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 OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country.

An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, including cases involving international arbitration. *See, e.g., GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 590 U.S. __ (2020).

Business Roundtable is an association of chief executive officers of over 225 leading U.S. companies that together have more than $9 trillion in annual revenues and more than 20 million employees. Business Roundtable was founded on the belief that businesses should play an active and effective role in the formulation of public policy, and Business Roundtable participates in litigation as *amicus curiae* where important business interests are at stake.

As global trade has expanded, companies around the world, including American companies, increasingly

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[1] No counsel for a party authored this brief in whole or in part. No person other than *amici curiae*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

rely on international commercial arbitration to resolve complex commercial disputes. Consequently, the governing legal landscape, including evidence-taking procedures, is critically important. Private parties increasingly have relied on a federal statute, 28 U.S.C. § 1782 ("Section 1782"), to petition United States district courts to order the production of documents or testimony in connection with an international commercial arbitration proceeding. *See* Gary B. Born & Peter B. Rutledge, *International Civil Litigation in United States Courts* 1052, 1060 (6th ed. 2018) (*hereinafter "Born & Rutledge"*). Because Section 1782 confines that authority to "the district in which a person resides or is found," these requests regularly are directed at companies based in the United States. Some requests arise in situations where the American-based company is not a party to the arbitration. Others arise in situations where the domestic company is a party to the arbitration but lacks a reciprocal opportunity to obtain documents from its foreign adversary. *See id.* Both types of requests disadvantage U.S.-based companies relative to their foreign counterparts.

Thus, *amici* have a strong interest in the proper construction of Section 1782.

STATEMENT

This case concerns the proper construction of the term "foreign or international tribunal" in 28 U.S.C. § 1782. Congress added that term to Section 1782 and neighboring provisions of Title 28 as part of a broader package of changes in federal law governing international judicial assistance in 1964. International judicial assistance concerns the aid provided by one sovereign government to another sovereign govern-

ment in the execution of some judicial act (such as the service of process, the enforcement of a foreign judgment or, of relevance here, the taking of evidence). *See generally* Born & Rutledge at 866, 1017, 1051-52. A careful review of the context and history of international judicial assistance in the United States is critical to the proper interpretation of the term at issue in this case. The historical examination reveals two distinct strands unified by the 1964 legislation: (1) assistance to foreign courts and (2) assistance to interstate arbitration tribunals created in treaties and other agreements between sovereign governments. Wholly absent from these two historical strands is any mention of private arbitral panels.

1. Assistance to foreign courts. Historically, international judicial assistance came in the form of letters rogatory, requests issued by the courts of one country (where the case was being heard) to the courts of another (where the evidence was located), often through diplomatic channels. As Professor Greenleaf explains in an early edition of his authoritative treatise:

> This method of obtaining testimony from witnesses, in a foreign country, has always been familiar in Courts of Admiralty; but it is also deemed to be within the inherent power of all Courts of Justice. For, by the law of Nations, Courts of Justice, of different countries, are bound mutually to aid and assist each other, for the furtherance of justice; and hence, when the testimony of a foreign witness is necessary, the Court, before which the action is pending, may send to the Court, within whose jurisdiction the witness resides, a writ, either patent or close, usually termed a letter rogatory, or, a commission . . . .

Simon Greenleaf, *A Treatise on the Law of Evidence* § 320 at 462 (3d ed. 1832).

Despite this historic practice and early examples of such letters *issued* by federal (and state) courts, *see, e.g., Nelson v. United States*, 17 F. Cas. 1340, 1342 n. 2 (C.C.D. Pa. 1816) (No. 10,116), in 1855 Attorney General Cushing concluded that a United States Court lacked the power to *execute* a letter rogatory issued from France absent express Congressional authorization. 7 Op. of the Att'y Gen. 56 (1855).

In the wake of Attorney General Cushing's opinion, Congress enacted the original federal statute governing international judicial assistance. That statute authorized federal courts to execute "letters rogatory . . . from *any court of a foreign country*" to compel witnesses to appear before and to be deposed by a commissioner designated by that United States Court. Act of Mar. 2, 1855, ch. 140, § 2, 10 Stat. 63 (emphasis added). In the century that followed, Congress periodically revised the federal law governing this form of international judicial assistance. Act of Mar. 3, 1863, ch. 95, § 1, 12 Stat. 769; Act of June 25, 1948, ch. 646, § 1782, 62 Stat. 949; Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103. Throughout this century-long evolution, one feature of this first strand remained unbroken: it confined the authority to requests for international *judicial* assistance, that is requests to assist a foreign country's *courts*. Immediately prior to the 1964 amendments, federal law authorized district courts to compel the deposition of witnesses located in the United States for use "in any judicial proceeding pending in any *court* in a foreign country with which the United States is at peace." 28 U.S.C. § 1782 (1952) (emphasis added).

Much of the disagreement over the question presented focuses exclusively on this first strand. As the Second Circuit has correctly recognized, that focus is too narrow. *See Nat'l Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184, 189-90 (2d Cir. 1999). It overlooks a second, distinct strand of history: the history of assistance to interstate arbitral tribunals.

2. Assistance to interstate arbitral tribunals. Interstate arbitration is the consensual submission of a dispute *between foreign nations* to one or more arbitrators, typically pursuant to an international agreement. Historically, interstate arbitrations resolved an array of claims between nations (like boundary disputes), alleged violations of international law (like the alleged unlawful seizure of a foreign-flagged vessel) or claims "espoused" by one nation on behalf of its citizens against another nation, *see Dames & More v. Regan*, 453 U.S. 654, 679-83 (1981). It too enjoys a long history in the United States, dating back to the 1794 Jay's Treaty with Great Britain. *See, e.g.*, Treaty of Amity Commerce and Navigation between His Britannic Majesty and The United States of America, Arts. V-VII, *reprinted in* II H. Miller, *Treaties and Other International Acts of the United States of America 1776-1863* 245 (1931).

This frequent use of arbitration as a form of interstate dispute resolution complemented then-prevailing doctrines of sovereign immunity. Under those doctrines, a foreign sovereign was absolutely immune from suit in another sovereign's courts. (It was only in the second half of the twentieth century that the more recent "restrictive theory" reflected in the Tate Letter and codified in the Foreign Sovereign Immunities Act gained traction). *See Samantar v. Yousuf*, 560 U.S. 305, 312-13 (2010). Consequently, interstate arbitration offered a viable mechanism whereby foreign

states could voluntarily submit and amicably resolve designated disputes without subjecting themselves to the jurisdiction of each other's courts.

Members of this Court periodically served on interstate arbitral tribunals. For example, in the *Pelletier* case, Justice Strong resolved certain claims by American citizens against the Republic of Haiti. *See* II John Bassett Moore, *History and Digest of International Arbitrations to which the United States Has Been a Party* 1749, 1793 (1898). Similarly, pursuant to a treaty between Guatemala and Honduras, Chief Justice Hughes served on an interstate arbitral tribunal to resolve a century-old boundary dispute between those two nations. *See* F.C. Fisher, *The Arbitration of the Guatemalan-Honduran Boundary Dispute*, 27 Am. J. Int'l L. 403 (1933). Justice Roberts served as an umpire in the Mixed Claims Commission, created to resolve claims between the United States and Germany for damages suffered by Americans during the First World War. *See Lehigh Valley R.R. (U.S. v. Germany)*, 8 R.I.A.A. 104 (Mixed Cl. Comm'n 1932).

Despite this occasional involvement of sitting jurists, interstate arbitration tribunals often lacked the power to compel the attendance of witnesses or the production of documents. *See* Durward V. Sandifer, *Evidence Before International Tribunals* 208-09 (1939) (*hereinafter* "Sandifer"). Occasionally, particular treaties or special federal legislation conferred limited compulsory powers on a particular panel. *See* Sandifer at 209; Chandler P. Anderson, *Production of Evidence by Subpoena Before International Tribunals*, 27 Am. J. Int'l L. 498, 500 (1933). Until 1930, however, no general federal legislation authorized such powers or judicial assistance thereto.

Congress enacted such legislation in the midst of the famous *I'm Alone* case, a paradigmatic interstate arbitration. The case of the *S.S. I'm Alone* involved a dispute over the sinking of a ship running rum across the territorial boundaries between the United States and Canada during the Prohibition Era. *See* Nancy G. Skogland, *The* I'm Alone *Case: A Tale from the Days of Prohibition*, 23 U. Rochester Libr. Bull. 43 (1968). A 1924 treaty between the United States and the United Kingdom authorized the boarding of private vessels bearing either country's flag outside the country's territorial waters and established a commission to resolve disputes for loss or injury. Convention between the United States and Great Britain on the Prevention of Smuggling of Intoxicating Liquors (Jan. 23, 1924), U.S. Treaty Series No. 685, 24 Int'l L. Stud. 88-91. Following the sinking of the *I'm Alone* by United States authorities, a commission was established pursuant to the treaty and included Justice Willis Van Devanter. *See* 2 Hackworth, Digest of International Law 703-08 (1941).

During the arbitration, questions arose over whether the *I'm Alone* was a Canadian vessel at all or, instead, belonged to American owners hiding under the Canadian flag (a fact that would have been fatal to Canada's claim). The challenge, however, was how to secure statements from those involved in the bootlegging, for the 1924 treaty did not expressly authorize such evidence taking. The American Agent suggested that the Commission issue a subpoena. After the Commission expressed doubts over its authority to do so, Secretary of State Stimson requested that Congress enact general legislation authorizing any international tribunal or commission to which the United States was a party "to require by subpoena the attendance and the testimony of witnesses and the production of documentary evi-

dence relating to any matter pending before it." Act of July 3, 1930, ch. 851 §1-4, 46 Stat. 1005, 1006. *See also* Letter from Secretary of State Henry L. Stimson to the Honorable George W. Norris, Chairman of the Judiciary Committee of the United States Senate, *reprinted in* 72 Cong. Rec. 1044 (1929). Congress rapidly responded and approved the requested legislation. Based on this statutory authorization, Justice Van Devanter issued several subpoenas. Sandifer at 211.

Justice Van Devanter's exercise of his authority pursuant to this legislation depended partly on the lack of any objection by the Canadian government. As noted above, the treaty authorizing the tribunal's creation did not expressly vest it with any authority to issue compulsory process. So, the question remained whether an interstate arbitral tribunal had the authority to issue a subpoena pursuant to the new federal law when the underlying treaty did not authorize it and the state party objected.

Soon thereafter, that question arose in a case before the "Mixed Claims Commission" and resulted in further changes to the federal law governing in interstate arbitration. The "Mixed Claims Commission" was an interstate arbitral tribunal formed in the Treaty of Berlin to resolve claims between the United States and Germany for claims suffered by American nationals during the First World War. Anderson, 27 Am. J. Int'l L. at 500. As in the *I'm Alone* case, the American Agent petitioned the Commission to secure the witness testimony, but the German Government objected on the ground that such a request illegitimately expanded the Commission's jurisdiction beyond the treaty's terms. *See* Sandifer at 211.

In response, Congress amended the legislation in 1933. Those amendments authorized an American

Agent directly to petition a United States court to issue the subpoena for testimony or documents (without needing to seek the Commission's authorization) and provided for enforcement of the subpoenas by a United States court. Act of June 7, 1933, ch. 50, 48 Stat. 117. Subsequently exercising that authority, several federal courts rejected challenges to subpoenas sought by the American Agent. *See, e.g., U.S. ex rel. Lehigh Valley R.R. Co. v. Germany*, 5. F. Supp. 97, 100 (E.D.N.Y. 1933). *See generally* Sandifer at 213 n. 31.

Federal law governing the authority to issue compulsory process in support of interstate arbitral tribunals was eventually codified in Title 22 of the United States Code ("Foreign Relations and Intercourse") at Sections 270-270g. Immediately prior to the 1964 amendments, the relevant section of Title 22 was limited to discovery in connection with interstate arbitral proceedings to which the United States was a party:

> [t]he agent of the United States before any international tribunal or commission, whether previously or hereafter established in which the United States participates as a party whenever he desires to obtain testimony or the production of books and papers by witnesses may apply to the United States District Court for the district in which such witnesses may be found, for the issuance of subpoenas to require their attendance and testimony . . . and the production of books and papers, relating to any matter or claim in which the United States on its own behalf or on behalf of any of its nationals is concerned as a party claimant or respondent before such international tribunal or commission.

22 U.S.C. § 270d (1958).

In 1952, Attorney General James McGranery called for a critical re-examination of the law governing international judicial assistance. *See* Report of Honorable James P. McGranery, *reprinted in* Report of the Judicial Conference of the United States at 38-41 (1952) ("*McGranery Report*"). Shortly thereafter, Congress established the Commission on International Rules of Judicial Procedure ("*Rules Commission*"). *See* Act of Sept. 2, 1958, Pub. L. No. 85-906, § 2, 72 Stat. 1743. Congress instructed the Rules Commission "to study the system of international judicial assistance in the United States and to recommend improvements." 1 Bruno A. Ristau, *International Judicial Assistance* §1-1-4 at 12 (1990) (footnote omitted). The Rules Commission recommended changes in three main areas: (1) revisions to the Federal Rules of Civil and Criminal Procedure; (2) adoption of a uniform state law governing interstate and international procedure; and (3) amendments to the United States Code.

In 1964, Congress unanimously adopted the changes to federal law recommended by the Rules Commission. Those changes included substantial revisions to the law governing both of the above-described strands of international judicial assistance. With respect to the first strand, Congress removed various restrictions on the availability of that assistance such as the provision limiting it to a "judicial proceeding pending in any court in a foreign country with which the United States is at peace." With respect to the second strand, Congress repealed the separate provisions governing judicial assistance to interstate arbitral tribunals contained in Title 22. Merging these two strands into a single integrated provision, the revised version of Section 1782 authorized federal district courts to issue subpoenas for testimony or documents "for use in a proceeding in a foreign or international tribunal."

SUMMARY OF ARGUMENT

Section 1782 does not authorize federal courts to issue subpoenas to support private arbitral panels. Rather, the term "foreign or international tribunals" only encompasses courts and other sovereign adjudicative bodies formally created by the official act of one or more sovereign governments. Along with the textual reasons advanced by Respondents, two additional ones support this interpretation.

First, this interpretation best comports with this Court's precedents. Those precedents treat commercial arbitration as a mutual agreement between private parties to trade "the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Petitioner's proposed extension of Section 1782 upends this "mutual agreement." It embroils federal courts in disputes where the parties never intended their involvement. It imposes asymmetric burdens on American-based companies relative to their foreign counterparts. Finally, it produces absurd results like an obligation to produce documents located in a foreign country even where that country's own laws would not require that production for use in an arbitration.

Second, the interpretation of "foreign or international tribunals" in Section 1782 to exclude private arbitral panels best comports with the historical backdrop against which Congress adopted the term. A careful examination of that history reveals that the term "foreign or international tribunal" unified two strands of federal law – a strand governing assistance to foreign courts and a separate strand governing assistance to interstate arbitral tribunals. Absolutely

nothing in the history refers to (much less reveals an intention to include) private arbitral panels.

ARGUMENT

I. THE TERM "FOREIGN OR INTERNATIONAL TRIBUNAL" IN SECTION 1782 DOES NOT INCLUDE PRIVATE ARBITRAL PANELS.

Section 1782 does not *expressly* authorize United States courts to issue subpoenas in support of private arbitral panels. That statute does not mention "arbitrators" at all. Congress knows perfectly well how to enact statutes about private arbitral panels, including statutes concerning evidence-taking in support of those panels. It did so nearly forty years prior to the 1964 amendments when, in 1925, it adopted the Federal Arbitration Act ("FAA"). Section 7 of the FAA, a provision of the "Arbitration" Title of the United States Code, authorizes "arbitrators" sitting in the United States, whether in a domestic or international commercial dispute, to issue subpoenas in certain limited circumstances and authorizes federal district courts to enforce those subpoenas. *See Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004) (Alito, J.).

The question before this Court is whether, despite the lack of comparable express authorization in Section 1782, private arbitral panels can be shoehorned into the statutory term "foreign or international tribunal." The answer to that question is no. That phrase, appearing in the "Judiciary and Judicial Procedure" Title of the United States Code, covers only proceedings in courts and other sovereign adjudicatory authorities formally created by the official acts of one or more sovereign governments. Respondents' brief thoroughly canvasses the textual arguments buttress-

ing this rule. So *amici* concentrate this brief on why Petitioner's contrary construction (A) is incompatible with the basic attributes and practice of international commercial arbitration set forth in this Court's jurisprudence and (B) untethers the term "foreign or international tribunal" from its historical moorings. In contrast to Petitioner's strained interpretation of the term, "[s]tatutory history provides a better lesson . . . which is confirmed by following out the practical consequences of [Petitioner's] position." *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 199 (2000).

A. Petitioner's proposed extension of Section 1782 is incompatible with the basic attributes and practice of international commercial arbitration set forth in this Court's jurisprudence.

A bedrock principle of international commercial arbitration, reflected in this Court's jurisprudence, is that it is fundamentally a creature of contract. That principle ordinarily vests choices about procedural matters, including evidence taking, in the parties' mutual agreement in the first instance and, where such agreement is lacking, in the arbitrator's discretion. The unilateral system of evidence-taking proposed by Petitioner would detonate that bedrock principle and bring about "a major . . . alteration in established legal relationships" in conflict with the best reading of the statute, particularly in light of its context and history. *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 616 (1978). It would impose several costs on the target of the subpoena, ones that would disproportionately affect and asymmetrically burden U.S.-based companies. This "fallout underscores the

implausibility of [Petitioner's] interpretation." *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021).

1. Both this Court's precedents and the practice of international commercial arbitration rest on a foundation of enforceable private agreements over the procedures, including on matters of evidence taking.

International commercial arbitration, much like its domestic counterpart, is fundamentally a "solemn agreement between the parties that such controversies be resolved elsewhere." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 517 n. 11 (1974). While such private agreements were often historically unenforceable, the FAA reversed this presumption and replaced it with a liberal federal policy "guaranteeing the enforcement of private contractual arrangements." *Mitsubishi*, 473 U.S. at 625. By presumptively enforcing these procedural contracts, the FAA "allow[ed] parties to avoid the costliness and delays of litigation." *Scherk*, 417 U.S. at 510-11.

Procedural autonomy helps parties avoid those costs and delays. By opting for arbitration, private parties trade "the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration." *Scherk*, 417 U.S. at 628. Consequently, federal law "lets parties tailor . . . [many] features of arbitration by contract," *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008), and "requires courts rigorously to enforce arbitration agreements according to their terms, including terms that specify … the rules under which that arbitration will be conducted." *Epic Sys. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (internal quotations omitted). This helps

parties "to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forgo access to judicial remedies." *Mitsubishi*, 473 U.S. at 633.

The parties' procedural autonomy extends to matters of evidence taking. As the International Chamber of Commerce acknowledges, the compulsory disclosure of evidence is *not* a matter of right in international commercial arbitration. *See* ICC Br. at 12. Rather, the availability (and extent) of evidence taking depends upon the parties' agreement. Sometimes, parties explicitly regulate the matter directly in the arbitration clause. In these instances, virtually every major set of arbitral rules, including the rules applicable in this case, instruct the arbitrators to apply the parties' agreed-upon procedural rules. *See* Rules of the Chartered Institute of Arbitrators, Appendix II, para. 19(d). *See generally* II Gary B. Born, International Commercial Arbitration § 15.02[D] at 2302-04 (3d ed. 2021) (*hereinafter* "*Born*"). In other instances, the parties' arbitration clause may be silent (or incomplete) on matters of disclosure and evidence-taking. In these instances, international arbitration rules, including the rules applicable in this case, almost uniformly delegate to the tribunal the authority to make procedural determinations. *See* Rules of the Chartered Institute of Arbitrators Art. 27(3); *see also* ICC Br. at 13-14 (citing other institutional rules).

In harmony with this two-step framework, most national arbitration laws provide only limited opportunity for judicial assistance in support of international commercial arbitration. The UNCITRAL Model Law on International Commercial Arbitration, an international arbitral law adopted by over forty countries and several states in the United States, exemplifies these

limits. Article 27 of the UNCITRAL Model Arbitration Law provides that: "The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence." Moreover, Article 1(2) of the Model Law strictly limits the application of judicial assistance to arbitrations sited in the country where the court sits. In other words, the UNCITRAL Model Arbitration Law, like the laws of many other nations, does not permit a court in one of the countries that has adopted it to provide judicial assistance in the taking of evidence to support an arbitration sited elsewhere. *See generally* II Born § 16.03[A] at 2570-74. These generally accepted limits ensure both that the judicial assistance proceeding does not undermine the arbitral panel's authority to resolve the parties' dispute and that satellite litigation does not undercut the parties' desire for just, speedy, and efficient resolution of the dispute.

Section 7 of the Federal Arbitration Act accords with this prevailing international practice. Like other countries' international arbitration laws noted above, Section 7 designates the arbitral tribunal as the gatekeeper for any requests to take evidence in an arbitral proceeding. 9 U.S.C. § 7. Similar to the geographic limitations set forth in other countries' international arbitration laws, Section 7 sets forth a firm geographic limitation: only the district court "in which such arbitrators, or a majority of them, are sitting" may compel compliance with the arbitrators' subpoena. Section 7's limitations apply to international arbitrations sited *in* the United States either by operation of the residual application clauses contained in the implementing legislation for two conventions, *see* 9 U.S.C. §§ 208, 307, or by direct application in case of an arbitration not subject to one of these

conventions, *see The Instituto Cubano de Estabilizacion Del Azucar v. Firbranch*, 130 F. Supp. 170 (S.D.N.Y. 1954).

2. Petitioner's proposed construction of Section 1782 upends these contractual foundations and the practice of international commercial arbitration.

The interpretation of Section 1782 offered by Petitioner upends this carefully crafted framework governing international commercial arbitration upon which the rules of all major arbitral institutions and the international arbitral laws of major trading nations rest. "Attention to the practical consequences" for international arbitration counsels against that interpretation. *Cortez Byrd Chips*, 529 U.S. at 203.

First, Petitioner's reading vests federal district courts with oversight of entirely foreign disputes where the prospect of proceedings in an American forum was not even within the parties' contemplation. For example, a Russian company and a Singaporean company might enter into an arbitration agreement designating England as an arbitral forum. Even though the underlying transaction has no relationship to the United States whatsoever, Petitioner's construction would permit a federal district court to entertain a subpoena request from one of the parties to obtain evidence for use in the English arbitration proceeding. *See, e.g.*, *JSC MCC EuroChem v. Chauhan*, No. 3:17-MC-00005, 2018 WL 3872197, at *4 (M.D. Tenn. Aug. 15, 2018). This results in precisely the "unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages" that this Court's international arbitration jurisprudence has sought to avoid. *Scherk*, 417 U.S. at 516-17.

Second, Petitioner's construction does not "give effect to the contractual rights and expectations of the parties," *Mitsubishi*, 489 U.S. at 479, and instead grafts onto them a set of evidence-taking procedures to which the parties never consented. Moreover, as this case illustrates, because a proceeding need not even be pending under this Court's precedents, *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258-59 (2004), Petitioner's proposed interpretation allows parties to invoke Section 1782 before the arbitrators have been selected. This produces "costly satellite litigation" incompatible with the parties' mutual agreement. II Born § 16.03 at 2586.

Third, Petitioner's construction imposes an asymmetric burden on U.S.-based companies. Consider an arbitration between a United States-based company and a German-based company sited in Belgium. Because the Section 1782 authority is limited to the district where a party may be "found," the U.S.-based company can be subject to a Section 1782 subpoena. But the German company likely will not. Under the above-described UNCITRAL Model Arbitration Law (adopted in revised form in Germany), *supra* at 15-16, a German court will not provide judicial assistance to compel the production of evidence located in Germany for use in a Belgian arbitration. *See* II Born § 16.03[B] at 2597. Nor is a Belgian court likely to interfere in an arbitration proceeding between foreign companies sited there. *See* H. Verbist & H. van Houtte, *Belgium*, in Practitioner's Handbook on International Commercial Arbitration (Weigand and Baumann, eds.) § 4.215 at 192 (3d ed. 2019). Consequently, Petitioner's construction affords greater discovery rights to foreign-based parties to an international arbitration than their American-based counterparts. *See e.g.*, *In re*

Hallmark Cap. Corp., 534 F. Supp. 2d 951, 952 (D. Minn. 2007).

This asymmetric burden extends to situations where the U.S.-based company is not even a party to the arbitration. Consider, for example, an arbitration sited in Austria between a Ukrainian company and the Ukrainian-based subsidiary of a U.S.-based parent company. Under Petitioner's reading, the Ukrainian company could employ Section 1782 to seek discovery from the U.S.-based parent company even though that company is not subject to the Austrian arbitrators' jurisdiction. Similarly, Petitioner's interpretation would allow the Ukrainian-based company to harass not just the parent company but any number of U.S.-based affiliates such as banks, accountants, or other services companies utilized by the subsidiary that might have "discoverable" information. *See In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006).

Fourth, Petitioner's construction might allow a party to attempt to obtain evidence located abroad even when the laws of those countries would not require the disclosure for use in an arbitration. Courts routinely analyze the scope of a Section 1782 disclosure obligation by reference to the provisions of the Federal Rules of Civil Procedure governing subpoenas generally. *See, e.g.*, *HRC-Hainan Holding Company, LLC v. Yihan Hu*, 2020 WL 906719, at *11 (N.D. Cal. Feb. 25, 2020). Those rules include provisions requiring a party to produce evidence within its "possession, custody and control." Some courts have interpreted this language broadly to encompass material located abroad provided that the target of the discovery can secure its production. *See, e.g., In re Application of Antonio Del Valle Ruiz*, 939 F.3d 520 (2d Cir. 2019). Consequently, under Petitioner's proposed interpreta-

tion, in a foreign-sited arbitration between a Japan-based company and U.S.-based multinational, the Japan-based company could bring a Section 1782 subpoena against the U.S.-based company and seek to require it to disclose not only documents located *in* the United States but also documents in the possession of its foreign-based subsidiaries and *located abroad*. Even where local laws might not require those foreign subsidiaries to produce those documents for use in an arbitration, such local laws would not prevent the federal district court from ordering production. *See* Born & Rutledge at 966-67, 1013-14. Under these circumstances, the Court "should give some alternative meaning to [foreign or international tribunal] . . . that avoids this [absurd] consequence." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring).

3. Reliance on the district court's discretion to manage Section 1782 subpoenas does not adequately address these costs or conflicts with this Court's precedents.

Petitioner and several of its *amici* attempt to avoid these prudential concerns and absurd results by claiming that district courts can manage them through the exercise of their discretion under Section 1782. That argument is unavailing. No exercise of discretion can avoid the substantial costs that come from allowing Section 1782 to upend the procedural contract underpinning arbitration. *See Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (eschewing "complex tests" that "complicate a case", "eat[] up time and money," and put judicial resources "at stake").

For one thing, no exercise of district court discretion can avoid "frustrat[ing]" the "streamlined proceedings

and expeditious results" that the parties expected when they agreed to arbitrate. *Preston v. Ferrer*, 552 U. S. 346, 357–358 (2008). This proceeding illustrates the point. The underlying arbitration proceeding commenced in September 2018 in England. Since that time, protracted Section 1782 proceedings have already dragged on in multiple federal courts for over two and a half years. Such delays exceed not only the presumptive deadlines for rendering the award set forth in some international arbitral rules but also the average length of time typically taken by international arbitral panels to render an award. *See, e.g.*, Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, Art. 43 (2017) (setting a six-month deadline from the date on which the arbitration was referred to the panel); LCIA Releases Costs and Duration Data, *The London Court of International Arbitration* (Nov. 3, 2015) (concluding that the median and mean lengths of an LCIA arbitration are 16 and 20 months respectively). Against this backdrop, such delays "make[] the process slower, more costly, and more likely to generate procedural morass than final judgment." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011).

Nor can the exercise of discretion offset the publicity of the collateral litigation, an outcome fundamentally at odds with the confidentiality that attends many private commercial arbitrations. Commentators routinely point to this confidentiality as one of the procedural advantages of international commercial arbitration in contrast to litigation. *See* II Born § 20.01 at 3003 n. 2 (collecting commentary). Many arbitral rules affirmatively obligate the tribunal, the administering institution and, sometimes, even the parties to maintain the confidentiality of the proceedings. *See generally id.* § 20.04[A] at 3029-30. The

availability of a Section 1782 application compromises that confidentiality to which the parties have committed. Regardless of whether a district court grants the subpoena, the public nature of the Section 1782 proceeding cannot undo that harm.

Finally, the exercise of discretion needlessly burdens the federal district courts. Since *Intel*, the Section 1782 caseload of the federal district courts has exploded. Wang Br. at 5. While Petitioner and several *amici* urge a "high bar" before a Section 1782 subpoena should be granted to support a private arbitration, that high bar nonetheless requires district courts to wade through an array of factors and considerations to decide, first, whether the prerequisites of Section 1782 have been met and, second, if they have, whether to exercise the discretion to grant the subpoena. Those determinations require district courts to familiarize themselves with proceedings in foreign forums, pursuant to unfamiliar sets of rules, and often with no sense whatsoever whether the arbitrators even want the requested materials. Such an investment of judicial resources in the context of an international commercial arbitration makes no sense because the parties necessarily have agreed *not* to resolve their dispute in those courts or, for that matter, any court at all.

B. Petitioner's argument is unmoored from the historical background against which the term "foreign or international tribunal" was adopted.

Apart from the discord with both this Court's jurisprudence and the very nature of private arbitration, Petitioner's proposed construction conflicts with the historical development of the term "foreign or international tribunal." "When called on to resolve a

dispute over a statute's meaning, this Court normally seeks to afford the law's terms their ordinary meaning at the time Congress adopted them." *Niz-Chavez v. Garland*, 141 S.Ct. 1474, 1480 (2021). In 1964, contrary to the suggestions of Petitioner and some *amici*, Congress did not adopt the terms "foreign or international tribunal" in some ahistorical vacuum. Rather it took into account "settled nuances or background conventions," spanning several centuries of history. John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2392–2393 (2003). Specifically, it added that term to merge two strands of federal law governing international judicial assistance and, thereby, to create a unified standard governing federal judicial assistance to sovereign adjudicative authorities formally created by the official act of one or more sovereign governments. Several sources support this interpretation.

First, consider the statutory antecedents. As noted above, the version of Section 1782 immediately preceding adoption of the 1964 amendments limited judicial assistance to "any judicial proceeding pending in any court in a foreign country with which the United States is at peace." As *Intel* explained, 542 U.S. at 257-58, this version of the statute had been interpreted to preclude support to quasi-judicial bodies like investigative magistrates, administrative agencies, and a French "juge d'instruction." *See, e.g., In re Letters Rogatory From Examining Magistrate of Tribunal of Versailles, France*, 26 F. Supp. 852 (D. Md. 1939). *See generally* Lucien R. Lelievre, Letters Rogatory 13 (Grossman ed. 1956). Replacing the term "judicial proceeding pending in any court in a foreign country" with the term "proceeding in a foreign tribunal" helped to ensure that these governmental "first-instance decisionmaker[s]" fell within the statute's sweep.

Intel, 542 U.S. at 258. *See also* Rules Commission, *Fourth Annual Report to the President* 45 (1962).

By contrast, use of the term "international tribunal" did not represent a change in the terminology of federal law. Rather, this was the identical term that Congress had employed to describe interstate arbitral panels in the above-described Title 22 provisions. To be sure, the merging of the Title 22 provisions with the new version of Section 1782 "broadened" the scope of judicial assistance to such tribunals. *Intel*, 542 U.S. at 258. For example, it eliminated the requirement that the United States be a party to the interstate arbitral proceeding. That change would permit judicial assistance in a case like the above-described Guatemala-Honduras border dispute on which Chief Justice Hughes served, *supra* at 6. But the basic term – "international tribunal" – remained unchanged. This textual continuity supports the proposition that Congress sought to expand the *range* of assistance available to such adjudicative authorities but not the *identity* of the bodies to which such judicial assistance was available.

Second, relevant treaties and related material support this interpretation. For example, the bilateral treaty between the United States and Canada that created the interstate panel in the *I'm Alone* arbitration, *supra* at 7-8, described it as a "tribunal." 24 Int'l L. Stud. at 90. Multilateral treaties, like the 1899 and 1907 Hague Conventions on Pacific Settlements (both of which the United States signed), similarly utilized the term "tribunal" to refer to an interstate arbitral tribunal. At the turn of the last century, the United States ratified these two conventions to promote the use of interstate arbitration as a method for peaceful resolution of interstate conflict. Both treaties state

explicitly that "[i]nternational arbitration has as its object the settlement of differences between States. . . ." Convention for the Pacific Settlement of International Disputes art. 15, July 29, 1899, 32 Stat. 1799 (*"Hague I treaty"*); *see also* Convention for the Pacific Settlement of International Disputes art. 37, Oct. 18, 1907, 36 Stat. 2199 (*"Hague II treaty"*) (same). Against that background understanding, both Hague treaties repeatedly use the term "tribunal" to describe an interstate arbitral tribunal. *See* Hague I treaty arts. 21, 24-25; Hague II treaty arts. 42, 45-46. The use of the term in both bilateral and multilateral treaties further re-enforces the historical understanding of the term "international tribunal" to encompass an interstate arbitral tribunal.

That treaty-based understanding is consistent with a project that demonstrably informed the Rules Commission's work. The Commission's terminology borrowed heavily from a 1939 Draft Harvard Convention on International Judicial Assistance ("*Harvard Convention*") that employed a virtually identical construction. *See* 33 Am. J. Int'l L. 11 (Supp. 1939). In contrast to many nations in Europe and South America, the United States was not a party to any multilateral treaty providing for international judicial assistance. *See* Bruno A. Ristau, *Overview of International Judicial Assistance*, 18 Int'l Lawyer 525, 526 (1984); Rules Commission, *First Annual Report to the President* 8-9 (1959). The Harvard Convention represented an early effort to create a harmonized framework that the United States and other nations could adopt.

The Harvard Convention employed technical terminology strikingly similar to the 1964 amendments. It regulated judicial assistance to "a tribunal of a State," defined as "a judicial authority, or an administrative

authority while engaged in the exercise of judicial or quasi-judicial functions, created by a State or political subdivision thereof." Harvard Convention Art. 1(d). This definition closely paralleled Congress' explanation, *supra* at 23-24, for why it substituted the term "foreign tribunal" for the pre-1964 term "judicial proceeding pending in any court in a foreign country." The explanatory comments specified that this term excludes "a tribunal of arbitration set up by private parties to adjudicate controversies between them unless the law of the State declares it to be a judicial authority." 33 Am. J. Int'l L. at 36. The Harvard Convention also regulated judicial assistance to an "international tribunal," defined as "a tribunal created by the agreement of two or more States for the adjudication or settlement of a controversy between States." Harvard Convention Art. 1(e). This terminology is identical to the term "international tribunal" in Section 1782. The explanatory comments to this section of the Harvard Convention elaborate that the term was designed to include interstate arbitrations (like those described above). 33 Am. J. Int'l L. Supp. at 36.

The Harvard Convention informed the Commission's work. Attorney General McGranery cited it in his 1952 Report calling for the Commission's creation. *McGranery Report* at 39. The Commission's Director described the Harvard Draft Convention as a "starting point for [the Commission's] study and recommendations," noting that its underlying commentary and sources "constitute the only reservoir of authority on the subject available in American libraries." Harry LeRoy Jones, *International Judicial Assistance: Procedural Chaos and A Program for Reform*, 62 Yale L.J. 515, 518 n. 6 (1953). Finally, the Commission cited the Draft Convention in its reports to the President. *See First Annual Report* at 10. Thus, the Harvard Draft

Convention offers especially compelling evidence to support the interpretation offered here.

Third, this construction of the term is in harmony with other uses of the term in the 1964 amendments. "[I]dentical words used in different parts of the same statute are . . . presumed to have the same meaning." *IBP, Inc. v. Alvarez*, 546 U. S. 21, 34 (2005). Here, the identical words – "foreign or international tribunal" – are used in two other provisions of the 1964 legislation. *See* 28 U.S.C. §§ 1696, 1781. Section 1696, entitled "Service in foreign and international litigation," concerns service of process, including service by letters rogatory, by a foreign or international tribunal. Section 1781 likewise concerns transmission of letters rogatory (sometimes terms "letters of request") to or from a foreign or international tribunal. Letters rogatory, as noted in the Statement *supra* at 2-3, historically have been quintessential judicial devices; private arbitral panels do not issue them, and operative treaties in the United States do not permit letters rogatory to collect evidence for use by a private arbitral panel. *See* Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters art. I (1), Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231. These uses of the term "foreign or international tribunal" in contemporaneously enacted surrounding sections of Title 28 strongly support the conclusion that the term in Section 1782 was confined to sovereign adjudicative bodies formally created by the official act of one or more sovereign governments.

In contrast to this robust history, there is no comparable evidence suggesting that it extended to private arbitral panels. Indeed, throughout the four volumes of the Rules Commission's reports to the President and all of the congressional committee

reports underlying the 1964 amendments, there is not a single reference to international commercial arbitration. This is not surprising. At that time, the United States was not a party to any multilateral treaty governing the enforcement of international commercial arbitration agreements or awards. It had refused to ratify the Geneva Protocol of 1923 and the Geneva Convention of 1927, early multilateral instruments designed to promote international commercial arbitration. Against this legal backdrop, if Congress had intended to include private arbitral panels "at a time when it was enacting liberalizing amendments to the statute, it would have included statutory language to that effect." *Intel*, 542 U.S. at 260 (citation and internal quotations omitted).

Despite this dearth of historical support, one of Petitioner's *amici* cites the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") as proof that the Congress had international commercial arbitration "in mind when enacting Section 1782" and claims that the United States was a "protagonist in establishing the [New York Convention]." Bermann Br. at 13-14. This is dead wrong. While a delegation from the United States had participated in the drafting of the New York Convention, the United States refused to sign the treaty at the time of its completion, opposed ratification due to an array of legal concerns and, as of 1964, still had not ratified it. *See* Report of the U.S. Delegation to the United Nations Conference on International Commercial Arbitration (Aug. 15, 1958), *reprinted in*, 19 Am. Rev. Int'l Arb. 91, 95 (2008) (reproducing reasons for United States delegation's recommendation not to sign or ratify New York Convention). The United States only ratified the New York Convention in 1970 – six years after Congress

passed the amendments to Section 1782 at issue in this case. Even when it did so, neither the treaty nor the implementing legislation employed the term "tribunal" when describing a private arbitral panel. Instead, those documents utilized terms like "arbitrator" or "arbitral authority," *see* New York Convention Article V, 9 U.S.C. § 206. Thus, far from supporting Petitioner's argument, the New York Convention and its ratification history cut in precisely the opposite direction.

In sum, in addition to the command of this Court's precedents, the historical backdrop against which the 1964 legislation was adopted supports the proposition that the term "foreign or international tribunal" encompasses courts and other sovereign adjudicative bodies formally created by the official act of one or more sovereign governments.

* * *

At bottom, this is a case about dicta run wild. Prior to this Court's decision in *Intel*, the uniform view among federal appellate courts was that the term "foreign or international tribunal" in Section 1782 did not encompass a private arbitral panel. While *Intel* did not hold otherwise, a single ambiguous phrase contained in a parenthetical quote from a law professor's article published after the enactment of statute at issue has unleashed a veritable kudzu of litigation where none previously existed. The resulting jurisprudential confusion recalls Chief Justice Marshall's admonition about dicta written two centuries ago:

> [G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not

> to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated. *Cohens v. Virginia*, 19 U.S. 264, 399–400 (1821).

Chief Justice Marshall's reminder is especially apt here, for the kudzu was not planted in a general expression of this Court but, rather, a stray quotation of an ambiguous statement by a private citizen about the meaning of a federal statute. Now that the issue has been "investigated with care" and "considered in its full extent," all indicia of statutory interpretation demonstrate that the pre-*Intel* courts had it right all along: a private arbitral panel is not a "foreign or international tribunal" within the meaning of Section 1782 because it is not a court or other sovereign adjudicative body formally created by the official act of one or more sovereign governments. *See Bear Stearns*, 165 F.3d at 189-90.[2]

[2] *Amici* take no position on whether "foreign or international tribunal" could be interpreted to encompass panels established pursuant to international investment treaties.

CONCLUSION

For the foregoing reasons, the judgment of the Seventh Circuit should be affirmed.

Respectfully submitted,

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