No. 20-794

IN THE
Supreme Court of the United States

SERVOTRONICS, INC.,
Petitioner,
v.

ROLLS-ROYCE PLC, ET AL.,
Respondents.

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

BRIEF OF INSTITUTE OF INTERNATIONAL BANKERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

STEPHANIE WEBSTER
INSTITUTE OF INTERNATIONAL BANKERS
299 Park Avenue
17th Floor
New York, NY 10171
(646) 213-1149

DEREK T. HO
Counsel of Record
ELIANA MARGO PFEFFER*
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dho@kellogghansen.com)
* Admitted only in New York; supervised by members of the firm

June 28, 2021

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Institute of International Bankers ("IIB") is the only national association devoted exclusively to representing and advancing the interests of banking organizations headquartered outside the United States that operate in the United States. The IIB's membership consists of internationally headquartered banking and financial institutions from around the world. The IIB regularly appears before federal courts as *amicus curiae* in cases that raise significant legal issues related to banking.

The IIB's members are frequent targets of discovery requests under 28 U.S.C. § 1782. Indeed, nearly one-quarter of all § 1782 requests are filed in the Southern District of New York (where both U.S. and international financial institutions are often subject to jurisdiction) with another 13.9% in the Southern and Middle Districts of Florida (where Latin American financial institutions are often subject to jurisdiction).

Because IIB members frequently find themselves the subject of § 1782 discovery requests, the IIB respectfully submits this *amicus* brief to provide the Court with insight into the burdens imposed on respondents to § 1782 applications where the requested discovery is intended for use in foreign arbitration. Those burdens are exacerbated by the lower courts' failure to limit the extraterritorial appli-

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amicus* also represent that all parties have consented to the filing of this brief.

cation of § 1782, resulting in U.S. courts becoming a magnet for foreign litigants seeking documents located in the possession of foreign companies and located abroad.

INTRODUCTION AND SUMMARY

In its decision in *Intel*, this Court alluded to the importance of "further experience with § 1782(a) applications in the lower courts." *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 265 (2004). The experience of the ensuing 15 years indicates the need to narrow § 1782, not expand it. Section 1782 applications impose tremendous burdens on companies that do business in the United States, pursuant to a procedural regime that unfairly favors applicants over discovery respondents.

As a matter of practice, § 1782 applications are filed *ex parte*; the respondent has no notice of it. The district court rules on the application purely on the basis of the self-serving arguments made in the application. Predictably, the applicant nearly always prevails. Only then does the respondent have a chance to challenge the application, upon service of the subpoena authorized by the grant of the application. But by that point, the respondent faces the uphill battle of proving that the application was improperly granted or that the subpoena violates Federal Rule of Civil Procedure 26 or 45.

Making § 1782 available to parties to foreign arbitration would only exacerbate these problems. The number of foreign arbitrations is growing rapidly, exposing respondents to an increasing number of § 1782 applications. Worse, foreign arbitrations (like domestic ones) are largely confidential. Respondents therefore generally lack the ability to obtain the arbitration record to evaluate the

arguments made in the application or the propriety of the subpoena's scope. The respondent bears the burden of proof, yet it has no access to the evidence.

In addition, courts have been unwilling to reject the extraterritorial application of § 1782, even though it is unsupported by either the text or the legislative history of § 1782. As a result, respondents such as IIB's members are routinely faced with the specter of having to produce documents *worldwide* in response to § 1782-authorized subpoenas. Again, allowing parties to foreign arbitrations to use § 1782 as a means to obtain *worldwide* discovery is inconsistent with the statute's text and structure and would exacerbate the already severe burdens faced by financial institutions and other multinational companies with a U.S. presence.

ARGUMENT

I. Expanding § 1782 To Foreign Arbitrations Would Exacerbate The Heavy Burdens Already Faced By Discovery Targets

A. Section 1782 Applications Impose Significant Burdens on Financial Institution Respondents

Section 1782 imposes significant burdens on financial institutions like IIB's members. Between 2005 (right after this Court's decision in *Intel*) and 2017, the annual number of § 1782 applications quadrupled. *See* Yanbai Andrea Wang, *Exporting American Discovery*, 87 U. Chi. L. Rev. 2089, 2109 (2020) (hereinafter, "Wang"). IIB members routinely are required to retain outside litigation counsel – and often foreign-law experts – to respond to § 1782 applications. IIB estimates that its members collectively spend millions of dollars annually responding to such applications.

Applicants in § 1782 proceedings frequently ask banks to produce an overwhelming number of documents. For example, one applicant demanded all documents ever created relating to the billion-dollar acquisition of another bank, including documents about bank operations predating the purchase. *See In re Kreke Immobilien KG*, No. 13 Misc. 110 (NRB), 2013 WL 5966916, at *7 (S.D.N.Y. Nov. 8, 2013), *abrogated by In re del Valle Ruiz*, 939 F.3d 520 (2d Cir. 2019). Others have asked a dozen banks for "the full records" of a whole host of firms and individuals, as well as "[c]opies of any orders, instructions or wire transfers received from a payor/transferor bank to a payee/transferee bank for the benefit or credit of, or with any reference to," those entities. *In re Application of Hornbeam Corp.*, No. 14 Misc. 424, 2014 WL 8775453, at *2 (S.D.N.Y. Dec. 24, 2014). Yet another sought every financial transaction seven companies had engaged in with 11 different banks, along with considerable additional financial information. *See In re MT BALTIC SOUL Produktentankschiff-Ahrtsgesellschaft mgH & Co. KG*, No. 15 Misc. 319 (LTS), 2015 WL 5824505, at *3 (S.D.N.Y. Oct. 6, 2015).

Banks have a legitimate interest in ensuring that § 1782 discovery is relevant and proportionate under the Federal Rules. But their ability to resist overly broad and unduly burdensome discovery requests under § 1782 is curtailed significantly by a procedural framework that structurally disadvantages respondents and makes it costly and difficult to resist even clearly inappropriate discovery.

Section 1782 applications are generally handled by a district court *ex parte*.[2] The district judge therefore determines whether to authorize discovery based on the applicant's one-sided recitation of the facts and without the benefit of any adversarial process. While some district courts have adopted the salutary practice of routinely requiring that the applicant serve the application on the target of the discovery, *see*, *e.g.*, Order, *In re Application of Fairlight Art Ventures LLP For an Order to Take Discovery Pursuant to 28 U.S.C. § 1782(a)*, No. 1:18-mc-00464-GHW, ECF No. 7 (S.D.N.Y. Oct. 11, 2018), that practice has not been widely adopted. Little surprise, then, that the initial application is granted in an overwhelming percentage of cases. *See* Wang, 87 U. Chi. L. Rev. at 2123 (finding that *ex parte* § 1782 applications are granted 97.3% of the time).

In these cases, a respondent learns of the application for the very first time when a subpoena is served. At that point, the respondent can challenge the discovery by moving to quash the subpoena or to vacate the Court's grant of the application. Whichever procedure the respondent uses, however, it bears the burden as the movant to show that the discovery is unwarranted. *See Heraeus Kulzer, GmbH v. Biomet, Inc.*, 633 F.3d 591, 597 (7th Cir.

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[2] *See*, *e.g.*, *In re Schlich*, 893 F.3d 40, 51 (1st Cir. 2018) (noting that "courts may adjudicate ex parte petitions under § 1782"); *Gushlak v. Gushlak*, 486 F. App'x 215, 217 (2d Cir. 2012) (stating that "it is neither uncommon nor improper for district courts to grant applications made pursuant to § 1782 *ex parte*"); *In re Application of Masters for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in a Foreign Proceeding*, 315 F. Supp. 3d 269, 272-73 (D.D.C. 2018) (holding that "district courts are generally authorized to review a § 1782 application on an *ex parte* basis").

2011) ("Once a section 1782 applicant demonstrates a need for extensive discovery for aid in a foreign lawsuit, the burden shifts to the opposing litigant to demonstrate, by more than angry rhetoric, that allowing the discovery sought (or a truncated version of it) would disserve the statutory objectives."); *In re Application of Gorsoan Ltd. & Gazprombank OJSC for an Order Pursuant to 28 U.S.C. 1782 to Conduct Discovery for Use in a Foreign Proceeding*, No. 13 Misc. 397 (PGG), 2014 WL 7232262, at *5 (S.D.N.Y. Dec. 10, 2014) (requiring that a party specifically identify the manner and extent of the burden and the negative consequences of compliance before quashing a § 1782 subpoena pursuant to the Federal Rules), *aff'd sub nom. Gorsoan Ltd. v. Bullock*, 652 F. App'x 7 (2d Cir. 2016). Moreover, because the district court has already granted the *ex parte* application, the respondent must convince the court to reverse itself despite never having had an opportunity for its views to be taken into consideration on the initial application.

For example, under *Intel*, a significant consideration in whether to grant § 1782 discovery is the foreign tribunal's receptivity to the evidence sought. Of course, the applicant's *ex parte* application will rarely highlight possible unwillingness on the part of the foreign tribunal to consider discovery obtained abroad. The respondent is thus forced to *disprove* the foreign tribunal's receptivity to the evidence – again, in a reconsideration posture where it must prove that the district court initially got it wrong. *See*, *e.g.*, *In re Republic of Kazakhstan for an Order Directing Discovery from Clyde & Co. LLP Pursuant to 28 U.S.C. § 1782*, 110 F. Supp. 3d 512, 514-15, 516-17 (S.D.N.Y. 2015). As explained further below, that procedure – which is unfair in *any* case – raises

particularly serious due process problems when discovery is sought in aid of a foreign arbitration.

The procedures for appellate review also disadvantage discovery respondents. The denial of a motion to vacate a § 1782 subpoena is immediately appealable under 28 U.S.C. § 1291, *see*, *e.g.*, *In re Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3d 1262, 1274 n.6 (11th Cir. 2014), but that right to appeal is largely theoretical unless a respondent can satisfy the high standard for a stay pending appeal, *see*, *e.g.*, *JSC MCC EuroChem v. Chauhan*, No. 18-5890, 2018 WL 9650037, at *1 (6th Cir. Sept. 14, 2018). Without such a stay, the respondent must comply with the subpoena – upon risk of contempt – before the appeal can be heard.

B. Expanding § 1782 to Foreign Arbitrations Would Greatly Exacerbate the Burdens on Respondents

Expanding § 1782 to include discovery in aid of foreign arbitration – rather than court proceedings – would greatly increase the already significant burdens on IIB members and other financial institutions with operations in the United States.

For starters, the number of foreign arbitration proceedings has increased dramatically in recent years. For example, the International Centre for Settlement of Investment Disputes ("ICSID") announced that it saw a record number of arbitrations filed in 2020.[3] The International Chamber of Commerce ("ICC") also posted its highest number of

[3] *See* ICSID, "2020 Year in Review" (Dec. 21, 2020), https://icsid.worldbank.org/news-and-events/news-releases/2020-year-review/.

cases since 2016.[4] The London Court of International Arbitration ("LCIA") similarly announced that it had seen an all-time high in referrals.[5] Petitioner's position would thus dramatically expand the number of § 1782 applications in federal courts.

Foreign arbitrations, moreover, pose particularly significant challenges for respondents faced with improper discovery requests. Foreign arbitration proceedings are generally private; there is no electronic docket where § 1782 respondents can review the nature of the proceeding, access relevant filings, and determine the scope of the issues being adjudicated. *See generally* Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. Kan. L. Rev. 1211, 1214-22 (2006) (describing arbitration as "generally less transparent than court proceedings"). Thus, a respondent generally has no means to obtain basic information needed to evaluate whether the discovery sought is appropriate.

To return to the example of receptivity discussed above, the respondent often has no way to obtain foreign arbitral discovery orders or other rulings that might demonstrate the limits on the arbitrators' willingness to consider evidence obtained abroad. More generally, in the context of a confidential foreign arbitration, it is often difficult to discern whether the applicant is an "interested person" for purposes of § 1782, the type of arbitral proceeding at

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[4] *See* ICC, "ICC announces record 2020 caseloads in Arbitration and ADR" (Jan. 12, 2021), https://iccwbo.org/media-wall/news-speeches/icc-announces-record-2020-caseloads-in-arbitration-and-adr/.

[5] *See* LCIA, "Record number of LCIA Cases in 2020" (Jan. 20, 2021), https://www.lcia.org/News/record-number-of-lcia-cases-in-2020.aspx.

issue (*e.g.*, an international commercial arbitrational from international investment arbitration), the agreements, rules, laws, or treaties governing the arbitration's proceedings, the procedural posture of the arbitration (*e.g.*, how advanced the arbitration is), the scope of the issues in the underlying proceeding, what other discovery has already been obtained, any arbitral rulings that might bear on the appropriateness of the requested discovery, whether the documents or testimony sought might otherwise be within the arbitral body's reach, or whether the request is unduly intrusive or burdensome given the scope and subject of the dispute. All of these issues bear on the factors that district courts consider under *Intel* in deciding whether to grant the § 1782 discovery in the first instance. But in moving to quash or vacate the subpoena, a respondent must rely almost entirely on the applicant's proffer to contest whether the § 1782 factors were met.

Even the straightforward questions of relevance and burden are extremely difficult for respondents to evaluate in the context of foreign arbitration. In evaluating whether a subpoena is unduly burdensome, courts consider "such factors as relevance, the need of the party for the documents, the breadth of the document, the time period covered by it, the particularity with which the documents are described and the burden imposed." *In re Application of Gorsoan*, 2014 WL 7232262, at *10 (citation omitted). The respondents must adduce evidence on these issues; "mere[] assert[ions]" of undue burden are insufficient. *Id.* at *5 (citation omitted). Without the ability to independently evaluate the scope of the underlying proceeding, however, non-party banks are deprived of the tools to resist overbroad discovery.

Contrast this with a Rule 45 subpoena arising from a judicial proceeding, in which the discovery target can review filings and prior decisions in the case to evaluate whether the requested discovery is reasonable or unduly burdensome, and use the record to support its argument in any challenge to the subpoena. In short, expanding § 1782 to foreign arbitration will exacerbate a process that already severely curtails respondents' practical ability to oppose improper discovery requests.

II. Interpreting "Tribunal" To Include Foreign Arbitration Would Exacerbate The Improper Extraterritorial Application Of § 1782

Expanding § 1782 to foreign arbitrations threatens to expand the questionable application of the statute to documents located outside of the United States. IIB members face this problem routinely, because they have operations both in the United States and abroad. Some IIB members with small (but important) operations in the United States have affiliates in as many as 59 other countries. IIB's members routinely receive subpoenas that purport to require them to produce not only documents in the possession of their U.S. branch or entity, but also documents in the possession of their foreign affiliates located around the world.

As this Court has frequently reaffirmed, there is a strong presumption *against* extraterritorial application of federal statutes; they are presumed to apply "only domestically" unless "'the statute gives a clear, affirmative indication' that rebuts this presumption." *Nestlé USA, Inc. v. Doe*, No. 19-416, slip op. 3 (U.S. June 17, 2021) (quoting *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016)). Indeed, this presumption "is at its apex" when there

is risk of U.S. law conflicting with foreign law. *RJR Nabisco*, 136 S. Ct. at 2107. That is because this presumption, among other things, "serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries." *Id.* at 2100.

Nothing in the text of § 1782 makes clear that Congress "affirmatively and unmistakably instructed" that it should apply extraterritorially. *Id.* Congress knows how to speak clearly if it wants to. *See*, *e.g.*, 18 U.S.C. § 1596(a) (stating that "the courts of the United States have extra-territorial jurisdiction over any offense" related to certain human-trafficking practices); *id.* § 1621 (applying U.S. perjury law regardless of whether "the statement or subscription is made within or without the United States"). It has not done so in § 1782.

Even so, two circuits have held that § 1782 may be used to compel the production of evidence located abroad. *See In re del Valle Ruiz*, 939 F.3d 520, 524 (2d Cir. 2019) (holding that "there is no per se bar to the extraterritorial application of § 1782"); *Sergeeva v Tripleton Int'l Ltd.*, 834 F.3d 1194, 1200 (11th Cir. 2016) (holding that § 1782 reaches "responsive documents and information located outside the United States" so long as it is within the "possession, custody, or control of" the discovery target). And some district courts have followed their lead. *See*, *e.g.*, *Illumina Cambridge Ltd. v. Complete Genomics, Inc.*, No. 19-mc-80215-WHO (TSH), 2020 WL 820327, at *10 (N.D. Cal. Feb. 19, 2020) (deciding that, so long as respondents controlled the documents, "the Court declines to limit production to documents physically located within the United States"); *but see Pinchuk v. Chemstar Prods. LLC*, No. 13-mc-306-RGA,

2014 WL 2990416, at *4 (D. Del. June 26, 2014) (quashing a discovery request for documents located abroad).

Because § 1782 provides that "the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure," these circuits have determined that Congress effectively incorporated the Federal Rules of Civil Procedure whole cloth – including its lack of geographic limitation. *See Sergeeva*, 834 F.3d at 1200 (inferring from Rule 45's requirement that parties produce documents within their possession, custody, or control "that the location of responsive documents and electronically stored information . . . does not establish a *per se* bar to discovery under § 1782"); *In re del Valle Ruiz*, 939 F.3d at 533 (same). Congress does not "hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001). The statute's passing reference to the Federal Rules is clearly insufficient to overcome the presumption against extraterritoriality.

Even if the reference to the Federal Rules somehow rendered the statute ambiguous, § 1782's legislative history only confirms this reading. Professor Hans Smit, the principal author of § 1782, observed "that the drafters of § 1782 did not intend that the statute be used to compel documents located in a foreign country." *In re Godfrey*, 526 F. Supp. 2d 417, 423 (S.D.N.Y. 2007), *abrogated on other grounds by In re del Valle Ruiz*, 939 F.3d 520 (2d Cir. 2019). The drafters instead intended to create "a harmonious scheme": "Evidence in Spain is obtained through proceedings in Spain, evidence in Great Britain is obtained through proceedings in Great Britain, and evidence in the United States is obtained through

proceedings in the United States." 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, 11 (1998). The point was to provide "judicial assistance and cooperation," *Intel*, 542 U.S. at 248 (citation omitted), not to turn federal courts into "clearing houses for requests for information from courts and litigants all over the world in search of evidence to be obtained all over the world," Smit, 25 Syracuse J. Int'l L. & Com. at 11. Further, the Senate Report provides that "[t]he proposed revision of section 1782 . . . clarifies and liberalizes existing U.S. procedures for assisting foreign and international tribunals and litigants in *obtaining oral and documentary evidence in the United States*." S. Rep. No. 88-1580, at 7 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788 (emphasis added). It further states that "[t]he purpose of [§ 1782] is to improve U.S. judicial procedures for . . . [o]btaining evidence in the United States in connection with proceedings before foreign and international tribunals." *Id*. at 1, *reprinted in* 1964 U.S.C.C.A.N. 3782.

Unless and until this Court corrects the lower courts' failure to adhere to the presumption against extraterritoriality, expanding § 1782 to foreign arbitrations will only exacerbate the burdens faced by multinational banks such as IIB's members. Section 1782 applicants will continue to use § 1782 discovery aimed at the U.S. branches of multinational banks to demand production of *all* documents wherever they are located. Section 1782 will turn federal courts into clearing houses for worldwide discovery into multinational banks for proceedings pending across the globe.

The burden of producing documents located in foreign countries is also particularly severe. Some IIB members with small (but important) outposts in the United States have affiliates in as many as 59 other jurisdictions. Searching for and reviewing documents in multiple locations – and potentially in multiple languages – consumes substantial time and resources. Moreover, IIB members often face strict privacy laws in other jurisdictions. Compliance with those laws is complex and expensive at the very least; not infrequently, those laws conflict with the broad discovery authorized by the Federal Rules. *See*, *e.g.*, Emily Burge, *Patents vs. Privacy: Balancing Cross-Border Discovery with the General Data Protection Regulation in Patent Litigation*, 48 AIPLA Q.J. 719, 724-27 (2020) (contrasting the Federal Rules with the European Union's General Data Protection Regulation). Petitioner's interpretation of the statute would not only increase the burden faced by respondents, but also create needless conflict between U.S. and foreign law. *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164-65 (2004) (noting that the Court ordinarily construes statutes in a manner that "helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

STEPHANIE WEBSTER
INSTITUTE OF
INTERNATIONAL BANKERS
299 Park Avenue
17th Floor
New York, NY 10171
(646) 213-1149

DEREK T. HO
Counsel of Record
ELIANA MARGO PFEFFER*
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dho@kellogghansen.com)
* Admitted only in New York; supervised by members of the firm

June 28, 2021