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

REPLY BRIEF FOR THE PETITIONERS

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On October 27, this Court granted petitioners' request for a stay of the district court's discovery order pending the Court's decision on whether to grant certiorari. *ZF Automotive US, Inc. v. Luxshare, Ltd.*, No. 21A80 (Oct. 27, 2021). That decision necessarily rested in part on the Court's conclusion that there was—at a minimum—a "reasonable probability" that the Court would grant review, and a "fair prospect" that the Court would reverse the judgment below. *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). That conclusion was correct: The Section 1782 question presented is important; it has given rise to an entrenched circuit split; the Court granted certiorari to resolve that split in *Servotronics, Inc. v. Rolls-Royce PLC*, No. 20-794; and this case presents an ideal vehicle for resolving the issue now that *Servotronics* has been dismissed. The Court should grant certiorari to determine the meaning of Section 1782, once and for all.

Luxshare's opposition does not seriously deny the need for this Court to address the Section 1782 issue and eliminate the rampant confusion in the lower courts. Instead, Luxshare raises a series of arguments for why this case is the wrong vehicle for doing so. But events since Luxshare filed its opposition have refuted each of its asserted case-specific grounds for denying review.

First, both parties have now told the Sixth Circuit that it should go ahead and enter judgment for Luxshare, without any need for further briefing or argument. Petitioners made that request because binding Sixth Circuit precedent forecloses their argument that a private arbitration is not a "foreign

or international tribunal" under Section 1782. Luxshare's point that this case is currently in a certiorari-before-judgment posture therefore carries little weight: The Sixth Circuit is certain to affirm the district court's decision, in line with circuit precedent. And petitioners' summary affirmance motion affirmatively abandons various alternative grounds for reversal that Luxshare cited as creating a vehicle problem.

Second, this Court's decision to stay the discovery order—and ZF US's unconditional commitments not to use this Court's grant of certiorari to prejudice Luxshare's rights in the forthcoming arbitration—conclusively establish that this case will *not* become moot if the Court grants review. Since Luxshare filed its opposition, ZF US has unconditionally waived its right to invoke the statute of limitations while this Court considers petitioners' case. As a result, there is no need for Luxshare to file its German arbitration proceeding by the end of 2021. And even if Luxshare does file by then, ZF US has also irrevocably committed to waiving the six-month decision deadline, such that Luxshare will be able to take advantage of any favorable ruling from this Court upholding its right to discovery. Either way, the arbitration proceeding will not conclude before this Court resolves the Section 1782 issue. This case will not become moot.

In short, the case is perfectly teed up for the Court to finish the work it began in *Servotronics*. Certiorari should be granted.

A. Luxshare Does Not Deny That The Section 1782 Issue Warrants Review

Luxshare has never disputed the existence of a circuit split over whether foreign private arbitrations are Section 1782 "tribunals" potentially triggering discovery obligations under that statute. Nor could it, given that the Court granted certiorari on that exact question in *Servotronics*. Whereas the Sixth and Fourth Circuits have held that private arbitration proceedings can be "foreign or international tribunal[s]" for which discovery may be sought under Section 1782, the Second, Fifth, and Seventh Circuits have held that such proceedings are not Section 1782 tribunals. *See* Pet. 13-14 (collecting cases). That split will only deepen without this Court's intervention.

Nor does Luxshare dispute that the Section 1782 issue is sufficiently important to warrant this Court's attention. That is for good reason: This Court already granted certiorari on that same issue in *Servotronics* last spring. Nothing has changed since then.

Luxshare dismissively refers to the Section 1782 issue as an "esoteric question of civil procedure." Opp. 14. But that characterization ignores its obvious and wide-ranging importance to the many, many entities engaging in foreign arbitration every year. The question whether Section 1782 encompasses private arbitration is recurring, has a direct impact on the evidence available to parties in countless foreign arbitrations, and even deters entities from agreeing to arbitrate their disputes in the first place. Pet. 13-16. There is a reason that a host of top-flight amici—including the United States, the Chamber of Commerce, the International Court of Arbitration of the International Chamber of Commerce, the

Institute of International Bankers, and a number of academics—filed briefs in *Servotronics*. The Section 1782 question has major significance and requires this Court's urgent attention.

Notably, Luxshare's opposition does not even try to contest petitioners' argument that private arbitrations are *not* "foreign or international tribunal[s]" under Section 1782. *See* Pet. 19-23 (discussing merits). As petitioners have explained, Section 1782's text and structure, as well as contemporary usage and policy concerns, all support the views of the Second, Fifth, and Seventh Circuits that foreign private arbitrations are not Section 1782 tribunals. *Id.* at 19-24. Luxshare does not address any of that. Nor does Luxshare acknowledge the persuasive amicus briefing of the United States in *Servotronics*, which not only set forth the compelling statutory arguments for petitioners' construction of Section 1782, but also emphasized that the opposite interpretation would "create significant tension between [Section 1782] and the" Federal Arbitration Act. *Servotronics* United States Amicus Br. 14-15 (June 28, 2021).

For all these reasons—none seriously disputed—the Court should still want to resolve the Section 1782 issue that it planned to address in *Servotronics*.

B. Luxshare's Vehicle Arguments Fail

Instead of arguing that the Section 1782 issue is inherently unworthy of review, Luxshare advances a series of arguments for why this case is a poor vehicle for addressing these issues. Luxshare raised all of these arguments when opposing petitioners' request for a stay—and this Court properly rejected them. None of the arguments holds water, and they are

plainly refuted by developments ever since Luxshare filed its opposition brief three weeks ago.

1. Luxshare's primary argument in opposing review is that this case does not meet the Court's standards for a writ of certiorari *before judgment*. Opp. 9-14. But on October 14, petitioner moved the Sixth Circuit to summarily affirm the district court's order against them, based on that Court's erroneous—but binding—precedent in *Abdul Latif Jameel Transp. Co. v. FedEx Corp.* (*In re Application to Obtain Discovery for Use in Foreign Proceedings)* ("*Abdul Latif*"), 939 F.3d 710, 730 (6th Cir. 2019). *See* CA6 ECF No. 32. And Luxshare has confirmed to the Sixth Circuit that it believes summary affirmance is appropriate. *See* CA6 ECF No. 33 at 4 ("Luxshare does not oppose entry of summary affirmance in its favor.").

Both parties to this case thus now *agree* that the Sixth Circuit appeal is effectively over, and that the court should now enter judgment in Luxshare's favor. Given that agreement, there is no reason for the Sixth Circuit to delay entering judgment. And there is no mystery as to what that judgment will say: The Section 1782 issue has been foreclosed in the Sixth Circuit since the beginning of this litigation. This case accordingly offers a clean vehicle for review.

In any event, this case would be certworthy even without a Sixth Circuit judgment, as petitioners have already explained. Pet. 13-19. After all, this case came to the Court two days after the *Servotronics* parties indicated that their case was likely to be dismissed, and this Court has previously granted certiorari before judgment "when a similar or identical question of constitutional or other importance was before the Court in another case," and

when granting review in the second case would facilitate review of the question presented. Stephen M. Shapiro et al., *Supreme Court Practice* § 4.20 (11th ed. 2019, online) (citing examples). In at least one case, the Court appears to have granted certiorari before judgment to protect against the possibility that an earlier-granted case presenting the same issue could be moot. *See Porter v. Dicken*, 328 U.S. 252, 254 (1946) (discussed at Appl. 19).[1] And here, waiting for the Sixth Circuit to rule would be pointless, given that *Abdul Latif* mandates a ruling in Luxshare's favor.

Luxshare is certainly correct that this Court rarely grants certiorari before judgment. But to our knowledge, there has never been a case in which (1) the Court previously granted review of a case presenting precisely the same issue; (2) that case was unexpectedly dismissed; and (3) there is no doubt how the court of appeals will rule in the later case giving rise to the certiorari petition, given the agreement of both parties that binding circuit precedent requires affirmance of the district court's ruling. These

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[1] Luxshare argues that the grant of certiorari before judgment in *Dicken* was based on the "close relationship of the important question raised to the question presented in [*Porter v. Lee*, 328 U.S. 246 (1946)]." Opp. 12-13 (alteration in original) (citation omitted). But this case presents precisely the *same* important question raised in *Servotronics*, rendering Luxshare's purported distinction from *Dicken* and *Lee* meaningless. Just as with *Dicken* and *Lee*, certiorari before judgment is appropriate here as a backstop for the possibility (and now the reality) that *Servotronics* is moot. *See* Opp. 17 & n.8, *Windsor v. United States,* No. 12-63 (Aug. 31, 2012), 2012 WL 3838176 (describing *Dicken* as involving a grant of certiorari before judgment motivated by mootness concerns).

unusual circumstances strongly support discretionary review here.

2. Luxshare's opposition also claimed that this case was a poor vehicle because petitioners had raised alternative grounds to prevail in the Sixth Circuit, based on the district court's misapplication of the discretionary factors governing Section 1782 discovery set forth in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004). *See* Opp. 15-17. But petitioners' motion for summary affirmance in the Sixth Circuit definitively abandoned those arguments. *See* CA6 ECF No. 32 at 3 n.1. They are no longer an impediment to review (if they ever were).[2]

3. Luxshare's opposition further argued that this case might become moot because arbitration proceedings might conclude before the Court is able to render a decision. Opp. 17-19. That objection lacks merit: This Court's decision to stay the discovery order—and petitioners' unconditional commitments not to use a grant of certiorari to prejudice Luxshare's rights in the forthcoming arbitration—have now conclusively established that this case will *not* become moot.

By granting a stay of the district court's order, this Court has ensured that the discovery dispute will

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[2] Petitioners abandoned their discretionary-factors arguments after the Sixth Circuit concluded—when rejecting their stay request—that those arguments were unlikely to succeed on the merits. CA6 ECF No. 31-2 at 3. In light of that ruling, petitioners reluctantly chose to abandon those arguments in order to make this case an even cleaner vehicle for the Court's review of the core *Servotronics* question. *See* Appl. 12; Appl. Reply 12-13.

remain live until the Section 1782 issue is resolved in this case. Luxshare's opposition argued that the case would nonetheless become moot because Luxshare would file its arbitration before December 31, 2021, purportedly to avoid expiration of the statute of limitations. Opp. 17-19. That argument warrants no credence, because (1) ZF US has irrevocably and unconditionally committed that it will *not* invoke the statute of limitations before this Court resolves the dispute, and (2) the discovery dispute will *not* become moot even if Luxshare carries out its threat to needlessly file by the end of the year.

In opposing the stay, Luxshare challenged the validity of ZF US's unilateral commitment not to invoke the statute of limitations because it was conditional on the Court's grant of a stay. Stay Opp. 33. In response to those arguments, ZF US submitted two formal declarations from Michael J. Way, a corporate officer, irrevocably committing that ZF US would not invoke the statute of limitations if a stay is granted, until at least four months after proceedings in this Court conclude. *See* Appl. Ex. F ¶ 8; Appl. Reply Ex. 2 ¶¶ 4, 6. Those commitments were valid, legitimate, and enforceable under German law, as petitioners have explained. *See* Appl. 31 & n.6; Appl. Reply Ex. 1 (Baus Decl.).

Nonetheless, ZF US also indicated that if the Court granted the stay, it would subsequently execute an additional *unconditional* declaration to the same effect. Appl. Reply Ex. 1 ¶ 6. And ZF US has now carried through on that promise. On November 1—three business days after the stay was granted—Mr. Way executed and delivered to Luxshare an additional declaration unconditionally stating that

> ZF US will not invoke the three-year statute of limitations governing the claims giving rise to this discovery dispute until four months after the Supreme Court resolves the case. This unilateral commitment is unconditional and irrevocable ("*unbedingter, unwiderruflicher befristeter Verzicht auf die Einrede der Verjährung*" under the applicable German law).

Notably, Luxshare's counsel approved this language before Mr. Way executed the new declaration. As a result, it is fully clear that Luxshare no longer has any need to file the German arbitration by the end of 2021. There is accordingly no reason to believe that Luxshare will file its arbitration before this Court resolves the Section 1782 issue in this case.

Even if Luxshare inexplicably disregarded both this Court's stay and petitioners' tolling commitment, and insisted on filing it arbitration before December 31, this case would *still* not become moot. Luxshare's opposition to certiorari suggested otherwise based on the Supplementary German Arbitration Institute ("DIS") Rules on Expedited Proceedings, under which arbitral panels are generally instructed to make final awards within six months after an initial case management conference. *See* Opp. 17-18; Appl. Reply Ex. 1.B at 44. But once again, Luxshare is mistaken.

The express premise of Luxshare's argument is that if the arbitration is filed by December 31, petitioners would insist on sticking to the six-month timeline in an effort to prejudice Luxshare's right to obtain discovery. *See* Opp. 18 ("Doubtless, Petitioners would oppose any request to extend the six-month deadline to wait for the § 1782(a) discovery . . . .").

But as Mr. Way unambiguously committed in his October 22, 2021 declaration to this Court, if Luxshare nonetheless files its arbitration by December 31, 2021, ZF US will *itself* "ask the arbitral panel to extend the six month target deadline for rendering a decision, for whatever reasonable amount of time the arbitral panel believes is necessary" to allow Luxshare to obtain and use any discovery this Court determines it should receive. Appl. Reply Ex. 2 ¶¶ 8-9. DIS Rules authorize the arbitral panel to take account of the parties' timing preferences and extend the timeline for decision when good reasons exist for doing so—as they surely would here.[3]

In short, whether Luxshare chooses to take advantage of petitioners' tolling commitment or instead chooses to file early, the arbitration proceeding will not conclude before this Court resolves the Section 1782 issue. Mootness is not a problem.

4. Finally, Luxshare asserts that review is not warranted because of the recently filed petition for certiorari in *AlixPartners, LLP v. Fund for Protection of Investor Rights in Foreign States*, No. 21-518 (docketed Oct. 7, 2021). Opp. 19. But as petitioners previously explained, that is wrong. *AlixPartners* does not squarely present the Section 1782 issue raised by this case and will not necessarily resolve the

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[3] Notably, Luxshare does not contend that the arbitral panel *must* issue an order within six months, or lacks authority to extend that timeline—particularly where, as here, both parties would endorse such an extension. On the contrary, Article 5 of the Rules is emphatic that the timeline is ultimately aspirational and subject to the panel's discretion. *See* Appl. Reply Ex. 1.B at 44; *see also* Appl. Reply 11 (discussing DIS rules).

existing circuit split giving rise to *Servotronics*. *See* Appl. 20 n.3; Appl. Reply 15-16.

The issue in this case—as in *Servotronics*—is whether Section 1782 applies to foreign *private* arbitrations. *AlixPartners* is different: It concerns whether Section 1782 applies to an arbitration between an investor and a *foreign state* "that takes place before an arbitral panel *established by a bilateral investment treaty to which that foreign State is a party*." *In re Application of the Fund for Prot. of Investor Rights in Foreign States v. AlixPartners, LLP*, 5 F.4th 216, 220, 224, 228 (2d Cir. 2021) (emphasis added); *see AlixPartners* Pet. 4-6.

That difference matters. The circuit split that gave rise to *Servotronics*—and that petitioners assert here—involves whether Section 1782 applies to purely *private* arbitrations. Moreover, the statutory analysis might produce different results depending on the type of arbitration in question. For example, the Second Circuit has held that Section 1782 authorizes discovery in the investor-state arbitration at issue in *AlixPartners*, but *not* in the purely private arbitration at issue here (and in *Servotronics*). *See AlixPartners*, 5 F.4th at 220, 224, 228.

These differences make clear that *AlixPartners* and this case are not interchangeable. Most importantly, nothing would require this Court to resolve the private-party issue if it grants certiorari in *AlixPartners*. Indeed, if this Court agrees with the Second Circuit's approach, the circuit split that prompted the certiorari grant in *Servotronics*—and that is squarely implicated by this case—will remain unresolved.

Accordingly, this Court should grant review here in order to address the circuit split that it planned to resolve in *Servotronics*. It can then either hold *AlixPartners* pending a decision in this case, or alternatively grant *AlixPartners* (if it wishes to review the distinct question of the status of investor-state arbitrations). Either way, certiorari is appropriate here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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