No. 21-401

In the Supreme Court of the United States

ZF AUTOMOTIVE US, INC., GERALD DEKKER, AND CHRISTOPHE MARNAT,

Petitioners,

v.

LUXSHARE, LTD.,

Respondent.

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

BRIEF FOR THE PETITIONERS

SEAN M. BERKOWITZ
LATHAM & WATKINS LLP
330 N. Wabash Avenue
Suite 2800
Chicago, IL 60611

ZACHARY L. ROWEN
JUSTIN S. KIRSCHNER
LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, NY 10020

ROMAN MARTINEZ
Counsel of Record
TYCE R. WALTERS
BRENT T. MURPHY
GRAHAM B. HAVILAND*
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
roman.martinez@lw.com

Counsel for Petitioners

QUESTION PRESENTED

Whether 28 U.S.C. § 1782(a), which permits litigants to invoke the authority of United States district courts to render assistance in gathering evidence for use in "a foreign or international tribunal," authorizes those courts to order discovery for use in a purely private foreign commercial arbitration proceeding conducted by private parties, and private arbitrators, pursuant to a private contract.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner ZF Automotive US Inc. hereby states that it is not a publicly traded company, it is ultimately owned by parent company ZF Friedrichshafen AG, and no publicly held corporation owns 10% or more of its stock, nor does any publicly held corporation own 10% or more of the stock of ZF Friedrichshafen AG.

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OPINIONS AND ORDERS BELOW

The district court's order granting respondent's *ex parte* application to take discovery under 28 U.S.C. § 1782 (Pet. App. 20a-21a) is not reported. The district court's order denying petitioners' motion to quash respondent's subpoenas (Pet. App. 1a-19a), is also not reported but is available at 2021 WL 2705477. The district court's order granting respondent's motion to compel production of discovery (Pet. App. 57a-69a) is not reported but is available at 2021 WL 3629899.

JURISDICTION

The district court's order denying the motion to quash and ordering discovery was entered on July 1, 2021. Pet. App. 1a-19a. Petitioners filed a notice of appeal on July 20, 2021. JA18. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The relevant portion of 28 U.S.C. § 1782 states:

> (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.

Additional statutory provisions are reproduced in the addendum to this brief.

INTRODUCTION

For well over 150 years, Congress has authorized federal district courts to provide discovery assistance to foreign courts, in order to further international comity and encourage reciprocal assistance. And for nearly a century, Congress has similarly extended discovery assistance to intergovernmental arbitral tribunals tasked with resolving disputes between sovereign states. In 1964, Congress united those two strands of international judicial assistance, amending 28 U.S.C. § 1782 to authorize discovery assistance for proceedings pending in a "foreign or international tribunal." At the time—and for decades afterward—the statute was universally understood to authorize assistance to legal proceedings operating under the auspices of one or more sovereign governments.

The question presented in this case is whether Section 1782's reference to "foreign or international tribunal[s]" also authorizes discovery assistance to private commercial arbitral panels convened abroad under private contracts to resolve private business disputes, without any governmental role whatsoever. The answer to that question is no. Like its predecessor provisions, Section 1782 remains limited to proceedings before governmental entities.

That conclusion flows from the ordinary meaning of the statutory text. When Congress enacted the modern version of Section 1782 in 1964, the primary definition of "tribunal" was a "court," "judicial assembly," or "forum of justice"—i.e., a government-created entity empowered to exercise sovereign power in resolving legal disputes. Congress confirmed the provision's government-centric focus by using the modifiers "foreign" and "international" to specify

which types of "tribunal" Section 1782 covers. Like the terms "foreign leader" or "foreign flag," each of which plainly refers to the leader or flag of a foreign government, a "foreign tribunal" necessarily means an adjudicative entity of a foreign government. And contemporary sources confirm that the term "international tribunal" refers to intergovernmental adjudicatory bodies established by international treaties or agreements. This interpretation of Section 1782 is confirmed by the surrounding statutory text, by other neighboring provisions, and by the standard legal meaning of "tribunal," "foreign tribunal," and "international tribunal" reflected in other statutes and decisions by this Court.

Section 1782's history reinforces that private foreign arbitrations are outside its purview. At the time Congress enacted the modern version of that provision in 1964, the Federal Arbitration Act (FAA) had been on the books for nearly 40 years. But although the FAA reflects a strong policy of promoting domestic private arbitration, its authorization of court-ordered discovery for use in such arbitration is narrow—far narrower than the discovery authorized by Section 1782. It is inconceivable that Congress would have wanted to grant foreign parties in foreign arbitrations greater procedural rights to obtain discovery from U.S. entities than is available to parties in domestic arbitrations under the FAA.

Indeed, the legislative history confirms that both Congress and the Commission on International Rules of Judicial Procedure (which drafted the key language) understood that Section 1782 would authorize discovery assistance to foreign courts and quasi-judicial agencies, and to intergovernmental arbitral tribunals—but *not* to private arbitral panels.

The House and Senate committee reports and other materials show that Congress used the word "tribunal" (instead of "court") to sweep in quasi-judicial government entities, such as investigating magistrates and administrative agencies performing adjudicatory functions. Despite enormous debate in the late 1950s and 1960s among academics, legislators, and government officials over whether and how to expand international judicial assistance, there is no hint that *anyone* believed that Section 1782 would authorize district courts to order discovery for use in private arbitrations.

Below, Respondent Luxshare, Ltd., persuaded the district court to order discovery for use in a private arbitration it plans to initiate in Germany. The district court ordered such discovery based on the Sixth Circuit's 2019 decision in *Abdul Latif Jameel Transportation Co. v. FedEx Corp. (In re Application to Obtain Discovery for Use in Foreign Proceedings)*, 939 F.3d 710 (6th Cir. 2019)—the first appellate decision conclusively interpreting Section 1782 to allow such discovery for private arbitrations. But *Abdul Latif* misinterpreted Section 1782's text, ignored the relevant history, and disregarded the harmful consequences for U.S. courts and businesses. The Sixth Circuit's interpretation of Section 1782 would flood federal courts with requests for discovery to be used in foreign proceedings with purported evidentiary connections to the United States. And the burdens of such discovery would fall directly—and exclusively—on U.S.-based individuals and businesses, with the benefits flowing disproportionately to their adversaries overseas.

There is no reason for this Court to bless these results, particularly when text, statutory context,

history, and policy all point in the opposite direction. The Court should hold that when Congress authorized discovery assistance to "foreign or international tribunal[s]," it did not implicitly extend such assistance to purely private commercial arbitrations abroad. The district court's discovery order should be reversed.

STATEMENT OF THE CASE

A. Legal Background

In 1964, Congress enacted the modern version of 28 U.S.C. § 1782 to consolidate and strengthen the process by which U.S. courts could provide assistance to foreign and international judicial proceedings. As relevant here, Section 1782(a) states that a district court may order a person residing or 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*." 28 U.S.C. § 1782(a) (emphasis added).

Section 1782(a) emerged from decades of discussion over how best to promote international comity by extending (and encouraging) reciprocal discovery assistance to foreign nations and intergovernmental bodies. Since the mid-nineteenth century, Congress had enacted multiple statutes authorizing such assistance to "court[s] of a foreign country."[1] And, since 1930, Congress had similarly authorized assistance to "international commission[s]

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[1] *See* Act of Mar. 2, 1855 (1855 Act), ch. 140, § 2, 10 Stat. 630; Act of Mar. 3, 1863, ch. 95, § 1, 12 Stat. 769; Act of Feb. 27, 1877, ch. 69, § 875, 19 Stat. 240, 241; Act of June 25, 1948 (1948 Act), ch. 646, § 1782, 62 Stat. 869, 949; Act of May 24, 1949 (1949 Act), ch. 139, § 93, 63 Stat. 89, 103.

or tribunal[s]" in which the United States was participating as a party.[2] By the late 1950s, these two strands of international judicial assistance—to foreign courts, and to interstate arbitral tribunals—were reflected in separate statutory provisions. *See* 28 U.S.C. § 1782 (1958) ("court in a foreign country"); 22 U.S.C. §§ 270-270g (1958) ("international tribunal or commission").

Around the same time, Congress faced calls from the Executive Branch and outside experts to establish a commission that would prepare draft legislation and international agreements to improve the engagement of the U.S. judicial system with litigation abroad. As Justice Department official Harry Jones wrote at the time, "United States courts neither receive adequate assistance from, nor dispense adequate aid to other nations," and "no other government permits such widespread confusion and such profound disregard for the concept of comity or international obligation in connection with judicial assistance between nations." Harry Leroy Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 Yale L.J. 515, 516, 538 (1953) (Jones).

In 1958, Congress responded with legislation creating the Commission on International Rules of Civil Procedure. Pub. L. No. 85-906, 72 Stat. 1743 (1958 Act). Congress charged the Commission with recommending improvements to "existing practices of judicial assistance and cooperation between the United States and foreign countries." *Id.* § 2, 72 Stat. at 1743.

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[2] *See* Act of July 3, 1930 (1930 Act), ch. 851 §§ 1-2, 46 Stat. 1005, 1005-06; Act of June 7, 1933, ch. 50, 48 Stat. 117, 117-18.

Five years later, the Commission submitted its final report. *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). As relevant here, the Commission proposed revamping the various statutory provisions that had previously governed assistance to foreign courts and international tribunals. *Id.* at 17-52. In their place, the Commission proposed rewriting 28 U.S.C. § 1782 to authorize district courts to provide discovery assistance, in appropriate circumstances, for use in a "foreign or international tribunal." *Id.* at 43-47.

The Commission explained that it used the phrase "foreign . . . tribunal" to ensure that assistance was "not confined to proceedings before conventional courts" but instead encompassed proceedings before "investigating magistrates," "foreign administrative tribunal[s]," and "quasi-judicial agenc[ies]." *Id.* at 45. And it cited an article by Hans Smit—a Columbia University professor serving as Reporter to the Commission—explaining that an "international tribunal" is one that "owes both its existence and its powers to an international agreement." *Id.* (citing Hans Smit, *Assistance Rendered by the United States in Proceedings before International Tribunals*, 62 Colum. L. Rev. 1264, 1267 (1962) (Smit 1962)).

In 1964, Congress unanimously enacted the legislation as proposed by the Rules Commission. Pub. L. No. 88-619, § 9, 78 Stat. 995, 997 (1964 Act). The 1964 Act substantially revised Section 1782, now captioned "Assistance to foreign and international tribunals and to litigants before such tribunals," to permit aid to "foreign and international tribunals." And the House and

Senate reports each incorporated—verbatim—the Commission's explanation of these changes. *See* S. Rep. No. 1580, at 7-8 (1964) (Senate Report); H.R. Rep. No. 1052, at 9 (1963) (House Report); *see also Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 249 (2004).

B. The Parties' Agreement To Settle Disputes By Private DIS Arbitration

Petitioner ZF US is a Michigan-based automotive parts manufacturer and indirect subsidiary of ZF Friedrichshafen AG (ZF AG), a German corporation headquartered in Germany. JA94-95 (¶¶ 2-5). Petitioner Gerald Dekker was formerly a Vice President at ZF US. JA95 (¶ 6). Petitioner Christophe Marnat is Chief Operations Officer of ZF US. *Id.*

In August 2017, after several months of negotiations and due diligence, ZF US sold its Global Body Control Systems and Radio Frequency Electronics business unit to Respondent Luxshare, a Chinese-owned limited liability company based in Hong Kong. JA95-97 (¶¶ 8 & 11). The terms of the sale are contained in a Master Purchase Agreement (MPA). *See* JA92-93. Section 20.10.2 of the MPA provides that all disputes:

> shall be exclusively and finally settled by three (3) arbitrators in accordance with the Arbitration Rules of the German Institution of Arbitration e.V. (DIS), including the Supplementary Rules for Expedited Proceedings, . . . without recourse to the ordinary courts of law.

JA93.

The German Arbitration Institute, or "DIS," is a registered private membership association, based in Berlin. *See* DIS Statutes § 2.[3] It is funded entirely by private grants, membership contributions, fees from conducting arbitral proceedings, and revenue generated by its events and publications. *Id.* § 5. "The aims and objectives of [DIS] are to promote arbitration," and it carries that out by promulgating arbitration rules and supporting and administering arbitral proceedings. *Id.* § 1(1). DIS membership is open to "[a]ny natural or legal person, who is prepared and undertakes to promote" these objectives. *Id.* § 3. DIS states that it will "carry out its tasks in close contact with the organizations of the business sector and academic institutions." *Id.* § 1(2).

Apart from mandating "equal treatment" and an "effective and fair" hearing, German law does not set rules for the conduct of DIS-governed or other private arbitrations. *See* German Code of Civil Procedure (GCCP) § 1042. Instead, such arbitrations are governed by DIS's own privately determined rules. *See* 2018 DIS Arbitration Rules, art. 1.1 (DIS Rules).[4]

The DIS Rules establish that the parties generally control the size and composition of the arbitral panel. *See id.* art. 10.1, 12.1, 12.2. The arbitrators are paid by the parties through DIS. *Id.* art. 35.

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[3] The DIS Statutes are adopted by the non-governmental DIS General Assembly and govern DIS's operations. DIS Statutes §§ 11-1(e), (5). They are reproduced, in English translation, at https://www.disarb.org/en/about-us/organisation/statutes (last visited Jan. 19, 2022).

[4] The DIS Rules are available at https://www.disarb.org/en/tools-for-dis-proceedings/dis-rules (last visited Jan. 19, 2022).

The DIS Rules give the arbitral panel full control over the evidentiary proceedings, empowering it to "appoint experts . . . and order any party to produce or make available any documents or electronically stored data." *Id.* art. 28.2. Unlike German judicial proceedings, DIS arbitrations are generally confidential. *Id.* art. 44. The expedited DIS procedures agreed to in the MPA direct the panel to issue a final award within six months from the conclusion of the case management conference, if possible. *Id.*, Annex 4.[5]

C. The Section 1782 Proceedings

1. On October 16, 2020, more than two years after the transaction's closing, Luxshare filed an *ex parte* application in the Eastern District of Michigan seeking discovery from petitioners under Section 1782. Luxshare asserted that it planned to initiate a DIS arbitration against ZF US pursuant to the MPA, charging that ZF US fraudulently concealed information during the negotiation and diligence process. JA37-38. Luxshare argued that the district court had authority to order discovery under Section 1782 because the forthcoming DIS arbitration qualifies as a "proceeding[] before a foreign tribunal." JA28.

Six days later, the district court granted Luxshare's application in a one-page order. *See* Pet.

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[5] German law does not provide for judicial review of the merits of private arbitral decisions. Rather, a German court may "reverse" an arbitral award only under limited circumstances, such as when an arbitral party lacked capacity to conclude an arbitration agreement, a party was not properly notified of the arbitration, or German law prohibits arbitration of the dispute. *See* GCCP § 1059.

App. 20a-21a. Luxshare served petitioners with subpoenas the next day. Pet. App. 3a.

Petitioners moved to quash the subpoenas on various grounds, including that the application should have been denied in its entirety. D.Ct. Dkt. No. 6. As relevant here, petitioners argued that the DIS arbitral panel was not a "foreign or international tribunal" within the meaning of Section 1782. *Id.* at 9-11 & n.4. Petitioners recognized that the Sixth Circuit has held that a private arbitral body qualifies as a Section 1782 tribunal. *See Abdul Latif*, 939 F.3d at 717-31. But petitioners also noted there was a circuit split on this issue. On March 22, 2021, this Court granted certiorari to resolve that split in *Servotronics, Inc. v. Rolls-Royce PLC,* No. 20-794.

2. On May 27, 2021, the magistrate judge partially granted and partially denied petitioners' motion to quash. *See* Pet. App. 22a-56a. Specifically, it ordered ZF US and Mr. Marnat to respond to the document subpoenas, subject to certain limitations, and ordered either Mr. Marnat or Mr. Dekker to sit for a deposition. *Id.* at 49a-56a. The magistrate judge noted this Court's grant of certiorari in *Servotronics*, but refused to stay discovery pending the resolution of that case. *Id.* at 48a. On July 1, 2021, the district court denied petitioners' subsequent objections to the magistrate judge's order, confirming that discovery should proceed. *Id.* at 1a-19a.

3. Petitioners appealed to the Sixth Circuit, and shortly thereafter moved the district court to stay the discovery order pending resolution of the appeal. JA17. In response, Luxshare moved the district court to compel the production of certain documents. *Id.*

While those motions remained pending in the district court, petitioners also moved the Sixth Circuit to stay the district court's discovery order. JA1. In August 2021, the district court denied petitioners' motion for a stay pending appeal, and simultaneously granted Luxshare's motion to compel. Pet. App. 57a-69a. But the district court delayed the deadline to produce the discovery until 14 days after any denial by the Sixth Circuit of petitioner's stay motion in that court. *Id.* at 69a.

4. On September 8, 2021, the *Servotronics* petitioners informed this Court that they planned to stipulate to dismissal of that case. Two days later, petitioners here filed a petition for a writ of certiorari before judgment arguing that the Court should grant review here to resolve the Section 1782 issue that it had planned to address in *Servotronics*.

On October 13, 2021, the Sixth Circuit denied petitioners' pending request for a stay of the district court's discovery order. *See* JA5. Petitioners accordingly filed an application for a stay to Justice Kavanaugh, arguing that this Court was likely to grant certiorari and reverse that order.

On October 27, 2021, this Court granted the stay. And on December 10, 2021, the Court granted the petition for certiorari. Its order consolidated this case with *AlixPartners, LLP v. Fund for Protection of Investors' Rights in Foreign States*, No. 21-518, which raises the related (but distinct) question whether Section 1782 applies to investor-state arbitrations pursuant to international treaties.

SUMMARY OF ARGUMENT

Section 1782 authorizes district courts to render discovery assistance for use in "a foreign or

international tribunal." That provision does not authorize discovery for use in purely private commercial arbitrations conducted by private parties and private arbitrators pursuant to a private contract. The district court's discovery order must be reversed.

I. A commercial arbitration falls within the scope of Section 1782 only if that proceeding takes place before a "foreign tribunal" or an "international tribunal." Luxshare argues that the DIS arbitral panel here qualifies as a "foreign tribunal," but the statutory text forecloses that result.

The ordinary meaning of "foreign tribunal" encompasses only governmental adjudicative or quasi-adjudicative bodies. The primary dictionary definition of "tribunal" indicates as much, and the entire phrase makes that meaning abundantly clear: A "foreign tribunal" is the tribunal of a foreign government, just as a "foreign leader" is the leader of a foreign government. That understanding is confirmed by contemporary statutory and judicial usage (including every pre-1964 use by this Court of the term "foreign tribunal"), as well as by the contemporary usage of academics debating the very issues that were addressed in the 1964 Act.

The broader statutory context confirms that Section 1782 covers governmental adjudicators—not purely private commercial arbitration panels. Section 1782(a) itself contemplates that a "foreign tribunal" applies "the practice and procedure of [a] foreign country," which private arbitral panels do not. Section 1981 uses the terms "foreign or international tribunal" and "tribunal" in ways that can refer only to governmental tribunals. And Section 1696 contemplates that a "foreign or international

tribunal" will issue "judgment[s], decree[s], or order[s]." 28 U.S.C. § 1696(a). Congress uses these terms to refer to decisions by courts and other governmental adjudicators, preferring "arbitral awards" to describe the decisions of private arbitrators.

History tells the same story. Congress enacted Section 1782 to promote international comity by providing discovery assistance to foreign governments and to interstate arbitral tribunals. The 1958 Act establishing the Rules Commission, the Commission's proposed legislation and 1963 Report, and the 1964 Act's direct legislative history all show that Congress used the phrase "foreign tribunal"—instead of "foreign court"—in order to capture a somewhat broader range of *governmental* investigative and adjudicatory entities, such as investigating magistrates and administrative agencies. None of the historical materials contains any hint of an intent to expand discovery assistance to the then-novel category of private commercial arbitrations.

Such intent would have been particularly unlikely given the broader historical and legal backdrop against which Congress legislated. Almost forty years earlier, Congress had enacted the FAA to support private *domestic* arbitration—yet it refused to give arbitral parties recourse to the sorts of broad discovery later authorized by Section 1782. There is no reason to believe that Congress would have sought to dramatically privilege private arbitrations abroad over domestic ones. Indeed, in 1964, the U.S. government was still highly skeptical of private commercial arbitration abroad, as reflected in its refusal to bring the United States into the New York

Convention authorizing domestic enforcement of foreign arbitral awards. Congress would not have authorized wide-ranging discovery for use in such foreign arbitrations.

Text, structure, and history resolve this case. But policy considerations also weigh strongly against extending Section 1782 to foreign private arbitrations. Doing so would flood the U.S. judicial system with burdensome Section 1782 requests, forcing district courts to wade into foreign private disputes often lacking any close connection to the United States. It would unfairly privilege entities abroad over U.S.-based companies, allowing the former to seek broad discovery in the United States without equivalent benefits to the latter. And it would undermine the core advantages of arbitration, betraying its promise of quicker and more streamlined dispute resolution and upsetting the terms of the parties' contractual bargain. Congress intended none of this.

II. *AlixPartners* is different from this case. This case turns on whether a purely private foreign commercial arbitration constitutes a "foreign tribunal" under Section 1782. By contrast, *AlixPartners* addresses whether an investor-state arbitration conducted pursuant to an international treaty constitutes an "international tribunal."

Because Section 1782 authorizes discovery for use only in *governmental* proceedings, the discovery requests should fail in both cases. But any distinctions between this case and *AlixPartners* underscore the entirely private and non-governmental aspects of the DIS arbitral proceeding at issue here. Petitioners should prevail in this case no matter how the Court decides *AlixPartners*.

ARGUMENT

I. SECTION 1782 DOES NOT APPLY TO PRIVATE COMMERCIAL ARBITRATIONS

Section 1782 authorizes federal district courts to order a person residing in the district to produce discovery "for use in a proceeding in a foreign or international tribunal." 28 U.S.C. § 1782(a). Text, structure, history, and policy all confirm that this provision does not authorize discovery assistance to private arbitrations. Rather, a "foreign tribunal" is an adjudicative or quasi-adjudicative body of a foreign government, and an "international tribunal" is an intergovernmental adjudicatory body created by an international treaty or agreement.

Below, Luxshare sought Section 1782 discovery exclusively on the grounds that the DIS arbitral panel contemplated here qualifies as a "foreign tribunal," without any suggestion that it might also qualify as an "international tribunal." JA28; *see also* JA45; No. 21A80 Stay Opp'n 1, 3-4, 8-10, 18, 21-22, 24 n.15, 27-30, 32. In fact, it counts as neither. The DIS arbitration is authorized solely by a private contract, between two private companies, under the rules of a private commercial arbitration organization, and with arbitrators who are private citizens and are selected and paid by the parties themselves. Section 1782 discovery is not available, and the decision below should therefore be reversed.

A. The Ordinary Meaning Of "Foreign Or International Tribunal" Does Not Encompass Private Arbitration Panels

The "proper starting point" for determining Section 1782's meaning "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 phrase is not defined in the statute, the Court must "ask what that term's 'ordinary, contemporary, common meaning' was when Congress enacted" the statutory language in 1964. *Id.* at 2362 (citation omitted). Here, Section 1782 authorizes discovery for use in a "foreign tribunal" or "international tribunal." Neither phrase encompasses arbitrations established by private contracts and involving only private parties and non-state adjudicators.

1. A Private Commercial Arbitration Panel Is Not A "Foreign Tribunal"

Luxshare is wrong to argue that the DIS tribunal here qualifies as a "foreign tribunal" under Section 1782(a). JA28, 45. Dictionary definitions, ordinary usage, and legal usage all establish that a "foreign tribunal" is a tribunal of a foreign government.

a. When Section 1782 became law in 1964, the primary dictionary definitions of the word "tribunal" referred exclusively to courts and similar governmental bodies. *See Black's Law Dictionary* 1677 (4th ed. 1951) ("[t]he seat of a judge," "[t]he whole body of judges who compose a jurisdiction; a judicial court"); *Webster's Third New International Dictionary of the English Language* 2441 (1961) (*Webster's Third*) ("the seat of a judge"; "the bench on which a judge and his associates sit for administering justice"; "a court or forum of justice"); *Oxford English Dictionary* 341 (1933, reprinted 1961) ("[a] court of justice" or "a judicial assembly"); *American Heritage Dictionary of the English Language* 736 (paperback ed. 1970) ("[a] seat or court of justice"). And while

"foreign" may in some circumstances refer simply to where something is situated, *see Webster's Third* 889 ("situated outside a place or country"), the lead legal definitions of "foreign" were something "[b]elonging to another nation or country[, or] belonging or attached to another jurisdiction." *Black's Law Dictionary* 775.

Putting these definitions together, a "foreign tribunal" under Section 1782 most naturally refers to a court or other governmental adjudicative or quasi-adjudicative body convened to render justice. It does not encompass a private arbitral panel whose authority derives solely from the contractual agreement of private parties rather than any government, and which is not composed of government adjudicators.

The primary definitions of "foreign" and "tribunal" thus exclude the possibility that a private arbitration counts as a proceeding before a "foreign tribunal." To be sure, there were also other, arguably broader dictionary definitions of "tribunal" in circulation that lacked a government connotation. For example, *Webster's Third* offered an alternative definition of "tribunal" as any "person or body of persons having authority to hear and decide disputes so as to bind the disputants." *Webster's Third* 2441. But that expansive definition is obviously too broad: It ranges far beyond courts and arbitration panels and would cover an indefinite array of non-governmental adjudicatory bodies, including such entities as Oxford University's Conference of Colleges Appeals Tribunal (for student discipline), Facebook's Oversight Board (for social media takedown decisions and free speech matters), the Disciplinary Commission of the non-governmental International Olympic Committee (for

athlete eligibility and other matters), and countless others.

The secondary definition plainly doesn't work here. No one thinks Section 1782 authorizes federal district courts to order intrusive discovery for use before any entity that happens to resolve disputes and is located outside the United States. Rather, Congress used "tribunal" in its primary sense—to refer to a *governmental* adjudicatory body.

b. Section 1782's focus on governmental adjudicators is confirmed by its use of the word "tribunal" as part of the unified phrase "foreign tribunal." This Court has often recognized that "two words together may assume a more particular meaning than those words in isolation." *FCC v. AT&T Inc.*, 562 U.S. 397, 406 (2011) (giving examples); *see also Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). When construing such a phrase, courts should not merely determine the definition of each word and then mechanically glue those definitions together, but should instead consider the phrase as a unified whole.

Here, the phrase "foreign tribunal" is more than just the sum of its parts. When the word "foreign" modifies a noun with potential governmental or sovereign connotations—like "tribunal"—it typically indicates that the noun belongs to the sovereign entity. In such circumstances, the word "foreign" does not mean "situated outside [the United States]," *Webster's Third* 889, but rather belonging to the government of another nation. *See Black's Law Dictionary* 775.

Consider a straightforward example—the phrase "foreign leader." Taking the literal meaning of each

word individually and in isolation, one might argue that a "foreign leader" is simply "a leader who is foreign." But that is not how ordinary people use the phrase. Rather, a "foreign leader" is the leader of a foreign nation. In ordinary speech, the Prime Minister of England is a "foreign leader," but the CEO of British Petroleum—or the captain of the Manchester United Football Club—is not.

The same is true of other common formulations, like "foreign official," "foreign flag," and "foreign law." Just as with "foreign leader," these phrases almost invariably refer to officials, flags, and laws *of foreign countries*. *See Black's Law Dictionary* 776 (defining "foreign laws" as "[t]he laws of a foreign country"). They do not refer to Canadian hockey officials, the official flag of the Cannes Film Festival, or Kosher dietary law privately observed in Russia. And "foreign country" can refer to England, but not to the English countryside.

Congress used the modifier "foreign" in this same sense elsewhere in the 1964 Act, alongside its revision of Section 1782. In a new statutory provision entitled "Foreign official documents," Congress specified that "An official record or document *of a foreign country* may be evidenced by a copy, summary, or excerpt authenticated as provided in the Federal Rules of Civil Procedure." 1964 Act, § 5(a), 78 Stat. at 996 (codified at 28 U.S.C. § 1741) (emphasis added). Congress thus equated "Foreign official document" to an "official or record or document *of a foreign country*." The term does *not* include every official document that originates outside the United States: Foreign company business records and foreign university academic transcripts do not qualify. Rather, just as with the other examples above, the adjective "foreign"

signifies that the nouns that follow take on their *governmental* meaning.

So too in Section 1782(a). Taken as a whole, the phrase "foreign tribunal" refers to the tribunal of a foreign country. That would include all ordinary foreign courts, as well as other foreign governmental entities such as a French examining magistrate (juge d'instruction), the Japanese Patent Office, and the Korean Free Trade Commission, among countless others. But a private arbitral body does not count.

c. The government-centric understanding of "foreign tribunal" set forth above is fully consistent with how Congress, this Court, and legal commentators regularly used those terms in the run-up to the 1964 Act. *See Peter v. Nantkwest, Inc.*, 140 S. Ct. 365, 373 (2019) (noting that "statutory usage" illuminates ordinary meaning).

Before 1964, in every instance in which Congress had previously used the term "tribunal," it had referred *only* to courts, equivalent governmental bodies, or intergovernmental adjudicative bodies.[6] That practice continued after 1964. For example,

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[6] *See, e.g.*, Pub. L. No. 87-187, 75 Stat. 415, 415 (1961) (codified at 28 U.S.C. § 2414) (authorizing the United States to pay "final judgments rendered by a State or foreign court or tribunal against the United States"); Pub. L. No. 75-696, § 2, 52 Stat. 840, 842-43 (1938) (authorizing bankruptcy receivers to bring "any pending suit or proceeding . . . before any judicial, legislative, or administrative tribunal in any jurisdiction"); 1930 Act, §§ 1-2, 46 Stat. at 1005-06 (codified at 22 U.S.C. §§ 270-270g (1958)) (judicial assistance to "international tribunal or commission"); *see also* 1964 Act § 8(a), 78 Stat. at 996-97 (codified at 28 U.S.C. § 1781); *accord* U.S. Const. art. I, § 8, cl. 9 (giving Congress the authority to "constitute Tribunals inferior to the supreme Court").

Congress has now defined "foreign courts" to encompass "a court, administrative body, or other *tribunal* of a foreign country." 28 U.S.C. § 4101(3) (emphasis added); 19 U.S.C. § 4452(f)(3).[7]

By contrast, Congress has regularly described purely private arbitrations—in legislation and in treaties—as "arbitration proceedings" before "arbitrators." Most notably, the FAA does not use the word "tribunal" to refer to private arbitrations, but instead refers to proceedings before "arbitrators" or "umpires." *See* 9 U.S.C. §§ 7, 202, 207.[8]

Contemporaneous judicial usage points in the same direction. By 1964, the term "foreign tribunal" had consistently been used by this Court and others, in a multitude of cases, as a synonym for "tribunal of a foreign country" or "tribunal of a foreign sovereign."

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

[8] In three statutes, Congress has used the broader phrase "arbitral tribunal," but *not* to refer to private commercial arbitrations established by private contract and lacking any ties to government authority. *See, e.g.*, 22 U.S.C. § 1650a(a) (discussing award of an "arbitral tribunal" constituted under Convention on the Settlement of Investment Disputes); 22 U.S.C. § 290k-11 (same for awards resolving disputes arising under treaty provisions involving Multilateral Investment Guarantee Agency); 16 U.S.C. § 973n (discussing U.S. government selection of arbitrator for "arbitral tribunal" under South Pacific Tuna Treaty).

For example, this Court's *forum non conveniens* decisions instructed lower courts to consider whether "the litigation can more appropriately be conducted in a foreign tribunal." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947) (citation omitted).[9] And the Court had used the phrase "arbitral tribunal" to refer to international tribunals established by sovereign governments.[10]

Legal scholars and government officials used the key terms the same way. For example, the 1939 *Draft Convention on Judicial Assistance* (the Harvard Convention), which served as a major influence on the creation and work of the Rules Commission, *infra* at 33-34, stated that "[t]he term 'tribunal' as here used includes all courts and a limited number of administrative agencies," and "must be an authority created by the State or a political subdivision." 33 Am. J. Int'l L. Supp. 11, 36 (1939). The Convention

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[9] *See also, e.g., Canada Malting Co. v. Patterson S.S.*, 285 U.S. 413, 423 (1932); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); *Hilton v. Guyot*, 159 U.S. 113, 161(1895); *Moran v. Sturges*, 154 U.S. 256, 269 (1894); *Aspden v. Nixon*, 45 U.S. 467, 491 (1846); *In re Letters Rogatory out of First Civ. Ct. of City of Mexico*, 261 Fed. 652, 653 (S.D.N.Y. 1919) (Hand, J.). The term "foreign tribunal" was also regularly used in the context of personal jurisdiction, to refer to courts of another state. *See, e.g., Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (describing the "burden of defending in a foreign tribunal"). This is consistent with petitioners' core point that a "foreign tribunal" is a *governmental* body.

[10] *See Louisiana v. Mississippi*, 202 U.S. 1, 50-51 (1906) (using "arbitral tribunals" to refer to resolution of dispute between United States and Great Britain before the German Emperor); *N. Am. Com. Co. v. United States*, 171 U.S. 110, 133 (1898) (using "arbitral tribunal" to refer to resolution of dispute between United States and Great Britain).

further noted that the term *excluded* "a tribunal of arbitration set up by private parties to adjudicate controversies between them . . . unless the law of the State declares it to be a judicial authority of the State." *Id.*

Similarly, in 1953 Justice Department official Harry Jones (who later served as Director of the Rules Commission) repeatedly used the terms "tribunal" and "foreign tribunal" the same way—to refer exclusively to governmental bodies—when urging amendments to Section 1782 to improve "aid rendered by one nation to another in support of judicial or quasi-judicial proceedings in the recipient country's tribunals." Jones at 515, 516, 530, 533, 539, 540, 550, 552. This usage—proposing the very reforms addressed by the 1964 Act—confirms that only governmental bodies were understood to be "foreign tribunals."

2. A Private Commercial Arbitration Panel Is Not An "International Tribunal"

Luxshare has never asserted that the forthcoming DIS arbitration is a proceeding before an "*international* tribunal." *See supra* at 17. That is for good reason: Section 1782's phrase "international tribunal" refers only to intergovernmental adjudicatory bodies established by international agreements.

Professor Hans Smit—who served as Reporter to the Rules Commission—explained this point in an influential 1962 article proposing revisions to the statutes then governing assistance to "international tribunal[s]." *See* Smit 1962 at 1267-75 (discussing 22 U.S.C. §§ 270-270g). He noted that an "international tribunal" is one that "owes both its existence and its

powers to an international agreement." *Id.* at 1267. That phrase thus encompasses such entities as the Mixed Claims Commission that resolved disputes between the United States and Germany in the wake of the First World War, the International Court of Justice, the European Court of Human Rights, and the Dispute Settlement Body of the World Trade Organization.

Professor Smit's 1962 understanding of "international tribunal" is consistent with contemporary dictionary definitions, as well as with usage in other statutes, judicial opinions, and the 1938 Harvard Convention.[11] Moreover, the Rules Commission, House Report, and Senate Report all expressly invoked Professor Smit's analysis when explaining Section 1782's discovery assistance to "international tribunal[s]." *See* 1963 Report at 45; House Report at 9; Senate Report at 8.

In short, there is no colorable argument that Section 1782's reference to "international tribunal" sweeps in arbitral panels resolving private disputes, between private parties, pursuant to private

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[11] *See, e.g.*, *Webster's Third* 1181 (defining "international" as "relating to the intercourse of nations" or "participated in by two more nations"); 5 U.S.C. § 552b(c)(10) (separately listing actions "in a foreign court or international tribunal, or an arbitration"); 22 U.S.C. § 2710(d)(1) (establishing a litigation fund for "the expenses of the [State] Department related to preparing or prosecuting a proceeding before an international tribunal"); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 422-23 (1964); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 178 n.4 (1951) (Douglas, J., concurring); Harvard Convention, 33 Am. J. Int'l L. Supp. at 15; *see generally Nat'l Broad. Co. v. Bear Stearns & Co.* ("*NBC*"), 165 F.3d 184, 189 (2d Cir. 1999) (tracing statutory usage of "international tribunal").

contracts—with no government or treaty involvement whatsoever. DIS arbitrations do not qualify.

B. The Broader Statutory Context Confirms That Section 1782 Does Not Cover Private Arbitrations

This Court has often emphasized that statutory text "cannot be construed in a vacuum" and that the "words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019) (citation omitted). Here, both the text surrounding Section 1782(a) and other nearby provisions of the 1964 Act reinforce that a "foreign or international tribunal" must be a governmental adjudicator or quasi-adjudicative entity—not a purely private arbitration.

1. Section 1782(a)'s broader language is consistent *only* with petitioners' reading of the statute, and should be decisive here. Immediately after authorizing district courts to issue discovery orders for use in a "foreign or international tribunal" and explaining how requests for such discovery can be made, the provision goes on to state that the district court's order granting the discovery "may prescribe the practice and procedure, which may be in whole or in part the practice and procedure of [1] the *foreign country* or [2] the *international tribunal*," for obtaining the discoverable testimony or document. 28 U.S.C. § 1782(a) (emphasis added).

These references to the procedure of the "foreign country" or "international tribunal" neatly parallel the operative language at issue here—which appears just a few lines above—authorizing grants of discovery for use in a "[1] foreign or [2] international

tribunal." *Id.* Congress plainly understood that a "foreign tribunal" would apply "the practice and procedure of the foreign country," whereas an international tribunal would apply "the practice and procedure of . . . [that] international tribunal." *Id.* Each category of tribunal corresponds to a default procedure. *See Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 695 (7th Cir. 2020).

This language confirms that Section 1782's reference to a "foreign tribunal" applies to government bodies—and *not* to private commercial arbitration panels. After all, foreign courts, quasi-judicial agencies, and other governmental bodies apply "the practice and procedure" of foreign countries. But private commercial arbitral panels do not—they instead apply whatever rules the parties' agreement specifies. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010); *see supra* at 9 (noting parties' agreement to arbitrate under privately-adopted DIS rules). Congress's failure to identify a default set of procedures for private arbitrations reinforces that such arbitrations fall outside Section 1782's scope.

2. Section 1781—also promulgated in modern form in the 1964 Act—further confirms that only governmental bodies count as "foreign or international tribunal[s]" under Section 1782. *See* 28 U.S.C. § 1781.

Section 1781 authorizes the State Department to serve as middleman with respect to letters rogatory and other requests for international judicial assistance. The provision contains two parallel subsections indicating that the Department can play this role regardless of whether the request originates with a foreign, international, or domestic body. First,

Section 1781(a)(1) states that the Department may (1) "receive a letter rogatory issued, or request made, by a *foreign or international tribunal*"; (2) "transmit it to the *tribunal*, officer, or agency *in the United States* to whom it is addressed"; and (3) "receive and return [the request] after execution" (emphasis added). Second, Section 1781(a)(2) states that the Department may (1) "receive a letter rogatory issued, or request made, by a *tribunal in the United States*"; (2) "transmit it to the *foreign or international tribunal*, officer, or agency to whom it is addressed"; and (3) "receive and return [the request] after execution" (emphasis added).

Section 1781(a)(1) and (2)'s italicized phrases above—"foreign or international tribunal" and "tribunal in the United States"—necessarily refer only to *government* tribunals. After all, letters rogatory "are matters of comity between governments," *Servotronics,* 975 F.3d at 695—and the State Department is responsible for the U.S. government's relationship with other governments. It would make no sense for the Department to serve as an intermediary between one or more purely private non-governmental entities.

Congress's use of "foreign or international tribunal" and "tribunal" in Section 1781(a) sheds considerable light on what it meant by those exact same terms in Section 1782. "[I]t is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Pereira v. Sessions*, 138 S. Ct. 2105, 2115 (2018) (citation omitted). And this inference is particularly strong here, since "Section 1782 works in tandem with and supplements [Section] 1781." *Servotronics*, 975 F.3d at 691. In

both places, Congress was referring only to government tribunals—*not* to purely private arbitral panels. *Id.*

3. Section 1696 also confirms petitioners' interpretation of "foreign or international tribunal." *See* 28 U.S.C. § 1696. That provision was also created by the 1964 Act; it governs procedures by which U.S. district courts may (upon request) order service of documents issued in connection with proceedings in "a foreign or international tribunal." *Id.* § 1696(a). Congress wanted to make clear, however, that merely ordering such service would not automatically signify endorsement of that tribunal's adjudication of the dispute. Section 1696(a) thus concludes with a statement that "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*" (emphasis added).

Congress's use of the italicized phrase "judgment, decree, or order" to refer to the final decision of a "foreign or international tribunal" again confirms that the latter phrase excludes private arbitral panels. In the U.S. Code, those words signify decisions from courts or other quasi-judicial governmental bodies. By contrast, the FAA repeatedly refers to decisions by private arbitral panels as "awards"—and never as "judgments," "decrees," or "orders" (each of which it reserves for judicial decisions).[12]

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[12] *See, e.g.*, 9 U.S.C. § 9 (discussing arbitral "award," as distinct from court "judgment" or "order" addressing that award); *id.* §§ 13, 15 (same); *see also id.* § 8 (arbitral "award" and

If Congress had understood private arbitrations to qualify as "foreign or international tribunal[s]," it would have included "awards" in the caveat at the end of Section 1696(a). But it didn't. In both Sections 1696(a) and 1782—and indeed, throughout the 1964 Act—Congress understood that key phrase to refer only to governmental tribunals. *See Servotronics*, 975 F.3d at 695.

C. History Confirms That Section 1782 Does Not Authorize Discovery For Use In Private Commercial Arbitrations

Section 1782's text and structure establish that the provision does not authorize discovery assistance to private commercial arbitrations. The statute's history reinforces that conclusion. Section 1782's antecedents, its direct statutory history, the broader context in which it was enacted, and decades of post-enactment practice all point in the same direction: A private arbitral panel is not a "foreign or international tribunal" under the statute.

1. Congress And The Rules Commission Always Understood Section 1782 And Its Predecessors To Allow Assistance To Government-Created Adjudicative Bodies

The 165-year history of Section 1782 and its statutory antecedents makes clear that Congress was consistently focused on affording comity to foreign nations, as well as to intergovernmental bodies that resolved disputes between them. There is no indication whatsoever that the Congress of 1964

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court "decree"); *id.* §§ 10-12, 16, 207 (arbitral "award" and court "order"); *id.* §§ 203, 205 (arbitral "award").

would have understood itself to be extending the assistance of U.S. courts to private commercial arbitrations.

a. The 1964 amendments to Section 1782 unified two distinct historical strands of international assistance. *Supra* at 6-9. The first strand—eventually reflected in Section 1782(a)'s authorization of assistance to "foreign tribunal[s]"—emerged from a century-old tradition of assistance to the government-established courts of foreign countries. *Id.* at 3, 6. In 1855, Attorney General Cushing announced that federal courts lacked authority to execute letters rogatory received from a foreign court—notwithstanding the "execution of such commissions being a proper act of national comity." Rogatory Commissions, 7 Op. Att'y Gen. 56, 56 (1855). Congress responded days later, with a statute authorizing federal courts to provide judicial assistance upon receipt of a letter rogatory "from any court of a foreign country." *See* 1855 Act, § 2, 10 Stat. at 630.

In 1948, Congress updated the statutory framework for such judicial assistance to foreign courts by enacting the initial version of Section 1782, which authorized discovery assistance to "any civil action pending in any court in a foreign country with which the United States is at peace." 1948 Act, § 1782, 62 Stat. at 949. The following year, Congress broadened that authorization, substituting "judicial proceeding" for "civil action." 1949 Act, § 93, 63 Stat. at 103. Still, Section 1782 remained applicable exclusively to "court[s]" in "foreign countr[ies]."

The second strand of relevant international assistance—eventually reflected in Section 1782(a)'s authorization of discovery for use in "international

tribunal[s]"—began with a 1930 statute intended to allow discovery for use in intergovernmental arbitral tribunals and claims commissions regularly constituted to resolve disputes between countries. 1930 Act, §§ 1-2, 46 Stat. at 1005-06. Congress eventually codified that assistance in Title 22 of the United States Code, titled "Foreign Relations and Intercourse." Before the relevant 1964 amendments to Section 1782, these provisions allowed an "agent of the United States before any international tribunal or commission . . . in which the United States participates as a party" to "apply to the United States district court for the district in which such witness or witnesses reside or may be found" to compel testimony or production of documents. 22 U.S.C. § 270d (1958).

b. Against the backdrop of these statutes, government officials and academics promoted more sweeping reforms of international judicial assistance that would unite both strands discussed above. In 1939, a group of American scholars and officials (including Justice Department official Harry Jones) prepared the Draft Harvard Convention on International Judicial Assistance, 33 Am. J. Int'l L. Supp. 11; *see generally* Bruno A. Ristau, *Overview of International Judicial Assistance*, 18 Int'l Lawyer 525, 527 (1984).

The Harvard Convention proposed a regime of reciprocal multilateral assistance. It provided for judicial assistance to a "tribunal of a State," defined as "a judicial authority, or an administrative authority while engaged in the exercise of judicial or quasi-judicial functions, created by a State or by a political subdivision thereof." Harvard Convention, 33 Am. J. Int'l L. Supp. at 15. The Convention

similarly regulated judicial assistance to an "international tribunal," which it defined as "a tribunal created by the agreement of two or more States for the adjudication or settlement of a controversy between States." *Id.*

After World War II, the American Bar Association and the Executive Branch continued to push broader reforms to foreign judicial assistance. 1963 Report at 76. In 1952, Attorney General McGranery cited the Harvard Convention in calling for the creation of a Rules Commission to propose draft legislation and treaties addressing the topic. *See* Report of James P. McGranery, *reprinted in* Report of the Judicial Conference of the United States at 38-41 (1952).

And in an influential article, Justice Department official Harry Jones made the case for reform on inter-governmental comity grounds. *See* Jones at 538-43. Jones lamented that "United States courts neither receive adequate assistance from, nor dispense, adequate aid to other nations." *Id.* at 516. He further emphasized that "no other government permits such widespread confusion and such profound disregard for the concept of comity or international obligation in connection with judicial assistance between nations." *Id.* at 538.

c. In 1958, Congress heeded these calls and enacted legislation creating the Rules Commission and charging it with recommending improvements to "existing practices of judicial assistance and cooperation *between the United States and foreign countries*." 1958 Act, § 2, 72 Stat. at 1743 (emphasis added). The 1958 Act itself emphasized Congress's goal of providing inter-governmental assistance to the judicial systems of foreign nations, instructing the Commission to consider "the procedures of our State

and Federal tribunals for the rendering of assistance to *foreign courts and quasi-judicial agencies*." *Id.* (emphasis added). "Noticeably absent from this statutory charge [wa]s any instruction to study and recommend improvements in judicial assistance to private foreign arbitration." *Servotronics*, 975 F.3d at 694.

Five years later, the Rules Commission (with Jones serving as Director) issued its final report recommending the statutory language that would become the present Section 1782. In doing so, the Commission again emphasized the importance of providing assistance to courts and other governmental adjudicators. 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." 1963 Report at 45 (emphasis added).

To facilitate access to such evidence, the Commission recommended expanding Section 1782's existing scope to encompass aid to "foreign or international tribunal[s]." *Id*. at 25. The Commission explained that "[t]he word 'tribunal' is used" in its proposed revision "to make it clear that assistance is not confined to proceedings before conventional courts," but also extends to those before "*investigating magistrates*," as well as "*foreign administrative tribunal[s]*" and "*quasi-judicial agenc[ies]*." *Id.* at 45 (emphasis added).

The Commission's Report also explained its recommended expansion of Section 1782 to cover

"international tribunal[s]." *Id.* In doing so, it cited Professor Smit's article, *id.*, which had defined such an entity as "ow[ing] both its existence and powers to an international agreement," Smit 1962 at 1267.

Nowhere in any of its extensive analysis did the Rules Commission hint that by expanding international discovery assistance to encompass a broader range of government entities, it sought to depart from the historical understanding that such assistance was meant to aid governmental proceedings in furtherance of international comity. And it certainly did not suggest that its proposed expansion of Section 1782 would also authorize assistance to private commercial arbitrators.

d. In 1964, Congress unanimously revised Section 1782 using the exact language recommended by the Rules Commission. *See* 1964 Act, § 9, 78 Stat. at 997. The Senate and House committee reports accompanying its legislation incorporated—verbatim—the section-by-section analysis of the Commission's report. *See* Senate Report at 2-11; House Report at 4-13. That included the Commission's explanation that the word "tribunal" was used to expand Section 1782 to cover a broader range of foreign government entities, such as "investigating magistrates in foreign countries" and "quasi-judicial agenc[ies]." Senate Report at 7-8; House Report at 9. It also included the citations to Professor Smit's 1962 article defining an "international tribunal" as an inter-governmental body. Senate Report at 3, 8 (citing Smit 1962 at 1267, 1274); House Report at 5, 9 (same).

Crucially, nothing at all in the statutory or legislative history suggests that Congress intended its revisions of Section 1782 to assist private

commercial arbitrators who happened to be located abroad. If that sort of dramatic expansion of international discovery assistance had been contemplated, it surely would have been remarked upon by *someone*. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (noting Congress does not "hide elephants in mouseholes").

2. The 1964 Congress Would Not Have Favored Foreign Private Arbitration Over Domestic Arbitration Covered By The FAA

The broader historical and legal context in which Congress enacted the modern Section 1782 in 1964 confirms that it did not authorize discovery to private arbitral panels. Almost forty years earlier, Congress had enacted the FAA to provide strong federal support for private *domestic* arbitration. But even in that context, it refused to give arbitral parties recourse to the sorts of broad discovery later authorized by Section 1782. Interpreting Section 1782 to allow such discovery for use in private arbitrations is incompatible with Congress's intent and creates needless conflict between Section 1782 and the FAA. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (noting that this Court "aim[s] for harmony over conflict in statutory interpretation" and avoids whenever possible conflicting readings of two acts of Congress).

Enacted in 1925, the FAA's "primary substantive provision" makes any covered agreement to arbitrate "valid, irrevocable, and enforceable." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (first quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); then quoting 9

U.S.C. § 2). The Act's other provisions prescribe various rules and procedures regulating how arbitrations are carried out. *See, e.g.*, 9 U.S.C. § 4 (compelling a party to arbitrate); *id.* § 5 (selecting arbitrators and assembling arbitral panels); *id.* § 9 (confirming arbitral awards). As relevant here, Section 7 of the FAA addresses when and how district courts are authorized to provide assistance to private arbitrations by compelling testimony or requiring the production of documents before the arbitral panel.

Section 1782's grant of authority to district courts over discovery is much broader than under the FAA in at least four ways. *First*, district courts can entertain requests for discovery from any "interested person," which means anyone who "'possess[es] a reasonable interest in obtaining [judicial] assistance'" related to the arbitration. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 256 (2004) (alterations in original) (citation omitted). By contrast, neither parties nor third parties can request discovery under the FAA—only the arbitrator can. 9 U.S.C. § 7.

Second, Section 1782 allows a district court to compel discovery for proceedings that have not even begun; instead, the "proceeding" need only be "within reasonable contemplation." *Intel*, 542 U.S. at 259. The FAA, on the other hand, limits requests to arbitrations that have already commenced, because Section 7 is premised on *arbitrators* requesting discovery assistance. 9 U.S.C. § 7. Until an arbitrator has been selected—which is to say, until an arbitration has begun—no one is authorized by Section 7 to petition the district court.

Third, pretrial discovery is available under Section 1782—but not the FAA. Section 1782 permits

a district court to order depositions as well as the production of documents or other items. But the FAA does not provide for pretrial discovery, and instead merely authorizes the district court to summon "person[s] to attend before [the arbitrator] as a witness," and only to compel that documents be produced by a witness who physically appears before the arbitrators. *See, e.g.*, 9 U.S.C. § 7; *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3d Cir. 2004).

Finally, Section 1782 makes discovery available nationwide—and even in multiple districts for use in the same case. Section 1782 authorizes discovery assistance from any "district court of the district in which a person resides or is found." As a result, witnesses and documents could be sought from any one or more district courts across the country. Indeed, in *Servotronics* separate Section 1782 proceedings were filed in federal district courts in Illinois, South Carolina, and Minnesota. *See Servotronics* Rolls-Royce Br. 5-7 (June 21, 2021); *see also infra* at 48. By contrast, the FAA authorizes assistance from a single court only—the "district court for the district in which such arbitrators, or a majority of them, are sitting." 9 U.S.C. § 7. And discovery is generally available only from witnesses who live within 100 miles of where the arbitration will take place. *See* Fed. R. Civ. P. 45; *see also* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2455.1 (3d ed. Apr. 2021 update). Parties seeking discovery outside that geographic zone are typically out of luck.

All these discrepancies weigh strongly against interpreting Section 1782 to reach private commercial arbitrations. That reading creates a bizarre asymmetry between foreign and domestic arbitration

rules that is "devoid of principle" and hard to square with any reasonable assessment of Congress's purpose. *NBC*, 165 F.3d at 191. It is simply implausible to think that Congress intended to create a discovery regime that so dramatically privileges foreign arbitrations over domestic ones. *See Servotronics*, 975 F.3d at 695.

3. Congress's Pre-1970 Skepticism Of Foreign Private Arbitration Would Have Made It Highly Unlikely To Grant Discovery Assistance To Such Arbitration

Interpreting Section 1782 to grant special discovery privileges to foreign private arbitrations is also anomalous for another reason: When that provision was enacted, the United States government policy actively *disfavored* international private arbitration.

In 1964, private, contract-based arbitration between private parties of different nationalities was a "then-novel arena." *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 882 (5th Cir. 1999); *see infra* at 46 (discussing growth in international private arbitration since 1960s). Not only was transnational private arbitration new, it was looked on with skepticism and outright hostility by Congress and the Executive Branch. At that time, the United States had refused to ratify the Geneva Protocol of 1923 and the Geneva Convention of 1927—both of which sought to promote such international arbitration. Laurence Shore et al., *International Arbitration in the United States* 16-17 (2017).

In 1958, the United Nations Economic and Social Council had adopted the New York Convention, an international treaty making foreign arbitral awards

directly enforceable in the signatories' domestic courts. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (New York Convention). That same year, twenty-four countries ratified the Convention, with eleven others joining by 1964. *See* Daniel J. Rothstein, *A Proposal to Clarify U.S. Law on Judicial Assistance in Taking Evidence for International Arbitration*, 19 Am. Rev. Int'l Arb. 61, 73 (2009) (Rothstein).

But the United States had *refused* to join. On the contrary, the U.S. delegation to the U.N. Conference that drafted the New York Convention "recommend[ed] strongly that the United States not sign or adhere to the convention." *Id.* (alteration in original) (citation omitted). This reflected the generally skeptical attitude of the United States government and business community toward international commercial arbitration. *See* Martin Domke, *The Settlement of Disputes in International Trade*, 1 U. Ill. L. Forum 402, 412 (1959). And that attitude persisted throughout much of the 1960s: The United States did not ratify the Convention and pass the accompanying implementing legislation until 1970. Gary B. Born, *The New York Convention: A Self-Executing Treaty*, 40 Mich. J. Int'l L. 115, 128-29 (2018); *see* 9 U.S.C. §§ 201-208.

Given all this, it would have been "inconsistent" for the United States government to embrace judicial assistance to foreign private arbitrations when it enacted Section 1782 in 1964, given its refusal to join the New York Convention and other treaties supporting such arbitrations. Rothstein at 74. Moreover, this "inconsistency would have been obvious to the" Rules Commission. *Id.* If "such an

inconsistency [had] been intended, the intention should have been stated clearly in the [1964 Act] or legislative history." *Id.* It is inconceivable that the Rules Commission or Congress would have wanted to provide wide-ranging discovery rights to then-disfavored foreign private arbitration without anyone saying a word on the subject.

4. Legislation And Judicial Decisions Postdating The 1964 Act Reinforce This Understanding

For many years after its passage, Section 1782 was widely understood *not* to have authorized discovery for use in private commercial arbitration. *See* Rothstein at 61 & n.1, 74-76.

One scholar has researched the original public meaning of Section 1782 by comprehensively reviewing the relevant academic, governmental, and other sources published between 1958 and 1970—including the leading academic journals, a draft international convention on arbitral procedure, a multi-country survey of national laws on commercial arbitration, and a number of books and symposia on international arbitration. *Id.* at 74-76. His conclusion is striking: Despite extensive treatment of international judicial assistance as a general matter, the "issue of international assistance in taking evidence *for private arbitration was not discussed* in the relevant professional literature" of that period. *Id.* at 75. That silence makes no sense if the original public meaning of Section 1782 authorized such discovery.[13]

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[13] In 1965, Professor Smit published a law review article asserting that Section 1782's term "tribunal" includes

Additional clues come from 1970 and 1990, when Congress enacted implementing legislation applying the FAA—including its discovery provisions—to certain foreign arbitrations conducted pursuant to the New York Convention and the Inter-American Convention on International Commercial Arbitration.[14] If Section 1782 authorizes discovery for use in private arbitrations, then the 1970 and 1990 legislation would have simultaneously subjected covered arbitrations to two conflicting discovery regimes—one under Section 1782, the other under Section 7. *See supra* at 37-40 (discussing the conflict). Congress would not have intended that result, which means it understood Section 1782 *not* to cover private arbitrations.

It was not until 1989 that commentators began to assert that private arbitrations might qualify as

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"investigating magistrates, administrative and *arbitral tribunals*, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts." Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1026 n.71 (1965) (emphasis added). But the article did not discuss *private* arbitration, and in context the reference to "arbitral tribunals" is best understood as a reference to the sorts of intergovernmental arbitral tribunals that Congress plainly had in mind when amending Section 1782 to encompass "international tribunal[s]." *See supra* at 25-26, 32-33, 35-36; *Servotronics*, 975 F.3d at 696; *Guo v. Deutsche Bank Sec. Inc. (In re Guo)*, 965 F.3d 96, 105 (2d Cir. 2020); Rothstein at 71.

[14] *See* 9 U.S.C. §§ 201-208, 301-307; Pub. L. No. 91-368, § 1, 84 Stat. 692, 692-93 (1970) (implementing New York Convention); An Act to Implement the Inter-American Convention on International Commercial Arbitration, Pub. L. No. 101-369, § 1, 104 Stat. 448, 448-49 (1990); *see also Servotronics*, 975 F.3d at 695-96.

"foreign or international tribunals" under Section 1782, and the first judicial decision addressing the prospect did not appear until 1994. *See* Rothstein at 1; *In re Application of Technostroyexport*, 853 F. Supp. 695, 697 (S.D.N.Y. 1994). By the end of the 1990s, however, the only two courts of appeals to have decisively weighed in on that proposition had rejected it. *See Biedermann Int'l*, 168 F.3d 880; *NBC*, 165 F.3d 184. That understanding remained in force, largely undisturbed, until the Sixth Circuit's decision in *Abdul Latif* twenty years later.[15]

During that period, this Court's only decision interpreting the scope of Section 1782 is consistent with that decades-long view. In *Intel Corp. v. Advanced Micro Devices, Inc.*, the Court addressed whether Section 1782 authorized district court assistance for a proceeding before the European Commission's Directorate-General for Competition—an agency of the executive branch of the European Union. 542 U.S. at 246. In concluding that such assistance *is* authorized, the Court canvassed many of the same historical sources discussed here. *Id.* at 247-49, 257-63 (discussing 1855 Act, history of amendments to Section 1782, legislation authorizing Rules Commission, 1963 Report, and 1964 Act's legislative history).

Notably, the Court emphasized that Congress's decision to expand Section 1782 to cover "foreign or

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[15] The Eleventh Circuit briefly held that Section 1782 could encompass private arbitration, but the panel *sua sponte* granted reconsideration and decided the case on other grounds. *See Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3d 1262, 1269-70 (11th Cir. 2014).

international tribunal[s]" in 1964 was meant "to ensure that 'assistance is not confined to proceedings before conventional courts,' but extends also to '*administrative and quasi-judicial proceedings*.'" *Id.* at 249 (emphasis added) (quoting Senate Report at 7-8). That focus on governmental proceedings was essential to *Intel*'s holding that the Directorate-General was encompassed within the scope of Section 1782 because it was a "quasi-judicial agenc[y]." *Id.* at 258. As the Court emphasized, the Directorate-General's investigatory functions involve a hearing before an independent officer that adjudicates the Directorate-General's complaint, *id.* at 255; its final decision is reviewable by EU courts, *id.* at 254-55; and the record for judicial review is created only through submissions during the agency proceedings, *id.* at 257-58.

All of those attributes distinguish a governmental proceeding like the Directorate-General's investigation from a purely private commercial arbitration. *Intel* affirmatively supports petitioners' interpretation.

D. Extending Section 1782 To Private Arbitrations Would Burden U.S. Courts, Harm U.S. Companies, And Undermine Arbitration

Extending Section 1782 to private arbitrations abroad would also raise a host of policy problems—none of which Congress would have invited. These harmful consequences underscore the importance of enforcing Section 1782's ordinary meaning.

1. Interpreting Section 1782 to encompass private arbitrations would burden overstretched federal district courts with discovery requests for use in

foreign proceedings that often have little or no connection to the United States. Since the 1960s, the number of private arbitrations abroad has skyrocketed, and there are now thousands of such arbitrations every year. Gary B. Born, *International Commercial Arbitration* 92-93 (3d ed. 2021) (reporting more than 9,000 cases at the top 14 international arbitration institutions in 2018); International Chamber of Commerce, *ICC Dispute Resolution Statistics: 2020*, https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/ (last visited Jan. 19, 2022) (noting a record-breaking 946 cases before International Chamber of Commerce in 2020 alone).

At the same time, district courts have struggled to cope with an explosion of litigation over Section 1782. *See* Yanbai Andrea Wang, *Exporting American Discovery*, 87 U. Chi. L. Rev. 2089, 2106-13 (2020) (Wang). Between 2005 and 2017, the number of discovery requests received by U.S. courts for use in international civil or commercial proceedings *quadrupled*. *Id.* at 2111. Reasons for this increase include the rapid growth in cross-border activity (which gives rise to disputes with evidentiary links to the United States), as well as greater awareness by law firms and parties of Section 1782 and its strategic value. *Id.*

Section 1782 proceedings can be especially burdensome for district courts to resolve fairly. Applications for discovery are typically made by a single party on an *ex parte* basis. *Id.* at 2110. Courts thus initially lack adversarial briefing by opposing parties and the views of the foreign arbitral panel on the discovery request, making it "uniquely difficult" to assess whether the request is "abusive, overly

burdensome, or proportional to the demands of the case." *Id.* at 2153. Courts grant roughly 90% of Section 1782 discovery applications from individual parties, and close to 40% end up involving time-consuming adversarial litigation (either through an initial opposition; subsequent motions to quash, vacate, or reconsider; or an opposed motion to compel). *Id.* at 2122 & n.146.[16]

Any ruling that Section 1782 authorizes discovery for foreign private arbitrations will open the floodgates and multiply the burdens on busy district judges across the country. The strategic advantages of running to U.S. courts to obtain full-blown pre-trial discovery will be simply too great for arbitral parties to pass up. Those opportunities include targeting evidence held by U.S. law firms, and taking advantage of the more liberalized attitude of the U.S. judicial system toward discovery. *See id.* at 2140 (noting incentives for "sidestepping foreign discovery restrictions"). Arbitral parties will also use Section 1782 to seek evidence from third parties—even when the same evidence is also held by their arbitration counter-parties—to avoid the risk that the foreign arbitrator might deny a request to obtain the evidence

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[16] This case perfectly illustrates these problems. After granting Luxshare's *ex parte* motion without the benefit of briefing from petitioners, the magistrate judge was then presented with full briefing by both sides on petitioners' motion to quash, followed by objections to the magistrate's recommendation and a decision by the district court, and followed in turn by stay briefing (that was ultimately granted by this Court) in order to preserve an opportunity for meaningful appellate review. This preliminary litigation has thus been ongoing for nearly a year already, with 41 docket entries in the district court alone. *See* JA20.

directly from their adversaries. *See, e.g.*, *Food Delivery Holding 12 S.a.r.l. v. DeWitty & Assocs. CHTD*, 538 F. Supp. 3d 21, 23-24 (D.D.C. 2021); Wang at 2139-40 (noting same dynamic in litigation).

Nor is there any inherent limit on the number of discovery requests that a single foreign dispute can generate. In recent arbitration and litigation between Chevron and Ecuador, Chevron filed over *twenty-three* Section 1782 requests across the country—generating more than *fifty* federal court orders and opinions. Wang at 2153. And the indigenous plaintiffs and government of Ecuador filed many additional Section 1782 requests of their own. *Id.*

Expanding Section 1782 to cover private arbitrations would also pointlessly enmesh district courts in foreign private disputes with little connection to the United States. In *Servotronics*, the U.S. Chamber of Commerce and Business Roundtable gave the example of Russian and Singaporean companies that enter a private arbitration agreement designating England as an arbitral forum for a dispute over a particular business transaction. It makes little sense for U.S. federal courts to play a role in any ensuing arbitration when "the underlying transaction has no relationship to the United States whatsoever." *Servotronics* U.S. Chamber et al. Amici Br. 17 (June 28, 2021). Doing so does nothing to advance the government-centric comity interests that motivated Section 1782's passage. To the contrary, comity considerations have long been understood to act "as a canon of construction, [to] shorten the reach of a statute," in situations like this in which "a court [should] presume that Congress, out of respect for foreign sovereigns, limited the application of domestic law." *In re Picard*, 917 F.3d 85, 100 (2d Cir. 2019)

(citation omitted); *see also Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting) (discussing "prescriptive comity").

2. Allowing Section 1782 discovery in private foreign arbitrations would also inflict direct—and asymmetric—harm on U.S. residents and businesses. After all, Section 1782 only authorizes discovery against individuals and companies located within the U.S. federal district in which the application is filed.

The most obvious target of Section 1782 requests will be American companies doing business overseas who agree to arbitrate disputes. Such companies will be exposed to public and intrusive discovery proceedings launched by foreign entities who would not themselves be exposed to equal and reciprocal discovery in their own countries. This result would be one-sided, unfair, and contrary to U.S. commercial interests.

Congress authorized discovery against U.S. entities for use in foreign and international *governmental* proceedings because doing so furthers international comity. *See supra* at 31-37. But that comity rationale does not apply to purely private *non*-governmental arbitrations; indeed, no other nation authorizes Section 1782-style discovery for use in such foreign private arbitrations. *See* Born, *International Commercial Arbitration* at 2597-98 (noting that many nations do not allow discovery assistance to foreign arbitrations at all).

3. Finally, if Section 1782 were read to sweep in private arbitrations, it would undermine many of the benefits that lead parties to embrace arbitration in the first place. Arbitration is an attractive alternative to litigation because of its "promise of quicker, more

informal, and often cheaper resolutions for everyone involved." *Epic Sys.*, 138 S. Ct. at 1621. "[I]t is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts [litigants] mutually to forgo access to judicial remedies." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985). Arbitration achieves those benefits by streamlining the dispute resolution process, ensuring a clear set of procedural rules agreed by the parties in advance, and eliminating the need for lengthy collateral litigation and appeals.

Extending Section 1782 to private arbitration would undercut these benefits. It would spawn time-consuming and expensive discovery disputes and generate the kind of "procedural morass" that private parties seek to avoid through arbitration. *AT&T Mobility*, 563 U.S. at 348. Moreover, by infusing arbitration with some of the most wasteful, inefficient, and internationally criticized features of U.S. civil litigation, it would threaten the very comity interests Congress sought to advance. Wang at 2094 (noting that "American discovery is regarded as excessive and has been approached with skepticism and animosity" by other countries).

All of these dangers can be avoided by holding that Section 1782—in accordance with its text, structure, and history—does not apply to purely private arbitrations.

II. PETITIONERS HERE SHOULD PREVAIL REGARDLESS OF THE OUTCOME IN *ALIXPARTNERS*

This case and *AlixPartners* are different. Whereas this case involves a purely private arbitration

mandated by the parties' private contract, *AlixPartners* involves an investor-state arbitration mandated by an international treaty. And whereas Luxshare argues that the DIS arbitral panel here qualifies as a "*foreign* tribunal" under Section 1782, the *AlixPartners* respondent argues that the arbitral panel in that case is an "*international* tribunal." *See supra* at 17; *AlixPartners* BIO 14 (Nov. 8, 2021).

These differences should not affect the bottom line: Section 1782 does not permit discovery in either case. Although the degree of government involvement in *AlixPartners* is far greater than here—where there is *none*—the arbitral panel in that case is not a government entity and exercises no governmental or quasi-governmental authority. That panel, like the DIS panel here, is not a "foreign or international tribunal" triggering discovery under Section 1782.

Petitioners expect that the *AlixPartners* respondent will defend the Second Circuit's interpretation of Section 1782—under which they prevailed—just as they did at the certiorari stage. *AlixPartners* BIO 19-23. Petitioners here would clearly win under that interpretation. For decades, the Second Circuit has correctly recognized that Section 1782 does not extend to "international arbitral panels created exclusively by private parties." *Guo v. Deutsche Bank Sec. (In re Guo)*, 965 F.3d 96, 104-07 (2d Cir. 2020) (quoting *NBC*, 165 F.3d at 190).

In *Guo* and *AlixPartners*, the Second Circuit refined a multi-factor "functional approach" for assessing whether an arbitral body that was "originally created through state action"—but has "subsequently evolved such that it arguably no longer qualifies [as a state entity]"—can trigger Section 1782

discovery. *Guo*, 965 F.3d at 107. Under that test, courts consider (1) "the degree of state affiliation and functional independence possessed by the [arbitral] entity," (2) the "degree to which a state possesses the authority to intervene to alter the outcome of an arbitration after the panel has rendered a decision," (3) the "nature of the jurisdiction possessed by the panel," (4) the "ability of the parties to select their own arbitrators," (5) whether a foreign state is a party to the arbitration, and (6) whether the arbitral panel is convened pursuant to a "bilateral investment treaty." *Id.* at 107-08 & n.7; *AlixPartners* Pet. App. 15a-22a (Oct. 5, 2021). The "key question" this inquiry seeks to answer is "whether the body in question possesses the functional attributes most commonly associated with private arbitration." *Guo*, 965 F.3d at 107; *see also AlixPartners* Pet. App. 14a. If the answer to that question is yes, then Section 1782 is not available.

The Second Circuit's multi-factor test does not apply to this case, because here the forthcoming DIS arbitration is indisputably a purely private arbitration. Nonetheless, the Second Circuit's factors help illustrate why the DIS arbitration here is non-governmental—and thus not a "foreign or international tribunal" under a proper interpretation of Section 1782. Here, there is no doubt that (1) the DIS panel will have no state affiliation, will be conducted according to rules devised by DIS (a private entity), and will be completely independent of any government; (2) no state generally can intervene to overturn the DIS arbitrators' independent judgment; (3) the DIS panel's authority derives from a private contract between two private companies; (4) the private parties will select and pay the arbitrators; (5)

no foreign state is a party to the arbitration; and (6) the arbitration is not the product of a bilateral investment treaty. *See supra* at 9-11.

In *AlixPartners*, the Second Circuit applied its multi-factor test and upheld the district court's order granting Section 1782 discovery. In doing so, the court emphasized that the arbitration at issue in that case qualified as an international tribunal because it was convened pursuant to an international bilateral investment treaty, its procedural rules were developed by a United Nations subsidiary entity, and it involves a state (Lithuania) as one of the two parties. *See AlixPartners* Pet. App. 17a-22a. In resolving *AlixPartners*, this Court will need to consider if the Second Circuit was right about how those considerations affect the Section 1782 analysis.

But whatever the Court decides in *AlixPartners* should not impact the outcome of *this* case. As explained, the purely private arbitration at issue here is distinguishable from *AlixPartners* in every way that might even conceivably bear on the Section 1782 analysis. Petitioners here should win no matter how the Court resolves *AlixPartners*.

CONCLUSION

The district court's discovery order should be reversed.

Respectfully submitted,

SEAN M. BERKOWITZ
LATHAM & WATKINS LLP
330 N. Wabash Avenue
Suite 2800
Chicago, IL 60611

ZACHARY L. ROWEN
JUSTIN S. KIRSCHNER
LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, NY 10020

ROMAN MARTINEZ
Counsel of Record
TYCE R. WALTERS
BRENT T. MURPHY
GRAHAM B. HAVILAND*
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
roman.martinez@lw.com

Counsel for Petitioners

January 24, 2022

* Admitted to practice in Illinois only. All work supervised by a member of the DC Bar.

ADDENDUM

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

Chap. CXL.—*An Act to prevent Mis-trials in the District and Circuit Courts of the United States, in certain Cases.*

Be it enacted by the Senate and House of Representatives of the United Sates of America in Congress assembled,

* * *

SEC. 2. *And be it firther 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.

APPROVED, March 2, 1855.

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

CHAP. XCV.—*An Act to facilitate the taking of Depositions within the United States, to be used in the Courts of other Countries, and for other Purposes.*

Be it enacted by the Senate and House of Representatives of the United Sates 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 ussued from the court in which said suit is pending, on producing the same before the district judge of any district whee 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.

* * *

Act of Feb. 27, 1877, ch. 69, § 875, 19 Stat. 240, 241

CHAP. 69.—An Act to perfect the revision of the statutes of the United States, and of the statutes relating to the District of Columbia.

Be it enacted by the Senate and House of Representatives of the United Sates of America in Congress assembled, That for the purpose of correcting errorors and supplying omissions in the act entitled "An act to revise and consolidate the statutes of the United States in force on the first day of December, anno Domini one thousand eight hundred and seventy thrce," so as to make the same truly express such laws, the following amendments are hereby made therein:

* * *

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."

* * *

Act of July 3, 1930, ch. 851, §§ 1-2, 46 Stat. 1005, 1005-06

CHAP. 69.— An Act Authorizing commissioners or members of international [S. 2828.] tribunals to administer oaths, to subpoena witnesses and records, and to punish [Public, No. 524.] for contempt.

Be it enacted by the Senate and House of Representatives of the United Sates of America in Congress assembled, That whenever any claim in which the United States or any of its nationas is interested is pending before an international tribunal or commission, established pursuant to an agreement between the United States and any foreign government or governments, each member of such tribunal or commission, or the clerk or a secretary thereof, shall have authority to administer oaths in all proceedings before the tribunal or commission; and every person knowingly and willfully swearing or affirming falsely in any such proceedings, whether held within or outside the United States, its territories or possessions, shall be deemed guilty of perjury and shall, upon conviction, suffer the punishment provided by the laws of the United States for that offense, when committed in its courts of justice.

SEC. 2. Any such international tribunal or commission shall have power to require by subpoena the attendance and the testimony of witnesses and the production of documentary evidence relating to any matter pending before it. Any member of the tribunal or commission may sign subpcenas.

* * *

Act of June 7, 1933, ch. 50, 48 Stat. 117, 117-18

[CHAPTER 50]

AN ACT

To amend the Act approved July 3, 1930 (46 Stat. 1005), authorizing commissioners or members of the international tribunals to administer oaths, or so forth.

Be it enacted by the Senate and House of Representatives of the United Sates of America in Congress assembled, That the Act of July 3, 1930 (46 Stat. 1005), authorizing commissioners or members of international tribunals to administer oaths, and so forth, be, and the same is hereby, amended by adding at the end thereof the following additional sections:

"SEC. 5. That the agent of the United States before any international tribunal or commission, whether previously or hereafter established, in which the United States participates as a party whenever he desires to obtain testimony or the production of books and papers by witnesses may apply to the United States district court for the district in which such witness or witnesses reside or may be found, for the issuance of subpoenas to require their attendance and testimony before the United States district court for that district and the production therein of books and papers, relating to any matter or claim in which the United States on its own behalf or on behalf of any of its nationals is concerned as a party claimant or respondent before such international tribunal or commission.

"SEC. 6. That any United States district court to which such application shall be made shall have authority to issue or cause to be issued such

subpoenas upon the same terms as are applicable to the issuance of subpoenas in suits pending in the United States district court, and the clerk thereof shall have authority to administer oaths respecting testimony given therein, and the marshal thereof shall serve such subpoenas upon the person or persons to whom they are directed. The hearing of witnesses and taking of their testimony and the production of books and papers pursuant to such subpoenas shall be before the United States district court for that district or before a commissioner or referee appointed by it for the taking of such testimony, and the examination may be oral or upon written interrogatories and may be conducted by the agent of the United States or his representative. Reasonable notice thereof shall be given to the agent or agents of the opposing government or governments concerned in such proceedings who shall have the right to be present in person or by representative and to examine or cross-examine such witnesses at such hearing. A certified transcript of such testimony and any proceedings arising out of the issuance of such subpoenas shall be forwarded by the clerk of the district court to the agent of the United States and also to the agent or agents of the opposing government or governments, without cost.

"SEC. 7. That every person knowingly or willfully swearing or affirming falsely in any testimony taken in response to such subpoenas shall be deemed guilty of perjury, and shall, upon conviction thereof, suffer the penalty provided by the laws of the United States for that offense when committed in its courts of justice. Any failure to attend and testify as a witness or to produce any book or paper which is in the possession or control of such witness, pursuant to

such subpoena, may be regarded as a contempt of the court and shall be punishable as a contempt by the United States district court in the same manner as is provided by the laws of the United States for that offense in any other proceedings in its courts of justice.

"SEC. 8. For the purposes of sections 5, 6, and 7 of this Act, the Supreme Court of the District of Columbia shall be considered to be a district court of the United States."

Approved, June 7, 1933.

Act of June 25, 1948, ch. 646, § 1782,
62 Stat. 869, 949

[CHAPTER 646]

AN ACT

To revise, codify, and enact into law title 28 of the United States Code entitled

"Judicial Code and Judiciary".

Be it enacted by the Senate and House of Representatives of the United Sates of America in Congress assembled, That title 28 of the United States Code, entitiled "Judicial Code and Judiciary" is hereby revised, codified, and enacted into law, and may be cited as "Title 28, United States Code, section—", as follows:

* * *

CHAPTER 117—EVIDENCE; DEPOSITIONS

* * *

§ 1782. 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.

* * *

Act of May 24, 1949, ch. 139, § 93, 63 Stat. 89, 103

[CHAPTER 139]

AN ACT

To amend title 18, entitled, Crimes and Criminal Procedure, and title 28, entitled, Judiciary and Judicial Procedure, of the United States Code, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United Sates of America in Congress assembled, That the analysis of part I of title 18, United States Code, entitled "Crimes and Criminal Procedure",

* * *

SEC. 93. 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".

* * *

22 U.S.C. §§ 270-270g (1958)

§ 270. International trihunals; administration of oaths; perjury.

Whenever any claim in which the United States or any of its nationals is interested is pending before an international tribunal or commission, established pursuant to an agreement between the United States and any foreign government or governments, each member of such tribunal or commission, or the clerk or a secretary thereof, shall have authority to adminiater oaths in all proceedings before the tribunal or commission; and every person knowingly and willfully swearing or affirming falsely in any such proceedings, whether held within or outside the United States, its territories or possessions, shall be deemed guilty of perjury and shall, upon conviction, suffer the punishment provided by the laws of the United States for that offense, when committed in its courts of justice. (July 3, 1930, ch. 851, § 1, 46 Stat. 1005.)

§ 270a. Same; testimony of witnesses; documentary evidence; subpoenas.

Any such international tribunal or commission shall have power to require by subpoena the attendance and the testimony of witnesses and the production of documentary evidence relating to any matter pending before it. Any member of the tribunal or commission may sign subpoenas. (July 3, 1930, ch. 851, § 2, 46 Stat. 1006.)

§ 270b. Same; contempts.

Any failure to attend as a witness or to testify as a witness or to prodluce documentary evidence in an appropriate case may be regarded as a contempt of

the authority of the tribunal or commission and shall be punishable in any court of the United States in the same manner as is provided by the laws of the United States for that offense when committed in its courts of justice. (July 3, 1930, ch. 851, § 3, 46 Stat, 1006.)

§ 270c. Same; commissioners to take evidence; procedure.

To afford such international tribunal or commission needed facilities for tle disposition of cases pending therein said tribunal or commission is authorized and empowered to appoint competent persons, to be named as commissioners, who shall attend the taking of or take evidence in cases that may be assigned to them severally by the tribunal or commission and make report of the findings in the case to the tribunal or commission. Any such commissioner shall proceed under such rules and regulations as may be promulgated by the tribunal or commission and such orders as the tribunal or commission may make in the particular case and may have and perform the general duties that pertain to special masters in suits in equity. He may fix the times for hearings, administer oaths, examine witnesses, and receive evidence. Either party to the proceeding before the tribunal or commission may appear before the commissioner by attorney, produce evidence, and examine witnesses. Subpoenas for witnesses or for the production of testimony before the commissioner may issue out of the tribunal or commission by the clerk thereof and shall be served by a United States marshal in any judicial district in which they are directed. Subpoenas issued by such tribunal or commission requiring the attendance of witnesses in order to be examined before any person

commissioned to take testimony therein shall have the same force as if issued from a district court and compliance therewith shall be compelled under such rules and orders as the tribunal or commission shall establish. Any person appointed as commissioner may be removed at the pleasure of the tribunal or commission by which he is appointed. (July 3, 1930, ch. 851, § 4, 46 Stat. 1006.)

§270d. Same; subpoenas; application by agent to United States district court.

The agent of the United States before any international tribunal or commission, whether previously or hereafter established, in which the United States participates as a party whenever he desires to obtain testimony or the production of books and papers by witnesses may apply to the United States district court for the district in which such witness or witnesses reside or may be found, for the issuance of subpoenas to require their attendance and testimony before the United States district court for that district and the production therein of books and papers, relating to any matter or claim in which the United States on its own behalf or on behalf of any of its nationals is concerned as a party claimant or respondent before such international tribunal or commission. (July 3, 1930, ch. 851, § 5, as added June 7, 1933, ch. 50, 48 Stat. 117.)

§ 270e. Same; issuance of subpoenas by United States district court; proceedings thereon; notice to foreign governments; filing transcripts of testimony with agent of United States.

Any United States district court to which such application shall be made shall have authority to issue or cause to be issued such subpoenas upon the same terms as are applicable to the issuance of subpoenas in suits pending in the United States district court, and the clerk thereof shall have authority to administer oaths respecting testimony given therein, and the marshal thereof shall serve such subpoenas upon the person or persons to whom they are directed. The hearing of witnesses and taking of their testimony and the production of books and papers pursuant to such subpoenas shall be before the United States district court for that district or before a commissioner or referee appointed by it for the taking of such testimony, and the examination may be oral or upon written interrogatories and may be conducted by the agent of the United States or his representative. Reasonable notice thereof shall be given to the agent or agents of the opposing government or governments concerned in such proceedings who shall have the right to be present in person or by representative and to examine or cross-examine such witnesses at such hearing. A certified transcript of such testimony and any proceedings arising out of the issuance of such subpoenas shall be forwarded by the clerk of the district court to the agent of the United States and also to the agent or agents of the opposing government or governments, without cost. (July 3, 1930, ch, 851, § 6, as added June 7, 1933, ch. 50, 48 Stat. 117.)

§ 270f. Same; perjury; contempte; penalties.

Every person knowingly or willfully swearing or affirming falsely in any testimony taken in response to such subpoenas shall be deemed guilty of perjury, and shall, upon conviction thereof, suffer the penalty provided by the laws of the United States for that offense when committed in its courts of justice. Any failure to attend and testify as a witness or to produce any book or paper which is in the possession or control of such witness, pursuant to such subpoena, may be regarded as a contempt of the court and shall be punishable as a contempt by the United States district court in the same manner as is provided by the laws of the United States for that offense in any other proceedings in its courts of justice. (July 3, 1930, ch. 851, § 7, as added June 7, 1933, ch. 50, 48 Stat. 118.)

§ 270g. District Court of the United States for the District of Columbia a district court of United States,

CODIFICATION

Section, act July 3, 1930, ch. 851, § 8, as added June 7, 1933, ch. 50, 48 Stat. 118, has been omitted since the District of Columbia constitutes a judicial district, and the district court of the United States for thd District of Columbia is included within the term "United States district court" as used in sections 270d—270f of this title. See sections 88 and 132 of Title 28, Judiciary and Judicial Procedure.

28 U.S.C. § 1782 (1958)

§ 1782. 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. (June 25, 1948, ch. 646, 62 Stat. 949: May 24, 1949. ch. 139. § 93, 63 Stat. 103.)