NOTES

THE JURISDICTIONAL LIMITS OF § 1782

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Under 28 U.S.C. § 1782, U.S. district courts have jurisdiction to provide discovery assistance for foreign proceedings. That jurisdiction is based, in part, on whether the discovery target "resides or is found" in the relevant district. Recently, federal courts have disagreed on the standard for meeting that requirement. This Note argues that a faithful construction based on the statute's text, Congress's intent, and the broader system of transnational litigation warrants reading the requirement as extending to the limits of personal jurisdiction consistent with due process. This Note also examines the history and current practice of discovery assistance and reviews the lessons that they offer for § 1782 litigation today.

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INTRODUCTION

Commentary on § 1782 nowadays mostly hovers around two schools of thought. Traditionally, the statute's[1] hallmark has been that it gives federal courts broad discretion to assist with the gathering of evidence for use in proceedings abroad.[2] This traditionalist, liberal approach to § 1782 furthers Congress's twin aims of providing efficient assistance to litigants in foreign proceedings and encouraging reciprocal assistance.[3] More recently, however, commentators have lamented the rise of excessive uses of § 1782 that, in their view, unduly burden stakeholders.[4] This line of

1. 28 U.S.C. § 1782.

2. See Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 260, 264 (2004) (Ginsburg, J.) (observing that § 1782 "leaves the issuance of an appropriate order to the discretion of the court" (internal quotation marks omitted) (quoting S. Rep. No. 88-1580, at 7 (1964))).

3. See In re Banco Mercantil del Norte, S.A., 126 F.4th 926, 930 (4th Cir. 2025) (citing *Intel*, 542 U.S. at 252) (identifying the statute's twin aims); In re Letter of Request From the Crown Prosecution Serv. of the U.K., 870 F.2d 686, 690 (D.C. Cir. 1989) (Ginsburg, J.) ("The congressional purpose to 'liberalize[] existing U.S. procedures' is not in doubt . . . ." (quoting S. Rep. No. 88-1580, at 7)); Hans Smit, American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited, 25 Syracuse J. Int'l L. & Com. 1, 9 (1998) [hereinafter Smit, American Assistance] ("The purpose of Section 1782 is to liberalize the assistance given to foreign and international tribunals.").

4. See Yanbai Andrea Wang, Exporting American Discovery, 87 U. Chi. L. Rev. 2089, 2098 (2020) ("[Section 1782's] most pressing shortcoming is its failure to include and to provide due process to the appropriate actors."); Shay M. Collins, Note, The Death Knell and the Wild West: Two Dangers of Domestic Discovery in Foreign Adjudications, 122 Mich. L. Rev. 127, 133 (2023) [hereinafter Collins, The Death Knell] ("In practice, . . . district courts grant wide-ranging and exorbitant § 1782(a) orders and do so with almost unbounded regularity."); David Rubinstein, Note, Judicial Assistance as Intended: Reconciling § 1782's Present Practice With Its Past, 123 Colum. L. Rev. 513, 515 (2023)

commentary reflects practical concerns that certain actors may be abusing American discovery and that federal courts risk becoming complicit in that perversion.[5]

The conflict between these two schools of thought—traditionalists and pragmatists—borders on the existential, and those who value the statute's role in the American legal system would be wise to view it as a pressing matter.[6] Resolving the tension requires balancing the statute's flexible design[7] against the risk of overreach on the part of litigants.[8] It requires attention both to Congress's broad purpose and to the practical effects of unbridled United States–style discovery on nonparties, foreign tribunals, and the federal courts. Recently, the Supreme Court relied largely on textualism to draw the line under one misuse: discovery for private arbitral proceedings.[9] Yet, § 1782's text and purpose—along with the practicalities of civil discovery—can leave room for innovation as procedure evolves.[10]

This Note assesses these considerations in the context of one growing disagreement among the federal circuit and district courts regarding

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(describing multinational corporations' use of the statute for nonlitigation purposes as "an abuse of the judicial power vested in the federal judiciary and a departure from Congress's intent behind § 1782").

5. See Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095, 1105 (2d Cir. 1995) (Jacobs, J., dissenting) (explaining that an expansive approach risks "interfer[ing] with [foreign] discovery practice and clog[ging] the [foreign] court with the random harvest of the American discovery"); see also Heraeus Kulzer, GmbH v. Biomet, Inc., 633 F.3d 591, 594–95 (7th Cir. 2011) (Posner, J.) (outlining that potential abuses include harassing defendants, swamping foreign courts with evidence, and racking up litigation costs); Wang, supra note 4, at 2137–46 (identifying more systemic risks like undermining foreign tribunals and eroding shared litigation values).

6. For more on this debate, see Gabriela Barriuso Clark, Note, Interpretive Challenges of 28 U.S.C. § 1782 in the Aftermath of *Intel Corp. v. Advanced Micro Devices, Inc.*, 53 Vand. J. Transnat'l L. 1377, 1381 (2020).

7. See Hans Smit, International Litigation Under the United States Code, 65 Colum. L. Rev. 1015, 1026 (1965) ("The only limitation on the nature of the evidence is that it must be sought for use in a proceeding in a foreign or international tribunal.").

8. See, e.g., Collins, The Death Knell, supra note 4, at 129 n.5 ("[O]ne [§ 1782] applicant demanded all documents ever created relating to the billion-dollar acquisition of another bank, including documents about bank operations predating the purchase." (quoting Brief of Inst. of Int'l Bankers as Amicus Curiae in Support of Petitioners at 4, ZF Auto. US, Inc. v. Luxshare, Ltd., 142 S. Ct. 2078 (2022) (Nos. 21-401 & 21-518), 2022 WL 333350, at *4)).

9. *ZF Auto.*, 142 S. Ct. at 2083, 2086–87 (relying largely on text and context to determine that a tribunal must be "imbued with governmental authority" to qualify as a "foreign or international tribunal").

10. See Maryum Jordan, Utilizing Foreign Legal Assistance Actions to Promote Corporate Accountability for Human-Rights Abuses, 132 Yale L.J. Forum 844, 856–61 (2022), https://yalelawjournal.org/essay/utilizing-foreign-legal-assistance-actions-to-promote-corporate-accountability-for-human-rights-abuses [https://perma.cc/EY27-Q67V] (describing her organization's use of § 1782 for human rights and environmental litigation in Mexico, the Netherlands, Nigeria, Peru, and Tanzania); see also Order Granting 28 U.S.C. § 1782 Request at 1, ACL Netherlands B.V., No. 3:19-mc-80023-CRB (N.D. Cal. Mar. 20, 2019) (using § 1782 to provide testimony via video link for a trial in England).

§ 1782: the standard for whether a person "resides or is found" in a district.[11] A faithful construction based on the statute's text, Congress's intent, and the broader system of transnational litigation warrants reading the requirement as extending to the limits of personal jurisdiction consistent with due process.[12] Embracing this reading hews closely to the meaning of the term "resides or is found" at the time of the statute's enactment and furthers courts' duty to help collect evidence for proceedings elsewhere.[13]

This Note makes its argument in three parts. Part I traces the history of discovery assistance at chancery and common law and reviews the modern statutory scheme. Part II examines the conflicting approaches to federal courts' jurisdiction under § 1782. And Part III proposes a resolution to the conflict among lower courts that blends the current personal jurisdiction doctrine with the requirements of discovery assistance for courts past and present.

I. JUDICIAL ASSISTANCE THEN AND NOW

This Part provides an overview of § 1782's history and current operation. While scholars have briefly touched on its origins in common law and chancery practice,[14] what has been missing is an in-depth exploration of the evolution of foreign discovery assistance from chancery and common law through the operations of American courts in the early Republic.[15] Section I.A examines this history before section I.B describes § 1782 practice as it currently exists.

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11. See 28 U.S.C. § 1782(a) ("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." (emphasis added)).

12. See infra Parts II, III.

13. See infra sections I.B, II.B.2.

14. See Walter B. Stahr, Discovery Under 28 USC § 1782 for Foreign and International Proceedings, 30 Va. J. Int'l L. 597, 600–01 (1990) (charting this history); Harry Leroy Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 Yale L.J. 515, 540 n.74 (1953) (recognizing courts' inherent power at common law to assist with discovery); Rubinstein, supra note 4, at 518 n.22 (same); see also In re Letter Rogatory from the Just. Ct., 523 F.2d 562, 564 (6th Cir. 1975) ("While it has been held that federal courts have inherent power to issue and respond to letters rogatory, such jurisdiction has largely been regulated by congressional legislation." (citations omitted)).

15. Other authors and judicial opinions have treated the post-1855 history in depth. See Comm. on Int'l Com. Disps., N.Y.C. Bar Ass'n, 28 U.S.C. § 1782 as a Means of Obtaining Discovery in Aid of International Commercial Arbitration—Applicability and Best Practices 2–14 (2008), https://www.nycbar.org/wp-content/uploads/2023/05/1782_Report.pdf [https://perma.cc/88NC-3B8A] ("The history of Section 1782 begins in 1855 . . . ."); Robert H. Smit, Tyler B. Robinson & Lauren W. Brazier, The History of 28 U.S.C. § 1782, *in* Obtaining Evidence for Use in International Tribunals Under 28 U.S.C. § 1782, at 1, 4–21 (Edward M. Mullins & Lawrence W. Newman eds., 2d ed. 2024) (charting the post-1855 history); Rubinstein, supra note 4, at 517–22 (same); see also Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 247–49 (2004) (same).

A. *Discovery Assistance at Common Law and Chancery*

The statutory history of § 1782 has received thorough treatment among scholarly literature and judicial opinions.[16] As that history goes, Congress passed a statute in 1855 empowering courts to compel witnesses to testify before commissioners pursuant to letters rogatory.[17] The Attorney General had requested the legislation thinking that federal courts were powerless to compel testimony for use in foreign proceedings.[18] Then, in 1863, Congress passed another discovery assistance statute.[19] The 1863 statute permitted a federal district court to summon a witness who resided or was found in its district to testify pursuant to a commission or letters rogatory.[20] After decades of neglect, Congress incorporated the judicial assistance statute into the Judicial Code in 1948.[21] Congress then overhauled the statute in 1964, based on the work of the Commission on International Rules of Judicial Procedure and the Project on International Procedure at Columbia Law School.[22] That version of the statute remains largely intact.[23]

Commentators have paid less attention to what came before the statutes.[24] This section reviews § 1782's origins in the symbiotic practice among courts at common law and chancery. While the statute has formally supplanted these practices, they reveal important considerations for the jurisdiction of courts when responding to foreign requests for discovery.

1. *The Views of Treatise Writers.* — Assistance with discovery for foreign proceedings was the practice of courts at common law and chancery.[25]

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16. See supra note 15.

17. Act of Mar. 2, 1855, ch. 140, § 2, 10 Stat. 630, 630. For more on commissions and letters rogatory, see infra notes 26–28 and accompanying text.

18. Rogatory Commissions, 7 Op. Att'ys Gen. 56, 56–57 (1855).

19. Act of Mar. 3, 1863, ch. 95, 12 Stat. 769, 769 (codified as amended at 28 U.S.C. § 1782). Commentators have surmised that Congress was unaware of the 1855 statute because of unclear indexing. See Jones, supra note 14, at 540 n.77 (explaining that the overarching statute had been indexed under the heading "Mistrials"); Stahr, supra note 14, at 601 n.18 (same).

20. 12 Stat. at 769. The statute, however, had two major limitations: (1) The foreign government had to be a party or have an interest, and (2) the suit had to be for money or property. Id.

21. Act of June 25, 1948, ch. 646, 62 Stat. 949, 949 (codified as amended at 28 U.S.C. § 1782(a)).

22. Act of Oct. 3, 1964, Pub. L. No. 88-619, § 9, 78 Stat. 995, 997 (codified as amended at 28 U.S.C. § 1782(a)); H.R. Rep. No. 88-1052, at 1–6 (1963) (documenting the collaboration).

23. Congress enacted a minor amendment in 1996 to clarify that foreign criminal investigations were appropriate proceedings. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1342(b), 110 Stat. 186, 486 (codified as amended at 28 U.S.C. § 1782(a)).

24. Cf. Comm. on Int'l Com. Disps., supra note 15, at 2 ("The history of Section 1782 begins in 1855 . . . .").

25. See Stahr, supra note 14, at 600–01 (describing the period from 1780 to 1863 as the "golden age" of federal discovery assistance for foreign cases).

Courts could seek assistance via two mechanisms: letters rogatory and commissions.[26] The main difference between the two forms of assistance was that a commission involved the taking of evidence by commissioners appointed by the issuing court, while letters rogatory placed the taking of evidence in the hands of the receiving court.[27] Receiving courts would assist "by reason of the comity existing between nations in ordinary peaceful times."[28]

According to Blackstone, courts of law and equity worked synergistically to issue commissions ex parte.[29] Courts of law lacked the inherent power to order the examination of witnesses abroad ex parte, while courts of equity had this power.[30] Blackstone outlined three scenarios when courts of equity could grant commissions to examine witnesses: (1) if the cause of action arose abroad but the witness resided in England; (2) if the cause arose in England, and the witness was abroad or was about to leave England; and (3) if the witness was aged or infirm.[31] When granting a commission in such cases, a court of equity could "exercise the same jurisdiction, which might have been exercised at law, if the witnesses could probably attend."[32] At common law, therefore, a court of law had two options for pursuing discovery abroad: (1) get the consent of both parties or (2) stay proceedings in the court of law and channel requests through courts of equity.[33]

In his treatises on equity procedure, Justice Joseph Story recognized this auxiliary jurisdiction of courts of equity to compel discovery for use in actions at law.[34] The standard procedural tool at chancery was the bill for

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26. See id. (describing the difference).

27. When issuing commissions, the issuing court would appoint a person to take evidence abroad. Id. at 600 n.13. Letters rogatory, on the other hand, issued from one court to another. Id. at 600 n.12; see also Note, Reciprocity for Letters Rogatory Under the Judicial Code, 58 Yale L.J. 1193, 1194 n.6 (1949) (noting that letters rogatory rely on the receiving court's procedure for fulfilment). The modern statute incorporates both mechanisms as alternatives to an original action in the district courts. 28 U.S.C. § 1782(a).

28. Note, supra note 27, at 1194 n.6 (internal quotation marks omitted) (quoting The Signe, 37 F. Supp. 819, 820 (E.D. La. 1941)). But see Ex parte Harkins, 6 Ala. 63, 65–66 (1844) (declining to extend letters rogatory to criminal trials because "neither the courts of England or the United States, which proceed according to the course of the common law, have at any time, in virtue of such power, claimed the right to cause testimony to be taken by deposition").

29. See 3 William Blackstone, Commentaries *383 ("[E]xamin[ing] witnesses abroad . . . may . . . be done indirectly at any time, through the channel of a court of equity . . . .").

30. Id. at *438.

31. Id.

32. Id.

33. Id.

34. 2 Joseph Story, Commentaries on Equity Jurisprudence, as Administered in England and America § 1484 (6th ed. 1853) [hereinafter 2 Story, Equity Jurisprudence] (stating that courts of law lacked the power to compel discovery, which made the power to

discovery, in which the only remedy sought was disclosure of facts.[35] The bill often included a request to stay proceedings at law, pending resolution of the discovery request.[36] While there was some confusion on whether these bills were appropriate for foreign proceedings,[37] Justice Story declared,

> [I]t constitutes no objection to a bill of discovery that it is to assist proceedings in a Court which sits in a foreign country, if in amity with that where the bill is filed; for it is but a just exercise of that comity which the mutual necessities and mutual convenience of all nations prescribe in their intercourse with each other.[38]

2. *Discovery Assistance in the Early Republic.* — American courts in the early Republic were familiar with this practice of granting and receiving requests for judicial assistance.[39] Early American case law referred to the writ of dedimus potestatem, which authorized a person named in a commission to compel the attendance of witnesses.[40] The First Congress incorporated the dedimus potestatem into the first Judiciary Act for the federal courts.[41] The federal courts' organic statute, therefore, recognized their

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compel discovery "one of the most important and extensive sources of the jurisdiction of Courts of Equity").

35. See id. § 689 (explaining that a party could also use the bill to uncover "deeds, or writings, or other things, in [the opponent's] custody, possession, or power"); see also Kellen R. Funk, Law's Machinery: Reforming the Craft of Lawyering in America's Industrial Age 219 (2025) [hereinafter Funk, Law's Machinery] ("When the interrogation of a party was the only remedy sought, the pleading was called a 'bill of discovery.'").

36. 2 Story, Equity Jurisprudence, supra note 34, § 689 ("[The party] may pray, and often does pray, for a stay of proceedings at law, until the discovery shall be made."); see also Duckett v. Williams (1831) 148 Eng. Rep. 1525, 1526; 1 C. & J. 510, 512–13 (Bolland, B., concurring) ("[At common law,] the examination [of witnesses abroad] could only be obtained (except by consent) through a Court of equity; and if the defendant were desirous of obtaining the examination, he must have moved to stay the trial in the Court of law.").

37. See Joseph Story, Commentaries on Equity Pleadings, and the Incidents Thereof, According to the Practice of the Courts of Equity of England and America § 311 (John M. Gould ed., 10th ed. 1892) ("It is a vexed question, upon which the authorities are contradictory, whether a bill for discovery lies in aid of a suit or defence to a suit pending in a foreign court.").

38. 2 Story, Equity Jurisprudence, supra note 34, § 1495.

39. Stahr, supra note 14, at 600.

40. See Dedimus Potestatem, Black's Law Dictionary (12th ed. 2024) (defining a dedimus potestatem as "[a] commission issuing from the court before which a case is pending, authorizing a person named in the commission to compel the attendance of certain witnesses"); see also Buddicum v. Kirk, 7 U.S. (3 Cranch) 293, 297 (1806) (Marshall, C.J.) (holding that an attorney for a deponent had waived an objection based on lack of notice for a deposition pursuant to a dedimus potestatem by failing to assert it in a timely manner).

41. See Judiciary Act of 1789, ch. 20, § 30, 1 Stat. 73, 88–90 ("[N]othing herein shall be construed to prevent any court of the United States from granting a *dedimus potestatem* to take depositions according to common usage, when it may be necessary to prevent a failure or delay of justice, which power they shall severally possess . . . ." (footnote omitted)). The Judiciary Act incorporated all three of Blackstone's scenarios under the names depositions

inherited authority to issue and assist with transnational discovery requests.[42]

American federal courts routinely issued commissions and letters rogatory on the basis of comity.[43] In *Nelson v. United States*, a federal court resolved claims to a vessel and its cargo, which the United States had seized for suspected breach of nonimportation laws.[44] The court had issued a commission to take evidence in Cuba but the Spanish authorities deemed such a commission "an interference with the rights of the judicial tribunals there" and resisted its execution.[45] The federal court therefore followed up with letters rogatory "according to the form and practice of the civil law," which led to the successful production of testimony.[46] Notably, the letters rogatory included a customary offer to the authorities in Cuba that the federal court "shall be ready and willing to do the same for you in a similar case when required."[47] Comity, after all, required reciprocal discovery assistance to further justice.[48]

The realities and necessities of court practice also drove state courts' early transnational discovery procedures. In *Farnsworth v. Pierce*, the Vermont Supreme Court decided that the state's common-law courts could issue commissions ex parte.[49] The court rejected the consent rule, which required common-law courts to get both parties' consent before issuing a commission.[50] Custom, practicality, and directness drove the court's decision. First, the custom among lower courts to issue commissions ex parte

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de bene esse, dedimus potestatem, and depositions in perpetuam rei memoriam. See id.; supra text accompanying note 31.

42. See Judiciary Act of 1789, § 30.

43. See Farnsworth v. Pierce, 7 Vt. 83, 86 (1835) ("[T]he practice in this state has been pretty general, if not universal, to issue these commissions . . . .").

44. 17 F. Cas. 1340, 1340 (C.C.D. Pa. 1816) (No. 10,116). Congress passed the nonimportation law as one of several measures to restrict trade with Britain and its colonies during the War of 1812. Donald R. Hickey, American Trade Restrictions During the War of 1812, 68 J. Am. Hist. 517, 536 (1981).

45. *Nelson*, 17 F. Cas. at 1341 n.2. To this day, civil-law systems "typically regard evidence gathering as a judicial function" and shun private discovery. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct., 482 U.S. 522, 550 (1987) (Blackmun, J., concurring in part and dissenting in part); see also Diego Zambrano, A Comity of Errors: The Rise, Fall, and Return of International Comity in Transnational Discovery, 34 Berkeley J. Int'l L. 157, 167–68 (2016) (explaining that discovery is judge-led rather than party-led in civil-law systems); Judicial Assistance Country Information: Brazil, U.S. Dep't State, https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/Brazil.html (on file with the *Columbia Law Review*) (last updated Dec. 8, 2021) ("[U]nder Brazilian Constitutional Law, only Brazilian judicial authorities are competent to perform acts of a judicial nature . . . . [Taking depositions] potentially could result in the arrest, detention, expulsion, or deportation of the American attorney or other American participants.").

46. *Nelson*, 17 F. Cas. at 1341 n.2.

47. Id.

48. Note, supra note 27, at 1194 n.6.

49. 7 Vt. 83, 86 (1835).

50. Id.; see also supra note 33 and accompanying text.

had become so widespread that the common law in the state had evolved beyond that in England.[51] Second, the ex parte procedure was more practical for the state's court system because it avoided several operational defects of the consent rule.[52] One defect was that courts would "endeavor to force the adverse party to consent" by withholding trial.[53] That exercise was often futile in cases in which the plaintiff, rather than the defendant, was seeking a commission because delaying trial ultimately benefited the defendant.[54] Another downside was that the consent rule imposed a cost burden on the party requesting a commission.[55] These drawbacks made the ex parte option all the more practicable for the state's courts. Third, the court reasoned, "We do many things here directly, that in England are done by useless circuity . . . ."[56] Two circumstances accounted for this straightforward approach. One was that Vermont did not have a separate court of chancery at the time.[57] Limited resources and the volume of law matters rendered the equity side of the court all but closed for relatively minor proceedings.[58] The other circumstance was that Vermont, unlike Great Britain, was not an island and could not rely on surrounding waters to limit the volume of transnational discovery requests.[59] Recurrent cross-border migration warranted a liberal approach to cross-border discovery

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51. See *Farnsworth*, 7 Vt. at 86 ("Usage alone, this being rather a matter of practice, might be a sufficient ground for us to decide . . . .").

52. Id. at 85.

53. Id.

54. See id. ("[T]o put off the trial to punish the defendant would be like reprieving a criminal, unless he would consent to be executed.").

55. Under the English Rule, courts of law typically awarded the prevailing party their costs. See Arthur L. Goodhart, Costs, 38 Yale L.J. 849, 851–54 (1929) (charting the history of costs in English courts). For suits in equity, however, the default was for each side to bear its own costs, and taxation against the losing party was discretionary. Id. at 854. For a party requesting a commission before a common-law court under the consent rule, the price of consent was losing out on the possibility of costs being taxed. *Farnsworth*, 7 Vt. at 84. Commissions before common-law courts were, therefore, a sunk cost for the requesting party. See id.

56. *Farnsworth*, 7 Vt. at 86.

57. Id. at 85 ("Yet, though this practice of the English courts, of requiring consent, seems unnecessary, it may be tolerable there on that island, where foreign jurisdictions do not come to suitors' thresholds, and where the court of chancery is always open."); Paul S. Gillies, Ruminations, The Vermont Court of Chancery, Vt. Bar J., Fall 2012, at 10, 11 ("For sixty years, law and equity were merged in the high court. Chancery and the Supreme Court were the same.").

58. Gillies, supra note 57, at 11 (explaining that "[l]aw was taking all the court time, and there were delays in handling equitable issues"). Vermont eventually adopted a "separate" court of chancery, consisting of all its supreme court judges who sat independently as chancellors. Id. at 12; Henry H. Ingersoll, Confusion of Law and Equity, 21 Yale L.J. 58, 62 (1911). For more on the rebirth of state chancery courts in the early nineteenth century, see Amalia D. Kessler, Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800–1877, at 19–61 (2017).

59. *Farnsworth*, 7 Vt. at 85 ("[W]e are separated on most sides from other jurisdictions by only a mathematical line, and witnesses are daily floating away by the tide of emigration . . . .").

procedures.[60] These factors led the court, like others in early America, to reaffirm courts' power to request and assist with the collection of evidence for use in foreign proceedings.[61]

These early cases offer three lessons for defining the jurisdictional limits of § 1782. First, early American courts embraced a liberal approach to cross-border discovery requests. Courts respected the traditional limitations on their jurisdictions at law and in equity while recognizing that those powers should evolve as the circumstances require.[62] Second, these courts recognized that, in an increasingly interconnected world, people move across borders more frequently. Defining the jurisdictional requirements for cross-border discovery practice, then, should be informed by the reality that the targets of discovery are mobile.[63] And third, comity was the backstop against overly zealous flexibility. That is, the receiving jurisdiction's willingness to permit reciprocal discovery shaped the practice of the sending court.[64] These lessons can guide federal courts in their transnational discovery practice today.

3. *The Status Quo at the Time of Codification.* — In light of courts' inherent powers, the question remains: Why was a statute necessary in the first place?[65] The view of then–Attorney General Caleb Cushing, which prompted the first statute, was that neither federal nor New York courts could compel witnesses to give testimony for use abroad.[66] For Cushing, the federal courts' supposed lack of a power to compel discovery was an embarrassing "defect."[67] American courts' reliance on assistance from their foreign counterparts and perceived inability to provide assistance in return risked tarnishing their reputation.

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60. Id.

61. Id. at 86; see also, e.g., McKenzie's Case, 2 Parson's Select Equity Cases 227, 227 (Pa. Ct. C.P. 1843) (granting a request from the New York State Supreme Court via letters rogatory for the deposition of witnesses in an action for libel). Recognizing the importance of comity, the Pennsylvania court noted, "[W]e are not bound to compel these witnesses to testify; but in executing this commission, it is a courtesy proper to be extended by all judicial tribunals one to the other, for the purpose of aiding in the administration of justice . . . ." Id. at 228. Similarly, in *Sergeant's Lessee v. Biddle*, the United States Supreme Court held that depositions of witnesses in Philadelphia—which commissioners had taken under a dedimus potestatem from the Delaware federal circuit court—were admissible as evidence. 17 U.S. (4 Wheat.) 508, 511–12 (1819).

62. See supra notes 49–61 and accompanying text.

63. See supra notes 59–60 and accompanying text.

64. See supra notes 43–48 and accompanying text.

65. See Stahr, supra note 14, at 600–01 (noting the language in the opinions of early American courts that suggested that they believed they could provide discovery assistance).

66. See Rogatory Commissions, 7 Op. Att'ys Gen. 56, 56–57 (1855) ("[T]he courts . . . of the United States [and] of the State of New York . . . have concurred in the conclusion . . . that no lawful authority exists to compel [a deponent subject to a commission] to appear for that purpose.").

67. See id. at 57 ("[T]he execution of similar commissions heretofore in France, at the instance of our courts, gave to her a special right to the exercise of correspondent international comity on the part of the United States.").

Commentators, however, have pointed out that Cushing's opinion may have been "erroneous."[68] In fact, less than a decade earlier, New York's Court of Chancery reaffirmed its power to compel discovery for foreign suits.[69]

The error may have resulted from the reform of New York's civil procedure. The Field Code revolutionized the state's system of practice and pleadings and merged the procedures of law and equity.[70] One of the reforms was to outlaw the bill of discovery and replace it with the Code's own provisions for pretrial examination.[71] The intention was to make discovery equally available across actions at law and suits in equity.[72] Foreign discovery assistance, however, may have been collateral damage. Abolishing the bill of discovery also eliminated the mechanism by which parties could access discovery for use abroad, at least in New York courts.[73] Hence, it is plausible that the changed practice of New York courts was at least a partial reason for the codification of cross-border discovery practice.

B. *The Text and Practice of § 1782*

Statute, rather than customary practice, now governs federal discovery assistance.[74] Section 1782 vests United States district courts with juris-

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68. See, e.g., Jones, supra note 14, at 540 ("The Attorney General's conclusion that a statute or treaty was necessary may have been erroneous . . . .").

69. See Burgess v. Smith, 2 Barb. Ch. 276, 279 (N.Y. Ch. 1847) ("This court has jurisdiction, and will entertain a bill of discovery in aid of the prosecution of a civil suit, in a sister state, or in a foreign tribunal, or in a court of the United States.").

70. Kellen Funk, Equity Without Chancery: The Fusion of Law and Equity in the Field Code of Civil Procedure, New York 1846–76, 36 J. Legal Hist. 152, 152 (2015) [hereinafter Funk, Equity Without Chancery]. The architects of the Code were the three-member Commission on Practice and Pleadings, which included David Dudley Field. Id. at 163–67.

71. See Act of Apr. 12, 1848, ch. 379, § 343, 1848 N.Y. Laws 497, 559 ("No action to obtain discovery under oath, in aid of the prosecution or defence of another action, shall be allowed, nor shall any examination of a party be had, on behalf of the adverse party, except in the manner prescribed by this chapter.").

72. See Funk, Law's Machinery, supra note 35, at 221 ("[N]o *action*—that is, no separately filed case whose only remedy was the disclosure of information—would be permitted under the code. Instead, all of the code's provisions for the discovery of information would be available in *every* action."). Professor Funk has noted that the impetus for this prohibition was New York's recent "constitutional mandate that 'testimony in equity cases shall be taken in like manner as in cases at law.'" Funk, Equity Without Chancery, supra note 70, at 176 (quoting N.Y. Const. of 1846, art. VI, § 10).

73. The Commissioners seem to have been aware of this situation because they later proposed that courts be able to compel testimony for proceedings in other states, albeit not foreign countries. See Arphaxed Loomis, David Graham & David Dudley Field, The Code of Civil Procedure of the State of New York: Reported Complete by the Commissioners on Practice and Pleadings § 1833–1835 (1850) ("Any party to an action or special proceeding, in a court, or before a judge, *of a sister state*, may obtain the testimony of a witness residing in this state, to be used in such action or proceeding, in the cases mentioned in the next two sections." (emphasis added)). The New York legislature, however, did not adopt this proposal. See Funk, Law's Machinery, supra note 35, at xi (noting that the Commission proposed its Final Report at the end of 1849, but the legislature did not adopt it).

74. See 28 U.S.C. § 1782.

diction to assist with discovery for foreign and international proceedings.[75] Courts generally apply a two-step framework when considering § 1782 petitions.[76] First, applicants must satisfy three statutory requirements: (1) the discovery target[77] must "reside[] or [be] found" in the district in which the applicant makes the application; (2) the discovery must be "for use in a proceeding before a foreign [or international] tribunal"; and (3) a request must come from "a foreign or international tribunal" or "any interested person."[78] Second, district courts must consider the four discretionary *Intel* factors: (1) whether the discovery target "is a participant in the foreign proceeding"; (2) "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance"; (3) "whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States"; and (4) whether the request is "unduly intrusive or burdensome."[79] Courts often also consult § 1782's

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75. Id.; see also In re Letter Rogatory from the Just. Ct., 523 F.2d 562, 564 (6th Cir. 1975) ("While it has been held that federal courts have inherent power to issue and respond to letters rogatory, such jurisdiction has largely been regulated by congressional legislation." (citations omitted)).

76. See, e.g., Fed. Republic of Nigeria v. VR Advisory Servs., Ltd., 27 F.4th 136, 148 (2d Cir. 2022) ("The analysis of a district court hearing an application for discovery pursuant to § 1782 proceeds in two steps."); Pons v. AMKE Registered Agents, LLC, 835 F. App'x 465, 467 (11th Cir. 2020) (describing the same two-step framework for § 1782 applications).

77. This Note uses "discovery target" to refer to the person from whom an applicant seeks discovery.

78. Kiobel ex rel. Samkalden v. Cravath, Swaine & Moore LLP, 895 F.3d 238, 243 (2d Cir. 2018) (quoting In re Esses, 101 F.3d 873, 875 (2d Cir. 1996)). Several other circuits list the same three requirements. See, e.g., In re Gliner, 133 F.4th 927, 932 (9th Cir. 2025) (outlining the same three statutory requirements); SPS Corp I, Fundo de Investimento em Direitos Creditórios Não Padronizados v. Gen. Motors Co., 110 F.4th 586, 590–91 (3d Cir. 2024) (same); Bravo Express Corp. v. Total Petrochemicals & Refin. USA, 613 F. App'x 319, 322 (5th Cir. 2015) (per curiam) (same).

Other circuits include a perfunctory fourth requirement that the application must be in search of evidence. See, e.g., In re Banco Mercantil del Norte, S.A., 126 F.4th 926, 930 (4th Cir. 2025) (requiring also that the application "must seek evidence, including 'testimony' or 'a document'" (quoting In re Newbrook Shipping Corp., 31 F.4th 889, 894 (4th Cir. 2022))); *Pons*, 835 F. App'x at 467–68 (identifying the same requirement).

The First Circuit lists the three common requirements and adds a fourth requirement from the text of the statute: The information must not be privileged. In re Schlich, 893 F.3d 40, 46 (1st Cir. 2018).

79. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 264–65 (2004). Although district courts have discretion as to how they balance the four factors, at least one circuit has held that it is an abuse of discretion for a district court to deny an application without explaining its reasoning. See *Bravo Express*, 613 F. App'x at 320 ("[O]ur precedent requires a district court to provide an explanation when it denies a § 1782(a) application . . . ."); see also Banco Mercantil de Norte, S.A. v. Paramo, 114 F.4th 757, 762 (5th Cir. 2024) ("A district court must offer some explanation whenever it grants or denies a motion to quash § 1782 discovery.").

"twin aims": (1) "providing efficient assistance to participants in international litigation" and (2) "encouraging foreign countries by example to provide similar assistance to our courts."[80]

1. *Formalism and Realism in § 1782 Practice*. — Descriptions and critiques of § 1782 disputes often focus on the "typical" § 1782 case.[81] A party seeking discovery will often file an application for a § 1782 order ex parte.[82] District courts commonly grant these applications ex parte, much to the ire of commentators.[83] Applicants often attach a template subpoena describing the deponents and documents sought.[84] The court will then issue a subpoena for the applicant to serve on the discovery target.[85] If the

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On appeal, circuit courts typically review lower courts' application of the statutory requirements de novo and their weighing of the discretionary factors for abuse of discretion. See, e.g., *Bravo Express*, 613 F. App'x at 321 (outlining the different standards of review for the two sets of requirements). The Fourth Circuit, however, reviews the district court's entire decision to grant a § 1782 application for abuse of discretion. *In re Banco Mercantil del Norte*, 126 F.4th at 930.

80. *In re Banco Mercantil del Norte*, 126 F.4th at 930 (internal quotation marks omitted) (quoting *Intel*, 542 U.S. at 252); Certain Funds, Accts. &/or Inv. Vehicles Managed by Affiliates of Fortress Inv. Grp. v. KPMG, L.L.P., 798 F.3d 113, 117 (2d Cir. 2015).

81. See, e.g., William S. Dodge, A Typical 1782 Case, Transnat'l Litig. Blog (Sep. 1, 2022), https://tlblog.org/a-typical-1782-case/ [https://perma.cc/7CPK-7JPA] (illustrating a "typical example of how federal courts apply this important provision"); see also Wang, supra note 4, at 2094 ("Seeking US discovery is typically straightforward.").

82. See Smit, American Assistance, supra note 3, at 16 ("The reported cases reflect that, in actual practice, application for assistance under Section 1782 are frequently filed *ex parte*."); Wang, supra note 4, at 2110 ("Requests are typically considered ex parte, without informing or including the foreign tribunal or foreign opposing party, though occasionally notice is given in haphazard ways."). But see Venequip S.A. v. Caterpillar Inc., 83 F.4th 1048, 1051–52 (7th Cir. 2023) (providing a rare example of an applicant serving a summons on the discovery target instead of proceeding ex parte); Banca Pueyo SA v. Lone Star Fund IX (US), L.P., 55 F.4th 469, 474 (5th Cir. 2022) ("[I]t is not unusual for § 1782(a) applications to be made initially on an *ex parte* basis to the district courts, though this does not seem to be routine practice.").

83. Commentators have criticized this practice because the court relies on asymmetrical information and does not always provide notice to the foreign court and other parties. See Wang, supra note 4, at 2142–46 ("When foreign discovery requests proceed ex parte, they raise all the alarms that ex parte proceedings usually do."); William S. Dodge, Tagging Corporate Directors for Discovery Under Section 1782, Transnat'l Litig. Blog (June 7, 2023), https://tlblog.org/tagging-corporate-directors-for-discovery-under-section-1782/ [https://perma.cc/D72G-WC4M] [hereinafter Dodge, Tagging Corporate Directors] ("[G]ranting such petitions ex parte biases a court's decisions by allowing it to hear the arguments on only one side."). A recent study showed that, in 2015, the grant rate for uncontested § 1782 requests was 93.9%. Wang, supra note 4, at 2122–23.

84. See, e.g., Municipality of Mariana, 713 F. Supp. 3d 1125, 1132 (D.N.M. 2024) ("It is further ordered that Applicants are authorized to serve the subpoena annexed as Exhibit C on Respondent . . . ." (emphasis omitted)); see also In re Mammoet Salvage, B.V., No. 23-mc-00073 (LJL), 2025 WL 3009507, at *16–17 (S.D.N.Y. Oct. 28, 2025) (modifying a subpoena because the requested discovery was overbroad).

85. Wang, supra note 4, at 2124.

target wishes to contest the subpoena, they must typically move to intervene and file a motion challenging the subpoena.[86]

While the above suffices as a formal description of a typical § 1782 dispute, proceedings may be more nuanced than this standard formula. As with discovery matters in general, the statute vests district courts with discretion to manage parties' obligations.[87] Judges may hold settlement conferences to encourage parties to resolve their discovery disputes without formally granting applications.[88] These conferences provide a third way—beyond the ex parte and adversarial proceedings—whereby parties can configure the scope of discovery assistance.[89] Courts may also propose § 1782 discovery as a less intrusive alternative to adversarial proceedings, for instance, when dismissing a suit for forum non conveniens.[90] Moreover, the parties remain free to come to voluntary agreements to share information without relying on § 1782 at all.[91]

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86. These typically take the form of a "motion to quash, motion to vacate, motion to stay, motion for reconsideration, or a motion to compel from the requestor." Id. at 2122 n.146. Otherwise, the party risks being held in contempt. See In re Letters Rogatory Issued by the Dir. of Inspection of the Gov't of India, 385 F.2d 1017, 1018 (2d Cir. 1967) (Friendly, J.) (noting that a "witness is able to obtain review [of a § 1782 order] by allowing himself to be cited for contempt"). Professor Wang's research showed that, in 2015, only thirty-seven percent of requests from foreign parties were contested. Wang, supra note 4, at 2122.

87. See Sampedro v. Silver Point Cap., L.P., 958 F.3d 140, 142 (2d Cir. 2020) (highlighting "the district court's broad discretion under section 1782"); In re 840 140th Ave. NE, 634 F.3d 557, 563 (9th Cir. 2011) ("Congress gave the federal district courts broad discretion to determine whether, and to what extent, to honor a request for assistance under 28 U.S.C. § 1782." (internal quotation marks omitted) (quoting Four Pillars Enters. Co. v. Avery Dennison Corp., 308 F.3d 1075, 1078 (9th Cir. 2002))).

88. See In re Caterpillar Crédito, No. 22-mc-00568 (SCC-MDM), 2024 WL 2972782, at *2 (D.P.R. June 13, 2024) ("[T]he Court offered a more practicable option, . . . assisted [the parties] in various attempts to meet and confer[,] . . . and held several hearings akin to settlement conferences.").

89. See Paul W. Grimm, Introduction: Reflections on the Future of Discovery in Civil Cases, 71 Vand. L. Rev. 1775, 1776–77 (2018) (explaining that the 2015 amendments to the Federal Rules of Civil Procedure "encourage[d] . . . judges to informally resolve discovery disputes without the time and expense required for formal briefing").

90. See Proyectos Orchimex de Costa Rica, S.A. v. E.I. duPont de Nemours & Co., 896 F. Supp. 1197, 1202–03 (M.D. Fla. 1995) ("In the event of dismissal to the foreign forums, the plaintiffs would nevertheless be able to obtain documents from third parties located in the United States under 28 U.S.C. § 1782 . . . ."); see also Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) (listing "the relative ease of access to sources of proof" as a factor for forum non conveniens analysis).

91. See 28 U.S.C. § 1782(b) ("This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him."); Viren Mascarenhas & Mariella Montplaisir-Bazan, Milbank LLP, 28 U.S.C. § 1782: Powerful Tool in the US to Obtain Discovery for Use in Foreign Proceedings 2 (2024), https://www.milbank.com/a/web/vQK7kV1u29p4jvpaxadY2q/milbank-insights_powerful-tool-in-the-us-to-obtain-discovery-for-use-in-foreign-proceedings_may-2024.pdf [https://perma.cc/459J-WRVF] ("Section 1782 does not dictate any formal procedure or approval for the provision of evidence on a voluntary basis.").

2. *Some Peculiarities of § 1782's Blended Procedure.* — Nonetheless, § 1782 practice has some procedural oddities. Some of this awkwardness comes from the statute's incorporation of the Federal Rules of Civil Procedure as a procedural default.[92] As a result, discovery for foreign proceedings must typically abide by American procedural norms.[93]

For instance, judges adopt more of a managerial function in § 1782 proceedings than in plenary proceedings.[94] Professor Judith Resnik has identified judges' role in pretrial discovery as a factor that contributed to the rise of managerial judging.[95] A § 1782 application, when opposed, is essentially a grand discovery dispute because the whole point of the action is to compel the discovery target to disclose information.[96] At the outset of a § 1782 action, not only do district courts often look at the specific information requested by applicants,[97] but they also consider the scope of discovery more broadly.[98] It is no wonder, then, that some commentators worry that judges' ultramanagerial role in § 1782 proceedings risks converting them into "global 'Special Masters for Discovery.'"[99]

Section 1782 also runs counter to the unspoken rule that parties should try their hardest to leave the court out of discovery matters.[100] As

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92. See 28 U.S.C. § 1782(a) ("To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.").

93. See Judith Resnik, The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75, 162 U. Pa. L. Rev. 1793, 1796 (2014) (describing "conflicts over norms that the Rules both represent and have engendered").

94. See Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 374, 376–77 (1982) (describing managerial judging as when judges "play[] a critical role in shaping litigation and influencing results" as opposed to the "classical view" that "judges are not supposed to have an involvement or interest in the controversies they adjudicate").

95. Id. at 391–93 (identifying judges' role in pretrial discovery as a contributing factor to the increased managerial role of judges); see also Lee H. Rosenthal, From Rules of Procedure to How Lawyers Litigate: 'Twixt the Cup and the Lip, 87 Denv. U. L. Rev. 227, 231 (2010) ("[T]he critical element in bridging the gap between the rules and their application is making the district judge . . . more involved in the details of discovery in cases that need such involvement . . . .").

96. See Seth Katsuya Endo, Discovery Hydraulics, 52 U.C. Davis L. Rev. 1317, 1328 (2019) (describing discovery disputes as mostly pertaining to the quantity of information a party must produce); cf. Funk, Law's Machinery, supra note 35, at 219 (describing a similar role for the bill of discovery).

97. See supra note 84 and accompanying text.

98. See Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 265 (2004) (permitting district courts to "reject[] or trim[]" § 1782 requests that are "unduly intrusive or burdensome").

99. In re Malev Hungarian Airlines, 964 F.2d 97, 102–03 (2d Cir. 1992) (Feinberg, J., dissenting).

100. See Diego A. Zambrano, The Unwritten Norms of Civil Procedure, 118 Nw. U. L. Rev. 853, 892 (2024) ("Most trial judges expect lawyers to attempt to resolve their disputes outside of court." (quoting Best Pretrial Hacks, ABA (Apr. 2019), https://www.americanbar.org/news/abanews/publications/youraba/2019/april-2019/legal-experts-share-their-best-pretrial-hacks/ (on file with the *Columbia Law Review*))).

Professor Diego Zambrano has described, "a cultural norm instructs litigants not to bring trivial discovery disputes to the judge, nor file repeated motions."[101] The court's role in setting the particulars of discovery, then, makes § 1782 somewhat antithetical to the norm that American discovery should consist of private interparty negotiations outside of the watchful eye of the court.[102]

One reason why these procedural arrangements may seem awkward is that they belie the notion that fact discovery should come *after* the court's preliminary establishment of its jurisdiction during the pleading stage.[103] Ordinarily, to access "the fruits of U.S. discovery,"[104] a plaintiff must first establish a colorable claim that the court has jurisdiction over the parties.[105] Section 1782 procedure, on the contrary, binds up the preliminary jurisdictional inquiry into the question of the entire propriety of the action.[106] A district court must determine whether it has jurisdiction over the application while also deciding whether to grant discovery and how much discovery to grant.[107] To borrow a metaphor from a similar preliminary issue, § 1782 "collapse[s] the [jurisdictional] inquiry into the

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101. Id. at 856 (citing ABA, supra note 100); see also Janet Cooper Alexander, Judges' Self-Interest and Procedural Rules: Comment on Macey, 23 J. Legal Stud. 647, 659 (1994) ("[Discovery] requires no expenditure of judicial resources except when discovery disputes are brought to the court for resolution.").

102. See supra notes 94–99 (describing the roles that district judges play in managing pretrial and § 1782 proceedings); cf. Edith Beerdsen, Discovery Culture, 57 Ga. L. Rev. 981, 998 (2023) ("The primary responsibility for running the discovery process lies with the parties and their legal representatives, and discovery negotiations generally take place without the court's involvement.").

Similarly, § 1782 proceedings take place without normal initial disclosures. Cf. Fed. R. Civ. P. 26(a)(1)(A) (listing the disclosures that "a party must, without awaiting a discovery request, provide to the other parties"). The Federal Rules exempt a "proceeding ancillary to a proceeding in another court" from the initial disclosure requirement. Fed. R. Civ. P. 26(a)(1)(B)(viii); see also Gyptec, S.A. v. Hakkim-Daccach, No. 16-20810-CIV-WILLIAMS/SIMONTON, 2018 WL 4679724, at *12–13 (S.D. Fla. Sep. 28, 2018) (noting that § 1782 actions are exempted from the initial disclosure requirements). § 1782 actions are also exempt from the initial meet and confer requirement. See Fed. R. Civ. P. 26(f)(1) ("Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) . . . , the parties must confer as soon as practicable . . . .").

103. See Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009) ("Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."); Lee H. Rosenthal, Pleading, for the Future: Conversations After *Iqbal*, 122 Dick. L. Rev. 383, 386 n.7 (2017) ("The need for a pleading filter, a standard that must be met before a case can proceed, is widely recognized.").

104. Heraeus Kulzer, GmbH v. Biomet, Inc., 633 F.3d 591, 594 (7th Cir. 2011).

105. See supra note 103.

106. See *Heraeus Kulzer*, 633 F.3d at 593 (explaining that a district court's denial of a § 1782 application is an appealable final judgment because "the only matter is discovery").

107. See Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 249, 265 (2004) (requiring district courts to assess whether a discovery target "resides or is found" in the district while also assessing whether the request is "unduly intrusive or burdensome" (internal quotation marks omitted) (quoting 28 U.S.C. § 1782(a))).

merits."[108] While this may seem like an odd amalgam of jurisdictional and merits analyses, this Note argues that it is less odd than it seems in light of the role that personal jurisdiction plays at the core of the statute.[109]

II. TESTING THE LIMITS OF PERSONAL JURISDICTION UNDER § 1782

This Part provides an overview of the disagreement among courts about the jurisdictional requirements of § 1782. For a judge to order discovery under § 1782, the applicant must request assistance in a judicial district where the discovery target "resides or is found."[110] Recently, federal courts interpreting this requirement have proposed two different standards. One contingent, led by the Second Circuit, has concluded that the scope of the requirement "extends to the limits of personal jurisdiction consistent with due process."[111] The Fourth Circuit, on the other hand, has determined that the term requires physical presence in the judicial district.[112] Section II.A reviews the Second Circuit's personal jurisdiction approach, then section II.B examines the Fourth Circuit's physical presence approach. Ultimately, this Note concludes that the Second Circuit had the better argument.

A. *The Second Circuit's Approach*

The Southern District of New York and the Second Circuit have been the forerunners in establishing the jurisprudence of § 1782,[113] owing

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108. Cf. Baur v. Veneman, 352 F.3d 625, 642 (2d Cir. 2003) (cautioning against "collaps[ing] the [Article III] standing inquiry into the merits").

109. See infra Parts II, III.

110. 28 U.S.C. § 1782(a).

111. In re del Valle Ruiz, 939 F.3d 520, 528 (2d Cir. 2019); see also Absolute Activist Value Master Fund Ltd. v. Devine, Nos. 21-13587, 22-11313, 22-11590, 22-13207, 2025 WL 764608, at *8 (11th Cir. Mar. 11, 2025) (per curiam) ("Because personal jurisdiction over Spears in the Middle District of Florida comports with due process, we similarly hold that Spears was 'found' in the district for § 1782 purposes."); Shueisha Inc. v. Paypal Holdings, Inc., No. 22-mc-80273-JSC, 2023 WL 2277102, at *3 (N.D. Cal. Feb. 27, 2023) ("While the Ninth Circuit has not interpreted this portion of the statute, the Second Circuit held 'resides or is found' extends to the limits of personal jurisdiction." (quoting *In re del Valle Ruiz*, 939 F.3d at 528)); In re De Leon, No. 19-mc-0197 (TSC), 2020 WL 1047742, at *2 (D.D.C. Mar. 4, 2020) ("Although there appear to be no cases in this Circuit addressing the issue, the court finds the Second Circuit's reasoning persuasive.").

112. See In re Eli Lilly & Co., 37 F.4th 160, 164 (4th Cir. 2022) ("[A] corporation, to be 'found' in a district, '*must be present* in the district by its officers and agents carrying on the business of the corporation,' thus requiring a form of physical presence in the district." (quoting People's Tobacco Co. v. Am. Tobacco Co., 246 U.S. 79, 84 (1918))). Other district courts have also shown skepticism of the Second Circuit's approach. See In re R.D. Project Dev. B.V., No. 24-mc-80287-DMR, 2025 WL 1397507, at *3 (N.D. Cal. May 14, 2025) ("The court finds that the jurisdictional analysis applied by *del Valle Ruiz* is not a good fit for a section 1782 analysis.").

113. One of the early appellate decisions on § 1782 came from the Second Circuit on appeal from the Southern District. See In re Letters Rogatory Issued by the Dir. of Inspection

perhaps to the status of the Southern District as a forum of choice for cross-border disputes.[114] Perhaps unsurprisingly, then, the Second Circuit's approach to construing the "resides or is found" requirement emerged over the course of seventeen years in the form of two cases.

1. In re Edelman. — The Second Circuit first addressed the "resides or is found" requirement in the 2002 case *In re Edelman*, which reviewed a § 1782 application from Asher Edelman.[115] The application sought and secured subpoenas duces tecum from the Southern District of New York to support ongoing shareholder litigation in France.[116] Included in the subpoenas was a catch-all authorization for service upon "additional individuals and entities with knowledge and information."[117] One of these individuals was Claude Taittinger, a French director of the corporation at the center of the shareholder lawsuit.[118] Taittinger was a resident of France, which made service upon him in the Southern District improper so long as he was not found in that district.[119] Edelman, therefore, waited three days until Taittinger was visiting New York City to serve him personally.[120]

The question on appeal was "whether an individual, who lives and works abroad, may be subject to being subpoenaed for deposition pursuant to § 1782(a) while traveling in the United States."[121] Answering this question required giving fresh construction to § 1782's "resides or is found" requirement.[122] The court thought it apparent that there was at least some geographic requirement—both verbs, "to reside" and "to find," connote physical location.[123] The parties, however, disagreed about when a person must be located in a place to satisfy the requirement.[124] The par-

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of the Gov't of India, 385 F.2d 1017, 1018 (2d Cir. 1967) (highlighting the meager authority on the appealability of denials of motions to vacate in § 1782 proceedings).

114. See Marcus S. Quintanilla & Christopher A. Whytock, The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law, 18 Sw. J. Int'l L. 31, 36 (2011) (noting that the Southern District is "known for handling many transnational suits").

115. 295 F.3d 171, 173–74 (2d Cir. 2002).

116. Id. (internal quotation marks omitted).

117. Id.

118. Id. "Taittinger [was] also the head of Taittinger, S.A., . . . a company famous to the champagne cognoscenti." Id. at 174.

119. Id. at 173–74; see also 28 U.S.C. § 1782(a) (requiring that a discovery target "reside[] or [be] found" in the district).

120. *In re Edelman*, 295 F.3d at 174–75. Taittinger was visiting an art gallery at the time of service. Id.

121. Id. at 173.

122. See id. at 176 ("Until now neither we, nor any other circuit so far as we are aware, has ruled on the scope of the first requirement of § 1782(a), that is to say, that the deposed be found in the district.").

123. See id. at 177 ("We need look no further therefore than the words of the statute to discern a geographic limitation with respect to testimonial evidence.").

124. Id.

ties debated two alternatives: (1) presence at the time of service versus (2) presence at the time the court granted the application.[125]

For the *In re Edelman* court, however, a narrow focus on the temporal question missed the mark for two reasons. First, the Federal Rules of Civil Procedure already provided protection for nonparty deponents.[126] Rule 45 limited the distance a deponent needed to travel to one hundred miles in most cases.[127] Furthermore, Rule 26 authorized a district court to quash a subpoena if it would cause a deponent "annoyance, embarrassment, oppression, or undue burden or expense."[128] The district court's discretion to manage discovery and protect nonparties obviated the need to read a strict physical presence requirement into § 1782.[129]

Rather than create a new standard, the Second Circuit turned to "well-settled case law on territorial jurisdiction."[130] In fact, one of the precedents at the outer rim of the Supreme Court's personal jurisdiction jurisprudence was almost directly on point. *Burnham v. Superior Court* established that tag jurisdiction—the assertion of general personal jurisdiction over a nonresident based on personal service in a state or district—generally fits within the requirements of due process.[131] This was also the scenario in *In re Edelman*—the server tagged Taittinger with a subpoena while he was a transient visitor in the district.[132] Therefore, the court concluded that "[i]t is consistent construction to endow the phrase 'or is found' in § 1782 with the same breadth as that accorded it in *Burnham*."[133]

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125. Id. at 177–78 ("Taittinger insists that the words '*is* found' mean that a prospective deponent must be in the district . . . when the district court issues the discovery order[,] . . . [while] Edelman asserts that . . . a subpoena . . . may be served on a district resident or a nonresident who is physically present in the district when served." (emphasis added by id.) (quoting 28 U.S.C. § 1782(a))).

126. See supra note 92 and accompanying text.

127. See Fed. R. Civ. P. 45(c)(1); *In re Edelman*, 295 F.3d at 178 ("The purpose of the 100 mile exception is to protect such witnesses from being subjected to excessive discovery burdens in litigation in which they have little or no interest.").

128. Fed. R. Civ. P. 26(c). The rules also required that a person be served in the district from which the subpoena came, though this rule has subsequently been amended. Contrast Fed. R. Civ. P. 45(b)(2) (1991) (providing, absent a state statute governing service, that "a subpoena may be served *at any place within the district of the court by which it is issued*, or at any place without the district that is within 100 miles of the place of the deposition" (emphasis added)), with Fed. R. Civ. P. 45(b)(2) (allowing litigants now to serve subpoenas "at any place within the United States"). This change was likely less of a concern for a deponent who, like Taittinger, resided outside the United States because the new geographic limitation was now the national borders of the United States. See *In re Edelman*, 295 F.3d at 174.

129. *In re Edelman*, 295 F.3d at 178 ("Accordingly, we see no need to interpret the statute's language to provide even more protection to a nonresident prospective deponent.").

130. Id. at 179.

131. 495 U.S. 604, 628 (1990) (plurality opinion).

132. See supra note 120 and accompanying text.

133. *In re Edelman*, 295 F.3d at 179 (quoting 28 U.S.C. § 1782).

The legislative history of § 1782 reinforced the *In re Edelman* court's construction and revealed the "liberalizing trend" behind Congress's twentieth century amendments.[134] Congress had imposed a requirement that a witness be "*residing* within the United States" in the initial codification of § 1782 in the Judicial Code in 1948[135] but removed the residence requirement entirely the next year.[136] The House Report explained that the purpose was to "correct[] restrictive language in section 1782 . . . and permit[] depositions in any judicial proceeding without regard to whether the deponent is 'residing' in the district or *only sojourning there*."[137] Congress's aim that the statute be interpreted broadly, therefore, encompassed nonresidents like Taittinger whom applicants could tag when they set foot on American soil.[138] Consequently, the Second Circuit held that physical presence in a district at the time of personal service was sufficient to render a person "found" in that district for the purposes of § 1782.[139]

2. In re del Valle Ruiz. — If *In re Edelman* held that personal service and in-district presence were *sufficient* to satisfy the "resides or is found" requirement,[140] *In re del Valle Ruiz* considered whether those conditions were *necessary*.[141] In that case, a group of Mexican nationals and investment firms requested a subpoena from the Southern District of New York for, among others, Santander and its affiliate Santander Investment Securities (SIS).[142] The applicants hoped to use the discovery in civil, criminal, and arbitral proceedings abroad stemming from Santander's acquisition of another Spanish bank.[143]

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134. Id. at 179–80.

135. Id. at 179 (internal quotation marks omitted) (quoting Act of June 25, 1948, ch. 646, § 1782, 62 Stat. 949, 949 (current version at 28 U.S.C. § 1782(a))).

136. Id. (citing Act of May 24, 1949, ch. 139, § 93, 63 Stat. 89, 103 (current version at 28 U.S.C. § 1782(a))). In its place, the statute allowed for the deposition of "any witness within the United States." Id. (internal quotation marks omitted) (quoting § 93, 63 Stat. at 103).

137. H.R. Rep. No. 81-352, at 16 (1949) (emphasis added). The 1949 amendment also broadened the category of eligible foreign proceedings from "civil action" to "any judicial proceeding." § 93, 63 Stat. at 103; H.R. Rep. No. 81-352, at 16.

138. The court also derived Congress's intent for a broad construction of § 1782 from subsequent amendments that expanded the types of discovery that courts could order under the statute, explained who could request assistance under the statute, and clarified that the statute could be used for foreign criminal proceedings. *In re Edelman*, 295 F.3d at 180.

139. Id. (internal quotation marks omitted) (quoting 28 U.S.C. § 1782(a)). As a corollary, a foreign resident is not necessarily immune from service of a subpoena merely because they were outside the district at the time the district judge granted the § 1782 petition. Id.

140. Id.

141. See 939 F.3d 520, 527 (2d Cir. 2019).

142. Id. at 525. Santander was a Spanish bank with its principal place of business in Madrid and SIS was a Delaware corporation with its principal place of business in New York City. Id. at 525 n.4.

143. See id. at 525.

Before turning to the specifics of the court's analysis, it is worth noting that the personal jurisdiction landscape had changed completely since 2002 when the *In re Edelman* court handed down its decision. The Supreme Court worked a sea change to its general personal jurisdiction doctrine by restricting general personal jurisdiction over corporations from the commonly understood standard of continuous and systematic forum contacts[144] to "essentially at home" characteristics.[145] For this reason, then, the *In re del Valle Ruiz* applicants conceded that Santander was not subject to general personal jurisdiction in the Southern District.[146]

The question before the Second Circuit in *In re del Valle Ruiz*, therefore, was whether a specific personal jurisdiction test could also satisfy the "is found" requirement.[147] *In re Edelman* had laid a foundation for this conclusion, reasoning that "well-settled case law on territorial jurisdiction" was instructive.[148] At that time, tag jurisdiction was at the outer rim as a basis for general personal jurisdiction.[149] However, *Daimler* and *Goodyear* outlined that the general personal jurisdiction inquiry was different for corporations and natural persons.[150] Those cases' restriction of general personal jurisdiction to "essentially at home" characteristics suggested that tag jurisdiction was beyond the due process limits for corporations.[151] The outer rim of personal jurisdiction over corporations, therefore, became

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144. Richard D. Freer, Some Specific Concerns With the New General Jurisdiction, 15 Nev. L.J. 1161, 1165 (2015) ("Before *Goodyear* and *Daimler*, the general jurisdiction canon was that a corporate defendant could be sued on a claim not arising in the forum if the defendant engaged in 'continuous and systematic' activities in the forum." (quoting Peter Hay, Patrick J. Borchers & Symeon C. Symeonides, Conflict of Laws 404–05 (5th ed. 2010))).

145. See Daimler AG v. Bauman, 571 U.S. 117, 138–39 (2014) ("[T]he inquiry under *Goodyear* is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's 'affiliations with the State are so "continuous and systematic" as to render [it] essentially at home in the forum State.'" (second alteration in original) (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011))).

146. See *In re del Valle Ruiz*, 939 F.3d at 528 n.9 (noting that the petitioners did not press the issue of general personal jurisdiction over Santander on appeal); see also id. at 531 (noting that parties did not challenge the district court's conclusion that it had general personal jurisdiction over SIS).

147. Id. at 529 ("Petitioners . . . request that we address exactly what process is due an entity such as Santander, which is not subject to potential liability[,] . . . [and] what contacts are necessary to give rise to specific personal jurisdiction.").

148. In re Edelman, 295 F.3d 171, 179 (2d Cir. 2002) (citing Burnham v. Superior Ct., 495 U.S. 604 (1990)).

149. See id. (reasoning that tag jurisdiction is an "exercise of personal jurisdiction based on nothing more than physical presence").

150. See *Daimler*, 571 U.S. at 137 (explaining how to establish personal jurisdiction over corporations, as opposed to individuals); *Goodyear*, 564 U.S. at 924 (same).

151. See Martinez v. Aero Caribbean, 764 F.3d 1062, 1064 (9th Cir. 2014) (concluding that *Burnham* does not apply to corporations); Roger Michalski, Personal Jurisdiction's Aberrant Theory of Consent, 74 Am. U. L. Rev. 1719, 1747 (2025) ("Tag jurisdiction does not apply to [corporations] because they have no body to tag.").

specific jurisdiction.[152] Applying *In re Edelman*'s reasoning required, in turn, assessing whether specific jurisdiction over a nonresident corporation fell within *In re Edelman*'s broad construction of the "found" requirement.[153]

The *In re del Valle Ruiz* court reaffirmed *In re Edelman* and concluded that the meaning of "'found' . . . extends . . . to the limits of personal jurisdiction consistent with due process."[154] Three arguments were at the core of the court's analysis.

First, the court concluded that *In re Edelman*'s "focus on tag jurisdiction comporting with due process in no way suggests that § 1782's reach should be coextensive only with the limits of a district court's *general* jurisdiction."[155] Tag jurisdiction, in other words, was sufficient but not necessary to satisfy the "resides or is found" requirement.[156]

Second, the court dismissed Santander's argument that the legislative history limited the scope to a strict "physical presence" requirement.[157] The House Report for the 1949 amendment indicated an intention that depositions should be appropriate regardless of "whether the deponent is 'residing' in the district *or only sojourning there*."[158] Santander argued that strict physical presence was a requirement because both terms imply physical presence.[159] Santander cited Professor Hans Smit—one of the principal drafters of the 1964 amendments—for additional support.[160] Professor Smit's position was that § 1782's "evident statutory purpose is to create adjudicatory authority based on presence."[161] For corporations, then, the term "'found' . . . equate[s] systematic and continuous local activities with presence."[162]

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152. See Linda J. Silberman & Aaron D. Simowitz, Recognition and Enforcement of Foreign Judgments and Awards: What Hath *Daimler* Wrought?, 91 N.Y.U. L. Rev. 344, 351 (2016) ("Justice Ginsburg's decision in *Daimler* presumed that specific jurisdiction—the power to decide claims arising out of or related to the defendant's contacts in the forum—would substitute for the dramatic diminution of general jurisdiction.").

153. See *In re Edelman*, 295 F.3d at 178 (emphasizing the need for a "flexible reading" of "found").

154. In re del Valle Ruiz, 939 F.3d 520, 523 (2d Cir. 2019).

155. Id. at 527.

156. See id. (explaining that *In re Edelman* "did *not* conclude that tag jurisdiction was *necessary* to satisfy § 1782").

157. Id. at 527–28.

158. Id. (quoting H.R. Rep. No. 81-352, at 16 (1949)).

159. Id.; see also In re Edelman, 295 F.3d 171, 177 (2d Cir. 2002) ("We need look no further therefore than the words of the statute to discern a geographic limitation with respect to testimonial evidence."); supra note 123 and accompanying text.

160. *In re del Valle Ruiz*, 939 F.3d at 528 (citing Smit, American Assistance, supra note 3, at 10).

161. Smit, American Assistance, supra note 3, at 10.

162. Id. Professor Smit argued for a liberal construction of § 1782's in personam reach based on the statute's purpose "to liberalize the assistance given to foreign and international tribunals." Id. at 9. However, he thought that "mere transient presence," as outlined in *Burnham*, was not sufficient. Id. at 10 n.44. Presumably, then, Professor Smit would have also disagreed with *In re Edelman*'s holding. See id.

The *In re del Valle Ruiz* court rejected these arguments and opted for a broad and "flexible" construction of "resides or is found."[163] This reading was consistent both with other circuits' interpretations of the term in other statutory contexts[164] and with the Second Circuit's own broad reading of the statute in light of its twin goals.[165] These factors led the court to reject a narrow reading that would "cabin 'found' to the facts of *In re Edelman*."[166] The court concluded, instead, that the scope of the "resides or is found" requirement was coextensive with "the limits of personal jurisdiction consistent with due process."[167]

B. *The Fourth Circuit's Approach*

One criticism of the Second Circuit's statutory construction in *In re del Valle Ruiz* is that it is not the most ardent application of textualism, at least as modern textualists might conceive that theory.[168] Modern textualism generally focuses on the ordinary public meaning of a term at the time of a statute's enactment.[169] If the term's ordinary public meaning is ambig-

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163. *In re del Valle Ruiz*, 939 F.3d at 528 (quoting *In re Edelman*, 295 F.3d at 178).

164. The Second Circuit cited two decisions from other circuits that equated whether a fund can be "found" in a district for venue purposes under ERISA with whether a district court could properly assert personal jurisdiction under International Shoe Co. v. Washington, 326 U.S. 310 (1945). *In re del Valle Ruiz*, 939 F.3d at 527–28 (citing Waeltz v. Delta Pilots Ret. Plan, 301 F.3d 804, 810 (7th Cir. 2002); Varsic v. U.S. Dist. Ct., 607 F.2d 245, 248–49 (9th Cir. 1979)). Appellants' opening brief also listed other statutes that use similar language, including the 1789 Judiciary Act, the Securities Exchange Acts of 1933 and 1934, and RICO. Joint Brief and Special Appendix for Petitioners-Appellants at 27–29, In re del Valle Ruiz, 939 F.3d 520 (2d Cir. 2019), No. 18-3226(L), 2018 WL 6380875.

165. *In re del Valle Ruiz*, 939 F.3d at 528 ("[W]e have repeatedly recognized Congress's intent that § 1782 be 'interpreted broadly,' especially given the district court's ability 'to exercise discretion in deciding whether, and in what manner, to order discovery in particular cases.'" (quoting *In re Edelman*, 295 F.3d at 180)).

166. Id. at 527–28.

167. Id.

168. When confronted with an undefined statutory term, a textualist approach seeks to give that term its ordinary public meaning. See, e.g., Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.").

169. See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 33 (2012) ("The interpretive approach we endorse is that of the 'fair reading': determining the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued.").

Professor Anita Krishnakumar has pointed out that textualist justices are not consistent about the point in time at which courts should assess the public meaning. See Anita S. Krishnakumar, Textualism in Practice, 74 Duke L.J. 573, 610–17 (2024) (concluding in an empirical study of Supreme Court opinions between the 2012 and 2020 terms that "[a]ll the Justices considered to be textualists referenced noncontemporaneous dictionary definitions in a nontrivial percentage of the opinions in which they employed dictionary definitions").

uous, textualists resolve that ambiguity using text-based tools.[170] In *In re del Valle Ruiz*, the Second Circuit based its statutory construction on (1) *In re Edelman*'s "flexible reading of the phrase" and (2) "Congress's intent that § 1782 be 'interpreted broadly.'"[171] Neither of these bases is particularly textualist.[172]

The Fourth Circuit repudiated the Second Circuit's statutory construction of the "resides or is found" requirement in the case *In re Eli Lilly & Co.*[173] The court criticized the Second Circuit's approach on three grounds: (1) for failing to consider the plain meaning of "found," (2) for not addressing contemporaneous dictionary definitions of "found," and (3) for allegedly ignoring binding precedent.[174] This section examines that case and offers its own critique of the Fourth Circuit's mode of construction.

1. In re Eli Lilly. — *In re Eli Lilly* reviewed a § 1782 application to obtain discovery from Novartis for use in patent infringement lawsuits in several European countries.[175] The district court, on review of a magistrate judge's order, denied Eli Lilly's application and granted Novartis's motion to quash the subpoena.[176] The lower court determined that Novartis was not found in the district because it did not have a "physical presence" there.[177] It also concluded, in the alternative, that Novartis lacked sufficient contacts to render it subject to personal jurisdiction.[178]

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170. Krishnakumar, supra note 169, at 577 ("[Textualists] rely on a limited universe of text-based interpretive tools, such as plain meaning, dictionary definitions, the whole act and whole code rules, and language canons . . . ."). Textualists eschew "atextual" interpretive tools like "legislative history, statutory purpose, legislative intent, and practical consequences." Id. at 577, 582.

171. *In re del Valle Ruiz*, 939 F.3d at 528 (quoting In re Edelman, 295 F.3d 171, 178, 180 (2d Cir. 2002)).

172. See Krishnakumar, supra note 169, at 577, 582 (explaining that textualists discourage the use of "atextual" interpretive tools like "legislative history, statutory purpose, legislative intent, and practical consequences").

173. 37 F.4th 160, 167 (4th Cir. 2022).

174. Id.

175. Id. at 162.

176. Id. at 163.

177. Id. (internal quotation marks omitted).

178. Id. Eli Lilly had argued that personal jurisdiction over Novartis was appropriate because Novartis had purchased several related patent applications pending with the U.S. Patent and Trademark Office. In re Eli Lilly & Co., 580 F. Supp. 3d 334, 340 (E.D. Va. 2022), aff'd, 37 F.4th 160 (4th Cir. 2022). The district court reasoned that these contacts were insufficient to establish personal jurisdiction. Id. at 341. On appeal, Eli Lilly argued that Novartis's conduct was sufficient because Novartis "amended the applications to make improper and unsupported claims that target its prime competitor products." Opening Brief of Movants-Appellants at 38, *In re Eli Lilly*, 37 F.4th 160 (No. 22-1094). Eli Lilly also argued that a statute grants the Eastern District of Virginia personal jurisdiction over patentees that do not designate an agent for service of process. Id. at 40 (citing 35 U.S.C. § 293). The Fourth Circuit did not reach these arguments on appeal. Cf. *In re Eli Lilly*, 37 F.4th at 167 (declining to reach the district court's alternative holding).

The Fourth Circuit determined that "physical presence" was the proper test for the "resides or is found" requirement, rejecting *In re del Valle Ruiz*'s personal jurisdiction framework.[179] As a preliminary step, the court distinguished the question of where a *corporation* "is found" from where a *natural person* "is found."[180] Unlike a natural person, a corporation is a creature of law without physical existence, which makes the term "is found" somewhat ambiguous.[181]

The court, therefore, turned to "an assessment of [the] text to find its 'ordinary meaning at the time of [its] enactment.'"[182] In doing so, the Fourth Circuit relied on definitions of the term "found" in *Black's Law Dictionary* from around the time of the enactment of the Judicial Code.[183] The dictionary defined "found," when applied to corporations, as requiring that the corporation "'be doing business in such state through an officer or agent or by statutory authority in such manner as to render it liable then to suit and to constructive or substituted service of process,' thereby establishing its 'actual presence' there."[184] Focusing on the "actual presence" component of the definition, the *In re Eli Lilly* court equated "found" to "physical presence."[185] Regardless of whether a corporation was subject to personal jurisdiction, the determinative factor was whether it was physically present by its officers and agents carrying on its business.[186]

The Fourth Circuit then turned to precedent to reinforce its construction. On precedent, the court considered the "settled" meaning of "found" from decisions interpreting the Sherman and Clayton Acts' venue provisions, which used nearly "identical" statutory language.[187] The Sherman Act, passed in 1890, permitted plaintiffs to bring antitrust suits

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179. See *In re Eli Lilly*, 37 F.4th at 167 ("And while the [*In re del Valle Ruiz*] court did recognize that § 1782's legislative history indicated that 'found' embraced a physical-presence requirement, the court conclusorily dismissed that evidence to reach the opposite conclusion.").

180. Id. at 163–64.

181. Id. at 164 ("[I]nquiring as to where a corporation is found might give rise to various answers anchored in where its charter was issued or is retained; where its agents or properties are located; where—by analogy to an individual's presence—it is present; or to some other aspect."). The court cited *Neirbo Co. v. Bethlehem Shipbuilding Corp.* for this proposition but the principle goes further back. *In re Eli Lilly*, 37 F.4th at 163–64 (citing 308 U.S. 165, 168 (1939)); see also Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819) (Marshall, C.J.) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.").

182. *In re Eli Lilly*, 37 F.4th at 164 (quoting United States v. George, 946 F.3d 643, 645 (4th Cir. 2020)) (alteration in original); see also supra note 169 and accompanying text (explaining the role of contemporaneous meaning for textualists).

183. *In re Eli Lilly*, 37 F.4th at 164.

184. Id. (quoting Found, Black's Law Dictionary (4th ed. 1951)) (citing Found, Black's Law Dictionary (4th rev. ed. 1968); Found, Black's Law Dictionary (3d ed. 1933)).

185. Id.

186. Id. at 167 (rejecting the significance of *International Shoe* for the court's statutory interpretation of the "found" requirement).

187. See id. at 164–65.

"in the district in which the defendant resides or is found."[188] In 1914, the Clayton Act expanded this provision beyond the place where a corporation resided or could be found to include wherever a corporation "transacts business."[189] The *In re Eli Lilly* court cited early Supreme Court opinions that reasoned that a corporation must be present "with officers and agents carrying on the business of the corporation" for venue to be proper for antitrust suits.[190] These opinions, the court explained, were "controlling" and the *In re del Valle Ruiz* court was remiss not to consider them.[191]

The Fourth Circuit also sought support for its construction from legislative history. Contrary to the Second Circuit,[192] the *In re Eli Lilly* court reasoned that the terms that the 1949 House Report used—"resides," "is found," and "sojourning"—all strictly require physical presence.[193] Although *In re del Valle Ruiz* acknowledged that the legislative history implies physical presence to some extent, *In re Eli Lilly* rebuked the Second Circuit for "conclusorily dismiss[ing] that evidence to reach the opposite conclusion."[194]

2. *A Critique of* In re Eli Lilly. — Several of *In re Eli Lilly*'s charges against *In re del Valle Ruiz* had merit. The *In re del Valle Ruiz* court did not necessarily marshal the textualist tools available to construe the meaning of the "found" requirement.[195] The Second Circuit's opinion also hastened to move on from the legislative history after recognizing that physical presence was at least a consideration in the House Report.[196] However, the *In re Eli Lilly* court's argument was not itself unblemished. The court's statutory construction disregarded important precedent that would have added color to the definition of the "is found" requirement.

In re Eli Lilly's construction of "is found" as equating to physical presence relies on an incomplete definition.[197] In reaching its conclusion, the court placed less weight on the part of the definition that requires the cor-

188. Sherman Antitrust Act, ch. 647, § 7, 26 Stat. 209, 210 (1890) (repealed by Act of July 7, 1955, ch. 283, § 3, 69 Stat. 282, 283).

189. Clayton Antitrust Act, ch. 323, § 12, 38 Stat. 730, 736 (1914) (codified at 15 U.S.C. § 22).

190. *In re Eli Lilly*, 37 F.4th at 164–65 (citing People's Tobacco Co. v. Am. Tobacco Co., 246 U.S. 79, 84 (1918) (defining "found" in the context of the Sherman Act's venue provision)); see also Eastman Kodak Co. of N.Y. v. S. Photo Materials Co., 273 U.S. 359, 373 (1927) (defining "found" in the Clayton Act).

191. *In re Eli Lilly*, 37 F.4th at 167.

192. See supra note 157 and accompanying text.

193. *In re Eli Lilly*, 37 F.4th at 165.

194. Id. at 167.

195. See In re del Valle Ruiz, 939 F.3d 520, 527–28 (2d Cir. 2019) (relying largely on legislative history and other courts' definitions of the term).

196. See id. (stating that the court was "not convinced" by the physical presence arguments).

197. Cf. supra notes 185–186 and accompanying text.

poration to be "liable . . . to suit" and to "service of process."[198] Liability to suit and service of process, however, are features of the classical formulation of personal jurisdiction.[199] By maintaining a strict physical presence approach, the court neglected the role of personal jurisdiction in qualifying the required in-district conduct.

The Fourth Circuit also hastily equated *actual* presence with *physical* presence. *Black's Law Dictionary* did not define "actual presence"; it merely contrasted that term with "constructive presence."[200] In other words, the most that the *In re Eli Lilly* court could rely on from the dictionary in defining "actual presence" was that it was different from "constructive presence," not that it was the same as "physical presence."[201]

Rather, the concept of "presence" for corporations is intertwined with personal jurisdiction. Because a corporation cannot truly be "physically" present anywhere, the law imputes a corporation's presence to the contacts of its officers and agents.[202] The heuristic for determining corporate pres-

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198. See *In re Eli Lilly*, 37 F.4th at 164–65 (internal quotation marks omitted) (quoting Found, Black's Law Dictionary (4th rev. ed. 1968); Found, Black's Law Dictionary (4th ed. 1951); Found, Black's Law Dictionary (3d ed. 1933)) ("In view of these contemporaneous definitions in legal dictionaries and Supreme Court opinions, we can presume . . . that a corporation is found where it is physically present by its officers and agents carrying on the corporation's business.").

199. See Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) ("[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940))); Hansberry v. Lee, 311 U.S. 32, 40 (1940) ("It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." (citing Pennoyer v. Neff, 95 U.S. 714, 733 (1877); 1 A.C. Freeman, A Treatise of the Law of Judgments Including All Final Determinations of the Rights of Parties in Actions or Proceedings at Law or In Equity § 407 (5th ed. 1925))); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1340 (2d Cir. 1972) (Friendly, J.) ("[A]lthough [the service of process provision of the Securities Exchange Act of 1934] does not deal specifically with *in personam* jurisdiction, it is reasonable to infer that Congress meant to assert personal jurisdiction . . . ."), abrogated on other grounds by Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010).

200. See Presence, Black's Law Dictionary (4th ed. 1951) ("Besides actual presence, the law recognizes *constructive* presence, which latter may be predicated of a person who, though not on the very spot, was near enough to be accounted present by the law, or who was actively co-operating with another who was actually present." (citing Mitchell v. Commonwealth, 74 Va. (33 Gratt.) 845 (1880))); cf. supra text accompanying note 183. The dictionary defined "presence" as the "[a]ct, fact, or state of being in a certain place and not elsewhere, or within sight or call, at hand, or in some place that is being thought of." Presence, Black's Law Dictionary (4th ed. 1951) (citing London v. Md. Cas. Co., 299 N.W. 193 (Minn. 1941)).

201. Cf. Presence, Black's Law Dictionary (4th ed. 1951).

202. See supra note 184 and accompanying text; see also *Int'l Shoe*, 326 U.S. at 316 ("Since the corporate personality is a fiction . . . it is clear that unlike an individual its 'presence' . . . can be manifested only by activities carried on in its behalf by those who are

ence, like personal jurisdiction, is minimum contacts.[203] As *International Shoe* explained,

> [T]he terms "present" or "presence" are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process. Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.[204]

The *In re Eli Lilly* court, on the other hand, dismissed the salience of personal jurisdiction, stating, "Congress did not incorporate *International Shoe*'s 'modern approach[]' . . . when enacting § 1782."[205] Instead, according to the court, Congress chose the word "'found,' a well-recognized term in this context with an established meaning."[206] But precedent showed that Congress's choice of the word "found" was not conclusive.

Despite charging the Second Circuit with lack of attention to relevant precedent,[207] the *In re Eli Lilly* court also failed to properly account for the precedent underlying its opinion. In *United States v. Scophony Corp. of America*, decided shortly before § 1782's codification, the Supreme Court examined the Sherman and Clayton Acts' "found" requirement in depth.[208] The Court began by noting that § 12 of the Clayton Act is not merely a venue requirement but also sets the geographic bounds for service of process based on the corporation's forum contacts.[209] Furthermore, the statutory requirements for venue and service of process were different:

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authorized to act for it." (citing Klein v. Bd. of Tax Supervisors, 282 U.S. 19, 24 (1930))); Martinez v. Aero Caribbean, 764 F.3d 1062, 1068 (9th Cir. 2014) ("[C]orporations, which can only act through their agents and can do so in many places simultaneously . . . can be present only through their contacts . . . .").

203. See *Int'l Shoe*, 326 U.S. at 316–17 (citing Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930)).

204. Id. (citation omitted) (citing *Hutchinson*, 45 F.2d at 141).

205. In re Eli Lilly & Co., 37 F.4th 160, 167 (4th Cir. 2022).

206. Id.

207. Id.

208. 333 U.S. 795, 802–10 (1948). In *Scophony*, the government brought civil antitrust claims against a nonresident British corporation. Id. at 796–97. The issue was "whether that company 'transacted business' and was 'found' within the Southern District of New York under § 12 of the Clayton Act, so that it could be sued and served there in a civil proceeding charging violation of §§ 1 and 2 of the Sherman Act." Id. The Court decided *Scophony* in April 1948, before Congress enacted the Judicial Code (which contained the recodified § 1782) in June 1948. Id. at 795; Jake Kobrick, The Codification of Federal Statutes on the Judiciary, Fed. Jud. Ctr., https://www.fjc.gov/history/spotlight-judicial-history/federal-judicial-statutes [https://perma.cc/5Z9Z-VF4D] (last visited Aug. 31, 2026).

209. *Scophony*, 333 U.S. at 802 ("Section 12 of the Clayton Act has two functions, first, to fix the venue for antitrust suits against corporations; second, to determine where process in such suits may be served."); cf. supra notes 188–191 and accompanying text.

The Clayton Act included "transacts business" as a basis for venue but left the service of process component intact.[210]

In *Scophony*, the Court lamented the "hair-splitting legal technicalities encrusted upon the 'found'–'present'–'carrying-on-business' sequence."[211] The prior *Eastman* case, according to *Scophony*, had effectuated Congress's remedial purpose by replacing an overly technical understanding of venue with a practical one: "engaging in any substantial business operations."[212] Congress's practical goal for the venue provision was to "substantially remove[] the serious obstacles and practical immunities to suit which had grown up under § 7 of the Sherman Act."[213]

Scophony also construed "found" differently for the venue and service of process provisions. For venue, "found" became different from "engaging in any substantial business operations," which was equated with "transact[ing] business."[214] For service of process, however, *Scophony* said that *Eastman* "merely carried forward the preexisting law."[215] This bifurcation meant that in some cases a party could satisfy venue and service of process on different grounds.[216] This, in fact, was the situation in *Scophony*. There, the Court did not conclude that the corporation was "found" in the Southern District for the purposes of venue.[217] Rather, venue was proper merely because the corporation was "transacting business" in the

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210. Clayton Antitrust Act, ch. 323, § 12, 38 Stat. 730, 736 (1914) (codified at 15 U.S.C. § 22). Venue, therefore, is proper in the district where the defendant is an "inhabitant," "may be found," or "transacts business." Id. Service of process, on the other hand, is proper only where a defendant is an "inhabitant" or "may be found." Id.

211. 333 U.S. at 808. The Court opined that "[i]f the statutory slate were clean, one might readily conclude that the words 'inhabitant' and 'found' would have the same meaning for locating both venue and the proper place for serving process." Id. at 803–04. Two legal issues made this simple issue much harder: (1) the difficulty in distinguishing a corporation's activities from those of a natural person when assessing forum contacts and (2) the fact that "[b]oth legislative and judicial hands have written upon [the statutory slate, leaving the] writing meandering, unclear in part, and partly erased." Id. at 804.

212. Id. at 807.

213. Id. at 808, 810 ("A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating or even without retreating to its headquarters defeat or delay the retribution due." (footnote omitted)).

214. Id. at 807 (internal quotation marks omitted).

215. Id. at 809.

216. Id.; see also Eastman Kodak Co. of N.Y. v. S. Photo Materials Co., 273 U.S. 359, 373–74 (1927) ("[T]his section . . . [enables an injured person] to institute the suit in a district . . . in which the corporation . . . *transacts business*, and bring it before the court by the service of process in a district in which it *resides or may be* '*found*.'" (emphasis added)). The *Scophony* court also noted that the policy question of whether both venue and service of process must always be proper in the same district remains with Congress. *Scophony*, 333 U.S. at 809 n.21. After all, "[t]here is certainly no constitutional requirement that [venue and service of process] be coextensive." Id.

217. Cf. *Scophony*, 333 U.S. at 818 ("We think that Scophony . . . was 'transacting business' of a substantial character in the New York district at the times of service, so as to establish venue there . . . .").

district.[218] But for service of process, the same contacts were sufficient to render the corporation "found" in the district.[219] The term "found," then, can have ambiguous meanings even within the same statutory provision.[220]

Scophony, therefore, challenges the *In re Eli Lilly* court's reliance on the construction of "found" as requiring "physical presence" in three ways.[221] First, *Scophony*, at a minimum, belies the Fourth Circuit's premise that "found" was "a well-recognized term in this context with an established meaning."[222] Rather, the doctrine surrounding the "found" inquiry was, at the time, "meandering, unclear in part, and partly erased."[223] Second, *Scophony*'s acknowledgment that "found" can have different meanings in the same statutory provision on the same set of facts rebuts the Fourth Circuit's presumption that a strict physical presence test was Congress's intention.[224] And third, *Scophony* emphasizes the principle, which the *In re del Valle Ruiz* court followed, that the question of whether a corporation is found in a district is intertwined with the question of whether personal jurisdiction is proper.[225]

III. SETTING THE LIMITS OF PERSONAL JURISDICTION UNDER § 1782

Part II of this Note explained why personal jurisdiction is inherent to the question of whether a person—natural or legal—"resides or is found" within a district under § 1782. In the Second Circuit's view, the bounds of the requirement "extend[] . . . to the limits of personal jurisdiction con-

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218. Id. (internal quotation marks omitted).

219. See id. ("We think that Scophony . . . on the sum of the facts regarding its activities was [also] 'found' there within the meaning of the service-of-process clause of § 12.").

220. See id.

221. Cf. In re Eli Lilly & Co., 37 F.4th 160, 164 (4th Cir. 2022) ("[A] corporation, to be 'found' in a district, '*must be present* in the district by its officers and agents carrying on the business of the corporation,' thus requiring a form of physical presence in the district." (emphasis added by id.) (quoting People's Tobacco Co. v. Am. Tobacco Co., 246 U.S. 79, 84 (1918)).

222. Id. at 167.

223. *Scophony*, 333 U.S. at 804; see also supra notes 211–212 and accompanying text. Justice Frankfurter recognized potential unintended consequences of tampering with this doctrine and would have held for the government on much narrower grounds. See *Scophony*, 333 U.S. at 818–20 (Frankfurter, J., concurring in the judgment) ("No doubt legal reasoning must be on its guard not to oversimplify. Dangers also lurk in overcomplicating.").

224. Cf. *In re Eli Lilly*, 37 F.4th at 165 ("In view of these contemporaneous definitions . . . , we can presume that when Congress similarly used 'found' in § 1782, it intended that the same meaning apply—that a corporation is found where it is physically present by its officers and agents carrying on the corporation's business.").

225. See supra note 219 and accompanying text (noting that the same contacts rendered the corporation both found and amenable to service of process in the district); see also BNSF Ry. Co. v. Tyrrell, 581 U.S. 402, 409 (2017) ("Congress'[s] typical mode of providing for the exercise of personal jurisdiction has been to authorize service of process."); In re del Valle Ruiz, 939 F.3d 520, 523 (2d Cir. 2019) (concluding that the limits of § 1782 extend to the "limits of personal jurisdiction consistent with due process").

sistent with due process."[226] Part III sketches the contours of those limits in the context of § 1782, a question that the Second Circuit has left open.[227] This Part answers that question by providing a framework for assessing the minimum contacts that are necessary to satisfy § 1782's "resides or is found" requirement.

A. *Personal Jurisdiction for § 1782: General, Specific, and Beyond*

The first step is to translate the personal jurisdiction framework for plenary actions to the § 1782 discovery context. This section outlines high-level requirements of general and specific jurisdiction under the statute. This section also considers § 1782 jurisdiction in light of the broader scope of federal courts' jurisdiction under the Fifth Amendment.

1. *General Personal Jurisdiction and § 1782.* — General personal jurisdiction for the purposes of § 1782 is a relatively straightforward application of the existing doctrine. For plenary actions, an individual is subject to general personal jurisdiction in a forum where they are domiciled,[228] where they have been served personally with process,[229] or where they have consented to personal jurisdiction.[230] General jurisdiction over a corporation, on the other hand, is proper where the corporation's "continuous and systematic" contacts render it "essentially at home"[231] or where it has consented to personal jurisdiction.[232]

For § 1782 actions, the thresholds of general personal jurisdiction would largely be the equivalent. An individual § 1782 target would be subject to general jurisdiction in the forum where they reside, have been personally and validly served with a subpoena, or have consented to personal

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226. *In re del Valle Ruiz*, 939 F.3d at 523.

227. See id. at 530 ("We decline to hold that there is a categorically lower showing of due process needed to obtain discovery from a nonparty.").

228. See Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 924 (2011) ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile . . . ."); Lea Brilmayer, Jennifer Haverkamp, Buck Logan, Loretta Lynch, Steve Neuwirth & Jim O'Brien, A General Look at General Jurisdiction, 66 Tex. L. Rev. 721, 730 (1988) ("Domicile is traditionally the strongest basis supporting general jurisdiction over a party.").

229. Burnham v. Superior Ct., 495 U.S. 604, 628 (1990) ("[T]he Due Process Clause does not prohibit . . . courts from exercising jurisdiction . . . based on the fact of in-state service of process . . . .").

230. Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) ("A variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court."); see also Pennoyer v. Neff, 95 U.S. 714, 733 (1877) (recognizing voluntary appearance as a means of conferring personal jurisdiction).

231. Daimler AG v. Bauman, 571 U.S. 117, 138–39 (2014) (internal quotation marks omitted) (quoting *Goodyear*, 564 U.S. at 919).

232. See Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2039 (2023) ("[A]n out-of-state corporation that *has* consented to in-state suits in order to do business in the forum is susceptible to suit there.").

jurisdiction.[233] And general jurisdiction over a corporate § 1782 target would be proper in the forum where it is "essentially at home" (typically, where it is incorporated or has its principal place of business) or has consented to personal jurisdiction.[234]

2. *Specific Personal Jurisdiction.* — Specific jurisdiction is trickier. For plenary actions, this form of jurisdiction is proper when (1) a defendant "purposefully avails itself of the privilege of conducting activities within the forum";[235] (2) the claims "'arise out of or relate to the defendant's contacts' with the forum";[236] and (3) the exercise would not be "unreasonable and unfair."[237]

In re del Valle Ruiz relied on the Second Circuit's then-existing narrow understanding of the "arising out of" or "related to" prong of the specific personal jurisdiction framework.[238] This understanding "required some *causal* relationship between an entity's in-forum contacts and the proceed-

233. Cf. supra notes 228–230 and accompanying text; see also In re Edelman, 295 F.3d 171, 179 (2d Cir. 2002) ("Given that this so-called tag jurisdiction is consistent with due process, we do not think that § 1782(a), which is simply a discovery mechanism and does not subject a person to liability, requires more.").

234. Cf. supra notes 231–232 and accompanying text; see also In re del Valle Ruiz, 939 F.3d 520, 525 n.4 (2d Cir. 2019) (noting that one of the discovery targets was subject to general jurisdiction in the Southern District of New York and satisfied the "resides or is found" requirement because its principal place of business was in New York City). It is helpful for this inquiry that the term "resides or is found" provides a textual footing for the general jurisdiction inquiry. See Smit, American Assistance, supra note 3, at 10 ("[I]f the relationship of the person addressed to the district is such as to warrant the exercise of in personam authority under the due process clause, it should be regarded as 'resident' there.").

235. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1024–25 (2021) (internal quotation marks omitted) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

236. Id. at 1025 (alterations omitted by id.) (quoting Bristol-Myers Squibb Co. v. Superior Ct., 582 U.S. 255, 262 (2017)).

237. See Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 113–16 (1987) (concluding that personal jurisdiction in that instance was improper because it would have been "unreasonable and unfair"). The Court has outlined five factors for assessing fairness: (1) "the burden on the defendant," (2) "the forum State's interest in adjudicating the dispute," (3) "the plaintiff's interest in obtaining convenient and effective relief," (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and (5) the "shared interest of the several States in furthering fundamental substantive social policies." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)). Some commentators think that *Ford* has cast doubt on the extent to which fairness remains an element of the specific jurisdiction framework. See, e.g., Scott Dodson, Personal Jurisdiction, Comparativism, and *Ford*, 51 Stetson L. Rev. 187, 195 (2022) ("After *Ford*, it is unclear whether the fairness factors retain their status as a discrete inquiry, what work they do in the test, and whether all of them remain good law."); see also Haley S. Anderson, The Sovereignty of Personal Jurisdiction, 83 Wash. & Lee L. Rev. (forthcoming 2026) (manuscript at 61), https://ssrn.com/abstract=5374629 [https://perma.cc/XH9F-WWHJ] (footnote omitted) ("[T]o the extent that the 'fairness factors' from *World-Wide Volkswagen* are good law under *Ford*'s approach to specific jurisdiction, courts should apply these with only internal sovereignty in mind.").

238. See 939 F.3d at 530.

ing at issue."[239] The *In re del Valle Ruiz* court, therefore, outlined that "the respondent's having purposefully availed itself of the forum must be the *primary or proximate reason* that the evidence sought is available at all" and that "where the respondent's contacts are broader and more significant, a petitioner need demonstrate only that the evidence sought would not be available *but for* the respondent's forum contacts."[240]

Since then, however, the Supreme Court has clarified that the limits of specific jurisdiction are broader than those that the *In re del Valle Ruiz* court assumed. In *Ford*, the Court expanded the required nexus beyond a causal relationship.[241] Rather, the doctrine now requires merely "a 'connection' between a plaintiff's suit and a defendant's activities."[242] Specific jurisdiction in the § 1782 context, then, would require that the discovery sought arise out of or relate to the discovery target's purposeful availment of the forum and that the exercise of jurisdiction would not be unreasonable or unfair.[243]

3. *Personal Jurisdiction Under the Fifth Amendment.* — Even if specific personal jurisdiction over a person were to be improper under this framework, the inquiry might not end there. The Due Process Clause of the Fifth Amendment allows federal courts flexibility to exercise personal jurisdic-

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239. Id.

240. Id. (emphasis added).

241. 141 S. Ct. at 1026 ("None of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do."). The Court reasoned that the "relates to" term "contemplates that some relationships will support jurisdiction without a causal showing." Id.

242. Id. (quoting Bristol-Myers Squibb Co. v. Superior Ct., 582 U.S. 255, 255–56 (2017)).

243. See supra notes 235–237 and accompanying text; see also In re Brookfield Infrastructure Partners, No. 24-mc-533 (LJL), 2025 WL 1503942, at *13 (S.D.N.Y. May 27, 2025) ("Now that the 'normal personal-jurisdiction framework' no longer requires causation, it cannot be that the [Second] Circuit will require causation to establish the residence requirement for Section 1782.").

Some commentators have opined that the relevant action for nonparty specific jurisdiction might be the underlying merits action (in this case, the foreign proceeding) rather than the auxiliary action. See Aaron D. Simowitz & Linda J. Silberman, Nonparty Jurisdiction, 55 Vand. J. Transnat'l L. 433, 471–72 (2022) [hereinafter Simowitz & Silberman, Nonparty Jurisdiction] ("The two contenders [for the relevant action] are the underlying merits action for which evidence is sought or the action seeking the evidence itself."); cf. *In re del Valle Ruiz*, 939 F.3d at 530 ("[W]e think it enough for purposes of due process in these circumstances that the nonparty's contacts with the forum go to the actual discovery sought rather than the underlying cause of action."). However, this approach would unduly narrow the scope of specific jurisdiction over nonparties. See Ryan W. Scott, Note, Minimum Contacts, No Dog: Evaluating Personal Jurisdiction for Nonparty Discovery, 88 Minn. L. Rev. 968, 1004–05 (2004) (explaining that nonparties face no direct threat from the underlying action and that there is rarely a nexus between the nonparty, the forum, and the underlying action); see also Simowitz & Silberman, Nonparty Jurisdiction, supra, at 472 ("The problems of tying nonparty actions to the jurisdictional contacts related to the underlying claim should prompt courts to consider a nexus requirement that looks to the nonparty action itself.").

tion under a broader set of circumstances.[244] According to *Fuld*, the Fifth Amendment governs whenever federal law confers jurisdiction on the federal court rather than Rule 4(k)(1)(A) and state law.[245] The Supreme Court, however, has not set the limit for personal jurisdiction under the Fifth Amendment, besides identifying that courts' reach under the Fifth Amendment is broader than the Fourteenth Amendment's minimum contacts framework.[246] Section 1782 may be a candidate for broader jurisdiction under the Fifth Amendment because it is a federal statute that grants jurisdiction to the federal district courts.[247] In that case, courts could order discovery from a broader set of targets than under the Fourteenth Amendment minimum contacts framework. How far that jurisdiction could extend, though, remains unclear.[248]

B. *How Much Process Is Due in the § 1782 Discovery Context?*

Setting aside for now the question of scope under the Fifth Amendment,[249] personal jurisdiction under § 1782 generally should not offend due process so long as the application satisfies the specific personal

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244. See Fuld v. Pal. Liberation Org., 145 S. Ct. 2090, 2105 (2025) ("[T]he Due Process Clause of the Fifth Amendment necessarily permits a more flexible jurisdictional inquiry commensurate with the Federal Government's broader sovereign authority.").

245. See id. at 2102 ("Any difference between the Fifth and Fourteenth Amendments is therefore implicated in only a subset of federal cases, such as those in which personal jurisdiction is . . . 'authorized by a federal statute.'" (quoting Fed. R. Civ. P. 4(k)(1)(C))).

246. See id. at 2106 ("Although we hold today that the Fifth Amendment does not impose the same jurisdictional limitations as the Fourteenth, we do not purport to delineate the outer bounds of the Federal Government's power, consistent with due process, to hale foreign defendants into U.S. courts."); Maggie Gardner, The Future of *Fuld*, 135 Yale L.J. Forum 500, 501 (2026), https://yalelawjournal.org/supreme-court-collection/the-future-of-fuld [https://perma.cc/5Q5T-LZH4] (outlining two potential approaches: "one that starts from the same basic premise as the Fourteenth Amendment's personal-jurisdiction analysis—requiring an intentional nexus to the forum sufficient to make the exercise of jurisdiction reasonable—and one that sets *no* limit on the personal jurisdiction Congress can authorize for federal courts"). For more on the latter approach, see generally Stephen E. Sachs, The Unlimited Jurisdiction of the Federal Courts, 106 Va. L. Rev. 1703 (2020).

247. See James E. Pfander & Daniel D. Birk, Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction, 124 Yale L.J. 1346, 1390–91 (2015) (identifying proceedings under § 1782 as an example of noncontentious jurisdiction falling within federal courts' Article III power). But see Republic of Ecuador v. Connor, 708 F.3d 651, 655–56 (5th Cir. 2013) ("Describing a federal court's authority under § 1782 as 'jurisdictional' fits awkwardly with conventional Article III terminology.").

248. See In re Mammoet Salvage, B.V., No. 23-mc-00073 (LJL), 2025 WL 3009507, at *9 n.5 (S.D.N.Y. Oct. 28, 2025) (declining to assess personal jurisdiction under the Fifth Amendment because neither party raised that issue but noting that the bank at issue "enjoys its existence from a federal charter and . . . petitioner is suing under a federal statute"); Gardner, supra note 246, at 501 ("Th[e] avoidance of doctrinal commitments in *Fuld* means the lower federal courts will have to flesh out the contours of the Fifth Amendment's personal-jurisdiction analysis.").

249. Though the limits under the Fifth Amendment remain unclear, it suffices for the purposes of this Note that they would lie beyond the limits of specific jurisdiction under the Fourteenth Amendment. See supra notes 244–246.

jurisdiction rule outlined above.[250] One remaining question is how much process is due to a § 1782 target relative to a person subject to plenary liability.[251] Courts and commentators have identified three sets of concerns that are relevant to this question: (1) the nature of the action; (2) the burden on the nonparty; and (3) the interest of the parties, the forum state, and the interstate judicial system.[252] All three sets of concerns point to a lower threshold for due process in the § 1782 context.

1. *The Nature of the Action.* — The nature of § 1782 discovery actions weighs in favor of a lower due process requirement. Generally, the process due to a party correlates with the extent to which an action exposes a party to liability.[253] Section 1782 actions require less due process than plenary

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250. See supra text accompanying note 243. The exercise of general jurisdiction remains a due process concern. The current doctrine, though, places the limits of general personal jurisdiction within the outer rim set by specific jurisdiction. After all, general jurisdiction relies largely on residence, presence, or consent within the forum. See supra notes 228–233 and accompanying text. And while tag jurisdiction may be beyond the rim set by specific jurisdiction, commentators have characterized it as an "exorbitant" exercise of general jurisdiction. Maggie Gardner, Pamela K. Bookman, Andrew D. Bradt, Zachary D. Clopton & D. Theodore Rave, The False Promise of General Jurisdiction, 73 Ala. L. Rev. 455, 474 n.102 (2022); see also Smit, American Assistance, supra note 3, at 10 n.44 (casting doubt on "mere transient presence" as a basis for jurisdiction under § 1782); Dodge, Tagging Corporate Directors, supra note 83 (recognizing that "[a]lthough tag jurisdiction is a valid basis for personal jurisdiction in § 1782 cases, its use [may] rub[] [judges] the wrong way"). But see Ted Folkman, "Tag Service" and Section 1782, Letters Blogatory (June 13, 2023), https://lettersblogatory.com/2023/06/13/tag-service-and-section-1782/ [https://perma.cc/RL66-B36P] (noting that "a foreigner who is served with a subpoena while passing through and then returns home has procedural options that the foreign defendant doesn't have," like Federal Rule of Civil Procedure 45(c) and foreign blocking statutes).

Some commentators have argued for a national-contacts rule for specific personal jurisdiction over alien parties, which would push the outer rim even further. See William S. Dodge & Scott Dodson, Personal Jurisdiction and Aliens, 116 Mich. L. Rev. 1205, 1232 (2018).

251. Compare In re del Valle Ruiz, 939 F.3d 520, 530 (2d Cir. 2019) ("We decline to hold that there is a categorically lower showing of due process needed to obtain discovery from a nonparty."), with First Am. Corp. v. Price Waterhouse LLP, 154 F.3d 16, 20 (2d Cir. 1998) ("[A] person who is subjected to *liability* by service of process far from home may have better cause to complain of an outrage to fair play than one similarly situated who is merely called upon to supply documents or testimony.").

252. See Simowitz & Silberman, Nonparty Jurisdiction, supra note 243, at 436 ("[Among] [t]he concerns motivating the constitutional doctrine of personal, or adjudicative, jurisdiction . . . two factors seem to predominate: the burdens on the target of the action and the nature of the action itself."); Scott, supra note 243, at 1012–13 ("[T]his analysis weighs the burden on the nonresident defendant against the interest of the forum state, the plaintiff's interest in obtaining relief, the judicial system's interest in efficient resolution of controversies, and substantive social policies." (citing Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 113 (1987))).

253. Professors Simowitz and Silberman have illustrated this principle by using *Shaffer v. Heitner*. See Simowitz & Silberman, Nonparty Jurisdiction, supra note 243, at 437 (citing 433 U.S. 186, 210 n.36 (1977)). The majority opinion distinguished between (1) quasi-in-rem jurisdiction—that is, general jurisdiction over a defendant wherever a defendant's

actions because they do not expose parties to any liability.[254] Of course, when a nonparty refuses to cooperate with a § 1782 subpoena, that nonparty risks being held in contempt.[255] The prevailing view, however, is that contempt liability is separate from liability for the associated action.[256] The absence of liability for § 1782 actions, therefore, implies that less process is due.

2. *The Burden on the Discovery Target.* — The burdens on the discovery target, while often remarkable, are lower relative to defendants in plenary actions. The most salient burdens for nonparties in § 1782 actions are often the time and costs of discovery in a distant forum.[257] The costs may also be greater if the discovery requested or the mechanisms used are particularly invasive or complex.[258]

While these burdens are potentially significant, they still point to a lower due process threshold for § 1782 actions. First and foremost, all of the burdens referenced are also at play in plenary actions. In plenary actions, moreover, parties are more likely to have an interest in deploying discovery in terrorem against their opponents.[259] Second, recent scholar-

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property could be found—for plenary actions and (2) quasi-in-rem jurisdiction for the recognition and enforcement of judgments. *Shaffer*, 433 U.S. at 199 n.17. The Court "preserved quasi-in-rem jurisdiction for post-judgment actions even as it eliminated it for plenary actions." Simowitz & Silberman, Nonparty Jurisdiction, supra note 243, at 467 (citing *Shaffer*, 433 U.S. at 210 n.36). In other words, the postjudgment action warrants less process because it does not expose the respondent to new liability. See id.

254. In re Edelman, 295 F.3d 171, 179 (2d Cir. 2002) ("Given that this so-called tag jurisdiction is consistent with due process, we do not think that § 1782(a), which is simply a discovery mechanism and does not subject a person to liability, requires more.").

255. In re Letters Rogatory Issued by the Dir. of Inspection of the Gov't of India, 385 F.2d 1017, 1018 (2d Cir. 1967).

256. Contempt exists as an auxiliary remedy to protect a court's "ability to render judgment." See United States v. Hall, 472 F.2d 261, 265, 266 (5th Cir. 1972) (Wisdom, J.) ("[B]road applications of the power to punish for contempt may be necessary . . . if courts are to protect their ability to design appropriate remedies and make their remedial orders effective."). This approach would suggest that contempt is not the point at which ultimate liability vests because it is subordinate to a judgment. See id.

257. These costs include "incremental out-of-pocket costs associated with production, transportation, and delivery of information; incremental time and opportunity costs incurred in responding to requests in a distant forum; and incremental legal costs, such as the retention of local counsel and additional state-specific legal demands, associated with the forum." Scott, supra note 243, at 1013.

258. See id. ("Such costs include the size, complexity, and invasiveness of the discovery requested; the nonincremental monetary, time, and legal costs of responding; the embarrassment or hardship caused to the nonparty through compelled testimony; and the strategic costs imposed on a nonparty forced to disclose nonpublic information about its business.").

259. See Jonathan Remy Nash & Joanna Shepherd, Aligning Incentives and Cost Allocation in Discovery, 71 Vand. L. Rev. 2015, 2027 (2018) ("This 'impositional function' of discovery—that is, discovery sought purely for the purpose of imposing costs on the producing party—can result in the settlement of meritless claims in which litigants not entitled to recover under the law nevertheless obtain a settlement." (footnote omitted)

ship has argued that the widespread commentary on discovery abuse lacks an empirical basis.[260] This scholarship would imply that, outliers notwithstanding, the burdens that a § 1782 discovery target faces are likely to be somewhat limited.[261] Third, § 1782 and the Federal Rules of Civil Procedure provide their own procedural safeguards to mitigate burdens. Section 1782 doctrine permits courts to tailor requests that are overbroad[262] and deny applications that are "unduly intrusive or burdensome."[263] And under the Federal Rules, a court may issue a protective order, for instance, to shift costs to the proponent in the event of "undue burden or expense."[264] The subpoena rule also limits the distance a court may compel a § 1782 target to travel to attend a deposition.[265] These safeguards weigh in favor of a lower due process requirement for § 1782 discovery targets.

3. *The Remaining Interests.* — The third set of interests are the forum state's interest, the plaintiff's interest, the interests of the interstate judicial system in efficiently resolving controversies, and the "shared interest of the several States in furthering fundamental substantive social policies."[266] Transposing them onto the § 1782 context calls for some adaptation, for a few reasons. For one, the plaintiff in the foreign lawsuit need not be the

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(citing John K. Setear, The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse, 69 B.U. L. Rev. 569, 581–84 (1989))).

260. See Diego A. Zambrano, Discovery as Regulation, 119 Mich. L. Rev. 71, 84–85 (2020) (compiling research that "seems to show that 'the federal civil system is highly effective in most cases, that total costs develop in line with stakes, and that discovery volume and cost is proportional to the amount at stake'" (quoting Danya Shocair Reda, The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions, 90 Or. L. Rev. 1085, 1089 (2012))).

261. It is no wonder, then, that empirical research has shown that most § 1782 requests go uncontested. See Wang, supra note 4, at 2122 (showing that opponents contested only twenty-two percent of requests in 2015).

262. See In re Mammoet Salvage, B.V., No. 23-mc-00073 (LJL), 2025 WL 3009507, at *16–17 (S.D.N.Y. Oct. 28, 2025) (modifying a subpoena because the requested discovery was overbroad).

263. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 265 (2004).

264. See Fed. R. Civ. P. 26(c)(1)(B) ("The court may, for good cause, issue an order . . . specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery . . . ."); Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978) ("[A party] may invoke the district court's discretion under Rule 26(c) to grant orders protecting him from 'undue burden or expense' in doing so, including orders conditioning discovery on the requesting party's payment of the costs of discovery.").

265. Fed. R. Civ. P. 45(c)(1)(A) ("A subpoena may command a [nonparty] to attend a . . . deposition only . . . within 100 miles of where the person resides, is employed, or regularly transacts business in person . . . .").

266. Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 113 (1987) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)); see also Scott, supra note 243, at 1012–15 (adapting the minimum contacts analysis, including the fair play factors from *World-Wide Volkswagen*, to an analysis of personal jurisdiction over nonparty witnesses).

party seeking discovery.[267] Also, the forum state's interest does not map directly onto the § 1782 context because the relevant forum is the federal judicial district.[268] And § 1782 calls for less of a focus on the interstate judicial system and the states' shared interests and more focus on federal policy. After all, § 1782 is a federal statute that grants jurisdiction.[269] Nevertheless, the important relational interests among jurisdictions with a stake in the discovery remain relevant.[270]

This Note, therefore, proposes reworking the remaining due-process interests into the following three considerations for § 1782 applications: (1) the applicant's interest in the discoverable information,[271] (2) the federal interest in providing for transnational discovery,[272] and (3) the interests of comity among courts.[273]

All three of these factors, moreover, support a lower requirement of due process for § 1782 actions. The applicant's interest in the discovery favors broader assertions of jurisdiction.[274] The same goes for the federal interest because Congress's twin aims for the statute favor broader discovery for foreign proceedings.[275] And the comity interests, as expressed in § 1782 precedents, would also weigh in favor of broader jurisdiction because providing discovery assistance encourages foreign courts to do the same in return.[276] Comity, after all, informed the evolution of early courts'

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267. 28 U.S.C. § 1782(a) ("The order may be made . . . upon the application of any interested person . . . .").

268. See In re del Valle Ruiz, 939 F.3d 520, 529 n.10 (2d Cir. 2019) ("We note that in the context of a § 1782 application, the relevant 'forum' is limited to the *district* in which the district court sits." (citing 28 U.S.C. § 1782(a))).

269. See Kermit Roosevelt III, The Myth of Choice of Law: Rethinking Conflicts, 97 Mich. L. Rev. 2448, 2497 n.218 (1999) ("[B]ecause federal policy is local policy everywhere, there is no contrary local policy." (citing Mondou v. N.Y., New Haven & Hartford R.R. Co., 223 U.S. 1, 57 (1912))).

270. See Scott, supra note 243, at 1015 (noting in the context of state court subpoenas for litigation in other states that "in cases where one forum obtains discovery on behalf of litigation pending in another jurisdiction, the forum issuing the subpoena has no interest of its own, save perhaps interstate comity").

271. Cf. supra note 267 and accompanying text.

272. Cf. supra note 268 and accompanying text.

273. Cf. supra notes 269–270 and accompanying text.

274. See In re del Valle Ruiz, 939 F.3d 520, 530 (2d Cir. 2019) (noting that it was the applicants who "urge[d the court] to conclude that the process due nonparties is less than that due defendants").

275. See Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 252 (2004) (recognizing the twin aims as "providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts").

276. See id. at 262 ("§ 1782(a)'s objective [is] to assist foreign tribunals in obtaining relevant information that the tribunals may find useful but, for reasons having no bearing on international comity, they cannot obtain under their own laws."); see also ZF Auto. US, Inc. v. Luxshare, Ltd., 142 S. Ct. 2078, 2088 (2022) ("The animating purpose of § 1782 is comity: Permitting federal courts to assist foreign and international governmental bodies promotes respect for foreign governments and encourages reciprocal assistance.").

procedures that provided liberal discovery assistance to assist tribunals abroad.[277]

Reliance on comity, however, raises concerns that foreign tribunals and jurisdictions may in fact disapprove of United States–style discovery.[278] These concerns are likely heightened when interested parties, rather than tribunals themselves, are the ones requesting discovery.[279] These considerations would caution against a comity-based justification for a lower due process requirement. Once again, though, § 1782's other procedural safeguards militate against reckless assertions of jurisdiction.[280] *Intel* requires district courts to assess the receptivity of the foreign tribunal to the judicial assistance, whether the request reflects an attempt to circumvent foreign evidentiary policies, and whether the discovery target is a participant in the foreign lawsuit.[281] These safeguards oblige federal courts to balance the relevant comity interests even under a lower level of due process.

In sum, the interests at play in § 1782 proceedings weigh in favor of a lower requirement of due process in these applications. Even so, the statute itself, the Federal Rules of Civil Procedure, and courts' doctrine provide ample safeguards to protect nonparties from excessive discovery.

CONCLUSION

Conversations about the breadth of § 1782 are likely to continue. This Note's limited intervention is to propose that a broader reading of the statute's personal jurisdiction requirement is warranted considering the statute's text, Congress's aims, and the history of discovery assistance among courts of law and equity. A broader reading also provides parties and courts with the flexibility and discretion that they need to fulfill Congress's twin aims for the statute and achieve their procedural goals. And the statute, the Federal Rules of Civil Procedure, and the Constitution work in tandem to protect the interests of discovery targets and foreign tribunals, under a lower requirement of due process than in plenary actions.

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277. See supra section I.A.

278. See Lawrence Collins, The Use and Abuse of 28 U.S.C. § 1782 Litigation in England, 56 N.Y.U. J. Int'l L. & Pol. 151, 161–63 (2023) [hereinafter Collins, § 1782 Litigation in England] (reviewing examples of injunctions from English courts to restrain § 1782 proceedings).

279. See Wang, supra note 4, at 2113 ("[T]he number of party requests has exceeded the number of tribunal requests in most recent years.").

280. See supra notes 262–265 and accompanying text (discussing these other safeguards).

281. 542 U.S. at 264; see also Advanced Micro Devices, Inc. v. Intel Corp., No. C 01-7033, 2004 WL 2282320, at *23 (N.D. Cal. Oct. 4, 2004) (denying AMD's application on remand because, among other things, the foreign tribunal's amicus brief before the Supreme Court indicated that it was not receptive to U.S. judicial assistance); Collins, § 1782 Litigation in England, supra note 278, at 154–55 (remarking that the *Intel* factors should cause there, "[i]n theory, [to] be very few occasions in which the English court should object to the use of § 1782 in support of its proceedings").

The onus on parties and courts in § 1782 litigation, then, is to balance the interests and burdens of those entities with a stake in the discovery while pursuing the duty of courts to "aid[] in the administration of justice."[282]

282. See McKenzie's Case, 2 Parson's Select Equity Cases 227, 228 (Pa. Ct. C.P. 1843).