Balancing Efficiency and Authority: The Proper Role of Magistrate Judges in Section 1782 Applications for International Discovery

I. Introduction

A key feature of civil litigation in the United States is its adversarial discovery procedures, which enable parties to secure evidence that might have otherwise been unattainable. It is well recognized that American civil procedure "is 'far broader' in scope than in other countries."[1] However, United States discovery rules are not solely limited to domestic lawsuits. Under 28 U.S.C. § 1782, foreign litigants can apply to obtain the United States's liberal discovery practices for the benefit of their trial back home.[2] In essence, § 1782 breaks the boundaries between foreign legal systems and provides a pathway for the international exchange of evidence. Accordingly, the statute has been described as a "powerful strategic advantage" and an "invaluable tool" for overseas litigators.[3]

It is therefore unsurprising that the past several years have seen a dramatic increase in the use of § 1782 applications for international discovery.[4] In fact, a recent empirical study found that the foreign civil demand for United States discovery procedures "approximately *quadrupled*" between 2005 and 2017.[5] In addition to sheer volume, the countries of origin of these applications have increased and diversified,[6] and the requests involve case issues ranging from multi-billion dollar lawsuits to private family law proceedings.[7] More importantly, this study showed that these applications have great success in United States district courts—an approval rate of 91.9%.[8] The increasing international demand for United States discovery assistance combined with the mechanism's high success rate means that § 1782 will continue its huge global impact.

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1. Yanbai Andrea Wang, *Exporting American Discovery*, 87 U. CHI. L. REV. 2089, 2093 (2020).
2. *See* 28 U.S.C. § 1782.
3. Wang, *supra* note 1, at 2093.
4. *See id.* at 2109-12 (documenting in her empirical study the recent surge in § 1782 discovery requests); *see also* Edward F. Maluf et al., *The Expanding Use of 28 USC § 1782*, SEYFARTH (June 7, 2021), https://www.seyfarth.com/news-insights/the-expanding-use-of-28-usc-1782.html.
5. Wang, *supra* note 1, at 2099.
6. *Id.*
7. *Id.* at 2091.
8. *Id.* at 2121.

While § 1782 applications are widely successful and powerful tools in litigation, the statute's use has faced criticism.[9] Inbound discovery applications, meaning § 1782 applications that originate from outside of the United States, allow foreign litigants to effectively bypass their own country's discovery rules and procedures. This thereby raises policy concerns involving reciprocity and the balance of international peace and treaty obligations. Even absent these policy concerns, courts also struggle with § 1782's specifics.[10] For example, the United States Supreme Court recently resolved a circuit court split by holding that international discovery is not available to parties engaged in private arbitration in other countries.[11] This ruling resolved one question, but disagreement between the circuit courts remains prevalent in other areas regarding the correct application of § 1782.[12] The question of proper magistrate judge authority over international discovery requests pursuant to § 1782 is one of these unresolved issues that will soon require an answer.[13]

This Note analyzes the intersection between inbound § 1782 applications for international discovery assistance originating from foreign civil cases and the proper scope of magistrate judge authority. Specifically, this Note shows that rather than having the power to issue binding orders in § 1782 applications, which can only be reversed upon a finding of clear error, magistrate judges should be limited to offering only their record and recommendation for the district judge to review de novo. By examining not only the statutory scheme and constitutionality of magistrate power but also the nature of § 1782 applications compared to other pretrial matters, this Note argues that magistrate rulings on § 1782 foreign discovery requests should be limited to de novo review by a district court because these decisions (1) are functionally case-dispositive and (2) could also be considered an "additional duty" rather than a pretrial matter.

Part II explains the mechanics involved in granting international discovery requests as set forth by federal statute and the factors articulated in *Intel*

9. *See id.* at 2099 (arguing that the grant rate "call[s] into question whether US judges are serving as effective discovery gatekeepers for disputes in foreign tribunals").

10. *See* Maluf et al., *supra* note 4.

11. ZF Auto. US, Inc. v. Luxshare, Ltd., 596 U.S. 619, 638 (2022).

12. *See*, e.g., *In re* Eli Lilly & Co., 580 F. Supp. 3d 334 (E.D. Va. 2022), *aff'd*, 37 F.4th 160 (4th Cir. 2022) (discussing what it means for a foreign party to be "found" in judicial district within the statutory meaning of 28 U.S.C. § 1782).

13. TIMOTHY P. HARKNESS ET AL., FED. JUD. CTR., DISCOVERY IN INTERNATIONAL CIVIL LITIGATION: A GUIDE FOR JUDGES 40 (2015), https://www.fjc.gov/sites/default/files/2015/Discovery%20in%20International%20Civil%20Litigation.pdf.

Corp. v. Advanced Micro Devices, Inc.[14] Part III explains magistrate judge authority, starting with the constitutional differences between magistrate judges and Article III federal judges, then outlines the current scheme through relevant statutes and federal rules. Part III ends with a discussion of the functional approach that courts have used to distinguish between dispositive and nondispositive pretrial matters, as well as a brief overview of how some specific judicial actions have been analyzed under this court-made test. Using statutory language, case law, and parallel issues, Part IV argues that, in light of the statutory scheme and constitutional concerns surrounding magistrate authority, best practice dictates that magistrate decisions in § 1782 applications are dispositive and require a de novo level of review by the district judge upon a party objection. Part IV also addresses the "additional duties" caveat. As one circuit court has flagged, this caveat would require analysis under 28 U.S.C. § 636(b)(3) rather than 28 U.S.C. § 636(b)(1)(A) or (B), and it would also require a de novo level of review by the district judge.

II. The Availability of International Discovery Assistance Under § 1782

As outlined, 28 U.S.C. § 1782 empowers a United States district court to provide discovery assistance to foreign parties.[15] Although § 1782 was enacted by Congress in 1948, it was neither the first nor the last mechanism allowing for the international exchange of evidence. Section 1782 was passed in part to remedy the inefficiency of letters rogatory.[16] Letters rogatory are the traditional method for obtaining foreign discovery assistance, and they involve a prolonged formal request sent from one foreign tribunal to another.[17] The letters rogatory process ensures reciprocity because requests originate from a tribunal,[18] however, it is extremely slow.[19]

Then came § 1782. With this statute, Congress hoped to bring assistance to foreign tribunals and parties and encourage reciprocity between nations.[20] Section 1782 is unique because it enables foreign litigants or "interested persons" to request discovery assistance from a United States federal court directly, without the involvement of any foreign tribunal or intermediary

14. 542 U.S. 241 (2004).

15. *See* 28 U.S.C. § 1782; David Rubinstein, Note, *Judicial Assistance As Intended: Reconciling § 1782's Present Practice with Its Past*, 123 COLUM. L. REV. 513, 514 (2023).

16. *See* Wang, *supra* note 1, at 2102-03.

17. HARKNESS ET AL., *supra* note 13, at 45.

18. *Id.* at 19 n.67.

19. *Id.* at 19.

20. Wang, *supra* note 1, at 2104.

authority.[21] This "dramatic departure" from traditional norms[22] means that foreign reciprocity is not always guaranteed.[23]

In addition to the American methods, Hague Convention letters of request (originating in the 1960s at the Hague Evidence Convention) are another means to the foreign exchange of evidence.[24] Like letters rogatory, letters of request ensure reciprocity because they originate from a foreign judicial authority instead of merely a foreign party.[25] However, the process is also slow and inefficient, and some countries refuse to participate at all.[26]

Regardless of how it got there, once a request makes it to a district judge, it is processed under the statutory scheme set by § 1782.[27] Therefore, § 1782 plays a key role in any request for foreign discovery assistance. An application for international discovery pursuant to § 1782 must satisfy a two-prong test before it is available to overseas litigants.[28] First, the district court must look to the prerequisites within the statute to "determine whether it can order the requested relief—that is, whether it has the authority to do so."[29] Section 1782 provides that:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. . . . The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. . . . The order may prescribe the practice and procedure . . . for taking the testimony or statement or producing the document or other thing.[30]

In other words, a district court has authority to grant discovery assistance when "(1) the person from whom discovery is sought resides or is found

21. *See* 28 U.S.C. § 1782(a).
22. Wang, *supra* note 1, at 2106.
23. HARKNESS ET AL., *supra* note 13, at 48.
24. Wang, *supra* note 1, at 2104.
25. *Id.*; HARKNESS ET AL., *supra* note 13, at 48.
26. Wang, *supra* note 1, at 2105.
27. *Id.* at 2106.
28. Food Delivery Holding 12 S.A.R.L. v. DeWitty & Assocs. CHTD, 538 F. Supp. 3d 21, 26 (D.D.C. 2021).
29. *Id.*
30. 28 U.S.C. § 1782(a).

within the district; (2) the discovery is for use in a proceeding before a foreign or international tribunal; and (3) the application is made by an interested person."[31] Once these statutory elements are satisfied, the district court must move on to the next part of the analysis.

The second prong of the test is discretionary and allows courts to look beyond statutory language and instead consider the underlying policy rationales behind § 1782 applications for international discovery.[32] The practice of providing international discovery assistance reflects "a long-term policy of Congress to facilitate cooperation with foreign countries" and aims to both "provid[e] efficient means of assistance to participants in international litigation in our federal courts and encourage[e] foreign countries by example to provide similar means of assistance to our courts."[33] Accordingly, after satisfying the statute itself, a court then "must decide whether it *should* order the requested relief—that is, whether exercising its discretion to do so would further the statute's" policy goals.[34]

However, many feared that furthering Congress' policy goals under § 1782 could instead undermine international reciprocity by permitting discovery aid in situations which might be offensive to the foreign nation's own legal practices, culture, or traditions.[35] Courts continue to struggle with properly balancing § 1782 discovery aid and comity and parity with other nations.[36]

The Supreme Court provided much-needed guidance on what issues to consider when reviewing an application against policy goals in *Intel Corp. v. Advanced Micro Devices, Inc.* In this case, the Supreme Court held that while foreign litigants could use § 1782 as a mechanism to gain access to evidence that would otherwise be inaccessible, thereby circumventing at-home policies, "a district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so."[37] In other words, due to international reciprocity concerns, district court judges have discretion over providing discovery assistance even after determining that the statutory elements have been satisfied. The Supreme Court then identified four

31. *Food Delivery Holding 12 S.A.R.L.*, 538 F. Supp. 3d at 26.

32. *See id.*

33. *In re* Sadeq, No. 1:21MC6, 2022 WL 825505, at *25 (M.D.N.C. Mar. 18, 2022) (quoting Al Fayed v. United States, 210 F.3d 421, 424 (4th Cir. 2000)).

34. *Food Delivery Holding 12 S.A.R.L.*, 538 F. Supp. 3d at 26.

35. *See* Wang, *supra* note 1, at 2107.

36. *Id.*

37. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 264 (2004).

discretionary factors for district courts to consider when granting § 1782 applications.[38] These include:

> (1) whether the target of the discovery request is a participant in the foreign or international proceeding, (2) the nature of the foreign tribunal and character of its proceedings, (3) whether the application is an attempt to "circumvent foreign proof-gathering restrictions or other policies," and (4) whether the request is "unduly intrusive or burdensome."[39]

These factors allow district courts to grant discovery requests under an international policy lens, ensuring that the original policy goals of Congress are not outweighed by adverse effects on foreign affairs. Only after satisfying both prongs of this test may a court grant a motion under § 1782. Even with the clarification that the Intel Co. case provided, it is still unclear on how magistrate judges should treat § 1782 applications.

III. Magistrate Judge Authority

Magistrate judge authority is similarly riddled with strict rules. This Part will analyze how constitutional concerns regarding magistrate authority impact § 1782's statutory scheme. The legislature addressed these concerns head-on by restricting the decision-making authority of magistrate judges in the Federal Magistrates Act.[40] As a result, magistrate judge authority differs significantly from that of their federal district judge counterparts. These differences are necessary "to ensure that the use of magistrate judges does not violate the Constitution's allocation of the federal judicial power to the Article III judiciary."[41]

A. Federal Magistrates Act of 1968 and Constitutional Concerns

Congress enacted the Federal Magistrates Act (the "Act") in 1968 to "improv[e] the operation of the federal court system and eas[e] burdens on the district courts" by supplying federal courts with magistrate judges to

38. *See id.* at 265.

39. *Food Delivery Holding 12 S.A.R.L.*, 538 F. Supp. 3d at 26 (quoting *In re* Veiga, 746 F. Supp. 2d 8, 17 (D.D.C. 2010)).

40. *See* PETER G. MCCABE, FED. BAR ASS'N, A GUIDE TO THE FEDERAL MAGISTRATE JUDGES SYSTEM 6 (2016).

41. 2 STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY Rule 72 (Feb. 2024 update), Westlaw FRCP-RC RULE 72 ("Magistrate Judges: Pretrial Order").

lighten the caseload.[42] Since the Act's enactment, amendments to the Act have further expanded the role and responsibilities of magistrate judges.[43] From September 2020 to September 2021, magistrate judges handled a total of 263,145 civil pretrial matters pursuant to 28 U.S.C. § 636(b).[44] Assuredly, magistrate judges play an invaluable role in the federal court system.

Although this class of judges can resolve many of the same issues that their district judge colleagues can, magistrate power is significantly more limited in scope. This limited scope arises because these two classes of judges receive their power from different sources. Federal district judges are often referred to as Article III judges because their power originates from Article III of the Constitution.[45] While the Supreme Court is the only court expressly created in Article III of the Constitution, Article III provides Congress the power to establish "inferior Courts" as needed.[46] Almost immediately, Congress utilized this Article III power and established the federal court system through the Judiciary Act of 1789.[47] Now, the federal court system involves thirteen courts of appeals and ninety-four district courts in addition to the Supreme Court.[48]

Article III also provides federal judges with job-related perks, namely, lifetime tenure and undiminished salaries, regardless of whether the judge's court is "superior" or "inferior."[49] The drafters of the Constitution's included these benefits to prevent corruption and encourage independent decision making within the judicial branch.[50] These Article III attributes "are as

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42. 12 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3066 (3d ed. Apr. 2023 update), Westlaw FPP § 3066 ("The Federal Magistrates Act of 1968—History and Purpose").

43. *See id.*

44. *Table M-4A. U.S. District Courts—Civil Pretrial Matters Handled by U.S. Magistrate Judges Under 28 U.S.C. § 636(b) During the 12-Month Period Ending September, 2021 as of November 18, 2021*, U.S. CTS. (Nov. 18, 2021), https://www.uscourts.gov/sites/default/files/data_tables/jb_m4a_0930.2021.pdf.

45. Commentators often refer to district court judges as "Article III Judges." *See* Tim A. Baker, *The Expanding Role of Magistrate Judges in the Federal Courts*, 39 VAL. U. L. REV. 661, 662 (2005).

46. U.S. CONST. art. III, § 1.

47. *Facts About the Judiciary Act of 1789*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/annual-observances/anniversary-federal-court-system (last visited Feb. 17, 2024).

48. *Id.*

49. U.S. CONST. art. III, § 1.

50. *Id.* ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

essential to the independence of the judiciary now as they were when the Constitution was framed" and serve a vital role in promoting the separation of powers between the three branches of government.[51] Article III safeguards also "protect litigants with unpopular or minority causes or litigants who belong to despised or suspect classes."[52] Consequently, federal litigants have a personal right to Article III adjudication and may demand it.[53] Most importantly, however, these constitutionally granted benefits are unique to Article III judges, and the Constitution implicitly commands that only those judges holding Article III powers should make Article III decisions.[54]

Conversely, magistrate judges are not Article III judges.[55] Instead, Congress, through the Federal Magistrate Act, created the magistrate judge position by exercising the power "to constitute tribunals inferior to the supreme Court" under Article I.[56] Thus, "magistrate judges have no inherent Article III powers" and instead "are creatures of statute and have only those powers vested in them by Congress."[57] Magistrate judges are often called Article I judges for this reason.[58] Magistrate judges therefore lack the constitutional safeguards enjoyed by Article III judges. Unlike Article III

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51. Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 541 (9th Cir. 1984).

52. *Id.* at 541 (quoting Palmore v. United States, 411 U.S. 389, 412 (1973) (Douglas, J., dissenting)).

53. *Id.*

54. *See id.* at 540.

55. *See* Ira P. Robbins, *Magistrate Judges, Article III, and the Power to Preside over Federal Prisoner Section 2255 Proceedings*, 2002 FED. CTS. L. REV. 2, at III.A.3 ("[M]agistrate judges are not Article III judges.").

56. U.S. CONST. art. I, § 8, cl. 9; *see What Is a Magistrate Judge*, FED. MAGISTRATE JUDGES ASS'N 1 (2021), https://fmja.org/wp-content/uploads/2021/07/What-is-a-Magistrate-Judge-for-FJMA-webpage.pdf ("Magistrate Judges are appointed by the district courts via congressional action under Article I of the U.S. Constitution."); Treadway v. Otero, 2:19-CV-00244, 2022 WL 17448238, at *2 (S.D. Tex. Dec. 6, 2022) ("[The litigant's] argument that the Constitution does not give court authority to magistrate judges is contrary to United States Constitution Article 1, § 8, which states that the Congress has the power 'to constitute tribunals inferior to the supreme court' and 28 U.S.C. § 631, which is the legislation creating positions for magistrate judges."); Adrienne Arnold, Comment, *Magistrates and Misdemeanors: Examining Magistrate Judges' Petty-Offense Jurisdiction*, 54 HOUS. L. REV. 209, 227 (2016) (referring to magistrate judges as "legislative judges who receive their authority from Article I of the Constitution").

57. Cleversafe, Inc. v. Amplidata, Inc., 287 F.R.D. 424, 425 (N.D. Ill. 2012).

58. *See* Kevin Koller, Note, *Deciphering De Novo Determinations: Must District Courts Review Objections Not Raised Before a Magistrate Judge?*, 111 COLUM. L. REV. 1557, 1564 (2011); *see also* Ruth Dapper, *A Judge by Any Other Name? Mistitling of the United States Magistrate Judge*, 9 FED. CTS. L. REV. no. 2, 2015, at 1, 3.

judges, magistrate judges do not enjoy lifetime tenure or undiminished salaries. Magistrate appointments are restricted in the Act by eight-year term limits, statutory grounds for removal, and minimum requirements for candidacy.[59] The Act also provides that Congress may diminish magistrate judge compensation.[60] Essentially, the Act permits Article III judges to delegate work to Article I judges, who do not possess any constitutional safeguards against undue coercion and threats to independent decision making. This delegation implicates "both the rights of the parties and the relations between the separate branches of the government."[61] Unsurprisingly, the federal courts have grappled with the constitutionality of some magistrate decisions as a result.[62]

Thus, "[d]etermining whether a judicial duty is properly delegable to a magistrate judge requires . . . ask[ing] whether Congress . . . intended for [magistrate judges] to perform the duty in question" and "whether the delegation of this duty to a magistrate judge offends principles of Article III."[63] In other words, magistrate judges may neither act in violation of congressional intent, which is memorialized in the statutory limits of the Federal Magistrates Act, nor act in ways that would encroach on Article III territory. This latter restraint exists because Congress cannot grant magistrate judges more power than what Article III authorizes.[64] The Act therefore balances the promotion of efficiency in the district courts and the preservation of the authority of the federal district judges.

Congress has been careful to stay within the constitutional lines by ensuring that the entire statutory scheme treats the Article III judge as the final arbiter of a case. First, district judges must delegate power to a magistrate judge in order for the magistrate judge to have authority over a particular issue, but even then, the magistrate's power is restricted by statute.[65] Section 636(c) of the Act provides that if all parties consent, a magistrate judge has the authority to "conduct any or all proceedings in a jury

59. 28 U.S.C. § 631.

60. *See id.* § 634(a)-(b).

61. Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 541 (9th Cir. 1984).

62. *See id.*

63. United States v. Dees, 125 F.3d 261, 264 (5th Cir. 1997).

64. *See* Ocelot Oil Corp. v. Sparrow Indus., 847 F.2d 1458, 1463 (10th Cir. 1988) ("The Constitution requires that Article III judges exercise final decisionmaking authority . . . . Section 636 may not be read to confer more power on magistrates than the Constitution permits.").

65. *See id.*

or nonjury civil matter and order the entry of judgment in the case."[66] The magistrate judge may file dispositive final orders in these scenarios.[67] Courts have concluded that consent cures many of the constitutional concerns regarding the delegation of Article III power to non-Article III judges.[68] More specifically, free and voluntary consent of the parties waives any constitutional objections to a magistrate judge's ruling because the right to be heard in an Article III tribunal is a personal right, which is waivable.[69] The Act ensures that a district or magistrate judge properly obtain consent by requiring either judge to notify and inform all the parties of their relevant rights.[70] Further, consent to magistrate authority under § 636(c) does not undermine Article III's focus on the separation of powers because the Act is structured in a way that ensures that the authority of the presiding Article III judge remains.[71] For example, the Act guarantees Article III authority by requiring that appeals to magistrate orders pursuant to § 636(c) be heard in Article III courts,[72] and the Act also provides a mechanism for district courts to vacate magistrate references sua sponte.[73]

Magistrate authority is even more vulnerable to constitutional scrutiny in cases where both parties have not consented pursuant to § 636(c).[74] Therefore, Congress carefully limited magistrate power in these scenarios. Absent consent, the Act provides that a district court may still grant authority to a magistrate judge through referral if the issue involves a "pretrial" matter.[75] Section 636(b)(1) of the United States Code and Rule 72 of the Federal Rules of Civil Procedure are triggered when a pretrial matter is

66. *Id.* § 636(c)(1).

67. *Id.*

68. *See* Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 542 (9th Cir. 1984).

69. *Id.* at 542-43.

70. 28 U.S.C. § 636(c)(2).

71. *Pacemaker Diagnostic Clinic, Inc.*, 725 F.2d at 544-45 ("Article III courts control the magistrate system as a whole. The statutory scheme created by Congress protects against intervention by political branches of government.").

72. 28 U.S.C. § 636(c)(3).

73. *Id.* § 636(c)(4).

74. *Pacemaker Diagnostic Clinic, Inc.*, 725 F.2d at 542.

75. 28 U.S.C. § 636(b)(1); WRIGHT ET AL., *supra* note 42, § 3068.1, Westlaw FPP § 3068.1 ("Magistrate Judge Handling of Matters Other Than Trial—Scope of the Magistrate Judge's Authority—'Pretrial' Matters") ("[T]he term 'pretrial' . . . is not defined anywhere in the statute or the Rule. The legislative history of Section 636(b) reveals . . . that 'pretrial' is meant to include 'a great variety of preliminary motions and matters which can arise in the preliminary processing of either a criminal or a civil case.'"). Therefore, "pretrial" matters encompass a broad category of issues and can sometimes be ambiguous. *Id.*

referred to a magistrate judge in these circumstances.[76] Together, these rules dictate that upon referral, the magistrate judge will have the power to either make a binding determination or provide a recommended disposition, depending on the nature of the pretrial matter at issue.[77] However, in either case, the magistrate judge's decision must be subject to some level of review by the referring district judge.[78] This structure prevents constitutional objections from arising by ensuring that Article III courts retain exclusive control over the magistrate system, while still allowing magistrate judges to provide varying levels of assistance depending on the issue at hand and the needs of the federal courts.

B. Magistrate Authority in Pretrial Matters According to Rule 72 and Section 636(b)(1)

The limited authority of federal magistrate judges in pretrial matters is codified in 28 U.S.C. § 636 and further controlled by Rule 72 of the Federal Rules of Civil Procedure. Despite the existence of these statutory and procedural guidelines, determining proper magistrate power, at least for pretrial matters referred to the magistrate judge without the consent of the parties, can be complicated.

Section 636 grants pretrial authority to magistrate judges in two distinct levels. First, the statute provides that once a matter is referred, a magistrate judge has the power "to hear and determine any pretrial matter pending before the court."[79] The district judge may only reconsider these decisions by a finding that the magistrate judge's order was "clearly erroneous or contrary to law."[80] This low level of review provides magistrate judges with a significant amount of decision-making power in pretrial issues. Essentially, the statute authorizes the magistrate judge to make binding decisions on certain judicial actions.

However, magistrate judges do not have that much power in all their pretrial decisions. Section 636 lists eight types of motions that are exceptions to the general rule for pretrial issues:

> a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a

76. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(a).
77. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b).
78. 28 U.S.C. § 636(b)(1)(C).
79. *Id.* § 636(b)(1)(A).
80. *Id.*

> criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.[81]

When one of these listed exceptions applies, the magistrate judge may only submit to the court their "findings of fact or recommendations for the disposition."[82] In other words, § 636 separates magistrate judge authority into two categories of pretrial matters, findings of fact *or* recommendations for the disposition, each requiring a different level of review by the district judge. However, the statutory distinction between the two categories is not completely clear on its face.

Section 636's procedural counterpart, Rule 72, implements and clarifies the two levels of magistrate power identified in the statute. Rule 72 creates a distinction between "dispositive" and "non-dispositive" pretrial matters.[83] When a pretrial matter is "not dispositive of a party's claim or defense," the magistrate judge may "issue a written order stating the decision."[84] This order is binding unless a party objects within fourteen days after filing.[85] If a party does timely object, then the order may only be set aside if the district judge concludes it was "clearly erroneous or contrary to law."[86] In other words, magistrate orders in nondispositive pretrial issues are independently operative unless timely challenged. This part of the Rule reflects the general rule set out in § 636(b)(1)(A).[87]

When a pretrial matter is "dispositive of a claim or defense," Rule 72 requires that the magistrate judge keep a "record" of the proceedings and "enter a recommended disposition, including, if appropriate, proposed findings of fact."[88] Unlike an order, a magistrate judge's record and recommendation is not effective on its own.[89] Instead, it requires review by the referring district judge regardless of whether a party objected to it.[90] As with nondispositive issues, the parties will have fourteen days to file objections to the magistrate's proposed findings of fact.[91] If there are no

81. *Id.*
82. *Id.* § 636(b)(1)(B).
83. FED. R. CIV. P. 72(a)-(b).
84. *Id.* at 72(a).
85. *Id.*
86. *Id.*
87. *Compare* 28 U.S.C. § 636(b)(1) *with* FED. R. CIV. P. 72(a).
88. FED. R. CIV. P. 72(b)(1).
89. *Id.* at 72(a).
90. *Id.*
91. *Id.* at 72(b)(2).

objections to the magistrate's record and recommendation, then the district judge's review is discretionary.[92] If a party timely objects, the district judge must make a de novo determination of "any part of the magistrate judge's disposition that has been properly objected to."[93] The district judge must use this de novo level of review when deciding whether to "accept, reject, or modify the recommended disposition" or to take further action.[94] This part of the Rule implements the requirements of § 636(b)(1)(B), and it includes the eight exceptions listed in § 636(b)(1)(A).[95]

In sum, the framework established in 28 U.S.C. § 636 and Rule 72 dictates that a district judge must review a magistrate judge's orders in nondispositive issues for clear error if the order is objected to, but if the issue is dispositive, the magistrate judge is limited to providing a record and recommendation, which the district judge must review de novo upon any objections. Together, § 636 and Rule 72 show that the main distinction between the two levels of magistrate authority is whether the pretrial matter is dispositive or nondispositive. This categorization helps prevent magistrate authority from intruding on Article III territory by ensuring that the presiding district judge retains ultimate authority over the issues that matter most.

This framework is helpful but has also created confusion in the courts because not all pretrial matters can be neatly classified as dispositive or nondispositive. Rule 72 broadens the application of de novo review for magistrate decisions because it encompasses *all* dispositive pretrial matters, not simply the eight exceptions listed out in § 636(b)(1)(A).[96] Therefore, under Rule 72, the fact that a judicial function does not appear in the statutory list of dispositive matters does not mean that the issue is nondispositive. Instead, the lack of an exhaustive list from Congress within the rules and statutory scheme necessitates interpretation by the judiciary.[97]

Thus far, "the Supreme Court has identified some judicial functions as dispositive notwithstanding the fact that they do not appear in the list," thereby giving the lower courts a directive to follow in some specific instances.[98] However, the Supreme Court has not offered a uniform test for determining whether a matter not listed in § 636(b)(1)(A) is dispositive or nondispositive. In the absence of an exhaustive list or uniform test, courts

92. *Id.* (advisory committee's note to 1991 amendment).
93. *Id.* at 72(b)(3).
94. *Id.*
95. *Compare* FED. R. CIV. P. 72(b)(3) *with* 28 U.S.C. § 636(b)(1).
96. 28 U.S.C. § 636(b)(1)(A).
97. *See* CPC Patent Techs. PTY Ltd. v. Apple, Inc., 34 F.4th 801, 803-04 (9th Cir. 2022).
98. *Id.* at 807 (citing Flam v. Flam, 788 F.3d 1043, 1046 (9th Cir. 2015)).

must "go beyond the label and consider the impact of the action taken on the case to determine whether [the pretrial issue] is dispositive" or nondispositive in order to identify the proper scope of magistrate authority.[99]

When determining whether a pretrial issue is dispositive or nondispositive, courts must be careful not to exceed the power limits of the Federal Magistrates Act. The distinction between dispositive and nondispositive pretrial matters is important and reflects Congress's constitutional concerns surrounding the implementation of magistrate authority in the federal courts.[100] Congress divided referrals of pretrial issues into two separate categories because it feared that magistrate decisions could be vulnerable to reversal on the grounds that the case should have been decided by an Article III judge.[101] Accordingly, magistrate judges are limited to providing a record and recommendation rather than an order in dispositive pretrial matters to ensure that the district judge is still seen as the ultimate authority in issues where a ruling could terminate a case in its entirety.[102] Thus, "in all pretrial matters the magistrate acts under the direct supervision of the district judge, but in 'dispositive' matters Congress chose to provide a framework for objection and substantial review so as to avoid any constitutional concerns."[103] Therefore, the dispositive or nondispositive distinction is not only important for how the district courts handle an issue, it is also necessary to ensure that a magistrate judge is not given more power over an issue than Congress intended.

C. The Functional Test

Although the Supreme Court has not backed any specific test, all the circuit courts that have spoken to this issue have adopted some version of the functional test to determine whether a pretrial matter is dispositive for the purposes of proper magistrate authority.[104] At present, this list includes the First, Second, Third, Sixth, Seventh, Ninth, and Tenth Circuits.[105] Under the

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99. *In re* Plowiecki, No. CV 21-23, 2021 WL 4973762, at *4 (D. Minn. Oct. 26, 2021) (quoting WRIGHT ET AL., *supra* note 42, § 3068.2, Westlaw FPP § 3068.2).

100. WRIGHT ET AL., *supra* note 42, § 3068.2.

101. *Id.*

102. *Id.*

103. *Id.*

104. *See id.* Rule 72 n.21 ("To determine whether a motion is dispositive, we have adopted a functional approach that looks to the effect of the motion." (quoting Flam v. Flam, 788 F.3d 1043, 1046 (9th Cir. 2015))).

105. *See* Williams v. Beemiller, Inc., 527 F.3d 259, 265 (2d Cir. 2008); Khrapunov v. Prosyankin, 931 F.3d 922, 931 (9th Cir. 2019) (Callahan, J., concurring in the judgment and dissenting); *Flam*, 788 F.3d at 1046.

functional approach, the court must "look to the effect of the motion, in order to determine whether it is properly characterized as 'dispositive of non-dispositive of a claim or defense of a party.'"[106] If the court concludes that the decision "effectively denies 'the ultimate relief sought' by a party or disposes of 'any claims or defenses,'" then the judicial motion is dispositive.[107] In other words, a motion is dispositive if its decision would resolve the main dispute between the parties. Conversely, if the motion disposes of an ancillary issue to a party's underlying claims or defenses, then the matter is nondispositive.[108]

The courts have debated the dispositive nature of many different pretrial matters pursuant to § 636(b) under the functional approach.[109] However, this Note only discusses the pretrial issues that are most analogous to the area of international discovery requests pursuant to § 1782. In doing so, this Note analyzes how the courts have analyzed § 636(b) magistrate referrals in the context of (1) motions to remand, (2) domestic discovery requests and discovery sanctions, and (3) administrative subpoenas and search warrants under the functional approach. Then, in Part IV, this Note compares these pretrial matters to § 1782 applications for international discovery assistance and concludes that § 1782 applications should be considered dispositive pretrial matters under the functional approach.

1. Motions to Remand to State Court

The circuit courts have uniformly agreed that under the functional approach, a motion to remand is a dispositive issue and therefore "a remand order is beyond the power of a magistrate judge to issue."[110] These courts all used the functional test to examine the effects of the motion to remand. However, the courts limited their analysis to effects of the order to remand felt within the federal tribunal alone, rather than focusing on the effects felt by the state court system as well.[111] In other words, "[t]he issue is whether the decision grants or denies the ultimate relief sought *in the federal court*

106. *Flam*, 788 F.3d at 1046 (quoting United States v. Rivera-Guerrero, 377 F.3d 1064, 1068 (9th Cir. 2004)).

107. CPC Patent Techs. PTY Ltd. v. Apple, Inc., 34 F.4th 801, 807 (9th Cir. 2022) (quoting SEC v. CMKM Diamonds, Inc., 729 F.3d 1248, 1260 (9th Cir. 2013)).

108. *In re* DMCA Subpoena to Reddit, Inc., 441 F. Supp. 3d 875, 880 (N.D. Cal. 2020).

109. *See* Williams v. Beemiller, Inc., 527 F.3d 259, 265 (2d Cir. 2008); *Khrapunov*, 931 F.3d at 931; *Flam*, 788 F.3d at 1046.

110. *Flam*, 788 F.3d at 1046-47; *see also* Vogel v. U.S. Off. Prods. Co., 258 F.3d 509, 517 (6th Cir. 2001); First Union Mortg. Corp. v. Smith, 229 F.3d 992, 996 (10th Cir. 2000); *In re* U.S. Healthcare, 159 F.3d 142, 146 (3d Cir. 1998).

111. *Flam*, 788 F.3d at 1047.

proceeding, not whether the decision will dispose of claims or defenses in the underlying proceedings to be litigated elsewhere."[112]

An order for remand sends the case state-side and effectively ends any federal court involvement. Although the entirety of the case remains to be resolved in state court, the circuit courts determined that any of the motion for remand's effects felt in the state court system are immaterial.[113] Only the effects felt in the federal court system itself are relevant to a functional test analysis of pretrial motions. Therefore, the Ninth Circuit in *Flam v. Flam* "held that a motion to remand a case to state court is a dispositive matter under this court's functional test '[b]ecause a . . . remand order is dispositive of all *federal* proceedings in a case.'"[114] Using the same reasoning, the Ninth Circuit also held that "a motion to transfer a case from one federal district court to another is a non-dispositive matter" because unlike with a motion for remand, a transferred case will still be litigated within the federal court system.[115] Therefore, under the functional test, a pretrial motion can be considered dispositive even if does not resolve a case in its entirety or looks to be ancillary from the perspective of an outside tribunal. Most importantly, these holdings show that an analysis of a pretrial motion's effects under the functional test should focus on the federal tribunal alone.

2. Pretrial Discovery Requests and Discovery Sanctions in Domestic Cases

The courts also uniformly agree that pretrial discovery motions—that is, the typical kind of discovery requests that take place in domestic lawsuits—are generally considered nondispositive issues in which a magistrate judge may enter a binding order because rulings on domestic discovery requests are usually not dispositive of any claim or defense.[116] However, this is not always the case. In some instances, a pretrial discovery motion can make or break the outcome of a case. For example, some courts have noted that "the exclusion of certain evidence" like expert witness testimonies can have a

112. *Khrapunov*, 931 F.3d at 933.

113. *See Flam*, 788 F.3d at 1046-47; *Vogel,* 258 F.3d at 517; *First Union Mortg. Corp.,* 229 F.3d at 996; *In re U.S. Healthcare,* 159 F.3d at 145.

114. CPC Patent Techs. PTY Ltd. v. Apple, Inc., 34 F.4th 801, 808 (9th Cir. 2022) (quoting Harmston v. City & Cnty. of San Francisco, 627 F.3d 1273, 1278-79 (9th Cir. 2010)).

115. *Id.*

116. GENSLER, *supra* note 41, Rule 72; *see also* Westefer v. Snyder, 472 F. Supp. 2d 1034, 1036 (S.D. Ill. 2006) ("In general, discovery orders are nondispositive within the meaning of Rule 72(a).").

dispositive effect.[117] In these cases, a magistrate judge may be required to follow the pathway for dispositive issues set out in Rule 72(b) and provide a record and recommendation subject to de novo review.[118] Proper procedure for these exceptions depends on the effect of the discovery motion, so courts must flag and identify these issues on their own. A de novo requirement for dispositive pretrial discovery disputes would deviate from the general rule and require more work on the part of the district courts, it would better ensure that magistrate power does not violate congressional intent.

Exceptions to the general rule for pretrial discovery matters are similarly evident in the area of discovery sanctions under Rule 37 of the Federal Rules of Civil Procedure.[119] The majority of circuit courts have reasoned that although pretrial discovery rulings by magistrate judges are typically considered nondispositive, this does not mean that discovery sanctions are always nondispositive.[120] In one Tenth Circuit case, the court reasoned that "the striking of [the plaintiff's] pleadings with prejudice [as a discovery sanction] means that [the plaintiff] can no longer sue the [defendant]."[121] Therefore, the "sanction ha[d] the effect of dismissing [the] action, contrary to [the plaintiff's] wishes" and constituted an involuntary dismissal under § 636(b)(1)(A).[122] The court then concluded that the motion to strike the plaintiff's pleadings was "beyond the power of a magistrate to order" and that this result avoids constitutional problems because it ensures that the Article III judge exercises the final decision-making authority.[123]

Much like with dispositive discovery decisions mentioned above, proper magistrate authority over pretrial discovery sanctions under Rule 37 depends on the effect of the specific sanction being imposed.[124] If a discovery sanction

117. Jesselson v. Outlet Assocs. of Williamsburg, Ltd. P'ship, 784 F. Supp. 1223, 1228 (E.D. Va. 1991).

118. GENSLER, *supra* note 41, Rule 72.

119. *See* Phinney v. Wentworth Douglas Hosp., 199 F.3d 1, 6 (1st Cir. 1999) (holding that motions for sanctions premised on alleged discovery violations "ordinarily should be classified as nondispositive") ("Withal, we caution that a departure from this general rule may be necessary in those instances in which a magistrate judge aspires to impose a sanction that fully disposes of a claim or defense.").

120. GENSLER, *supra* note 41, Rule 72.

121. Ocelot Oil Corp. v. Sparrow Indus., 847 F.2d 1458, 1462 (10th Cir. 1988).

122. *Id.*

123. *Id.* at 1462-63.

124. What matters here is the categorization of the discovery sanction ultimately implemented by the magistrate judge, not of the discovery sanction that the movant requested. Even if the moving party requested a discovery sanction that would have been dispositive, courts look to the sanction actually imposed in order to determine whether the discovery

has the effect of dismissing a case, then the issue is functionally dispositive and must be treated as such. If the discovery sanction does not terminate the case on the merits, it is not dispositive on any functional metric. The courts' treatment of dispositive discovery issues and discovery sanctions shows that even in cases that seem clear at first blush, the effect, rather than the name, of a pretrial motion is what matters under the functional approach. Therefore, strict general rules, like the one for pretrial discovery requests, are hard to pin down, as the effect of a judicial action changes on a case-by-case basis.

3. Administrative Subpoenas and Administrative Search Warrants

The circuit courts that have adopted the functional test have all concluded that actions to enforce administrative subpoenas are dispositive.[125] Administrative subpoenas are different from normal pretrial document requests because the former involves no related civil action.[126] In an administrative action, the administrative agency itself will resolve the action's merits rather than a federal court.[127] A federal court only becomes relevant to an administrative action when it comes to the review and enforcement of an administrative subpoena.[128] Congress gave administrative agencies the power to demand documents with subpoenas but not the power to compel compliance.[129] That power is reserved for the judiciary.[130] Therefore, in an action to enforce an administrative subpoena, the federal court does not resolve any part of the underlying administrative action on the merits; instead, the court merely gives the administrative agency the means to adjudicate its own issues.

Under the functional approach, "the subpoena is its own civil case" "independent of a complaint or litigation," so an action to enforce an administrative subpoena "is dispositive of the sole issue presented in the

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sanction was dispositive. *See* Gomez v. Martin Marietta Corp., 50 F.3d 1511, 1519 (10th Cir. 1995).

125. *See* CPC Patent Techs. PTY Ltd. v. Apple, Inc., 34 F.4th 801, 808 (9th Cir. 2022); *In re DMCA Subpoena to Reddit, Inc.*, 441 F. Supp. 3d 875, 879 (N.D. Cal. 2020); Khrapunov v. Prosyankin, 931 F.3d 922, 932 (9th Cir. 2019) (Callahan, J., concurring in the judgment and dissenting) (citing Third, Fourth, Fifth, and Eighth Circuit cases holding that "a ruling on a motion to enforce an administrative subpoena is dispositive").

126. *Khrapunov*, 931 F.3d at 932.

127. U.S. DEP'T OF JUST., REPORT TO CONGRESS ON THE USE OF ADMINISTRATIVE SUBPOENA AUTHORITIES BY EXECUTIVE BRANCH AGENCIES AND ENTITIES 6-9 (n.d.), https://stacks.stanford.edu/file/druid:fr519jc1066/rpt_to_congress.pdf.

128. *Id.* at 9-14.

129. *Id.* at 6-9.

130. *Id.* at 9.

case—whether the subpoena should be enforced or not."[131] Therefore, a ruling to enforce an administrative subpoena is dispositive because it resolves the entire matter as it pertains to the federal court.

In *EEOC v. City of Long Branch*, a case that is especially relevant because of its discussion of § 1782 applications, the Third Circuit reaffirmed its previous holding that a motion to enforce an administrative subpoena is a dispositive issue because such a proceeding "is over regardless of which way the court rules."[132] Furthermore, the court reasoned that "[o]nce the court grants or quashes the agency subpoena, it determines with finality the duties of the parties. The district court proceeding is admittedly collateral to the [agency's] pending administrative proceeding, but the question of whether or not to enforce the subpoena is the only matter before the court."[133] Therefore, the Third Circuit concluded that a ruling on a motion to enforce an administrative subpoena is "a final decision which dispose[s] entirely of the [agency's] business before the court."[134] As a result, a ruling to quash a subpoena issued under § 1782 "determines with finality the duties of the parties" in federal court.[135]

In addition to administrative subpoenas, Congress also provided administrative agencies with the power to discover information through an administrative search warrant.[136] Administrative search warrants are just like administrative subpoenas except the agency is requesting that the court enforce a search warrant, not a subpoena.[137] Once the decision to enforce the administrative search warrant is made, the case as it pertains to the federal court is complete.[138]

In *Alcoa v. United States Environmental Protection Agency*, the Fourth Circuit held that administrative search warrants, like administrative subpoenas, are dispositive.[139] In this case, the Fourth Circuit was tasked with determining whether the district court had erred in affirming a magistrate judge's report and recommendation, in which the magistrate denied to quash an ex parte administrative search warrant against Alcoa.[140] The district court

131. *In re* DMCA Subpoena to Reddit, Inc., 441 F. Supp. 3d 875, 880 (N.D. Cal. 2020).

132. 866 F.3d 93, 100 (3d Cir. 2017) (quoting NLRB v. Frazier, 966 F.2d 812, 817 (3d Cir. 1992)).

133. *Frazier*, 966 F.2d at 817-18.

134. *Id.* at 818.

135. *Id.* at 817.

136. *See* 49 U.S.C. § 32707(b)(2).

137. *Frazier*, 966 F.2d at 816-18.

138. *Id.*

139. 663 F.2d 499, 501 (4th Cir. 1981).

140. *Id.*

had reviewed the order under the clearly erroneous standard of § 636(b)(1)(A) instead of the de novo standard required under § 636(b)(1)(C).[141] The parties in this case did not consent to magistrate authority, therefore, the issue was referred to the magistrate judge according to § 636(b)(1)(A), which covers the referral of nondispositive pretrial matters absent consent.[142] The court explained that the standard of review is less stringent for issues that fall under § 636(b)(1)(A) because "the magistrate will not be disposing of the entire case," and nondispositive issues are the kind of pretrial matters for which Congress intended magistrate judges to have decision-making power.[143] Upon review of the district court's decision, the Fourth Circuit stated that although the district court applied a clear error standard of review, the statutory standard for nondispositive pretrial issues, "[t]he magistrate certainly treated [the motion to quash the administrative search warrant] as dispositive."[144] The Fourth Circuit in *Alcoa* ultimately held that the district judge's review for clear error was improper because magistrate decisions on administrative search warrants are dispositive and require de novo review.[145] However, some district courts would not agree.[146]

IV. Proper Magistrate Judge Authority in the Context of § 1782 Applications for International Discovery

Part II explained the two-prong test federal courts utilize to determine if international discovery assistance is proper under 28 U.S.C § 1782. Part III analyzed magistrate judge authority, including the policy reasons behind enacting these Article I judges and how constitutional concerns over judicial authority shaped the rules regarding magistrate power. Under this statutory scheme, unconsented-to magistrate judge authority over pretrial matters depends on whether that matter is dispositive or nondispositive. Part III also discussed the functional approach that courts have utilized to distinguish between dispositive and nondispositive pretrial matters, as well as some analogous examples the circuit courts have agreed on. Part IV now highlights the intersection of the issues discussed in both Part II and Part III.

Part IV first explains magistrate authority over § 1782 discovery requests when all parties have consented to magistrate authority under § 636(c). Then,

141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *See, e.g.*, *In re* Sadeq, No. 1:21MC6, 2022 WL 825505, at *27 (M.D.N.C. Mar. 18, 2022); *In re* Plowiecki, No. CV 21-23, 2021 WL 4973762, at *4 (D. Minn. Oct. 26, 2021).

this Part outlines cases showing the current split regarding proper magistrate authority over § 1782 applications for international discovery under § 636(b) and Rule 72 of the Federal Rules of Civil Procedure. Part IV then argues that, based on these cases, magistrate judge decisions over § 1782 applications are functionally dispositive and should be limited to a record and recommendation. Finally, Part IV also discusses the "additional duties" pathway for magistrate power and how it enforces the conclusion that magistrate decisions in § 1782 applications should be subject to de novo review by a district judge.

A. Consent to Magistrate Authority Pursuant to 28 U.S.C. § 636(c)

The argument between dispositive and nondispositive matters is moot when it comes to magistrate authority under § 636(c). Under this section, a magistrate judge is authorized to issue final orders "upon the consent of the parties" regardless of whether the decision disposes of the entire case or not.[147] Therefore, it may initially appear that, under § 636(c), magistrate judges would be permitted to make binding orders over § 1782 applications, even if that jurisdiction considers these international discovery requests to be dispositive matters. A few courts have referenced this as being the case.[148] But § 636(c) contemplates an adversarial relationship that does not always exist in applications for judicial assistance under § 1782.[149] This is because § 636(c) requires the consent of all parties, and the meaning of all parties in the context of § 1782 applications can be blurry.

147. 28 U.S.C. § 636(c)(1); *see supra* Part III.

148. *See, e.g.*, Gonzalez v. Verfruco Foods, Inc., No. 21-14093-GG, 2022 WL 17228780, at *2 (11th Cir. Mar. 1, 2022) ("Here, the parties did not consent to the magistrate judge proceeding under § 636(c). Instead, the case was referred to the magistrate judge for a ruling . . . under § 636(b)."); CPC Pat. Techs. PTY Ltd. v. Apple, Inc., 34 F.4th 801, 808 (9th Cir. 2022) ("CPC's application for court-ordered discovery pursuant to § 1782 was a dispositive matter. Because both parties did not consent to magistrate judge jurisdiction, the magistrate judge here lacked authority to issue a binding ruling that denied the application."); *In re* Application of Rainsy, No. 16-MC-80258, 2017 WL 528476, at *1 n.1 (N.D. Cal. Feb. 9, 2017) (opinion by a magistrate judge) (granting an ex parte § 1782 application after stating that the applicants declined to consent to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. § 636(c) and that the issue is non-dispositive under 72(a)); Phillips v. Beierwaltes, 466 F.3d 1217, 1221 (10th Cir. 2006) (providing a more in-depth analysis of the issue under 636(c), however, ultimately holding that there was no consent because the parties were not properly notified).

149. 28 U.S.C. § 636(c).

Most significantly, international discovery requests under § 1782 are commonly made on an ex parte basis.[150] In theory, "all parties" could mean the consent of only the applicant, or it could mean the consent of each party in the foreign proceeding back home. It could also include the consent of the U.S. subject from which discovery is being sought. For example, a magistrate judge recently determined that although the applicant requesting discovery assistance under § 1782 had consented to magistrate judge authority pursuant to § 636(c), "the consent was ineffective because 'all parties' did not voluntarily consent, as the correspondent banks from whom [the applicant] seeks discovery have not consented."[151] The magistrate judge then determined magistrate authority according to § 636(b) and Rule 72.[152] Interestingly, this magistrate judge included the applicant and the domestic subjects of the subpoena request in his definition of "all parties" but did not consider the consent of the other party to the originating foreign criminal case, the Latvian prosecutors. Therefore, the meaning of "all parties" pursuant to § 636(c) is far from clear, and magistrate judges should be careful when exercising authority under this section.

Only when all parties consent may the magistrate judge make binding orders over case-dispositive matters.[153] However, courts in prior cases presumably did not utilize this pathway for § 1782 applications because in those cases, the respective parties had not unanimously consented to the procedure in § 636(c).[154] Furthermore, the characterization of § 1782 applications under § 636(b) and Rule 72 will always be important in cases where consent to magistrate authority is not unanimous. As a result, this Note focuses on proper magistrate authority over § 1782 applications for international discovery under the alternate pathways found in § 636(b) and Rule 72.

B. Pre-Circuit Court Split

Appellate-level precedent regarding proper magistrate authority in the context of § 1782 applications is both recent and slim. Although most district

150. *In re* Application Varian Med. Sys. Int'l AG, No. 16-MC-80048, 2016 WL 1161568, at *2 (N.D. Cal. Mar. 24, 2016) ("§ 1782 petitions are regularly reviewed on an *ex parte* basis.").

151. *In re* Ulmans, No. 23-MC-00023(GHW), 2023 WL 3853703, at *2 (S.D.N.Y. Apr. 20, 2023), *report and recommendation adopted* No. 23-MC-00023(GHW), 2023 WL 3412769 (S.D.N.Y. May 12, 2023).

152. *Id.*

153. *See Apple, Inc.*, 34 F.4th at 808.

154. *See* CPC Patent Technologies PTY Ltd. v. Apple, Inc., 34 F.4th 801, 803 n.1 (9th Cir. 2022).

courts agree that these matters are nondispositive,[155] the question is far from definitively answered. This specific issue has not been considered by the Supreme Court, and in the absence of a binding directive, the circuit courts have tackled the intersection of magistrate power and § 1782 applications in many different ways.[156] At present, only two circuit courts have touched on this issue, and only one of those courts has addressed it head-on. Therefore, it is safe to say that the issue of proper magistrate jurisdiction in applications for international discovery will not likely be resolved any time soon.

C. The Ninth Circuit's Approach

The Ninth Circuit, the only circuit court to have directly considered the issue of magistrate power in the context of applications for international discovery, concluded in *CPC Patent Technologies PTY Ltd. v. Apple, Inc.* that these matters are dispositive and that the proper level of review in these cases should be de novo.[157] The suit in this case originated in Germany, but the U.S. federal court system became involved after one of the foreign litigants sought discovery assistance pursuant to § 1782.[158] The magistrate judge assigned to the case declined the request at the district court level, and the foreign applicant then appealed.[159] Here, the Ninth Circuit had to determine whether the district judge acted properly when that judge used a clear error standard to review the magistrate judge's decision and subsequently refused to overturn that decision.[160] To answer this question, the court stated that "the standard of review a district court must apply to the denial of a § 1782 application turns on whether the magistrate judge's decision was dispositive within the meaning of 28 U.S.C. § 636."[161] The court then explained that the Ninth Circuit had adopted the "functional test"

155. The majority view promulgated by the district courts is that decisions over § 1782 applications are nondispositive, so a magistrate judge has the authority to make binding orders. *See* Food Delivery Holding 12 S.A.R.L. v. DeWitty & Assocs. CHTD, 538 F. Supp. 3d 21, 23 n.2 (D.D.C. 2021) ("Since the Court's decision on a Section 1782 application is non-dispositive, it may be decided by a magistrate judge by opinion and order, rather than a report and recommendation to the district court.") (quoting *In re* Application of Shervin Pishevar for an Order to Take Discovery for Use in Foreign Proceedings Pursuant to 28 U.S.C. § 1782, 439 F. Supp. 3d 290, 301 (S.D.N.Y. 2020)).

156. *See infra* Section IV.C.

157. 34 F.4th 801, 810 (9th Cir. 2022).

158. *Id.* at 803.

159. *Id.*

160. *Id.* at 804-05.

161. *Id.* at 806.

to determine whether a pretrial matter is dispositive under § 636(b)(1)(A) and Rule 72.[162]

As stated in Part III, courts using the functional approach must "look[] to the effect of the motion, in order to determine whether it is properly characterized as dispositive or non-dispositive of a claim or defense of a party."[163] With this test, the Ninth Circuit in *CPC* held that the foreign litigant's § 1782 application for discovery assistance "was a dispositive matter because the magistrate judge's order denied the only relief sought by [the applicant] in this federal case: court-ordered discovery."[164] The court reached this decision by comparing § 1782 discovery requests to domestic discovery requests and administrative subpoenas.[165] Although the court did not dispute that pretrial discovery disputes in domestic cases are considered nondispositive across the board, the court stressed that § 1782 applications for foreign discovery come in an entirely different context.[166] The court explained that in magistrate rulings on typical pretrial discovery matters, "the discovery sought is part of an ongoing civil case in that same federal court for monetary damages, injunctive relief, or the like. Conversely, here we deal with a 'freestanding subpoena request' that 'was filed on its own and not in conjunction with' another federal lawsuit."[167] When looking at effect under the functional test, the Ninth Circuit concluded that judgements on applications for discovery assistance pursuant to § 1782 should not be treated the same way as judgements on typical discovery issues that do not involve foreign tribunals or the Federal Magistrates Act.[168]

Instead, the court reasoned that § 1782 requests are more similar to rulings on administrative subpoenas, which the Ninth Circuit and all other circuit courts have previously established are dispositive because there is no related civil case.[169] As with administrative subpoenas, denials of § 1782 requests represent the entirety of the case as relevant to the federal court.[170] The rest of the case takes place entirely outside of the United States court system. The Ninth Circuit held that "our precedents indicate that we must treat CPC's §

162. *Id.* at 807.

163. *Id.*

164. *Id.*

165. *See id.* at 808.

166. *Id.*

167. *Id.* (quoting *In re DMCA Subpoena to Reddit, Inc.*, 441 F. Supp. 3d 875, 879 (N.D. Cal. 2020)).

168. *Id.*

169. Khrapunov v. Prosyankin, 931 F.3d 922, 932 (9th Cir. 2019) (Callahan, J., concurring in the judgment and dissenting).

170. NLRB v. Frazier, 966 F.2d 812, 816-18 (3d Cir. 1992).

1782 application as dispositive of the federal court proceedings, and not as merely ancillary to the contemplated proceedings in Germany."[171] Accordingly, the Ninth Circuit concluded that

> [j]ust as an order denying a § 1782 application for discovery is "final" in the sense of resolving the entire case presented to the federal court, such an order rules on a "dispositive matter" by denying "the ultimate relief sought" in the federal case, namely the issuance of an order to produce documents.[172]

In other words, the Ninth Circuit showed that a ruling on a § 1782 application is functionally identical to that of an administrative subpoena and should be treated as such. The Ninth Circuit then concluded that, as with administrative subpoenas, magistrate decisions over § 1782 applications are functionally dispositive and require de novo review by a district court.[173]

With this conclusion, the court in *CPC* held that the district judge erred in using the clear error standard to review the magistrate judge's decision and that the magistrate judge lacked authority to bind the litigants to the judgement.[174] The Ninth Circuit concluded that for applications for international discovery pursuant to § 1782, magistrate authority should be limited to providing nonbinding recommendations to which the district judge must review de novo upon the objection of a party.[175]

In *Khrapunov v. Prosyankin*, a case that the Ninth Circuit heard only a few years after *CPC*, Judge Callahan's concurring opinion analyzed the proper standard of review over magistrate decisions in the context of § 1782 applications for international discovery.[176] In this case, the district court refused to reverse a magistrate judge's decision to narrow the scope of a subpoena rather than quashing it in its entirety.[177] The subpoena was issued after the magistrate judge granted § 1782 international discovery assistance to a litigant for a lawsuit based in England pursuant to § 1782.[178] Ultimately, the Ninth Circuit's majority opinion resolved the issue by looking at § 1782's statutory requirements instead of delving into magistrate authority head-

171. *Apple, Inc.*, 34 F.4th at 808.
172. *Id.* (citation omitted).
173. *Id.*
174. *Id.*
175. *Id.* at 807.
176. *See* Khrapunov v. Prosyankin, 931 F.3d 922, 933 (9th Cir. 2019) (Callahan, J., concurring in the judgment and dissenting).
177. *Id.* at 924.
178. *Id.*

on.[179] However, one concurring judge, Judge Callahan, and the dissenters chose not to ignore this issue and stated that "a ruling resolving objections to a subpoena issued under § 1782 is dispositive, and thus, absent consent by the parties to a magistrate judge having general jurisdiction, such a matter must be determined de novo by a district court judge."[180] In other words, "magistrate judges are not authorized to decide a motion to quash a subpoena issued under § 1782 because such matters are 'dispositive' within the meaning of the Federal Magistrates Act and Federal Rule of Civil Procedure 72."[181]

To come to this conclusion, Judge Callahan first distinguished § 1782 discovery requests from normal discovery requests, just like the court did in *CPC*.[182] As the Judge Callahan put it, "The ultimate relief sought in a § 1782 application is court-ordered discovery. A decision on whether to quash a subpoena issued under § 1782 necessarily grants or denies 'the ultimate relief sought.' This sets § 1782 applications apart from discovery decisions in ongoing domestic civil or criminal proceedings."[183] Discovery decisions in ongoing civil domestic civil or criminal discovery decisions are "but one step toward the ultimate resolution of the underlying criminal case."[184] On the other hand, "the district court's subpoena order [in a § 1782 proceeding] is the district court's last, or 'final,' order because, critically, the underlying case in a § 1782 appeal necessarily is conducted in a foreign tribunal."[185] It resolves all the controversy before the district court.

Next, Judge Callahan discussed administrative subpoenas. According to Judge Callahan, a ruling on whether to enforce a subpoena and "a ruling on whether to quash a subpoena issued under § 1782" both "'determine[] with finality the duties of the parties' in federal court."[186] The judge noted that the predominant view in the circuit courts is that administrative subpoenas are dispositive.[187] To remain consistent with other circuit courts, Judge Callahan argued that the court must conclude that decisions over § 1782 discovery requests are dispositive too.

179. *Id.* at 926.
180. *Id.* at 927.
181. *Id.* at 930.
182. *Id.* at 927.
183. *Id.* at 932.
184. *Id.*
185. *Id.*
186. *Id.* at 933 (quoting NLRB v. Frazier, 966 F.2d 812, 817 (3d Cir. 1992)).
187. *Id.* at 932-33.

In Judge Callahan's view of the functional test, the prospect of additional litigation after a decision does not necessarily make the matter nondispositive because "that possibility exists in virtually all cases, even after the entry of a final judgment."[188] Therefore, "[t]he possibility that a party may defy the court's order granting or denying the ultimate relief sought is not a basis for concluding that such an order is non-dispositive."[189] As a result, rulings on § 1782 discovery requests are still dispositive even if a party refuses to cooperate with the discovery request. Although Judge Callahan's conclusion does not reflect the majority decision in *Khrapunov* because the majority skipped over the issue of magistrate authority, his opinion is persuasive.

D. The Second Circuit's Approach

The Ninth Circuit is the only circuit court that has directly answered the question of proper magistrate power under § 1782 requests for international discovery assistance. However, the Second Circuit mentioned this issue in *Sampedro v. Silver Point Capital, L.P.*, a case involving a foreign citizen who appealed a magistrate judge's decision to deny reciprocal discovery under § 1782.[190] The Second Circuit held that the district court had not abused its discretion in declining the discovery request.[191] In coming to this conclusion, the court stated in a footnote that "the district court properly reviewed the magistrate judge's order for clear error" pursuant to Rule 72(a), the rule regarding nondispositive pretrial motions.[192] The court further stated in dicta that "the decision about whether to grant reciprocal discovery was nondispositive" and included a quote stating that "[m]atters concerning discovery generally are considered 'nondispositive' of the litigation."[193]

In effect, the court in *Sampedro* likened § 1782 applications for international discovery to domestic discovery issues in order to conclude that magistrate decisions over § 1782 are nondispositive.[194] This reasoning is directly at odds with the holding in *CPC*, in which the Ninth Circuit distinguished § 1782 applications from normal discovery requests to conclude that they are dispositive.[195] Unlike the Ninth Circuit in *CPC*, the

188. *Id.* at 933.
189. *Id.*
190. 958 F.3d 140, 142 (2d Cir. 2020).
191. *Id.* at 145.
192. *Id.* at 142 n.1.
193. *Id.* (quoting Thomas E. Hoar, Inc. v. Sara Lee Corp., 900 F.2d 522, 525 (2d Cir. 1990)).
194. *Id.*
195. CPC Pat. Techs. PTY Ltd. v. Apple, Inc., 34 F.4th 801, 806 (9th Cir. 2022).

Second Circuit in *Sampedro* did not look past the general rule that domestic discovery matters are dispositive, even though the Second Circuit has adopted the functional approach for these issues.[196] If the court had made a more in-depth analysis of § 1782 ruling using the functional test, its holding might have been different. Unfortunately, the court's reasoning in *Sampedro* is bare. However, the conflicting holdings between the Ninth and Second Circuits reflect the lack of uniformity at the appellate level concerning magistrate authority. In the context of magistrate rulings over § 1782 requests, the question of power allocation needs a definitive answer.

E. The District Courts

The majority rule adopted by the district courts is that decisions on international discovery issues pursuant to § 1782 are nondispositive pretrial issues to which magistrate judges may issue binding orders, which can only be reversed for clear error.[197] However, as Judge Callahan noted in *Khrapunov v. Prosyanki*, these district courts "rely on reasoning that doesn't square with our decisions interpreting § 636(b)(1) and Rule 72. Those district court cases, for example, fail to distinguish between § 1782 proceedings and discovery in domestic civil or criminal cases."[198] The district courts also improperly distinguish § 1782 applications from administrative subpoenas and administrative search warrants.[199] Ultimately, the majority rule among the district courts does not accurately depict § 1782 applications under the scope of the functional test. Their collective conclusion that magistrate decisions on international discovery assistance are nondispositive is risky because it ignores the constitutional concerns that necessitated a strict scheme of power allocation in the first place.

Although the Second Circuit did not deeply analyze the issue, district courts have used the *Sampedro* opinion to bolster the argument that § 1782 applications for international discovery are nondispositive pretrial matters. The District Court of Minnesota concluded in *In re Plowiecki* that "a district court should only reverse a magistrate judge's order quashing or limiting a subpoena authorized under 21 U.S.C. § 1782 if the order is clearly erroneous

196. *Sampedro*, 958 F.3d at 142 n.1.

197. *In re* Pons, 614 F. Supp. 3d 1134, 1141 (S.D. Fla. Apr. 13, 2020) ("The great majority of courts to address the issue have found that a magistrate judge has jurisdiction to issue an order on . . . Section 1782 discovery motions.").

198. 931 F.3d 922, 934 (9th Cir. 2019) (Callahan, J., concurring in the judgment and dissenting).

199. *See In re* Sadeq, No. 1:21MC6, 2022 WL 825505, at *27 (M.D.N.C. Mar. 18, 2022); *In re* Plowiecki, No. CV 21-23, 2021 WL 4973762, at *4 (D. Minn. Oct. 26, 2021).

or contrary to law" because "a decision to quash or modify a § 1782 subpoena is nondispositive."[200] To support this holding, the court cited the footnote in *Sampedro* and stated that, prior to *CPC*, "the Second Circuit is the only circuit court to have addressed the proper standard of review, holding that the district court reviews a magistrate judge's order for clear error because discovery orders under § 1782 are nondispositive."[201] This statement certainly supports the court's argument, but the lack of analysis and reasoning in *Sampedro* diminishes its persuasive edge.

Compounding its problematic holding, *the Plowiecki* court went further than the *Sampedro* court and argued that § 1782 discovery requests are non-dispositive by differentiating § 1782 discovery requests from administrative subpoenas.[202] Like the Second Circuit in *Sampedro*, the *Plowiecki* court noted the general rule that a magistrate's order regarding the issuance of a subpoena in a civil matter is generally considered nondispositive and is thus reviewed for clear error.[203] However, unlike the Second Circuit, the Plowiecki court acknowledged that some types of subpoenas are exceptions to the general rule and instead require de novo review.[204] Administrative subpoenas fall into this exception.[205] The court then reasoned that the exception for administrative subpoenas is not analogous to rulings on § 1782 discovery requests because "in the former there is not necessarily a 'related civil action.'"[206] This is true because the administrative action related to the subpoena request takes place within the agency rather than the civil court system.

The court then explained that there is a related civil action in § 1782 discovery requests because, as the statute dictates, "a § 1782 subpoena requires a related proceeding at least 'in reasonable contemplation.'"[207] Therefore, a ruling on a § 1782 subpoena might resolve the entire action in the federal courts of the United States, but it will not resolve the entire related litigation in the courts of the home country. In other words, the judgment on a § 1782 will not resolve the entire related case on the merits. For this reason, the *Plowiecki* court concluded that § 1782 discovery requests are

200. No. 21-23, 2021 WL 4973762, at *3 (D. Minn. Oct. 26, 2021).
201. *Id.*
202. *Id.* at *12.
203. *Id.* at *13.
204. *Id.*
205. *Id.*
206. *Id.* at *5 (quoting EEOC v. Schwan's Home Serv., 707 F. Supp. 2d 980, 989 (D. Minn. 2010), *aff'd*, 644 F.3d 742 (8th Cir)).
207. *Id.* (quoting Intel Corp. v. Advanced Micro Devices, Inc. 542 U.S. 241, 247 (2004)).

distinguishable from administrative subpoenas and fall under the general category of discovery requests in civil proceedings.[208] Therefore, § 1782 magistrate decisions are nondispositive and can only be reversed upon a finding of clear error.[209] The court then held that the magistrate judge's decision to quash the subpoena for the foreign litigant was not clearly erroneous and would not be overturned.[210]

The distinction between international discovery requests and administrative subpoena requests in *Plowiecki* makes no sense under a functional approach. It is true that a magistrate judge's decision to provide international discovery assistance pursuant to § 1782 will not resolve the case back home on the merits. However, neither will a magistrate judge's order to enforce an administrative subpoena resolve the action within the agency.[211] In both situations, the underlying cases take place outside of the federal court system, and the federal court's role will not terminate the portion of the case pending before the foreign tribunal.

As noted, courts are supposed to limit their analysis to the federal courts under the functional approach.[212] Therefore, the *Plowiecki* court correctly ignored the effects of magistrate rulings on administrative subpoenas within the agency to conclude that the ruling is dispositive and resolves the entire issue before the federal court.[213] However, the court did not do the same in its discussion on magistrate rulings on § 1782 requests. Instead, the court improperly focused on the ruling's effect within the foreign tribunal rather than just the federal one, noting that the issue would not be resolved back home. If the district court had kept its analysis consistent, as Judge Callahan recommended in *Khrapunov v. Prosyanki*,[214] it would have likely held that a magistrate decision over a § 1782 international discovery request is dispositive because it resolves the sole issue presented to the federal courts. The procedures of our district courts should not be dictated by outside foreign tribunals we have no control over. If the courts agree that motions to remand are dispositive because the case leaves the federal forum, despite nothing being decided on the merits, then they should also agree on this.

208. *Id.*
209. *Id.*
210. *Id.* at *6.
211. U.S. DEP'T OF JUST., *supra* note 127.
212. *See supra* Section IV.C.
213. *In re Plowiecki*, 2021 WL 4973762, at *5.
214. Khrapunov v. Prosyankin, 931 F.3d 922, 927 (9th Cir. 2019) (Callahan, J., concurring in the judgment and dissenting).

Plowiecki is not the only district court case to conclude that magistrate decisions are nondispositive and should be reviewed for clear error.[215] Through *In re Sadeq*, the District Court for the Middle District of North Carolina also adopted the majority rule, holding that § 1782 applications are nondispositive and require only clear error review.[216] According to the *Sadeq* court, "the Fourth Circuit has not explicitly held that § 1782 applications qualify as matters which magistrate judges may determine, it has repeatedly acted consistently with the majority view that magistrate judges may determine such matters."[217] Like the *Plowiecki* court, the *Sadeq* court emphasized that § 1782 discovery requests are related to an outside tribunal that the federal courts have no control over, and therefore, rulings on § 1782 subpoenas will not resolve the case in its entirety.[218] The court concluded that under clear error review, the magistrate judge had possessed the authority to issue an order granting the application for international-discovery assistance.[219]

The *Sadeq* court went further than the *Plowiecki* court, however, and also added that § 1782 applications are different and distinguishable from ex parte administrative search warrants.[220] The movants in *Sadeq* contended that § 1782 applications should qualify as dispositive based on the "analogous context of an enforcement proceeding for an administrative search warrant."[221] As authority for this argument, the movants pointed to *Alcoa*, the Fourth Circuit case that held that magistrate decisions regarding ex parte administrative search warrants are dispositive and require de novo review by the district judge.[222]

Although the movants' argument was probably a better solution under the functional approach, the district court in *Sadeq* did not agree. Instead, the court distinguished the two issues from one another.[223] The court stated that, as with administrative subpoenas, "there is not necessarily a 'related civil

215. *In re* Plowiecki, 2021 WL 4973762, at *3 ("Most lower courts have held that magistrate judges have authority to quash a § 1782 subpoena, that such decisions are nondispositive, and have reviewed orders from magistrate judges for clear error.").

216. *In re* Sadeq, No. 1:21MC6, 2022 WL 825505, at *27 (M.D.N.C. Mar. 18, 2022).

217. *Id.* at *28.

218. *Id.* at *27.

219. *Id.* at *29.

220. *Id.* at *27.

221. *Id.* at *26 (quoting Memorandum at 27, *Sadeq*, No. 1:21MC6).

222. Alcoa v. U.S. Env't Prot. Agency, 663 F.2d 499, 502 (4th Cir. 1981).

223. *In re Sadeq*, 2022 WL 825505, at *27.

action'" to administrative search warrants.[224] The magistrate's decision regarding an administrative search warrant will resolve the entire case because there is no related case to be concerned with.[225] But there is a related case to consider for international discovery requests, and the magistrate's action will not affect it on the merits.[226] Therefore, the *Sadeq* court concluded that § 1782 requests for foreign discovery aid are nondispositive pretrial motions and can be reviewed for clear error.[227] Again, this interpretation is problematic because it is inconsistent. If the court was consistent when looking at how different pretrial matters functionally affect the federal forum alone, it would conclude that § 1782 applications are dispositive as well. Pretrial matters and § 1782 applications both set forth all the relief requested from the federal court.

In summary, the majority view held by the district courts is not as persuasive as the Ninth Circuit's view in *CPC* because the majority view improperly applies the functional approach. First, the district courts should only consider the federal forum when analyzing functional effect. The district courts also improperly liken § 1782 applications to domestic discovery disputes, which come in an entirely different context according to an accurate use of the functional test. Finally, the district courts improperly distinguish § 1782 applications from administrative subpoenas and administrative search warrants. If the district courts had correctly applied the functional test, they would have concluded that all three of these judicial actions are dispositive to the issue before the federal court.

The majority view of the district courts is also unpersuasive because it ignores important constitutional concerns. As mentioned in Part III, district judges should proceed with caution when a question arises about whether a pretrial issue is dispositive or nondispositive.[228] It is true that the policy behind § 1782 applications encourages efficient discovery assistance to federal forums,[229] however, this does not mean the district judges should disregard constitutional consequences when accepting a lower standard of review for magistrate decisions under § 1782. Congress designed the Federal Magistrates Act with strict limits to ensure that non-Article III judges would

224. *Id.* (quoting *In re* Plowiecki, No. 21-23, 2021 WL 4973762, at *5 (D. Minn. Oct. 26, 2021)).

225. *Id.*

226. *Id.*

227. *Id.* at *27.

228. GENSLER, *supra* note 41, Rule 72.

229. Khrapunov v. Prosyankin, 931 F.3d 922, 927 (9th Cir. 2019) (Callahan, J., concurring in the judgment and dissenting).

not usurp Article III power.[230] Therefore, it is better to require a de novo determination by the district judge in § 1782 cases than to risk violating a litigant's constitutional rights. Congress ultimately intended that magistrate judges should not have binding authority in pretrial matters that are dispositive of the case,[231]so magistrate judges should be limited to giving a record and recommendation to the district judge in issues regarding foreign discovery assistance pursuant to § 1782.

F. The "Additional Duties" Provision of 28 U.S.C. § 636(b)(3)

Although the *Sadeq* court was able to distinguish the holding in *Alcoa* from its own, *Alcoa* still helps to show that § 1782 decisions should be reviewed de novo rather than for clear error. In *Alcoa*, the Fourth Circuit ultimately held that magistrate decisions on administrative search warrants are dispositive issues and require de novo review.[232] The district court should have utilized a de novo standard of review because "[t]he motion was not a 'pretrial matter' but set forth all of the relief requested."[233] According to the court, the magistrate's ruling on the motion to quash the administrative search warrant would have disposed of the entire case, and thus it did not fall into the category of nondispositive issues under § 636(b)(1)(A).[234] Consequently, the district judge should have referred the motion using the alternate pathways set out in § 636(b)(1)(B), which covers dispositive issues, or § 636(b)(3), which covers the referral of issues that are outside the scope of § 636(b)(1) and that are not considered pretrial matters.[235] Unfortunately, both of these statutes require a de novo determination, and the court did not have to decide between the two pathways.[236] The case was remanded for a de novo determination in accordance with the procedures set out in § 636(b)(1)(C).[237]

In contemplating the proper pathway for referral, the *Alcoa* court importantly pointed out that § 636(b)(3) exists as an alternate statutory route for matters that are not considered pretrial within the scope of § 636(b)(1).[238] The court further highlighted the relevancy of this alternate

230. WRIGHT ET AL., *supra* note 42, § 3066.
231. *See* 28 U.S.C. § 636(b); FED. R. CIV. P. 72(b).
232. Alcoa v. U.S. Env't Prot. Agency, 663 F.2d 499, 502 (4th Cir. 1981).
233. *Id.* at 501.
234. *Id.*
235. *Id.* at 501-02.
236. *Id.* at 502.
237. *Id.* at 501.
238. *Id.* at 502 n.8 ("If the reference to the magistrate was under § 637(b)(1)(B), then a *de novo* determination is required by § 636(b)(1)(C). However, no specific standard of review is

pathway, noting that the motion to quash the administrative subpoena "was not a 'pretrial matter'" at all because it "set forth all of the relief requested."[239] The court did not decide which statutory route to take, though.[240] Instead, it acknowledged that some issues that are traditionally considered pretrial matters can also be viewed as freestanding cases on their own.[241] This reasoning is significant, and Article III judges should extend it to magistrate rulings on § 1782 applications.

Section 636(b)(3) is known as the "additional duties" provision of the Federal Magistrates Act because it extends magistrate power to areas outside the scope of both § 636(b)(1), which only encompasses pretrial and trial matters, and § 636(b)(2), which only speaks to designating magistrate judges as special masters.[242] Section 636(b)(3) states that "a magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and the laws of the United States."[243] Congress designed this provision to promote efficiency in the federal courts by granting magistrate authority over experimental duties so long as doing so is not unlawful.[244] Although a strict reading of this text implies that magistrate judges are permitted to perform a broad range of unspecified duties, "the Supreme Court has limited it to 'subsidiary' matters that 'bear some relation to' the duties specified elsewhere in the Act."[245]

This restriction is important because, as with the other rules in § 636(b), the additional duties clause arises in cases where both parties have not consented to a magistrate's authority.[246] Therefore, constitutional issues run rampant.[247] Another important restriction on the statute's power—a restriction that the statute itself expressly contemplates—is the

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listed in the Act for a reference under § 636(b)(3), *but see United States v. Miller*, 609 F.2d 336 (8th Cir. 1979), which indicates that a *de novo* determination is required under § 636(b)(3). Furthermore, given the legislative intent that dispositive motions are to be reviewed by a *de novo* determination, we hold that if a dispositive matter is referred to a magistrate under § 636(b)(3), a *de novo* determination is required.").

239. *Id.* at 501.

240. *Id.* at 502.

241. *Id.*

242. GENSLER, *supra* note 41, Rule 72.

243. 28 U.S.C. § 636(b)(3).

244. WRIGHT ET AL., *supra* note 42, § 3066.

245. GENSLER, *supra* note 41, Rule 72 & n.70 (citing Gomez v. United States, 490 U.S. 858, 864 (1989)).

246. *See id.*

247. *See Gomez*, 490 U.S. at 863.

Constitution.[248] This restriction demands the preservation of the district judge's Article III authority. Nonetheless, the "additional duties" provision still significantly broadens the application of magistrate power.[249] Section 636(b)(3) thereby enables the district courts "to continue innovative experimentation in the use of this judicial office."[250] After all, magistrate judges were meant to lighten the workload throughout the district courts.[251]

Although the Code does not specify a standard of review for magistrate decisions under the "additional duties" caveat, the majority of circuit courts have agreed that a de novo determination is required in these circumstances.[252] A magistrate judge can never make a binding order pursuant to § 636(b)(3) in these courts. These circuits reached this conclusion by looking at the legislative intent behind § 636(b)(3), noting that "it is clear from the legislative history that Congress did not intend the express authorization for magistrates to conduct hearings provided by section 636(b)(1)(B) to preclude their conducting hearings in other contexts."[253] From a statutory interpretation standpoint, if Congress knew to specify that a binding order can be made in § 636(b)(1), then the absence of this instruction in the "additional duties" section indicates that an order is not permitted and that a record and recommendation is the default.[254] Therefore, the magistrate decision must be reviewed by the district judge de novo through the procedure set out in § 636(b)(1)(C). Following that conclusion, the proper level of review under the "additional duties" provision is the exact same as the standard regarding dispositive pretrial matters.

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248. 28 U.S.C. § 636(b)(3).

249. *Id.*

250. WRIGHT ET AL., *supra* note 42, § 3066.

251. *Id.*

252. GENSLER, *supra* note 41, Rule 72 n.71 (quoting Springs v. Ally Fin. Inc., 657 Fed. Appx. 148, 152-53 (4th Cir. 2016); Rajaratnam v. Moyer, 47 F.3d 922, 924 (7th Cir. 1995) ("[An additional duty] referral does not permit the magistrate judge to enter a final decision appealable to this court.")); Massey v. City of Ferndale, 7 F.3d 506, 509 (6th Cir. 1993) ("Matters assigned under this provision are not subject to final determination by a magistrate judge.")); *see also* Alcoa v. U.S. Env't Prot. Agency, 663 F.2d 499, 502 n.8 (4th Cir. 1981); United States v. Miller, 609 F.2d 336, 340 (8th Cir. 1979).

253. *Miller*, 609 F.2d at 339.

254. *See* Russello v. United States, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (alteration in original) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)).

However, the Third Circuit is an outlier on this issue. In contrast to other circuit court decisions, "the Third Circuit has stated that, as with practice under § 636(b)(1), courts should consider whether the matter is functionally dispositive or nondispositive when determining the proper scope of referral and standard of review."[255] Under the Third Circuit's approach, a magistrate referral under the "additional duties" provision would require an extra step in the analysis. If the matter substantively disposes of a case, then the magistrate judge is limited to providing a record and recommendation for the district judge's de novo review.[256] If the matter does not dispose of a claim that is collateral to the main proceeding, then, unlike in any of the other circuits who have explicitly spoken to this issue,[257] the district court should review magistrate decisions for clear error.[258] These two pathways mirror the procedures set out in § 636(b)(1) depending on whether the issue is dispositive.

It is not a stretch to say that § 1782 applications for international discovery assistance could fall into the "additional duties" provision rather than § 636(b)(1) of the Code. Many courts have already concluded that a § 1782 application is more similar to a "freestanding" case "filed on its own and not in conjunction with another federal lawsuit."[259] As the Ninth Circuit concluded in *CPC*, decisions over § 1782 discovery requests ultimately encompass the entirety of the case that exists within the federal court system.[260] Although these courts used this reasoning to argue that magistrate decisions regarding § 1782 applications are dispositive under § 636(b)(1), it could also show that rulings on § 1782 discovery requests constitute standalone cases within the United States. Considering this, it would be difficult to call decisions regarding § 1782 applications "pretrial matters" at all. And if magistrate decisions on § 1782 applications are not pretrial issues but are instead whole cases, then district judges must review magistrate decisions on international discovery requests in accordance with § 636(b)(3).

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255. GENSLER, *supra* note 41, Rule 72.

256. *See* NLRB v. Frazier, 966 F.2d 812, 816 (3d Cir. 1992); State Farm Mut. Auto. Ins. Co. v. Lincow, 792 F. Supp. 2d 806, 808-09 (E.D. Pa. 2011).

257. The Sixth Circuit may be another outlier in this issue, but its comment in *Carter v. Hickory Healthcare Inc.* on the standard of review under § 636(b)(3) is arguably dicta. *Cf.* 905 F.3d 963, 967 (6th Cir. 2018).

258. *Frazier*, 966 F.2d at 816.

259. CPC Pat. Techs. PTY Ltd. v. Apple, Inc., 34 F.4th 801, 808 (9th Cir. 2022) (quoting *In re* DMCA Subpoena to Reddit, Inc., 441 F. Supp. 3d 875, 879 (N.D. Cal. 2020)).

260. *Id.*

Admittedly, the argument that § 1782 applications are not pretrial matters in the context of § 636(b)(1) is not bulletproof. With § 1782 applications, there exists a related, unresolved case back home, and typical domestic discovery requests are considered nondispositive because they relate to a larger, unresolved case. However, the U.S. federal courts have no involvement with the underlying foreign litigation once they grant or deny international discovery assistance. In other words, "[t]he ultimate relief sought in a § 1782 application is court-ordered discovery" and "[a] decision on whether to quash a subpoena issued under § 1782 necessarily grants or denies 'the ultimate relief sought'" in the United States tribunals.[261] As a result, decisions over § 1782 applications are different from normal discovery decisions in ongoing, domestic proceedings. It follows that a ruling on a § 1782 application for international discovery can be viewed as the entire case from start to finish, and therefore, such a ruling is not a pretrial matter at all.

If magistrate decisions over § 1782 applications are not pretrial matters under the Federal Magistrates Act, then the courts have been looking for guidance in all the wrong places. Instead of § 636(b)(1), the courts should rely on § 636(b)(3). This conclusion would not change much of the analysis for the courts that have labeled § 1782 discovery requests as dispositive. In these jurisdictions, the magistrate judge would still be limited to providing a record and recommendation for a district judge's de novo review because the pathway under § 636(b)(1) is the same as under § 636(b)(3). This would mean that the Ninth Circuit got it right in *CPC*, but for all the wrong reasons.

However, in jurisdictions where courts have determined that § 1782 applications are nondispositive, then the choice between applying § 636(b)(1) or § 636(b)(3) would make a real difference. Section 636(b)(1) would allow a magistrate judge to make a binding order that can only be reviewed by a district judge for clear error if a party objects. Contrastingly, § 636(b)(3) would require the district judge's de novo determination over a magistrate judge's record and recommendation at the request of either party. But regardless of the jurisdiction, a district court should not neglect to analyze § 1782 under the "additional duties" section of the Federal Magistrates Act.

261. Khrapunov v. Prosyankin, 931 F.3d 922, 931 (9th Cir. 2019) (Callahan, J., concurring in the judgment and dissenting) (quoting SEC v. CMKM Diamonds, Inc., 729 F.3d 1248, 1260 (9th Cir. 2013)).

V. Conclusion

By enacting foreign discovery assistance through 28 U.S.C. § 1782, Congress allowed the world to come to the United States tribunals for access to information that might otherwise be unavailable.[262] Additionally, a magistrate judge's power under the Federal Magistrates Act to make binding orders in certain cases and nonbinding recommendations in others reflects an important and deliberate move by Congress to prevent magistrate judges from trespassing into Article III territory. Although the difference between the two levels of magistrate authority in § 636(b) might seem inconsequential, it can seriously impact the outcomes of cases all over the globe. Magistrate authority is especially important for international discovery requests because international reciprocity and constitutional boundaries hang in the balance. Therefore, it is important to have guidance on proper magistrate authority over international-discovery requests made pursuant to § 1782.

The best conclusion is that when a party objects to a magistrate judge's ruling on a § 1782 application, the magistrate judge should be limited to providing a record and recommendation for the district judge to review de novo. First, under § 636(b)(1), magistrate decisions over discovery requests made pursuant to § 1782 should be considered case dispositive. An order to grant or deny an international-discovery request effectively terminates the federal courts' involvement in the underlying foreign case entirely.[263] The remainder of the foreign proceeding is left to its originating country.[264] Unlike typical discovery requests in domestic litigations, § 1782 applications are dispositive because they represent the ultimate requested relief. Instead of domestic discovery requests, § 1782 applications are more like administrative subpoenas and ex parte administrative search warrants, which are both considered by the circuit courts to be dispositive matters.[265] Although some district courts have argued otherwise,[266] judgments on all three of these issues would result in a complete grant or denial of the relief being sought. Therefore, magistrate opinions on § 1782 applications are dispositive and thus require a de novo determination by the district court to even become binding at all.

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262. *See* Wang, *supra* note 1, at 2107.
263. *See CPC*, 34 F.4th at 807-08.
264. *See id.*
265. *See In re* Sadeq, No. 1:21MC6, 2022 WL 825505, at *27 (M.D.N.C. Mar. 18, 2022).
266. *See, e.g.*, Carter v. Hickory Healthcare Inc., 905 F.3d 963, 967 (6th Cir. 2018).

Second, the "additional duties" caveat under 28 U.S.C. § 636(b)(3) also reinforces the conclusion that magistrate judges should be limited to providing a record and recommendation for de novo review for § 1782 applications for international discovery.[267] The dispositive versus nondispositive distinction found in § 636(b) and Rule 72 only applies to pretrial issues, however, § 1782 applications make up the entirety of the case in the United States federal court system, and therefore could arguably fall under § 636(b)(3). Issues falling under the "additional duties" catch-all provision must be consistent with the Constitution, and a district judge must review those issues de novo.[268] Therefore, § 636(b)(3) issues require the same level of magistrate authority and review as dispositive pretrial issues under § 636(b) and Rule 72. So not only does the "additional duties" clause dictate that magistrate decisions over § 1782 applications require de novo review by the district judge before becoming operative, but it also ensures that this level of magistrate power is the best bet when considering the dispositive nature of § 1782 applications under § 636(b)(1).

Regardless of which provision of the Federal Magistrates Act the courts ultimately decide is proper for § 1782 applications, limiting a magistrate judge to providing a report and recommendation for de novo review is the safest approach. Allowing magistrate judges to make binding orders that are only reviewed for clear error upon a party's objection might leave magistrate decisions over § 1782 applications vulnerable on appeal. Therefore, the courts should find that § 1782 are dispositive and that the proper level of review for magistrate judge authority is de novo. Ultimately, the dispositive and freestanding nature of § 1782 applications dictates that they are not the kind of issue that Congress intended magistrate judges to have binding authority over. Any conclusion otherwise would not be mindful of the constitutional concerns that led to the imposition of such a strict statutory scheme in the first place.

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267. 28 U.S.C. § 636(b)(3).

268. *See* sources cited *supra* note 252.