No. 20-794

In the Supreme Court of the United States

SERVOTRONICS, INC., PETITIONER

v.

ROLLS-ROYCE PLC, ET AL.

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Section 1782 of Title 28 of the United States Code provides that a federal district court "may order" a person who "resides or is found" in the district "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." 28 U.S.C. 1782(a). The question presented is:

Whether Section 1782 authorizes a district court to order the production of materials for use in a private commercial arbitration.

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in the proper construction of 28 U.S.C. 1782, which authorizes federal district courts to provide foreign and international tribunals and interested persons with assistance in obtaining evidence for use in "a proceeding in a foreign or international tribunal." 28 U.S.C. 1782(a). Section 1782 plays an important role in encouraging international cooperation, facilitating the resolution of foreign disputes, and fostering international comity. The United States utilizes Section 1782 to present to courts letters rogatory and letters of request that are received through the Department of State or the Department of Justice. In addition, the United States is a party to many bilateral investment treaties and free-trade agreements that employ investor-state arbitration, on which this Court's resolution of the question presented may have a bearing.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this brief. App., *infra*, 1a-12a.

STATEMENT

A. Statutory Background

Section 1782 of Title 28 of the United States Code, captioned "Assistance to foreign and international tribunals and to litigants before such tribunals," authorizes federal district courts to order testimony or the production of documents or things "for use in a proceeding in a foreign or international tribunal." 28 U.S.C. 1782(a) (emphasis omitted). The current provision is the culmination of "congressional efforts," dating back more than 165 years, "to provide federal-court assistance in gathering evidence for use in foreign tribunals." *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 247 (2004).

1. Historically, a principal mechanism for a court in one country to obtain evidence or the testimony of a witness located in another country was a letter rogatory, a formal "request by a domestic court to a foreign court to take evidence from a certain witness." *Intel*, 542 U.S. at 247 n.1 (quoting Harry Leroy Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 61 Yale L.J. 515, 519 (1953) (Jones)). As a matter of "international practice," such "[r]equests rest entirely upon the comity of courts toward each other, and customarily embody a promise of reciprocity." 22 C.F.R. 92.54. In an 1855 opinion, Attorney General Cushing observed that such "[r]ogatory commissions" were, "from time to time, addressed by courts in the United States to the courts of other countries, where, in most cases (but not in all), they ha[d] received their due execution."

7 Op. Att'y Gen. 56, 56 (1855). Conversely, he noted, similar "rogatory commissions from abroad have been addressed repeatedly to the proper authorities in the United States and been executed by them voluntarily, there being in the laws of the country nothing to forbid this, and the execution of such commissions being a proper act of national comity." *Ibid.*

Attorney General Cushing concluded, however, that at that time, federal courts—unlike courts of some States—lacked statutory authority to execute a letter rogatory to compel a witness to testify. 7 Op. Att'y Gen. at 57. He accordingly determined that a federal court could not, under then-existing law, execute a letter rogatory issued by a French court—transmitted by an official of the French government to the State Department—that sought assistance in securing testimony for a French proceeding. See *ibid.* Attorney General Cushing explained that a statute or treaty provision authorizing such assistance was necessary, and he undertook to "secure a prompt, general, and complete remedy for the present defect in our law." *Ibid.*

The first federal legislation authorizing federal courts to execute letters rogatory was signed into law days after Attorney General Cushing's 1855 opinion. See Jones 540 & n.75 (citing Act of Mar. 2, 1855 (1855 Act), ch. 140, 10 Stat. 630). The 1855 Act authorized a circuit court, on receipt of a letter rogatory from a foreign court, to appoint a United States commissioner to examine a witness whose testimony was sought by the foreign court, and to compel the witness to appear if necessary. § 2, 10 Stat. 630. Because of "a succession of errors in indexing and revising the statutes," however, the 1855 Act was "buried in oblivion," and courts apparently were unaware of it. Jones 540.

Eight years later, Congress enacted new legislation governing discovery requests from foreign courts. Act of Mar. 3, 1863 (1863 Act), ch. 95, § 1, 12 Stat. 769. The 1863 Act authorized federal courts to respond to letters rogatory by compelling witnesses in the United States to provide testimony for use in foreign courts. See *ibid.* That assistance was available, however, only if the foreign proceedings were "for the recovery of money or property depending [sic] in any court in any foreign country with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest." *Ibid.*; see *Intel*, 542 U.S. at 247.

In 1877, Congress addressed the issue again, enacting statutory language "virtually identical" to the 1855 Act that had fallen into desuetude. *In re Letter Rogatory from the Justice Court, Dist. of Montreal, Canada*, 523 F.2d 562, 564 n.5 (6th Cir. 1975) (*Montreal*) (citing Act of Feb. 27, 1877 (1877 Act), ch. 69, 19 Stat. 241 (Rev. Stat. § 875 (1877))). The 1877 Act authorized a circuit court that received a letter rogatory to appoint a commissioner to execute it, without the limitations imposed by the 1863 Act. *Ibid.* But the substance of the "apparently more limited" 1863 Act persisted in separate provisions, and "[t]h[o]se two sets of statutes remained separate" for more than 70 years. *Ibid.*; see *id.* at 566-568 (reproducing statutes); App., *infra*, 5a-7a.

2. In 1948, Congress "revised and consolidated" those separate provisions, *Montreal*, 523 F.2d at 564 n.5, and in doing so it "broadened the scope of assistance federal courts could provide for foreign proceedings," *Intel*, 542 U.S. at 247-248; see Act of June 25, 1948 (1948 Act), ch. 646, § 1782, 62 Stat. 949. The 1948 Act authorized "[t]he deposition of any witness residing within the United States to be used in any civil action

pending in any court in a foreign country," and it eliminated the requirement that the government of a foreign country be a party or have an interest in the proceedings. See § 1782, 62 Stat. 949. The following year, Congress further broadened the provision by replacing the term "civil action" with the term "judicial proceeding" (and deleting the word "residing"). Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103; see *Intel*, 542 U.S. at 248. Thus, by 1949, federal courts were authorized to compel the testimony of any witness located in the United States to be used in a pending foreign judicial proceeding—not limited to civil actions—but only proceedings in courts of countries with which the United States was at peace. See 28 U.S.C. 1782 (1952); Jones 541-542.

3. In 1958, "prompted by the growth of international commerce," Congress again revisited the issue of judicial assistance to foreign countries. *Intel*, 542 U.S. at 248. A Senate report that year observed that "[t]he extensive increase in the international, commercial and financial transactions involving both individuals and governments and the resultant disputes, leading sometimes to litigation, ha[d] pointedly demonstrated the need for comprehensive study of the extent to which international judicial assistance can be obtained." S. Rep. No. 2392, 85th Cong., 2d Sess. 3 (1958).

In light of those concerns, Congress in 1958 created a Commission on International Rules of Judicial Procedure (Rules Commission), which it directed to investigate, and to recommend improvements to, "existing practices of judicial assistance and cooperation between the United States and foreign countries." Act of Sept. 2, 1958 (1958 Act), Pub. L. No. 85-906, § 2, 72 Stat. 1743. Congress charged the Rules Commission with "draft[ing] and recommend[ing] * * * any necessary legislation,"

and proposing any needed international agreements or other action, to further the dual aims of (1) rendering "more readily ascertainable, efficient, economical, and expeditious" those "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 foreign territory, such as the service of judicial documents, the obtaining of evidence, and the proof of foreign law"; and (2) "similarly improv[ing]" "the procedures of our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies." *Ibid.*

In 1963, the Rules Commission submitted to Congress a report that recommended enacting legislation that the Commission had drafted to address various aspects of international judicial assistance. See *Fourth Annual Report of the Commission on International Rules of Judicial Procedure*, H.R. Doc. No. 88, 88th Cong., 1st Sess. 2, 15-52 (1963) (1963 Report). The following year, Congress unanimously enacted the Rules Commission's proposed legislation. Act of Oct. 3, 1964 (1964 Act), Pub. L. No. 88-619, 78 Stat. 995; see *Intel*, 542 U.S. at 248.

Of particular relevance here, the 1964 Act revised Section 1782, newly captioned "Assistance to foreign and international tribunals and to litigants before such tribunals." § 9(a), 78 Stat. 997 (28 U.S.C. 1782 (1964)) (emphasis omitted). In place of the prior version's language that had authorized assistance only for a "judicial proceeding pending in any court in a foreign country with which the United States is at peace," 28 U.S.C. 1782 (1958), revised Section 1782 provided that federal district courts "may order" the production of documents or testimony "for

use in a proceeding in a foreign or international tribunal," upon request by "a foreign or international tribunal or upon the application of any interested person," 1964 Act § 9(a), 78 Stat. 997 (28 U.S.C. 1782(a) (1964)).

The Rules Commission explained that "[t]he word 'tribunal'" in revised Section 1782 "[wa]s used to make it clear that assistance is not confined to proceedings before conventional courts." 1963 Report 45. "For example," the Rules Commission observed, "it [wa]s intended that the court have discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries," from which "[a] rather large number of requests for assistance emanate[d]." *Ibid.* "In view of the constant growth of administrative and quasi-judicial proceedings all over the world," the Rules Commission explained, "the necessity for obtaining evidence in the United States may be as impelling in proceedings before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional foreign court." *Ibid.* The accompanying Senate and House reports echoed that understanding. See S. Rep. No. 1580, 88th Cong., 2d Sess. 7-8 (1964) (Senate Report); H.R. Rep. No. 1052, 88th Cong., 1st Sess. 9 (1963) (House Report); see also *Intel*, 542 U.S. at 249.

Revised Section 1782 further provided that a court's "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." 1964 Act § 9(a), 78 Stat. 997 (28 U.S.C. 1782(a) (1964)). It additionally stated that 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." *Ibid.*

"To the extent that the order does not prescribe otherwise," amended Section 1782 stated that "the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure." *Ibid.*

Other provisions of the 1964 Act addressed related procedural issues. New Section 1696 vested district courts with discretion to grant or deny requests for assistance in effecting service of documents "issued in connection with a proceeding in a foreign or international tribunal." § 4(a), 78 Stat. 995 (28 U.S.C. 1696). And amendments to existing Section 1781 authorized the State Department to receive, and to return after execution, "a letter rogatory issued, or request made, by a foreign or international tribunal" requesting assistance from a "tribunal, officer, or agency in the United States," as well as a letter rogatory or request from "a tribunal in the United States" to a "foreign or international tribunal, officer, or agency." § 8(a), 78 Stat. 996 (28 U.S.C. 1781(a)). Revised Section 1781, however, "d[id] not preclude * * * 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," or vice versa. *Ibid.* (28 U.S.C. 1781(b)).

The 1964 Act also repealed prior enactments that had authorized judicial assistance to international, state-to-state tribunals and claims commissions that had been established by a treaty to which the United States was a party involving claims in which the United States or its nationals were interested. See § 3, 78 Stat. 995 (repealing 22 U.S.C. 270-270g (1958)). Those prior enactments had authorized tribunals and their commissioners to administer oaths in proceedings involving such claims, and they

permitted agents of the United States before the international tribunal to invoke the assistance of a district court in compelling the production of documents. See Act of July 3, 1930, ch. 851, 46 Stat. 1005, as amended by Act of June 7, 1933, ch. 50, 48 Stat. 117 (22 U.S.C. 270-270g (1958)). As both the Rules Commission and the Senate report observed, those provisions were viewed as inadequate, and the amendments to Section 1782 and other provisions in the 1964 Act were intended to address those deficiencies. See Senate Report 3-4, 8; 1963 Report 36-37.

4. Section 1782 as amended by the 1964 Act remains in force today, with one alteration. In 1996, Congress added to the end of Section 1782(a)'s first sentence, following the phrase "for use in a proceeding in a foreign or international tribunal," the phrase "including criminal investigations conducted before formal accusation." National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1342(b), 110 Stat. 486.

B. The Present Controversy

1. In 2016, during a test by respondent Boeing of a new aircraft in South Carolina, an engine caught fire. Pet. App. 2a-3a. Boeing sought compensation from respondent Rolls-Royce, which had manufactured the engine. *Id.* at 3a. Respondents settled their dispute, and Rolls-Royce sought indemnification from petitioner. *Ibid.*

Petitioner's contract with Rolls-Royce required any dispute not resolved through negotiation to be resolved by arbitration in the United Kingdom under the Rules of the Chartered Institute of Arbiters. Pet. App. 3a. After negotiations proved unsuccessful, Rolls-Royce commenced an arbitration. *Ibid.*

2. Petitioner filed an ex parte application under 28 U.S.C. 1782 in the Northern District of Illinois, seeking certain documents from Boeing's headquarters. Pet. App.

19a. The district court initially granted the application and issued a subpoena. *Id.* at 3a.

Rolls-Royce filed a motion (which Boeing joined) to vacate the district court's order granting the application and to quash the subpoena. Pet. App. 3a, 17a. The court granted the motion. *Id.* at 17a-25a (J.A. 69a-77a). The court determined that Section 1782(a) does not authorize a court to order testimony or production of documents for use in a private arbitration. *Id.* at 21a-25a.

3. Meanwhile, petitioner filed a separate ex parte application in the District of South Carolina seeking to depose certain Boeing employees. Pet. App. 19a. The district court in South Carolina denied petitioner's application. *In re Servotronics, Inc.*, No. 18-364, 2018 WL 5810109, at *1-*5 (D.S.C. Nov. 6, 2018). The South Carolina court reached the same conclusion as the Illinois district court, determining that "the private arbitral body conducting the arbitration" between the parties "does not fall within § 1782's definition of 'tribunal.'" *Id.* at *4; see *id.* at *2-*5.

The Fourth Circuit reversed in relevant part. *Servotronics, Inc.* v. *Boeing Co.*, 954 F.3d 209 (2020). The court "conclude[d] that the arbitral panel in the United Kingdom is * * * a foreign tribunal for purposes of § 1782." *Id.* at 210; see *id.* at 211-216. In the court's view, the 1964 Act's "delet[ion] from the former version of [Section 1782(a)] the words 'in any *judicial* proceeding pending *in any court* in a foreign country'"—which it "replaced * * * with the phrase 'in a proceeding in a foreign or international *tribunal*'"—reflected "Congress' policy to increase international cooperation by providing U.S. assistance in resolving disputes before not only foreign *courts* but before all foreign and international *tribunals*." *Id.* at 213 (citation omitted). The

court additionally concluded that, even if the phrase "'foreign or international tribunal'" in Section 1782 "refers only to 'entities acting with the authority of the State,'" the private arbitration in England between the parties here would "meet[] that definition" because, under the law of the United Kingdom, such "arbitrations are sanctioned, regulated, and overseen by the government and its courts." *Id.* at 214.

4. The Seventh Circuit thereafter affirmed the Illinois district court's judgment in this case. Pet. App. 1a-16a (J.A. 78a-93a).

The court of appeals determined that "§ 1782(a) does not authorize the district court to compel discovery for use in a private foreign arbitration." Pet. App. 2a; see *id.* at 7a-16a. The court observed that the Second and Fifth Circuits had held "[t]wo decades ago" that "§ 1782(a) authorizes [a] district court to provide discovery assistance only to state-sponsored foreign tribunals, not private foreign arbitrations." *Id.* at 2a (citing *National Broad. Co.* v. *Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999) (*NBC*), and *Republic of Kazakhstan* v. *Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999)). The court of appeals agreed with those decisions, while acknowledging that the Fourth and Sixth Circuits had reached a contrary conclusion. See *ibid.* (citing *Servotronics*, 954 F.3d at 214, and *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d 710, 714 (6th Cir. 2019)).

The court of appeals noted that "the word 'tribunal' is not defined in the statute," and it found "dictionary definitions" of that term inconclusive. Pet. App. 9a. The court observed that, "when the present-day version of the statute was adopted" in 1964, legal and nonlegal dictionaries defined "tribunal" in ways that "appear[ed] to

exclude private arbitral panels." *Ibid.* (citing, *inter alia*, *Black's Law Dictionary* 1677 (4th ed. 1951) (*Black's*)). But the court found the term "tribunal" ambiguous, noting that dictionaries "[t]oday" provide "broader" definitions that could "plausibl[y]" "include private arbitration panels." *Id.* at 9a-10a.

The court of appeals concluded, however, that when "the word 'tribunal'" is "situate[d] * * * in its proper statutory context, the more expansive reading of the term—the one that includes private arbitrations—becomes far less plausible." Pet. App. 10a. The court recounted that "the language of present-day § 1782 dates to 1964," when Congress "unanimously adopted legislation recommended by the Rules Commission." *Id.* at 11a-12a (citation omitted). The court noted that the Rules Commission had been charged by statute to study potential improvements in "the procedures of our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies," and improvements in procedures in "State and Federal courts and quasi-judicial agencies which involve the performance of acts in foreign territory." *Id.* at 11a (quoting 1958 Act § 2, 72 Stat. 1743). The court observed that "[n]oticeably absent from th[at] statutory charge is any instruction to study and recommend improvements in judicial assistance to private foreign arbitration." *Id.* at 12a. The court additionally reasoned that other language in Section 1782(a) itself, as well as other provisions enacted contemporaneously in the same 1964 Act that employ the same "foreign or international tribunal" phrase, reinforce a more limited understanding that does not extend to private arbitration. *Id.* at 12a-13a.

The court of appeals additionally explained that a "narrower understanding of the word 'tribunal' avoids a

serious conflict with" the Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.* Pet. App. 13a; see *id.* at 13a-15a. The court observed that "[t]he discovery assistance authorized by § 1782(a) is notably broader than that authorized by the FAA." *Id.* at 14a. The court found it incongruous to construe Section 1782 to afford "litigants in foreign arbitrations * * * access to much more expansive discovery than litigants in domestic arbitrations." *Ibid.* And the court explained that, because "the FAA applies to some foreign arbitrations, * * * [r]eading § 1782(a) broadly to apply to all private foreign arbitrations creates a direct conflict with the [FAA] for th[at] subset of foreign arbitrations." *Id.* at 14a-15a.

The court of appeals found unpersuasive the Fourth Circuit's reasoning that the parties' contract-based arbitration in the United Kingdom constitutes a foreign tribunal because such "arbitration is the 'product of government-conferred authority.'" Pet. App. 8a (quoting *Servotronics*, 954 F.3d at 214); see *id.* at 8a n.2. The court of appeals explained that "[t]he source of a private arbitral panel's adjudicative authority is found in the parties' contract, not a governmental grant of power," and that "[a] private arbitral body does not exercise governmental or quasi-governmental authority." *Id.* at 8a n.2. The court noted that "[n]o one here argue[d] that arbitration in the United Kingdom (or the United States) is the product of government-conferred authority." *Ibid.*

The court of appeals also rejected petitioner's contention that this Court's decision in *Intel* compelled a broader interpretation of Section 1782(a). Pet. App. 15a-16a. The court of appeals explained that the *Intel* Court had held that a proceeding before the Directorate General for Competition of the Commission of the European Communities—a "public agency with quasi-judicial authority"—"was a

'proceeding in a foreign or international tribunal.'" *Id.* at 15a. The court of appeals found unpersuasive petitioner's contention that a parenthetical quotation in *Intel* of a footnote in a law-review article "written by the law professor who served as the reporter for the [Rules Commission]"—which described "tribunal" in Section 1782 as including "arbitral tribunals"—reflected a determination by this Court that Section 1782 authorizes discovery assistance for "private foreign arbitrations." *Id.* at 16a (citation and emphasis omitted).

SUMMARY OF ARGUMENT

I. Section 1782 permits a court to order a witness to testify or to produce a document or thing for use in "a proceeding in a foreign or international tribunal." 28 U.S.C. 1782(a). The parties and lower courts have disputed the ordinary meaning of "tribunal" in 1964. Whatever the meaning of that term in isolation, however, when properly construed as part of the broader phrase "foreign or international tribunal," in light of the statutory context and history, it does not extend to private commercial arbitration.

The pre-1964 precursor to the current version of Section 1782 was expressly limited to providing assistance for proceedings in a "court in a foreign country." 28 U.S.C. 1782 (1958). In 1958, Congress charged the Rules Commission with proposing revisions to improve procedures for providing assistance to "foreign courts and quasi-judicial agencies." 1958 Act § 2, 72 Stat. 1743. The Rules Commission's recommended revision, which Congress enacted unanimously, replaced the term "court" with "foreign or international tribunal," 28 U.S.C. 1782—a modification that the Commission intended, and Congress understood, to include certain quasi-judicial entities and inter-governmental bodies in addition to conventional

courts. Nothing in the text or history of that amendment indicates that Congress intended to fundamentally transform Section 1782, which had long been limited to judicial proceedings, to encompass any overseas adjudicator, such as an arbitral panel in a private commercial arbitration. Other language in Section 1782, nearby provisions of the 1964 Act, and additional aspects of the statutory background reinforce that interpretation and are difficult to reconcile with petitioner's contrary, expansive reading.

Petitioner's broad interpretation of "proceeding in a foreign or international tribunal" in Section 1782(a) would also create significant tension between that provision and the FAA. The FAA more narrowly limits discovery in connection with arbitration. Petitioner's approach thus would give parties to foreign arbitration broader access to court-assisted discovery than parties in domestic arbitration. And it would also create inconsistent standards for certain foreign arbitrations that are directly subject to the FAA.

II. Although not directly presented in this case, the logic of petitioner's position implicates a question of particular concern to the United States: whether Section 1782 authorizes assistance for use in investor-state arbitration. Investor-state arbitration permits a foreign investor to arbitrate a claim directly against the government of the state in which the investment is held or was sought to be made. While investor-state arbitration mechanisms vary, they share many of the salient features of private commercial arbitration and so fall outside Section 1782 for similar reasons. And Congress could not have envisioned the application of Section 1782 to treaty-based investor-state arbitration when it enacted the provision's relevant language in the 1964 Act, because that type of arbitration did not exist in 1964.

Petitioner does not directly address the investor-state context, but the logic of its position would extend Section 1782 to encompass investor-state arbitration. And some lower courts that have construed Section 1782—even some courts that have held that Section 1782 does not encompass arbitration between private parties—have indicated that it does cover investor-state arbitration. That result is unsound and should be rejected. The advent of investor-state arbitration has brought advantages to the dispute-resolution process for investor-state disputes. Construing Section 1782 to reach such arrangements would jeopardize many of those advantages, including undermining the predictability and efficiency of investor-state arbitration proceedings. This Court should reject petitioner's position that would sweep investor-state arbitration into Section 1782. At a minimum, if the Court concludes that Section 1782 encompasses some private arbitration, it should reserve judgment on whether the provision authorizes judicial assistance in connection with investor-state arbitration.

ARGUMENT

I. SECTION 1782 DOES NOT AUTHORIZE DISCOVERY FOR USE IN A PRIVATE COMMERCIAL ARBITRATION

Section 1782 authorizes a district court to order a person who "resides or is found" in the district "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." 28 U.S.C. 1782(a). Properly construed in light of the statutory context and history, that language does not encompass private commercial arbitration.

A. The Statutory Phrasing, Context, And History Show That Congress Did Not Intend "A Proceeding In A Foreign Or International Tribunal" To Include A Private Commercial Arbitration

In construing Section 1782, "a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." *Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). Because the term "tribunal" is not defined in the statute, courts first "ask what that term's 'ordinary, contemporary, common meaning' was when Congress enacted" Section 1782's relevant language in 1964. *Id.* at 2362 (citation omitted).

The parties and lower courts have offered starkly different understandings of the word "tribunal" at that time. As the court of appeals below observed, legal and nonlegal dictionaries in 1964 primarily defined a "tribunal" in ways that connote a judicial forum and would appear to exclude private arbitration. Pet. App. 9a. The court observed that, for example, *Black's* defined "tribunal" to mean "[t]he seat of a judge; the place where he administers justice. The whole body of judges who compose a jurisdiction; a judicial court; the jurisdiction which the judges exercise." *Ibid.* (quoting *Black*'s 1677). Other contemporaneous dictionaries offered similar principal definitions. See, *e.g.*, *Webster's New International Dictionary of the English Language* 2707 (2d ed. 1960) ("the seat of a judge; the bench on which a judge and his associates sit for administering justice; a judgment seat; * * * [h]ence, a court or forum of justice"). And respondents marshal additional evidence from dictionaries and from usage in federal statutes predating the 1964 Act suggesting that the term

"tribunal" in 1964 generally described a sovereign decisionmaker. See Rolls-Royce Br. 15-16, 20-23; Boeing Br. 18-21. Petitioner, however, points to decisions of this Court and others referring to arbitral bodies as "tribunals." Pet. Br. 10-14. Petitioner's amici and lower courts have pointed to additional cases and commentary that they assert used the term "tribunal" in similar ways. FedArb Br. 8-10; see also, *e.g.*, *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d 710, 720-722 (6th Cir. 2019); but see Rolls-Royce Br. 27-31; Boeing Br. 34-36.

Like the Second and Fifth Circuits, the court of appeals here ultimately found the competing evidence of the ordinary meaning of "tribunal" inconclusive. Pet. App. 9a-10a. It found that term standing alone to be ambiguous as to whether it includes or excludes private arbitral proceedings. *Ibid.*; see *National Broad. Co.* v. *Bear Stearns & Co.*, 165 F.3d 184, 188 (2d Cir. 1999); *Republic of Kazakhstan* v. *Biedermann Int'l*, 168 F.3d 880, 881 (5th Cir. 1999). The court accordingly looked to the statutory history and context as the "key to unlocking" Section 1782's meaning. Pet. App. 10a.

This Court similarly need not resolve the meaning of the word "tribunal" "in a vacuum" because its meaning in Section 1782 is clarified by the "statutory context," including Section 1782's "history" and "purpose." *Abramski* v. *United States*, 573 U.S. 169, 179 (2014) (citation omitted). "Statutory interpretation requires more than concentration upon isolated words." *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235, 250 (1970). And "construing statutory language is not merely an exercise in ascertaining 'the outer limits of [a word's] definitional possibilities.'" *FCC* v. *AT&T Inc.*, 562 U.S. 397, 407 (2011) (citation

omitted); see, *e.g.*, *Bloate* v. *United States*, 559 U.S. 196, 205 n.9 (2010) (rejecting interpretation that "rest[ed] upon a dictionary definition of two isolated words" but "d[id] not account for the governing statutory context"). Instead, "[s]tatutory construction * * * is a holistic endeavor," and "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme"—for example, where "the same terminology is used elsewhere in a context that makes its meaning clear," or where "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (Scalia, J.). Here, regardless of whether the word "tribunal" standing alone would have been properly understood in 1964 to describe private arbitral bodies, the phrasing of Section 1782 that contains the word "tribunal," as well as the statutory context and history, counsel strongly against construing the phrase "proceeding in a foreign or international tribunal" to encompass private commercial arbitration.

To begin, the word "tribunal" in Section 1782 is part of the broader phrase "foreign or international tribunal." 28 U.S.C. 1782(a). The most natural reading of that broader phrase is that it refers to a standing *governmental* body—the judicial or quasi-judicial body of a "foreign" country or an "international" state-to-state commission or similar formal entity established by two or more nations. See Rolls-Royce Br. 15-17, 24-27. And the evolution of Section 1782 and its overall structure confirm that understanding.

1. Before Congress revised Section 1782 in the 1964 Act to include the relevant language, the provision and its precursors had long authorized judicial assistance

only in connection with proceedings in foreign courts. The first federal statute authorizing such assistance permitted a circuit court to appoint a commissioner to examine witnesses at the request of "any court of a foreign country." 1855 Act § 2, 10 Stat. 630. Subsequent enactments similarly referred to foreign "court[s]." 1863 Act § 1, 12 Stat. 769; 1877 Act, 19 Stat. 241; 1948 Act § 1782, 62 Stat. 949. Immediately prior to the 1964 Act's revisions, Section 1782 authorized taking "[t]he deposition of any witness within the United States to be used in any judicial proceeding pending in any court in a foreign country with which the United States is at peace." 28 U.S.C. 1782 (1958).

The 1964 Act revised Section 1782 in various respects, including regarding what types of proceedings abroad may be the object of domestic judicial assistance. But Congress's replacement of the phrase "any judicial proceeding pending in any court in a foreign country," 28 U.S.C. 1782 (1958), with the phrase "a proceeding in a foreign or international tribunal," 28 U.S.C. 1782, embodied only a measured expansion of the provision's scope to capture quasi-judicial entities (such as investigating magistrates) and certain inter-governmental bodies (such as state-to-state claims commissions), which were of concern at the time, see 1963 Report 45.

The 1964 Act's revision of Section 1782 was the work of the Rules Commission that Congress had established six years earlier and charged with drafting legislation to improve judicial assistance that domestic courts provide to, and receive from, foreign courts and certain analogous entities. The legislation establishing the Rules Commission tasked it with "draft[ing] and recommend[ing] to the President any necessary legislation,"

treaties, and other actions to render "more readily ascertainable, efficient, economical, and expeditious" the "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 foreign territory," including service of documents and obtaining evidence. 1958 Act § 2, 72 Stat. 1743. The Rules Commission was additionally charged with drafting legislation and recommending other actions to "similarly improve[]" "the procedures of our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies." *Ibid.*

The Rules Commission carried out that task, drafting and submitting to Congress the text that became the 1964 Act, including revisions to Section 1782. See 1963 Report 1-52. The Rules Commission explained that "[t]he word 'tribunal' [wa]s used" in its proposed revision of Section 1782 "to make it clear that assistance is not confined to proceedings before conventional courts." *Id.* at 45. As an "example," the Rules Commission observed that "[a] rather large number of requests for assistance emanate from investigating magistrates," and the word "tribunal" was designed to provide district courts with "discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries." *Ibid.* More generally, the Commission 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 in proceedings before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional foreign court." *Ibid.*

The Rules Commission also proposed including "international tribunal[s]" in Section 1782 to address a different deficiency it perceived in then-existing law. 1963 Report 37. In 1930, "in direct response to problems that arose in an arbitration proceeding between the United States and Canada"—a state-to-state arbitration—Congress had enacted 22 U.S.C. 270-270c (1958), which authorized members of "international tribunals to administer oaths, to subpoena witnesses or records, and to charge contempt." *NBC*, 165 F.3d at 189. In 1933, after another "intergovernmental" body—the United States-German Mixed Claims Commission—concluded that it lacked authority under the 1930 legislation to compel testimony or other evidence, Congress enacted 22 U.S.C. 270d-270g (1958), which authorized United States agents before such bodies to seek judicial assistance in obtaining evidence. *NBC*, 165 F.3d at 189. In the Rules Commission's view, however, those existing provisions were "inadequate." 1963 Report 36. In particular, they "improperly limit[ed] the availability of assistance to the United States agent before an international tribunal," and they afforded less assistance to litigants before bodies such as the United States-German Mixed Claims Commission than litigants in courts of foreign countries. *Id.* at 36-37. The Rules Commission recommended putting such intergovernmental bodies on the same footing with foreign courts by repealing those prior provisions and "making the assistance provided by proposed Section 1782 * * * available in proceedings before international tribunals." *Id.* at 37.

Congress was aware of the Rules Commission's rationales for making those measured changes in existing law governing judicial assistance. Both the House and Senate reports explained the intention and effect of the

1964 Act's provisions in substantially the same terms as the Rules Commission's 1963 Report. See House Report 5-6, 9-10; Senate Report 3-4, 7-8. Congress thereafter unanimously enacted the Rules Commission's recommended legislation. 1964 Act §§ 3, 9(a), 78 Stat. 995, 997; *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 248 (2004).

Considered against that background of the existing law and Congress's objective in undertaking the revision, Congress's use of the phrase "proceeding in a foreign or international tribunal" in Section 1782 cannot fairly bear the broad meaning petitioner imputes to it (Br. 14-19). The 1964 Act's revisions to that provision undoubtedly expanded the provision's scope to an extent. But the history and context discussed above show, and the Rules Commission's and congressional reports confirm, that the revisions merely put foreign quasi-judicial entities (and intergovernmental bodies) on the same footing with foreign courts.

2. That analysis and conclusion accord with *Intel*, *supra*, the only decision from this Court construing Section 1782. As relevant here, the Court in *Intel* concluded that Section 1782 authorized judicial assistance in obtaining documents for use before the European Commission's Directorate General for Competition "to the extent that it acts as a first-instance decisionmaker." 542 U.S. at 258; see *id.* at 257-258. As the Court explained, the Directorate General was responsible for enforcing European competition laws—first by investigating an alleged violation and deciding whether to pursue a complaint, and then either "issu[ing] a decision" finding infringement and imposing penalties" or "dismis[sing] the complaint," with its decision subject to judicial review. *Id.* at 255 (citation omitted).

In concluding that the Directorate General was a "foreign or international tribunal," the Court in *Intel* emphasized Congress's instruction to the Rules Commission in the 1958 Act "to recommend procedural revisions 'for the rendering of assistance to foreign courts *and quasi-judicial agencies*.'" 542 U.S. at 257-258. The Court recounted the Rules Commission's replacement of "'any judicial proceeding'" in the prior version of Section 1782 "with 'a proceeding in a foreign or international tribunal,'" observing that "Congress understood that change to 'provide the possibility of U.S. judicial assistance in connection with administrative and quasi-judicial proceedings abroad.'" *Id.* at 258 (brackets and citation omitted). Although the *Intel* Court did not have occasion to delineate every type of adjudicator that Section 1782 encompasses, the Court's focus on the statutory context—and in particular on the history and purpose of the 1964 Act's revisions reflecting Congress's limited intention to include quasi-judicial governmental bodies—supports construing Section 1782 to encompass only the types of judicial and quasi-judicial decisionmakers that Congress and the Rules Commission contemplated.

3. Whatever precise array of tribunals that Congress intended revised Section 1782 to encompass, no sound basis exists to conclude that the 1964 Act swept private commercial arbitration into Section 1782's ambit. Nothing in the text or context of that amendment evinces any intent to extend Section 1782's discovery tools to private commercial arbitration—which bears little resemblance to the types of judicial proceedings that Section 1782 and its precursors had long covered, or to the examples of standing quasi-judicial bodies that the Rules Commission and Congress considered and that this Court confronted in *Intel.*

And "[t]here is no contemporaneous evidence that Congress contemplated extending § 1782 to the then-novel arena of international commercial arbitration" in particular. *Biedermann Int'l*, 168 F.3d at 882.

Moreover, as the court of appeals observed, other portions of the 1964 Act reinforce the conclusion that Congress's revision to Section 1782 did not sweep in private commercial arbitration. See Pet. App. 12a-13a. The 1964 Act added to Section 1782(a) language providing that a court granting an application under that provision "may prescribe the practice and procedure" for production of testimony or other evidence, "which may be in whole or part the practice and procedure of the foreign country or the international tribunal." § 9(a), 78 Stat. 997 (28 U.S.C. 1782(a)). That proviso makes perfect sense for judicial and quasi-judicial governmental bodies of a foreign country or a standing intergovernmental entity established by multiple nations, which typically have established procedures applicable to a category of cases that come within their jurisdiction. But it would be puzzling if applied to a private commercial arbitration, which follows whatever practice and procedure the parties select in their particular contract. Pet. App. 13a.

The 1964 Act also employed the phrase "foreign or international tribunal" in two other provisions where the context again strongly suggests that Congress contemplated judicial and quasi-judicial entities. Section 1696, captioned "Service in foreign and international litigation," authorizes a district court, on receipt of "a letter rogatory issued, or request made, by a foreign or international tribunal or upon application of any interested person," to order service on a person in the district "of any document issued in connection with a proceeding in a foreign or international tribunal." 1964 Act § 4(a), 78 Stat. 995

(28 U.S.C. 1696(a)) (emphasis omitted). And Section 1781 grants express (but nonexclusive) authority to the State Department "to receive a letter rogatory issued, or request made, by a foreign or international tribunal," and to transmit a letter from a U.S. court to such a tribunal. § 8(a), 78 Stat. 996 (28 U.S.C. 1781(a)). Especially given the subject matter of both provisions—serving litigation documents, and transmittal of letters rogatory—the phrase "foreign or international tribunal" most naturally refers to judicial and quasi-judicial governmental bodies. See Pet. App. 12a-13a. Had Congress intended also to bring private commercial arbitration within Section 1782, that phrasing would have been at best an awkward fit.

B. Extending Section 1782 To Cover Private Commercial Arbitration Would Create Tension With The FAA

Beyond the immediate context and history of Section 1782 itself, the broader context of federal arbitration law and policy counsels strongly against interpreting Section 1782 to authorize discovery in private commercial arbitration.

As the court of appeals recognized, extending judicial assistance under Section 1782 to such arbitration would create tension with the FAA, 9 U.S.C. 1 *et seq.*, by allowing more expansive discovery in foreign disputes than what is permitted domestically. Pet. App. 13a-15a. "The methods for obtaining evidence under § 7 of the FAA are more limited than those under § 1782." *NBC*, 165 F.3d at 187. For example, Section 7 of the FAA, 9 U.S.C. 7, "explicitly confers authority only upon *arbitrators*; by necessary implication, the *parties* to an arbitration may not employ this provision to subpoena documents or witnesses." *Ibid.* In addition, Section 7 "confers enforcement authority only upon the 'district

court for the district in which such arbitrators, or a majority of them, are sitting.'" *Ibid.* It does not permit the arbitrator to order discovery in jurisdictions where parties reside but where the arbitral panel does not sit. Nor does the FAA "grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents during prehearing discovery." *COMSAT Corp.* v. *National Sci. Found.*, 190 F.3d 269, 275 (4th Cir. 1999). Those limitations are by design: by reducing the opportunities for lengthy discovery, they enable arbitrations to be less costly relative to litigation.

Section 1782, in contrast, contains none of those limitations. Section 1782 "permits both foreign tribunals *and litigants* (as well as other 'interested persons') to obtain discovery orders from district courts." Pet. App. 14a. And it is not confined to authorizing discovery in the district where the arbitrators (or a majority of them) are sitting, or to discovery from the parties themselves. Instead, it empowers a court to order testimony or production of other evidence from any person who "resides or is found" in the district. 28 U.S.C. 1782(a).

As the court of appeals observed, it is "hard to conjure a rationale for giving parties to private foreign arbitrations such broad access to federal-court discovery assistance in the United States while precluding such discovery assistance for litigants in domestic arbitrations." Pet. App. 14a. To be sure, Section 1782's text does not mechanically confine judicial assistance to circumstances where domestic law would allow the same discovery. See *Intel*, 542 U.S. at 263. In that sense, Section 1782 "does not direct United States courts to engage in [a] comparative analysis to determine whether analogous proceedings

exist here." *Ibid.* But in determining which of two competing interpretations of Section 1782 best reflects Congress's intent, this Court should take into account that one reading would produce such a stark asymmetry.

Moreover, as the court of appeals further explained, see Pet. App. 14a-15a, extending Section 1782 to private commercial arbitration would result in the application of inconsistent standards in the context of certain foreign arbitrations that are subject to the FAA, "by virtue of legislation implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 7 I.L.M. 1046 * * * , and the Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 14 I.L.M. 336." *NBC*, 165 F.3d at 187; see 9 U.S.C. 208, 307. It would be incongruous to construe a general federal statute that governs international judicial assistance—and that permits broad assistance in obtaining discovery—to override a separate, arbitration-specific statute authorizing narrower assistance in that context.

II. SECTION 1782 SHOULD NOT BE EXTENDED TO ENCOMPASS INVESTOR-STATE ARBITRATION

Although the facts of this case and the question presented concern private commercial arbitration, the logic of petitioner's argument would appear also to extend to the context of investor-state arbitration. The analytical approaches to Section 1782 followed by some lower courts would likewise appear to encompass investor-state arbitration. That result would be problematic and would raise significant policy concerns. The Court should reject the conclusion that Section 1782 extends to investor-state arbitration, or should at a minimum expressly reserve judgment on that question.

A. Investor-state arbitration is a relatively recently developed method for resolving disputes between investors and foreign states in which they have invested or sought to invest (their host states). Historically, the predominant mechanism for an investor to resolve a dispute with a host state was a process known as diplomatic protection. An investor's home state would "treat[] an injury to [its] national caused by an act or omission of the host State as an international wrong against that national's home State, for which the home State was entitled—but not bound—to seek reparation in its own name." O. Thomas Johnson, Jr., et al., *From Gunboats to BITs: The Evolution of Modern Investment Law*, Yearbook on Int'l Investment L. & Pol'y 651 (2011) (Johnson). Representatives from each state would then seek to negotiate resolution of the foreign national's claim.

Adjudication of claims subject to diplomatic protection often took the form of resolution before mixed-claims commissions established by treaties between the host and home states. Johnson 653. For example, the Jay Treaty between the United States and Great Britain, see Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116, T.S. No. 105, "established three arbitral commissions" to resolve, among other things, "claims brought by U.S. shipowners against Great Britain for the unlawful capture and condemnation of vessels." Johnson 653 n.19. By the mid-1900s, there were at least sixty such commissions (such as the U.S.-German Mixed Claims Commission) "set up to deal with disputes arising from injury to the interests of aliens." Ian Brownlie, *Principles of Public International Law* 521 (4th ed. 1990).

Although diplomatic protection provided a potential for recourse for the investor who otherwise might not obtain any redress, it was not always a complete solution. Because the negotiations occurred between sovereigns, whose broader foreign relations were at stake, no guarantee existed that a particular investor's claim would ultimately be settled. Exercising diplomatic protection also consumed significant diplomatic resources, risked politicizing disputes, and was not always peaceful. See Johnson 653.

Investor-state arbitration arose as an alternative dispute-resolution model that did not require direct participation by the investor's home state. Following the formation of the United Nations, the development of international economic institutions, and a substantial rise in foreign investment, the 1965 Washington Convention established the International Center for the Settlement of Investment Disputes (ICSID). Johnson 669. Twenty nations ratified the convention, agreeing not to exercise diplomatic protection if a foreign national and host state entered into arbitration under ICSID. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 27, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090. Several years thereafter, bilateral investment treaties—international agreements that set conditions for private investment by individuals or companies—"began to include * * * [a] provision for compulsory arbitral jurisdiction over disputes between investors and host States, available to the investor without any intervention on the part of his government." Johnson 669, 677, 679. The United States today is a party to many bilateral investment treaties and free-trade agreements that provide for such arbitration.

The advent of treaty-based investor-state arbitration offered several advantages. Because investors could bring a claim in arbitration directly against the host state, investors often no longer needed to exhaust their remedies in the host state's local courts, nor were they dependent on diplomatic efforts by their home state. That, in turn, reduced the costs associated with dispute resolution and ensured that claims could be heard by an experienced and neutral arbiter. It also depoliticized the dispute-resolution process and reduced friction between nations. Johnson 669. In addition, investor-state arbitration generally allows the parties to determine the arbitral rules that will govern, including agreeing on rules with respect to discovery.

B. Like a private commercial arbitration, an investor-state arbitration is not properly understood as a "proceeding in a foreign or international tribunal" within the meaning of Section 1782. 28 U.S.C. 1782(a). Investor-state arbitration resembles private commercial arbitration in the most salient respects. The parties (an investor and a host state) voluntarily submit their dispute for resolution by a nonjudicial body empowered by the parties' consent to decide it. The authority of investor-state arbitration panels to decide a dispute derives from the parties' consent to the arbitration. Investor-state arbitration also does not entail adjudication of a claim by a foreign court or by a standing quasi-judicial entity of the kind Congress contemplated in enacting the 1964 Act. And unlike intergovernmental bodies of which the Rules Commission and Congress were aware in revising Section 1782, such as mixed-claims commissions, see p. 22, *supra*, investor-state arbitration does not involve state-to-state claim resolution. It entails only proceedings between an investor that brings a claim and a foreign state that has consented to resolve the claim through arbitration. Congress, moreover, could not have

envisioned the application of Section 1782 to investor-state arbitration because that form of dispute resolution did not exist in 1964. To the government's knowledge, the first international agreements containing provisions for investor-state arbitration were not adopted until several years later.[1]

Extending judicial assistance under Section 1782 to investor-state arbitration would also threaten to jeopardize the advantages that it affords. For example, injecting broad discovery, aided by the assistance of U.S. courts, into streamlined investor-state arbitrations could undermine the efficiency and cost-effectiveness of those mechanisms. Doing so could upset settled expectations of investors and foreign states that select a particular arbitral regime, including rules applying to discovery, by allowing one party, or potentially both, to circumvent those settled rules.[2] And to the extent that the availability of broad, court-aided discovery would dissuade investors and foreign states from selecting that model, it could hinder certain benefits that stem from the availability of investor-state arbitration.

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[1] See, *e.g.*, Joachim Pohl et al., *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey* 11 n.6 (2012), https://www.oecd-ilibrary.org/docserver/5k8xb71nf628-en.pdf; Agreement on Economic Cooperation, Neth.-Indon., art. 11, July 7, 1968, 799 U.N.T.S. 13.

[2] Whether a party engaged in arbitration with a foreign state could seek judicial assistance to obtain evidence under Section 1782 would depend on whether the person from whom the evidence is sought is "a person [who] resides or is found" in the district where assistance is sought, 28 U.S.C. 1782(a); cf. *Al Fayed* v. *CIA*, 229 F.3d 272, 277 (D.C. Cir. 2000) (concluding that the United States is not a "person" under Section 1782), and might implicate questions of foreign sovereign immunity, cf. 28 U.S.C. 1602 *et seq.* Whether a foreign state could request judicial assistance under Section 1782 would depend on whether it is "an[] interested person" with respect to the arbitral proceeding. 28 U.S.C. 1782(a).

C. Although petitioner does not specifically address investor-state arbitration in its brief, its position (*e.g.*, Br. 7) that the term "tribunal" in Section 1782(a) categorically encompasses all arbitral panels would appear equally to encompass investor-state arbitration. In addition, some of petitioner's amici start from the mistaken assumption that investor-state arbitration is covered by Section 1782 and reason that private commercial arbitration must be covered as well. See Bermann Br. 10-18; FedArb Br. 21-24. Conversely, some district courts have held or suggested that private commercial arbitration is not covered by Section 1782 because (in their view) it lacks certain attributes that they ascribe to investor-state arbitration, such as the involvement of states in entering international agreements addressing such arbitration, the participation of a foreign state, or other factors. See, *e.g.*, *In re Grupo Unidos Por El Canal, S.A.*, No. 14-226, 2015 WL 1810135, at *8 (D. Colo. Apr. 17, 2015) (citing *In re Oxus Gold PLC*, No. 06-82, 2007 WL 1037387, at *5 (D.N.J. Apr. 2, 2007)). And still other courts have adopted an approach to Section 1782 that calls for a multi-factor inquiry into the role played by a foreign government in a particular dispute-resolution mechanism in order to determine whether it constitutes private arbitration falling outside Section 1782, or a covered proceeding before a foreign or international tribunal. See *In re Guo*, 965 F.3d 96, 107-108 (2d Cir. 2020).

To the extent that any of those approaches would sweep investor-state arbitration within Section 1782's scope, they are unsound and should be rejected for the reasons set forth above. See pp. 31-32, *supra*. If the Court concludes that Section 1782 does not extend to

the type of commercial arbitration between private parties at issue here, it should make clear that its determination applies equally to an analogous arbitration between an investor and a foreign state. At a minimum, the Court should reserve judgment on that issue, to avoid any misimpression that the Court's decision would lead to a particular conclusion for investor-state arbitration.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 9 U.S.C. 7 provides:

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.

2. 9 U.S.C. 208 provides:

Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

3. 9 U.S.C. 307 provides:

Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent chapter 1 is not in conflict with this chapter or the Inter-American Convention as ratified by the United States.

4. 28 U.S.C. 1696 provides:

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.

5. 28 U.S.C. 1781 provides:

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.

6. 28 U.S.C. 1782 (1958) provides:

Testimony for use in foreign country

The deposition of any witness within the United States to be used in any judicial proceeding pending in any court in a foreign country with which the United States is at peace may be taken before a person authorized to administer oaths designated by the district court of any district where the witness resides or may be found.

The practice and procedure in taking such depositions shall conform generally to the practice and procedure for taking depositions to be used in courts of the United States.

7. 28 U.S.C. 1782 provides:

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.

8. Act of Mar. 2, 1855, ch. 140, § 2, 10 Stat. 630, provides:

And be it further enacted, That where letters rogatory shall have *be* [been] addressed, from any court of a foreign country to any circuit court of the United States, and a United States commissioner designated by said circuit court to make the examination of witnesses in said letters mentioned, said commissioner shall be empowered to compel the witnesses to appear and depose in the same manner as to appear and testify in court.

9. Act of Mar. 3, 1863, ch. 95, § 1, 12 Stat. 769, provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the testimony of any witness residing within the United States, to be used in any suit for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest, may be obtained, to be used in such suit. If a commission or letters rogatory to take such testimony shall have been issued from the court in which said suit is pending, on producing the same before the district judge of any district where said witness resides or shall be found, and on due proof being made to such judge that the testimony of any witness is material to the party desiring the same, such judge shall issue a summons to such witness requiring him to appear before the officer or commissioner named in such commission or letters rogatory, to testify in such suit. Such summons shall specify the time and place at which such witness is required to attend, which place shall be within one hundred miles of the place where said witness resides or shall be served with said summons.

10. Act of Feb. 27, 1877, ch. 69, 19 Stat. 241 (Rev. Stat. § 875), provides:

Section eight hundred and seventy-five is amended by adding at the end of the section the following:

"When letters rogatory are addressed from any court of a foreign country to any circuit court of the United States, a commissioner of such circuit court designated by said court to make the examination of the witnesses mentioned in said letters, shall have power to compel the witnesses to appear and depose in the same manner as witnesses may be compelled to appear and testify in courts."

11. Act of June 25, 1948, ch. 646, § 1782, 62 Stat. 949, provides:

Testimony for use in foreign country

The deposition of any witness residing within the United States to be used in any civil action pending in any court in a foreign country with which the United States is at peace may be taken before a person authorized to administer oaths designated by the district court of any district where the witness resides or may be found.

The practice and procedure in taking such depositions shall conform generally to the practice and procedure for taking depositions to be used in courts of the United States.

12. Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103, provides:

Section 1782 of title 28, United States Code, is amended by striking out "residing", which appears as the sixth word in the first paragraph, and by striking out from the same paragraph the words "civil action" and in lieu thereof inserting "judicial proceeding".

13. Act of Sept. 2, 1958, Pub. L. No. 85-906, 72 Stat. 1743, provides in relevant part:

ESTABLISHMENT OF THE COMMISSION ON INTERNATIONAL RULES OF JUDICIAL PROCEDURE

SECTION 1. There is hereby established a Commission to be known as the Commission on International Rules of Judicial Procedure, hereinafter referred to as the "Commission".

PURPOSE OF THE COMMISSION

SEC. 2. 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 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 proce-

dures of our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies be similarly improved, the Commission shall—

(a) draft for the assistance of the Secretary of State international agreements to be negotiated by him;

(b) draft and recommend to the President any necessary legislation;

(c) recommend to the President such other action as may appear advisable to improve and codify international practice in civil, criminal, and administrative proceedings; and

(d) perform such other related duties as the President may assign.

14. Act of Oct. 3, 1964, Pub. L. No. 88-619, 78 Stat. 995, provides in pertinent part:

SEC. 4. (a) Chapter 113 of title 28, United States Code, is amended by inserting therein, after section 1695:

"§ 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."

* * * * *

SEC. 8. (a) Section 1781 of title 28, United States Code, is amended to read:

"**§ 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."

* * * * *

SEC. 9. (a) Section 1782 of title 28, United States Code, is amended to read:

"§ 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. 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."