No. 12-627

IN THE
Supreme Court of the United States

ED MOLONEY AND ANTHONY MCINTYRE,
Petitioners,

v.

UNITED STATES, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE ANCIENT ORDER OF HIBERNIANS, THE IRISH AMERICAN UNITY CONFERENCE, AND THE BREHON LAW SOCIETY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

The Ancient Order of Hibernians (AOH) is the oldest and largest Irish American organization in the United States. Founded in 1836, the AOH has long been involved in charitable and community activities. The AOH supports a re-unification of Ireland, and has been at the forefront of civil and human rights initiatives to protect minority rights in Northern Ireland.

The Irish American Unity Conference (IAUC) is a nationwide, nonpartisan, nonsectarian, chapter-based human rights organization working for justice and peace in Ireland. The IAUC advocates the peaceful reunification of Ireland by working through the American democratic process. The IAUC's members represent every occupational and educational stratum in the United States.

The Brehon Law Society is a professional association that fosters the profession of law among individuals of Irish ancestry. The Brehon Law Society takes its name from the body of ancient Celtic law that defined and governed legal relationships on the island of Ireland. Inspired by the strongly humanitarian tradition embodied in the Brehon law, the members of the Brehon Law Society strive to use

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[1] No counsel for a party authored this *amicus curiae* brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. By letters dated December 7, 2012, the *amici* notified counsel of record for both parties in this case of their intent to file this *amicus* brief, and both parties have consented to the filing of this brief.

their talents to protect, to defend, and to extend human rights, principally — but not exclusively — in Northern Ireland.

The *amici curiae* are interested in the instant case because the decision by the U.S. Court of Appeals for the First Circuit, permitting the enforcement of subpoenas requesting confidential academic interview materials relating to the violent conflict in Northern Ireland that preceded the U.S.-brokered multi-party Belfast Agreement of 1998 (also known as the "Good Friday Agreement"), raises the possibility of reprisals against the interviewees (who are former participants in the conflict) and risks destabilizing the fragile accord. In addition, the *amici* are interested in ensuring that U.S. courts apply the appropriate standard of judicial review to subpoenas issued pursuant to requests by foreign law enforcement authorities.

INTRODUCTION

This case arises from two subpoenas issued pursuant to a request made by the law enforcement authorities of the United Kingdom for recordings and documents from the Belfast Project, housed in the Boston College library. The Belfast Project, started in 2001, was an oral history project that sought to document in taped interviews the recollections of various participants of the conflict in Northern Ireland from 1969 onward. The interviewees included members of paramilitary and political organizations from both sides of the conflict, including former members of the Irish Republican Army (IRA) and the Ulster Volunteer Force. The goal of these confidential interviews was to preserve the stories of individual participants, thereby providing unique insight into this violent conflict.

In May and August 2011, the United States issued two sets of subpoenas seeking materials from the Belfast Project. These subpoenas related to an investigation that the United Kingdom authorities initiated into the 1972 abduction and murder of Jean McConville, who was believed by the IRA to have acted as an informer for the British authorities. The subpoenas were issued pursuant to a formal request made by the United Kingdom under the Mutual Legal Assistance Treaty between the United States and United Kingdom ("US-UK MLAT"). The US-UK MLAT was signed on January 6, 1994, and entered into force on December 2, 1996. Pet. App. 16a-17a (citing Treaty Between the Government of the United States and the Government of the United Kingdom of Great Britain and Northern Ireland on Mutual Legal

Assistance in Criminal Matters, U.S.-U.K., Dec. 2, 1996, S. Treaty Doc. No. 104-2).[2]

When the US-UK MLAT was originally concluded, requests made pursuant to the treaty had to be executed under 28 U.S.C. § 1782 — a statute that prescribed a mechanism by which federal courts could render assistance in the production of evidence for use in a foreign or international legal proceeding. *See* S. Exec. Doc. No. 104-23, at 13 (1996) (report of the Senate Committee on Foreign Relations accompanying the US-UK MLAT); Pet. App. 19a; 56a. Section 1782 authorized federal courts to provide such assistance when requested by a foreign or international tribunal upon the application of "any interested person," whether a government entity or a private party. 28 U.S.C. § 1782(a); *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 248–49 (2004). In 2009, however, Congress enacted a new statute, 18 U.S.C. § 3512, which provided for a more streamlined process for executing requests made specifically by foreign governments for assistance in the investigation or prosecution of criminal offenses. Pet. App. 19a. Section 1782 required the Attorney General to respond to requests for evidence from a foreign government by filing such requests with the district court in every district where evidence or a witness may be found, which necessitated

[2] The US-UK MLAT was subsequently modified by the mutual legal assistance treaty between the United States and the European Union. Pet. App. 17a (citing Agreement on Mutual Legal Assistance Between the United States of America and the European Union, U.S.-E.U., June 25, 2003, S. Treaty Doc. No. 109-13).

involvement of multiple U.S. Attorneys' Offices and federal district courts. Pet. App. 19a-20a n.13. Section 3512 authorized a more streamlined procedure, permitting a single Assistant U.S. Attorney to pursue requests in multiple judicial districts, *see* 18 U.S.C. § 3512(a)(1), and authorizing individual district courts to oversee and approve subpoenas and other orders "in any place in the United States," *id.* § 3512(f). *See also* Pet. App. 19a-20a n.13; 66a. The subpoenas seeking materials from the Belfast Project were issued pursuant to 18 U.S.C. § 3512. *See* Pet. App. 9a; 56a.

Boston College moved to quash the subpoenas. Pet. App. 10a. Petitioners Ed Moloney (former Project Director for the Belfast Project) and Anthony McIntyre (former Lead Project Researcher) moved to intervene. Pet. App. 11a. In addition to supporting the arguments advanced by Boston College, Petitioners also alleged that the Attorney General's compliance with the United Kingdom's request was contrary to the terms of the US-UK MLAT. Pet. App. 11a. Petitioners argued, *inter alia*, that "it was not reasonable to believe that a prosecution would take place in the underlying case"; that "the crimes under investigation by the United Kingdom were 'of a political character,'" and therefore the request should have been refused under Article 3, ¶ 1(c)(i) of the US-UK MLAT; and that the Attorney General "did not consider the implications for the peace process in Northern Ireland of complying with the United Kingdom's request." Pet. App. 16a n.11; *see also* Pet. App. 41a n.28 (Torruella, J., concurring in the judgment) ("the academic investigations carried out by [Petitioners] in this case, and the evidence sought by the United Kingdom involve 'offenses of a political

nature' irrespective of how heinous we may consider them").

Addressing the proper standard of review for requests made under an MLAT, the district court analogized these requests to a grand jury subpoena, Pet. App. 73a–75a, and concluded that such requests "ought receive deference similar to grand jury subpoenae, which are granted a presumption of regularity," Pet. App. 75a (citation omitted). The district court acknowledged, however, that while "a grand jury is independent of all three branches of government and is intended as a 'kind of buffer or referee between the Government and the people,'" an MLAT request, in contrast, "is a direct request by the executive branch on behalf of a foreign power." Pet. App. 75a (quoting *United States v. Williams*, 504 U.S. 36, 47 (1992)) (additional citation omitted). In fashioning the applicable standard of review, the district court did not examine the continuing applicability of any of the discretionary factors that courts used to apply under 28 U.S.C. § 1782 — the statute that previously provided the procedure for executing an MLAT request, *see* Pet. App. 19a; 56a; *supra* at 4 — even though the court acknowledged that, as interpreted by this Court, section 1782 vested courts with "wide discretion," Pet. App. 65a (citing *Intel*, 542 U.S. at 255). The district court then refused to quash the subpoenas and denied Petitioners' motion to intervene. Pet. App. 89a-90a.[3]

[3] The district court then similarly dismissed Petitioners' original complaint, which raised essentially the same claims as their intervenor complaint. *See* Pet. App. 4a–5a.

The court of appeals affirmed this decision as a permissible exercise of the district court's discretion. Pet. App. 26a-27a. The First Circuit rejected the argument that the district court should have evaluated the subpoenas by applying the discretionary factors set forth by this Court in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004). Pet. App. 26a n.17. In the court of appeals' view, the *Intel* factors were not applicable for two reasons: First, because these factors were developed in the context of a request made under 28 U.S.C. § 1782, the court of appeals believed they offered no guidance when reviewing a request made under 18 U.S.C. § 3512. Second, the First Circuit viewed *Intel* as applicable solely where section 1782 "provided the only substantive standards for evaluating a request" for assistance addressed to a federal court. Pet. App. 26a n.17. Because here, the United Kingdom's request was made pursuant to the US-UK MLAT, the court of appeals opined that only the MLAT supplied the relevant substantive standards for evaluating the request. *Id.* Finally, the First Circuit held that it could not review whether the subpoenas were in conformity with the terms of the US-UK MLAT because Article 1, ¶ 3 of the MLAT prohibited private parties from enforcing any rights under the treaty. Pet. App. 16a n.11; 20a-23a.

SUMMARY OF THE ARGUMENT

This Court's review is imperative given the potential negative repercussions from the enforcement of the subpoenas at issue to the fragile peace process in Northern Ireland. The success of the 1998 Belfast Agreement remains uncertain, and its

implementation is imperiled by the continuing atmosphere of mistrust and, specifically, the history of past collusion with loyalist paramilitary forces on the part of the Northern Ireland police. Given the recent history of the conflict, the enforcement of the subpoenas poses not only a risk of violent reprisals to the former participants in the Belfast Project, but also potentially undesirable consequences to the continuing process of reconciliation in Northern Ireland.

Certiorari is further warranted by the need to reaffirm the ability of the judicial branch to provide meaningful review of foreign requests for legal assistance. The court of appeals below failed to consider the factors set forth by this Court in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), and instead upheld the district court's reliance on a newly minted "reasonableness" standard that is entirely inapposite. In *Intel*, this Court established several factors that a court should consider when reviewing foreign requests for assistance pursuant to 28 USC § 1782. The court of appeals, in holding that *Intel* should apply only to cases arising pursuant to section 1782, but not to requests made under 18 U.S.C. § 3512, failed to consider the similar application of the two statutes and the intent of Congress in enacting section 3512. The First Circuit also erred in holding that, as a general matter, an MLAT abrogates the substantive requirements of sections 1782 and renders irrelevant the *Intel* factors.

Judicial review of foreign subpoenas for conformity with the terms of MLATs would not impermissibly encroach upon the Executive's

authority. Court decisions made in the context of extradition treaties, which Congress intended to inform the interpretation of the US-UK MLAT, demonstrate that interpretation and application of the political offense exception can comfortably fall within the scope of judicial review. Similarly here, courts could exercise judicial review of Executive Branch adherence to political offense exceptions in the MLAT context.

ARGUMENT

A. *This Court's Review is Warranted Given the Potential Negative Implications for the Fragile Peace Process in Northern Ireland from the Enforcement of the Subpoenas.*

The Belfast Project, the materials of which the United Kingdom authorities seek pursuant to the subpoenas at issue, has been conceived following the 1998 Belfast ("Good Friday") Agreement. Pet. App. 5a-6a; Pet. 6. This agreement ended a decades-long violent conflict of the "Ulster Troubles" in Northern Ireland. This conflict "took the lives of 3,700 people in a province of only one and a half million." Paul Bew, *The Making and Remaking of the Good Friday Agreement* 140 (2007) (hereinafter "Bew, *Making and Remaking*"). This conflict continues to reverberate through the North Irish society. "Hardly a family remained unscarred in the sense that everyone knew someone who had either been murdered or injured in the Troubles." *Id.* The violence was committed by both sides of the conflict: While almost 60 percent of the killing was carried out by the IRA and its allies,

30 percent of the murders were done by Protestant militants and 10 percent by the security forces. *Id.*

The Belfast Agreement followed nearly ten years of protracted negotiations. Duncan Shipley-Dalton, *The Belfast Agreement*, 22 Fordham Int'l L.J. 1320, 1322 (1999). The United States in particular invested immense political effort in facilitating the peace process in the region. The U.S. Special Envoy for Northern Ireland, former Senate majority leader George J. Mitchell, chaired the Northern Ireland peace talks that finally culminated in the Belfast Agreement. *See generally* George J. Mitchell, *Making Peace* (1999). The Belfast Agreement brought a profound transformation in the politics of Northern Ireland, creating a power-sharing structure and sharply reducing the level of paramilitary violence. Michael Cox, *et al.*, *A Farewell to Arms? Beyond the Good Friday Agreement* 41 (2000) (hereinafter, "Cox, *A Farewell to Arms?*"); Bew, *Making and Remaking* 140.

The Belfast Agreement envisioned a truth-and-reconciliation process, which would acknowledge the "suffering of the victims of violence as a necessary element of reconciliation." Agreement Reached in the Multi-Party Negotiations, Apr. 10, 1998, Eng.-Ir., ¶ 11; *see also* Christine Bell, *Dealing with the Past in Northern Ireland*, 26 Fordham. Int'l L.J. 1095, 1108-11 (2003). The Belfast Project was intended as an early version of this truth recovery process. Pet. 6 n.1.

Nevertheless, the continuing success of the Belfast Agreement remains uncertain. The agreement is still treated with continued suspicion by "both sides of the communal divide" in Northern

Ireland. Cox, *A Farewell to Arms?* 42. The difficulties that the peace process faces are exacerbated by "the legacy of grief in the province for those whose families and communities have been affected by the thirty years of violence. Indeed, these victims are now expected to accept the presence in mainstream politics of some of those who perpetrated the violence." *Id.* In particular, the former Northern Ireland police force — the Royal Ulster Constabulary ("RUC"), since reformed into the Police Service of Northern Ireland — was — and continues to be — viewed by the nationalist side with deep suspicion. *Id.* at 170-72. In fact, the reform of the Northern Ireland police force was "just about the most crucial element in the political settlement proposed for Northern Ireland." *Id.* at 184.[4]

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[4] The issue remains the subject of continuing political debate. Only earlier this month, the U.K. government released a report of government inquiry into the 1989 murder of a Belfast human rights lawyer Patrick Finucane — one of the most well-known and controversial killings during the Troubles. The report revealed what the British Prime Minister David Cameron described as "shocking levels of State collusion" with the Ulster loyalist paramilitary forces. *Prime Minister David Cameron's Statement on Patrick Finucane* (Dec. 12, 2012), http://www.number10.gov.uk/news/david-cameron-statement-on-patrick-finucane. Prime Minister Cameron stressed the extensive reforms that have been made to the policing and security in Northern Ireland in recent years. *Id.* At the same time, however, there are concerns that some of these reforms are in danger of being reversed. *See* Henry McDonald, *Northern Ireland Police Service "Rehired 20% of Retired RUC Officers,"* The Guardian (Oct. 3, 2012), available at http://www.guardian.co.uk/uk/2012/oct/03/northern-ireland-police-rehired (discussing comments by a Sinn Féin minister

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The enforcement of the subpoenas, and the provision of the requested confidential interview material to the United Kingdom authorities, poses not only a risk of violent reprisals against the interview participants, *see* Pet. 8-10, but also a danger of negatively impacting the fragile peace and reconciliation process in Northern Ireland. The end of the conflict in Northern Ireland is relatively recent history, and many participants in the conflict remain prominent figures in the public and political life in Northern Ireland. In addition to important constitutional issues raised by Petitioners, *see* Pet. 17-32, and the vital question of defining the proper judicial review standard for requests made pursuant to MLATs, this factor further demonstrates the importance of this Court's review.

B. *This Court's Review Is Needed to Re-Affirm the Judicial Branch's Ability to Meaningfully Review Foreign Requests for Legal Assistance.*

The First Circuit's refusal to consider any of the discretionary factors laid down by this Court in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), needs to be corrected by this Court. *See* Pet. 16-17; 32-36. In *Intel*, this Court examined in detail 28 U.S.C. §1782 — the statute that, prior to the enactment of 18 U.S.C. § 3512 in 2009, provided the mechanism under which federal courts reviewed

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regarding the rehiring of "almost 20% of the 5,000 RUC officers laid off under the reforms").

foreign governments' requests for assistance. Emphasizing that the statutory language made a federal court's compliance with such a request discretionary, and not mandatory, *Intel*, 542 U.S. at 255, this Court then laid down several specific factors that a court should consider when ruling on a section 1782 request, *id.* at 254-65. Thus, the court may consider such factors as whether the "request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country of the United States" or whether the request is "unduly intrusive or burdensome," including in instances where confidentiality of requested information is at issue. *Id.* at 254-65.

By contrast, the court of appeals here expressly disavowed any reliance on these factors. Pet. App. 26a n.17. Instead, the First Circuit affirmed the district court on the basis that the court did not abuse its discretion when it employed a newly minted "reasonableness" standard, plucked out of the inapposite grand jury subpoena context and unmoored from any grounding in the text of section 3512 or in this Court's precedent. *See* Pet. App. 26a-27a; 71a-77a. Because MLATs are increasingly being used as a law enforcement instrument by foreign governments, this Court should clarify the appropriate standard for judicial review of foreign subpoena requests and re-affirm *Intel*'s broad applicability to such requests.

The court of appeals gave two reasons for its cavalier treatment of *Intel*. *See* Pet. App. 26a n.17. Neither reason holds. First, the court of appeals stated (without elaboration) that because the *Intel* factors were developed in the context of a request

made under 28 U.S.C. § 1782, they had no applicability to a request made under 18 U.S.C. § 3512. Pet. App. 26a n.17. But prior to the enactment of section 3512, the statute that provided an exclusive mechanism for rendering assistance to foreign requests for evidence — including requests under MLATs — was 28 U.S.C. § 1782. *See* Pet. App. 19a; *see also* S. Exec. Doc. No. 104-23, at 13; *supra* at 4. Nor did this Court in *Intel* limit its analysis, or its prescriptive factors, solely to requests made by private foreign litigants or to requests made in the context of civil litigation. 542 U.S. at 247-65.

There is no reason to disregard the *Intel* rationale entirely when analyzing foreign requests made pursuant to section 3512. Section 3512 was not intended to supersede 28 U.S.C. § 1782 as the exclusive means of facilitating requests by foreign authorities. Indeed, section 3512 expressly provides that "[n]othing in [§ 3512] shall be construed to preclude any foreign authority or an interested person from obtaining assistance in a criminal investigation or prosecution pursuant to section 1782." 18 U.S.C. § 3512(g). There is no logical reason why a foreign government request for assistance in a criminal investigation that is submitted to federal courts pursuant to section 1782 should be analyzed under a different standard than if the same request were submitted under section 3512.

Similar to the language of section 1782, the language of section 3512 is permissive, and not mandatory, as to a federal court's obligations upon the receipt of a foreign request for assistance. *Compare* 18 U.S.C.§ 3512 ("a Federal Judge *may* issue such orders as *may be necessary* to execute a

request from a foreign authority for assistance in the investigation or prosecution of criminal offenses") (emphasis added), *with Intel*, 542 U.S. at 255 (section 1782 "authorizes, *but does not require*, a federal district court to provide assistance") (emphasis added); *see also* Pet. 33-34. There is certainly no textual underpinning for the First Circuit's different treatment of these two statutory provisions with respect to the applicable standard of review.

The history of section 3512's enactment further demonstrates that Congress did not intend to render this Court's analysis in *Intel* inapplicable to foreign requests for assistance made pursuant to this newly enacted provision. Rather, Congress' objective in enacting section 3512 as part of the Foreign Evidence Request Efficiency Act of 2009, Pub. L. No. 111-79, 123 Stat. 2086, was to reduce an administrative burden on the U.S. Department of Justice and federal courts when seeking evidence pursuant to a request from a foreign authority. *See* 155 Cong. Rec. H10092-01 (2009) ("This legislation would *merely* eliminate an entirely unnecessary paperwork burden … .") (emphasis added). Prior to that time, section 1782 required the Attorney General to file requests with the district court in every district where evidence or a witness may be found, which necessitated involvement of multiple U.S. Attorneys' Offices and federal district courts. Pet. App. 19a-20a n.13. Section 3512 provided for a more streamlined process for executing such requests when made specifically in connection with the investigation or prosecution of criminal offenses, by permitting a single Assistant U.S. Attorney to pursue requests in multiple judicial districts, *see* 18 U.S.C. § 3512(a)(1), and authorizing individual district courts to oversee and approve

subpoenas anywhere in the United States, *id.* § 3512(f). *See also* Pet. App. 19a-20a n.13; 66a; *supra* at 4-5.

Congress did not intend to alter longstanding safeguards employed by courts in reviewing requests received from foreign authorities. *See* 155 Cong. Rec. H10092-01 (2009) ("Courts will continue to act as gatekeepers to make sure that requests for foreign evidence meet the same standards as those required by domestic cases."). Congress recognized the importance of preserving the role of the courts in reviewing requests from foreign governments while honoring the underlying purpose of our cooperation agreements with foreign governments. *See* 155 Cong. Rec. S6807-01 (2009) ("[R]espect for civil liberties demands that we not suddenly change the types of evidence that foreign governments may receive from the United States *or reduce the role of courts as gatekeepers* for searches. The Foreign Evidence Request Efficiency Act would leave those important protections in place, while simultaneously reducing the paperwork that the cumbersome existing process imposes on our U.S. Attorneys.") (emphasis added). As the U.S. Department of Justice represented, when urging the Senate to enact section 3512, "the proposed legislation would not in any way change the existing standards that the government must meet in order to obtain evidence, nor would it alter any existing safeguards on the proper exercise of such authority." 155 Cong. Rec. S6810 (2009). In *Intel*, this Court observed that section 1782 "leaves the issuance of an appropriate order to the discretion of the court which, in proper cases, may refuse to issue an order or may impose conditions it deems desirable," *id.* at 260-61 (quoting, S. Rep. No. 1580, at

7), and then prescribed the factors to guide this discretion. The legislative history of section 3512 expressly reflects congressional intent to maintain this gatekeeping function of the courts.

The First Circuit's second reason to brush *Intel* aside fares no better. The court of appeals opined that the *Intel* factors applied only where section 1782 "provided the only substantive standards for evaluating a request" for assistance addressed to a federal court, and were inapposite where a request "was made pursuant to an MLAT," because the MLAT supplied the governing substantive standards. Pet. App. 26a n.17. The First Circuit engaged in no textual analysis of the US-UK MLAT to determine whether it superseded the standards mandated by section 1782. Instead, the court of appeals relied on a prior decision by the Ninth Circuit to conclude that MLAT requests use only section 1782's procedural mechanisms but do not import the statute's substantive requirements. Pet. App. 26a n.17 (citing *In re 840 140th Ave. NE*, 634 F.3d 557, 571 (9th Cir. 2011)). Here, the US-UK MLAT provides that requests made under the treaty shall be followed only "to the extent that it is not incompatible with the laws and practices of the Requested Party," US-UK MLAT, Art. 5 ¶ 3, and that "[a] person requested to testify or to produce documentary information or articles … may be compelled to do so in accordance with the requirements of the law of the Requested Party," *id.*, Art. 8 ¶ 2. As the Ninth Circuit observed, when it considered an analogous language in the U.S.-Russia MLAT, such provisions are ambiguous as to whether they incorporate both procedural and substantive requirements of section 1782, or only the statute's procedural mechanisms. *In re 840 140th*

Ave. NE, 634 F.3d at 568-69. The Ninth Circuit resolved this ambiguity only after carefully considering the text of the treaty and employing accepted principles of treaty interpretation. *Id.* at 569-70; *see also In re Comm'r Subpoenas*, 325 F.3d 1287, 1294-1304 (11th Cir. 2003) (noting a similar ambiguity in the analogous provision of the U.S.-Canada MLAT and resolving it after examining the treaty's negotiation history and applying canons of treaty construction). The First Circuit here engaged in no comparable analysis; it simply assumed that, as a general matter, an MLAT abrogates the substantive requirements of section 1782 and renders irrelevant the factors this Court articulated in *Intel*.

This question is important enough to warrant this Court's review. As the Ninth Circuit acknowledged, in the decision on which the court of appeals below relied, an MLAT "does not expressly specify the procedure/substance distinction" and "such a distinction is an unusual method of interpreting a law." *In re 840 140th Ave. NE*, 634 F.3d at 570-71. Given the increased use of the MLAT procedures by foreign sovereigns, this Court should examine whether this cramped interpretation of section 1782 comports with the standard principles of treaty interpretation. [5] The decision below sets a dangerously low bar for the enforcement of a foreign

[5] The United States has MLATs in force with 56 different countries, as well as the European Union, and either has signed or is negotiating MLATs with additional countries. Bureau for Int'l Narcotics & Law Enforcement Affairs, U.S. Dep't of State, *International Narcotics Control Strategy Report Volume II: Money Laundering and Financial Crimes* 20 (2012), *available at* http://www.state.gov/documents/organization/184329.pdf.

subpoena and effectively withdraws the juridical safeguards previously set forth by this Court in *Intel*. Such a result will have important practical implications. Here, Petitioners alleged several grounds supporting non-enforcement of the United Kingdom's subpoena under the US-UK MLAT that may not have been necessarily obvious from the face of the request. *See* Pet. App. 16a n.11; *see also* Pet. App. 41a n.28 (Torruella, J., concurring in the judgment); *supra* at 5-6. Proper judicial review is essential to ensure that such requests comply with the terms of the treaty.[6] Subpoenas issued pursuant

[6] The "grand jury subpoena" standard of review adopted by the district court below, *see* Pet. App. 73a-75a, falls woefully short of providing the needed protection. The district court posited that MLAT requests and grand jury subpoenas share common objectives and thus should be afforded a common level of judicial deference. Pet. App. at 73a-75a. But the grand jury is afforded a presumption of reasonableness that does not apply to MLAT requests. "The grand jury occupies a unique role in our criminal justice system. It is an investigatory body charged with the responsibility of determining whether or not a crime has been committed." *United States v. R. Enters., Inc.*, 498 U.S. 292, 297 (1991) (internal quotations omitted). Requests for evidence from a grand jury are less constrained than those in connection with a criminal trial because of the important role a grand jury plays both as an investigating body and as a safeguard against unfounded indictments. *United States v. Mechanik*, 475 U.S. 66, 73-74 (1986) (an important task of the grand jury is to "serve the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or dictated by an intimidating power or by malice and personal ill will") (O'Connor, J., concurring) (internal quotations omitted). No similar deference is accorded to a request made by a foreign government, nor would a foreign government be concerned with safeguarding the accused against unwarranted demands. For this reason, a request from a

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to foreign requests should not be immune from review because they are wrapped in the ribbon of a treaty that is itself intended to provide assistance in good-faith investigations.

C. *Judicial Review of Foreign Requests for Conformity with the Terms of MLATs Would Not Impermissibly Encroach upon the Executive's Authority.*

Petitioners have raised bona fide reasons why the United Kingdom's request may not be in compliance with the terms of the US-UK MLAT. *See* Pet. App. 16a n.11; *see also* Pet. App. 41a n.28 (Torruella, J., concurring in the judgment); *supra* at 4-5, 19. In particular, as Judge Torruella observed in his separate concurrence, Petitioners' claim that "the crimes under investigation by the United Kingdom were of 'a political nature'" was well founded:

> That the academic investigations carried out by [Petitioners] in this case, and the evidence sought by the United Kingdom involve "offenses of a political nature" irrespective of how heinous we may

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foreign government must be reviewed by the federal courts with a sufficient level of scrutiny to ensure that these important protections are not being subverted in an effort to comply with an investigatory request from a foreign government that may, or may not, employ similar safeguards prior to making the request. The presence of an MLAT authorizing cooperation with a foreign subpoena request does not reduce a court's independent obligation to ensure that subpoena requests are not used toward unjust ends.

> consider them, is borne out by the terms of the Belfast Agreement (also known as the "Good Friday Agreement") entered into by the Government of the United Kingdom and the Irish Republican Army, whereby almost all prisoners were released by the British government, *including many who had been convicted of murder*.

Pet. App. 41a n.28 (Torruella, J., concurring in the judgment) (citing Karl S. Bottigheirmer & Arthur H. Aughley, *Northern Ireland*, Encyclopedia Britannica (2007)) (emphasis in the original).

The court of appeals refused to review whether the offense underlying the request at issue here — the 1972 abduction and murder of Jean McConville, who was suspected of having been informing the British authorities on the IRA's activities, *see* Pet. App. 3a — was "an offence of a political character" within the meaning of Article 3, paragraph 1(c) of the US-UK MLAT. Pet. App. 16a n.11 ("The federal courts may not review this decision by the Attorney General.").

But federal courts routinely review Executive Branch compliance with political offense exceptions. In the context of extradition treaties, which contain such exceptions, courts have held that the interpretation of political offense exceptions and the application of those exceptions to a particular set of facts fall within the scope of judicial review. *See, e.g.*, *Meza v. Attorney Gen.*, 693 F.3d 1350, 1358–60 (11th Cir. 2012), *petition for cert. filed* (U.S. Oct. 4, 2012) (No. 12-6641); *Ahmad v. Wigen*, 910 F.2d 1063, 1066 (2d Cir. 1990); *Quinn v. Robinson*, 783 F.2d 776, 787–

90 (9th Cir. 1986); *Eain v. Wilkes*, 641 F.2d 504, 513–17 (7th Cir. 1981); *Escobedo v. United States*, 623 F.2d 1098, 1104 (5th Cir. 1980); *Garcia-Guillern v. United States*, 450 F.2d 1189, 1192 (5th Cir. 1971). The decisions rendered in the extradition context are particularly instructive given congressional intent that the Executive look toward that jurisprudence when implementing the US-UK MLAT. *See* S. Exec. Doc. No. 104-23, at 15 ("Paragraph 1(c)(i) [of Article 3 of the US-UK MLAT] permits the Requested Party to deny the request if it relates to a political offense, and paragraph 1(c)(ii) permits denial if the offense is a military offense. These restrictions are similar to those found in other mutual legal assistance treaties. It is anticipated that the Central Authorities will employ jurisprudence similar to that used in the extradition context for the application of these provisions."). [7] Just as in the extradition context, therefore, courts should exercise judicial review of Executive Branch adherence to the political offense exception provision.

Such determinations would not impermissibly encroach upon the Executive's prerogatives. *See Eain*, 641 F.2d at 514–16 (a determination of whether a particular crime constitutes a "political offense" requires courts to simply interpret the treaty and to analyze past facts — functions that the judiciary is

[7] Although the extradition cases arise through writs of habeas corpus and there is express statutory authority for judicial review, *see* 18 U.S.C. § 3184, they nevertheless remain instructive as to federal courts' ability to exercise meaningful judicial review of the Executive's decisions rendered in the context of international law enforcement cooperation.

well-equipped to perform); *Quinn*, 783 F.2d at 787–90 ("We fail to see how the judicial construction of [the political offense exception] and the applicable treaty, and the application of these laws to the facts of a given case, differs from all other judicial decisionmaking.").

The judiciary's involvement in determining whether a particular crime constitutes a "political offense" would be consistent with the language of the US-UK MLAT. Article 3 of the US-UK MLAT provides that "[t]he Central Authority of the Requested Party may refuse assistance if … the request relates to an offence that *is regarded by the Requested Party* as … an offence of a political character." US-UK MLAT, Art. 3 ¶ 1(c)(i) (emphasis added). Thus, the determination of whether a crime constitutes a "political offense" is not committed solely to "the Central Authority," which the MLAT defines as the Attorney General or his designee. *See* US-UK MLAT, Art. 2 ¶ 2. Given congressional expectation that, in executing a request under the MLAT that "requires compulsory process," the Attorney General "would ask a federal court to issue the necessary process under [28 U.S.C. §] 1782," S. Exec. Doc. No. 104-23, at 17, and the fact that Congress looked towards the extradition precedents for guidance, *id.* at 15, the US-UK MLAT can reasonably be construed to involve the federal courts in interpreting and applying the political offense exception provision. *See also* Pet. 34. Allowing "the impartial judiciary — particularly life-tenured Article III judges" — to consider whether the political offense exception applies would "substantially lessen[] the risk that majoritarian consensus or favor due or not due to the country seeking [the enforcement of a

subpoena] will interfere with individual liberty." *Quinn*, 783 F.2d at 789 (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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