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 *AMICUS CURIAE* HALLIBURTON COMPANY IN SUPPORT OF RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

Halliburton Company has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Halliburton Company ("Halliburton") is a leading provider of products and services to the energy industry. Halliburton has a strong interest in this case because it is a party to an appeal pending before the Third Circuit addressing the same issue. *In re: Application of EWE Gass*, No. 20-1830 (3d Cir.) (argued Dec. 9, 2020).

In that matter, EWE, a German company, initiated a private contractual arbitration in Germany against two German affiliates of Halliburton. The arbitration was convened under the rules of the German Arbitration Institute ("DIS") pursuant to the commercial agreements between these German companies. Like the Chartered Institute of Arbitrators at issue in this case, *see* Rolls-Royce Br. 20, the DIS is a private, nongovernmental association with its own set of arbitration rules. The arbitrators are German, and the proceedings are conducted in Germany and in German. Under the DIS Rules, the arbitral panel is authorized to control the scope and timing of any discovery. *See* Joint App'x JA00206, *In re: Application of EWE Gass*, No. 20-1830 (3d Cir. filed Aug. 3, 2020), ECF No. 34; *Arbitration Services of the DIS*, https://www.disarb.org/en/about-us/arbitration-services-of-the-dis (last visited June 25, 2021).

Although Halliburton is not a party to the DIS arbitration or to the agreements at issue in the

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution toward its preparation or submission. All parties have consented to the filing of this brief.

arbitration, EWE filed an application pursuant to 28 U.S.C. § 1782(a) seeking sweeping discovery from Halliburton to use in the arbitration. The district court concluded that private, contract-based arbitrations like the DIS arbitration do not fall within section 1782(a). *In re EWE Gasspeicher GmbH*, No. Civ. 19-mc-109-RGA, 2020 WL 1272612, at *2 (D. Del. Mar. 17, 2020). EWE appealed to the Third Circuit, which heard oral argument in December 2020.

Although the district court in Halliburton's case reached the correct result, EWE's application and the years of litigation it has generated highlight the lack of fit between section 1782(a) and private commercial arbitrations abroad. Halliburton's German affiliates contracted for a confidential, efficient arbitration. But EWE's section 1782(a) application resulted in both disclosure of extensive information about the arbitration and extensive litigation about confidentiality and sealing. *See, e.g.*, *id.* And EWE's application gave it an asymmetric discovery weapon: EWE has no U.S. affiliate, so the German Halliburton entities that are parties to the arbitration were limited to the very narrow discovery available under the DIS rules and the arbitral panel's orders, while EWE sought sweeping U.S.-style discovery.

If Congress truly subjected private commercial arbitrations abroad to section 1782(a), then these anomalies would be unfortunate results of Congress's choice. But Congress made no such choice. As explained in respondents' briefs and elaborated below, the statutory text, structure, and context all demonstrate that when Congress referred to "a proceeding in a foreign or international tribunal," it

did not sweep in private commercial arbitrations abroad. And as explained below, if the Court considers the legislative history and scholarly commentary relating to section 1782(a)'s enactment in 1964, those sources further confirm that private commercial arbitrations abroad do not fall within the statute.

SUMMARY OF THE ARGUMENT

Every interpretive guide points in the same direction: a purely private, contract-based arbitration abroad is not "a proceeding in a foreign or international tribunal" under section 1782(a).

First, of course, is the text of that provision, which shows that Congress understood that a "foreign . . . tribunal" would apply "the practice and procedure of the foreign country." 28 U.S.C. § 1782(a). That makes perfect sense as applied to governmental bodies, which necessarily adhere to the practice and procedure of the foreign country of which they are a part. And it makes nonsense if one attempts to apply it to private, contract-based arbitrations, which apply the rules of the private arbitral body involved—or even whatever rules the parties have agreed to in their contract.

After the text of section 1782(a) comes the text of the closely related statutes that form the context of Congress's enactment of section 1782(a). The 1958 statute creating the Commission whose proposal became section 1782(a) directed the Commission to study improvements for U.S. judicial assistance to "foreign courts and quasi-judicial agencies"—plainly governmental bodies. Pub. L. No. 85-906, § 2, 72 Stat. 1743, 1743 (1958). Section 1781, enacted alongside section 1782(a), repeatedly uses the "foreign tribunal" language at issue to refer to official governmental

bodies. And it confirms that Congress was addressing only governmental bodies by enlisting the State Department to receive and transmit letters rogatory and requests for judicial assistance. Accepting petitioner's position would require believing that Congress directed the State Department—our nation's diplomatic emissary to other countries—to interact directly with purely private commercial bodies in other countries. That is beyond implausible.

For these reasons, the Court need not consider the legislative history or contemporaneous scholarship surrounding section 1782(a)'s enactment. But if the Court does so, those sources only further confirm that section 1782(a) is concerned with governmental bodies only. The Senate and House Reports accompanying the 1964 enactment of section 1782(a) repeatedly make clear that Congress intended to provide for assistance to governmental bodies abroad—"a foreign administrative tribunal or quasi-judicial agency," or an "investigating magistrate[]." H.R. Rep. No. 88-1052, at 9 (1963) ("House Report"); S. Rep. No. 88-1580 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 3782, 3788 ("Senate Report").

In contrast to these repeated, clear references to governmental bodies, there is not the slightest hint in any of the contemporaneous materials that anyone in Congress intended to provide for assistance to private commercial arbitrations abroad. And that silence is particularly telling given that private commercial arbitration was front of mind at the time, as the United States had declined to ratify the New York Convention just three months before Congress created the Commission in 1958. Accepting petitioner's

position would require believing that Congress extended judicial assistance to private foreign arbitrations without a whisper of acknowledgment and against the backdrop of the United States declining to ratify the New York Convention because of discomfort with arbitration.

Finally, the contemporaneous articles written by Professor Hans Smit, the reporter for the Commission, likewise show that no one involved in section 1782(a)'s development or enactment had private commercial arbitrations in mind. Petitioner seizes on the words "arbitral tribunals" in the snippet of Professor Smit's article quoted by this Court in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004). But *Intel*—and the Smit article itself—make clear that Congress and Professor Smit were focused exclusively on governmental bodies. The two words petitioner seizes on appear in a list of governmental bodies, and only governmental bodies, as Professor Smit described what the term "tribunal" would cover: "investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts." *Id*. at 258 (internal quotation marks omitted). Again, there should be no need to consider Professor Smit's writings given the clarity of the statutory text and context. But it is striking that even Professor Smit's contemporaneous writings—latched onto as a lifeline by petitioner—actually support respondents.

ARGUMENT

I. Statutory Text And Context Demonstrate That Private Contractual Arbitrations Fall Outside Section 1782(a).

Petitioner's argument that "foreign or international tribunal" as used in section 1782(a) includes private commercial arbitrations cannot be reconciled with the language of section 1782(a) itself or the context in which Congress enacted that statute.

A. The 1958 statute creating the Commission shows that Congress was focused exclusively on governmental bodies.

Section 1782(a), as enacted in 1964, grew out of a statute enacted by Congress in 1958 creating the Commission on International Rules of Judicial Procedure (the "Commission"). Everything about Congress's creation of the Commission shows that private commercial arbitrations abroad lay far outside of Congress's contemplation and that Congress was focused exclusively on proceedings in governmental bodies.

There is no need to infer what Congress was getting at in creating the Commission—Congress was explicit about its goals in the statute it enacted. Section 2 of the statute describes the purpose of the Commission in terms that make crystal clear that Congress was focused exclusively on governmental bodies:

> The Commission shall investigate and study existing practices of judicial assistance and cooperation *between the United States and*

> *foreign countries* with a view to achieving improvements. To the end that procedures necessary or incidental to the conduct and settlement of *litigation in State and Federal courts and quasi-judicial agencies* which involve the performance of acts in a foreign territory, such as the service of judicial documents, the obtaining of evidence, and the proof of foreign law, may be more readily ascertainable, efficient, economical, and expeditious, and that *the procedures of our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies* be similarly improved . . . .

Pub. L. No. 85-906, § 2, 72 Stat. at 1743 (emphasis added).

To state the obvious, private arbitral bodies like the DIS are not "foreign countries," and "cooperation between the United States" and such a private entity would not "achiev[e] improvements" vis-à-vis foreign countries. Indeed, even to speak of "cooperation between the United States" and such a private entity is anomalous, given that the United States normally cooperates with foreign governments, not private entities in foreign countries.

Congress's repeated references to "courts and quasi-judicial agencies" further confirm that Congress was focused on official governmental bodies. "Quasi-judicial" implies government sponsorship. *See Quasi-Judicial*, Black's Law Dictionary 1411 (4th ed. 1951) (Quasi-judicial is "[a] term applied to the action, discretion, etc. *of public administrative officers*, who are required to investigate facts, or ascertain the

existence of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature") (emphasis added). Private arbitrations do not fit that definition. As Boeing points out, private arbitrations are creatures of contract whose processes are not controlled by "public administrative officers or bodies" and involve no "official action." *Id.*; *see* Boeing Br. 26.

Congress's parallelism in referring to "courts and quasi-judicial agencies" both as the U.S. bodies that might need foreign assistance and as the foreign bodies that might receive assistance from "our State and Federal tribunals" merely gilds the lily. 72 Stat. at 1743. Regardless of what the word "tribunals" might be capable of meaning on its own or in a different context, no reader of this 1958 statute would think Congress meant to include private arbitrations when it referred to "litigation in State and Federal courts and quasi-judicial agencies." *Id.*

B. Congress's changes to the text of section 1782(a) confirm Congress's focus on governmental bodies.

Given the clarity with which Congress's charter for the Commission focused on proceedings in governmental bodies, it is not surprising that the amendments proposed by the Commission and enacted in 1964 by Congress confirm that focus. Respondents' briefs provide a detailed and persuasive analyses of the revised text of section 1782(a), so Halliburton will limit itself to highlighting two points.

Before the 1964 revisions, Congress provided for judicial assistance through two sets of statutes: (1) a prior version of section 1782, which permitted district

courts to designate persons to preside at depositions "to be used in any judicial proceeding pending in any court in a foreign country with which the United States is at peace," Act of June 25, 1948, Pub. L. No. 80-773, ch. 646, § 1782, 62 Stat. 869, 949; Act of May 24, 1949, Pub. L. No. 81-72, ch. 139, § 93, 63 Stat. 89, 103; and (2) 22 U.S.C. §§ 270–270g, which addressed similar matters, conferring powers on commissioners or members of "international tribunals." *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 189 (2d Cir. 1999). The Commission-drafted revision expanded section 1782's reach by replacing the statute's former reference to "any judicial proceeding" with the phrase "a proceeding in a foreign or international tribunal." *Compare* Act of May 24, 1949, § 93, 63 Stat. at 103, *with* 28 U.S.C. § 1782(a).

Petitioner tries to make hay out of this widening of the statute's scope, *see* Pet. Br. 3, 18, 21, as if the fact that Congress widened the statute's scope means that it must stretch so far as to cover private commercial arbitrations. But there is a big difference between a tweak at the edges to encompass proceedings in governmental bodies that might be better described as "quasi-judicial" rather than simply "judicial" and a dramatic, unprecedented expansion to capture purely private commercial arbitrations. Congress, after all, had directed the Commission to develop improvements for assistance to "foreign courts and quasi-judicial agencies," and that is what the Commission did.

Not only is there no indication in the text of section 1782(a) that Congress exceeded that limiting principle, but the text Congress enacted makes sense

only in light of that limiting principle. Section 1782(a) suggests that district courts look to "the practice and procedure of the foreign country or the international tribunal" when ordering testimony or document production for use in a foreign or international tribunal. Foreign courts and quasi-judicial agencies, as governmental bodies, necessarily adhere to "the practice and procedure of the foreign country" of which they are a part. But private arbitral bodies like the DIS have their own private rules governing practice and procedure. *See* Rolls-Royce Br. 32. Such private bodies need not and generally do not adhere to the practice and procedure of any foreign country.

Congress plainly intended that "a foreign . . . tribunal" would be governed by "the practice and procedure of the foreign country" that created it—an expectation that makes no sense if the statute is stretched to apply to purely private arbitrations. Rather than attribute to Congress an intent to make nonsense, the Court should interpret section 1782(a) according to its text to provide for assistance to "foreign tribunal[s]" that are governed by "the practice and procedure of the foreign country" to which they owe their existence. *See Intel*, 542 U.S. at 249 (describing section 1782(a) as applicable to foreign or international "administrative and quasi-judicial proceedings" (quoting Senate Report at 3788)).[2]

[2] Remarkably, petitioner's brief does not even acknowledge section 1782(a)'s reference to "the practice and procedure of the foreign country."

C. The provisions enacted alongside section 1782(a) further confirm that a private commercial arbitration is not a "foreign or international tribunal."

When Congress unanimously enacted legislation recommended by the Commission, it revised not only section 1782 but also 28 U.S.C. § 1696, regarding service of process in foreign litigation, and 28 U.S.C. § 1781, regarding letters rogatory. Act of Oct. 3, 1964, Pub. L. No. 88-619, § 4, 78 Stat. 995, 995; *id.* § 8, 78 Stat. at 996–97. This package of amendments all related to facilitation of litigation abroad, and all three statutes use the identical phrase "foreign or international tribunal" to describe the object of the district court's assistance. Courts apply the presumption that "[a] term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). Indeed, not even petitioner suggests that this phrase could be given a different meaning in section 1782(a) from its meaning in sections 1696 and 1781.

Examining these provisions in context confirms that private contract-based arbitrations do not fall within the "foreign or international tribunal[s]" covered by section 1782(a). As respondents discuss in further detail, service-of-process assistance and letters rogatory are about comity between governments—a construct that does not apply in the context of private arbitration. Rolls-Royce Br. 34–36; Boeing Br. 24–25.

The text of section 1781 provides particularly powerful confirmation that Congress was addressing

governmental bodies only. Section 1781 authorizes the State Department "to receive a letter rogatory issued, or request made, *by a foreign or international tribunal,*" and "to transmit it *to the tribunal, officer, or agency in the United States* to whom it is addressed." 28 U.S.C. § 1781(a)(1) (emphasis added). And, correspondingly, it authorizes the State Department "to receive a letter rogatory issued, or request made, *by a tribunal in the United States*" and "to transmit it *to the foreign or international tribunal, officer, or agency* to whom it is addressed." *Id.* § 1781(a)(2) (emphasis added).

The textual and structural signals here are myriad and uniform. First, an "officer" or "agency" is a governmental actor. Words are known by the company they keep, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 562 (1995), and Congress grouped a "foreign or international tribunal" with an "officer[] or agency," signaling that a "foreign or international tribunal" is a governmental actor as well. Second, Congress used the word "tribunal" in parallel to refer to both the requesting entity and the ultimate recipient, authorizing the State Department to transmit the request "to the tribunal, officer, or agency in the United States to whom it is addressed." Again, because "officer" or "agency" clearly refer to governmental actors, it follows that "tribunal" as used here does too.

Third, the statute is addressed to the State Department. The State Department is the United States' representative with respect to other countries. *See, e.g.*, *In re Letter Rogatory from 1st Ct. of First Instance in Civ. Matters, Caracas, Venezuela*, 42 F.3d

308, 311 (5th Cir. 1995) (noting that the State Department issues guidelines for the formulation of letters rogatory). The State Department is not in the business of private commercial arbitration, and it would be highly anomalous for Congress to direct the State Department to receive requests directly from private arbitral panels in foreign countries or, equally, to transmit U.S. requests to such private foreign bodies. There is no reason whatever to believe that Congress intended to put the State Department into direct contact with, for example, the DIS private arbitral association in Germany.

Far from it—in addition to the textual evidence just discussed, section 1781 is concerned with letters rogatory, which are official requests from one country to another. Black's defines them as "[t]he medium whereby one country, speaking through one of its courts, requests another country, . . . acting through its own courts and by methods of court procedure peculiar thereto and entirely within the latter's control, to assist the administration of justice in the former country." *Letters Rogatory*, Black's Law Dictionary 1050 (4th ed. 1951).[3] True, section 1781 also refers to "requests," but such requests are still to

[3] *See* 22 C.F.R. § 92.54 (defining letters rogatory as a "a formal request from a court"); U.S. Dep't of State, Bureau of Consular Affairs, *Preparation of Letters Rogatory*, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/obtaining-evidence/Preparation-Letters-Rogatory.html (last visited June 25, 2021) (defining letters rogatory as "requests from courts in one country to the courts of another country requesting the performance of an act which, if done without the sanction of the foreign court, could constitute a violation of that country's sovereignty").

be received and transmitted *by the State Department*. It is not remotely plausible that by the use of one innocuous word Congress intended to expand the State Department's mission to encompass being the interlocutor of private arbitral bodies like the DIS. To the contrary, Congress gave the State Department this role in section 1781 because Congress was talking about interactions between countries.

II. The Legislative History And Scholarly Commentary Further Confirm That Section 1782(a) Does Not Cover Private Commercial Arbitrations.

The textual, structural, and contextual points discussed above resolve this case without any need to resort to legislative history or scholarly commentary. But some have argued that those sources support interpreting section 1782(a) to apply to private foreign arbitrations. *See* Pet. Br. 16; *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 213 (4th Cir. 2020); *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d 710, 722 (6th Cir. 2019). That is incorrect. If the Court does choose to look to legislative history and contemporaneous commentary, it will see that those sources merely further confirm that Congress was focused exclusively on governmental bodies.

A. The 1964 Senate and House Committee Reports show that Congress contemplated only governmental bodies.

In the only case this Court has decided involving section 1782(a), the Court discussed the Senate and House Reports accompanying the 1964 enactment of

the statute. *Intel*, 542 U.S. at 260–64 In holding that the European Commission's Directorate-General for Competition was an "international tribunal" within the meaning of section 1782(a), the Court consulted the 1964 Senate Report and House Report (which largely mirrored the Senate Report). Like the 1958 statute creating the Commission, the Senate and House Reports confirm that Congress was focused on governmental bodies and had no contemplation at all of extending U.S. judicial assistance to private contractual arbitrations abroad.

The House and Senate Reports first explain why Congress repealed 22 U.S.C. §§ 270–270g: Those provisions "improperly limit[ed] the availability of assistance to the U.S. agent before an international tribunal and require[d] that the evidence relate to a matter in which the United States or any of its nationals [was] involved." House Report at 6; Senate Report at 3784–85. Such restrictions were "undesirable" limitations; Congress believed that the availability of assistance to international tribunals should not depend on whether the United States was a party to their establishment or involved in proceedings before them. *Id.* This switch from sections 270–270g to the current section 1782(a) was intended to extend "the reach of the surviving statute to intergovernmental tribunals not involving the United States;" it provides "no indication that Congress intended for the new provisions to reach private international tribunals, which lay far beyond the realm of the earlier statute." *Nat'l Broad. Co.*, 165 F.3d at 190; *see Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 882 (5th Cir. 1999).

The Reports then go on to explain the revisions to section 1782. Explaining the replacement of the word "court" with "tribunal," the House and Senate Reports stated that "[t]he word 'tribunal' is used to make it clear that assistance is not confined to proceedings before conventional courts." House Report at 9; Senate Report at 3788. But far from suggesting that the word "tribunal" was intended to cover private arbitrations, the Reports made clear that Congress was addressing governmental bodies only and merely recognized that, in the international and foreign context, government-created bodies might appear in various forms and might look different from "conventional courts."

Echoing the 1958 legislation that created the Commission, the Reports explained that "[i]n view of the constant growth of administrative and quasi-judicial proceedings all over the world, the necessity for obtaining evidence in the United States may be as impelling before *a foreign administrative tribunal or quasi-judicial agency* as in proceedings before a conventional foreign court." Senate Report at 3788 (emphasis added); House Report at 9. Foreign administrative tribunals and quasi-judicial agencies are plainly governmental bodies. *See Nat'l Broad. Co.*, 165 F.3d at 189 ("[I]t is apparent in context that the authors of these reports had in mind only governmental entities, such as administrative or investigative courts, acting as state instrumentalities or with the authority of the state."). Similarly, the Reports explained that "it is intended that the court have discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries." House Report at 9; Senate Report

at 3788. Investigating magistrates are obviously official actors.

The Reports also provide useful context for Congress's inclusion of the word "requests" in section 1781. The Sixth Circuit placed great weight on that word, stating that "[a] private arbitral panel can make a request for evidence, so this section does not indicate that the word 'tribunal' in the statute refers only to judicial or other public entities." *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d at 723. As explained above, this fails to grapple with Congress's enlistment of the State Department to handle such "requests." *Supra* at 12–14. Maybe anyone can "make a request," but the State Department doesn't handle requests from just anyone.

The Reports provide a far more plausible explanation for Congress's inclusion of "requests" alongside letters rogatory: it was a practical accommodation for the possibility that foreign practices may differ, so that functional equivalents of letters rogatory would be covered even if the foreign country's practice or procedure were slightly different. The Senate Report thus shows Congress's recognition that a request may vary based on the "character of the proceedings in that country" or the "nature of the tribunal and the character of the proceedings before it." Senate Report at 3788. Such a minor accommodation of differences in terminology among foreign countries in no way suggests that Congress intended to include purely private foreign entities.

In short, the legislative history on which this Court relied in *Intel* further confirms what the statutory text and context already make clear:

Congress was focused exclusively on governmental bodies and had no intent to cover private contract-based arbitrations abroad.

B. Congress made no reference to private arbitrations.

In fact, Congress made no reference to private arbitrations at all. That silence is significant in context because arbitration would likely have been on Congress's mind at that time. In June 1958, over 40 countries participated in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). June 10, 1958, 21 U.S.T. 2517. Considered the foundational document on international private commercial arbitration, the New York Convention governs the recognition and enforcement of foreign arbitral awards as well as the enforcement of agreements to arbitrate. *See* 9 U.S.C. § 201.

While the United States participated in the New York Convention negotiations, it did not ratify the treaty at that time. The U.S. delegates expressed concern that the Convention would conflict with U.S. procedural and substantive law. Binding contracts requiring arbitration were not universally accepted here; many states deemed such provisions revocable at any time before the issuance of an award. *See* Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049, 1049–50 (1961). The delegates believed that the New York Convention "embodie[d] principles of arbitration law which it would not be desirable for the United States to endorse" because, among other

reasons, it would "override the arbitration laws of a substantial number of States and entail changes in State and possibly Federal court procedures." *Id.* at 1074 n.108.[4]

It was against this backdrop that Congress created the Commission in September 1958—just three months after the United States opted not to ratify the New York Convention. Given the rationale behind the United States' reticence to join the New York Convention, Congress surely would have discussed private commercial arbitrations at some point during the legislative process if it had intended section 1782(a) to open up U.S. courts to providing assistance in private foreign arbitrations. That would have been a major and novel step—and utterly out of step with the United States' decision not to join the New York Convention because of skepticism about arbitration.

Given this context, it was an understatement for the Second Circuit to state that it was "confident that a significant congressional expansion of American judicial assistance to international arbitral panels created exclusively by private parties would not have

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[4] This Court did not find arbitration agreements irrevocable and enforceable under the Federal Arbitration Act until 1967. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). The next ten years saw rapid changes to the private commercial arbitration landscape. In 1970, the United States ratified and incorporated the New York Convention into what is now Chapter 2 of the FAA, 9 U.S.C. §§ 1–16, 200–208, and in 1975, the United States ratified the Panama Convention and incorporated it into Chapter 3 of the FAA. *See* Inter-American Convention on International Commercial Arbitration, 9 U.S.C. §§ 301–07.

been lightly undertaken by Congress without at least a mention of this legislative intention." *Nat'l Broad. Co.*, 165 F.3d at 190. In this context, to observe that "there is no indication that Congress intended for the new provisions to reach private international tribunals, which lay far beyond the realm of the earlier statute," *id.*, is not to give undue credence to legislative history—it is merely to recognize that context can make it significant when a dog doesn't bark.

C. Professor Smit's contemporaneous articles confirm that all involved in the 1964 amendment of section 1782(a) were focused on foreign governmental bodies.

In addition to legislative history, some courts have looked to Professor Hans Smit's contemporaneous writings for guidance on the scope of section 1782(a) because he was considered the "dominant drafter of, and commentator on, the 1964 revision[s]" to section 1782. *In re Letter of Request from Crown Prosecution Serv. of U.K.*, 870 F.2d 686, 689 (D.C. Cir. 1989) (R.B. Ginsburg, J.). Professor Smit commented on section 1782 in 1962 while the Commission was drafting the revised statutes and again in 1965 immediately after Congress enacted the revised section 1782.

Some have argued that the Court's quotation of Professor Smit's 1965 article in *Intel* shows that section 1782(a) covers private foreign arbitrations. Pet. Br. 16; *see, e.g., In re Babcock Borsig AG*, 583 F. Supp. 2d 233, 238–39 (D. Mass. 2008). That argument is wrong on every level.

First, as Rolls-Royce explains, Professor Smit is not Congress and *Intel* had nothing to do with private foreign arbitrations. Rolls-Royce Br. 46. It is implausible in the extreme that the *Intel* Court relied on a snippet of Professor Smit's article to suggest a view on that issue in a string cite.

But while Professor Smit's article would be no match for the statutory text and context discussed above even if the article supported petitioner, the article does not support petitioner in any event. As with the legislative history discussed above, the Court need not divert its attention from the statutory text and structure to pause to consider Professor Smit's article. But if the Court chooses to do so, it will see that the article provides yet further confirmation that Congress was exclusively focused on governmental bodies and did not intend to cover private foreign arbitrations in section 1782(a).

Just before quoting Professor Smit's article, the Court emphasized that "when Congress established the Commission on International Rules of Judicial Procedure in 1958, . . . it instructed the Rules Commission to recommend procedural revisions 'for the rendering of assistance to foreign courts *and quasi-judicial agencies*.'" *Intel*, 542 U.S. at 257–58 (citing § 2, 72 Stat. at 1743). The Court then noted that "[s]ection 1782 had previously referred to 'any judicial proceeding'" and the "Commission's draft, which Congress adopted, replaced that term with 'a proceeding in a foreign or international tribunal.'" *Id.* And the Court explained that "*Congress understood that change to 'provid[e] the possibility of U.S. judicial assistance in connection with [administrative and*

quasi-judicial proceedings abroad].'" *Id.* (bracketed text by the Court; emphasis added). In this last sentence, the Court quoted the Senate Report discussed above, which makes clear—in the excerpt quoted by the Court as well as in multiple other places—that Congress was focused exclusively on providing for assistance to governmental bodies.

Then, as additional support for this last sentence, the Court cited Professor Smit's 1965 article. Because petitioner has taken two words out of context from this quote, Pet. Br. 16, we reproduce the Court's quote in its entirety: "'[T]he term tribunal . . . includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts'; in addition to affording assistance in cases before the European Court of Justice, § 1782, as revised in 1964, 'permits the rendition of proper aid in proceedings before the [European] Commission in which the Commission exercises quasi-judicial powers.'" *Intel*, 542 U.S. at 257–58 (quoting Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1026–27 & nn.71, 73 (1965)).

In keeping with the Court's emphasis on assistance to "quasi-judicial agencies" and "administrative and quasi-judicial proceedings abroad," Professor Smit's article likewise underscores Congress's intent to provide for assistance to governmental bodies. "Investigating magistrates" and "quasi-judicial agencies" are plainly official governmental entities. So are "administrative" tribunals. And Professor Smit's reference to "arbitral

tribunals" cannot be separated—contextually or even syntactically—from his reference to "administrative . . . tribunals." A basic tenet of linguistic interpretation is that "a word is known by the company it keeps," and "words grouped in a list should be given related meaning." *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 378 (2006) (quoting *Gustafson*, 513 U.S. at 575, and *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990)); John R. Firth, *A Synopsis of Linguistic Theory, 1930-1955*, *in* Studies in Linguistics Analysis 11 (Basil Blackwell ed., 1962) ("You shall know a word by the company it keeps!"). In short, it is crystal clear that Professor Smit was referring to governmental bodies and only to governmental bodies.[5]

To make the circle complete, Professor Smit himself cited the Senate and House Reports as support for this quoted statement—the very same ones the *Intel* Court quoted and cited just before quoting Professor Smit's article. *See* Smit, 65 Colum. L. Rev. at 1026 & n.71 (citing Senate Report at 3782, 3788). And those Reports, as shown by the Court's quotes and as discussed at more length above, make clear that Congress was focused exclusively on governmental bodies. *Intel*, 542 U.S. at 258; *supra* at 15–18.

The fact that petitioner has resorted to plucking the words "arbitral tribunals" out of the quote from

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[5] The second part of the Court's quote from Professor Smit's article addressed what *Intel* was actually about—a European Commission body that was obviously governmental rather than private and that, while not a conventional court, "exercises quasi-judicial powers." 542 U.S. at 258 (internal quotation marks omitted).

Professor Smit's article—as if the presence of those two words, wrenched from their context, proves that section 1782(a) must encompass private arbitrations abroad—underscores how bereft of support petitioner is.[6] And the fact that even Professor Smit's quote—the lifeline for many on petitioner's side of the question presented in the lower courts—supports respondents underscores how overdetermined the resolution of this case is.

[6] Petitioner also relies on Professor Smit's 1998 article where he claims to have believed 30-plus years earlier that "private arbitral tribunals come within the term the drafters used." Pet. Br. 16 (quoting 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's 1998 article has no probative value. Even post-enactment statements by actual legislators do not qualify as "legislative 'history.'" *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 298 (2010); *see Nat'l Broad. Co.*, 165 F.3d at 190 n.6 (explaining why Professor Smit's 1998 article is "unpersuasive"); Boeing Br. 38.

CONCLUSION

The Court should affirm the Seventh Circuit's holding that section 1782(a) does not apply to private commercial arbitrations abroad.

Respectfully submitted,

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