No. 02-572

In the Supreme Court of the United States

INTEL CORPORATION,

Petitioner,

v.

ADVANCED MICRO DEVICES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber, a nonprofit corporation organized under the laws of the District of Columbia, is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

The Chamber believes that this case presents the Court with a valuable opportunity to clarify the scope of discovery allowed to private parties seeking information from their business rivals. In the decision below, the Ninth Circuit vastly expanded the ability of companies operating in foreign nations to seek sensitive information from their U.S.-based business rivals including Chamber members, without engaging in the risks, costs, and reciprocal burdens of litigation. If the Ninth Circuit's ruling stands, a business can obtain the right to broad discovery by merely complaining to a foreign enforcement agency.

The Ninth Circuit's ruling allows competitors to seek this discovery even if the relevant foreign nation does not allow it.

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, the Chamber states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

This circumvention of foreign discovery rules can place U.S.-based companies at a substantial disadvantage by allowing their rivals to make extensive inquiries into their internal policies, strategies, and plans without allowing them a similar right of discovery.

The Chamber's members, many of which do business abroad, have a substantial interest in seeing the restoration of proper limits to the right to discovery under Section 1782.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the Ninth Circuit's ruling, any company that operates abroad can obtain nearly unlimited access to the business documents and competitive plans of its business rivals by filing a complaint with the European Commission and then seeking discovery under 28 U.S.C. § 1782. Under the Ninth Circuit's decision, the company is allowed this discovery without taking on any costs or risks of litigation, even though the discovery is not necessary to the decisionmaking of the Commission. By breezing past the statutory requirements that limit Section 1782 discovery to an "interested person" "for use in a proceeding in a foreign or international tribunal" and ignoring the discovery rules of the European Commission, the Ninth Circuit's ruling, if not reviewed by this Court, would open the door to businesses seeking to harass and obtain sensitive information from their U.S.-based rivals by exploiting the liberal discovery rules of the United States.

As described in greater detail in the petition, the Ninth Circuit's decision to allow discovery that a foreign authority does not allow, and to allow that discovery even though litigation is not pending or imminent, deepens circuit splits on both of these issues. This division among the circuits continues to solidify. A recent Ninth Circuit decision, *Four Pillars Enter-*

prises Co. v. *Avery Dennison Corp.*, 308 F.3d 1075 (9th Cir. 2002), acknowledged the "divergence among the federal circuits" on the discoverability issue and followed the earlier Ninth Circuit decision to reject the requirement of discoverability in the foreign tribunal.

Given the square conflicts in the circuits, it is time for this Court to clarify the limits of Section 1782. As we will show, the Ninth Circuit's decision reads the statute to create nearly unlimited access to Section 1782 discovery, allows the circumvention of foreign discovery laws, and subjects U.S.-based businesses to a flood of discovery requests from competitors.

I. The Ninth Circuit's opinion wrongly interprets Section 1782 in the broadest possible way. Instead of limiting the term "tribunal" to a proceeding in which an adjudicative function is exercised, the opinion expands the term to include decisions whether to prosecute. Instead of limiting Section 1782 discovery to discovery for use in an imminent proceeding, the opinion allows discovery for use in any proceeding regardless of time frame. And, instead of limiting the term "interested persons" to private parties in litigation, the opinion expands the term to include anyone who files a complaint with a foreign prosecutor.

II. By refusing to restrict Section 1782 discovery to items discoverable in the foreign proceedings, the Ninth Circuit provides a mechanism to circumvent foreign discovery rules. This circumvention is contrary to the purposes of Section 1782, results in a one-sided advantage to the party seeking discovery, and unilaterally imposes U.S. discovery rules on foreign nations.

III. If the Ninth Circuit's ruling is allowed to stand, any competitor that seeks information from a business rival will be allowed to gather that information by merely filing a complaint

with a foreign prosecutor. As a result, U.S.-based businesses will be forced to endure costly, time-consuming discovery that is nothing more than a fishing expedition.

ARGUMENT

I. THE NINTH CIRCUIT'S OVERLY BROAD INTERPRETATION OF SECTION 1782 STRETCHES THE SCOPE OF THE STATUTE PAST ITS LIMITS

At every turn, the Ninth Circuit's decision reads the terms of Section 1782 in the broadest possible way. Its expansive reading of "tribunal," its refusal to set a time limit on the "use" of discovery, and its refusal to limit the interpretation of "interested person" provide the opportunity for private parties to abuse Section 1782.

A. Section 1782 allows discovery "for use in a foreign or international tribunal." The Ninth Circuit's decision expands the term "tribunal" to include an agency deciding whether to prosecute an alleged violation of the law. Pet. App. 5a-7a. This holding squarely conflicts with the decisions of the Second Circuit.

The Second Circuit reads "tribunal" to mean a proceeding "in which an adjudicative function is being exercised." *In re Lancaster Factoring Co.*, 90 F.3d 38, 41 (2d Cir. 1996); *Fonseca* v. *Blumenthal*, 620 F.2d 322, 323 (2d Cir. 1980) ("It is evident that Congress intended 'tribunal' to have an adjudicatory connotation."). The Second Circuit has recognized correctly that the 1964 amendment to Section 1782, which replaced the phrase "judicial proceeding" with "proceeding in a foreign or international tribunal," did not go "so far as to authorize assistance 'whenever requested by a foreign country or a party there.'" *In re International Judicial Assistance for the Federa-*

tive Republic of Brazil General Universal Trading Corp., 936 F.2d 702, 705 (2d Cir. 1991) (quoting *In re Letters Rogatory Issued By Director of Inspection of Government of India*, 385 F.2d 1017, 1020 (2d Cir. 1967)). Instead, "congressional selection of the word 'tribunal' [evidences] an intention to confine assistance to those proceedings in which an adjudicative function is being exercised." *Ibid.* (citing *India*, 385 F.2d at 1020). Under this reading, the statute does not authorize "assistance to prosecuting or tax collecting authorities with responsibilities for asserting governmental interests, rather than for impartially adjudicating them." *Ibid.* (citing *India*, 385 F.2d at 1020).

The complaint Advanced Micro Devices (AMD) brought before the Directorate General-Competition (Directorate) is in the preliminary investigative stage. Pet. App. 2a. As the Ninth Circuit acknowledged, "This initial investigation is not considered an adversarial proceeding." Pet. App. 3a.[2] Rather, this preliminary investigation is a proceeding that *may* "lead[] to quasi-judicial proceedings." Pet. App. 6a. At this preliminary stage, the Directorate does not require any further information from AMD. "Upon receipt of a complaint, the Directorate first conducts a preliminary investigation. It may gather information on its own and provide the complainant with an opportunity to support its allegations." Pet. App. 3a. "The Directorate also has

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[2] "Competition proceedings before the Commission are * * * not to be regarded as adversary proceedings between the complainant and the undertaking concerned. The complainant is limited to a role which corresponds to the position, under criminal procedure, of a person who reports a matter to the authorities." *AKZO Chemie BV* v. *E.C. Comm'n*, [1987] 1 C.M.L.R. 231, 248.

the authority to seek information directly from the alleged infringer and may punish a failure to provide information with fines and penalties." Pet. App. 3a.

Having recognized for purposes of its analysis that the pending first-stage investigation is *not* itself a "proceeding in a foreign or international tribunal," the Ninth Circuit's decision is then somewhat obscure about what *future* proceeding it would consider to be such a "proceeding" in a "tribunal." At one point, the opinion suggests that it might be enough that "[a] decision not to go forward would be appealable to the Court of First Instance." Pet. App. 6a. Although the Court of First Instance certainly is a "tribunal," the speculative and temporally remote possibility of very limited judicial review of an exercise of prosecutorial discretion cannot possibly be enough to satisfy Section 1782. See Pet. 16 n.5. At other points, it appears that the Ninth Circuit held that the EC will *itself* become a "tribunal" within the meaning of Section 1782 when and if its investigation moves to the second stage. See Pet. App. 6a (rejecting Intel's argument "that the EC is not a tribunal"). As Intel explains (Pet. 14-16), however, the EC's blending of prosecutorial and adjudicative functions is fatal to such a holding, at least under the Second Circuit's test as elucidated by Judge Friendly in *India*, 385 F.2d at 1021.

The Ninth Circuit's response was that, in deciding whether to prosecute, the EC listens in an unbiased manner to both sides. Pet. App. 6a-7a (stating the blurring of "the distinction between prosecutor and decision-maker" is not "of concern" because the EC lacks "a discernable institutional bias toward a particular outcome"). The absence of bias, however, is at most a necessary condition – not a sufficient one – for a body to constitute a "tribunal" in ordinary usage.

Despite the Ninth Circuit's claim of evenhandedness, the EC is still charged with prosecutorial law enforcement. To qualify as a prosecutor rather than a "tribunal," one need not be "biased" – only zealous. No one would confuse a "fair" prosecutor with a fair judge. And recent events suggest that the EC may indeed act overzealously at times, and in a way that should invite particular caution in allowing the U.S. discovery process to be used by a competitor.

Three times in the past five months, European courts have reversed competition decisions of the Commission. The Commission's aggressive practices in the merger arena have resulted in public criticism by the European courts and commentators, particularly for excessive attention to the desires of *competitors* as opposed to *competition*. Mario Monti, the European Commissioner for Competition, just last week acknowledged criticism of the Commission decisionmaking process "for being too prone to capture by the competitors of the merging parties, who, the critics say, are able to influence excessively the investigation." Merger Control in the European Union: A Radical Reform (Nov. 7, 2002), *available at* http://www.ibanet.org/pdf/Mario_Monti_Speech.pdf.[3] Cf. *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993)

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[3] See also Philip Shishkin, *EU Ruling Has Mixed Message On Vetting Of Corporate Mergers*, WALL ST. J., Oct. 28, 2002 ("European antitrust enforcers have come under fire [from European courts] for failing to prove a merger would harm competitors and consumers, or dominate the market."); Francesco Guerrera & Victor Mallet, *Court Ruling Adds to Pressure for European Antitrust Overhaul*, FIN. TIMES, Oct. 23, 2002, at 1.

(quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962)) ("It is axiomatic that the [U.S.] antitrust laws were passed for 'the protection of competition, not competitors.'").

B. The Ninth Circuit's decision does not put any temporal limit on use of the discovered materials. Pet. App. 6a. Again, that holding places the Ninth Circuit in conflict with the Second Circuit. The Second Circuit requires proceedings to be "imminent – very likely to occur and very soon to occur in order to satisfy the statutory requirements." *In re Euromepa*, 154 F.3d 24, 29 (2d Cir. 1998) (quotation omitted).

The Ninth Circuit stated that the 1964 amendment, which eliminated the word "pending," justified the elimination of any timing requirement. The Second Circuit reads that amendment differently: "Curiously, the legislative history makes no mention of this change and describes the broadening of proceedings in language that raises a question as to whether the deletion of 'pending' was intentional or inadvertent." *Brazil*, 936 F.2d at 705. "If the omission of 'pending' was intended to mean 'eventually occurring,' we would expect to see at least some hint of that thought in the authoritative reports issued by the members of the Senate and House committees." *Id.* at 706.

Without a temporal limit on the use of the discovered materials, interested parties can request discovery for use in proceedings that might occur years into the future or that might never occur. For example, in *In re Ishihara Chemical Co.*, 251 F.3d 120 (2d Cir. 2001), Ishihara sought discovery under Section 1782 from one of its direct competitors for use in a patent proceeding before the Japanese patent office. While Ishihara was litigating the application of Section 1782, the Japanese patent proceeding concluded. Because the discovery could no longer be used in the patent proceeding, the Second Circuit dis-

missed the appeal as moot. *Id.* at 126. Ishihara argued that it was still entitled to discovery that would "be used in a new invalidity proceeding to be instituted in Japan." *Ibid.* Although the Second Circuit did not decide whether future litigation would be an adequate basis for Section 1782 discovery, it commented, "It is certainly questionable whether a proceeding that has yet to be initiated would satisfy § 1782's 'imminent' requirement. Ishihara is relying on mere speculation not only as to the commencement of such a proceeding, but also as to its need for discovery in such a proceeding." *Id.* at 127 n.4. Under the Ninth Circuit's decision, however, Ishihara's promise to file future litigation would be enough to justify Section 1782 discovery.

As the *Ishihara* example demonstrates, the Second Circuit's requirement that judicial proceedings be imminent protects against harassment and invasion of privacy. The imminency requirement "avoids the risks inherent in making confidential material available to investigative agencies of countries throughout the world at preliminary stages of their inquiries." *Brazil*, 936 F.2d at 706. Allowing discovery whenever proceedings are "probable" "poses dangers to legitimate privacy interests of our citizenry that we do not believe Congress intended to imperil." *Ibid.* See also *In re Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988) ("If the judge doubts that a proceeding is forthcoming, or suspects that the requirement is a 'fishing expedition' or a vehicle for harassment, the district court should deny the request.").

C. The Ninth Circuit failed to consider whether AMD, a private non-litigant, is an "interested person" within the meaning of Section 1782. The legislative history suggests that, to be an "interested person," a private party must be a party to foreign

litigation. *Trinidad & Tobago*, 848 F.2d at 1154 ("The legislative history stated that an 'interested person' can be a 'person designated by or under a foreign law, or a party to the foreign or international litigation.'") (quoting S. Rep. 1580, 1964 U.S.C.C.A.N. at 3789); *Lancaster Factoring Co.*, 90 F.3d at 41 (same). See also *Trinidad & Tobago*, 848 F.2d at 1155 ("a private individual may need to be a litigant in a pending proceeding in order to be an 'interested person'").

This restriction provides a sensible limit on private parties' seeking discovery under Section 1782. A litigant in a proceeding requires information to prosecute or defend its case. A mere complainant to a prosecutorial body does not possess the same need for discovery. In this case, for example, the Directorate has its own investigative powers and can request any discovery AMD could seek under Section 1782. Moreover, AMD does not have a stake in the Directorate's investigation. The Directorate's decision will not directly affect AMD. AMD's only "interest" in the preliminary investigation is to see that the competition law is enforced (or, more cynically, that the costs and burdens of an investigation and the threat sanctions are imposed upon its rival).[4] Under this view of "interest," any competitor of a company under investigation or any person interested in the proper enforcement of the competition laws could claim to be an "interested person."

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[4] See generally Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551 (1991).

II. THE NINTH CIRCUIT'S DECISION ALLOWS BUSINESSES SEEKING INFORMATION FROM A RIVAL TO CIRCUMVENT THE RULES OF DISCOVERY

Consistent with its expansive reading of the statute, the Ninth Circuit refused to restrict discovery under Section 1782 to discovery that would be discoverable in the foreign proceeding. Pet. App. 8a. See also *Four Pillars*, 308 F.3d 1075.

In the preliminary investigative stage, the Directorate does not require any further information from the complainant. Instead, the Directorate has the authority to "gather information on its own" and "to seek information directly from the alleged infringer." Pet. App. 3a.[5] If the Directorate seeks discovery in the United States, the Attorney General will assist in obtaining that discovery. 15 U.S.C. § 6203. Although a complainant has an opportunity to provide the Directorate with information in the complainant's possession, the Directorate does not turn the investigative process over to the complainant – a business rival, who is likely to possess ulterior motives.

European courts have recognized these ulterior motives and have acknowledged that businesses might file complaints simply to gather intelligence on their rivals. European courts have condemned this practice. In *AKZO Chemie BV*, the European Court of Justice stated, "[A] third party who has submitted a complaint may not in any circumstances be given access to documents containing business secrets. Any other solution would lead to the

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[5] In fact, AMD suggested to the Directorate that it seek the documents at issue here. The Directorate declined to do so. See Supp. E.R. 6-7.

unacceptable consequence that an undertaking might be inspired to lodge a complaint with the Commission solely in order to gain access to its competitors' business secrets." [1987] 1 C.M.L.R. 231, 259. The European Court of Justice also recognized "the extremely serious damage which could result from improper communication of documents to a competitor." *Ibid.* The Ninth Circuit's decision, however, allows complainants to circumvent this policy by providing them with a broad opportunity to seek sensitive competitive information from rivals.

AMD is not the only party to attempt to use Section 1782 to gather discovery not allowed in foreign proceedings. A number of private parties seeking discovery under Section 1782 "have been accused of conducting ad hoc discovery in an attempt to circumvent the governing foreign court's proscribed process regarding gathering of evidence." Brian Eric Bomstein & Julie M. Levitt, *Much Ado About 1782: A Look At Recent Problems With Discovery In The United States For Use In Foreign Litigation Under 28 U.S.C. § 1782*, 20 U. MIAMI INTER-AM. L. REV. 429, 465 (1989).

This circumvention of foreign discovery rules contradicts the "central intent of the 1964 amendments," which was to "clarify and liberalize existing U.S. procedures" and, according to the Senate Report, to "adjust[] those procedures to the requirements of foreign practice and procedure." *In re Asta Medica*, 981 F.2d 1, 5 (1st Cir. 1992) (quoting S. Rep. No. 1580, *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788). See also *In re Jenoptik AG*, 109 F.3d 721, 725 (Fed. Cir. 1997) (Newman, J., dissenting) ("Although 28 U.S.C. § 1782 is available to private litigants and foreign courts, its purpose is to facilitate the legitimate gathering of evidence, not to circumvent foreign laws."). "United States courts should not be a tool in

circumvention of the law of foreign countries." *Jenoptik*, 109 F.3d at 725.[6]

This circumvention results in a one-sided advantage for the party seeking discovery. In the case of litigation between a U.S. party and a foreign party, the disadvantage is obvious. Without a requirement of discoverability in the foreign jurisdiction, "a United States party involved in litigation in a foreign country with limited pre-trial discovery will be placed at a substantial disadvantage vis-à-vis the foreign party. All the foreign party need do is file a request for assistance under Section 1782 and the floodgates are open for unlimited discovery while the United States party is confined to restricted discovery in the foreign jurisdiction." *Asta Medica*, 981 F.2d at 5. "Congress did not amend Section 1782 to place United States litigants in a more detrimental position than their opponents when litigating abroad. This result would be contrary to the concept of fair play embodied in United States discovery rules and the notion that '[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.'" *Id.* at 5-6 (quoting *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court*, 482 U.S. 522, 540 n.25 (1987)). See also *In re*

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[6] Parties can also use Section 1782 to circumvent American discovery rules. "For example, where one party is involved in concurrent, related actions pending before both U.S. and foreign courts, that party might be tempted to file a Section 1782 request as a way of obtaining information otherwise unavailable under the appropriate U.S. discovery rules. The requesting party then could use the discovered information to his advantage in the U.S. proceeding." Bomstein & Levitt, *supra*, 20 U. MIAMI INTER-AM. L. REV. at 467.

Euromepa, 51 F.3d 1095, 1103 (2d Cir. 1995) (Jacobs, J., dissenting) ("The statute should not become an instrument of unilateral advantage as between the parties."). A similar lopsided advantage occurs when a foreign competitor files a complaint against a U.S.-based business. The foreign competitor can seek broad discovery of the U.S. firm's business plans and competitive strategies, but the U.S. firm cannot seek reciprocal information.

Unlike foreign magistrates or courts, private litigants do not have an institutional interest in protecting the foreign judicial process, and therefore are more likely to abuse Section 1782. In recognition of this principle, the Fifth Circuit imposes discoverability requirements on private litigants. One "reason for this is to avoid assisting a foreign litigant who desires to circumvent the forum nation's discovery rules by diverting a discovery request to an American court." *In re Letter Rogatory From First Court of First Instance in Civil Matters, Caracas Venezuela*, 42 F.3d 308, 310 (5th Cir. 1995). See also *John Deere Ltd.* v. *Sperry Corp.*, 754 F.2d 132, 136 (3d Cir. 1985) ("Concern that foreign discovery provisions not be circumvented by procedures authorized in American courts is particularly pronounced where a request for assistance issues not from letters rogatory, but from an individual litigant."); Molly Warner Lien, *The Cooperative and Integrative Models of International Judicial Comity: Two Illustrations Using Transnational Discovery and Breard Scenarios*, 50 CATH. U.L. REV. 591, 614, 633 (2001). Another "reason for reviewing a private litigant's request for information is out of a fear of offending the forum nation by furthering a scheme to obviate that Nation's discovery rules." *In re Letter Rogatory Caracas Venezuela*, 42 F.3d at 310-311.

"In amending Section 1782, Congress did not seek to place itself on a collision course with foreign tribunals and legislatures, which have carefully chosen the procedures and laws best suited for their concepts of litigation." *Asta Medica*, 981 F.2d at 6. Yet allowing parties to use Section 1782 to circumvent foreign discovery rules does exactly that. It also raises the concern that "foreign countries may be offended by the use of United States procedure to circumvent their own procedures and laws." *Ibid.*

"Few actions could more significantly impede the development of international cooperation among courts than if the courts of the United States operated to give litigants in foreign cases processes of law to which they were not entitled in the appropriate foreign tribunals." *In re Court of Comm'r of Patents for Republic of South Africa*, 88 F.R.D. 75, 77 (E.D. Pa. 1980). As one commentator stated, "The injection of American discovery procedures into foreign proceedings will otherwise be counterproductive to efficiency interests in both forums and may well trigger charges of American interference, chauvinism, or legal imperialism." Lien, *supra*, 50 CATH. U.L. REV. at 624. "[I]t is puzzling why the value judgments another country has made about the role of discovery are entitled to so little weight, since American discovery is, to say the least, both unique and not widely admired." *Id.* at 619.

III. BY REMOVING THE LIMITS ON WHO CAN SEEK DISCOVERY, THE NINTH CIRCUIT THREATENS TO SUBJECT U.S.-BASED BUSINESSES TO A FLOOD OF DISCOVERY REQUESTS AT THE INSTIGATION OF MERE COMPLAINANTS TO FOREIGN LAW ENFORCEMENT AGENCIES

The Ninth Circuit's unrestricted reading of the statute vastly expands the number of parties who may seek Section 1782 discovery. Under this reading, the "United States courts can be required to become global 'Special Masters for Discovery' to supervise proceedings in any court in the world if either a litigant in a foreign court or its evidence can be found here." *In re Malev Hungarian Airlines*, 964 F.2d 97, 103 (2d Cir. 1992) (Feinberg, J., dissenting) (alterations and quotations omitted).

The Ninth Circuit's decision exposes U.S.-based companies to costly fishing expeditions. "Because there is almost no limit on what the court may deem discoverable," an expansive reading of Section 1782 can result in "tremendous cost to the privacy interests and pocketbooks of U.S. citizens." Bomstein & Levitt, *supra*, 20 U. MIAMI INTER-AM. L. REV. at 438.

"[I]t is possible that a litigant in a foreign action would file a section 1782 request to obtain information which can be utilized as the basis for a legal action in the United States." *Id.* at 467. "Such abuse of section 1782 is at odds with U.S. notions of fair play and the manner in which U.S. courts permit discovery to be taken." *Ibid.*

The Ninth Circuit's opinion opens the door to the taking of discovery by mere complainants who have not undertaken the burdens of actual litigants in an adjudicative proceeding. It permits any company to take intrusive discovery of its commer-

cial rivals simply by asking a foreign enforcement agency to investigate them. In this case, AMD and Intel "are worldwide competitors in the microprocessor industry" (Pet. App. 2a), and the competition between the two companies is intense. David P. Hamilton, *Advanced Micro May Leapfrog Intel With Newest Chip*, WALL ST. J., Aug. 9, 1999. See also David P. Hamilton, *High Demand For Chips Lifts Intel Earnings*, WALL ST. J., Apr. 19, 2000.

Companies have incentives to seek competitive information from their rivals and to impose time-consuming and expensive discovery burdens on those rivals. See Lien, *supra*, 50 CATH. U.L. REV. at 624-625 (describing burdens and abuses of U.S. discovery). A large number of complainants could take advantage of the Ninth Circuit's expansive reading of Section 1782. Thousands of competition law matters are reviewed each year by foreign antitrust agencies. The Directorate alone receives more than 100 complaints a year. European Commission Directorate-General for Competition, XXXIst Report on Competition Policy 11 & 53 fig. 1 (2001), *available at* http://europa.eu.int/comm/competition/annual_reports/2001/competition_policy/eu.pdf. See also Paul Hofheinz & Brandon Mitchener, *In a First, EU Merger Decision is Rejected*, WALL ST. J., June 7, 2002 (Commission has reviewed more than 2000 mergers since 1990). But this is only the beginning. The Ninth Circuit's decision applies to nearly any party who files a complaint with any foreign prosecutorial body. Presumably, AMD could have complained against Intel to any competition authority anywhere in the world and obtained – if the Ninth Circuit's reasoning is correct – the discovery it seeks from Intel. A decision with such far-reaching implications should not be allowed to stand without this Court's review.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOVEMBER 2002