No. 20-794

In the Supreme Court of the United States

SERVOTRONICS, INC.,
PETITIONER,

v.

ROLLS-ROYCE PLC AND THE BOEING COMPANY,
RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT ROLLS-ROYCE PLC

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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.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are Servotronics, Inc., Rolls-Royce PLC, and The Boeing Company.

The parent corporations of Respondent 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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JURISDICTION

The court of appeals entered judgment on September 22, 2020. Servotronics filed a petition for a writ of certiorari on December 7, 2020, which was granted on March 22, 2021. Servotronics invoked the Court's jurisdiction under 28 U.S.C. § 1251(4). The Court lacks jurisdiction because the case is moot. *Infra* pp. 12-14.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this brief, App.1a-8a.

STATEMENT

Congress in 28 U.S.C. § 1782 authorized U.S. judicial assistance in obtaining evidence "for use in a proceeding in a foreign or international tribunal." Section 1782 is a sovereign-centric provision grounded in comity. The provision offers U.S.-style discovery to encourage foreign sovereigns to extend similar courtesies to U.S. parties.

The question here is whether section 1782 encompasses private arbitrators. The answer is no. All conventional indicia of statutory meaning show that a "foreign or international tribunal" is a court or equivalent governmental or intergovernmental adjudicative body. German trial courts, the International Criminal Tribunal for Rwanda, and the European Commission's antitrust division all count because they walk, talk, and act like courts. They are sovereign-created bodies that exercise delegated sovereign authority to adjudicate and render final decisions. By aiding those sovereign bodies, U.S. courts encourage other sovereigns to aid the United States in return. But private arbitrators lack institutional interests that would advance comity. As temporary decision-makers appointed for one dispute only, they exercise no sovereign authority whatsoever.

Servotronics' contrary interpretation offers no limiting principle, and could allow anyone interested in the outcome of private disputes presided over by private decision-makers to press U.S. courts for far-reaching discovery. Expanding section 1782 would unjustifiably expose U.S. courts, companies, and residents to exhaustive pretrial discovery demands. That result is implausible, especially because the Federal Arbitration Act (FAA) curtails U.S. companies' access to discovery in U.S. arbitrations. It defies credulity that Congress opened up broad discovery to aid private foreign or international arbitrations, but not U.S. arbitrations. Moreover, the FAA applies to many

international commercial arbitrations, which under Servotronics' interpretation would simultaneously be subject to incompatible discovery rules under section 1782 and the FAA.

Servotronics' interpretation would compromise the benefits of arbitration, too. Drawn-out discovery litigation undermines the efficiency and cost-effectiveness that parties bargain for in arbitration. Parties also pick arbitration for clear, predictable rules that put arbitrators in charge of discovery. But Servotronics' interpretation would allow parties to evade arbitrator-controlled discovery. Parties could run to court before the arbitrators are appointed, or even go to court to second-guess the extent of discovery that arbitrators order. Congress surely did not intend for section 1782 to bog down U.S. courts, upset arbitrations, and encourage gamesmanship.

A. Section 1782

The operative version of section 1782, enacted in 1964, authorizes district courts to order the production of evidence within the United States "for use in a proceeding in a foreign or international tribunal." 28 U.S.C. § 1782(a). Congress in a 1996 amendment provided that such proceedings "includ[e] criminal investigations conducted before formal accusation." Div. A, Title XIII, Feb. 10, 1996, Pub. L. No. 104-106, § 1342(b), 110 Stat. 486. And that "proceeding" must "be within reasonable contemplation." *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 259 (2004).

Section 1782 spells out how to obtain evidence. District courts can issue orders "pursuant to a letter rogatory" or "request made[] by a foreign or international tribunal." 28 U.S.C. § 1782(a). Letters rogatory are "request[s] by a domestic court to a foreign court to take evidence from a certain witness." *Intel*, 542 U.S. at 247 n.1.

Alternatively, "any interested person" may apply to U.S. district courts. 28 U.S.C. § 1782(a). An "interested person" includes "litigants" before the tribunal and anyone else with a "reasonable interest" in the matter. *Intel*, 542 U.S. at 256. However the request originates, the district court has discretion whether to grant it. *Id.* at 264-65.

Section 1782 prescribes what evidence district courts can compel. Courts can order "a person [who] resides or is found" within the court's jurisdiction "to give his testimony or statement or to produce a document or other thing." 28 U.S.C. § 1782(a). Thus, district courts can order depositions or compel document production just as they order pre-trial discovery in U.S. litigation.

Section 1782 also sets procedures for obtaining discovery. The court's 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." *Id.* If the order "does not prescribe otherwise," the default is "the Federal Rules of Civil Procedure," which govern discovery in federal litigation. *Id.*

B. Factual and Procedural Background

1. This case concerns Servotronics' efforts to enlist U.S. courts under section 1782 in obtaining U.S. discovery for Servotronics' use in a private arbitration in London. Pet.App.2a. In January 2016, a fire occurred during ground testing of an aircraft engine. Pet.App.2a-3a. Rolls-Royce manufactured the engine, which was installed on a Boeing aircraft. Pet.App.3a. Boeing sought compensation for damage to the aircraft. Rolls-Royce and Boeing settled all claims. *Id.*

Rolls-Royce sought reimbursement from Servotronics, which manufactured a component for the Rolls-Royce engine under the parties' supply agreement. *Id.*

That agreement included an arbitration clause whereby the parties agreed to resolve disputes through arbitration in England under the rules of the Chartered Institute of Arbitrators (CIArb). *Id.* On September 18, 2018, after settlement negotiations failed, Rolls-Royce initiated arbitration. *Id.*; J.A.20a.

2. On October 26, 2018, before the parties even selected arbitrators, Servotronics filed an *ex parte* section 1782 application in the Northern District of Illinois seeking to compel Boeing to produce documents concerning the incident. Pet.App.17a; J.A.15a-18a.

The district court granted Servotronics' application in a minute order. J.A.46a. Rolls-Royce and Boeing moved to vacate that order and quash the subpoena, arguing that section 1782 does not permit court-ordered discovery for use in private arbitrations. Pet.App.1a-2a. The district court agreed, vacated its order, and quashed the subpoena. Pet.App.25a.

The Seventh Circuit affirmed, holding that a "tribunal" under section 1782 "means a governmental, administrative, or quasi-governmental tribunal operating pursuant to the foreign country's 'practice and procedure.'" Pet.App.13a. That definition excludes "[p]rivate foreign arbitrations," *id.*, 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.

The Seventh Circuit considered the phrase "'foreign or international tribunal'" ambiguous in "common and legal parlance." Pet.App.10a. But the court reasoned that the "more expansive" reading of "tribunal" to include private arbitrations "becomes far less plausible" in light of statutory context. *Id.* The court highlighted 28 U.S.C. §§ 1696 and 1781, which refer to assistance with service of

process and letters rogatory—"matters of comity between governments" that signal that a "tribunal" excludes private arbitrators. Pet.App.12a-13a.

The Seventh Circuit added that its interpretation "avoid[ed] serious conflict with the Federal Arbitration Act," Pet.App.13a, which authorizes far less discovery than does section 1782. Pet.App.14a-15a. Because the FAA applies to some international commercial arbitrations, "[r]eading § 1782(a) broadly to apply to all private arbitration creates a direct conflict with the [FAA] for this subset of foreign arbitrations." Pet.App.15a. Further, "[i]f § 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," which the court considered implausible. Pet.App.14a.

3. Servotronics filed two other *ex parte* section 1782 applications requesting additional discovery for use in the London arbitration.

a. *South Carolina proceedings*. On October 26, 2018—the same day that Servotronics sought discovery in Illinois—Servotronics filed a section 1782 application in the U.S. District Court for the District of South Carolina seeking to compel testimony from three Boeing witnesses in South Carolina: Alan Sharkshnas, Scott Walston, and Terrance Shifley. J.A.15a.

The district court denied Servotronics' request, holding that the London arbitration panel was not a "foreign or international tribunal" under section 1782. *In re Servotronics, Inc.*, 2018 WL 5810109, at *4 (D.S.C. Nov. 6, 2018).

The Fourth Circuit reversed, concluding that "the UK arbitral panel … is a 'foreign or international tribunal'

under § 1782(a)." *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 216 (4th Cir. 2020). The court reasoned that the panel is "a product of 'government-conferred authority.'" *Id.* at 214. In the Fourth Circuit's view, the U.K. Arbitration Act of 1996, which authorizes enforcement and recognition of arbitral awards, established that U.K. arbitrations are "sanctioned, regulated, and overseen by the government and its courts." *Id.*

The Fourth Circuit remanded the case for the district court to determine whether to authorize the subpoenas. *Id.* at 216. Servotronics sought a writ of mandamus, which the Fourth Circuit granted. Order 1-2, Case No. 21-1305, ECF No. 22 (4th Cir. Apr. 15, 2021). The next day, the district court authorized depositions of Messrs. Walston and Sharkshnas. Order 1, Case No. 2:18-mc-00364-DCN (D.S.C. Apr. 16, 2021). On April 20, 2021, Rolls-Royce sought a stay of that order, which the Court denied on April 27. *See* No. 20A160.

b. *Minnesota proceedings*. On December 1, 2020, after Boeing employee Terrance Shifley moved to Minnesota, Servotronics filed another section 1782 application seeking his testimony. The Minnesota district court stayed this application pending this Court's review. *Servotronics, Inc. v. Rolls-Royce PLC*, 2021 WL 1221189, at *2-3 (D. Minn. Apr. 1, 2021).

4. Meanwhile, the London arbitrators have already considered the significance of the evidence that Servotronics sought through its section 1782 applications.

In 2020, Servotronics asked the arbitrators to order Rolls-Royce to produce all Boeing documents that Servotronics had sought in its section 1782 application in Illinois. 20A160 Appl.App.46a. In an interim ruling, the arbitrators rejected many of Servotronics' discovery requests as "excessively broad," but ordered Rolls-Royce to

produce various Boeing documents by requesting those documents from Boeing pursuant to the Rolls-Royce/Boeing settlement. Amended Interim Award, Case No. 19-1847, ECF No. 33-2 (7th Cir.). Rolls-Royce complied. In another interim ruling, the arbitrators concluded that all Boeing documents at issue "fall into one of two categories: either (a) documents that the Tribunal ordered [Rolls-Royce] to produce to [Servotronics], and which now have been produced; or (b) documents requested by [Servotronics], which … were not necessary for the fair disposal of this case." 20A160 Appl.App.46a.

As for the three Boeing witnesses Servotronics sought to depose, the arbitrators deemed their testimony unnecessary to a fair hearing. 20A160 Resp.App.6ra; 20A160 Appl.App.43a, 45a. The arbitrators thus deemed it contrary to "the interests of justice and fairness in this arbitration" to suspend arbitral proceedings pending resolution of Servotronics' U.S. lawsuits. 20A160 Resp.App.8ra.

In all events, Servotronics deposed Messrs. Sharkshnas and Walston on May 3 and 5, 2021. Servotronics relied on that testimony in the May 10-21, 2021 arbitration hearing. The parties provided final written submissions on June 4, 2021.

SUMMARY OF ARGUMENT

I. This case is moot. Servotronics filed section 1782 applications solely to obtain discovery for use at an arbitration hearing that occurred from May 10-21, 2021. The Court should dismiss the writ of certiorari because it can no longer redress Servotronics' asserted harm of being unable to present particular evidence to the arbitrators.

II. If this Court reaches the merits, the Court should affirm. Section 1782 authorizes U.S. judicial assistance in obtaining evidence "for use in a proceeding in a foreign or

international tribunal." A "foreign or international tribunal" means courts and similar governmental or intergovernmental adjudicative bodies, not private arbitrators.

A. All indicia of ordinary meaning confirm that when Congress enacted the operative version of section 1782 in 1964, a "foreign or international tribunal" meant governmental adjudicators, and thus excluded private arbitrators, who lack every distinguishing feature of sovereign adjudicators. Contemporaneous dictionaries define a "tribunal" as courts or similar sovereign adjudicators, including in the foreign and international context. Statutes and treaties reflect the same understanding. So do this Court's precedents and legal scholarship.

Servotronics' interpretation of "tribunal" offers no concrete definition and no limiting principle. If private arbitrators count as "tribunals," so could countless other private decision-makers. The modifiers "foreign" and "international" do not make sense applied to private arbitrators. Servotronics' purported examples of contrary usage are inapt. And Congress uses words other than "tribunal"—such as "arbitrators" or "referees"—to refer to private arbitrators.

B. The surrounding text of section 1782 reinforces that a "foreign or international tribunal" means governmental and intergovernmental adjudicative bodies.

1. Section 1782 authorizes district courts to defer to "the practice and procedure *of the foreign country or the international tribunal*, for taking the testimony or statement or producing the document." But foreign arbitrators follow the rules of the arbitral body the parties have selected, as well as whatever arbitration statutes or other rules govern their arbitration. Under Servotronics' interpretation, district courts would have leeway to defer to the

procedures set by "international" arbitral panels, but not "foreign" ones. Further, section 1782 presupposes that district courts could identify the "practices and procedures" of the foreign or international tribunal. But arbitral panels are ad hoc, and the parties can authorize arbitrators to pick their own evidentiary procedures, which may not even exist when the district court entertains a section 1782 application.

2. Section 1782 empowers U.S. courts to facilitate evidence-collection "for use *in a proceeding in* a foreign or international tribunal." That language suggests the "tribunal" is a standing, existing entity. But private arbitrations involve one-off adjudication by a temporary panel; no one would speak of seeking evidence for use "in a proceeding in an arbitral panel." Further, in the private arbitration context, district courts may confront section 1782 applications before arbitrators are selected, so there is no specific, existing forum to assist.

3. Section 1782 authorizes U.S. courts to facilitate evidence-gathering "for use in proceedings in a foreign or international tribunal, *including criminal investigations conducted before formal accusation*." That language bolsters the sovereignty theme running throughout section 1782. Sovereign bodies conduct criminal investigations; private arbitrators do not.

C. Four related statutory provisions confirm that section 1782 "tribunals" are sovereign adjudicators.

First, section 1696 refers to a "foreign or international tribunal" as an entity that renders "a judgment, decree, or order." Congress exclusively associates those words with courts and quasi-judicial bodies. By contrast, Congress uniformly refers to "arbitral awards."

Second, section 1781 refers interchangeably to "a tribunal in the United States" and "foreign or international tribunal[s]" as entities that may send or receive "letters rogatory" or "requests" for judicial assistance. The phrase "tribunal in the United States" cannot refer to U.S. arbitral panels; the FAA bars them from seeking such evidentiary assistance. And "tribunal" presumably has a uniform meaning. Since arbitral panels cannot be U.S. "tribunals," they cannot be "foreign or international tribunals," either.

Section 1781 also describes the U.S., foreign, and international recipients of a letter rogatory or a request for evidentiary assistance as a "tribunal, officer, or agency." An "officer" and an "agency" are quintessentially sovereign actors.

Third, 15 U.S.C. § 46(j)(2)(B) cross-references section 1782 in authorizing the Federal Trade Commission (FTC) to aid "foreign and international tribunals" if the request originates "from an agency" investigating civil or criminal-law violations. Again, agencies are sovereign actors.

Finally, 18 U.S.C. § 1510 makes it a crime to disclose subpoenas for records under section 1782 and other provisions, if those subpoenas are for customer records relating to violations of federal statutes or foreign laws. Section 1510 yet again focuses on assisting foreign sovereigns, not arbitrations.

D. This Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), treats a section 1782 "tribunal" as a governmental adjudicatory body. *Intel* emphasized that Congress expanded the availability of U.S. judicial assistance beyond courts to encompass "quasi-judicial agencies" that act as first-instance deci-

sion-makers and amass the record for later judicial review. That description does not fit private arbitrators.

E. Interpreting "foreign or international tribunal[s]" to include private arbitrators would subject many international arbitrations to conflicting discovery rules under section 1782 and the FAA. Congress did not plausibly intend to pit two statutes against each other in the same arbitrations. Further, Servotronics' reading would anomalously burden U.S. companies and residents with discovery orders to aid foreign arbitrations, while depriving U.S. companies and residents of the benefit of such discovery in U.S. arbitrations.

F. Servotronics invokes predecessor versions of section 1782 and the legislative history. Neither support including private arbitrators as "foreign or international tribunal[s]."

G. The destabilizing policy consequences of Servotronics' interpretation underscore its doubtfulness. U.S. courts, companies, and residents could be deluged with discovery requests. Private parties could manufacture arbitrations, then use section 1782 as a fishing expedition against U.S. entities. Servotronics' interpretation would also undermine bargained-for benefits of arbitration, namely efficiency, cost-effectiveness, confidentiality, and arbitrator-controlled discovery.

ARGUMENT

I. This Case Is Moot

Servotronics sought evidence for use in an arbitration hearing that is over. The case appears to be moot, and will certainly be moot when the arbitrators' award issues.

1. Under Article III of the Constitution, Servotronics must "demonstrate standing—a personal injury fairly

traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013) (quotations omitted). A controversy "must exist … through 'all stages' of the litigation." *Id.* at 91. When a court can no longer redress the plaintiff's harm, the case is moot. *Alvarez v. Smith*, 558 U.S. 87, 93 (2009).

Servotronics does not address mootness, so it is unclear how Servotronics considers the case live. Servotronics filed its section 1782 applications solely to obtain evidence for the London arbitration hearing that ended May 21, 2021. *See* Br. 7. There is no indication that the arbitrators will reopen the evidence; the arbitrators already declined to delay proceedings for the evidence Servotronics sought via section 1782, and the arbitrators' award will end any remote possibility of reopening. Courts have found section 1782 applications moot in similar circumstances. *Comision Ejecutiva Hidroelectrica del Rio Lempa v. Nejapa Power Co.*, 341 F. App'x 821, 827 (3d Cir. 2009); *In re Ishihara Chem. Co.*, 251 F.3d 120, 125 (2d Cir. 2001), *abrogated on other grounds by Intel*, 542 U.S. at 259.

There is no "reasonable expectation," *Already*, 568 U.S. at 97, that an appeal of the award to an English court could keep the controversy live. By agreeing to CIArb rules, the parties "waive[d] their right to any form of appeal or recourse to a court or other judicial authority insofar as such waiver is valid under the applicable law." CIArb Rules, art. 34(2), https://tinyurl.com/dtypp26z. Further, Servotronics conceded that it could obtain a fair hearing without the requested evidence: "It is not [Servotronics'] submission that any evidence from the [U.S.] Proceedings must be obtained before the substantive hearing of this arbitration can take place." 20A160 Appl.App.71a.

2. The mootness exception for issues that are capable of repetition yet evading review applies "only in exceptional situations" where (1) "the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration" and (2) "there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (quotations omitted); *see United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1540 (2018). Neither condition applies.

First, not every private arbitration involving a section 1782 application will invariably conclude before this Court can resolve the question presented. Although the arbitrators here declined to stay their proceedings, nothing prevents other arbitrators from staying arbitrations for section 1782 proceedings.

Second, there is no reasonable prospect that Servotronics will again face its asserted harm, i.e., the inability to use section 1782 to seek evidence for use in another arbitration involving Rolls-Royce. Where, as here, there is no reason "to expect the same parties to generate a similar, future controversy subject to identical time constraints," the "capable-of-repetition" exception is inapplicable. *Norman v. Reed*, 502 U.S. 279, 288 (1992).

II. "Foreign or International Tribunals" Under Section 1782 Exclude Private Arbitrators

Ordinary meaning, statutory context, harmonization of federal statutes, and compelling policy reasons show that a "foreign or international tribunal" encompasses sovereign adjudicatory bodies, not private arbitrators.

A. The Ordinary Meaning of a "Foreign or International Tribunal" Is a Governmental Adjudicator

Because Congress did not define a "foreign or international tribunal" in section 1782, this Court gives the

phrase its "ordinary … meaning … at the time Congress enacted the statute." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (quotations omitted). Here, that date is 1964, when Congress enacted the operative version of section 1782. Contemporaneous dictionaries, federal laws, this Court's usage, and legal scholarship overwhelmingly refer to a "tribunal" in the foreign or international context to mean a court or other sovereign adjudicative body.

1. **Contemporaneous dictionaries**. In 1964, dictionaries consistently defined a "tribunal" as a court or other governmental adjudicator.

a. The Oxford English Dictionary (1933, reprinted 1961) defined "tribunal" as a "court" or "judicial assembly." Webster's Seventh New Collegiate Dictionary (1963) defined a "tribunal" as "a court or forum of justice." *Accord Webster's New International Dictionary of the English Language* (3d ed. 1961). The relevant definition in The American Heritage Dictionary of the English Language (1970) reads: "[a] seat or court of justice." And Black's Law Dictionary (4th ed. 1951) defined "tribunal" as "[t]he whole body of judges who compose a jurisdiction; a judicial court."

As for the rest of the phrase, dictionaries defined "foreign" as "[b]elonging to another nation or country; belonging or attached to another jurisdiction," *Black's Law*, *supra*, or simply "situated outside one's own country," *Webster's Third*, *supra*. And dictionaries defined "international" as "[e]xisting, constituted, or carried on between different nations." *Oxford English Dictionary*, *supra*. So, circa 1964, a "foreign tribunal" meant another country's adjudicative body, or an overseas adjudicative body. And an "international tribunal" meant an adjudicative body involving many countries or nationalities.

Other dictionaries confirm that understanding. Webster's Second defines "tribunal" as "a court or forum of justice; a person or body of persons having authority to hear and decide disputes so as to bind the disputants," then lists three telling examples spanning domestic, foreign, and international contexts: "the Supreme Court is the highest *tribunal* of the United States. Cf. HAGUE TRIBUNAL; REVOLUTIONARY TRIBUNAL." *Webster's New International Dictionary of the English Language* (2d ed. 1959). This Court, the Hague Tribunal (established by 1899 treaty as a permanent body arbitrating disputes between sovereigns), and the Revolutionary Tribunal (from 1793-95 the court of the provisional French revolutionary government) are governmental or intergovernmental adjudicative bodies. *Cf.* Max Radin, *Law Dictionary* (1955) ("tribunal" is "[a] general word equivalent to court, but of more extensive use in public and international law").

Equating a "foreign or international tribunal" with a court or other governmental adjudicative body captures the variety of governmental structures worldwide. The United States distinguishes between executive, legislative, and judicial power, but other countries assign judicial functions to executive or legislative bodies. For instance, the British House of Lords historically conducted certain criminal trials of peers of the realm. Colin Rhys Lovell, *The Trial of Peers in Great Britain*, 55 Am. Hist. Rev. 69, 69 (1949). Similarly, civil-law judges in countries like France and Germany combine investigative, prosecutorial, and adjudicatory functions. *Morgan v. Mukasey*, 529 F.3d 1202, 1210 (9th Cir. 2008) (comparing systems). Whatever the system, sovereignty is the defining feature uniting "foreign or international tribunal[s]." Sovereigns establish adjudicatory bodies, appoint adjudicators, and delegate the authority to resolve disputes through final decisions that are legally binding in and of themselves.

See Grafton v. United States, 206 U.S. 333, 354 (1907); FedArb Br. 17.

This contemporaneous definition rules out private arbitrators. Arbitrators undisputedly exercise no sovereign authority. *See* Pet.App.8a n.2. Private parties create arbitral panels by appointing private citizens to decide a single dispute; once the arbitration ends, the panel dissolves. Bermann Br. 15-16. Arbitrators' authority is confined to the powers the parties' contract confers. Private arbitrators can never bind third parties. And private parties must go to court and obtain judicial recognition to transform arbitral awards into enforceable legal obligations. 4 Thomas H. Oehmke, *Commercial Arbitration* § 133:1 (2021).

Some lower courts, including the Seventh Circuit below, consider ordinary meaning inconclusive because some modern dictionaries define "tribunal" to encompass "a committee or board appointed to adjudicate in a particular matter" or a "court of public opinion." Pet.App.10a (quoting 2018 American Heritage Dictionary and 2020 Merriam-Webster); *accord Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, 939 F.3d 710, 719-20 (6th Cir. 2019). But this Court rejects such reliance on "recently published" dictionaries, which would allow "judges [to] freely invest old statutory terms with new meanings." *New Prime*, 139 S. Ct. at 539. And those definitions are obviously inapt; U.S. courts would hardly assist metaphorical courts of public opinion or foreign university disciplinary proceedings.

b. Servotronics instead contends that the ordinary meaning of a "foreign or international tribunal" includes private arbitrators. That position has two serious flaws.

First, any definition of a "tribunal" broad enough to cover private arbitrators would be hopelessly vague. Servotronics does not even offer a competing definition, instead asserting (at 6) that an unspecified "variety of decision-making entities" qualify as a "tribunal," including private arbitrators. But arbitrators are the proverbial camel's nose; if they fit within the tent, a zoo would follow. If commercial arbitrators are a "tribunal," why not a bishop arbitrating an ecclesiastical dispute between two priests? What about Facebook's multinational, content-moderating Oversight Board, which employs panels and conducts appeals? *See* Oversight Board, https://oversightboard.com/. Were the oenophiles adjudicating the 1976 Judgment of Paris a "tribunal," and if so, can future entrants in international wine competitions use section 1782 to rummage for evidence impugning the superiority of Californian cabernets?

Servotronics' amici suggest that only authoritative decision-makers are tribunals. Bermann Br. 3; *see* FedArb Br. 24, 27. Similarly, the Fourth Circuit defines a "tribunal" as any decision-maker whose decisions are recognized by courts or otherwise governmentally endorsed, emphasizing that various treaties provide for judicial enforcement of arbitral awards. *Servotronics*, 954 F.3d at 213-14. Servotronics has never embraced this position, *see* Pet.App.8a n.2, which would spawn endless line-drawing problems.

For instance, it is unclear which government's imprimatur matters: is it the foreign country where the private decision-maker renders decisions, or the country where the decision would be enforced? If the decision must be judicially enforceable to be authoritative, how can anyone predict where enforcement might occur? What if one party believes a particular decision would be unenforceable because of some procedural defect? If the decision-

maker is abroad and no one plans to enforce a decision in the United States, should it matter if the United States endorses or disfavors a particular dispute-resolution method?

Gauging whether the relevant government has given its imprimatur to a type of decision-making is equally question-begging. Take arbitration: should courts interpret heavy governmental regulation of arbitration as a sign of favor or suspicion? What if a government embraces some types of arbitration, but not others? What if a pro-arbitration government loses power and the new regime is anti-arbitration? Defining a "tribunal" in any given case should not require expertise in the minutiae of foreign legal regimes. Sovereignty is the commonsense dividing line. Just because a foreign country endorses, authorizes, or regulates a form of private dispute resolution—whether it is arbitration or dueling—does not vest the contest with sovereign authority.

The multitude of investment-related arbitrations further illustrate the line-drawing problem with this position. Amici argue that distinguishing between private and investor-state arbitration is difficult given the infinite variety of investment treaties and arbitrations. Bermann Br. 10-18; FedArb Br. 21-24; Wang Br. 22-24. But the only relevant inquiry should be whether the adjudicative body—the arbitral panel—is governmental or intergovernmental.

Second, Servotronics fails to interpret the phrase "foreign or international tribunal" as a whole. Defining "tribunal" to include private arbitrators would unleash a Pandora's box of problems in defining "foreign or international" arbitrators. Servotronics does not say if "foreign" means "of another country" or simply "overseas." Either way, that adjective fits private arbitral panels poorly. If a

single arbitrator is presiding, does her nationality determine if she is "foreign," or is an overseas hearing location dispositive? Or does the seat of the arbitration, i.e., the parties' contractually selected forum, control? If the arbitrator is a U.S. citizen sitting in Cannes, but the parties' contract adopts Florida law, does section 1782 apply?

Likewise, if "international" tribunals are ones comprising many nationalities, how could a single arbitrator be an "international tribunal"? If the parties' nationalities matter, how do parties bestow their nationalities on the arbitrator, the putative "tribunal"? What if the parties pick two arbitrators from different countries, but one withdraws?

None of these problems arise if a "foreign or international tribunal" refers only to sovereign adjudicative bodies. Foreign courts and quasi-judicial bodies are part of foreign countries. Likewise, international courts and their corollaries are standing bodies created by multiple sovereigns. Even if a single adjudicator presides over a proceeding, the institution is a multinational body (hence "international"). But with private arbitration, there is no institution, only ad hoc adjudicators. Bodies like the International Chamber of Commerce or the CIArb provide default rules and administrative support for arbitrations, but do not adjudicate, employ arbitrators, or endorse arbitrators' awards. ICC Br. 1-3. The uniquely difficult questions that arise from the distinctive features of private arbitration counsel against forcing this square peg into section 1782's round hole.

2. **Usage in federal law**. Congress' "record of statutory usage" also illuminates ordinary meaning. *Peter v. Nantkwest, Inc.*, 140 S. Ct. 365, 373 (2019) (quotations omitted); *accord Van Buren v. United States*, 141 S. Ct. 1648, 1655 & n.3 (2021). In 1964, every statute and scores of treaties used "tribunal" as a synonym for courts or their

equivalents. Since 1964, myriad statutes have used "tribunal" the same way. Meanwhile, Congress uses different words, like "arbitrators" or "referees," to describe private arbitrators.

a. In 1964, federal laws uniformly used the word "tribunal" to mean U.S. courts or governmental adjudicative bodies.[1] Congress likewise referred to foreign "tribunals" to mean foreign courts or their sovereign equivalents. For instance, Congress authorized the United States to pay "final judgments rendered by a State or foreign court *or tribunal* against the United States." 28 U.S.C. § 2414 (enacted 1961) (emphasis added). And Congress prescribed: "[A]ll suits and disputes arising in Persia between Persian subjects and citizens of the United States, shall be carried before the Persian *tribunal*, to which such matters are usually referred," Act of June 22, 1860, ch. 179, § 28, 12 Stat. 78 (emphasis added), i.e., the relevant court or equivalent body.

Federal law also consistently equated international "tribunals" with intergovernmental adjudicative bodies. By the mid-20th century, the United States had entered into hundreds of treaties providing for dispute resolution by "tribunals," i.e., intergovernmental bodies where sovereign-appointed adjudicators resolved disputes between sovereigns. "International arbitration" long referred just

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[1] *E.g.*, 10 U.S.C. § 814(b) (enacted 1956) (contrasting courts-martial with "civil tribunal"); Act of June 22, 1938, ch. 575, § 2, 52 Stat. 842-43 (authorizing bankruptcy receivers to bring "any suit or proceeding … before any judicial, legislative, or administrative tribunal in any jurisdiction"); Act of May 18, 1928, ch. 624, § 3, 45 Stat. 602 (authorizing courts to settle Indian land claims notwithstanding failure to present claims "to any other tribunal, including the commission created by the Act of March 3, 1851," i.e., the federal commission charged with settling California land claims); *accord* U.S. Const. art. I, § 8, cl. 9 (Congress may "constitute Tribunals inferior to the supreme Court").

to this sovereign-to-sovereign dispute-resolution process. Daniel J. Rothstein, *A Proposal to Clarify U.S. Law on Judicial Assistance in Taking Evidence for International Arbitration*, 19 Am. Rev. of Int'l Arb. 61, 70 (2008).

Such international tribunals date to the Founding and were the progenitors of today's international courts, like the International Court of Justice. Phillipe Couvreur, *The International Court of Justice and the Effectiveness of International Law* 9 (2017). By 1964, the United States and other countries had created "tribunals" to arbitrate everything from disputes about international civil aviation to damage that British-built ships caused during the Civil War. These bodies exercised delegated sovereign authority to conclusively resolve disputes, and their decisions created binding international legal obligations.[2]

Against that backdrop, Congress enacted two forerunners to section 1782. A 1930 provision authorized members of an "*international tribunal or commission*, established pursuant to an agreement between the United States and any foreign government or governments" to administer oaths "whenever any claim in which the United States or any of its nationals is interested is pending before" such tribunal or commission. Act of July 3,

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[2] *E.g.*, Convention Between the United States of America and Other Governments Respecting International Civil Aviation, art. 84, 61 Stat. 1180 (1947) (referring disagreements between contracting States to "*ad hoc* arbitral tribunal" or Permanent Court of International Justice); Agreement Between the United States of America and the United Nations Respecting the Headquarters of the United Nations, art. VIII, § 21, 61 Stat. 3416 (1947) ("tribunal" of sovereign-selected arbitrators to decide disputes between United States and United Nations over U.N. headquarters); Treaty of Washington, U.S.-Great Britain, arts. I-II, 17 Stat. 863 (1871) ("tribunal" of sovereign-selected arbitrators to settle U.S. claims against Britain over damage British-built ships caused during Civil War).

1930, ch. 851, § 1, 46 Stat. 1005-06 (emphasis added); *accord* 72 Cong. Rec. 1044 (1929) (Secretary of State urged enactment to facilitate evidence-gathering for dispute in U.S.-Canadian tribunal). Congress thus described an "international tribunal" as an intergovernmental dispute-resolution body. Congress, however, limited the availability of U.S. judicial assistance to "tribunals" that the United States helped create, and where the United States had claims pending. Without those limiting clauses, an "international tribunal or commission" would refer to all sovereign-created dispute-resolution bodies.

Congress' 1933 amendment to that provision reinforces that understanding. Congress authorized U.S. district courts to issue subpoenas upon the application of "the agent of the United States before any international tribunal or commission … in which the United States participates as a party." Act of June 7, 1933, ch. 50, § 5, 48 Stat. 117. That amendment was necessary to help the United States obtain testimony for use in proceedings before the U.S.-German Mixed Claims Commission. S. Rep. No. 88, 73rd Cong., 1st Sess., at 1-2 (1933). Again, an "international tribunal" referred to intergovernmental bodies adjudicating disputes between sovereigns.

By contrast, Congress used different language, like "referees" or "arbitrators," when referring to private arbitration. Consider the FAA. Congress' 1947 amendment to the FAA refers to an "arbitrator," "arbitrators," or "umpires," but never a "tribunal." *E.g.*, 9 U.S.C. §§ 5, 7, 9. Even 1970 FAA amendments governing the recognition and enforcement of foreign arbitral awards refer to "arbitrators," never to a "tribunal." *Id.* §§ 201-08. Other examples abound. *E.g.*, 29 U.S.C. § 186(c) (enacted 1947) ("impartial umpire to decide" employer-labor relations disputes); 45 U.S.C. § 157 (enacted 1926) ("arbitrators" resolve railroad-employee disputes).

b. Since 1964, Congress has enacted dozens of statutes referring to foreign "tribunals" and "international tribunals." All refer to courts or other sovereign adjudicatory bodies.

Many modern statutes refer to a foreign "tribunal" as part "of the foreign country," i.e., a governmental body.[3] And Congress frequently instructs U.S. courts how to treat foreign judgments rendered by "foreign courts," defined as "a court, administrative body, or other tribunal of a foreign country." 28 U.S.C. § 4101(3); *see* 19 U.S.C. § 4452(f)(3) (same).

Similarly, Congress uniformly uses "international tribunal" to refer to courts or intergovernmental judicial bodies, like international criminal tribunals that investigate and prosecute war crimes.[4] The 1976 Freedom of Information Act even distinguishes between actions "in a foreign court or international tribunal, or an arbitration." 5 U.S.C. § 552b(c)(10). If "international tribunals" included private arbitration, that distinction would be unnecessary. Even the three statutes that use the phrase

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[3] *E.g.*, 16 U.S.C. § 971c(b) (prohibiting international conventions that would subject U.S. persons to prosecution by "any court or tribunal of a foreign country"); 18 U.S.C. § 3190 (extradition statute referring to "tribunals of the foreign country from which" the accused escaped); 22 U.S.C. § 6912(a)(5)(D), (a)(11) (requiring monitoring of individuals' rights in Chinese "tribunal"); *id.* § 7427(c)(3) (authorizing defense of U.S. interests in "the courts or tribunals of any country").

[4] *E.g.*, 22 U.S.C. § 262-1(a), (d) (prohibiting U.S. participation in "any new international criminal tribunal"); *id.* § 2710(d)(1) (establishing litigation fund for State Department when prosecuting "before an international tribunal, or a claim by or against a foreign government or other foreign entity"); *id.* § 9243(c)(2) (requesting cooperation with prosecutions before "international tribunal").

"arbitral tribunal" refer exclusively to adjudicatory bodies that resolve disputes over treaty obligations, not to private arbitrators.[5]

In sum, it is implausible that Congress in section 1782 broke from its uniform usage. By 1964, "international commercial arbitration" was well-established. Bermann Br. 12-13. Congress was well aware of commercial arbitration, as the FAA illustrates. Yet Congress still used the word "tribunal" to refer to sovereign entities.

3. **Judicial usage**. This Court has uniformly used the phrases "foreign tribunal" and "international tribunal" to denote governmental or intergovernmental bodies performing judicial functions.

a. By 1964, this Court had mentioned "foreign tribunals" in dozens of cases, always as a synonym for courts or their equivalents. Take this Court's *forum non conveniens* cases, which instruct U.S. courts to consider whether "the litigation can more appropriately be conducted in a foreign tribunal." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947) (quoting *Can. Malting Co. v. Paterson S.S., Ltd.*, 285 U.S. 413, 422-23 (1932)). Or consider the Court's foundational decision on recognition of foreign judgments, *Hilton v. Guyot*, 159 U.S. 113, 210-11, 225-26, 231-32 (1895), which repeatedly equates "foreign courts" and

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[5] 22 U.S.C. § 1650a ("An award of an arbitral tribunal rendered pursuant to" Convention on the Settlement of Investment Disputes "create[s] a right arising under a treaty of the United States"); *id.* § 290k-11 (same for "[a]n award of an arbitral tribunal resolving a dispute arising under" treaty provisions involving Multilateral Investment Guarantee Agency); 16 U.S.C. § 973n (Secretary of State to select U.S. arbitrator if signatories to South Pacific Tuna Treaty require recourse to an "arbitral tribunal under Article 6 of the Treaty").

"foreign tribunals." Or take the Founding-era case asking: "Can this court examine the jurisdiction of a *foreign tribunal*?" *Rose v. Himely*, 8 U.S. 241, 268 (1808). Chief Justice Marshall's opinion answered yes, invoking the rule that "the sentence of a *foreign court* is conclusive" if the court has "jurisdiction of the subject-matter." *Id.* at 270 (emphasis added).[6]

By 1964, the Court had mentioned "international tribunals" in nine cases—never once to mean private arbitrators. Justice Douglas called the Nuremberg Tribunal and other post-World War II war-crimes tribunals "international tribunals." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 178 n.4 (1951) (Douglas, J., concurring); *Hirota v. MacArthur*, 338 U.S. 197, 204-05 (1949) (Douglas, J., concurring).

In the other cases, "international tribunals" refer to intergovernmental commissions that resolve disputes among sovereigns.[7] For instance, *Banco Nacional de*

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[6] *Accord, e.g.*, *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958) ("However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State"); *Berg v. Brit. & Afr. Steam Navigation Co.*, 243 U.S. 124, 156 (1917) (referring to "prize court of the German Empire" as "foreign tribunal"); *Patterson v. Eudora*, 190 U.S. 169, 178 (1903) ("[I]t is a duty of the courts of the United States to give full force and effect to such provisions. It is not pretended that this government can control the action of foreign tribunals."); *Downes v. Bidwell*, 182 U.S. 244, 264 (1901) ("[T]his was a court of separate and distinct jurisdiction … and as such its acts were not to be reviewed in a foreign tribunal."); *Norton v. Shelby Cnty.*, 118 U.S. 425, 440 (1886) ("[T]he decisions of the courts of a state are merely advisory … as those of a foreign tribunal are treated.").

[7] *Perry v. United States*, 294 U.S. 330, 353 n.3 (1935) (an "engagement validly made by a sovereign state is not without legal force, as readily appears if the jurisdiction to entertain a controversy" concerning "the

Cuba v. Sabbatino, 376 U.S. 398, 422-23 (1964), explained that when a nation expropriates a foreign national's property, the owner must "repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or *before an international tribunal*" (emphasis added). These usages share a common thread. "International tribunals" are intergovernmental bodies "acting under the joint authority of [multiple] countries," which is why their decisions are "conclusive between the governments concerned." *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 462-63 (1899).

b. Servotronics (at 11-14), relying on the Sixth Circuit's analysis in *FedEx*, cites six Supreme Court cases that use the freestanding word "tribunal" to mean private arbitration. *See* 939 F.3d at 721-22. That number hardly illustrates usage when more than 3,000 pre-1964 cases use the term "tribunal." Indeed, the Court more often uses

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engagement is conferred upon an international tribunal"); *Louisiana v. Texas*, 176 U.S. 1, 27 (1900) (Brown, J., concurring) ("international tribunals are constantly being established for the settlement of rights of private parties"); *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 462-63 (1899) (defining "international arbitration" as "mode for the settlement of disputes between sovereign states" and "international tribunal of arbitration" as a body "acting under the joint authority of two countries"); *United States v. Blaine*, 139 U.S. 306, 325-26 (1891) (discussing possible "retrial" of U.S.-Mexico claims before "an international tribunal, if the two governments so agreed"); *Frelinghuysen v. United States*, 110 U.S. 63, 68 (1884) (discussing same proposal for "retri[al] before a new international tribunal"); *cf. Shapleigh v. Mier*, 299 U.S. 468, 471 (1937) (calling "International Claims Commission" a "tribunal"); *City of New Orleans v. N.Y. Mail S.S. Co.*, 87 U.S. 387, 398 (1874) (Hunt, J., concurring) ("A prize court is in its very nature an international tribunal.").

"tribunal" as a synonym for courts, quasi-judicial agencies, or intergovernmental adjudicative bodies.[8]

Regardless, two of Servotronics' six cases confirm Rolls-Royce's interpretation because they refer to intergovernmental "arbitral tribunals" that resolved disputes between sovereigns. *See Louisiana v. Mississippi*, 202 U.S. 1, 50, 51 (1906) ("arbitral tribunal" resolved Alaskan boundary dispute between United States and Britain); *N. Am. Com. Co. v. United States*, 171 U.S. 110, 131, 133 (1898) ("tribunal of arbitration" resolved dispute between United States and Britain over fur-seal rights). Again, in the international context, an "arbitral tribunal" is an intergovernmental body, not private dispute resolution.

Servotronics' four other cases use "tribunal" to refer to private arbitration. Three involve passing statements about domestic arbitration: *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 185 (1955) (Black, J., dissenting); *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 203 (1956); and *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). *Scherk* also post-dates modern-day section 1782. Servotronics' fourth case, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985), referred to a commercial arbitration before an "international arbitral tribunal" two decades after Congress enacted modern-day section 1782. Those cases are a sandbar in a sea of cases that Servotronics and the Sixth Circuit ignore.

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[8] *E.g.*, *Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 18 (1963); *Brotherhood of R.R. Trainmen v. Chi. River & Ind. R.R. Co.*, 353 U.S. 30, 34 (1957); *United States v. Di Re*, 332 U.S. 581, 594 (1948); *Duncan v. Kahanamoku*, 327 U.S. 304, 323 (1946); *Sancho v. Texas Co.*, 308 U.S. 463, 470-71 (1940); *Butte, A. & P. Ry. Co. v. United States*, 290 U.S. 127, 142 (1933); *Davis v. Manry*, 266 U.S. 401, 404-05 (1925); *Freeman v. Alderson*, 119 U.S. 185, 188 (1886).

Servotronics also sidesteps a near-contemporaneous 1967 appellate decision interpreting "tribunal" as used in section 1782. *In re Letters Rogatory Issued by Dir. of Inspection of Gov't of India*, 385 F.2d 1017 (2d Cir. 1967) (Friendly, J.), defined "tribunal" with reference to how "most American legislators would entertain of what constitutes a 'tribunal.'" *Id.* at 1021. The court held that a "tribunal" is limited to governmental adjudicators, not even "all the plethora of administrators whose decisions affect private parties." *Id.* That definition excludes private arbitrators.

4. **Other contemporaneous usage**. Leading mid-20th century scholars understood foreign and international "tribunals" to mean sovereign adjudicative bodies, not private arbitrators.

In 1939, a group of American officials and scholars proposed a "Draft Convention on Judicial Assistance" (the Harvard Draft Convention) to formalize evidentiary assistance between countries. 33 Am. J. Int'l L. Sup. 11 (1939). After surveying international practice, the Draft Convention defined a "tribunal" to include "all courts and a limited number of administrative agencies." *Id.* at 36. The drafters added: "The judicial authority must be an authority created by the State or a political subdivision." *Id.* Thus, "[a] judicial body set up by a private association to adjudicate among its members *or a tribunal of arbitration set up by private parties … is not included*, unless the law of the State declares it to be a judicial authority of the State." *Id.* (emphasis added). Similarly, the Draft Convention defined an "international tribunal" as "a tribunal created by the agreement of two or more States for the adjudication or settlement of a controversy between States." *Id.* at 39.

International-law scholars used "tribunal" the same way. One seminal article urged Congress to overhaul section 1782 to improve "aid rendered by one nation to another in support of judicial or quasi-judicial proceedings in the recipient country's tribunals." Harry L. Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 Yale L.J. 515, 515 (1953). Likewise, a 1962 article by Professor Hans Smit, who drafted legislative recommendations for section 1782, defined an "international tribunal" as something that "owes both its existence and its powers to an international agreement." Hans Smit, *Assistance Rendered by the United States in Proceedings Before International Tribunals*, 62 Colum. L. Rev. 1264, 1267 (1962); *accord* Durward V. Sandifer, *Evidence Before International Tribunals* 2 (1939) ("international tribunals" are forums for "litigation between states [rather] than between individuals").

Servotronics (at 16) invokes a 1965 Smit article defining a section 1782 "tribunal" to include "arbitral tribunals." Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1021 (1965); *see* Bermann Br. 22-23; FedArb Br. 29-30. But this language most naturally refers to intergovernmental tribunals arbitrating disputes between sovereigns. Like Smit's other examples of "tribunals" in this article (e.g., administrative agencies and quasi-judicial bodies, *see* 65 Colum. L. Rev. at 1021), intergovernmental arbitral tribunals have adjudicatory power only because sovereigns endowed them with it. That reading reconciles Smit's views with his 1962 article defining an "international tribunal" as a treaty-created body. 62 Colum. L. Rev. at 1267; *In re Guo,* 965 F.3d 96, 105 (2d Cir. 2020).

One amicus also cites Blackstone (1787), Story (1866), and the Corpus Juris Secundum (1937) describing domestic commercial arbitration before "tribunals." FedArb

Br. 8, 11; *accord FedEx*, 939 F.3d at 720-21. But as the above discussion shows, in 1964 "tribunal" meant sovereign bodies. Amicus Professor Bermann (at 5, 20-21) emphasizes a draft 2019 Restatement for which he was the Reporter. That restatement notes the circuit split over whether a "foreign or international tribunal" includes private arbitration, then picks Servotronics' side. Restatement of the U.S. Law on International Commercial and Investor-State Arbitration § 3.5 cmt. b (2019). Such "aspirations for what the law ought to be" deserve "no weight whatever as to the current state of the law," let alone the state of play in 1964. *Kansas v. Nebraska*, 574 U.S. 445, 475-76 (2015) (Scalia, J., dissenting).

B. Section 1782's Surrounding Text Confirms that "Tribunals" Are Governmental Adjudicators

Surrounding statutory terms shed further light. *Smith v. United States*, 508 U.S. 223, 229 (1993). Surrounding language in section 1782 presupposes that a section 1782 "tribunal" is a court or a quasi-judicial agency. Interpreting "tribunal" to include private arbitrators would produce untenable "inconsisten[cies] with the design and structure" of section 1782. *See Van Buren*, 141 S. Ct. at 1659 (quotations omitted).

1. Section 1782 prescribes the "practice and procedure" that U.S. district courts should follow when ordering testimony or document production for use in foreign or international tribunals. Congress set the Federal Rules of Civil Procedure as the default. Critically, Congress also permits district courts to apply "the practice and procedure *of the foreign country or the international tribunal*." 28 U.S.C. § 1782(a) (emphasis added).

As the Seventh Circuit observed, this language links a foreign or international "tribunal" to sovereignty. Pet.App.13a. Foreign courts and foreign quasi-judicial

agencies follow the practices and procedures of a "foreign country." But foreign arbitrators apply the rules of the parties' selected arbitral body or the rules prescribed in the parties' arbitration agreement, as well as forum-specific arbitration laws. Here, for instance, the London arbitrators applied CIArb discovery rules, not those of the English courts. The parties can even let the arbitrators set their own rules for taking evidence.

Including private arbitrators as a foreign or international "tribunal" would introduce an inexplicable anomaly. Under Servotronics' reading, if multinational arbitrators count as "international tribunals," district courts have discretion to defer to those arbitrators' procedures. But because section 1782 speaks of deference to the "practice or procedure" of the "foreign *country*," not the "foreign tribunal," district courts lack similar discretion to apply *foreign* arbitrators' prescribed procedures. There is no reason for Congress to have created a bizarre asymmetry between two arbitral settings that even Servotronics considers interchangeable.

Further, section 1782 presupposes district courts could defer to freestanding, preexisting procedures. But that is an impossibility in cases where the parties contract for arbitrators to set their own evidentiary procedures. Such procedures exist only after the arbitrators are selected and create them. Yet interested persons could file section 1782 applications before those procedures come into being.

2. Section 1782(a) empowers U.S. courts to facilitate evidence collection "for use *in a proceeding in* a foreign or international tribunal." Section 1782(b) repeats that phrase, authorizing voluntary evidence production "for use in a proceeding in a foreign or international tribunal." *Id.* The phrase "in a proceeding in" makes sense for courts and other standing adjudicative bodies, which hear

disputes on a rolling basis. Applicants accordingly identify the specific "proceeding in" those forums.

But the phrase "in a proceeding in" is superfluous and illogical as applied to private arbitration, where arbitrators are pop-up adjudicators for one dispute only. No one would say, "I need evidence for use in a proceeding in an arbitral tribunal." Servotronics' reading thus would render surrounding words in section 1782 meaningless as applied to arbitral panels. *See Clark v. Rameker*, 573 U.S. 122, 131 (2014) ("[A] statute should be construed … so that no part will be inoperative or superfluous.") (quotations omitted).

Moreover, the phrase "a proceeding in a foreign or international tribunal" suggests that the "tribunal" is an existing, defined entity that U.S. courts could assist, even if the "proceeding" need only be within "reasonable contemplation." *Intel*, 542 U.S. at 259. Again, that assumption is not always true for private arbitrators, creating another mismatch. For instance, Servotronics filed section 1782 applications before the parties had selected arbitrators.

3. Section 1782 authorizes U.S. courts to facilitate evidence-gathering "for use in a proceeding in a foreign or international tribunal, *including criminal investigations conducted before formal accusation*." Congress added the italicized phrase to section 1782 in 1996, as part of amendments facilitating U.S. participation in the International Criminal Tribunals for the former Yugoslavia and Rwanda. Pub. L. No. 104-106, § 1342(b), 110 Stat. 486.

Ordinarily, "to include" means "to 'contain' or 'comprise as part of a whole.'" *Chickasaw Nation v. United States*, 534 U.S. 84, 89 (2001). Congress' inclusion of precharge criminal investigations as a "proceeding in a foreign or international tribunal" underscores Congress' ex-

clusive focus on proceedings before sovereign bodies. Private arbitrators do not conduct criminal investigations. And by specifically including criminal investigations as a relevant type of "proceeding," Congress again signaled that sovereignty is the indispensable attribute of a "tribunal."

C. Related Statutory Provisions Reinforce that "Tribunals" Exclude Private Arbitrators

"[R]elated statutory provisions" illuminate the meaning of "the statute's text." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558 (2005); *see Van Buren*, 141 S. Ct. at 1658-59. Four related provisions confirm that a "foreign or international tribunal" under section 1782 excludes private arbitral panels.

1. **Section 1696** is a related provision enacted in 1964 alongside section 1781 and modern-day section 1782. Like section 1782, section 1696 repeatedly uses the phrase "a foreign or international tribunal." Ordinarily, the same words in different parts of the same statute mean the same thing. *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1725 (2020). That intuition applies strongly to the phrase "foreign or international tribunal," because sections 1696 and 1782 are complementary. Pet.App.12a. Section 1782 authorizes U.S. district courts to offer evidentiary assistance in proceedings in "a foreign or international tribunal." Section 1696 then instructs U.S. courts how to serve documents "issued in connection with a proceeding in a foreign or international tribunal," 28 U.S.C. § 1696, such as an order from a foreign court summoning a U.S. resident to appear as a witness.

Section 1696 offers another contextual clue about "foreign or international tribunal[s]." Section 1696(a) provides that just because U.S. courts serve subpoenas or other documents "issued in connection with a proceeding

in a foreign or international tribunal" does not guarantee the "recognition or enforcement in the United States of *a judgment, decree, or order* rendered by a foreign or international tribunal." *Id.* (emphasis added). That language reinforces that a "tribunal" is a court or quasi-judicial agency, not a private arbitral panel, because Congress never refers to arbitral panels as issuing "judgment[s], decree[s], or order[s]."

Throughout the U.S. Code, Congress exclusively uses the phrase "judgment, decree, or order" to refer to acts by courts or quasi-judicial bodies. For instance, 43 U.S.C. §§ 390uu and 666 subject the United States "to judgments, orders, and decrees of the court having jurisdiction" in contractual disputes over federal reclamation law or in water-rights cases. Likewise, 15 U.S.C. § 80b-3(e)(4) mandates penalties for investment advisers who are "enjoined by order, judgment, or decree of any court of competent jurisdiction, including any foreign court of competent jurisdiction, from acting as an investment adviser." And 42 U.S.C. § 659(i)(2) defines "child support" as a "judgment, decree, or order … issued by a court or an administrative agency."

By contrast, Congress describes the result of arbitrations as "awards," not judgments, decrees, or orders. All statutory provisions governing foreign arbitrations refer to arbitral "awards." *E.g.*, 9 U.S.C. § 207 (cause of action to confirm "arbitral award falling under the [New York] Convention"). The FAA also repeatedly refers to the result of U.S.-based arbitrations as "awards." *Id.* §§ 9, 10, 12, 13, 16. Congress even distinguishes "arbitral awards" from court "judgments," for instance when ordering courts to give full faith and credit to certain "arbitral award[s]." 22 U.S.C. § 1650a; *id.* § 290k-11.

In short, Congress refers to courts and quasi-judicial agencies as issuing "judgment[s], decree[s], or order[s],"

whereas arbitrators render "awards." By providing that U.S. service of a document connected to "a proceeding in a foreign or international tribunal" does not guarantee U.S. "recognition or enforcement" of the tribunal's ultimate "judgment, decree, or order," Congress meant to cover the waterfront of decisions that "foreign or international tribunals" render. It would be nonsensical for section 1696 to leave open whether service of documents connected to private arbitrations might trigger more deferential treatment for arbitral awards.

2. **Section 1781** prescribes how "foreign or international tribunal[s]" transmit letters rogatory or other requests to a "tribunal, officer, or agency in the United States," and vice versa. 28 U.S.C. § 1781. Section 1781 works hand-in-hand with section 1782, which authorizes U.S. district courts to respond to such requests by ordering U.S. persons to produce evidence for use in foreign or international tribunals' proceedings. Pet.App.4a-5a. Two aspects of section 1781 reinforce that a "tribunal" is a court or other sovereign adjudicator.

a. Eight times, section 1781 refers interchangeably to "a tribunal in the United States" and "foreign or international tribunal[s]." Again, this Court presumes that term "mean[s] the same thing throughout a statute, a presumption surely at its most vigorous when a term is repeated within a given sentence." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Section 1781 repeats "tribunal" within the same sentences to prescribe the same transmittal rules for U.S. and foreign tribunals. Thus, American, foreign, and international "tribunals" undoubtedly refer to the same types of entities.

Because United States "tribunals" under section 1781 cannot encompass private arbitral panels, neither should "foreign or international tribunal[s]." Section 1781 treats U.S. "tribunals" as capable of transmitting or receiving

letters rogatory or other evidentiary requests. But U.S. arbitral panels cannot issue or receive letters rogatory; only "a judge in the United States" can. U.S. Dep't of Justice, *Criminal Resource Manual* § 275(A) (2020). Nor can U.S. arbitral panels otherwise "request" evidentiary assistance. The FAA, which governs private U.S. arbitrators' authority to order discovery, only empowers arbitrators to summon *witnesses*—not issue letters rogatory or other requests to foreign tribunals. 9 U.S.C. § 7; *infra* pp. 40-44.

Servotronics' amicus contends that section 1781 could theoretically apply to foreign arbitrators, who might "request" U.S. courts' assistance to access pre-hearing witnesses and documents. Bermann Br. 19; *see FedEx*, 939 F.3d at 723. But U.S. arbitrators cannot do so, and Congress presumably did not give the word "tribunal" different meanings within interlocking provisions.

b. Section 1781 describes the recipients of a letter rogatory or request for evidentiary assistance as a "tribunal, officer, or agency" four times. Either "the tribunal, officer, or agency in the United States" receives the letter or request from the "foreign or international tribunal," or "the foreign or international tribunal, officer, or agency" receives the letter or request from "a tribunal in the United States."

That recurrent list is significant, because "a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008). By repeatedly listing "tribunal" alongside "officer" and "agency," Congress signaled that all three recipients share a common characteristic. All are governmental actors that process direct requests for evidence or letters rogatory from their counterparts as a matter of international comity. Again, private arbitral panels do not fit the pattern.

3. **15 U.S.C. § 46(j)(2)(B)**, which cross-references section 1782, reinforces that section 1782 is all about assisting other sovereigns. This provision authorizes FTC attorneys to "seek and accept appointment by a United States district court … to provide assistance to foreign and international tribunals" and "litigants before such tribunals … pursuant to section 1782." *Id.* The FTC may assist only "when the request is from an agency acting to investigate or pursue the enforcement of civil laws, or … from an agency acting to investigate or pursue the enforcement of criminal laws." *Id.* This provision is another sign that section 1782 aids foreign courts, quasi-judicial agencies, and other sovereign adjudicators, full stop.

4. **18 U.S.C. § 1510** makes it a crime to disclose subpoenas for records under section 1782 and other provisions, including if the subpoenas pertain to violations of certain foreign laws. H.R. 6395, 116th Cong. § 6308(c)(1) (2021) (enacted); *see* 18 U.S.C. § 1510(b)(3)(B). Section 1510 again focuses on U.S. aid to foreign *sovereigns*, not arbitrators.

D. *Intel* Describes "Tribunals" as Governmental Adjudicators

This Court's only decision addressing section 1782, *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), treats a "tribunal" as a governmental adjudicatory body, not a private arbitral panel. *Intel* addressed whether the European Commission—which acts as the European Union's executive branch—qualifies as a "tribunal" under section 1782. The Commission performs multiple functions, including proposing legislation, engaging in foreign policy, and (as relevant in *Intel*) conducting antitrust investigations that can culminate in binding decisions reviewable in European courts. *Id.* at 250, 259.

This Court held that the European Commission "is a § 1782(a) 'tribunal' when it acts as a first-instance decisionmaker." 542 U.S. at 246-47. Every aspect of *Intel*'s reasoning weighs against counting private arbitrators as section 1782 "tribunal[s]."

To begin, the Court stated that "Congress introduced the word 'tribunal' to ensure that 'assistance is not confined to proceedings before conventional courts,' but extends also to 'administrative and quasi-judicial proceedings.'" *Id.* at 249 (quoting S. Rep. No. 1580, 88th Cong., 2d Sess., at 7 (1964)); *id.* at 258 (same). Private arbitral panels are not "administrative" bodies or "quasi-judicial agencies."

Further, *Intel* deemed the European Commission a "quasi-judicial agenc[y]" insofar as its antitrust-investigating functions involve adjudication and produce a final decision "reviewable by the European courts." *Id.* at 259. *Intel* emphasized that the European "Court of First Instance and the European Court of Justice" can only review "the record before the [European] Commission." *Id.* at 257. Thus, only by "submitting [evidence] to the Commission in the current, investigative stage" could European courts ever review that evidence on the merits. *Id.*

None of those limitations make sense if section 1782 "tribunal[s]" encompass private arbitral panels, which do not act as de facto trial courts or evidentiary gate-keepers amassing a record for later judicial review. Arbitrators render decisions based on the evidence before them. If parties ask courts to recognize or invalidate the ensuing award, courts do not review the underlying evidence. Consider the New York Convention, the treaty governing how scores of countries treat foreign or international arbitral awards. Courts can refuse to recognize or enforce such awards only on limited legal grounds. 9 U.S.C. § 207. Parties that wish to present collateral evidence relevant

to those grounds can do so in court in the first instance. Thomas H. Oehmke, *Arbitration Highways to the Courthouse—A Litigator's Roadmap*, 86 Am. Jur. Trials 111, § 282 (2002).

Finally, *Intel* instructed district courts to consider "the receptivity of *the foreign government or the court or agency abroad* to U.S. federal-court judicial assistance." 542 U.S. at 264 (emphasis added). And *Intel* stressed the relevancy of whether section 1782 applications "conceal[] an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country." *Id.* at 265. Notably missing is any mention of the receptivity of foreign or international private arbitral panels to the sought-after evidence.

Some incorrectly read *Intel* as confirming that private arbitral panels are "tribunals." FedArb Br. 29-30; Bermann Br. 22; *FedEx*, 939 F.3d at 724-25. They cite an explanatory parenthetical in *Intel*, which in turn quotes a footnote in a 1965 Smit piece defining "tribunal" to include "administrative and arbitral tribunals, and quasi-judicial agencies." *See Intel*, 542 U.S. at 258 (quoting Smit, 65 Colum. L. Rev. at 1026 n.71). That interpretation places undue weight on a stray parenthetical, Pet.App.16a; this Court does not resolve questions of statutory interpretation in dicta. *See Van Buren*, 141 S. Ct. at 1661. And, as noted, it is dubious whether Smit's article even refers to private arbitration, *supra* p. 30.

E. Servotronics' Reading Creates a Conflict Between Section 1782 and the FAA

Interpreting "foreign or international tribunal[s]" to encompass private arbitrators would create warring discovery regimes for international commercial arbitration, which is reason enough to reject Servotronics' reading. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018).

1. Servotronics does not dispute that an "international tribunal" under section 1782 is one involving multiple countries or nationalities. *Accord* Bermann Br. 3, 7; Wang Br. 2 n.1. The seat of an "international tribunal" is irrelevant. Thus, if section 1782 encompasses commercial arbitration, a panel of British and Swedish arbitrators resolving a dispute between British and Swedish companies over a U.S. investment is an "international tribunal" even if the contract mandates arbitration in Miami.

Meanwhile, the FAA governs all arbitrations seated in the United States involving interstate or foreign commerce. 9 U.S.C. §§ 1, 2; *accord id.* §§ 208, 307. Thus, the FAA and its discovery limitations apply to many commercial arbitrations before "international" arbitral panels, like the British-Swedish arbitration in Miami. Indeed, the International Commercial Disputes Committee of the New York City Bar Association has developed a model FAA subpoena that applies in international arbitrations seated in the United States. *See* Model Fed. Arb. Summons to Testify and Present Documentary Evidence at an Arb. Hearing 1-3, 34 (2014), https://tinyurl.com/3tdj8yaj. Foreign companies frequently pick New York City and Miami as preferred seats. *See* Edna Sussman, *A General Overview of the Conduct of International Arbitration Proceedings in the United States*, *in* INTERNATIONAL ARBITRATION IN THE UNITED STATES 211-12 (2018).

Under Servotronics' interpretation, the FAA and section 1782 would both govern countless international commercial arbitrations. Yet the statutes prescribe two strikingly incompatible discovery regimes:

- Section 1782 allows discovery to commence so long as a "proceeding" is "within reasonable contemplation." *Intel*, 542 U.S. at 259. But the FAA allows discovery only after the arbitration is in

progress, because only "arbitrators" can order discovery. 9 U.S.C. § 7.

- Section 1782 empowers "interested persons" to request discovery through U.S. courts. But under the FAA, parties cannot unilaterally enlist U.S. courts in discovery requests; the arbitrator controls discovery, and parties can only obtain evidence pursuant to the arbitrator's rulings. Wang Br. 21; *see* 9 U.S.C. § 7.
- Section 1782 authorizes pre-trial discovery, including depositions and document production, from any U.S. person. But the FAA prohibits all pre-hearing discovery plus obtaining information from any non-party. Arbitrators can only summon people to appear "as a witness" *at the hearing*, and can compel document production only by summoning a witness to bring documents with them. 9 U.S.C. § 7.[9]
- Section 1782 lets applicants seek discovery from any U.S. district court where witnesses or documents are located; applicants could file requests in every district court nationwide. But under the FAA, the arbitrator's authority to summon witnesses extends only within the jurisdiction of the district court "in which such arbitrators, or a majority of them, are sitting," 9 U.S.C. § 7, e.g., only within the District of Wyoming.

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[9] *See Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1160 (11th Cir. 2019) (per curiam); *accord Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3d Cir. 2004) (Alito, J.). The Eighth Circuit allows broader FAA discovery, but does not authorize arbitrators to compel depositions. *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870-71 (8th Cir. 2000). Thus, even that outlier approach to FAA discovery is incompatible with section 1782.

The FAA thus bars parties from obtaining the very discovery that section 1782 authorizes. *See* Pet.App.12a-13a. Servotronics' position would mire international commercial arbitrations in uncertainty. If parties to an FAA-covered arbitration could invoke section 1782 to obtain much broader discovery, they would end-run the FAA's limitations and eviscerate the FAA's arbitrator-driven process. But if the FAA's restrictions instead govern all FAA-covered international commercial arbitrations, section 1782 would do little. Congress ordinarily does not pit two regimes against each other and force parties subject to conflicting rules to sort them out. The more natural reading, which harmonizes the statutes, is that section 1782 does not apply to private arbitrators.

2. Servotronics' position would also produce the perverse result that Congress, via section 1782, gave parties interested in foreign or international arbitrations with a powerful discovery tool against U.S. companies or residents. Yet Congress, via the FAA, simultaneously denied that tool to U.S. companies or residents engaged in domestic commercial arbitration. It is "hard to conjure a rationale" for that disparity, Pet.App.14a, which would produce an "unacceptable asymmetr[y]" between the discovery available in U.S. and non-U.S. arbitrations. *See Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 540 n.25 (1987).

That anomalous outcome would make even less sense given the historical landscape. In 1964, the United States had not signed the New York Convention governing the recognition and enforcement of foreign arbitral awards. *See* 9 U.S.C. § 201 (enacted 1970). Thus, as of 1964, the FAA mandated that U.S. courts enforce *domestic* arbitral awards, but "U.S. federal law and most of the states did not provide for summary enforcement of foreign arbitral awards." Rothstein, *supra*, at 72. Given that Congress

treated international arbitral awards worse than domestic counterparts for enforcement purposes, Congress presumably did not give parties to international commercial arbitrations gold-plated discovery tools while consigning U.S. counterparts to tin.

F. The Legislative History Does Not Support Equating Private Arbitrators with "Tribunals"

Servotronics (at 14-19) invokes section 1782's genesis and legislative history, arguing that Congress aimed to expand U.S. judicial assistance in foreign and international proceedings. Nothing suggests Congress pursued that aim by including private arbitrators as "tribunals."

1. Servotronics (at 14-16) correctly observes that section 1782 "expanded the scope of the assistance federal courts have been authorized to provide." *See Intel*, 542 U.S. at 247-48. Earlier versions of section 1782, dating to 1948 and 1949, limited U.S. courts to assisting with evidence production for use in "any civil action pending" (or "any judicial proceeding") in specified "court[s] in a foreign country." *Id.* at 248. As noted, *supra* p. 22, another predecessor provision enacted in 1930 and amended in 1933 authorized U.S. courts to help obtain evidence for the United States' use in an "international tribunal or commission, established pursuant to an agreement between the United States and any foreign government," when the United States was participating in the proceedings. 46 Stat. 1005; 48 Stat. 117.

In 1964, Congress revised section 1782, replacing the phrase "court in a foreign country" with "foreign … tribunal" and eliminating the requirement that the United States be a party to proceedings before an "international tribunal." *Intel*, 542 U.S. at 248-49. Congress thus broadened eligibility for U.S. assistance beyond foreign courts

alone, and extended assistance to all "international tribunals" without qualification. But those two facts do not add up to Servotronics' conclusion that section 1782 encompasses private arbitrators.

Congress' change from foreign "court" to "foreign tribunal" expanded section 1782's reach to include "administrative and quasi-judicial proceedings." *Id.* at 249 (quotations omitted). Servotronics (at 18, 21) argues that Congress went further, asserting that if Congress wanted an "incremental increase in the scope of Section 1782," Congress would have referred to "governmental tribunals." But a "governmental tribunal" would have been redundant. The concept of sovereignty was already baked into Congress' understanding of a "tribunal."

Moreover, before 1964, an "international tribunal" meant sovereign-created intergovernmental bodies. *Supra* pp. 21-22. In 1964, Congress removed the restrictions that permitted U.S. courts to assist with proceedings before international tribunals only when the United States was a party. The natural inference is that Congress did not explode the basic definition of "international tribunal" to include private arbitrators. Rather, Congress authorized U.S. courts to assist "international tribunals" resolving disputes between other sovereigns, as a matter of comity.

2. Legislative history "is not the law," *Epic*, 138 S. Ct. at 1631, and does not help Servotronics anyway. The House and Senate Reports state that the change from "court" to "tribunal" in section 1782 was to facilitate "'U. S. judicial assistance in connection with [administrative and quasi-judicial proceedings abroad].'" *Intel*, 542 U.S. at 258 (quoting S. Rep. No. 1580, at 7-8) (alteration in original); *see id.* at 249 (quoting S. Rep. No. 1580, at 7 and H.R. Rep. No. 1052, 88th Cong., 1st Sess., at 9 (1963)).

Private arbitrators are neither quasi-judicial nor administrative bodies.

Servotronics (at 15-16) treats the views of Professor Smit as "contemporaneous expressions of legislative intent" because Smit drafted the language Congress adopted in section 1782. In 1998, Smit posited that a "tribunal" includes private arbitral panels, which Servotronics portrays as Smit's clarification of a 1965 article. *See* Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 Syracuse J. Int'l L. & Com. 1, 5 (1998); Smit, 65 Colum. L. Rev. at 1026-27 & nn.71 & 73. But Smit is not Congress. His articles went through peer review, not bicameralism and presentment. And his putative clarification came 34 years after section 1782's enactment.

G. Extending Section 1782 to Private Arbitration Would Burden U.S. Courts and Companies and Undermine Arbitration

1. Servotronics' interpretation risks overrunning U.S. courts, U.S. companies, and U.S. residents with a vast new frontier of abusive discovery requests. Under Servotronics' view, anyone with a reasonable interest in the outcome of a foreign or international commercial arbitration could file section 1782 applications asking U.S. courts to order reams of documents or subpoena testimony from U.S. companies and residents.

That deluge would strain district courts and subject U.S. companies and residents to fishing expeditions. Since *Intel*, the number of section 1782 applications "has exploded." Wang Br. 5. District courts "have struggled immensely" to adjudicate those applications, *id.*, which mostly involve foreign court proceedings. Until recently,

all circuit courts to consider the question barred "interested parties" to private arbitrations from resorting to section 1782. *See* Pet. 9.

If this Court flipped the prevailing rule nationwide, parties to foreign or international arbitrations would have every incentive to file abusive section 1782 applications. Already, section 1782 applicants have targeted evidence held by third-party U.S. law firms. Wang Br. 12-13. Parties have also used section 1782 to strategically obtain evidence from third parties "although the same evidence is *also* held by the opposing party in the international proceeding"—the requesting party just wants to avoid the risk that the foreign adjudicator would say no. *Id.* 12.

Opening the floodgates to section 1782 applications would transform U.S. courts into beacons for harassment. Suppose two foreign automakers were arbitrating an antitrust dispute. Either party could wield section 1782 to ferret out U.S. competitors' plans, for instance by persuading U.S. courts to order U.S. car makers to turn over documents about their manufacturing or production arrangements. Or suppose two Russian companies arbitrated a dispute over which of them owned stock that went through many owners after the fall of the Soviet Union. Section 1782 could be a tool for forcing third-party exiles in the United States to reveal information about whether their family members still hold shares, and their locations.

Amicus Professor Bermann (at 23-27) predicts that district courts would exercise their discretion to deny unjustified requests. *Accord FedEx*, 939 F.3d at 730. But district courts have little way to tell whether requests are abusive. Wang Br. 6-13. "Interested persons" often file barebones or misleading *ex parte* applications. *Id.* 8-9. Nor can district courts readily ascertain whether foreign or international tribunals want the requested evidence.

Id. 10-12. That inquiry is impossible when, as here, someone files a section 1782 application before the parties even select arbitrators. Tightening the criteria governing when district courts should grant section 1782 applications, *see id.* 13-19, is no complete answer. Even if U.S. courts ultimately deny section 1782 applications, the chance of success—and the opportunity to force U.S. third parties into burdensome litigation to defeat the request—encourages attempts. All of this "fallout underscores the implausibility" of Servotronics' reading. *Van Buren*, 141 S. Ct. at 1661.

2. Servotronics and its amici offer no benefits to counter these immense burdens. To the contrary, Servotronics' position would obliterate many advantages of arbitration and undermine arbitrators' authority.

Parties here and abroad choose arbitration as a faster, cheaper, and more predictable alternative to litigation. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344-45 (2011). Party-appointed arbitrators tend to decide disputes swiftly, in keeping with the parties' wishes. Those advantages would disappear if parties could derail arbitrations with parallel section 1782 litigation in U.S. courts. And if applications succeeded, further delay and costs would mount. American discovery is world-famous for offering expensive, no-stone-unturned evidentiary production that few other forums provide. *See Aérospatiale*, 482 U.S. at 542; Wang Br. 7.

Parties also choose arbitration for its confidentiality. The evidence, the arguments, even the existence of the arbitration need not be publicly disclosed. But section 1782 proceedings destroy those bargained-for benefits. To be sure, district courts cannot compel testimony or documents that would "violat[e] any legally applicable privilege." 28 U.S.C. § 1782(a). But that provision does not

protect against section 1782 applications or judicial rulings that reveal the progress of the arbitration or arbitrators' views on the sought-after evidence. "People who want secrecy should opt for arbitration." *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000). But when one party resorts to section 1782, both parties get "the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials." *Id.*

Parties likewise choose arbitration to select predictable rules and procedures in advance. One near-universal rule is that the arbitrators control discovery. ICC Br. 12-14. That rule is a critical bargained-for benefit for parties who seek to avoid costly U.S.-style discovery. *Id.* 10. But section 1782 lets parties unilaterally upset that bargain. Because the foreign or international proceeding need only be "within reasonable contemplation," *Intel*, 542 U.S. at 259, parties to arbitrations could rush to U.S. courts before picking arbitrators. Or parties could try their luck in U.S. courts even if the arbitrators signaled an unwillingness to consider the sought-after evidence. Thus, "a party might arbitrage different systems of discovery to obtain evidence using Section 1782 that is neither needed nor wanted by the tribunal with jurisdiction over the dispute." Wang Br. 7.

This case exemplifies the point. Servotronics and Rolls-Royce agreed to confidential arbitration before one arbitral panel. Instead, Rolls-Royce has endured years of litigation involving three district-court cases; two appeals; one mandamus proceeding; and proceedings in this Court, all of which inherently broadcast details of the arbitration.

Likewise, Servotronics and Rolls-Royce agreed to rules that put arbitrators in control of discovery. *See* CIArb Rules art. 27(3)-(4). Yet Servotronics filed multi-

ple lawsuits to obtain third-party evidence before the parties selected arbitrators. The arbitrators then had Rolls-Royce produce some of this evidence and deemed the rest unnecessary. Yet Servotronics is still pressing for that evidence in suits across the United States. Congress surely did not intend this result.

CONCLUSION

This Court should dismiss the case as moot. Alternatively, the judgment of the Seventh Circuit should be affirmed. In all events, Servotronics' request that this Court reinstate the vacated district-court order issuing subpoenas is improper and unsupported.

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APPENDIX

APPENDIX A

9 U.S.C. § 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

APPENDIX B

15 U.S.C. § 46. Additional powers of Commission

* * * * *

(j) Investigative assistance for foreign law enforcement agencies

* * * * *

(2) Type of assistance

In providing assistance to a foreign law enforcement agency under this subsection, the Commission may—

* * * * *

(B) when the request is from an agency acting to investigate or pursue the enforcement of civil laws, or when the Attorney General refers a request to the Commission from an agency acting to investigate or pursue the enforcement of criminal laws, seek and accept appointment by a United States district court of Commission attorneys to provide assistance to foreign and international tribunals and to litigants before such tribunals on behalf of a foreign law enforcement agency pursuant to section 1782 of title 28.

* * * * *

APPENDIX C

18 U.S.C. § 1510. Obstruction of criminal investigations

* * * * *

(b)(1) Whoever, being an officer of a financial institution, with the intent to obstruct a judicial proceeding, directly or indirectly notifies any other person about the existence or contents of a subpoena for records of that financial institution, or information that has been furnished in response to that subpoena, shall be fined under this title or imprisoned not more than 5 years, or both.

(2) Whoever, being an officer of a financial institution, directly or indirectly notifies—

(A) a customer of that financial institution whose records are sought by a subpoena for records; or

(B) any other person named in that subpoena; about the existence or contents of that subpoena or information that has been furnished in response to that subpoena, shall be fined under this title or imprisoned not more than one year, or both.

(3) As used in this subsection—

* * * * *

(B) the term "subpoena for records" means a Federal grand jury subpoena, a subpoena issued under section 3486 of this title, or an order or subpoena issued in accordance with section 3512 of this title, section 5318 of title 31, or section 1782 of title 28, for customer records that has been served relating to a violation of, or a conspiracy to violate—

(i) section 215, 656, 657, 1005, 1006, 1007, 1014,

1344, 1956, 1957, 1960, an offense against a foreign nation constituting specified unlawful activity under section 1956, a foreign offense for which enforcement of a foreign forfeiture judgment could be brought under section 2467 of title 28, or chapter 53 of title 31; or

* * * * *

APPENDIX D

28 U.S.C. § 1696. Service in foreign and international litigation

(a) The district court of the district in which a person resides or is found may order service upon him of any document issued in connection with a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon application of any interested person and shall direct the manner of service. Service pursuant to this subsection does not, of itself, require the recognition or enforcement in the United States of a judgment, decree, or order rendered by a foreign or international tribunal.

(b) This section does not preclude service of such a document without an order of court.

28 U.S.C. § 1781. Transmittal of letter rogatory or request

(a) The Department of State has power, directly, or through suitable channels—

(1) to receive a letter rogatory issued, or request made, by a foreign or international tribunal, to transmit it to the tribunal, officer, or agency in the United States to whom it is addressed, and to receive and return it after execution; and

(2) to receive a letter rogatory issued, or request made, by a tribunal in the United States, to transmit it to the foreign or international tribunal, officer, or agency to whom it is addressed, and to receive and return it after execution.

(b) This section does not preclude—

(1) the transmittal of a letter rogatory or request directly from a foreign or international tribunal to the tribunal, officer, or agency in the United States to whom it is addressed and its return in the same manner; or

(2) the transmittal of a letter rogatory or request directly from a tribunal in the United States to the foreign or international tribunal, officer, or agency to whom it is addressed and its return in the same manner.

28 U.S.C. § 1782. Assistance to foreign and international tribunals and to litigants before such tribunals

(a) 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, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. 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. To the extent that the order does not prescribe otherwise, the testimony or

statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.