No. 20-794

IN THE

Supreme Court of the United States

SERVOTRONICS, INC.,

Petitioner,

v.

ROLLS-ROYCE PLC, ET AL.,

Respondents.

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

BRIEF AMICUS CURIAE OF PROFESSOR GEORGE A. BERMANN IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae George A. Bermann is the Jean Monnet Professor of European Union Law, Walter Gellhorn Professor of Law, and Director of the Center for International Commercial and Investment Arbitration at Columbia Law School. He has been a faculty member at Columbia Law School since 1975, and both teaches and writes extensively on transnational dispute resolution, European Union Law, administrative law, and comparative law. He is also an affiliated faculty member of both the MIDS Masters Program in International Dispute Settlement in Geneva and the International Dispute Resolution LLM Program at the School of Law of Sciences Po in Paris.

For more than four decades, Professor Bermann has been an active international arbitrator in commercial and investment disputes. He is the Chief Reporter of the American Law Institute's *Restatement of the U.S. Law of International Commercial and Investor-State Arbitration* (Am. Law. Inst., Proposed Final Draft 2019), a project that began in 2007 and was completed in 2019. He is also co-author of the *UNCITRAL Guide to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, chair of the Global Advisory Board of the New York International Arbitration Center, co-editor-in-chief of the *American Review of International Arbitration*, and a founding member of the International Chamber of

[1] All parties consent 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 his counsel contributed monetarily to the preparation and submission of this brief.

Commerce International Court of Arbitration's Governing Body.

Professor Bermann frequently participates as amicus curiae in cases before the Court, addressing questions involving private international law, including international arbitration. He is interested in this case because it presents a highly important but unsettled issue of domestic law that affects international arbitration: whether the phrase "foreign or international tribunal" in 28 U.S.C. § 1782(a) encompasses international commercial arbitral tribunals, often referred to by U.S. courts as "private" tribunals.

As the Chief Reporter of the *Restatement of the U.S. Law of International Commercial and Investor-State Arbitration* and a leading member of the arbitration community both in the United States and internationally, Professor Bermann has an interest in ensuring that U.S. courts correctly and uniformly interpret Section 1782 in connection with international commercial arbitrations. The decision below misinterprets Section 1782 and should be reversed.

SUMMARY OF ARGUMENT

Section 1782 permits, but does not require, U.S. federal district courts to order discovery "for use in a proceeding in a foreign or international tribunal." 28 U.S.C. § 1782(a). The Seventh Circuit in this case interpreted "foreign or international tribunal" as excluding international commercial arbitral tribunals. It did so in error, and its judgment should be reversed.

I. The plain meaning of Section 1782 compels the conclusion that the statute applies to proceedings before international commercial arbitral tribunals.

In amending Section 1782 in 1964, Congress deliberately used a term—"foreign or international tribunal"—of great generality. The term "foreign" signified a location outside the United States. The term "international" denoted a situation involving multiple nations or nationalities. And "tribunal"—the word on which the decision below turned—meant a court or other body authorized to authoritatively resolve disputes by adjudicatory means. An international commercial arbitral tribunal fully satisfied all the required elements of a "foreign or international tribunal" within the meaning of Section 1782. Congress drew no distinctions among, and created no carve-outs from, foreign or international tribunals. That international commercial arbitral tribunals are included in that category was, and is, unambiguous.

It is telling that Congress did not limit assistance under Section 1782 to "foreign or international *courts*" or "foreign or international *judicial bodies*," as it easily could have. "Tribunal" is indisputably the term used to identify the bodies that conduct international arbitral proceedings. Indeed, when the term "foreign or international tribunal" is mentioned, international commercial arbitral tribunals come immediately to mind. Thus, both before and after 1964, this Court has repeatedly used the term "tribunal" to identify such bodies. In keeping with accepted canons of statutory construction, a statute is to be interpreted in accordance with the plain meaning of its terms, and the inquiry into meaning should stop there. *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1738 (2020). Courts interpreting Section 1782 must remain faithful to that precept.

Despite Section 1782's plain meaning, some courts, such as the Seventh Circuit in this case, have grafted onto the provision a requirement that the "foreign or international tribunal" be State-sponsored. It is on that basis that they have drawn a sharp distinction for Section 1782 purposes between two sets of international arbitral tribunals: those adjudicating treaty-based investment disputes between a private party and a State, on the one hand, and those adjudicating contract-based and contract-related disputes, on the other. Those courts have made recourse to Section 1782 available in connection with proceedings before the former, but not before the latter.

A distinction between these two sets of arbitral tribunals finds no support in the text of Section 1782 or its legislative history. Congress chose the capacious term "tribunal," which unambiguously encompasses adjudicatory bodies, whether established under treaty or contract. Nor have those courts advanced any principled policy justification for the notion that international investor-State and commercial arbitral tribunals should be treated differently in this regard.

Congress's use of the phrase "foreign or international tribunal" in other parts of Title 28 does not support a reading of Section 1782 that excludes international commercial arbitral tribunals. To the contrary, 28 U.S.C. §§ 1696 and 1781, both of which also use the phrase "foreign or international tribunal," are equally applicable to international commercial arbitral tribunals. They provide no reason to doubt the plain meaning of the words that Congress chose to use.

The question of Section 1782's applicability to international commercial arbitral tribunals was the subject of extended discussion and deliberation during

the drafting of the *Restatement of the U.S. Law of International Commercial and Investor-State Arbitration* (Am. Law. Inst., Proposed Final Draft 2019) ("the *Restatement*"). As approved in 2019, the *Restatement* takes the position that Section 1782 unqualifiedly applies to international arbitral tribunals, commercial and investor-State alike.

II. In *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), this Court's only decision on Section 1782's scope, the Court indicated that the term "foreign or international tribunal" was to be interpreted broadly. From *Intel*, we learn that a Section 1782 request may be granted even if (i) no adjudication is yet pending and the proceeding is at a purely investigatory stage, provided it may culminate in an adjudication, (ii) the applicant is not a party to the foreign or international proceeding, and (iii) the documents sought to be discovered under Section 1782 would not be discoverable either in that proceeding or in an analogous U.S. proceeding. To be sure, the *Intel* case itself involved a proceeding before a governmental body, namely the Commission of the European Union, but this Court gave no indication that that was an essential condition of Section 1782's applicability.

Instead, if any single overriding theme emerges from *Intel*, it is that Section 1782's applicability is subject to no *per se* conditions or restrictions. Thus, categorically excluding bodies conducting international commercial arbitral proceedings from the definition of Section 1782 would not only contravene the plain meaning of the text, but also deviate from *Intel*'s most basic teaching.

III. There is no reason to suppose that abiding by the clear statutory language of Section 1782 will produce the catastrophic results cited by those who oppose the availability of Section 1782 in international commercial arbitration. In *Intel*, this Court emphasized that a decision on a Section 1782 request is discretionary. Not only is a federal court free to grant or deny a Section 1782 application as it considers best, but even in granting such a request, it has ample latitude to narrow, limit, or condition discovery. Accordingly, appropriate safeguards are present.

A major objection to making Section 1782 available to parties in international commercial arbitration appears to be an alleged risk of interfering with arbitral tribunals' prerogatives in organizing arbitral proceedings and injecting cost, delay, and formalism that arbitration is meant to avert. Yet the Court in *Intel* knew about and addressed that generalized risk. Indeed, the Court counseled lower courts to ensure that the assistance they offer is not unduly burdensome, and it instructed them, in assessing Section 1782 requests, to take specifically into account the foreign or international tribunal's receptivity to the requested discovery. Those instructions can be—and have been—applied to Section 1782 requests in aid of international commercial arbitrations.

IV. Finally, contrary to the concerns of the Seventh Circuit and several other lower courts, there is no conflict between Section 1782 and Section 7 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 7. Section 7 addresses the authority of a district court to assist arbitral proceedings seated within that district in the gathering of evidence. Section 1782, by contrast, applies to foreign or international proceedings.

ARGUMENT

I. By its plain meaning, Section 1782 applies to international commercial arbitral tribunals.

Section 1782 applies to documents or testimony to be used in "a proceeding in a foreign or international tribunal." 28 U.S.C. § 1782(a). Congress did not define "foreign or international tribunal" in Section 1782, but the phrase's plain meaning—both when Congress used it in the statute in 1964 and today—includes privately-constituted arbitral tribunals. That "ordinary public meaning" is decisive. *Bostock*, 140 S. Ct. at 1738.

A. In 1964, an international commercial arbitral tribunal was a "foreign or international tribunal."

In 1964, the term "foreign or international tribunal" had a perfectly ordinary meaning that can be established from contemporaneous dictionaries.

"Foreign" meant "[s]ituated outside a place or country." *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d 710, 719 n.4 (6th Cir. 2019) (citing *Webster's Third New International Dictionary* (1961)). "International" meant "[e]xisting between or among nations or their citizens." *Id.* (citing *Webster's Third*); *see also id.* (observing that "international" can also mean "[o]f, relating to, or involving two or more nations or nationalities" (citing *The American Heritage Dictionary of the English Language* (1969))). As amended in 1964, Section 1782 encompassed proceedings taking place abroad and involving countries or parties of different nationalities. *Id.*

At that time, the meaning of "tribunal" was similarly broad. According to contemporaneous dictionaries, "tribunal" meant "a court or forum of justice: a person or body of persons having authority to hear and decide disputes so as to bind the disputants." *Id.* at 720 (citing *Webster's New International Dictionary of the English Language* (2d ed. 1950)); *see id.* (observing that the 1966 edition of *Webster's Third New International Dictionary* contained the same definition of "tribunal"). International commercial arbitral tribunals unquestionably constituted a "forum of justice" for the resolution of disputes and issued rulings binding on the parties.[2]

This conclusion is reinforced by this Court's own contemporaneous usages. In 1956, the Court explained that "[t]he nature of the tribunal"—whether it be "a court of law" or "an arbitration panel"—"may make a radical difference in" a given case's "ultimate result." *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956). Four years later, the Court observed that commercial disputes may be resolved either in court or in "the more informal arbitration tribunal[s]." *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960). The following year, the Court used the terms "union tribunals," "employer tribunals," and "joint tribunals" when describing bodies established "to arbitrate disputes." *National Labor*

[2] As this Court discussed extensively in *Intel*, the 1964 amendments to Section 1782 "deleted the words 'in any judicial proceeding pending in any court in a foreign country' and replaced them with the phrase 'in a proceeding in a foreign or international tribunal'" such that "the word 'tribunal' [would] ensure that 'assistance is not confined to proceedings before conventional courts,' but extends also to 'administrative and quasi-judicial proceedings.'" 542 U.S. at 248–49 (emphasis omitted).

Relations Bd. v. Radio & Television Broad. Eng'rs Union, 364 U.S. 573, 580 (1961). And in 1964, the same year that Congress added the term "tribunal" to Section 1782, the Court decided that, in submitting a labor dispute to private arbitration rather than the National Labor Relations Board, the union was "resort[ing] to a *tribunal* other than the Board." *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 272 (1964) (emphasis added).

These sources all show that, by 1964, the use of "tribunal" to refer to an arbitral panel was part of the common vernacular. Because Congress offered no "contrary direction" suggesting that it wished to depart from that common usage, it "presumably" meant to "adopt[] the cluster of ideas that were attached to" the term. *Morissette v. United States*, 342 U.S. 246, 263 (1952); *see United States v. Detroit Med. Ctr.*, 833 F.3d 671, 674 (6th Cir. 2016) (Sutton, J.) ("In the absence of any statutory definition to the contrary, courts assume that Congress adopts the customary meaning of the terms it uses.").

B. Today, an international commercial arbitral tribunal is a "foreign or international tribunal."

The plain meaning of "tribunal" has not changed since 1964. *Black's Law Dictionary* (11th ed. 2019) tells us that a "tribunal" is quite simply a "court of justice or other adjudicatory body." Arbitral tribunals are "other adjudicatory bod[ies]." *See id.* (noting in the definition of "arbitrator" that "[p]arties usu[ally] agree to have their dispute resolved by either a sole arbitrator or three arbitrators (referred to as an arbitral panel in domestic arbitration or an arbitral tribunal in international arbitration)").

This Court too has remained consistent in its use of the term "tribunal." In one of its most important international arbitration decisions, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court explained that enforcing "the parties' [arbitration] agreement" showed "respect for the capacities of foreign and transnational tribunals"—like the Tokyo-seated commercial arbitral tribunal to which the *Mitsubishi* parties had submitted their dispute. 473 U.S. 614, 629 (1985); *see id.* at 627, 629–631, 634, 636–637, 638 (repeatedly using "tribunal" to refer to international commercial arbitral panels). And in another landmark arbitration decision, *Scherk v. Alberto-Culver Co.*, the Court stated that, by agreeing to submit their dispute to International Chamber of Commerce arbitration, the parties had "agree[d] to arbitrate before a specified tribunal." 417 U.S. 506, 519 (1974).

C. The distinction that some lower courts have drawn between international commercial arbitral tribunals and international investment arbitral tribunals is flawed.

Several lower courts have held that Congress intended Section 1782 to apply only to "[S]tate-sponsored" international investment arbitral tribunals, not to "private" international commercial arbitral tribunals. *See, e.g.*, *National Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 188–90 (2d Cir. 1999). Thus, while the question whether Section 1782 discovery is available in aid of international commercial arbitration has sharply divided the federal courts, there is a consensus among those courts that Section 1782 discovery is available in aid of proceedings before inter-

national investment arbitral tribunals. *See Restatement*, § 3.5 Reporter's Note b; *see also, e.g.*, *In re Chevron Corp.*, 633 F.3d 153, 161 (3d Cir. 2011) (arbitral tribunal constituted under a bilateral investment treaty is "unquestionably" a "foreign or international tribunal" under Section 1782).

There is no basis, however, for drawing a sharp distinction between international investment and commercial arbitration in this context, and the Court should reject it.

1. The cases that make this distinction typically rely on two elements of Section 1782's legislative history: first, that Congress did not specifically mention international commercial arbitration when debating the 1964 amendments, *e.g.*, *National Broad.*, 165 F.3d at 189, and second, that one of Section 1782's predecessor statutes provided for discovery assistance only to tribunals "established pursuant to an agreement between the United States and any foreign government or governments," *id.* at 192. Neither rationale withstands scrutiny.

First, there is no evidence that Congress specifically contemplated arbitration under bilateral investment treaties when it amended Section 1782 in 1964. At that time, investor-State arbitral tribunals scarcely even existed. Treaty-based investor-State arbitration is largely a product of the 1980s and 1990s, at the earliest. The United States did not sign its first bilateral investment treaty until 1982. *See* Panama-U.S. Bilateral Investment Treaty, Oct. 27, 1982, S. Treaty Doc. No. 99-14. Since then, the treaty governing by far the most international investment arbitrations involving the United States has been the North American Free Trade Agreement, Can.-Mex.-U.S.,

Dec. 17, 1992, 32 I.L.M. 289 ("NAFTA"), which did not take effect until 1994.[3]

Nor should the Court attach particular significance to the United States' signature, in 1965, of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (the "ICSID Convention"). While that treaty created a framework for international investment arbitration, it gave rise to no investment rights or obligations.

In fact, by 1964, international commercial arbitration was much more established than international investment arbitration. It was over forty years earlier, in 1920, that New York passed its Arbitration Law to respond to "the demands of international commerce" and "establish[] legal machinery for protecting, safeguarding and supervising commercial arbitration." Julius H. Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 Yale L.J. 147, 148, 150 (1921). A few years later, in 1922, the International Chamber of Commerce ("ICC") published the first version of its Rules of Arbitration, which were designed for, and are still widely used in, international commercial arbitration.[4] That was followed the next year by the establishment of the ICC's International Court of Arbitration with the goal of "making arbitration the preferred method of commercial dispute resolution" in

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[3] *See* United Nations Conference on Trade and Dev., *Investment Dispute Settlement Navigator*, https://bit.ly/3tDksIG (last visited May 12, 2021) (listing twenty investor-State arbitrations brought against the United States, eighteen of which were brought under NAFTA).

[4] *See* Int'l Chamber of Commerce, *Leading Dispute Resolution Worldwide*, https://bit.ly/3tvOPRu (last visited May 12, 2021).

the wake of World War I.[5] The London Court of International Arbitration ("LCIA")—another popular institution for international commercial arbitration—is even older, having been established in 1892 to facilitate the arbitration of, among other things, "trans-national commercial disputes."[6] The arbitration workload of the ICC Court and the LCIA consists overwhelmingly of international commercial cases; meanwhile, the number of investor-State arbitration cases in those forums remains negligible.

The United States was also a protagonist in establishing the United Nations Convention on the Recognition and Enforcement of Arbitral Awards, June 10, 1958, 21 U.S.T. 217 (the "New York Convention"), the key international instrument in international arbitration, signed in 1958 and ratified by the United States in 1970. The overwhelming majority of arbitral agreements covered by the New York Convention are based on contract, not investment treaty, while the overwhelming majority of arbitral awards covered by the Convention arise out of private commercial disputes and are the product of privately constituted arbitral tribunals. Most New York Convention signatory States, including the United States, have also interposed a "commercial reservation" restricting their obligations under the Convention to disputes arising out of a commercial relationship.[7]

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[5] *Id.*

[6] London Court of Int'l Arbitration, *History*, https://bit.ly/3uy50yW (last visited May 12, 2021).

[7] *See* United Nations Comm'n on Int'l Trade Law, *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention")*,

In brief, the facts refute the theory that Congress had international investor-State tribunals—but *not* international commercial tribunals—in mind when enacting Section 1782.

Second, and no less significant, one of Section 1782's predecessor statutes, 22 U.S.C. §§ 270–270g, specified that it applied only to tribunals established by the United States and foreign governments—a limitation Congress specifically removed when it amended Section 1782 in 1964. *See* Pub. L. No. 88-619, §§ 3, 9(a), 78 Stat. 995, 995, 997 (1964); 22 U.S.C. §§ 270–270g (1958); *see also Application to Obtain Discovery*, 939 F.3d at 727–28; *National Broad.*, 165 F.3d at 189–90. To read a "State-sponsored" tribunal requirement into Section 1782, after Congress excised it from the statute in 1964, undermines Congress's purpose in deleting that requirement. *See Stokeling v. United States*, 139 S. Ct. 544, 561 (2019) ("When Congress keeps one piece of statutory text while deleting another, we generally have no trouble concluding that it does so with purpose." (quotation marks omitted)).

In sum, the distinction between international commercial arbitral tribunals and investment arbitral tribunals does no more than illustrate the maxim that "[l]egislative silence is a poor beacon to follow in discerning the proper statutory route." *Zuber v. Allen*, 396 U.S. 168, 185 (1969); *see Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) (when evaluating a stat-

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https://bit.ly/3y5b4B5 (last visited May 12, 2021) (noting that the United States and many others "will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law").

ute's legislative history, "a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark"). The basic fact remains that neither the text nor the legislative history of Section 1782, as amended in 1964, supports the notion that Congress intended to cover investment arbitral tribunals without likewise covering commercial arbitral tribunals.

2. The distinction is also inconsistent with the realities of international arbitration. Investment and commercial arbitral tribunals are indistinguishable in all their essential functions.

First, both types of tribunals derive their jurisdiction from the consent of the parties. In commercial arbitration, that consent is typically expressed in a contractual clause. *See Scherk*, 417 U.S. at 508. In investment arbitration, that consent is typically formed by an investor initiating arbitration of a dispute, a means of accepting a State's standing offer to arbitrate. *See BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 42 (2014). So even an agreement between an investor and a State to arbitrate their dispute does not arise from entry by the two States into an investment treaty; it arises from specific action taken by an investor vis-à-vis the host State.

Second, international investment arbitral tribunals do not exercise—whether directly, indirectly, or by delegation—any sovereign authority whatsoever. Just as in international commercial arbitration, the tribunals that decide investor-State disputes consist of three private individuals, one designated by each party and the chair named either by those party-named arbitrators, by the parties themselves, or by a privately constituted arbitral institution, such as the

ICC or LCIA. Neither an investment nor a commercial arbitral tribunal is a governmental authority.

Third, a foreign State can just as easily find itself a party to an international commercial arbitration as to an investor-State arbitration. States and their instrumentalities regularly engage in international commercial transactions with private parties, including foreign investors, that are subject to arbitration agreements. The resulting contract-based disputes unquestionably constitute commercial disputes falling within the jurisdiction of international commercial arbitral tribunals. Under the distinction drawn by the court below, the parties to such proceedings could not seek discovery under Section 1782. Yet if the investor were to bring an analogous claim against the State under an investment treaty, Section 1782 discovery would be available.

Fourth, international commercial and investment arbitral tribunals can and do apply identical procedural rules in conducting their proceedings. The United Nations Commission on International Trade Law Arbitration Rules ("UNCITRAL Rules"), for instance, are commonly used both in investor-State and commercial arbitration. *See Chevron*, 633 F.3d at 158 (UNCITRAL Rules applied to an international investment arbitration between Chevron and Ecuador); *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App'x 31, 32 (5th Cir. 2009) (UNCITRAL Rules applied to an international commercial arbitration between two private parties). While the ICSID Rules apply to investment disputes only, the rules of other international arbitral institutions apply equally to both species of arbitrations. *See,*

e.g., *Novenergia II – Energy & Environ. (SCA) v. Kingdom of Spain*, Civil Action No. 18-cv-01148 (TSC), 2020 WL 417794, at *1 (D.D.C. Jan. 27, 2020) (Stockholm Chamber of Commerce ("SCC") Rules applied to an international investment arbitration under the Energy Charter Treaty); *AO Techsnabexport v. Globe Nuclear Servs. & Supply, Ltd.*, 656 F. Supp. 2d 550, 551–52 (D. Md. 2009) (SCC Rules applied to an international commercial arbitration under a contract for sale of uranium).

Fifth, both types of tribunals interpret and apply rules of law—sometimes national law and sometimes international law, depending on the case. *See BG*, 572 U.S. at 31 (describing international investment arbitral tribunal's application of the bilateral investment treaty between the United Kingdom and Argentina); *El Paso*, 341 F. App'x at 32 (international commercial arbitral tribunal applied El Salvadoran substantive law and Swiss procedural law).

Sixth, both commercial and investment arbitral tribunals render final and binding decisions that courts in most countries are obligated to enforce under the same standards and procedures. Under the New York Convention, courts of all contracting States must, absent a Convention defense, enforce an award to which the New York Convention applies, whether rendered by an investment or a commercial arbitral tribunal. So too with the Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, O.A.S.T.S. No. 42, 1438 U.N.T.S. 245 (the "Panama Convention"). Thus, parties winning international arbitrations are equally dependent on national courts to enforce those awards, whether they are the

product of investment or commercial arbitral tribunals. *See Restatement*, § 3.5 Reporter's Note b. This further undermines the "State-sponsored" versus "private" dichotomy that has found favor with some lower courts.

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Both in form and function, international commercial arbitral tribunals and international investment arbitral tribunals are materially indistinguishable. Support for the distinction is therefore absent not just from Section 1782's text and legislative history, but also from international arbitration realities. There is no basis to conclude that Section 1782's reference to "foreign or international tribunal" captures one type of international arbitral tribunal but not the other.

D. The use of the phrase "foreign or international tribunal" elsewhere in Title 28 does not support a narrow interpretation of Section 1782.

Despite the absence of any textual limitation on the phrase "foreign or international tribunal" in Section 1782, the Seventh Circuit found that the use of the same phrase in 28 U.S.C. §§ 1696 and 1781 supports its narrow interpretation. *See* Pet. App. 12a–13a. Section 1696 permits a district court to order service of "any document issued in connection with a proceeding in a foreign or international tribunal" when presented with "a letter rogatory issued, or request made, by a foreign or international tribunal or upon application of any interested person." 28 U.S.C. § 1696(a). Section 1781 grants the U.S. Department of State the power "to receive a letter rogatory issued, or request made, by a foreign or international tribunal"

and to transmit "a letter rogatory issued, or request made," by a U.S. tribunal to a "foreign or international tribunal, officer, or agency to whom it is addressed." 28 U.S.C. § 1781(a). The Seventh Circuit held that because the subjects of Sections 1696 and 1781—"[s]ervice-of-process assistance and letters rogatory"—are "matters of comity between governments," the use of the same phrase in the three statutes suggests that Congress meant to refer to "state-sponsored tribunals" rather than international commercial arbitral tribunals in Section 1782. Pet. App. 12a–13a.

This finding is flawed. Although "identical words used in different parts of the same statute" will be "presumed to have the same meaning," *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 86 (2006), there is no reason why Sections 1696 and 1781 cannot apply to international commercial arbitral tribunals. The Seventh Circuit's attempt to harmonize these three statutes ignored their reference to "request[s] made" by a foreign or international tribunal. *See* 28 U.S.C. §§ 1696(a), 1781(a). This is not limited to foreign courts or State-sponsored tribunals; international commercial arbitral tribunals can also make a "request" for U.S. federal court assistance with service of a document or to obtain evidence. *See Application to Obtain Discovery*, 939 F.3d at 723; *see also Intel*, 542 U.S. at 257 n.10 ("Section 1696(a) . . . is not limited to service of process; it allows service of 'any document' issued in connection with a foreign proceeding." (emphasis omitted)).

Nor was the Seventh Circuit correct that Congress was solely concerned with international comity when passing these provisions. Section 1696 applies not only to a "request" from a "foreign or international

tribunal" but also to an "application of any interested person." 28 U.S.C. § 1696(a). As this Court has held, an "interested person" is anyone who "possess[es] a reasonable interest in obtaining [judicial] assistance." *Intel*, 542 U.S. at 256 (alterations in original) (quotation marks omitted). That extends beyond foreign courts or other State-sponsored tribunals, reaching parties to which comity considerations would not apply. There is therefore "no reason to doubt" the conclusion that the plain meaning of the text of Section 1782 compels, namely that "foreign or international tribunal" includes arbitral tribunals resolving international commercial disputes. *Application to Obtain Discovery*, 939 F.3d at 723.

E. The *Restatement* concludes that international commercial arbitral tribunals are "foreign or international tribunals" under Section 1782.

The *Restatement*'s drafters carefully considered whether Section 1782 applies to international commercial arbitrations and concluded that international commercial and investment arbitral tribunals stand on the same footing. *Restatement*, § 3.5 Reporter's Note b. The American Law Institute ("ALI") unanimously adopted that position when it approved the *Restatement* in May 2019.

The *Restatement* did not reach that conclusion lightly. As with all ALI Restatements, the *Restatement* underwent a rigorous deliberative and drafting process, in this case lasting twelve years. After closely analyzing the issue, the *Restatement*'s drafters agreed that Section 1782's plain language compels only one conclusion: that international commercial arbitral tribunals are "tribunals" within the meaning of Section

1782 and that there is no principled basis outside the statutory text for holding otherwise. *Restatement*, § 3.5 cmt. b. That conclusion follows from the bedrock principle that this Court's statutory interpretation "begins with the language of the statute" and "ends there as well" when, as here, "the statutory language provides a clear answer." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (quotation marks omitted).

II. This Court's *Intel* decision confirms that Section 1782 should be interpreted to apply to international commercial arbitral tribunals.

Intel—this Court's only decision interpreting Section 1782—confirms the outcome urged by amicus here. In *Intel*, the Court addressed whether the Directorate-General for Competition ("DG-Competition") of the European Commission was a "tribunal" under Section 1782. 542 U.S. at 246. Throughout *Intel*, the Court confirmed that the phrase "foreign or international tribunal" should be interpreted broadly. *E.g. id.* at 258 (emphasizing that "foreign or international tribunal" has a broader scope than language used in Section 1782's predecessor statutes and holding that there is "no warrant to exclude" a body that "acts as a first-instance decisionmaker"). The Court ultimately concluded that DG-Competition, which is not a court and was not at the time of the Section 1782 request acting in an adjudicatory capacity, was still a "tribunal" within the scope of Section 1782. *Id.*

In reaching that conclusion, the Court gave no particular weight to the fact that the European Commission was a governmental entity. To the contrary, that feature of the Commission received no attention.

Instead, the Court articulated its opposition to subjecting the availability of Section 1782 to hard-and-fast rules. *Id.* at 255. As noted, a foreign or international body need not be a court and need not be engaging in adjudicatory activity at the time of the discovery request in order to qualify as a tribunal under Section 1782. But *Intel* went further. It announced that Section 1782 discovery is not subject to categorical exclusions or limitations, such as a requirement that the material sought to be discovered under Section 1782 be discoverable either in the foreign or international forum or in an analogous domestic proceeding. Categorically excluding international commercial arbitral tribunals from the scope of Section 1782 would be at cross-purposes with *Intel*'s core teachings.

It is also significant that this Court in *Intel* relied repeatedly on articles by Professor Hans Smit. *See id.* at 248, 256–59, 261–62, 264. Professor Smit was not merely an expert in international civil procedure, but was also the "dominant drafter of, and commentator on, the 1964 revision[s]" to Section 1782. *In re Letter of Request from Crown Prosecution Serv. of UK*, 870 F.2d 686, 689 (D.C. Cir. 1989). One of those articles, published in 1965, specifically identified "arbitral tribunals" as one type of "tribunal" within the scope of Section 1782. Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1021, 1026 n.71, 1027 n.73 (1965). The Court cited that portion of Professor Smit's article with approval. *See Intel*, 542 U.S. at 258. Although the Court omitted part of the relevant passage ("all bodies exercising adjudicatory powers") in quoting Professor Smit, it maintained Professor Smit's specific reference to arbitral tribunals as falling within Section 1782's scope.

Compare id., *with* Smit, 65 Colum. L. Rev. at 1026 n.71.

Amicus does not take the position that academic commentary on Section 1782 can itself overcome the plain text, and acknowledges that the Court's reference to arbitral tribunals in *Intel* was *dictum*. That commentary is instructive here, however, because it accords with the plain meaning of the term "tribunal" and reflects the intention of the provision's principal drafter.

III. Holding that "foreign or international tribunal" encompasses international commercial arbitral tribunals will not prove detrimental to international commercial arbitration or the principles underlying it.

Amicus is as concerned as any other frequent actor in international arbitration about opening the floodgates to U.S.-style discovery in international arbitral proceedings. Unfettered access to discovery or use of it in all international commercial arbitrations would erode the procedural autonomy and efficiency of arbitration, and undermine some of arbitration's core purposes as an alternative to litigation. But the claim that making Section 1782 discovery available in international commercial arbitration will work great mischief is fundamentally misplaced. *See, e.g.*, *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 214 (4th Cir. 2020); *Application to Obtain Discovery*, 939 F.3d at 729–30.

To begin with, this Court has held that "a district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so." *Intel*, 542 U.S. at 264. Moreover, arbitral tribunals have authority to exclude documents obtained

through Section 1782; they can also preemptively make known to a U.S. court that they have no interest in such discovery. *See* Not. of Supp. Authority, Ex. 1 at 3, *Interglobe Enters. Private Ltd. v. Gangwal*, No. 1:19-mc-24257 (S.D. Fla. Apr. 21, 2020), ECF No. 31-1 (tribunal ruling that Section 1782 discovery was neither necessary nor helpful, and directing the party seeking Section 1782 discovery to advise the U.S. court of its ruling); *see also Intel*, 542 U.S. at 265 (noting that the European Commission stated in amicus briefs that it did not "need or want the District Court's assistance").

But beyond that, this Court and, under its guidance, lower federal courts have long since crafted sensible criteria to guide district courts in exercising their wide discretion under Section 1782. In *Intel*, the Court identified four factors relevant for this purpose: (i) whether the person from whom discovery is sought is a party to the foreign proceeding, (ii) the nature of the tribunal, the character of the foreign proceeding and the tribunal's receptivity to Section 1782 discovery, (iii) whether the Section 1782 application conceals an attempt to circumvent foreign proof-gathering restrictions, and (iv) whether compliance with the discovery requests would be unduly intrusive or burdensome. 542 U.S. at 264–65.

These criteria permit courts not only to deny discovery requests under Section 1782, but also to grant such requests subject to common sense conditions and limitations. *Intel* made clear that courts should approach each Section 1782 application strictly on its own terms. For example, as this Court stated in *Intel*, a court may require a party in whose favor discovery

has been ordered under Section 1782 to make a reciprocal exchange of information. *See id.* at 262 (citing *Euromepa, S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1102 (2d Cir. 1995)). Courts can (and do) take these considerations into account as soundly and effectively in the international commercial arbitration context as in any other.

While each of these factors is relevant to requests in aid of international commercial arbitrations, two of them have especially heightened utility in that context.

First, precisely because arbitral tribunals enjoy a high degree of procedural autonomy, it is all the more important that U.S. courts refrain from ordering discovery that is "unduly intrusive or burdensome." *Intel*, 542 U.S. at 265; *see Restatement*, § 3.5 cmt. c.

Second, and no less important in respecting the procedural autonomy of arbitral tribunals, is the above-mentioned requirement that courts seriously consider the "receptivity" of an international commercial arbitral tribunal to the discovery sought. Indeed, district courts recognize the limitations on discovery in international commercial arbitration and have demonstrated an ability to "exercise considerable restraint, granting access to requested information only in limited circumstances when the grant is consistent with the tribunal's receptivity to the information." *Restatement*, § 3.5 Reporter's Note b; *see also id.* at § 3.5 cmt. c ("[Courts] generally exercise considerable reserve in deciding whether to grant a § 1782 request in the international arbitration setting."); *see* Order at 4, *Interglobe*, No. 1:19-mc-24257 (S.D. Fla. Apr. 30, 2020), ECF No. 33 (denying Section 1782 discovery after international commercial arbitral tribunal ruled

that such discovery was neither necessary nor helpful); *see also In re Application of Chevron Corp.*, 762 F. Supp. 2d 242, 251 (D. Mass. 2010) ("[S]ince international arbitrators usually control the discovery process, this court believes it should exercise at least some restraint before granting the instant Section 1782 application."). Though district courts have been ordering Section 1782 discovery in aid of international commercial arbitrations for years, arbitration remains the mode of choice for the resolution of international disputes.[8] No evidence has been adduced that its availability is detrimental to international arbitration. On the contrary, the LCIA reported "an all-time high" number of cases in 2020 that was "an increase of approximately 10% compared with 2019, which was then a record year."[9]

Finally, if the availability of Section 1782 discovery in aid of proceedings before international commercial arbitral tribunals poses a threat to the procedural autonomy of arbitral tribunals, then so does the availability of Section 1782 discovery in aid of proceedings

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[8] For example, the 2021 Queen Mary International Arbitration Survey—an annual publication produced by White & Case LLP and the School of International Arbitration at Queen Mary University of London—found that 90% of respondents preferred arbitration (either on its own or together with other forms of alternative dispute resolution) for resolving cross-border disputes. White & Case LLP & Sch. of Int'l Arbitration Queen Mary Univ. of London, *2021 International Arbitration Survey: Adapting Arbitration to a Changing World* 2 (2021), https://bit.ly/3ocPDJV.

[9] London Court of Int'l Arbitration, *Record Number of LCIA Cases in 2020* (Jan. 20, 2021), https://bit.ly/3o2zruM; *see also* Int'l Chamber of Commerce, *ICC announces record 2020 caseloads in Arbitration and ADR* (Jan. 12, 2021), https://bit.ly/2RIhNQO (announcing the registration of 946 new arbitrations in 2020, the highest number since 2016).

before international investment arbitral tribunals. Surely, international investment tribunals are no less entitled to respect for their procedural autonomy than international commercial tribunals. Yet that has not deterred courts, even while treating the former as perfectly eligible under Section 1782, to treat the latter as categorically ineligible. If the availability of Section 1782 discovery presents a tolerable risk to investor-State arbitration, then it presents no less tolerable a risk to international commercial arbitration.

Congress entrusted district courts with a responsibility when it passed Section 1782. This Court later assisted district courts by enumerating the *Intel* factors. If the courts fail to properly exercise their discretion so as to protect arbitration's essential virtues, Congress can readily act. The problem, if there is any, should be addressed that way, not by indulging in the fiction that international commercial arbitral tribunals are not "foreign or international tribunals" and rewriting Section 1782 accordingly. *See Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1815 (2019) ("[C]ourts aren't free to rewrite clear statutes under the banner of [their] own policy concerns.").

IV. There is no conflict between Section 1782 and the Federal Arbitration Act

The decision below and those of other lower courts have suggested that applying Section 1782 to international commercial arbitration would give rise to a conflict between that statute and the FAA. This is allegedly so because Section 1782 authorizes broader discovery than is available under Section 7 of the FAA. *See* Pet. App. 13a–15a; *Republic of Kazakhstan v. Biedermann, Int'l*, 168 F.3d 880, 882–83 (5th Cir.

1999); *National Broad.*, 165 F.3d at 187–88. More specifically, under Section 7, the federal district court where an arbitral tribunal is seated may compel a person to comply with an order of that tribunal to appear before it as a witness and to provide documents that may be material to the case. 9 U.S.C. § 7. By contrast, Section 1782 allows any interested party to apply to the federal district court in which the target of discovery resides or is found for an order to provide testimony or produce documents for use in a proceeding in a foreign or international tribunal. 28 U.S.C. § 1782(a). Courts that oppose applying Section 1782 to international commercial arbitration consider it "not likely that Congress would have chosen to authorize . . . broader discovery in aid of foreign private arbitration than is afforded its domestic dispute-resolution counterpart." *Biedermann*, 168 F.3d at 883. This position is wrong.

First, as a threshold matter, this Court has squarely rejected a comparative analysis between Section 1782 and analogous domestic proceedings in *Intel*, holding that Section 1782, as "a provision for assistance to tribunals abroad" nowhere "direct[s] United States courts to engage in comparative analysis to determine whether analogous proceedings exist [in the United States]." 542 U.S. at 263; *see Servotronics*, 954 F.3d at 216 (rejecting comparison); *Application to Obtain Discovery*, 939 F.3d at 729 (same). The Court thus was untroubled by the fact that a Section 1782 applicant might be entitled to broader discovery than a party to a domestic proceeding. Yet that is precisely the kind of comparison between foreign and domestic proceedings that the Seventh Circuit engaged in here. *See* Pet. App. 14a.

Second, there is no conflict between Section 1782 and Section 7 of the FAA. Section 7 is concerned solely with the authority of the federal court of the district where the arbitration is seated. *Servotronics*, 954 F.3d at 215 ("[U]nder the FAA, American arbitrators have the benefit of subpoenaed testimony and documents through the enforcement of the courts."). It does not address the scenario in which evidence is sought for use in arbitral proceedings seated outside the United States. That is the scenario, and the only scenario, to which Section 1782 applies. *See Intel*, 542 U.S. at 263 ("Section 1782 is a provision for assistance to tribunals abroad."). By definition, Section 1782 contemplates proceedings before tribunals seated outside the United States—those tribunals to which Section 7 of the FAA does not apply. Because Congress knows of "existing law pertinent to the legislation it enacts," it would have understood the reach of Section 7 when it enacted Section 1782. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988).

This is the only interpretation that "interpret[s] Congress's statutes as a harmonious whole," *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018), while giving effect to the "ordinary public meaning" of the words that Congress chose to use in Section 1782, *Bostock*, 140 S. Ct. at 1738.[10]

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[10] Amicus is aware that the Seventh Circuit cited its obligation to avoid an interpretation that creates a conflict with another statute to conclude that Section 1782 does not apply to international commercial arbitral tribunals. *See* Pet. App. 13a–14a. But this interpretation should be disfavored because, rather than resolving a conflict, it manufactured a conflict and then rewrote the language of Section 1782 to resolve it.

Finally, Section 1782 stemmed specifically from the view that making discovery in the United States available for use in proceedings before non-U.S. adjudicatory bodies would foster international cooperation in evidence-gathering and, in doing so, encourage foreign countries to provide similar evidence-gathering assistance to proceedings before U.S. tribunals. *See Intel*, 542 U.S. at 252 (describing the "twin aims" of Section 1782); S. Rep. No. 88-1580, at 3783 (1964) (desiring to "provid[e] equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects"). As the Court emphasized in *Intel*, the 1964 amendment to Section 1782 was part of a much larger project to "investigate and study existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements." 542 U.S. at 248 (quoting Pub. L. No. 85-906, § 2, 72 Stat. 1743, 1743 (1958)). There is therefore nothing problematic in interpreting Section 1782 to include international commercial arbitral tribunals when that interpretation furthers those goals. *See Application to Obtain Discovery*, 939 F.3d at 730.

CONCLUSION

The notion that international commercial arbitral tribunals lie categorically outside the scope of Section 1782 is untenable. Had Congress intended in 1964 to exclude from the scope of Section 1782 precisely the kind of adjudicatory body that comes most readily to mind at the mention of the term "foreign or international tribunal," it would and easily could have done so. But the plain language of the statute Congress enacted, together with the legislative history, commentary from the principal drafter of Section 1782, and

this Court's *Intel* decision, compel only one conclusion: international commercial arbitral tribunals fall squarely and unambiguously within the category of foreign and international tribunals. The lower courts can be counted on to exercise their usual sound discretion in acting upon Section 1782 requests, with due emphasis in particular on tribunals' receptivity to the discovery sought and on the other guidance this Court provided in *Intel*.

This Court should reverse the judgment below.

Respectfully submitted,

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