No. 20-794

In the Supreme Court of the United States

SERVOTRONICS, INC.,

Petitioner,

v.

ROLLS-ROYCE PLC AND THE BOEING COMPANY,

Respondents.

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

BRIEF OF FEDERAL ARBITRATION, INC. (FEDARB) AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Federal Arbitration, Inc. ("FedArb") is a nationwide proponent of and source for alternative dispute resolution services, including arbitration, mediation, mock trials, special masters and corporate monitoring of court orders. For the past 15 years, FedArb has assisted clients embroiled in some of the largest and most consequential domestic and international arbitrations.

FedArb maintains a panel of highly experienced arbitrators that includes more than 60 retired Article III judges, as well as multiple retired Article I and state court judges. *See* https://www.fedarb.com/ (including a list of tribunal panelists, at https://www.fedarb.com/panelists/).

FedArb has developed detailed arbitration rules, which, *inter alia*, favor the application in its administered arbitrations of the Federal Rules of Civil Procedure and Federal Rules of Evidence absent party agreement otherwise. *See* FedArb Arbitration Rules, Rule 1.04 (https://www.fedarb.com/rules/fedarb-rules/).

For parties accustomed to practicing in federal court, the default use of the Federal Rules and FedArb's roster of former judges enables familiar and efficient rule-based procedures, while maintaining

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[1] Pursuant to Rule 37.6 of the Rules of this Court, the undersigned hereby states that no counsel for a party authored any part of this brief, in whole or in part, and no person other than *amicus curiae* or its counsel made any monetary contribution to the preparation or submission of this brief. Written confirmation of consent to this filing has been received from counsel of record for all parties.

the traditional benefits of arbitration (i.e., arbitrator selection, choice of law, confidentiality, cost-efficiency, customization, world-wide enforceability, etc.).

FedArb, as a leading arbitral institution with a keen focus on familiar federal court procedure, therefore has a strong interest in the applicability of 28 U.S.C. § 1782(a) to arbitrations commenced pursuant to party agreement, as it in effect extends the application of such procedure to a further group of arbitrations. FedArb, moreover, has an interest in seeing the United States policy in favor of arbitration be furthered by permitting the rightful extension of assistance available under section 1782(a) to all foreign and international arbitral tribunals.

SUMMARY OF ARGUMENT

Congress, over time, has greatly expanded and liberalized the scope of Section 1782(a) of Title 28 of the U.S. Code—a statute providing for federal court assistance in gathering evidence for use in foreign or international tribunals. The straightforward question raised in this case is whether that statute's use of the term "tribunal" encompasses arbitral tribunals hearing commercial cases. The text of the statute, standing alone, plainly includes such tribunals. The legislative history, to which this Court need not resort under well-established rules of statutory construction, only further bolsters that position.

The Court should disregard the distinction some courts have drawn between so-called "private" and "state-sponsored" arbitral tribunals in order to

exclude the former from section 1782's reach. The supposed distinction between these two variations of arbitration is illusory as all forms of arbitration are in fact "state sponsored," including the arbitration that gives rise to this case.

Even if this Court were to find that the plain language of section 1782(a) somehow does not encompass commercial arbitral tribunals, the Court's well-reasoned decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), should put this issue to rest. In *Intel*, the Court held that there was "no warrant to exclude" a "tribunal" from section 1782(a)'s ambit to the extent it "acts as a first-instance decisionmaker." *Id.* at 258. Arbitral tribunals—including commercial and investor-state tribunals alike—are indisputably first-instance decisionmakers performing, like courts, an important adjudicatory function.

For these reasons, as elaborated herein, the Court should reverse the decision of the Seventh Circuit and hold that the phrase "foreign or international tribunal" encompasses commercial arbitral tribunals.

ARGUMENT

28 U.S.C. § 1782 reflects a nearly 150-year Congressional policy to "provide federal-court assistance in gathering evidence for use in foreign tribunals." *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247 (2004).[2] While this policy

[2] For a detailed history of the statute, whose predecessor legislation first appeared in 1855 and 1863 (*see* 33 Cong. Ch. 140; 10 Stat. 630 (1855), 37 Cong. Ch. 95; 12 Stat. 769 (1863)),

was initially limited to proceedings in which a foreign sovereign was a party or had an interest (*id.* at 248), Congress has "substantially broadened the scope of assistance" under the statute over time. *Id.*[3] In 1958, having recognized "[t]he extensive increase in . . . international, commercial and financial transactions . . . and the resultant disputes" that "involv[ed] both individuals and governments," S. REP. N. 85-2392, at 5202-03 (1958), *as reprinted in* 1958 U.S.C.C.A.N. 5201, 5202-03, Congress further expanded the scope of section 1782(a) to "improve the assistance that it had previously afforded." *Servotronics, Inc. v. The Boeing Co.*, 954 F.3d 209, 213 (4th Cir. 2020). That process—led by Professor Hans Smit and the Commission on International Rules of Judicial Procedure—lasted six years and resulted in a "complete revision of § 1782." *Intel*, 542 U.S. at 248. Ultimately, the 1964 amendments to section 1782(a) "increas[ed] international cooperation by providing U.S. assistance in resolving disputes before not only foreign *courts* but before all foreign and international *tribunals*." *Servotronics*, 954 F.3d at 213 (emphasis in original); REP. NO. 88-1580, at 3782 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 3782

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see Brief for the United States as *Amicus Curiae* Supporting Affirmance, *Intel*, 542 U.S. 241 (No. 02-572).

[3] For example, in 1948, when Congress consolidated and codified the prior legislation as section 1782, it also eliminated the requirement that a foreign sovereign be a party or have an interest in the proceedings and permitted district courts to designate persons to preside at depositions "to be used in *any civil action* pending in any court in a foreign country with which the United States is at peace." *Intel*, 542 U.S. at 248 (emphasis in original). In 1949, Congress again broadened the statute by replacing "civil action" with "judicial proceeding." *Id.*

("1964 Senate Report") (explaining that the purpose of the amendments was to "improve U.S. judicial procedures for . . . [o]btaining evidence in the United States in connection with proceedings before foreign and international tribunals."). In doing so, the revised section 1782(a) gave US federal courts the broad authority to provide evidentiary assistance to any "foreign or international tribunal." Such "tribunals" undoubtedly include commercial arbitral tribunals.

I. The Text of 28 U.S.C. § 1782(a) Includes Commercial Arbitral Tribunals within the Phrase "Foreign or International Tribunals"

Section 1782 assists tribunals and interested parties in obtaining documents and testimony for use "in a proceeding in a foreign or international tribunal." 28 U.S.C. §1782(a). Some courts have applied this statute in a manner that is inconsistent with the plain meaning of the text. Indeed, courts have twisted the meaning of the phrase "foreign or international tribunal" to justify including certain tribunals within its scope, including so-called "state-sponsored" arbitral tribunals, and excluding others, most notably commercial arbitral tribunals. There is no basis for such a tortured construction, as Congress imposed no caveats or conditions on what constitutes a "foreign or international tribunal."

A. The Court Must Interpret Section 1782(a) Based on its Unambiguous Plain Meaning

This is a straightforward case of statutory construction. The Court must therefore "begin [its

examination of section 1782(a)] with the language of the statute." *Intel*, 542 U.S. at 255 (internal citation omitted). "In determining the meaning of a statutory provision, [the Court] look[s] first to its language, giving the words used their ordinary meaning." *Artis v. District of Columbia*, 138 S. Ct. 594, 603 (2018) (citation omitted) (internal quotation marks omitted). When "the statute's language is plain, 'the sole function of the courts'—at least where the disposition required by the text is not absurd—'is to enforce it according to its terms.'" *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (citation omitted) (internal quotation marks omitted); *see also Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13 (2000) ("It suffices that the natural reading of the text produces the result we announce."); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 69 (2012) [hereinafter Scalia, Reading Law] ("Interpreters should not be required to divine arcane nuances or to discover hidden meanings."). When Congress uses broad or general terms, such as "foreign or international tribunal," they are to be "accorded their full and fair scope," and not "arbitrarily limited," since "the presumed point of using general words is to produce general coverage—not to leave room for courts to recognize ad hoc exceptions." Scalia, Reading Law 101; *see also United States v. Furlong*, 18 U.S. 184, 196 (1820) ("[G]eneral words . . . ought not . . . to be restricted so as to exclude any cases within their natural meaning."). Accordingly, where a particular "disposition is required by the text of the statute," that should conclude the Court's analysis. *Intel*, 542 U.S. at 267 (Scalia, J., concurring).

Moreover, courts should not presume that the language of a statute is ambiguous. *See United States v. LaBonte*, 520 U.S. 751, 757 (1997) ("We do not start from the premise that [the statutory] language is imprecise. Instead, we assume that in drafting legislation, Congress said what it meant."). Similarly, courts may not impose their own limitations upon a plain and unambiguous statute or resort to legislative history to upend its common-sense construction. *See, e.g., Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) ("Even those of us who sometimes consult legislative history will never allow it to be used to 'muddy' the meaning of 'clear statutory language.'"); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) ("As the conclusion we reach today is directed by the text of § 1, we need not assess the legislative history of the . . . provision."); *Garcia v. United States*, 469 U.S. 70, 78 (1984) ("We are not willing to narrow the plain meaning of even a criminal statute on the basis of a gestalt judgment as to what Congress probably intended.").

B. The Plain Meaning of Section 1782(a) Includes Commercial Arbitral Tribunals

Section 1782(a) provides that:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a *proceeding in a foreign or international tribunal*, including criminal investigations conducted before formal accusation. The order

> may be made pursuant to a . . . request made, by a *foreign or international tribunal* or upon the application of any interested person. …

28 U.S.C. § 1782(a) (emphasis added).

The phrase "foreign or international tribunal" is not defined within section 1782(a). However, the text of the statute, standing alone, plainly includes commercial arbitral tribunals, as they are tribunals within the ordinary, common sense, and objective meaning of that term. *See FDIC v. Meyer*, 510 U.S. 471, 476 (1994) ("In the absence of . . . a definition, we construe a statutory term in accordance with its ordinary or natural meaning."); Scalia, Reading Law 419 (while dictionaries are "useful and authoritative," they "tend to lag behind linguistic realities—so a term now known to have first occurred in print in 1900 might not have made its way into a dictionary until 1950 or even 2000.").

The term "tribunal" has long and widely been understood to include arbitral tribunals, including commercial arbitral tribunals. For example, in 1787, Blackstone's Commentaries on the Laws of England discussed commercial arbitration and noted "the great use of these peaceable and domestic tribunals, especially in settling matters of account, and other mercantile transactions." 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 17 (A. Strahan, T. Cadell & D. Prince eds., 10th ed., London 1787); *see also* 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1457 at 686 (Boston, Little Brown and Co., 9th ed. 1866) (referring to private commercial arbitrations as "tribunals"); *Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, 939 F.3d 710, 721-22 (6th Cir. 2019) (amassing sources).

Similarly, over the last 100 years, this Court has consistently referred to arbitrators as "tribunals."[4] *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 627-37, 638 (1985) ("[N]ational courts will need to shake off the old judicial hostility to arbitration, and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a *foreign or transnational tribunal*.") (emphasis added) (citation omitted) (internal quotation marks omitted); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956) (referring to a commercial arbitration panel as a "tribunal"); *Red Cross Line v. Atl. Fruit Co.,* 264 U.S. 109, 121 n.1 (1924) (quoting *Tobey v. Cty. of Bristol*, 23 F. Cas. 1313, 1320 (D. Mass. 1845) (Story, J.)) ("[W]hen [courts of equity] are asked to . . . compel the parties to appoint arbitrators whose award shall be final, they necessarily pause to consider whether such tribunals possess adequate means of giving redress . . . .").

The Circuit Courts of Appeal likewise have long referred to arbitration "tribunals." *See, e.g.*,

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[4] Some courts (*see Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 882 (5th Cir. 1999)) have suggested that *commercial* arbitral tribunals were a new concept in the United States at the time of the 1964 amendments to section 1782(a)—a position that is rebutted by this Court's recognition of commercial arbitral tribunals in the early 1900s. In any event, that point is irrelevant. As Justice Scalia has remarked, "The meaning of rules is constant. Only their application to new situations presents a novelty. … 'Suppose a legislator enacts that it shall be a crime for anyone to "carry concealed on his person any dangerous weapon." …' The category denoted by *any dangerous weapon* may include untold numbers of yet-to-be-invented harmful devices." Scalia, Reading Law 86.

A.S. Abell Co. v. Baltimore Typographical Union No. 12, 338 F.2d 190, 195 (4th Cir. 1964) ("Board of Arbitration is the proper tribunal"); *Kanmak Mills, Inc. v. Soc'y Brand Hat Co.*, 236 F.2d 240, 244 (8th Cir. 1956) (referring to commercial AAA arbitration "tribunal"); *Wilko v. Swan*, 201 F.2d 439, 444 (2d Cir. 1953) (referring to a "'court of competent jurisdiction' but also in any other competent tribunal, such as arbitration"); *Kentucky River Mills v. Jackson*, 206 F.2d 111, 119 (6th Cir. 1953) (recognizing contract-based arbitration panel as an "arbitration tribunal"); *Hyland v. Millers Nat'l Ins. Co.*, 91 F.2d 735, 737 (9th Cir. 1937) ("tribunal of three arbitrators"); *Emlenton Refining Co. v. Chambers*, 35 F.2d 273, 275 (3d Cir. 1929) ("fact finding tribunal, such as arbitrators or a jury"); *Fore River Shipbuilding Co. v. S. Pac. Co.*, 219 F. 387, 395 (1st Cir. 1914) ("any tribunal, whether it was court or jury, judges or arbitrators"); *Toledo S.S. Co. v. Zenith Trans. Co.*, 184 F. 391, 400 (6th Cir. 1911) ("parties who have sought a settlement of their disputes out of court by a tribunal of their own choosing").

The use of the term "tribunal" by courts and scholars when referring to arbitrations is consistent with the dictionary definitions of that term before and after the 1964 amendments to the statute were adopted. *See, e.g.*, MAX RADIN, LAW DICTIONARY (1955) ("A general word equivalent to court, but of more extensive use in public and international law"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1964) (a "tribunal" includes "a person or body of persons having authority to hear and decide disputes so as to bind the disputants . . . : something that decides or judges: something that determines or directs a judgment or course of action"); BRYAN A.

GARNER, A DICTIONARY OF MODERN LEGAL USAGE (2d ed. 1995) ("(1) 'a court or other adjudicatory body[]' . . . . In its most usual application—sense (1)—tribunal is broader than court and generally refers to a body, other than a court, that exercises judicial functions . . . ."); Merriam-Webster's Dictionary of Law (1996) ("a court or forum of justice: a person or body of persons having to hear and decide disputes so as to bind the parties"); Scalia, Reading Law 72, 419, 423, Appendix A (listing the "Max Radin, *Law Dictionary*," "Bryan A. Garner, *A Dictionary of Modern Legal Usage*" and "*Merriam-Webster's Dictionary of Law*" as three of "the most useful and authoritative" dictionaries "that can be consulted to determine the near-contemporaneous common meaning of words" in the period 1951-2000).[5] *See also* 6 C.J.S. Arbitration and Award, § 1, p. 152 (1937) ("The settlement of controversies by arbitration is a legally favored contractual proceeding of common law origin by which the parties by consent submit the matter for determination to a tribunal of their own choosing in substitution for the tribunals provided by the

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[5] Legal dictionaries providing for narrower definitions—confining the term to "judges," "judicial court[s]," "[a] court," or "seat or bench for the judge or judges of a court" (*see FedEx*, 939 F.3d at 719-20)—are rendered inapposite by Congress's having granted liberal access to section 1782(a) through its 1964 amendments, explicitly removing the phrase "*judicial* proceeding pending in *any court*" and "replac[ing] [it] with the phrase 'in a proceeding in a foreign or international *tribunal*.'" *Intel*, 542 U.S. at 248-49 (emphasis added); *FedEx*, 939 F.3d at 710 n.5 ("We would be remiss if we did not note that both parties *agree* that the meaning of 'tribunal' in § 1782(a) is not limited to 'court'—the narrower of the two definitions we will discuss.") (emphasis in original).

ordinary processes of the law") (cited in *Livingston v. Shreveport-Texas League Baseball Corp.*, 128 F. Supp. 191 (W.D. La. 1955)).

There can be no doubt that the meaning of the term "tribunal" included arbitral tribunals in 1964, when the current language of the statute was drafted and the statute itself was broadly amended. Had Congress intended to materially narrow both the meaning of the term "tribunal" and the courts' discretion "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 (internal citation omitted). Congress, however, provided "categorical language" (*Intel*, 542 U.S. at 267 (Scalia, J., concurring)) that a federal district court may permit assistance to any "foreign or international *tribunal*," without otherwise limiting that term. The term's general and common sense meaning, therefore, controls.

C. Even if the Court were to Determine that the Plain Meaning of "Foreign or International Tribunal" was Ambiguous, there is No Clearly Expressed Legislative Intent Excluding Arbitral Tribunals

If the Court determines that the plain meaning of the term "foreign or international tribunal" is clear, its analysis must stop there. If, however, the Court finds that the term is ambiguous, the Court may look to "clearly expressed legislative intent" to determine its meaning. *United States v. Turkette*, 452 U.S. 576, 580 (1981); *see also Ron Pair*, 489 U.S. at 242 ("The plain meaning of legislation

should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'") (internal citation omitted). There is no clearly expressed legislative intent to exclude arbitral tribunals from section 1782(a)'s scope. Nothing in the 1964 Senate Report accompanying the amended statute states Congress's intent to limit the types of tribunals that could benefit from section 1782(a). Quite the opposite. Congress emphasized that the "word 'tribunal' is used to make it clear that assistance is *not confined to proceedings before conventional courts*," but also includes "administrative and *quasi-judicial proceedings* . . . ." *See* 1964 Senate Report, at 3788 (emphasis added). It further stated:

> [I]n view of the constant growth of administrative and *quasi-judicial proceedings* all over the world, the necessity for obtaining evidence in the United States may be as impelling in [these] proceedings . . . as in proceedings before a conventional foreign court. Subsection (a) therefore provides the possibility of U.S. judicial assistance in connection with *all such proceedings*. Finally, the assistance made available by subsection (a) is also *extended to international tribunals and litigants before such tribunals*.

Id. (emphasis added).

Thus, the Senate made clear that the 1964 amendments were intended to "clarif[y] and liberaliz[e] existing U.S. procedures for assisting foreign and international tribunals and litigations" by "replac[ing], and eliminat[ing] the undesirable

limitations of, the assistance extended by" the predecessor statutes. *Id.*

The legislative intent to apply the phrase "foreign or international tribunal" liberally was confirmed by Hans Smit, the principal author of the 1964 amendments, which were accepted wholesale by Congress. According to Professor Smit, the "legislative history puts beyond doubt that the assistance to international tribunals for which Section 1782 provides also *extends to private international tribunals*. … [Such] history demonstrates overwhelmingly that the purpose of Section 1782 was to make the assistance for which it provides available on the most liberal and comprehensive basis." Hans Smit, *The Supreme Court Rules on the Proper Interpretation of Section 1782: Its Potential Significance for International Arbitration*, 14 AM. REV. INT'L ARB. 295, 305-06 (2003) [hereinafter Smit, *The Supreme Court Rules*] (emphasis added).

The Court has recognized Congress's intent to broaden the reach of section 1782(a) over time. In *Intel*, the Court stressed that "Congress substantially broadened the scope of assistance federal courts could provide for foreign proceedings" and "the legislative history . . . reflects Congress' recognition that judicial assistance would be available 'whether the foreign or international proceeding or investigation is of a criminal, civil, administrative, *or other nature*. … *Nothing suggests that this amendment was an endeavor to rein in, rather than to confirm . . . the broad range of discovery authorized* in 1964." *Intel*, 542 U.S. at 247-48, 259 (emphasis in original removed, new emphasis added); *see also*

FedEx, 939 F.3d at 727-28 ("Assuming that legislative history is a helpful aid in some cases, . . . we do not find that it contradicts our conclusion here. . . . If anything, what the [legislative] statements make clear is Congress's intent to expand § 1782(a)'s applicability."); *HRC-Hainan Holding Co., LLC v. Yihan Hu*, 2020 WL 906719, at *7 (N.D. Cal. Feb. 25, 2020) ("[T]his court . . . does not find in the legislative history any clear signal that Congress intended to exclude private arbitral tribunals from 'foreign and international tribunals.'"); *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221, 1227 (N.D. Ga. 2006) ("The *Intel* court reviewed the legislative history of § 1782, and found a legislative intent to broaden the scope of the term 'tribunal'").

There also exists a "well-settled doctrine of this Court to read a statute, assuming that it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen." *Shapiro v. United States*, 335 U.S. 1, 31 (1948). Congress amended section 1782(a) in 1964 to expand judicial assistance to proceedings before "foreign or international tribunal[s]," not to limit such assistance. *See Intel*, 542 U.S. at 255 ("[W]e reject the categorical limitations [petitioner] would place on the statute's reach."). Congress used such broad language to ensure that courts had ample discretion to provide section 1782(a) assistance where needed. *Id.* at 247, 264 ("[A]s the 1964 Senate Report suggests, a court presented with a § 1782(a) request may take into account the nature of the foreign tribunal [and] the character of the proceedings underway abroad . . . ."). If the Court were to exclude commercial arbitral tribunals from

the statute's scope, it would not only frustrate Congressional intent as manifested by the only aspect of the legislative history that is clear,[6] but also trample this Court's prior admonition against imposing categorical limitations on the statute's scope. *Id.* at 255.[7]

II. The Distinction Drawn by Some Courts between "State Sponsored" Arbitrations and "Private" Arbitrations is False and, in any Event, is Irrelevant under 28 U.S.C. § 1782(a)

Some courts have distinguished between so-called "private" arbitral tribunals and "public," "governmental," or "state-sponsored" arbitral tribunals.[8] According to these courts, this distinction

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[6] To be sure, the *Intel* Court's "caution" of the district courts that section 1782(a) applications need not be granted further aligns with the Court's refusal to impose any "categorical limitations" on the statute's scope and affirms the considerable discretion accorded the district courts to determine whether particular "tribunals" are of a sufficient nature and character to be permitted assistance under the statute. *See Intel*, 542 U.S. at 247; *In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951, 956 (D. Minn. 2007) ("[T]he better approach to this issue is to reject any inflexible rule that would categorically exclude all private arbitrations from the definition of 'tribunal'.").

[7] A broad interpretation of section 1782(a) would certainly be consistent with the "liberal federal policy favoring arbitration." *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 83 (2002); *see also Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 237-39 (2013).

[8] *See, e.g.*, *In re Servotronics, Inc.*, 2019 WL 9698535, at *4 (N.D. Ill. Apr. 22, 2019) ("state-sponsored arbitral bodies" might constitute "foreign or international tribunal[s]" under

is meaningful because "private" arbitral tribunals "deriv[e] [their] authority not from the government, but from the parties' agreement," whereas so-called "public" tribunals are created under the authority of the state. *See Servotronics*, 954 F.3d at 213 (ultimately finding this distinction unpersuasive). This perspective sets up a false distinction and reflects a fundamental misunderstanding of international arbitration.

A. Commercial Arbitration Operates in Accordance with National and International Legal Authority

The right to resolve disputes and accord binding legal authority to such resolutions is inherently sovereign. This is why courts exist. For centuries, however, states have recognized the utility of permitting parties to arbitrate their disputes outside of the courts and have enacted laws defining what disputes may be arbitrated, authorizing judicial assistance to the arbitral process, and giving legal effect to these quasi-judicial proceedings. Indeed, virtually every modern jurisdiction that permits arbitration has enacted one or more of these laws. Thus, as Professor Smit remarked, "private

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Section 1782(a)) (citation omitted) (internal quotation marks omitted); *In re Dubey*, 949 F. Supp. 2d 990, 994 (C.D. Cal. 2013) (distinguishing between "purely private arbitrations established by private contract and state-sponsored arbitral bodies"); *In re Arb. between Norfolk S. Corp., Norfolk S. Ry. Co., & Gen. Sec. Ins. Co. & Ace Bermuda Ltd.*, 626 F. Supp. 2d 882, 885 (N.D. Ill. 2009) [hereinafter *In re Norfolk S. Corp. Arb.*] (same). *But see Servotronics*, 954 F.3d at 211 (finding that, even if this more restrictive definition were applied, it can nevertheless include private arbitral tribunals).

international [arbitral] tribunals . . . have been accorded by the body politic the power to adjudicate controversies." Hans Smit, *American Judicial Assistance to International Arbitral Tribunals*, 8 AM. REV. INT'L ARB., 153, 156 (1997) [hereinafter Smit, *American Judicial Assistance*]. *See also* Luca Radicati di Brozolo, *The Present – Commercial Arbitration as a Transnational System of Justice: The Control System of Arbitral Awards: A Pro-Arbitration Critique of Michael Reisman's "Architecture of International Commercial Arbitration*, in Albert Jan Van den Berg (ed.), ARBITRATION: THE NEXT FIFTY YEARS, ICCA CONGRESS SERIES, Vol. 16 (Kluwer 2012) ("ICCA Series"), 74-75 ("[a]rbitration cannot exist and operate as a legal mechanism for the settlement of disputes, domestic and international, unless it is tolerated and supported by States"); W. Michael Reisman & Brian Richardson, *The Present – Commercial Arbitration as a Transnational System of Justice: Tribunals and Courts: An Interpretation of the Architecture of International Commercial Arbitration,* in ICCA Series, 17-18, 20 ("Advocates of arbitration often assume . . . that arbitration is a free-standing procedure, conceptually and politically quite independent of the apparatus of the state. But international commercial arbitration, no less than arbitration within nation-states, while conducted in the sphere of private law, is a public legal creation whose operation and effectiveness is inextricably linked to prescribed actions by national courts."; "states, through their courts, . . . play a role *before* the arbitration commences, *during* the arbitration, or

after an award has been rendered.") (emphasis in original).[9]

In the United States, for example, the Federal Arbitration Act applies to all arbitrations that involve interstate commerce and each of the 50 states has its own arbitration laws that govern purely intra-state disputes. *See* 9 U.S.C. § 2; *see e.g.*, N.Y. C.P.L.R. §§ 7501-7515 (McKinney 2018). In addition, the United States has bound itself to the international standards set forth in the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), a treaty that obligates contracting states to recognize and enforce foreign arbitration agreements and awards.[10] It is for these reasons that, when granting Servotronics' section 1782 application, the Fourth Circuit recognized that:

> [A]rbitration in the United States is a congressionally endorsed and regulated process that is judicially supervised. And it was developed as a favored alternative to the

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[9] Respondents' position that "arbitrations before [so-called "private" arbitral tribunals] are not . . . 'quasi-judicial' because they are a mechanism created by private agreement for parties to resolve their disputes *outside* of the government's adjudicatory processes" and are not "imbued with governmental authority" or "imbued with judicial powers" clearly misrepresents the reality of how the commercial arbitration system operates. *See* Brief for Intervenors-Appellees, *Servotronics, Inc. v. Rolls-Royce PLC*, No. 1:18-cv-07187 (7th Cir. July 8, 2019), pp. 15, 32-33 (emphasis in original).

[10] The New York Convention is one of the most widely adopted treaties in the world, with 168 state parties. June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, *as reprinted in* 9 U.S.C. § 201.

> judicial process for the resolution of disputes. Thus, contrary to Boeing's general assertion that arbitration is not a product of 'government-conferred authority,' under U.S. law, it clearly is.

Servotronics, 954 F.3d at 213-14.

In the United Kingdom, the legal "seat" of the arbitration between Servotronics and Rolls-Royce in this case, commercial arbitrations are authorized and governed by the Arbitration Act 1996, which grants authority to arbitral tribunals to resolve disputes falling within its jurisdiction and legislates matters covering almost all aspects of the arbitral proceedings, from their commencement through the enforcement of arbitration awards.[11] Any commercial arbitration seated in the United Kingdom, including the one in this case, is conducted in accordance with the rules and procedures set out in the Arbitration Act 1996. The same is true of virtually all arbitrations conducted in juridical "seats" worldwide.[12]

In the international context, arbitrations are governed by both the domestic arbitration laws of the

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[11] For example, the Arbitration Act 1996 covers, *inter alia*, the enforceability and separability of arbitration agreements (sections 5-8), the powers of the courts in relation to the conduct of the arbitration proceedings (sections 42-45), the form, substance, timing and legal effect of the tribunal's award(s) (sections 46-58), and the powers of the courts to enforce or set aside the tribunal's award(s) (Section 66-71). Arbitration Act, 1996, c. 23 (UK).

[12] For a list of national arbitration laws in states that are parties to the New York Convention, see https://newyorkconvention1958.org/.

countries in which they are seated and the standards set by the international community through the New York Convention. The Convention reflects a consensus among its 168 contracting states that foreign arbitration agreements and awards must be enforced, subject to limited and discretionary exceptions. Its very purpose was to create universal standards governing the treatment of arbitration agreements and awards and to ensure inter-state consistency. Through this Convention, the international community has created—and each signatory state has accepted—an international legal regime authorizing, recognizing, and enforcing commercial arbitrations.

Thus, when commercial parties include an arbitration agreement in their contracts, they are electing to resolve disputes within the legal framework authorized by the juridical "seat" of arbitration, subjecting themselves to the supervisory authority of the courts in that "seat"—including the authority to annul or set aside final arbitral awards—and accepting that any resulting awards may be enforced in accordance with the international standards set by the New York Convention.

B. Efforts to Distinguish Investor-State Arbitration from Commercial Arbitration for Purposes of Section 1782(a) Fail

Some courts have held that section 1782(a) assistance is available to support investor-state arbitrations because these arbitrations are said to be "state-sponsored" or "government-sanctioned." *See, e.g.*, *In re Oxus Gold PLC*, 2007 WL 1037387, at *5

(D. N.J. Apr. 2, 2007) (finding Section 1782(a) applicable to an investment treaty arbitration tribunal because it was "being conducted within a framework defined by two nations and is governed by the [UNCITRAL Rules]."). [13] These holdings are wrong and efforts to distinguish between commercial and investor-state arbitrations are unpersuasive.

Investor-state arbitration is a mechanism by which states have granted private parties a direct right of action to bring claims against states in arbitration for violations of certain defined rights. Most commonly, these rights are set out in bilateral or multilateral treaties. In these cases, private investors are effectively third-party beneficiaries of the treaties, thus enabling them to directly enforce these rights against a breaching state. In other cases, however, the right to initiate an investor-state arbitration is established by statute or is contained in a contract between the state and a private party. In each case, the state defines the scope of disputes that may be arbitrated, provides the legal framework for the arbitration, and adopts the post-award enforcement regime that will be applicable—the precise framework applicable to commercial arbitrations. For example, investor-state

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[13] The UNCITRAL rules may be used in both commercial and treaty-based arbitrations and are not materially different than the arbitration rules promulgated by other arbitral institutions. Their use, therefore, does not impart upon the tribunal any special state or international sponsorship. *Contra Ukrnafta v. Carpatsky Petroleum Corp.*, 2009 WL 2877156, at *4 (D. Conn. Aug. 27, 2009) ("an arbitration panel governed by international law, namely, the UNCITRAL rules of arbitration, constitutes a 'foreign tribunal' for the purposes of Section 1782").

arbitrations conducted under the auspices of the International Centre for Settlement of Investment Disputes ("ICSID") are subject to an internal, self-contained review mechanism that precludes courts in an enforcing state from exercising any discretionary or review authority. By contrast, investor-state arbitrations conducted outside of the ICSID system are subject to enforcement and review under the New York Convention rules—the same rules applicable to so-called "private" commercial arbitrations.

Regardless of whether an investor-state arbitration is commenced pursuant to treaty, statute, or contract, it is the product of an agreement between the state and the private investor. Each party consents to submit their disputes to arbitration and any such arbitration is largely indistinguishable from a commercial arbitration. Professor Smit addressed this point:

> [Investment treaties] are, in effect, offers to arbitrate by the state of investment that can be accepted by, and thus become binding on, the investor. But, once the investor opts for arbitration, the situation of the parties is the same as that under an arbitration agreement of the same content. There is therefore no difference of substance between arbitral proceedings under ordinary arbitration agreements and those commenced under bilateral investment treaties that would justify treating the former differently as far as Section 1782 is concerned. Excluding international arbitral tribunals organized pursuant to bilateral investment treaties from

> the reach of Section 1782 would clearly produce the most untoward result. And if they are not excluded from its reach, no plausible argument can be advanced for excluding international arbitral tribunals not created pursuant to bilateral investment treaties from its reach.

Smit, *The Supreme Court Rules*, at 310.

Moreover, commercial arbitrations and investor-state arbitrations both share key characteristics that make it inappropriate to differentiate them for purposes of Section 1782(a). The tribunals in both types of proceedings are formed by private party appointment of arbitrators. Both may involve states as parties. Both derive their authority from national legislation and a form of international agreement (as discussed above). Both provide for a final and binding resolution of the parties' disputes through the issuance of awards capable of worldwide enforcement pursuant to treaty. And each proceeding is the product of a state-sanctioned acceptance of arbitration as a valid and suitable means of resolving disputes.

As such, even if this Court were to find relevant some role of "state-sponsorship" in the arbitration to bring it within the ambit of section 1782(a), arbitrations derived from private party contract and those from bilateral or multi-lateral investment treaties would both meet such a test.

III. The Court's Functional Determinations in *Intel* are Sufficient to Conclude that All Arbitral Tribunals are Included in the Phrase "Foreign or International Tribunal"

Even were the Court not to agree that the plain language of section 1782(a) encompasses commercial arbitral tribunals, the Court's prior determinations in *Intel* are nonetheless determinative.

In *Intel,* the Court was asked to decide whether the Directorate-General for Competition of the European Commission was a "tribunal" within the meaning of section 1782(a). Cognizant of the statute's history of expanding and liberalizing its application, the Court declined to impose a "categorical bar" on the types of tribunals encompassed by the statute. *Intel*, 542 U.S. at 246 n.15 ("[i]n light of the variety of foreign proceedings resistant to ready classification in domestic terms, Congress left unbounded by categorical rules the determination whether a matter is proceeding 'in a foreign or international tribunal.'"). Rather, it focused on the nature of the specific tribunal's function.

The Court held that there was "no warrant to exclude" an entity from section 1782(a)'s ambit to the extent it "exercises *quasi-judicial powers*" or "acts as a *first-instance decisionmaker*." *Intel*, 542 U.S. at 258 (emphasis added) (citing *Advanced Micro Devices, Inc. v. Intel Corp.*, 292 F.3d 664, 667 (9th Cir. 2002)) (remarking that "the language used by Congress in Section 1782 is broad and inclusive" and "the legislative history surrounding the adoption of

Section 1782 broadly [] include[s] 'bodies of a quasi-judicial or administrative nature' . . . .") (internal citation omitted). The Court thus focused on the tribunal's ability to bind the parties before it and to render a decision capable of resolving the underlying dispute. *Id.*, also at 246-47 ("the Commission is a § 1782(a) 'tribunal' when it acts as a first instance decisionmaker"); *see also FedEx*, 939 F.3d at 725 n.9 ("The Supreme Court seems to have primarily focused on the decision-making power of the Commission—and Congress's substitution in 1964 of the broad phrase 'foreign or international tribunal' for the specific phrase 'judicial proceeding in a foreign country'—in reaching its conclusion that the Commission was a 'tribunal'"; "the DFIC-LCIA [arbitration] panel is a 'first-instance decisionmaker' with the power to bind the parties—an exercise of 'quasi-judicial powers'.") (internal citation omitted); *Fonseca v. Blumenthal*, 620 F.2d 322, 323 (2d Cir. 1980) (per curiam) (stating that "impartial adjudication" is "the hallmark of a tribunal" in the section 1782 context).

Thus, while the Court did not specifically address whether private arbitral panels are "tribunals," it provided sufficient guidance to determine that arbitral panels are "tribunals" within the statute's scope. *See, e.g.*, *FedEx*, 939 F.3d at 723 ("Although the Supreme Court has not addressed the particular question facing us here, its decision in *Intel* did address the scope of § 1782(a)'s use of 'tribunal' in a different factual context. . . . *Intel* determined that § 1782(a) provides for discovery assistance *in non-judicial proceedings*.") (emphasis added).

Arbitral tribunals—including both commercial and investor-state tribunals—are first-instance decisionmakers performing a specific adjudicatory function, equivalent in myriad ways to conventional courts. They have the legal authority (as discussed in section II, above) to direct, receive and assess evidence, issue orders, resolve disputes through jurisdictional and liability determinations, award damages, and render awards that are final and binding on the parties. The final awards of both investor-state and commercial tribunals are subject to review for annulment purposes by the courts in the "seat" of arbitration (except, as explained, for ICSID cases) and by courts in jurisdictions where those awards are enforced. In each case, the reviewing court can determine whether the arbitral tribunal had jurisdiction over the parties, acted outside the scope of its authority, materially deprived a party of due process, or rendered an award that offends public policy. Indeed, awards issued by investor-state arbitrations conducted outside of the self-contained ICSID regime are governed by the New York Convention and are subject to the same level of judicial review as commercial arbitration awards[14]—a level of judicial

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[14] The scope of such review is defined by international treaty (*e.g.*, New York Convention), and includes, for example, whether the "subject matter of the difference is not capable of settlement by arbitration under the law of that country" or whether the "award would be contrary to the public policy of that country." New York Convention, Articles V(2)(a)-(b). Further, as mentioned, countries who are signatories to the New York Convention, including the United States and the United Kingdom, have enacted implementing legislation permitting courts to review arbitral awards rendered within their borders for purposes of set aside or vacatur applications

review that far exceeds that available to ICSID awards.[15] *See, e.g.*, *Mitsubishi*, 473 U.S. at 638 ("Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed."); *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 578, 590 (2008) ("The Federal Arbitration Act . . . provides for expedited judicial review to confirm, vacate, or modify arbitration awards"; "[W]e do not purport to say that [FAA §§ 10 and 11] exclude more

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and to assess whether to recognize and enforce said awards under the same or similar bases. *See, e.g.*, 9 U.S.C. § 10; Arbitration Act, 1996, c. 23, §§ 67-69 (UK).

[15] While this review is not a *de novo* reconsideration on the merits of the arbitral award (including the arbitrators' determinations of fact and law), there is no basis to conclude that a full substantive review was either necessary or warranted by Congress in its liberalization of the statute. *See Consorcio Ecuatoriano v. JAS Forwarding (USA)*, 685 F.3d 987, 990 (11th Cir. 2012), *vacated and superseded* 747 F.3d 1262 (11th Cir. 2014) ("[J]udicial review of arbitration awards in Ecuador, much like a federal court's review of an arbitration award, is focused primarily on addressing defects in the arbitration proceeding, not on providing a second bite at the substantive apple that would defeat the purpose of electing to pursue arbitration in the first instance."). Put simply, that awards are only reviewable for limited reasons does not undermine the fact that there exists judicial reviewability of such awards for purposes of assessing whether a tribunal may be included within section 1782(a). *Id.* at 996 ("[W]e can discern no sound reason to depart from the common sense understanding that an arbitral award is subject to judicial review when a court can enforce the award or can upset it on the basis of defects in the arbitration proceeding or in other limited circumstances.").

searching review based on authority outside the statute as well . . . ."); *FedEx*, 939 F.3d at 710 n.11 ("[R]eview of awards under the FAA is considered 'judicial review.'") (internal citations omitted). Those reviews are, moreover, appealable to the Circuit Courts of Appeal and, potentially, to the Supreme Court. *See, e.g.*, *Hall St.*, 552 U.S. 576.

In any event, despite the reliance placed by some courts on the judicial reviewability of a tribunal's decision,[16] "*Intel* does not say that a non-judicial 'tribunal' *must* be subject to judicial review." *FedEx*, 939 F.3d at 710 n.11 (emphasis added).[17] In fact, reviewability was not even discussed in the section of the *Intel* decision determining whether the Commission was a "tribunal." *See Intel*, 542 U.S. at 258 (section B).

Critically, the Court in *Intel* recognized, albeit in dicta, that "arbitral tribunals" fall within the meaning of "foreign or international tribunal" for purposes of section 1782(a). *See id.* at 258. In addressing the question of which entities "qualify as tribunals," *id.* at 257-58, the Court quoted approvingly Professor Smit, whose contemporaneous written work confirms that an "arbitral tribunal" constitutes a "tribunal" under the revised statute.

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[16] *See, e.g.*, *Ex rel Application of Winning (HK) Shipping Co. Ltd.*, 2010 WL 1796579, at *8 (S.D. Fla. Apr. 30, 2010); *In re Norfolk S. Corp. Arb.*, 626 F. Supp. 2d at 886.

[17] The issue in *Intel* was whether the D-G Competition of the European Commission was a quasi-adjudicative or purely executive actor, thus necessitating a discussion of whether its decisions had some form of judicial review. Such functional wrangling is unnecessary here, as arbitral tribunals are indisputably adjudicative.

Id. (quoting Smit, *International Litigation under the United States Code*, 65 COLUM. L. REV. 1015, 1026-27, nn. 71, 73 (1965) ("[t]he term 'tribunal' embraces *all bodies exercising adjudicatory powers*, and includes investigating magistrates, administrative and *arbitral tribunals*, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts"; "The increasing number and importance of international tribunals make this liberal provision of assistance in aid of litigation in international tribunals of great significance. … The new legislation also authorizes assistance in aid of *international arbitral tribunals*.") (emphasis added)). It is not surprising that the majority cited Professor Smit's section 1782 commentary with approval no less than six times, given the critical role he played in its 1964 revision.[18] It is in fact difficult to

[18] In fact, the late Professor Smit—whose multiple commentaries were cited repeatedly by the *Intel* Court (*id.* at 248 n.1, 249 n.3, 256-57, 258, 259 (citing Smit's 1965 article, from which *Intel* adopted the definition of "tribunal"); *id.* at 261, 262 nn.12, 14 (citing a 1994 article by Smit); *id.* at 262 n.13, 266 n.17 (citing a 1998 article by Smit))—was more than a leading scholar in his field. He was the Reporter to both the Advisory Committee to the United States Commission on International Judicial Assistance and the Commission itself as well as the Director of the Columbia Law School Project on International Procedure, which developed the revised legislation given Congress's failure to fund either the Committee or Commission. Smit, *American Judicial Assistance*, at 154. The late Justice Ginsburg, who wrote the *Intel* majority decision (and had at one time been an Associate Director of the Columbia Project (*id.* at 154)), also confirmed while sitting as a D.C. Court of Appeals judge that Professor Smit was "the dominant drafter of, and commentator on, the 1964 revision of 28 U.S.C. § 1782." *In re Letter of Request from Crown Prosecution Serv.*, 870 F.2d 686, 689 (D.C. Cir. 1989) (R.B. Ginsburg, J.); *see also In re Euromepa S.A.*, 51 F.3d 1095,

imagine what better evidence—outside the statute's plain language—one need muster to put this issue to rest or, for that matter, what "quasi-judicial" body could meet the definition of "tribunal" in section 1782(a) if *arbitral* tribunals (including *commercial* arbitral tribunals) are excluded.

CONCLUSION

For the foregoing reasons, FedArb respectfully suggests that the decision below in the Seventh Circuit should be reversed and commercial arbitral tribunals be included within the categories of "foreign or international tribunal" permitted access to section 1782(a).

Respectfully submitted,

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1099 (2d Cir. 1995) (recognizing Professor Smit as the "chief architect of Section 1782"); *In re Norfolk S. Corp. Arb.*, 626 F. Supp. 2d at 885 n.3.