Nos. 21-401

In the Supreme Court of the United States

ZF AUTOMOTIVE US, INC., ET AL.,

Petitioners,

v.

LUXSHARE, LTD.,

Respondent.

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

BRIEF OF INTERNATIONAL ARBITRATION CENTER IN TOKYO AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

ROBERT P. PARKER
Counsel of Record
ROTHWELL, FIGG, ERNST & MANBECK, P.C.
607 14TH STREET, N.W.
WASHINGTON, D.C. 20005
(202) 783-6040
rparker@rfem.com
Counsel for Amicus Curiae

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INTEREST OF THE *AMICUS CURIAE*[1]

International Arbitration Center in Tokyo ("IACT") was organized in 2018 under the auspices of the Japanese Patent Office. IACT provides a forum for the arbitration and mediation of international disputes at the intersection of commerce and technology. IACT's leadership includes former judges from the United States, China, Japan, Korea, Europe, Australia, and South America. The retired U.S. judges involved in IACT include former circuit, district, and administrative law judges. *See* *https://www.iactokyo.com/* (last visited December 27, 2021).

IACT differs from other arbitration forums in at least three respects. First, because IACT's substantive focus is at the intersection of commerce and technology, it offers particular expertise in associated legal areas, such as intellectual property and the commercial aspects of research, development, trade, and innovation. Second, IACT offers parties the opportunity to have their disputes considered by former judges and government officials from around the globe. Third, IACT seeks to promote consistency of outcomes across different legal regimes by promoting a cross-cultural approach to dispute resolution. In this regard, for example, Article 40 of

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[1] All parties have consented to the filing of this brief. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief. No counsel for a party in this case authored this brief in whole or in part. No one other than *amicus curiae* or its counsel contributed monetarily to the preparation and submission of this brief.

IACT's arbitration rules provides for substantive review of an arbitration award by a supervisory panel comprising one arbitrator from each of the U.S., Europe, China, Japan, and Korea.

IACT has a particular interest in promoting respect and cooperation among national judicial tribunals and international arbitration organizations. The fact that IACT's leadership includes former judges from countries with a variety of legal systems and traditions gives IACT a global perspective on transnational dispute resolution issues, including judicial assistance in aid of foreign proceedings.

IACT offers its views on the proper application of 28 U.S.C. § 1782(a) from this perspective.[2] The statute allows an "interested party" to file an application with a district court for the taking of discovery in the United States "for use in a proceeding in a foreign or international tribunal." For reasons stated below, IACT respectfully submits that the approach of the Second Circuit and other courts of appeals – by which judicial assistance is allowed only when the foreign arbitration is "state-sponsored," "governmental" or "quasi-governmental," and not with respect to "private" arbitrations – is unworkable and inconsistent with worldwide arbitration practice.

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[2] The captioned case, *ZF Automotive US, Inc. v. Luxshare, Inc.* (No. 21-241), has been consolidated with *AlixPartners, LLP v. The Fund for Protection of Investor Rights in Foreign States* (No. 518) (cert. granted, December 10, 2021).

From this standpoint, the statute's limiting factor is not the character of the arbitral tribunal. Rather, the limits are (i) the requirement that the requested discovery be "for use" in the foreign proceeding, and (ii) the federal courts' discretion to "prescribe the practice and procedure" for the taking of the evidence, "which may be in whole or part the practice and procedure of the foreign country or the international tribunal." This approach provides for clarity on the statute's application, reduces the likelihood of interference with foreign sovereign interests, and gives due respect to the nature of the proceedings and the rules under which the proceedings are conducted.

SUMMARY OF ARGUMENT

1. The courts of appeals are divided on whether judicial assistance under 28 U.S.C. § 1782(a) turns on the nature of the tribunal. The Second, Fifth, and Seventh Circuits hold that assistance is limited to proceedings before a "state-sponsored," "governmental," or "quasi-governmental" tribunal, and should be denied in a "private" arbitration. The Fourth and Sixth Circuits construe the statute to allow for assistance in all foreign arbitration proceedings, without regard to whether the tribunal is "state-sponsored" or "quasi-governmental."

The Fourth and Sixth Circuit's approach is both consistent with the statute's text and avoids the problems that have challenged the lower courts. It accounts for the wide variety of proceedings, conducted in a broad range of legal and cultural

contexts, in which governmental sponsorship, assistance, and enforcement vary from country to country and proceeding to proceeding. By contrast, the Second, Fifth, and Seventh Circuits' approach provides little guidance to federal courts on where the line is between "private" and "(quasi-) governmental," is difficult to apply, and has led to seemingly inconsistent results even among the courts that apply these tests.

These concerns are even more apparent given that § 1782(a) provides for judicial assistance in proceedings that often have no analogues in American practice. As this Court has recognized, foreign proceedings often incorporate practices regarding the roles of judges, parties, and attorneys that are embedded in local customs, history, and tradition – indeed, that reflect aspects of a country's "judicial sovereignty." The "state-sponsored" and "quasi-governmental" approach requires federal courts to investigate the foreign sovereign's interest or involvement in a proceeding, and paradoxically limits the federal courts' assistance to cases where intervention is most likely to interfere with those sovereign interests.

2. The Fourth and Sixth Circuits construe the statute's reference to "tribunal" to include "private" arbitration. Not only does this avoid the problems noted above, but it is consistent with the fact that even private arbitration depends on sovereign support and involvement.

This does not mean that § 1782(a) is without limits. The statute provides that the information sought in an application must be "*for use* in a proceeding in a foreign or international tribunal," and then grants courts the discretion to "prescribe the practice and procedure" for the collection of evidence. [Emphasis added]. The statute thus invites district courts to consider the nature of the underlying the proceeding – as reflected in the parties' arbitration agreement, the tribunal's rules, the record of the proceeding, and any other relevant materials – to determine whether the applicant has made a reasonable demonstration that the evidence sought is "for use" in the arbitration. If so, the statute then gives the district courts discretion to fashion an appropriate order consistent with the nature and scope of the particular proceeding.

ARGUMENT

I. Judicial Assistance Under § 1782(a) Should Not Depend on Whether the Underlying Proceeding Is "State-Sponsored," "Governmental," Or "Quasi-Governmental"

A. Private Arbitration Practice Has Long Benefited from Sovereign Recognition and Support

Arbitration has been recognized as a method of dispute resolution since ancient times. Homer describes an arbitration-like proceeding in the *Iliad,*

(Book 18, ll. 496-508), and private arbitration was known to ancient Romans as well as ancient Greeks. Earl S. Wolaver, *The Historical Background of Commercial Arbitratio*n, 83 U. PA. L. REV. 132, 132 (1934). The arbitration of commercial disputes had a long history in England before the American Revolution. *Id.* at 144-45.

Arbitration carried over to post-Revolution America. Roger Haydock & Jennifer Henderson, *Arbitration and American Civil Justice: An American Historical Review and a Proposal for Private/Arbitral and Public/Judicial Partnership,* 2 PEPP. DISP. RES. L. J., ISS. 2 at 144 (2002). As early as 1854, this Court upheld a judicial confirmation of an arbitral award, concluding that "[a]rbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. . . . If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact." *Burchell v. March,* 58 U.S. 344, 349-50 (1854).

Given this experience, and the increasing importance of arbitration as a dispute-resolution tool in the United States, Congress incorporated the *Burchell* approach into Chapter 1 of the Federal Arbitration Act of 1925 ("FAA"), codified at 9 U.S.C. §§ 1-16. The FAA calls for judicial recognition and enforcement of private arbitration agreements and, except in limited circumstances, the confirmation of arbitration awards. 9 U.S.C. §§ 2, 4, 9. Federal courts

may compel a witness to testify at an arbitration proceeding, and cite a recalcitrant witness for contempt. *Id.,* § 7.

Additionally, the United States has acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the "New York Convention"), and Congress codified the terms of the treaty in Chapter 2 of the FAA (9 U.S.C. §§ 201-208). The convention and statute authorize district courts to compel arbitration "in accordance with the [parties'] agreement at any place therein provided for, whether that place is within or without the United States." 9 U.S.C. § 206. District courts are also authorized to confirm "an arbitral award falling under the Convention[.]" *Id.,* 207. The convention currently has 169 signatories. *See* United Nations Comm'n on International Trade Law, Status: Convention on the Recognition and Enforcement of Foreign Trade Law, available at https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 (last visited January 4, 2022).

Congress thus established a national policy in favor of arbitration, and authorized federal courts to enforce arbitration agreements, assist in the development of a record, and enforce arbitration awards. The FAA and New York Convention do not distinguish among different arbitration rules, or limit the parties' discretion as to the selection of the arbitration forum or the manner in which their dispute will be resolved. Rather, they reflect near-universal recognition of "a policy guaranteeing the

enforcement of private contractual arrangements" for the arbitration of disputes. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 625 (1985).

Congress' 1964 amendment of § 1782(a), authorizing courts to provide judicial assistance to a "foreign or international tribunal," should be read in the context of this longstanding policy. Given the tradition of support for private arbitration, the then 40-year-old statute governing arbitration proceedings, and the more recent adoption of the New York Convention, Congress in 1964 presumably was aware that the statutory phrase "foreign or international tribunal" would be read to include arbitration tribunals.

B. The "State Sponsored," "Governmental," and "Quasi-Governmental" Tests Do Not Offer Clear Guidance To Already-Divided Federal Courts

Notwithstanding the broad recognition and support for the arbitration of private disputes, the U.S. courts of appeals have been divided over whether § 1782(a) allows a federal court to provide judicial assistance in support of a private foreign arbitration proceedings. Specifically, the courts disagree over whether the statutory term "tribunal" should be read broadly to include "private" arbitrations, or narrowly to include only proceedings in "state-sponsored," "governmental," or "quasi-governmental" forums. The effort to divide arbitrations into these categories,

however, runs headlong into the fact that countries around the world have adopted a variety of arbitration forums, procedures, and rules that do not necessarily fall neatly into these categories.

As noted above, the New York Convention has 169 signatories, and many nations have also enacted statutes that provide for judicial involvement in the arbitration process. These countries represent a large portion of the world's population and global commercial trade. The International Bar Association's survey of national arbitration laws, for example, confirms that private arbitrations in China, India, Germany, Japan, England, and South Korea are conducted under the backdrop of national statutes that provide for judicial intervention and assistance during the arbitration proceedings.[3] Although national arbitration laws may vary from country to country, that is the point: countries adopt arbitration laws that reflect their particular sovereign interests as to the scope and conduct of the proceedings. If the

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[3] *See* Hiroyuki Tezuka and Yutaro Kawabata, Arbitration Guide to Japan (IBA Arb. Comm., Jan. 2018); Peter Thorp and Huawei Sun, Arbitration Guide to China (IBA Arb. Comm., June 2018); Richard Kreindler, et al., Arbitration Guide to Germany (IBA Arb. Comm., Feb. 2018); Angeline Walsh, Arbitration Guide to England and Wales (IBA Arb. Comm., Jan. 2018); Sumeet Kachwaha, Arbitration Guide to India (IBA Arb. Comm., Dec. 2019); Kevin Kim, Arbitration Guide to South Korea (IBA Arb. Comm., Sept. 2012), available at https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Arbcountryguides#arbitrationguides (last visited January 25, 2022).

§ 1782(a) is read to apply only to "state-sponsored," "governmental," or "quasi-governmental" proceedings, but not to "private" arbitrations, then federal courts will have to assess each case to determine whether it fits into one category or the other.

The decisions applying the statute highlight the problem this raises. Early on, the Second Circuit declined to apply § 1782(a) to private foreign arbitrations. In an influential decision, that court concluded that the statute's reference to "tribunal" is ambiguous, and it construed the term in light of language in §1782(a)'s legislative history to the effect that "[t]he word 'tribunal' is used to make clear that assistance is not confined to proceedings before conventional courts." *National Broadcasting Co. v. Bear Stearns Co.,* 165 F.3d 184, 189 (2d Cir. 1999) ("*NBC*") (citations omitted). The court held, "[I]t is apparent in context that the authors of [the congressional] reports had in mind only governmental entities, such as administrative or investigative courts, acting as state instrumentalities or with the authority of the state." Soon thereafter, the Fifth Circuit "elect[ed] to follow the Second Circuit's recent decision that § 1782 does not apply to private international arbitrations." *Republic of Kazakhstan v. Biedermann Int'l* , 168 F.3d 880, 881 (5th Cir. 1999),

The Sixth Circuit has taken a different approach. In a comprehensive decision, *Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, 939 F.3d 710 (6th Cir. 2019), that court found no basis to restrict the term

"tribunal" to governmental entities: "[C]ourts' longstanding usage of the word shows not only that one permissible meaning of 'tribunal' includes private arbitrations but also that that meaning is the best reading of the word in this context." *Id.* at 726-27. The court concluded that the term "tribunal" should be read broadly, and that any restrictions on the application of the statute should rest on the parties' arbitration agreement, the arbitration tribunal's rules and orders, and the district court's discretion. *Id.* at 729-731.

These diverging views were underscored in a dispute between Servotronics and Rolls-Royce, in which Servotronics sought assistance under § 1782(a) in two district courts and received two different answers. In *Servotronics, Inc. v. Rolls-Royce PLC,* 975 F.3d 689 (7th Cir. 2020) cert granted, 141 S. Ct. 1684 (2020), cert. dismissed (U.S. Sept. 21, 2021), the Seventh Circuit relied on *NBC,* and construed the phrase "tribunal" to mean "a state-sponsored, public, or quasi-governmental tribunal." 975 F.3d at 696. The court read the statute to preclude assistance in a proceeding before a tribunal whose authority "is found in the parties' contract" rather than "a governmental grant of power." *Id.* at 693 n.2.

By contrast, in *Servotronics, Inc. v. Rolls-Royce PLC,* 954 F.3d 209, 213 (4th Cir. 2020), the Fourth Circuit followed the Sixth Circuit, reading the statute to "manifest[] Congress' policy to increase international cooperation by providing U.S. assistance in resolving disputes before not only

foreign *courts* but before all foreign and international *tribunals*." [Emphasis in original.] The court rejected the dichotomy between "private" and "governmental" arbitrations, noting that arbitrations rest on sovereign recognition and support:

> [A]rbitration in the United States is a congressionally endorsed and regulated process that is judicially supervised. And it was developed as a favored alternative to the judicial process for the resolution of disputes. Thus, contrary to Boeing's general assertion that arbitration is not a product of 'government-conferred authority,' under U.S. law, it clearly is.

Id., 954 F.3d at 214.

In the consolidated cases now before this Court, both the Second and Sixth Circuits upheld the provision of assistance under the statute, but they did so by separate routes. The Second Circuit followed *NBC,* but concluded that the proceeding at issue was sufficiently "governmental" to fall within the statute's scope. *Fund for Protection of Investor Rights v. AlixPartners, LLP*, 5 F. 4th 216, 225-29 (2d Cir. 2021). The district court in *Luxshare, Ltd. v. ZF Automotive US, Inc.*, No. 20-MC_51245, 2021 WL 3629899 (E.D. Mich., Aug. 17, 2021), followed *Abdul Lateef*, and thus did not have to decide whether the tribunal overseeing the dispute was "state-sponsored," "governmental," or "quasi-governmental." *Id.* at *2-*3. A review of the decisions shows why the Sixth Circuit's approach is preferable.

Because the court in *AlixPartners* was bound to follow *NBC,* the Second Circuit started with the proposition that the statute is limited to "governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies." 5 F.4th at 225, quoting *NBC*, 165 F.3d at 190. The court then applied a "functional approach" that considers "a range of factors to answer a key question: whether the body in question possesses the functional attributes most commonly associated with private arbitration." *Id.* at 225 (footnotes and internal quotation marks omitted). The court acknowledged that the arbitration panel at issue was independent of any government, but was persuaded by the fact that the proceeding "is between an investor and a foreign state party to a bilateral investment treaty…taking place before an arbitral panel established by that Treaty[.]" *Id.* at 232. Still, the court declined to "create a 'bright-line rule' that all arbitration conducted pursuant to a bilateral investment treaty qualify a foreign or international tribunal'." *Id.*

The Second Circuit also distinguished its earlier decision, *In re Guo***,** 965 F.3d 96 (2d Cir. 2020), in which the court had denied a request for assistance in an arbitration under the auspices of a commission originally established by the Chinese government. Despite the Chinese government's ongoing sponsorship and administration of the commission, the court in *Guo* concluded that commission proceedings were "private international commercial

arbitrations falling outside the ambit of § 1782." *Id.* at 107.

The effort to distinguish *AlixPartners* from *Guo* underscores the murkiness of the restrictive "state sponsored" or "(quasi)-governmental" approach when applying the statute to foreign arbitrations. In *Guo,* the commission that sponsored the arbitration was state-sponsored, at least to some extent, but the arbitration was considered "private." The arbitration in *AlixPartners* is under the auspices of a private institution, but the court was swayed by the fact that the dispute arose under an international treaty, and a sovereign is a party. Nothing in the analysis suggests that any of these facts is conclusive, and nothing links these elements to the language or purpose of § 1782(a).

Moreover, the Second Circuit's approach in *AlixPartners* draws into question the Fifth Circuit's decision in *Biedermann.* In that case, the court followed the Second Circuit's decision in *NBC*, and denied assistance under § 1782(a) with respect to a proceeding involving a sovereign party (Kazakhstan). 164 F.3d at 881. The court was not swayed by that fact, or by the fact that the sovereign itself had filed the application for assistance. The result in *AlixPartners* is difficult to reconcile with *Biedermann*, and the cases together demonstrate that a "state-sponsored" or "quasi-governmental" approach does not offer well-defined distinctions on which litigants and lower courts can rely.

The Seventh Circuit has drawn a sharper line by focusing more on the nature of the tribunal's affiliation with a sovereign. *Servotronics,* 975 F.3d at 696 ("a 'foreign or international tribunal' within the meaning of § 1782(a) is a state-sponsored, public, or quasi-governmental tribunal"). That, however, simply asks district courts in the first instance to draw another line based on the court's understanding of a foreign institution. For example, the arbitration commission in *Guo* was originally affiliated with the Chinese government; although its ties to the government may have loosened, it still receives government funding, and the Chinese government appoints the commission's officers. *Guo*, 965 F.3d at 100-01. Even under the Seventh Circuit's approach, it is not clear whether the tribunal in *Guo* would meet the "state-sponsored" test.

The restrictive application of § 1782(a) thus turns on issues that the statute does not address, that offer no clear rules of decision, and that federal courts would have to address through fact-intensive examination of a sovereign's relationship to the proceedings in a variety of international contexts. The Fourth Circuit avoided that trap when it recognized that all arbitration proceedings depend on sovereign recognition and support, and therefore reflect a sovereign interest. *Servotronics,* 954 F.3d at 214. That approach is based on a correct assessment of international practice, and is sensible in terms of clarity and predictability.

C. The Second Circuit's Approach Would Result in Application of the Statute in Cases Where Interference with Foreign Sovereign Interests is Most Likely

A second concern with the Second Circuit's functional approach to § 1782(a) is that it calls for U.S. courts to become involved in a proceedings precisely because the case touches on a foreign nation's sovereign interests. Neither the Second Circuit nor the other courts that have adopted a similar reading of the statute have explained why Congress would involve U.S. courts in proceedings precisely because those cases touch on matters of significant concern to a foreign government.

This Court touched on this point in *Intel Corp. v. Advanced Micro Devices, Inc.,* 542 U.S. 241 (2004). All of the Justices agreed that § 1782(a) should be construed in light of the variety of adjudicative processes around the world. Justice Breyer's dissent highlighted the "wide variety of nonprosecutorial, nonadjudicative bodies" to which the statute would apply. *Id.* at 268 (Breyer, J. dissenting). The majority agreed that "comparison of systems is a slippery business," that "a foreign proceeding may have no direct analogue in [America's] legal system," and that "foreign proceedings [are] resistant to ready classification in domestic terms." *Id.* at 263 n.15. Citing the statute's broad and discretionary language, the majority concluded that the § 1782(a) "authorizes, but does not require, a federal district court to provide

assistance" and rejected "the categorical limitations Intel would place on the statute's reach." *Id.* at 255.

The differences in dispute-resolution proceedings go to the heart of a country's dispute resolution process. For example, national courts in Europe, Japan, and elsewhere that follow a "civil law" approach to adjudication do not recognize pre-trial discovery in the American sense. Unlike plaintiffs in U.S. courts, claimants in civil-law courts present detailed claims at the outset of a case, but then the presiding judge or magistrate directs the completion and evaluation of an evidentiary record. Lauren Ann Ross, *A Comparative Critique to U.S. Courts' Approach to E-Discovery in Foreign Trials,* 11 Duke L. & Tech. Rev. 313, 318-19 (2012); John H. Langbein, *The German Advantage in Civil Procedure,* 52 U. Chi. L. Rev. 823, 827 (1985) (in civil law jurisdictions, "[d]igging for facts is primarily the work of the judge.")

One scholar summarized the difference between American practice and civil law proceedings as follows:

> The contrast between U.S. and foreign discovery practices is stark. As explained above, American courts have long been comfortable exercising their broad discovery and jurisdictional powers over parties wherever located. Discovery in civil law countries is drastically different from U.S. methods. Because the inquisitorial system

> predominates in civil law countries, it is judges, not the parties themselves, who have the exclusive power to gather facts. After compiling evidence, civil law judges produce an official summary, or dossier, that is used at trial.

Diego Zambrano, *A Comity of Errors: The Rise, Fall, and Return of International Comity in Transnational Discovery*, 34 BERKELEY J. OF INT'L LAW 157, 167-68 (2016) (footnotes omitted).

The civil law approach to the compilation of an evidentiary record is not merely a difference in style. Rather, international lawyers refer to it as an aspect of "judicial sovereignty." *Id.* at 172 (quoting Report of the United States Delegation to the Eleventh Session of the Hague Conference on Private International Law, 8 I.L.M. 785, 787 (1979)). The roles of judges and lawyers in different countries have roots in cultural and historical traditions relating to factors like "the trust in individual self help rather than the State as a provider of legal protection," and "different conceptions of the relationships among private individuals and between individuals and public authority." Oscar G. Chase, LAW, CULTURE, AND RITUAL: DISPUTING PROCESSES IN CROSS-CULTURAL CONTEXT 62 (2005), excerpted in Oscar G. Chase, et al., CIVIL LITIGATION IN COMPARATIVE CONTEXT 350, 352-3 (2d ed. 2017).

This Court has addressed the differences in national approaches to discovery, as well as the principle of "judicial sovereignty" over "evidence-

gathering." *Societe Nationale Industrielle Aerospatiale v. U.S. District Court for the Southern Dist. of Iowa*, 482 U.S. 522, 543 (1987). In that case, the Court stressed the importance of local control over judicial proceedings:

> It is well known that the scope of American discovery is often significantly broader than is permitted in other jurisdictions, and we are satisfied that foreign tribunals will recognize that the final decision on the evidence to be used in litigation conducted in American courts must be made by those courts.

Id. at 542.

Not only would the Second, Fifth, and Seventh Circuits' approach to § 1782(a) result in U.S. district courts' granting applications for judicial assistance *only* in cases in which sovereign interests are at issue in a proceeding, it would do so *precisely because* those interests are in play. It would then provide for American-type discovery, without regard to whether that approach would be consistent with the practice and procedures appropriate to that forum, or that particular case. At the same time, the Second Circuit's approach forecloses assistance where the dispute concerns private matters and the sovereign's interests are most remote.

The Fourth and Sixth Circuits' approach avoids this problem by accepting the baseline sovereign interest in the resolution of disputes through

arbitration – and as explained below, rests the application of the statute on matters that leave the federal courts with more discretion to balance competing sovereign and private interests.

II. Federal Courts Should be Guided by the Language Of § 1782(a) that Authorizes Assistance in The Collection of Evidence "For Use In" a Foreign Tribunal

Although § 1782(a)'s reference to "tribunals" should be read to include "private" as well as "state-sponsored" or "(quasi-)governmental" arbitrations, that does not mean that the grant of judicial assistance is without limits. The statute's limiting factors are (i) the requirement that the materials sought be "for use in a proceeding in a foreign or international tribunal" and (ii) the district court's discretion to "prescribe the practice and procedure" for the collection of evidence," which "may be in whole or in part the practice and procedure of the foreign country or the international tribunal." By making a threshold determination as to whether the application of the statute is "for use" in a proceeding – and if so, by crafting an order that is appropriate in the circumstances – federal courts can account for the context of the underlying proceeding, including any particular sovereign interests that may be affected.

This approach is consistent with the recognition in *Intel* that § 1782(a)'s "for use" provisions are the initial hurdle a § 1782(a) applicant has to overcome. *Intel* involved a § 1782(a) application by the

complainant in a proceeding before the European Commission's competition authority ("DG-Competition"). The Court explained that DG-Competition initiates proceedings on the basis of a complaint or *sua sponte*, and that DG-Competition is open to the receipt of information from the complainant during its investigative phase. *Intel*, 542 U.S. at 254. DG-Competition prepares a written decision, which is subject to review in European courts. *Id.* Information submitted at the investigative stage is available during subsequent appellate review. *Id.* at 256-57. In these circumstances, the Court concluded that the applicant had satisfied the statute's "for use" requirement. *Id.* at 257.

The Court in *Intel* also instructed district courts considering § 1782(a) applications to consider "the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance" and "whether the § 1782(a) request conceals an attempt to circumvent foreign proof gathering restrictions or other policies of a foreign country or the United States." *Id.* at 264-65. Although the Court in *Intel* declined "to adopt supervisory rules" pending "further experience with § 1782(a) applications in the lower courts," *id.* at 265, further experience now suggests that the determination of whether the evidence is sought for use in a proceeding – rather than the definition of "tribunal" – is the relevant threshold question.

Not only is this approach derived from the statutory language, it has other advantages as well. First, the "for use" requirement is easily applied. Resolution of applications submitted by, or with the concurrence of, the foreign tribunal should be straightforward. If the application is by a party, then the applicant could show at least a substantial prospect that the information sought would lead to evidence admissible in the foreign or international tribunal. The applicant could refer to the parties' arbitration agreement, the applicable rules of the tribunal, rules or orders regarding discovery (if any), the record of the proceedings, and similar information from which the district court can make an informed decision.

Second, treating the "for use" language as a threshold issue under § 1782(a) would resolve concerns raised by several courts regarding a potential inconsistency between § 1782(a) and the FAA. As the Seventh Circuit noted, § 1782(a) allows for an application by "any interested person," but the FAA requires that a request for judicial assistance come from the tribunal. 975 F.3d at 695-96. That discrepancy has nothing to do with the nature of the foreign tribunal – but it could be relevant to whether the evidence can or will be used in the underlying proceeding. Just as the district court would look to the FAA's provisions to determine whether assistance should be granted in a domestic arbitration, the court should consider the applicable statutes and rules governing the foreign tribunal to determine whether

the materials sought would be "for use" in that proceeding.

Third, requiring a "for use" demonstration would resolve concerns regarding comity and respect for foreign sovereign interests. The Court explained the concern in *Societe Nationale*:

> In addition, we have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation. . . . American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state.

482 U.S. at 546 (citation omitted). The Court in *Intel* explained that an application for judicial assistance under § 1782(a) raises the same concerns. 542 U.S. at 261 ("[C]omity and parity concerns may be important as touchstones for a district court's exercise of discretion in particular cases").

By considering whether the information sought in the § 1782(a) application is "for use" in the underlying proceeding, the district courts can approach the matter in a way that is sensitive to the concerns of foreign sovereigns, as well as the concerns raised by the courts that have tried to limit the statute in other ways. As the Court stated in *Intel*,

542 U.S. at 266, "§ 1782(a) authorizes, but does not require, discovery assistance," and it is there appropriate to "leave it to the courts below to ensure an airing adequate to determine what, if any, assistance is appropriate."

CONCLUSION

For the reasons stated above, the Sixth Circuit's view that § 1782(a) applies to private foreign arbitrations avoids the problems associated with the Second Circuit's "governmental" approach. Whether and how assistance is granted in a particular case should be left to the district court's assessment of the statute's "for use" requirement, and its discretion in crafting an appropriate order.

Respectfully submitted,

ROBERT P. PARKER
Counsel of Record
ROTHWELL, FIGG, ERNST & MANBECK, P.C.
607 14TH STREET, N.W.
WASHINGTON, D.C. 20005
(202) 783-6040
rparker@rfem.com

Counsel for Amicus Curiae

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