary's Med. Ctr. of Evansville, Inc.* v. *Disco Aluminum Prods. Co.*, 969 F.2d 585, 591 (7th Cir. 1992); *see also Nat'l Broad. Co.*,

165 F.3d at 187 ("the parties to an arbitration may not employ [Section 7] to subpoena documents or witnesses" (emphasis in original)). *Second*, Section 7 "explicitly confers enforcement authority only upon the 'district court for the district in which such arbitrators, or a majority of them, are sitting.'" *Nat'l Broad. Co.*, 165 F.3d at 188 (quoting 9 U.S.C. § 7). Section 1782(a), by contrast, authorizes district court discovery assistance anywhere "a person resides or is found"—a broad grant of authority that Servotronics sought to leverage by launching discovery actions in both Illinois and South Carolina. *Third*, "[n]owhere does the FAA grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents during prehearing discovery." *COMSAT Corp.* v. *Nat'l Sci. Found.*, 190 F.3d 269, 275 (4th Cir. 1999); *see also St. Mary's Med. Ctr.*, 969 F.2d at 591 ("parties who agree to arbitrate relinquish the right to liberal pretrial discovery allowed by the federal rules"). Yet Servotronics has sought precisely such relief in this proceeding and in South Carolina.

As the Seventh Circuit noted with respect to the differences between the FAA and Section 1782(a):

> If [Section] 1782(a) were construed to permit federal courts to provide discovery assistance in private foreign arbitrations, then litigants in foreign arbitrations would have access to much more expansive discovery than litigants in domestic arbitrations. It's hard to conjure a rationale for giving parties to private foreign arbitrations such broad access to federal-court discovery assistance in the United States while precluding such discov-

> ery assistance for litigants in domestic arbitrations.

Pet. App. 14a.

Moreover, a considerable subset of "foreign or international" arbitrations are subject to the FAA. *See Nat'l Broad. Co.*, 165 F.3d at 187 (noting that the FAA "applies to private commercial arbitration conducted in this country" and "also to arbitrations in certain foreign countries by virtue of legislation implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Inter-American Convention on International Commercial Arbitration"). As the Seventh Circuit noted, "[r]eading Section 1782(a) broadly to apply to all private foreign arbitrations creates a direct conflict with the Act for this subset of foreign arbitrations." Pet. App. 13a. Federal statutes should be read to create such a conflict with the FAA only if there is "a clearly expressed congressional intention that such a result should follow." *Epic Sys. Corp.*, 138 S. Ct. at 1624 (citation omitted). Section 1782(a) does not "even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as [this Court's precedent] demand[s]." 138 S. Ct. at 1624.

C. LEGISLATIVE HISTORY

As the Second Circuit held, the legislative history of Section 1782(a) further confirms that a private arbitration panel is not a "foreign or international tribunal" for purposes of the statute. That "legislative history reveals that when Congress in 1964 enacted the modern version of [Section] 1782, it intended to cover governmental or intergovernmental arbitral tribunals and conventional courts and other state-

sponsored adjudicatory bodies." *Nat'l Broad. Co.*, 165 F.3d at 190.

The impetus for the 1964 amendment was Congress's desire—expressed in enacted legislation—to improve "judicial assistance and cooperation between the United States and *foreign countries*." Act of Sept. 2, 1958, Pub. L. No. 85–906, § 2, 72 Stat. 1743 (emphasis added). To that end, the Rules Commission was directed to "improv[e]" the avenues for United States courts to assist "foreign courts and quasi-judicial agencies." *Ibid.* This assistance was important, Congress emphasized, to encourage other countries to facilitate "the performance of acts in foreign territory" when required by United States courts. *Ibid.*; *see also* S. Rep. No. 88-1580 ("Senate Report"), at 2 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3783 ("It is hoped that the initiative taken by the United States in improving its procedures will invite *foreign countries* similarly to adjust their procedures." (emphasis added)); H.R. Rep. No. 88-1052 ("House Report"), at 4 (1963) (same). The Seventh Circuit correctly observed that "[n]oticeably absent from this statutory charge is any instruction to study and recommend improvements in judicial assistance to private foreign arbitration." Pet. App. 12a.

Congress's focus on assistance to foreign courts and sovereign entities found expression in the legislation enacted in 1964. As an example of the type of proceeding that Congress had in mind when substituting the word "tribunal" for "court" in Section 1782(a), the Senate and House reports identify proceedings "before investigating magistrates in foreign countries." Senate Report at 7, 1964 U.S.C.C.A.N. at 3788; House Report at 9. Again, private arbitration goes unmentioned.

The Second Circuit reviewed this history and concluded that "it is apparent in context that the authors of these reports had in mind only governmental entities, such as administrative or investigative courts, acting as state instrumentalities or with the authority of the state." *Nat'l Broad. Co.*, 165 F.3d at 189. The court further emphasized that Congress would not lightly have undertaken the significant "expansion of American judicial assistance to international arbitral panels created exclusively by private parties . . . without at least a mention of this legislative intention." *Id.* at 190. Thus, the Second Circuit noted, "[t]he absence of any reference to private dispute resolution proceedings such as arbitration strongly suggests that Congress did not consider them in drafting the statute." *Id.* at 189.

* * *

For all of these reasons, the Seventh Circuit correctly followed longstanding and well-reasoned precedent in determining that the phrase "foreign or international tribunal" in 28 U.S.C. § 1782(a) encompasses only entities that exercise government-conferred authority, and does not extend to a private arbitral panel whose authority is contractually derived—such as the panel here. Review of the decision below is not warranted.

II. THE MINOR CIRCUIT SPLIT ON THE QUESTION PRESENTED DOES NOT WARRANT THIS COURT'S REVIEW.

As the Seventh Circuit noted, for "many years," Pet. App. 8a, the courts of appeals held unanimously that Section 1782(a) "does not authorize district courts to order discovery for use in private foreign arbitrations," Pet. App. 7a. Servotronics claims that recent decisions by the Fourth and Sixth Circuits

have created a "stark division in [statutory] interpretation," Pet. 2–3, but, in fact, the split is a shallow one, and most circuits have yet to address the issue.

The Sixth Circuit's departure from the approach taken by the Second, Fifth, and Seventh Circuits is an outlier that lacks the thorough and well-reasoned basis underlying the approach it rejected. The Sixth Circuit concluded that "the text, context, and structure of [Section] 1782(a) provide no reason to doubt that the word 'tribunal' includes private commercial arbitral panels established pursuant to contract and having the authority to issue decisions that bind the parties." *ALJ*, 939 F.3d at 723. In so ruling, however, the court construed the term "tribunal" in isolation from the rest of the statutory language, *see id.* at 719, and relied on modern, colloquial understandings of "tribunal" rather than the settled definition in 1964—requiring the exercise of governmental authority—when the current statute was adopted, *see id.* at 719–20. The Sixth Circuit's interpretation also rendered Section 1782(a)'s reference to the "practice and procedure of the foreign country or the international tribunal" meaningless as to private arbitral bodies, because the host country does not establish the "practice and procedure" for private arbitration, *cf. id.* at 722–23; and the court failed to meaningfully address the significant conflicts with the FAA that would result from applying Section 1782(a) to private arbitration, *cf. id.* at 728–29. No other court of appeals has yet agreed with the Sixth Circuit's interpretation.

The Fourth Circuit, meanwhile, charted its own course in concluding that the CIArb arbitration at issue in this case is a "foreign or international tribunal" for purposes of Section 1782(a). The court did

not dispute the established wisdom of the previous courts of appeals that the term "foreign or international tribunal" refers only to "entities acting with the authority of the State." *Servotronics*, 954 F.3d at 214. Rather, the Fourth Circuit concluded—based on a theory no party had argued—that, "even if we were to apply" that interpretation of the operative statutory language, arbitration in the United Kingdom is "a product of 'government-conferred authority,'" and therefore the arbitral panel is a "foreign or international tribunal." *Ibid.*

No court of appeals—or, it would appear, court of any sort—has adopted this understanding of private arbitration. The Seventh Circuit expressed in passing its view that the Fourth Circuit was "mistaken" because "[t]he source of a private arbitral panel's adjudicative authority is found in the parties' contract, not a governmental grant of power." Pet. App. 8a n.2. The court did not address the issue further because not even Servotronics had "argue[d] that arbitration in the United Kingdom . . . is the product of government-conferred authority." *Ibid.*

Accordingly, the recent, minor circuit split that Servotronics has identified does not warrant review by this Court now. Contrary to Servotronics's suggestion, *see* Pet. 13, most circuits simply have not yet resolved the issue, even when it has been presented. *See*, *e.g.*, *In re Consorcio Ecuatoriano de Telecomunicaciones S.A.*, 747 F.3d 1262, 1270 n.4 (11th Cir. 2014). In any event, they have had little time to consider the Sixth Circuit's ruling or the narrow alternative—applicable only to U.K. arbitral panels—offered by the Fourth Circuit. This Court would be best served by permitting the courts of appeals to further consider this issue and decide whether to fol-

low the well-reasoned approach that the Second Circuit first adopted more than two decades ago, and which two other courts of appeals have since embraced.

III. THE COURT SHOULD DENY THE PETITION BECAUSE THIS CASE OFFERS A POOR VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

Even if this Court wished to review the question presented, this case would be a poor vehicle for doing so. The arbitration proceeding for which Servotronics has sought discovery is scheduled for a ten-day hearing beginning on May 10, 2021. *See* Letter from Stephen R. Stegich to Scott S. Harris ("Stegich Letter") at 2 (Jan. 3, 2021). This schedule creates a serious concern that the case will become moot before it can be decided by this Court—let alone be fully resolved on remand if the Court were to reverse.[2]

"A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Murphy* v. *Hunt*, 455 U.S. 478, 481 (1982) (per curiam)). In Section 1782(a) cases, an application for discovery becomes "moot when there are 'no foreign proceedings, within the meaning of the

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[2] Servotronics did not mention the May hearing date in its petition for certiorari, raising it for the first time in a letter to the Clerk of Court after the petition was filed. *See* Stegich Letter at 2. Servotronics noted in the letter that it has "request[ed] that the hearing be rescheduled for the fall of 2021." *Ibid.* The panel has not yet ruled on that request, but is scheduled to hear oral argument on March 4, and Rolls-Royce is opposing the request.

statute, in which the discovery could be used.'" *Mangouras* v. *Squire Patton Boggs*, 980 F.3d 88, 96 (2d Cir. 2020) (quoting *Euromepa, S.A.* v. *R. Esmerian, Inc.*, 154 F.3d 24, 29 (2d Cir. 1998)).

If the district court denies discovery, and the "foreign proceedings relied upon . . . in [the] application . . . permanently conclud[e]" while the order is on appeal, then the party seeking discovery "has no 'legally cognizable interest in the outcome' of his appeal." *Mangouras*, 980 F.3d at 96–97 (quoting *Already, LLC*, 568 U.S. at 91). That is precisely the risk that the Court would face by granting review here, where the underlying arbitration is scheduled to conclude before the case could be fully briefed, argued, and decided in this Court.

Indeed, the mere conclusion of the arbitration *hearing*—scheduled for May of this year—is likely to render this case moot, even if some aspect of the arbitration remains pending. The Second Circuit, for example, has dismissed as moot an appeal from an order denying Section 1782(a) discovery where the foreign "'evidentiary hearing [had already] occurred,'" even though the foreign proceeding was still "currently pending." *In re Ishihara Chem. Co.*, 251 F.3d 120, 123–24 (2d Cir. 2001) (joined by Sotomayor, J.). Similarly, the Third Circuit dismissed as moot an appeal from an order denying Section 1782(a) discovery where "the time to submit any evidence in the current arbitration proceeding has passed," even though the arbitral panel had not yet issued its decision. *Comision Ejecutiva Hidroelectrica del Rio Lempa* v. *Nejapa Power Co.*, 341 F. App'x 821, 827 (3d Cir. 2009).

This Court will have numerous opportunities to address the question presented in cases where moot-

ness is not an issue. Servotronics acknowledges, for example, that "the Third and Ninth Circuits have the issue under consideration." Pet. 11 n.6.

Nor would awaiting such a more suitable case result in any unfairness to Servotronics. Servotronics sought Section 1782(a) discovery more than two years ago—in October 2018—but has never sought to expedite any court's consideration of its request. Even before this Court, where Servotronics and its *amici* have acknowledged the potential for mootness, Servotronics has not moved to expedite consideration of its petition.

Further, the arbitral panel has acknowledged its authority to order Rolls-Royce to demand that Boeing produce relevant documents, and Servotronics has requested and received document production covering many of the same categories of documents at issue here. *See* Rule 28(j) Letter at 1; *id.* Ex. A, at 3–6. Nor is there any reason to believe that the arbitral panel would consider additional documentary evidence in any event, as it has already considered and rejected the remaining categories that Servotronics has requested. *See id.* Ex. A, at 3–6.

Because the petition raises significant jurisdictional issues, and denying review would not result in any unfairness to Servotronics, the Court should await a more appropriate vehicle if it is otherwise inclined to review the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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