No. 20-794

IN THE SUPREME COURT OF THE UNITED STATES

SERVOTRONICS, INC.,
Petitioner,

v.

ROLLS-ROYCE PLC AND THE BOEING COMPANY,
Respondents.

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

BRIEF OF THE ATLANTA INTERNATIONAL ARBITRATION SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ANDREW J. TUCK
Counsel of Record
KRISTEN K. BROMBEREK
GAVIN REINKE
JAMIE S. GEORGE
ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, GA 30309
(404) 881-7000
andy.tuck@alston.com

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

The Atlanta International Arbitration Society ("AtlAS") is a non-profit organization established in 2011. The AtlAS Board of Directors includes representatives of approximately two dozen law firms, law schools, arbitral institutions, and litigation advisory service firms. *See* AtlAS website, http://www.arbitrateatlanta.org (last visited January 8, 2021).

AtlAS represents the international arbitration community in the southeastern United States, working with leaders in government, state and local bar associations, and the judiciary to ensure that state legislation and bar rules are supportive of international arbitration and conducive to the fair, efficient and cost-effective resolution of cross-border business disputes. AtlAS also educates neutrals, lawyers in private practice, corporate counsel, and law students regarding the substantive law, practice, and culture of international arbitration, as well as civic, business, and government leaders regarding the benefits of a vibrant international arbitration center to Atlanta, the State of Georgia, the southeastern United States, and beyond.

AtlAS and its members have a substantial interest in the outcome of this case. Resolving a circuit split about whether federal district courts may order persons to give testimony or produce documents in

[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part, nor did any party or counsel for a party make a monetary contribution to fund the brief's preparation or submission. Counsel of record for all parties received timely notice of and consented in writing to this filing.

private international arbitrations will remove uncertainty that may disincentivize parties from selecting such arbitrations to resolve their disputes, thereby fostering AtlAS's goal of promoting the use of international arbitration. *See* http://arbitrateatlanta.org/the-atlanta-international-arbitration-society (last visited January 8, 2021). Moreover, AtlAS's members include practitioners who specialize in private international arbitration and whose practices would benefit from the resolution of this question.

SUMMARY OF ARGUMENT

28 U.S.C. § 1782(a) governs the ability of disputants to apply to district courts to obtain discovery to be used in certain types of foreign proceedings. The statute limits the ability to obtain such discovery to situations in which the discovery sought will be "use[d] in a proceeding in a foreign or international tribunal." 28 U.S.C. § 1782(a). This Court has never decided whether the phrase "foreign or international tribunal" in that statute encompasses private international arbitrations, and the courts of appeals are split on that question. This Court should grant certiorari to resolve the circuit split, which will create certainty about what parties to private international arbitrations can expect and will remove an incentive to forum shop that exists under the current state of the law.

ARGUMENT

I. THIS CASE PRESENTS A QUESTION ABOUT DISTRICT COURTS' ABILITY TO ORDER DISCOVERY FOR USE IN PRIVATE INTERNATIONAL ARBITRATIONS THAT HAS DIVIDED THE COURTS OF APPEALS.

28 U.S.C. § 1782(a) gives district courts the authority to order a person "to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . . ." The statute does not define the phrase "foreign or international tribunal," and, as discussed below, the courts of appeals are divided about whether that phrase encompasses private international arbitrations.

A. This Court Has Never Addressed Whether 28 U.S.C. § 1782(a) Authorizes District Courts to Order Discovery for Use in Private International Arbitrations.

In *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), the Court considered whether Section 1782(a) authorized a district court to order discovery in connection with a proceeding pending before the Directorate-General for Competition of the Commission of the European Communities (the "European Commission"), which is "the executive and administrative organ of the European Communities." *Id.* at 246, 250 (internal quotation marks and citation omitted). This Court briefly discussed whether the European Commission qualified as a "tribunal" under the statute. It concluded that "Congress intended" Section 1782 "to provide the possibility of U. S. judicial

assistance in connection with administrative and quasi-judicial proceedings abroad." *Id.* at 258 (alterations, internal quotation marks, and citations omitted). And the Court held that because the European Commission "acts as a first-instance decisionmaker," it qualifies as a quasi-judicial proceeding and therefore as a "tribunal" under Section 1782(a). *Id.*

Intel implicated, but did not decide, the question whether private international arbitrations which, unlike the European Commission, are non-governmental arbiters of disputes, qualify as tribunals under the statute. *Id.* at 256; *see also* Restatement (Third) U.S. Law of Int'l Comm. Arb. § 3.5(b) (noting that post-*Intel* there is "[c]onsiderable debate . . . regarding the applicability of § 1782 to commercial (or, as courts refer to them, 'private') international arbitral tribunals").

B. <u>The Fourth and Sixth Circuits Hold that Private International Arbitrations Constitute a "Foreign or International Tribunal" Under 28 U.S.C. § 1782(a).</u>

In the absence of this Court's guidance about whether the term "tribunal" in Section 1782(a) includes private international arbitrations, the courts of appeals have developed divergent views. The Fourth Circuit and the Sixth Circuit have both interpreted the phrase "foreign or international tribunal" in 28 U.S.C. § 1782(a) to ***include*** private international arbitrations. In those circuits, interested parties in private international arbitrations can petition a district court to order a person located in the district to

provide testimony or produce documents for use in those arbitrations.

The Sixth Circuit considered this issue 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 Sixth Circuit first examined dictionary definitions of the term "tribunal" to assess whether it encompasses private arbitrations. *See id.* at 719-20. It concluded that dictionaries "leave room for interpretation" because, while "several legal and non-legal dictionaries contain definitions of 'tribunal' broad enough to include private arbitration," "others contain narrower definitions that seem to exclude such proceedings." *Id.* at 720. The court next examined how the term "tribunal" is used in legal writing, and concluded that the term's usage in legal writing was generally broad enough to "include[] private, contracted-for, commercial arbitral panels." *Id.* The Sixth Circuit also examined the "overall context and structure of the statute" and concluded that "the text, context, and structure of § 1782(a) provide no reason to doubt that the word 'tribunal' includes private commercial arbitral panels established pursuant to contract and having the authority to issue decisions that bind the parties." *Id.* at 722-23. Finally, the Sixth Circuit found that this Court's decision in *Intel* "contains no limiting principle suggesting that the ordinary meaning of 'tribunal' does not apply," and therefore that *Intel* does not suggest that private international arbitrations should be excluded from the definition of "tribunal" in Section 1782(a). *Id.* at 726.

In *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209 (4th Cir. 2020) (*Servotronics I*), the Fourth Circuit

joined the Sixth Circuit in concluding that Section 1782(a) allows parties to private international arbitrations to petition a district court for discovery in the United States. In agreeing with the Sixth Circuit that the term "tribunal" encompasses private arbitrations, the Fourth Circuit relied on Section 1782(a)'s legislative history, and found that certain changes Congress adopted when it implemented the statute suggest that Congress intended the statute to "increase international cooperation by providing U.S. assistance in resolving disputes before not only foreign *courts* but before all foreign and international *tribunals*." *Id.* at 213 (emphasis in original). Thus, the Fourth Circuit held, under Section 1782(a), "the district court has authority to provide, in its discretion, assistance in connection" with a private international arbitration.

C. The Second, Fifth, and Seventh Circuits Hold that Private International Arbitrations Do Not Constitute a "Foreign or International Tribunal" Under 28 U.S.C. § 1782(a).

The Second, Fifth, and Seventh Circuits have all adopted a substantially more narrow definition of the term "tribunal" in Section 1782(a). Under this view, Section 1782(a) does not authorize district courts to grant discovery for use in private international arbitrations. In *National Broadcasting Corp. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999), the Second Circuit found that the word "tribunal" in Section 1782(a) "is sufficiently ambiguous that it does not necessarily include or exclude" private arbitrations. *Id.* at 188. Thus, the Second Circuit "look[ed] to legislative history and purpose to determine the

meaning of the term in the statute." *Id.* It noted that the statute was enacted to "broaden the scope" of a statute that had been previously repealed "by extending the reach of the surviving statute to intergovernmental tribunals not involving the United States," but there was "no indication that Congress intended for the new provisions to reach private international tribunals, which lay far beyond the realm of the earlier statute." *Id.* at 190. The Second Circuit also found that permitting "broad discovery in proceedings before 'foreign or international' private arbitrators would stand in stark contrast to the limited evidence gathering provided in [the Federal Arbitration Act] for proceedings before domestic arbitration panels" and "would undermine one of the significant advantages of arbitration, and thus arguably conflict with the strong federal policy favoring arbitration as an alternative means of dispute resolution." *Id.* at 191.[2]

In *Republic of Kazakhstan v. Biedermann International*, 168 F.3d 880 (5th Cir. 1999), the Fifth Circuit adopted the Second Circuit's interpretation of the term "tribunal" in Section 1782(a). The Fifth Circuit's reasoning echoes that of *National Broadcasting*. *See generally id.* The Fifth Circuit also opined that "[e]mpowering arbitrators or . . . the parties, in private international disputes to seek ancillary discovery though the federal courts does not benefit the arbitration process" because, in that court's view, "arbitration's principal advantages may be destroyed if the parties succumb to fighting over

[2] The Second Circuit reaffirmed its holding that Section 1782(a) does not apply to private international arbitrations in *Hanwei Guo v. Deutsche Bank Sec.*, 965 F.3d 96, 100 (2d Cir. 2020).

burdensome discovery requests far from the place of arbitration." *Id.* at 883.

In this action, the Seventh Circuit sided with the Fifth and the Second Circuits in concluding that Section 1782(a) does not authorize discovery for use in private international arbitrations. Like the Second and the Fifth Circuits, the Seventh Circuit recognized that "dictionary definitions do not unambiguously resolve whether private arbitral panels are included." App. at 9a. It then looked to the way that the phrase "foreign or international tribunal" is used in other statutes that address foreign proceedings. *Id.* at 12a-13a. That phrase appears in 28 U.S.C. §§ 1696 and 1781, which address service-of-process assistance and letters rogatory, respectively. The Seventh Circuit noted that those processes "are matters of comity between governments, which suggests that the phrase 'foreign or international tribunal' as used in this statutory scheme means state-sponsored tribunals and does not include private arbitration panels." *Id.* The Seventh Circuit also opined that "[i]f § 1782(a) were construed to permit federal courts to provide discovery assistance in private foreign arbitrations, then litigants in foreign arbitrations would have access to much more expansive discovery than litigants in domestic arbitrations." *Id.* at 14a.

Thus, as discussed above, the five courts of appeals that have addressed the meaning of the term "tribunal" in Section 1782(a) have all concluded that the term is ambiguous. However, the courts of appeals have reached contrary conclusions about whether Congress intended Section 1782(a) to authorize district courts to allow discovery for use in private

international arbitrations. As discussed below, this Court should grant certiorari to resolve that question.

II. THE APPLICABILITY OF SECTION 1782(a) TO PRIVATE INTERNATIONAL ARBITRATIONS IS AN IMPORTANT QUESTION WORTHY OF THIS COURT'S DETERMINATION.

This Court should grant review to resolve the split among the courts of appeals about whether Section 1782(a) grants district courts the authority to compel discovery for use in a private arbitration. There are two reasons that this is an important question that is worthy of this Court's review.

First, the divergent approaches may disincentivize parties from entering into contractual agreements to privately arbitrate disputes. That is because, under the current state of the law, a party's ability to use a federal district court to obtain discovery in that arbitration depends on the happenstance of which federal judicial district the person from which the discovery sought is located. This creates uncertainty because it is difficult to predict when contracting where witnesses who possess information relevant to future arbitration may be located. The uncertainty is compounded by the fact that several of the circuits, including the Eleventh Circuit in which Atlanta sits, have not weighed in on whether a private international arbitration is a "tribunal" under Section 1782(a). Regardless of how this Court decides that question, resolving it will settle expectations by creating certainty, which will help parties to make more informed decisions when entering into agreements to resolve disputes by private international arbitration.

Second, the current circuit split encourages forum shopping. Where an entity from which discovery is sought is located in more than one judicial district, a party to an international arbitration seeking discovery from that entity is presently incentivized to file the petition in one of the circuits that permit such discovery. Resolving this uncertainty would eliminate the incentive to forum shop by creating a single consistent rule that is applicable nationwide.

CONCLUSION

For the reasons discussed above, AtlAS respectfully requests that this Court grant certiorari to decide whether Section 1782(a) allows district courts to order discovery for use in private international arbitrations.

Respectfully submitted January 11, 2021.

ANDREW J. TUCK
Counsel of Record
KRISTEN K. BROMBEREK
GAVIN REINKE
JAMIE S. GEORGE
ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, GA 30309
(404) 881-7000
andy.tuck@alston.com

Counsel for Amicus Curiae