No. 20-794

IN THE

# Supreme Court of the United States

SERVOTRONICS, INC.,

*Petitioner,*

*v.*

ROLLS-ROYCE PLC AND THE BOEING COMPANY,

*Respondents.*

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

## REPLY BRIEF


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## TABLE OF CONTENTS

*Table of Contents*

*Page*

## TABLE OF CITED AUTHORITIES

*Page*

**Cases**

*Cited Authorities*

*Page*

*Cited Authorities*



**Statutes and Other Authorities**

*Cited Authorities*

## SUMMARY OF ARGUMENT

Unable to construct a solid basis on which to refute that "foreign or international tribunal" is understood to encompass commercial arbitral tribunals and was so understood in 1964 when the current version of Section 1782 was enacted, Respondents resort to sounding false alarms over what they portray as dire consequences that would result from applying the statutory language as written. This "parade of horribles" includes the purported danger that such a definition would render the term "hopelessly vague," requiring courts to engage in "endless line-drawing" and sort through all manner of disagreements as well as "opening the floodgates" to unfettered discovery that would allegedly bog down the parties to foreign and international commercial arbitrations and deprive them of the benefits that make arbitration an attractive alternative to litigation. None of these predictions has any basis in fact. Nor do Respondents' arguments that applying the long-used and widely understood meaning of the term "foreign or international tribunal" to interpretation of Section 1782 creates a conflict within the statute, with related statutes, or with the Federal Arbitration Act.

The only line-drawing problem at issue in this case is the one created by the artificial public/private distinction drawn by the exclusions the Seventh and Second Circuits grafted onto the language of Section 1782. As a recent case from the Second Circuit illustrates, this exercise in judicial legislation in the guise of statutory interpretation defies logic and reason when courts undertake the task of practical application to Section 1782 requests. In essence, Respondents' purported concerns that allowing the district courts to introduce "American style discovery"

will make commercial arbitration before foreign and international tribunals less attractive is a criticism of the federal discovery rules and the manner in which they are implemented, not a viable basis for applying an overly narrow and clearly unworkable interpretation to the language of Section 1782.

Accordingly, Section 1782 should be applied to foreign and international commercial arbitral tribunals.

## ARGUMENT

### I. This Case Has Not Been Rendered Moot by Conclusion of the Hearing in the Arbitration Between Rolls-Royce and Servotronics

A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party. *Decker v. Nw. Env't Defense Ctr.,* 568 U.S. 597 (2013). As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot. *Knox v. Serv. Emp. Int'l Union,* 567 U.S. 298, 307-8 (2012) (*quoting Ellis v. Ry. Clerks,* 466 U.S. 435, 442 (1984)). Thus, Boeing's argument that this case is "almost certainly moot" (Boeing Br. at 12-13) is insufficient to support dismissal, as is the assertion by Rolls-Royce that this case appears to be moot and the prediction of impending mootness (Rolls-Royce Br. at 12). The burden of demonstrating mootness is a heavy one (*Los Angeles v. Davis,* 440 U.S. 625, 631 (1979); *United States v. W.T. Grant Co.,* 345 U.S. 629, 633 (1953)), which cannot be met at this juncture. The arbitral tribunal has not yet issued its final award, leaving open the possibility that documentary evidence obtained via subpoena served

on Boeing could be submitted for consideration prior to conclusion of the arbitration proceedings. Furthermore, if the arbitral tribunal issues an award before the Court renders a decision in this case, recourse to challenge the award in an English Court exists under the English 1996 Arbitration Act ("EAA"). *See* Section 68, EAA 1996.

In any event, this case is one that would not be moot even after any award issued by the arbitral tribunal becomes final because the issue under review is one that is capable of repetition yet evading review. *See Honig v. Doe,* 484 U.S. 305 (1988); *Roe v. Wade,* 410 U.S. 113, 123-25 (1973).[1] The issue of whether 28 U.S.C. § 1782 grants a District Court discretion to order third-party discovery in aid of a foreign commercial arbitration satisfies the two-pronged exception to mootness for controversies that are capable of repetition yet evading review: (1) the arbitration proceedings were too short in duration to allow for full litigation of the issue; and (2) there exists a reasonable expectation that Servotronics—the same complaining party—would be subject to the same action again. *See United States v. Sanchez-Gomez,* __ US,__, 138 S. Ct. 1532, 1540 (2018); *Honig,* 484 U.S. at 318-19; *Gannett Co. v. DePasquale,* 443 U.S. 368 (1979); *Weinstein v. Bradford,* 423 U.S. 147, 148-49 (1975).

1. The majority opinion in *Honig* made clear that the "capable of repetition" test is met if there exists a reasonable expectation that the complaining party would encounter a recurrence of the controversy raised in the court proceeding, stating: "Our concern in these cases, as in all others involving potentially moot claims, was whether the controversy was *capable* of repetition and not … whether the claimant has demonstrated that a recurrence of the dispute was more probable than not." 484 U.S. at 319 n.6 (emphasis in original).

Boeing's argument (at 15 n.1) that this case fails the first prong of the test because Servotronics had "ample time for full appellate review" and suggestion that Servotronics "could have requested expedited consideration at any stage of the proceedings" ignores the fact that both Rolls-Royce and Boeing would have opposed such a request. Respondents have vigorously opposed Servotronics' efforts to subpoena documents from Boeing and went to great lengths to delay issuance of deposition subpoenas on Boeing in a related case in the District of South Carolina.[2] Notably, when the district court finally issued the deposition subpoenas in compliance with a writ of mandamus from the Fourth Circuit (Order 1-2, Case No. 21-1305, ECF No. 22 (4th Cir. Apr. 15, 2021)), Rolls-Royce filed an emergency application requesting that this Court issue a stay in that case to prevent service of the subpoenas. *See* No. 20A160. In addition, it vigorously opposed Servotronics' requests to adjourn the arbitration hearing until this litigation is concluded in an effort to create a basis on which to argue mootness in this Court. Rolls-Royce even requested that the arbitral tribunal somehow enjoin Servotronics from pursuing review of the Seventh Circuit judgment in this Court. *Id.,* Rolls-Royce Appendix at 39a-40a.[3]

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2. Boeing also made a successful motion to extend the time to respond to the Petition for Certiorari in this Court, presumably to ensure this case could not be heard during the October 2020 Term, and Rolls-Royce obtained an extension of time to file its brief on the merits.

3. Respondents' argument that this case does not fall within the exception for issues that are capable of repetition yet evading review relies on language from *Already, LLC v. Nike, Inc.,* 568 U.S. 85 (2013), a case involving the voluntary cessation doctrine. Such cases pose the question: "Could the allegedly wrongful

With regard to the second prong of the test, Boeing is mistaken in its contention (at 14) that Servotronics "cannot plausibly assert it is likely to be involved in another Section 1782 dispute involving foreign arbitrations, let alone with either Boeing or Rolls-Royce." Servotronics is a party to a Long-Term Agreement with Rolls-Royce which requires arbitration of unresolved disputes in England. Shah Declaration ¶ 4, JA 20a. This fact alone is sufficient to raise the reasonable expectation that Servotronics would have a need to seek evidence in the United States in aid of foreign arbitration[4] with Rolls-Royce in the future. In the event an award of the arbitral panel becomes final before this Court issues its opinion in this case and Respondents file a motion to dismiss or a suggestion of mootness under the procedures prescribed in Supreme Court Rule 21, Servotronics will file a response accompanied by an affidavit from an officer of Servotronics providing additional information establishing that there is, indeed, a reasonable expectation that Servotronics would again be subject to the same denial of evidence needed for a foreign arbitration in the future.

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behavior reasonably be expected to recur?" The Court stated, "Nike cannot avoid its formidable burden by assuming the answer to that question." 568 U.S. at 92. In sharp contrast to the cases to which the voluntary cessation doctrine might apply, Respondents have spared no effort to prevent Servotronics from obtaining discovery from Boeing in both this and a related case and have given every indication that each of them would not hesitate to do so again in the future.

4. Although the parties to the arbitration at issue in the present case have different nationalities, the arbitral tribunal is a foreign one, because it is seated outside the United States and operates within the framework of a single foreign jurisdiction. *See* Wang Br. at 2 n.2.

Despite the best efforts of both Respondents, this case is not moot at this time. In the event subsequent developments require the Court's consideration of mootness, Servotronics will demonstrate that this case falls within the exception for wrongs that are capable of repetition yet evading review.

## II. Nothing in the Text of Section 1782 Evidences Congressional Intent to Exclude Commercial Arbitral Tribunals

### A. The Only Logical, Workable Interpretation of the Term "Foreign or International Tribunals" in Section 1782 is One that Encompasses Commercial Arbitral Tribunals

In the course of its textual analysis, the Seventh Circuit acknowledged that some dictionaries in use in 1964 defined "tribunal" to include arbitral tribunals while others did not, and for that reason concluded that "dictionary definitions do not unambiguously resolve" the issue. "All definitions agree that the word 'tribunal' means 'a court,' but some are more expansive, leaving room for both competing interpretations." JA 86a. However, Respondents attempt to create the false impression that contemporaneous dictionaries leave no room for doubt that the term "foreign or international tribunal" must have meant "a court or other governmental adjudicator" in 1964. Rolls-Royce Br. at 14-17; Boeing Br. at 18-19. An examination of contemporaneous dictionaries and judicial usage confirms that the term has long been understood to be much broader.

Notably, Rolls-Royce (at 16) quotes a dictionary definition of "tribunal" that includes "a person or body of persons having authority to hear and decide disputes so as to bind the disputants" (quoting *Webster's New International Dictionary of the English Language* (2d ed. 1959), which is identical to the definition from the 1961 edition of the same dictionary quoted in Petitioner's Opening Brief at 11. This is typical of definitions appearing in numerous dictionaries in general use since before 1964, including dictionaries Justice Scalia identified as particularly authoritative and useful for determining near-contemporaneous common meaning of words in the period 1951-2000. *See* FedArb Br. at 10-11. A commercial arbitral tribunal is unquestionably a body of persons with authority to hear and decide disputes so as to bind the disputants. Furthermore, the fact that Respondents have found instances in which the Court has used words other than "tribunal" to refer to a body conducting an arbitration does not detract from the fact that "tribunal" has long been in general use by the Court and lower courts to refer to an arbitral body.[5]

5. Contrary to the assertion of Rolls-Royce (at 29), *In re Letters Rogatory Issued by the Dir. of Inspection of the Gov't of India,* 385 F.2d 1017 (2d Cir. 1967), did not hold that Section 1782 is limited to governmental adjudicators. Instead, the court held that the foreign income tax officer was not a "tribunal" and thus could not utilize a Section 1782 request. In its analysis, the court used an example of a type of governmental adjudicator in France to contrast with the Indian government's tax officer. The court also observed that a tax audit does not fit the notion that most American legislators have of what constitutes a tribunal. 385 F.2d at 1021. By this standard, an arbitration does constitute a tribunal.

Respondents' efforts to tie the words "foreign" and "international" inextricably to institutions created by sovereigns fail on both a linguistic and analytical level. The dictionary definitions Respondents have cited reveal meanings of these words in use in 1964 that are no different from their common usage today. One need not consult a dictionary to know that "foreign" refers to persons, objects and institutions that are situated in or originated from another country, and do not necessarily have anything to do with the government or sovereignty of that country. Nor is the word "international" tied to sovereignty. The term international travel is but one of many examples in common use long before and after 1964.

A more fundamental problem with Respondents' argument and the corresponding rationale of the Second and Seventh Circuits is that it is impossible to draw a bright-line distinction between tribunals that are "state-sponsored, public, or quasi-governmental" and those that are "private." This is due to the fact that arbitral tribunals derive their authority to make decisions that are binding on the parties from the laws enacted by the country in which they sit. The agreements by which parties commit to submitting a matter to arbitration rather than a court are enforceable within the borders of the country in which the arbitration is conducted only if that country has enacted laws that recognize the validity of such agreements and empower the courts to enforce them. An array of treaties between and among various countries have created commitments to recognize and enforce foreign arbitration agreements and awards. The most prevalent of these treaties is the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), to which 168 countries adhere. *See* FedArb

Br. at 16-21; Wang Br. at 22-25; IACT Br. at 3-4 and 8-12. Thus, the public-private dichotomy adopted by the Second and Seventh Circuits and advocated by Respondents is an artificial construct that leads to illogical and inconsistent classifications in practice.

A prime example of the inconsistencies inherent in attempting to distinguish between "state-sponsored" and "private" tribunals is the recent decision by the Second Circuit in *Application of the Fund for Protection of Investor Rights in Foreign States v. AlixPartners, LLP,* Docket No. 20-2653 cv, 2021 WL 2963980 (2d Cir. July 15, 2021) ("*Fund Application*"). The Fund, a Russian corporation which is the assignee of a Russian national seeking compensation for expropriation of his shares in a failed bank in Lithuania, obtained a subpoena for discovery to be used in an arbitration against Lithuania. The arbitral tribunal was established pursuant to an investment treaty between Lithuania and Russia. Under Second Circuit precedent, so-called private arbitral bodies do not constitute foreign or international tribunals within the meaning of Section 1782. In order to determine whether the district court was justified in issuing a subpoena in aid of the arbitration, the Second Circuit utilized the set of four functional factors it had announced in *In re Guo,* 965 F.3d 96 (2d Cir. 2020).

The first *Guo* factor is the extent to which the arbitral body is internally directed and governed by a foreign state or international body. The court found that the *Fund Application* arbitral panel functioned independently from the governments of both Lithuania and Russia. Its members—two lawyers and a law professor—have no official affiliation with any government, governmental

entity or intergovernmental entity and the panel receives no government funding. In addition, the proceedings are confidential and the award may be made public only with the consent of both parties. Nevertheless, the Second Circuit concluded that the first factor weighed in favor of finding that the arbitral body is "public" because it was convened pursuant to a treaty and thereby "retains affiliation" with Russia and Lithuania. Another reason the court cited for its affiliation factor determination is that the rules adopted to govern the proceeding were developed by the United Nations Commission on International Trade Law (UNCITRAL), an international body. However, the treaty provided the parties with a choice of four sets of rules, which include those of the Arbitration Institute of the Stockholm Chamber of Commerce and the Court of Arbitration of the International Chamber of Commerce ("ICC"). *Fund Application,* 2021 WL 2963980 at *6, 2. These options, along with the UNCITRAL rules, are available to businesses arbitrating outside the context of any treaty.

The second factor, state authority to intervene or alter the outcome, was deemed to be neutral, even though such authority was "limited, if not non-existent." *Id.* at *7. Because the arbitral panel derived its adjudicatory authority from the treaty, the court found that the third factor—nature of jurisdiction possessed by the panel—weighed heavily in favor of qualifying as a foreign or international tribunal. *Id.*

The fourth factor examines the process by which the arbitrators were selected. The treaty specifies that each party selects one arbitrator and those two arbitrators select a third. As noted above, all of the selected arbitrators are individuals with no governmental or inter-

governmental affiliation. The court acknowledged that this process is suggestive of a private arbitration, but stated this factor was not determinative. *Id.*

The court also examined additional factors and determined that the arbitral body is a foreign or international tribunal within the meaning of Section 1782, but only because the court deemed it to be "public." *Id.* at *8.

The reasoning in *Fund Application* is fraught with inconsistency. The arbitral body in that case has virtually all the attributes of a body presiding over any foreign commercial arbitration. The only real difference between the *Fund Application* arbitration and an arbitration that the Second and Seventh Circuits classify as "private" is that it was convened pursuant to a bilateral treaty rather than a contract between the parties. The Second Circuit appears to have deemed this fact (the third of the *Guo* factors) to be dispositive. However, the arbitral tribunal was charged with resolving a commercial dispute and the need for discovery assistance from the district court pursuant to Section 1782 is no greater than or qualitatively different from the needs of any arbitral tribunal seated outside the United States and charged with resolving a commercial dispute between or among parties from different countries.[6]

6. To the extent the result in *Fund Application* may have been influenced by comity considerations, the case serves as a reminder that "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the needs of the international commercial system for predictability in the resolution of disputes" apply to foreign and international commercial arbitrations. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985).

Unlike the judicially-imposed exclusion for "private" arbitrations, the common meaning of "foreign or international tribunal" as used in Section 1782, which encompasses commercial arbitrations such as the one at issue in this case, does not render the term "hopelessly vague," as Rolls-Royce (at 18) contends. Nor is there any danger that resolution of this case in favor of Servotronics would "spawn endless line-drawing problems" (*id.*), as does the artificial public-private dichotomy adopted by the Second and Seventh Circuits. Instead, the case before this Court is one in which two corporate parties to a long-term contract (one British, the other American) agreed to present disputes relating to their commercial dealings with one another in arbitration conducted in England (a foreign country). Courts in the United States have no difficulty understanding this construct when presented with an array of issues such as whether a matter is arbitrable, whether litigation should be stayed pending arbitration or dismissed altogether in deference to the agreement to arbitrate, and whether discovery should be granted in aid of such arbitration.

The balance of Rolls-Royce's vagueness argument is equally meritless. Rolls-Royce suggests (at 19-20) that courts would need to make a qualitative assessment of whether a particular foreign government favors arbitration or particular types of arbitration before deciding whether to grant a request for discovery under Section 1782 and asks what the effect would be if a pro-arbitration government loses power in a country and is replaced by one that opposes it. Not only are these assertions and questions purely hypothetical,[7] but their purpose is to

7. The premises on which these arguments rest are highly speculative and contradictory. For example, Rolls-Royce attempts

persuade the Court that limiting the application of Section 1782 to tribunals formed by either an individual foreign country or a group of countries is somehow preferable to having the statute apply to commercial arbitral tribunals. By so doing, Rolls-Royce begs the question presented in *Fund Application,* in which the tribunal was not formed by any government but was convened by parties to a commercial dispute in the manner permitted by a bilateral treaty; it is urging this Court to legislate, rather than perform its judicial function of interpreting existing legislation. *See Maxwell v. Moore,* 63 U.S. (1 Wall) 185, 191 (1859). As the Court stated in *Bostock v. Clayton Cnty., Georgia,* __ U.S. __, 140 S. Ct. 1731 (2020):

> only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives.

140 S. Ct. at 1738.

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to contrast the transitory nature of private arbitral tribunals with the established nature of courts created by a single sovereign and international tribunals, ignoring the fact that international tribunals can be convened for a specific purpose, such as to try war crimes, and sovereigns have the ability to do the same within their own countries. Furthermore, the questions Rolls-Royce poses (at 19) about what happens if a change in the country government results in a change from a pro-arbitration policy to one that is hostile to arbitration undermines the premise that tribunals created by sovereigns necessarily have permanence.

### B. If Congress Meant to Limit Application of Section 1782 to Sovereign-Created Bodies, Such Exclusion Would Have Been Expressed in the Statutory Text

Rolls-Royce (at 20-25) presents an extensive catalog of statutes and treaties that use the word "tribunal" to refer to courts "or their equivalents" when addressing issues concerning such entities and other words to refer to bodies that conduct arbitrations when the exclusive subject is arbitration. This information sheds no light on how a statute that has been amended to expand its reach by replacing the word "courts" with "foreign or international tribunals" should be interpreted. Moreover, Respondents fail to explain how interpreting the term "foreign or international tribunal" to only mean "courts or their equivalents" does not fly in the face of the expressed Congressional intent in 1964 to significantly expand the scope of Section 1782.

In addition, at least two of the cited examples contradict the distinctions Respondents are attempting to draw. First, Rolls-Royce references (at 23) use of the words "arbitrators" or "umpires" in the 1947 amendment to the Federal Arbitration Act ("FAA") and the absence of the word "tribunal." If this observation is meant to support the conclusion that arbitral bodies are never tribunals, it contradicts Respondents' position that government-convened arbitrations are, in fact, tribunals for purposes of Section 1782. Second, Rolls-Royce states (at 24): "The 1976 Freedom of Information Act even distinguishes between actions 'in a foreign court or international tribunal, or an arbitration.' 5 U.S.C. § 552b(c)(10). If 'international tribunals' included private arbitration, that

distinction would be unnecessary." By the same logic, this provision draws a distinction between a court and a tribunal, which clearly was not the intention of Congress in amending Section 1782.

Also contrary to Respondents' position is the observation that international commercial arbitration was well-established by 1964 and that Congress was well aware of such proceedings (Rolls-Royce Br. at 25). Congressional awareness of international commercial arbitration, combined with the common usage of the word "tribunal" to refer to bodies that conduct arbitrations as well as courts created by a sovereign and other adjudicative bodies created by treaties, supports the conclusion that if Congress had intended to exclude arbitral tribunals from the scope of Section 1782 such intention would have been expressed in exclusionary language in the statute or by including a definition in the statutory text giving the term "foreign or international tribunal" such narrow, specialized meaning.[8]

8. As Rolls-Royce points out (at 22-23), Congress used language to limit international tribunals to ones created by governments in a 1930 provision granting certain authority to members of an "international tribunal or commission, established pursuant to an agreement between the United States and any foreign government or governments …." Act of July 3, 1930, ch. 851, § 1, 46 Stat. 1005-06. This history further demonstrates that if Congress intended to limit "foreign or international tribunal" to governmental or quasi-governmental tribunals in 1964, it easily could have expressed such intent.

### C. Interpreting Section 1782 as Written Does Not Result in Inconsistency Within that Statute or Any Related Statute

Section 1782 empowers the district court to issue an order that prescribes the practice and procedure for taking the testimony or statement of a witness or producing a document or thing. As Rolls-Royce accurately states, the Federal Rules of Civil Procedure is the default in these circumstances and the district court has the option of prescribing a practice or procedure that is "in whole or in part the practice and procedure of the foreign country or the international tribunal" for carrying out the discovery it orders. 28 U.S.C. § 1782(a). The fact that some tribunals may not have their own practices or procedures and look to those of the country in which they sit or rules promulgated by an international arbitration organization such as the Chartered Institute of Arbitrators, the ICC or FedArb does not create an inconsistency within the statute or require a narrow definition of the term "foreign or international tribunal." *See In re Application to Obtain Discovery for Use in Foreign Proceedings (Abdul Latif Jameel Transp. Co. v. FedEx Corp.),* 939 F.3d 710, 723 (6th Cir. 2019) (*"FedEx")* (permissive wording of the sentence in Section 1782 indicates it is an optional borrowing provision, not a requirement that such procedures exist or that foreign tribunal must be a governmental entity).

Nor does the fact that the term is used in 28 U.S.C. § 1781, which deals specifically with letters rogatory and requests, or in 28 U.S.C. § 1696, which involves service of documents, create an inconsistency requiring a narrow, sovereign-based interpretation. Foreign and international commercial arbitral tribunals can make

requests for assistance with service of a document or to obtain evidence. *Id.;* Bermann Br. at 18-20. *See also Intel Corp. v. Advanced Micro Devices,* 542 U.S. 241, 257 n.10 (2004) (*"Intel"*).

Thus, interpreting the term "foreign or international tribunal" to include commercial arbitral tribunals does not create any inconsistency, either within the statute or with related statutes. The term is broad and thus necessarily applies to a range of bodies that have certain characteristics in common, chief among which is performance of adjudicatory functions. It is to be expected that, within this broad category individual bodies will have differing rules, differing levels of authority, and some may be empowered to perform certain ancillary functions while others are not. These variations do not, however, alter the fact that such bodies are tribunals.

## III. Whether a Foreign or International Tribunal Includes Arbitral Tribunals Was Not Before the Court in *Intel* and Thus Was Not Addressed By the Court

Respondents take divergent approaches to invoking *Intel* in their briefs. Boeing misstates what was said in Petitioner's Opening Brief in order to challenge that perceived position, whereas Rolls-Royce argues (at 38) that the *Intel* opinion "treats a 'tribunal' as a governmental adjudicatory body, not a private arbitral panel," an issue that was never addressed in *Intel.* Rolls-Royce utilizes a quote from *Intel* and an embedded quote of the Senate Committee Report which states that the purpose of introducing the word "tribunal" was to ensure that discovery assistance rendered by the district courts would

not be confined to proceedings before conventional courts, but would be extended to also include "administrative and quasi-judicial proceedings." In the next sentence, Rolls-Royce makes an assertion (at 39) that changes the word "proceedings" to "agencies," a word that does not appear in the preceding quote, but is included within the quotation marks in the brief: "Private arbitral panels are not 'administrative' bodies or 'quasi-judicial agencies.'" This telling change was necessary to construct Respondents' flawed argument that *Intel* supports the illusory public/private dichotomy introduced by the judicially-made exception to Section 1782.

Prior to this case, *Intel* was the only occasion the Court had to examine the meaning of the term "foreign or international tribunal" in Section 1782, and it did so in the context of a proceeding other than a commercial arbitration. As noted in Petitioner's Opening Brief and Petition for Certiorari, the Court's analysis of the statutory language and its legislative history is instructive, but did not (and could not) provide a definitive answer to the question currently under review.[9]

9. In this regard, *Intel* followed the "well-worn path of declining to issue a sweeping ruling when a narrow one will do." *Azar v. Allina Health Serv.*, __ U.S. __, 139 S. Ct. 1804, 1814 (2019) (internal quotation marks omitted). *See Fed. Commc'ns Comm'n v. Pacifica Found.*, 438 U.S. 726, 734-35 (1978) ("However appropriate it may be for an administrative agency to write broadly in an adjudicatory proceeding, federal courts have never been empowered to issue advisory opinions.").

## IV. The Fact that Arbitral Tribunals are Encompassed by the Term "Foreign or International Tribunal" in Section 1782 Does Not Create a Conflict with the Federal Arbitration Act

Among the false alarms raised in Respondents' briefs is the prediction that the courts will be mired in confusion over how to resolve a perceived conflict between Section 1782 and the FAA. However, there is no conflict and the district courts have a clear path for avoiding whatever confusion litigants may attempt to create on the subject.

The FAA governs all arbitrations seated in the United States, regardless of the nationalities of the parties and the arbitrators. 9 U.S.C. § 2. There is no opportunity for confusion about whether Section 1782 might also apply to such arbitral tribunals because "Section 1782 is a provision for assistance to tribunals abroad." *Intel,* 542 U.S. at 263. It has no application to tribunals seated within the United States.

Section 7 of the FAA grants broad powers to arbitral tribunals seated in the United States to summon witnesses to give testimony or produce documents or other things at an evidentiary hearing and provides recourse to the district court for the judicial district in which the arbitration is seated if a witness refuses to comply with a summons issued by the arbitrators. 9 U.S.C. § 7. Such powers necessarily are limited by the same geographic restrictions that apply to the district court's power to compel appearances of witnesses for any purpose. *Id.*; Fed. R. Civ. P. 45(c). Because the FAA only applies to arbitrations seated in the United States, Section 7 cannot address the needs of arbitrations seated abroad.

Jurisdictional limits preclude arbitral tribunals seated abroad from compelling the attendance of witnesses or production of documents for their evidentiary hearings and no district court is empowered to compel attendance or production more than 100 miles outside its judicial district. Thus, Section 1782 is the sole means by which parties to arbitrations seated outside the United States may compel testimony by or production of documents or things from persons or entities within the United States for use in such proceedings.

Whether the benefits conferred by Section 7 of the FAA to arbitral tribunals seated in the United States are more or less beneficial than those conferred to parties to proceedings in tribunals seated abroad by Section 1782 is a question that is purely academic. As the Court stated, Section 1782 "does not direct United States courts to engage in comparative analysis to determine whether analogous proceedings exist here." *Intel,* 542 U.S. at 263. *See also Servotronics, Inc. v. Boeing Co.,* 954 F.3d 209, 216 (4th Cir. 2020); *FedEx,* 939 F.3d at 728-29.

## V. Respondents' Purported Concerns About Applying Section 1782 to Commercial Arbitral Tribunals are Objections to the Scope of Discovery in the United States

Respondents raise alarms about a "vast new frontier of abusive discovery requests," "opening the floodgates," "swamp[ing] the federal courts with applications for discovery," a "deluge that would strain district courts and subject U.S. companies and residents to fishing expeditions" and the danger of "transform[ing] U.S. courts into beacons for harassment." Rolls-Royce Br. at

46-47; Boeing Br. at 39. However, Respondents' arguments reveal the true nature of their concerns: applying Section 1782 to arbitrations "would obliterate many advantages of arbitration" because "American discovery is world-famous for offering expensive, no-stone-unturned evidentiary production that few other forums provide." Rolls-Royce Br. at 48.

While much is made in Respondents' briefs about delays encountered when discovery is sought pursuant to Section 1782 applications, there is no acknowledgement that in the proceedings below this was exactly the problem of their own making. Virtually all of the time taken up by Section 1782 proceedings is devoted to efforts to resist the requested discovery and challenges to adverse rulings.

The policy question of whether the extent of discovery permitted under the Federal Rules of Civil Procedure is in need of reform that Respondents raise in their briefs is wholly unrelated to the issue before this Court in the present case. The only issue in this case is one of statutory interpretation. As such, resolution of this case requires a determination of the intent of Congress, as revealed by the language of the statute and, possibly, its legislative history.[10]

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10. To the extent the Court deems it advisable for district courts to apply a uniform set of considerations to requests for assistance pursuant to Section 1782 in order to minimize burden and ensure that the foreign or international tribunal has an opportunity to weigh in on the scope of discovery contemplated by such requests, it is respectfully submitted that the Court might consider augmenting the directions given to district courts that were formulated in *Intel,* which have become known as the *Intel* factors. *See* Wang Br. at 13-22; ICC Br. at 6-9.

## CONCLUSION

Given the absence of any express intention to exclude commercial arbitrations from "foreign or international tribunals" and the general understanding of those words at the time of passage, the artificial and ultimately unworkable exclusion imposed by the Seventh Circuit below should be rejected and Section 1782 should be enforced as written. Accordingly, Petitioner Servotronics, Inc. respectfully requests that the Court reverse the judgment of the Seventh Circuit and direct the district court to reinstate (1) its November 19, 2018 Minute Order granting Servotronics' *ex parte* application and (2) the subpoena issued on November 20, 2018 (JA 8a).

Respectfully submitted,

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