No. 21-401

IN THE

Supreme Court of the United States

ZF AUTOMOTIVE US, INC.,
GERALD DEKKER, and CHRISTOPHE MARNAT,

Petitioners,

—v.—

LUXSHARE, LTD.,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether 28 U.S.C. § 1782(a), which authorizes federal district courts to render assistance in gathering evidence "for use in a proceeding in a foreign or international tribunal," encompasses foreign arbitral tribunals.

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Luxshare Ltd. hereby states that it has no parent company and that no publicly held company owns 10% or more of its stock.

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INTRODUCTION

Petitioners seek a writ of certiorari before judgment to address a narrow question of civil procedure—whether 28 U.S.C. § 1782(a), which authorizes federal district courts to render assistance in gathering evidence "for use in a proceeding in a foreign or international tribunal," encompasses foreign *arbitral* tribunals. This Court granted certiorari to resolve that question in *Servotronics v. Rolls-Royce PLC*, No. 20-794, but *Servotronics* was dismissed by stipulation of the parties on mootness grounds before this Court could rule.

This unsettled question concerning the scope of § 1782(a) may support the grant of certiorari when another suitable case is brought to this Court. This is not that case. Neither this case nor the question presented are of such imperative public importance as to satisfy the exacting standard for certiorari before judgment. And this Court's precedents offer no support for Petitioners' novel suggestion that certiorari before judgment should be granted to create a vehicle to resolve the question this Court would have answered in *Servotronics* had that case not been dismissed.

Moreover, this case is a poor vehicle to address the question of whether § 1782(a) applies to foreign arbitral tribunals. A ruling on the question presented may not be dispositive of this case, and may not even be necessary to resolve this case. Petitioners contend that, even if § 1782(a) applies to foreign arbitral tribunals as a general matter, the order compelling § 1782(a) discovery in this case must be vacated for several

case-specific reasons. Thus, a ruling by this Court may not finally resolve this case. And a ruling on the scope of § 1782(a) could be unnecessary here if the court of appeals were to accept any of Petitioners' case-specific arguments. This is not, therefore, a case that warrants skipping over the court of appeals.

This is a poor vehicle for the further reason that this case, like *Servotronics*, is likely to become moot before this Court can rule. To avoid statute-of-limitation issues, the request for arbitration should be filed by December 31, 2021. The arbitral tribunal should render its award within six months of the procedural hearing. Doubtless, Petitioners would oppose any request to extend the six-month deadline to wait for the § 1782(a) discovery, and there can be no guarantee that the arbitral tribunal would grant such an extension. Moreover, due to the expedited process, as a practical matter, Respondent's December 2021 request for arbitration needs—if at all possible—to incorporate the evidence that Respondent seeks through this § 1782(a) proceeding.

Meanwhile, a petition for writ of certiorari was recently filed in another case that presents the question of whether § 1782(a) encompasses foreign arbitral tribunals.[1] According to the petitioner, that other case represents a superior vehicle to address the question presented. Among other factors, the parties to that case have agreed

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[1] *AlixPartners, LLP v. The Fund for Prot. of Inv. Rights in Foreign States*, *pet. for cert. docketed*, No. 21-518 (Oct. 7, 2021).

a stay such that the case is not likely to become moot before this Court can rule.

The petition for writ of certiorari before judgment should be denied.

STATEMENT

I. Statutory Background

28 U.S.C. 1782(a) authorizes a district court to order a person "to give his testimony or statement or to produce a document or other thing for use in a proceeding in a *foreign or international tribunal*, including criminal investigations conducted before formal accusation." 28 U.S.C. § 1782(a) (emphasis added).

In *In re Application to Obtain Discovery for Use in Foreign Proceedings* (*Abdul Latif Jameel Transp. Co. v. FedEx Corp.*), 939 F.3d 710 (6th Cir. 2019), the United States Court of Appeals for the Sixth Circuit performed a thorough analysis of the statutory language and context, and concluded that § 1782(a) encompasses foreign arbitral tribunals. *See id.* at 717–31.

Earlier this year, this Court granted certiorari to resolve a circuit split on the applicability of § 1782(a) to foreign arbitral tribunals, but that case was recently dismissed by stipulation. *Servotronics v. Rolls-Royce PLC*, No. 20-794, *cert. granted*, 141 S. Ct. 1684 (2021), *cert. dismissed*, No. (R46-44 / OT 2020), 2021 WL 4619271 (U.S. Sept. 29, 2021).

II. Factual Background

A. Petitioner ZF US Defrauds Respondent Luxshare

Respondent Luxshare Ltd. is a Hong Kong limited liability company. Dkt. No. 1-5 at 1 (¶ 3).[2] Through its equity investments, Luxshare engages in manufacturing in the areas of consumer electronics, communications, and automotive. *Id*. Petitioner ZF Automotive US Inc. ("ZF US") is a Michigan-based manufacturer of automotive parts. Dkt. No. 1-6 at 2–3 (¶ 6); *see* Pet. at 6. Petitioners Marnat and Dekker are Michigan residents, and, respectively, current and former senior officers of ZF US. Dkt. No. 1-6 at 3 (¶¶ 7–8), No. 1-7 at 3 (¶ 7); *see* Pet. at 6.

In August 2017, Luxshare purchased two business units from ZF US for approximately $1 billion. Dkt. No. 1-5 at 2 (¶ 5). The parties entered into the German law-governed purchase agreement in Germany. *Id.*; Dkt. No. 6-2 (PageID.266) (¶ 20.10.1). The transaction closed in Germany in April 2018. Dkt. No. 1-5 at 6 (¶ 18).

Luxshare subsequently learned that ZF US had concealed material negative developments concerning several of the acquired businesses' largest customers. Dkt. No. 1-5 at 3 (¶ 7), 6 (¶ 19), No. 1-7 at 4–9 (¶¶ 9–22). Petitioners Dekker and Marnat were directly involved in the due diligence

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[2] Citations to "Dkt. No. __" refer to documents filed below *in In re Application for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in Foreign Proceedings*, No. 2:20-mc-51245 (E.D. Mich.). Citations to "CA6 ECF No. __" refers to documents filed in *Luxshare, Ltd. v. ZF Automotive US, Inc.*, No. 21-2736 (6th Cir.). The Appendix to the Petition is cited as "App. __".

process and they were aware of at least some of the undisclosed information. Dkt. No. 1-5 at 8 (¶ 24), No. 1-6 (¶ 9), No. 1-7 at 6 (¶ 17), 8 (¶ 20). ZF US's concealment of material negative information violated the applicable German law and inflated the purchase price paid by Luxshare by hundreds of millions of dollars. Dkt. No. 13-1 at 2 (¶ 3).

B. To Avoid Statute-of-Limitation Issues, Luxshare Should Initiate an Expedited Arbitration Proceeding in Germany by the End of 2021

Pursuant to the purchase agreement, Luxshare's claims must be arbitrated in Munich, Germany, under the fast-track Supplementary Rules for Expedited Proceedings of the Arbitration Rules of the German Institution of Arbitration e.V. (known as the "DIS Rules"). Dkt. No. 1-6 at 6 (¶ 18); *see* Dkt. No. 6-2 (PageID.266) (¶ 20.10.2). Luxshare intends to initiate that arbitration. Dkt. No. 1-6 at 5 (¶ 14), 10 (¶¶ 28–30). To avoid statute-of-limitation issues, the request for arbitration should be filed by December 31, 2021. Dkt. No. 13-2 at 14–15 (¶ 32).

Once Luxshare has filed its request for arbitration and ZF US has answered, the parties are limited to one written submission each, and there will be only one oral hearing. Dkt. No. 1-6 at 7 (¶ 19), No. 13-2 at 13–14 (¶ 29). The tribunal should render its award within six months of the case management conference. Dkt. No. 1-6 at 7 (¶ 19), No. 13-2 at 13–14 (¶ 29). As a practical matter, the expedited process requires that Luxshare's December 2021 request for arbitration—if at all possible—incorporate the

evidence in support of Luxshare's case, including the evidence to be gathered through this § 1782 proceeding. Dkt. No. 13-2 at 13–14 (¶ 29).

III. Procedural Background

A. The District Court Permits Luxshare to Take Limited Discovery for Use Before the German Arbitral Tribunal

In October 2020, the district court authorized Luxshare to issue subpoenas to Petitioners pursuant to 28 U.S.C. § 1782(a), to secure evidence pertaining to ZF US's concealment of material information from Luxshare. App. 20a–21a; *see* Dkt. No. 1-6 (¶ 15). ZF US asserts that Luxshare will not prevail on its claims without the evidence of fraudulent intent that Luxshare seeks through this § 1782 proceeding. Dkt. No. 6-2 (PageID.258) (¶ 18); *see also* Dkt. No. 1-6 at 7 (¶ 19).

In May 2021, a magistrate judge granted in part and denied in part Petitioners' motion to quash the subpoenas. *Id.* at 22a–56a. The magistrate judge weighed the discretionary "factors that bear consideration in ruling on a § 1782(a) request," *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 258, 264–66 (2004), and rejected Petitioners' contention that those factors required the denial of discovery. App. 30a–56a. Instead, the magistrate judge determined that, under the facts and circumstances of this case, the "*Intel*" factors militate in favor of limiting the scope of discovery from that requested. App. 30a–56a. Therefore, Luxshare would be permitted to depose Dekker or Marnat, but not both, and document discovery would be limited in several ways, including through the imposition of a narrowed time frame

and search terms, and by limiting the search to the emails of two custodians and documents held on ZF US's shared drives. App. 49a–56a.[3]

In July 2021, the district court rejected Petitioners' objections to the magistrate judge's ruling. App. 1a–19a. The district court also affirmed the magistrate judge's decision not to stay the proceeding pending this Court's decision in *Servotronics, Inc. v. Rolls-Royce PLC*, No. 20-794, as to whether § 1782 authorizes assistance in gathering evidence for use before a foreign arbitral tribunal. App. 17a–19a. The district court noted, in particular, the imminent expiration of the German limitation period, and the significant limitations the magistrate judge imposed on the scope of the discovery. *Id.*

B. The District Court Compels Petitioners to Comply with the Subpoenas, and Denies a Stay Pending Appeal

Even after the district court declined to quash the § 1782 subpoenas, Petitioners refused to comply with them. Therefore, in July 2021, Luxshare filed a motion to compel, Dkt. No. 31, which the district court granted in August 2021, App. 57a.

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[3] The magistrate judge also rejected Petitioners' argument that § 1782(a) is inapplicable because Luxshare has not yet commenced an arbitration. As the magistrate judge correctly held, § 1782 is satisfied because Luxshare's arbitration is "'*within reasonable contemplation*.'" App. 28a (emphasis in original) (citing *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 258–59 (2004)). Under Federal Rule of Civil Procedure 72(a), Petitioners waived any objection to that ruling by not raising it with the district judge. Dkt. No. 27.

For their part, in July 2021, Petitioners moved for a stay pending appeal, Dkt. No. 30, which the district court denied in August 2021, App. 57a. In doing so, the district court recognized the harm that Luxshare would suffer if it does not receive the requested discovery in time for the expedited arbitration, and aptly determined that "[f]or a multi-billion company like ZF US, the time and money required to produce a limited category of emails and conduct a single deposition is clearly not irreparable harm." App. 64a, 66a–67a.

C. The Court of Appeals Denies Petitioners' Motion for a Stay Pending Appeal

Without waiting for the district court to rule on their motion for a stay pending appeal, in July 2021, Petitioners filed a notice of appeal, Dkt. No. 32, and sought a stay pending appeal from the court of appeals, CA6 ECF No. 8.

Petitioners contend that the district court committed three errors that require reversal, independent of the question of whether § 1782(a) encompasses foreign arbitral tribunals: (1) the district judge applied the wrong standard of review to the magistrate judge's ruling—an issue that, according to Petitioners "may well be outcome-determinative;" and (2) the district court erred in its consideration of two of the *Intel* discretionary factors: (a) the receptivity of the German arbitral tribunal to § 1782 discovery, and (b) whether Luxshare is seeking to evade foreign proof-gathering restrictions. CA6 ECF No. 8 at 16–17; *see also* CA6 ECF No. 19. According to Petitioners, each of these arguments "provides an independent basis" to vacate the grant of § 1782 discovery. CA6 ECF No. 8 at 13–15.

Without waiting for the court of appeals to rule on the motion to stay, in September 2021, Petitioners filed the present petition for a writ of certiorari before judgment.

On October 13, 2021, the court of appeals denied Petitioners' motion to stay pending appeal. CA6 ECF No. 31-2. The court of appeals determined that Petitioners had "failed to show that the minimal and nonconfidential discovery here would constitute irreparable harm," and that they also had "not shown the requisite likelihood of success on the merits of [their] appeal." *Id.* at 3.

REASONS FOR DENYING THE PETITION

I. This Case Does Not Present the Kind of Extraordinary Circumstances that Could Warrant Certiorari Before Judgment

A. Whether 28 U.S.C. § 1782(a) Encompasses Foreign Arbitral Tribunals Is Not a Question of Imperative Public Importance Requiring Immediate Determination in this Court

This Court grants certiorari before judgment "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." S. Ct. R. 11. This is a "very demanding standard." *Mount Soledad Mem'l Ass'n v. Trunk*, 573 U.S. 954, 954 (2014) (Alito, J., respecting denial of certiorari before judgment); *see also Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (grant of certiorari before judgment is an "extremely rare occurrence") (Rehnquist, J., in chambers).

Thus, certiorari before judgment has been granted in cases that are of "great constitutional significance" or that have "extraordinary national importance for other reasons." S. Shapiro, *et al.*, *Supreme Court Practice* § 4.20 (11th ed. 2019, online) (collecting cases). But even then, "the public interest in a speedy determination" must be sufficiently "exceptional" to "warrant skipping the court of appeals in this fashion." *Id.*[4] Certiorari before judgment was therefore granted to address a time-sensitive constitutional and statutory challenge to the 2020 census questionnaire, *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2565 (2019), a constitutional challenge to the federal sentencing guidelines that had caused "disarray among the Federal District Courts," *Mistretta v. United States*, 488 U.S. 361, 371 (1989), a dispute that threatened to cause the United States to violate the executive agreement that ended the Iranian hostage crisis, *Dames & Moore v. Regan*, 453 U.S. 654, 660 (1981), and challenges to President Nixon's refusal to turn over the Watergate tapes to a federal grand jury, *United States v. Nixon*, 418 U.S. 683, 686–87 (1974), and to President Truman's wartime seizure of the national steel industry, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584 (1952).

This case and the civil-procedure question it presents cannot hold their own alongside the

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[4] These cases have been classified into three broad categories: constitutional challenges to federal statutes; foreign policy cases; and cases implicating the institutional authority of the federal government. *See* James Lindgren & William P. Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 Sup. Ct. Rev. 259, 288–95 (1986).

kinds of extraordinary cases in which this Court has granted certiorari before judgment. Indeed, certiorari before judgment has been denied in much more significant cases than this, including cases concerning restrictions on military service by transgender individuals, *Trump v. Stockman*, 139 S. Ct. 946 (2019), state-law non-recognition of same-sex marriages, *Robicheaux v. George*, 574 U.S. 1108 (2015), and the Affordable Care Act's individual mandate, *Virginia, ex rel Cuccinelli v. Sebelius*, 567 U.S. 951 (2012).

To be sure, the question of whether § 1782(a) encompasses foreign arbitral tribunals was sufficiently important to warrant a grant of certiorari under Rule 10 in *Servotronics v. Rolls-Royce PLC*, No. 20-794, *cert. granted*, 141 S. Ct. 1684 (2021). But—contrary to Petitioners' assertion, Pet. at 18—it does not follow that that issue or this case is sufficiently extraordinary to warrant certiorari before judgment under Rule 11, or that this case is an appropriate vehicle to review the issue. Illustrating the significantly higher standard applicable to certiorari before judgment, there are numerous examples of this Court denying certiorari before judgment, and later granting certiorari after a decision by the court of appeals.[5]

Petitioners' arguments about the need to resolve the circuit split on the question of whether § 1782(a) encompasses foreign arbitral tribunals, Pet. at 13–16, may support the grant of certiorari after judgment when this Court is presented

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[5] *See The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals, supra*, at 289 n.159 (collecting cases).

another suitable vehicle. For the reasons articulated below, this is not that case.

B. Certiorari Before Judgment Should Not Be Granted to Facilitate Review of the Question Presented in the Now-Dismissed *Servotronics* Case

No basis exists for Petitioners' novel argument that this Court should grant certiorari before judgment so that this case can serve as a vehicle to answer the question that *Servotronics* presented before it was dismissed. Pet. at 16–19. The parties in *Servotronics* recently stipulated to dismissal under Rule 46, apparently because the arbitration had ended, rendering the case moot. *Servotronics*, No. 20-794, *cert. dismissed*, No. (R46-44 / OT 2020), 2021 WL 4619271 (U.S. Sept. 29, 2021); *see* Pet. at 16.

Petitioners are not assisted by their reference to "eleven examples" over the last eighty-five years in which this Court has granted certiorari before judgment "'when a similar or identical question of constitutional or other importance was before the Court in another case,'" and where granting review in a second case would facilitate review of the question presented in the first case. Pet. at 19 (quoting *Supreme Court Practice*, *supra*, ¶ 4.20). None of those examples involved a grant of certiorari before judgment to permit review of a question presented in a prior case that had been dismissed. In particular, and contrary to Petitioners' theory, Pet. at 19, this Court granted certiorari before judgment in *Porter v. Dicken*, 328 U.S. 252 (1946), not because the first case, *Porter v. Lee*, 328 U.S. 246 (1946), was moot, but rather "by reason of the close relationship of the

important question raised to the question presented in [*Lee*]." *Dicken*, 328 U.S. at 254.[6]

Moreover, even if *Servotronics* were still pending, the examples that Petitioners reference do not support the issuance of a writ of certiorari here. Most of those examples involved cases that formed part of a single overarching controversy, arising from a single event or course of conduct, or involving the same or overlapping parties.[7] In at

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[6] *Porter v. Lee*, 328 U.S. 246 (1946), and *Porter v. Dicken*, 328 U.S. 252 (1946), involved cases brought by the same petitioner, the Price Administrator, to vindicate his powers under the Emergency Price Control Act. *Id.* at 253; *Lee*, 328 U.S. at 249.

[7] S*ee New Haven Inclusion Cases*, 399 U.S. 392, 398, 413–18 (1970) (two cases presenting related issues arising from the same railroad merger); *McCulloch v. Sociedad Nacional de Marineros de Hond.*, 372 U.S. 10, 12 & n.1 (1963) (two cases challenging related NLRB determinations); *Hannah v. Larche*, 363 U.S. 420, 421–22 & n.3 (1960) (two cases challenging the conduct of the Commission on Civil Rights in Louisiana); *McElroy v. U.S. ex rel. Guagliardo*, 361 U.S. 281, 307 (1960) (two cases challenging the armed forces' application of the Uniform Code of Military Justice to civilian employees); *Reid v. Covert*, 354 U.S. 1, 3–5 (1957) (two cases challenging the armed forces' application of the Uniform Code of Military Justice to the spouses of service members); *Graham v. Goodcell*, 282 U.S. 409 (1931) (several taxpayer cases pressing the same argument against the Internal Revenue Service); *Johnson v. U.S. Shipping Bd. Emergency Fleet Corp.*, 280 U.S. 320, 322–25 (1930) (three cases presenting the applicability of the Suits in Admiralty Act to vessels owned by the United States); *White v. Mechs.' Sec. Corp.*, 269 U.S. 283, 298–99 (1925) (several cases challenging the availability of funds held by the U.S. government to satisfy debts of the Imperial German government). The last three examples also pre-date the 1954 addition of the "imperative public importance" requirement to the predecessor of Rule

least two of those instances, certiorari before judgment was granted because the first case was a direct appeal from a three-judge district court under 28 U.S.C. § 1253, and therefore arrived in this Court while the second, related case was in the court of appeals.[8] These examples offer no support for Petitioners' request for certiorari before judgment to take up this case that—save for the legal question presented—has nothing do with any other case before this Court.

In the remaining examples, the "second" case, Pet. at 19, would independently satisfy Rule 11's strict standard by raising urgent constitutional questions of imperative public importance, such as the permissibility of imposing an enhanced sentence based on facts not found by a jury or admitted by the defendant, *United States v. Booker*, 543 U.S. 220, 229 (2005), the use of racial preferences in college admissions, *Gratz v. Bollinger*, 539 U.S. 244, 259–60 (2003), and the obstruction of minority voter registration, *United States v. Thomas*, 361 U.S. 950, 950 (1960). These examples offer no support for Petitioners' request for certiorari before judgment to review the important but undeniably esoteric question of civil procedure presented here.

II. This Case Is a Poor Vehicle to Address the Question Presented

Even if the demanding Rule 11 standard were otherwise satisfied, certiorari before judgment

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11. S. Ct. R. 20, 346 U.S. 968 (adopted April 12, 1954, effective July 1, 1954).

[8] *See New Haven Inclusion Cases*, 399 U.S. at 418; *Hannah*, 363 U.S. at 422 & n.3.

should still be denied because this case is a poor vehicle to address the question of whether 28 U.S.C. § 1782(a) encompasses foreign arbitration tribunals. *First*, Petitioners have told the court of appeals that the district court's order must be vacated even if § 1782(a) encompasses foreign arbitral tribunals. If that is correct, a ruling on the question presented will not be dispositive of the present case. And if the court of appeals reverses the district court's order on other grounds, there may be no need in this case for a definitive ruling on the question presented. *Second*, as in *Servotronics*, this case is likely to become moot before this Court can rule on the question presented.

A. A Ruling on the Question Presented May Not Be Dispositive of this Case, and May Not Even Be Necessary

This case is a poor vehicle to address the question presented because, contrary to Petitioners' assertion, it does not "cleanly present[] the same pure legal question presented in *Servotronics*." Pet. at 16.

Petitioners contend that the district court committed three errors, each of which they say "provides an independent basis" to vacate the order granting § 1782 discovery *even if § 1782(a) encompasses foreign arbitral tribunals*: (1) the district court applied the wrong standard of review to the magistrate judge's ruling—an issue that, according to Petitioners "may well be outcome-determinative;" and (2) the district court misapplied two of the *Intel* discretionary factors when it considered: (a) the receptivity of the German arbitral tribunal to § 1782 discovery, and

(b) whether Luxshare is seeking to evade foreign proof-gathering restrictions. CA6 ECF No. 8 at 13–17; *see also* CA6 ECF No. 19.

Under these circumstances, a ruling on the question presented may turn out to be advisory, and unnecessary to the adjudication of the present case. If this Court grants certiorari before judgment and rules that § 1782(a) encompasses private arbitral tribunals, Petitioners would press their "independent" case-specific arguments on remand. If the court of appeals accepts any of those arguments, the applicability of § 1782(a) to foreign arbitral tribunals will be academic in the present case. Granting certiorari here would therefore represent the antithesis of the "efficient assistance" that Congress intended § 1782 to facilitate. *In re Application to Obtain Discovery for Use in Foreign Proceedings* (*Abdul Latif Jameel Transp. Co. v. FedEx Corp.*), 939 F.3d 710, 730 (6th Cir. 2019).

If, on the other hand, this Court denies certiorari before judgment and the court of appeals reverses based on Petitioners' "independent" case-specific arguments, then, again, whether § 1782(a) encompasses foreign arbitral tribunals will be academic here. In short, this is not a case that "warrant[s] skipping the court of appeals" through a grant of certiorari before judgment. *Supreme Court Practice, supra,* § 4.20.

Moreover, although there is no reason for the court of appeals to revisit its well-reasoned and correct 2019 holding that § 1782(a) encompasses foreign arbitral tribunals, *Abdul Latif Jameel Transp. Co.*, 939 F.3d 710, Petitioners could

request en banc review, pointing to the proliferation of intervening appellate rulings on the issue. *See Fund for Prot. of Inv. Rts. in Foreign States Pursuant to 28 U.S.C. § 1782 for Ord. Granting Leave to Obtain Discovery for Use in Foreign Proceeding v. AlixPartners, LLP,* 5 F.4th 216 (2d Cir. 2021), *pet. for cert. docketed*, No. 21-518 (Oct. 5, 2021); *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689 (7th Cir. 2020); *In Re Guo*, 965 F.3d 96 (2d Cir. 2020); *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209 (4th Cir. 2020). And the question of whether § 1782(a) encompasses foreign arbitral tribunals is presented by two further cases that have been briefed, argued, and submitted to the Third and Ninth Circuits. *See In re EWE Gasspeicher GmbH*, No. 20-1830 (3d Cir.); *HRC-Hainan Holding Co. v. Yihan Hu*, Case No. 20-15371 (9th Cir.). In the event Petitioners persuaded the court of appeals to change course on the question presented, there would be no need for them to seek certiorari.

B. Like *Servotronics*, this Case Is Likely to Be Moot Before this Court Can Decide the Question Presented

This case is a poor vehicle to review the question presented for the additional reason that it is likely—as in *Servotronics*—to become moot before this Court can decided the question presented.

To avoid statute-of-limitation issues, the request for arbitration should be filed by December 31, 2021. *Supra* at 5–6. Once Luxshare has filed its request for arbitration and ZF US has answered, the parties are limited to one written submission each, and there will be only one oral

hearing. *Supra* at 5. Given the expedited process, as a practical matter Luxshare needs—if at all possible—to incorporate the discovery sought under § 1782(a) into its December 2021 filing. *Supra* at 5–6. The arbitrators should render their award within six months of the procedural hearing. *Supra* at 6. Doubtless, Petitioners would oppose any request to extend the six-month deadline to wait for the § 1782(a) discovery, and there can be no guarantee that the arbitral tribunal would grant such an extension. Therefore, it is not likely that this Court will be able to render a decision on the question presented in time for the § 1782 discovery to be used before the arbitral tribunal, especially given that Petitioners would seek on remand to press their "independent" arguments for vacatur of the order compelling discovery.

ZF US cannot avoid mootness by making shifting suggestions about a potential willingness to toll the German limitation period. ZF US has repeatedly represented that it would be "happy" to enter into a formal tolling stipulation, Dkt. No. 36 at 13 n.6; CA6 ECF No. 20 at 7, but it has never proffered such an instrument, signed by ZF US or by a person with authority. To the contrary, it has offered only statements from counsel, in which the hypothetical waiver becomes more and more limited and conditional with each retelling. It began as a commitment to "toll the statute of limitations on any claims that Luxshare is purporting to bring in the foreign arbitration related to the parties' agreement" through the resolution of proceedings in the court of appeals, but apparently did not extend to proceedings before this Court. Dkt. No. 30 at 3, 16. That

commitment was soon further conditioned upon the court of appeals granting a stay. CA6 ECF No. 20 at 7, 9–10. Most recently, the hypothetical tolling would apply only "until four months after any stay of discovery entered by the Sixth Circuit or this Court expires." Pet. at 17. Luxshare cannot risk losing claims worth hundreds of millions of dollars on statute-of-limitation grounds based on these insubstantial, ever-changing statements. As such, Luxshare intends to initiate the arbitration by December 31, 2021.

Meanwhile, other cases that are pending in or that have recently been resolved by the courts of appeals may present this Court one or more appropriate vehicles to decide the question presented. *Supra* at 17. In particular, a petition for writ of certiorari was recently filed in *AlixPartners, LLP v. The Fund for Protection of Investor Rights in Foreign States*, *pet. for cert. docketed*, No. 21-518 (Oct. 7, 2021), raising the question of whether § 1782(a) applies to arbitral tribunals.[9] The parties in *AlixPartners* have entered into a stipulation that obviates the mootness risk that caused the dismissal of *Servotronics* and that very likely will afflict the present case. *See AlixPartners* Pet. at 22–23. Moreover, the *AlixPartners* case arises from an investor-state arbitration. *Id.* at 2. The United States has expressed "particular concern" about

[9] This Court recently denied certiorari before judgment when—as here—another case presented the same questions in the context of an ordinary post-judgment petition for writ of certiorari. *See Pro-Football, Inc. v. Blackhorse*, 137 S. Ct. 44 (2016) (denying certiorari before judgment); *Lee v. Tam*, 137 S. Ct. 30 (2016) (granting certiorari).

the application of § 1782(a) to investor-state arbitral tribunals. *Servotronics,* Br. for the United States as *Amicus Curiae* Supporting Respondents at 15 (June 28, 2021). Granting certiorari in *AlixPartners* will afford this Court the opportunity to address the applicability of § 1782(a) to foreign arbitral tribunals and to address any additional considerations presented by investor-state arbitrations, all with the benefit of the Second Circuit's ruling.

* * *

Finally, there is no reason for this Court to hold this case in the event it grants certiorari in *AlixPartners*. The present case should proceed in the ordinary course before the court of appeals, where Petitioners can press, at a minimum, their "independent" arguments for reversal. *Supra* at 8. If this case remains live when the court of appeals disposes of the appeal, and the question of whether § 1782(a) encompasses foreign arbitral tribunals remains relevant in this case and unresolved by this Court, the losing party can then file a petition for a writ of certiorari to resolve that question.

CONCLUSION

The petition for writ of certiorari before judgment should be denied.

Respectfully submitted,

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