No.

In the Supreme Court of the United States

ARAB BANK, PLC,

Petitioner,

v.

COURTNEY LINDE, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

These suits under the Anti-Terrorism Act (ATA) and Alien Tort Statute (ATS) seek hundreds of millions of dollars in damages from Jordan's leading financial institution for providing banking services to charities and individuals allegedly affiliated with terrorist organizations operating in the Middle East. In discovery, Arab Bank produced some 200,000 bank records but was unable to produce others because foreign authorities told the Bank that production would violate their financial privacy laws and subject the Bank to criminal prosecution. The district court sanctioned Arab Bank for its refusal to breach these foreign criminal laws, authorizing the jury to infer that the Bank knowingly and purposefully supported terrorist acts and precluding it from introducing evidence to refute that inference—even though the Bank's state of mind is central to this case and it took great care to ensure that it did no business with terrorists. Over protests of Jordan, Lebanon, and the Palestinian Authority, the Second Circuit refused to vacate these draconian sanctions. And it failed to address the Bank's contention that the ATS claims of foreign plaintiffs must be dismissed for lack of jurisdiction. The questions presented are:

1. Whether the Second Circuit erred when, in conflict with decisions of this Court and other circuits and in disregard of international comity and due process, it failed to vacate severe sanctions for non-production of records located in countries where production would subject the Bank to criminal penalties, hobbling the Bank's defense.

2. Whether the courts below erred by failing to dismiss plaintiffs' ATS claims, as the Second Circuit's and this Court's decisions in *Kiobel* require.

RULES 14.1(b) AND 29.6 STATEMENTS

Petitioner Arab Bank, plc, a Jordanian corporation, has no parent corporation and no publicly held corporation owns 10% or more of its stock.

In this case, 11 suits have been consolidated for purposes of pre-trial proceedings. These cases are:

Litle, et al. v. *Arab Bank, PLC*, No. CV 04-5449 (E.D.N.Y. 2004); *Coulter, et al.* v. *Arab Bank, PLC*, No. CV 05-365 (E.D.N.Y. 2005); *Almog* v. *Arab Bank, PLC*, No. CV 04-5564 (E.D.N.Y. 2004); *Afriat-Kurtzer* v. *Arab Bank, PLC*, No. CV 05-388 (E.D.N.Y. 2005); *Bennett, et al.* v. *Arab Bank, PLC*, No. CV 05-3183 (E.D.N.Y. 2005); *Roth, et al.* v. *Arab Bank, PLC*, No. CV 05-3738 (E.D.N.Y. 2005); *Weiss, et al.* v. *Arab Bank, PLC*, No. CV 06-1623 (E.D.N.Y. 2006); *Jesner, et al.* v. *Arab Bank, PLC*, No. CV 06-3689 (E.D.N.Y.); *Lev, et al.* v. *Arab Bank, PLC*, No. CV 08-3251 (E.D.N.Y. 2008); and *Agurenko* v. *Arab Bank, PLC*, No. CV 10-626 (E.D.N.Y. 2010).

There are 6,596 individual plaintiffs in these suits—6,093 of whom are Alien Tort Statute plaintiffs who are foreign citizens or residents. These plaintiffs, respondents here, are identified in a letter that has been filed with the Clerk.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Arab Bank respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit's opinion rejecting Arab Bank's petition for mandamus and collateral order appeal (App., *infra*, 1a-54a) appears at 706 F.3d 92. Its order denying rehearing (App., *infra*, 224a) is unpublished. The district court's order imposing sanctions (App., *infra*, 55a-91a) is published at 269 F.R.D. 186, and its order denying reconsideration (App., *infra*, 91a-99a) at 269 F.R.D. 205. The district court's order denying leave to take a Section 1292(b) appeal (App., *infra*, 100a-101a) is unpublished. The district court's order refusing to dismiss the ATS claims in *Almog* is published at 471 F. Supp. 2d 257 (App., *infra*, 138a-213a), and in *Lev* (App., *infra*, 214a-223a) is unpublished.

JURISDICTION

The Second Circuit entered judgment on January 18, 2013. Arab Bank's timely petition for rehearing en banc was denied on March 26, 2013. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Relevant statutes and rules appear at App., *infra*, 298a-313a.

STATEMENT

Arab Bank petitioned the Second Circuit for mandamus to set aside extraordinary discovery sanctions that destroy any prospect that the central financial institution of an important United States al-

ly will obtain a fair trial, undermine public policies of three foreign governments, and threaten the privacy rights of tens of thousands of bank customers. The court of appeals erroneously denied relief. This Court often has granted certiorari to reverse denial of mandamus when important procedural issues are at stake. *E.g.*, *United States* v. *Jicarilla Apache Nation*, 131 S. Ct. 2313, 2320 (2011); *Cheney* v. *U.S. Dist. Ct.*, 542 U.S. 367 (2004); *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964); *Beacon Theatres* v. *Westover*, 359 U.S. 500, 501, 511 (1959) (reversing denial of mandamus and vacating discretionary ruling that infringed procedural rights). It should grant certiorari and hold that mandamus and collateral order review are warranted to prevent serious harms that cannot be remedied after the trial that will commence in coming months.

The vast majority of the 6,500 claimants seeking hundreds of millions of dollars in damages in these 11 lawsuits are foreign citizens or residents who are victims or family members of victims of terrorist attacks in the Middle East. Plaintiffs allege that Arab Bank, a leading Jordanian financial institution, violated the ATA (as to U.S. plaintiffs) and the ATS (as to foreign plaintiffs) by providing banking services to charities and individuals allegedly affiliated with Palestinian terrorist organizations. Plaintiffs allege that the Bank maintained accounts and transferred funds for individuals and charities (many of which received funding from the U.S. government) that turned out to be "fronts" for terrorist organizations. Plaintiffs also allege that the Bank administered payments from a Saudi Arabian government-created charity to family members of persons killed or imprisoned during the Israeli-Palestinian conflict. These banking services, plaintiffs claim—though routine

in character and screened in compliance with local laws and procedures designed to detect suspicious transactions—allowed terrorists "'to flourish and to engage in a campaign of terror.'" App., *infra*, 6a.

It is undisputed that plaintiffs, in order to prevail, must prove not only that Arab Bank's services proximately caused plaintiffs' injuries, but also that *the Bank knew of and intended that result*. App., *infra*, 59a; see, *e.g.*, 18 U.S.C. § 2339A(a). Accordingly, the Bank's knowledge and intent "lie at the core of [its] ATA and ATS liability." App., *infra*, 17a.

Nevertheless, the district court imposed discovery sanctions under Fed. R. Civ. P. 37(b) that eliminate plaintiffs' burden of proving the Bank's culpable state of mind and preclude the Bank from explaining its legitimate actions to the jury. The sole reason for these draconian sanctions was the Bank's inability to produce the complete account files of tens of thousands of its customers because their disclosure is barred by the financial privacy laws of Jordan, Lebanon, and the Palestinian Territories, where the documents are located. The Bank made every effort to obtain permission to disclose the requested information, resulting in the production of 200,000 documents otherwise subject to financial privacy laws. Nothing in those documents suggests that the documents barred from disclosure would show that the Bank knowingly and purposefully supported terrorism. Yet the district court ordered that "the jury will be instructed" that

- "based on defendant's failure to produce documents," the jury may "infer" that the Bank provided financial services to terrorists;

- the Bank "distributed payments on behalf of the Saudi Committee to terrorists"; and
- the Bank "did these acts knowingly and purposefully." App., *infra*, 91a.
- In addition, the Bank "is precluded from making any argument or offering any evidence regarding its state of mind or other issue that would find proof or refutation in withheld documents." *Ibid.*
- Beyond this, the Bank cannot attempt to prove that it "had no knowledge a certain bank customer was not a terrorist if it did not produce that person's complete account records" or submit any evidence that "the withheld documents could disprove." *Id.* at 88a.
- Finally, the Bank is barred from even telling the jury that its failure to produce was required by foreign criminal law. *Id.* at 106a.

These severe sanctions, which the Second Circuit refused to vacate, gag the Bank on the critical state-of-mind issue as a penalty for obedience to foreign criminal law. They violate important principles of international comity and fundamental precepts of due process. In these circumstances—which are exacerbated by the district court's subsequent elimination of the direct causation requirement, prohibition of testimony that would confirm that the Bank's conduct was innocent, and consolidation of 24 separate terrorist incidents for mass trial—the proceedings will be reduced to a virtual show trial.

In this case to be tried before a Brooklyn jury, the Second Circuit acknowledged, "the[se] sanctions are substantial" and mean that Arab Bank will "have

difficulty avoiding liability." App., *infra*, 30a, 48a. A verdict that the Bank knowingly supported terrorists is capable of disabling any bank, given "the stigma of being labeled a supporter of terror" (*id.* at 2a) and the dependence of all banks on the willingness of correspondent banks to do business with them. And the sanctions do so notwithstanding the conclusion of Judge Weinstein in a substantially identical case that the same "evidence does not prove that the Bank acted with an improper state of mind or proximately caused plaintiff's injury." *Gill* v. *Arab Bank*, 893 F. Supp. 2d 542, 547 (E.D.N.Y. 2012).

This dispute has serious foreign relations implications, evidenced by filings of three governments in the courts below, in which U.S. ally Jordan protested that the sanctions "severely infring[e]" its sovereignty and "punish Arab Bank for not violating Jordanian law." App., *infra*, 229a. There has been an "exponential increase" in similar clashes between foreign laws and U.S. discovery demands, as the American Bar Association recently reported in calling for greater respect for foreign privacy laws. ABA Resolution and Report 103 (Feb. 6, 2012). The decisions below guarantee that these conflicts will multiply by offering a template by which plaintiffs can sue *any* foreign bank, demand documents that cannot lawfully be disclosed, and exploit that inability by demanding outcome-determinative sanctions.

Fifty-five years ago this Court held in *Société Internationale* v. *Rogers*, 357 U.S. 197, 211-212 (1958), that "inability to comply" with U.S. discovery rules "because of foreign law" is a "weighty" reason for not producing requested documents. Since then, the Court has placed heightened emphasis on international comity in cases like *Morrison* v. *Nat'l Austral-*

ia Bank, 130 S. Ct. 2869 (2010), and *Kiobel* v. *Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013). By granting review here, the Court can harmonize *Rogers* with more recent comity jurisprudence and resolve circuit conflicts over the propriety of draconian sanctions when foreign criminal law forbids disclosure, as well as conflicts over the applicability of mandamus in this context.

This massive case, in which the injury the sanctions cause, the requirements of foreign law, and the views of foreign governments are all clear, and in which trial is imminent, provides an ideal vehicle to address these important issues. Mandamus is especially appropriate for these sorts of "particularly injurious" and "consequential" errors that work "a manifest injustice." *Mohawk Indus.* v. *Carpenter*, 558 U.S. 100, 110-111 (2009); *id.* at 118-119 (Thomas, J., concurring).

Furthermore, this Court definitively held in *Kiobel* that there is no cause of action under the ATS for violations of the law of nations that occur in the territory of a foreign sovereign. The Bank has repeatedly so argued since 2005, yet the Second Circuit failed to address plaintiffs' ATS claims, and the district court has continued to exercise jurisdiction over those claims—which comprise most of the litigation. *E.g.*, Order of June 17, 2013 (awarding plaintiffs $1.3 million in attorneys' fees based on the sanctions order, including fees related to pursuing the ATS claims). This Court should order dismissal of plaintiffs' ATS claims, or, at a minimum, grant, vacate, and remand on that issue in light of *Kiobel*.

A. Plaintiffs' Claims.

The 83-year-old Arab Bank has more than 600 offices across 30 countries, and its shares make up more than 25% of the capitalization of Jordan's stock exchange. As Jordan informed the district court, the Bank is "the leading financial institution" and "a pivotal force of economic stability and security in the Kingdom" and "broader region." App., *infra*, 250a. It is the largest bank in the Palestinian Territories, with 20-plus branches established as part of the Oslo peace process. It has been named the "best bank in the Middle East" by *Euromoney*[1] and "best trade finance" provider in the region by *Global Finance*.[2] The Bank has won widespread recognition for fostering financial stability in the region; and the Israeli Defense Forces has stated that there is no evidence that it "or any of its employees were involved in any way whatsoever in terrorist activities, or funded terrorism." App., *infra*, 254a.

In these suits thousands of foreign citizens and a far smaller number of U.S. citizens (many residing abroad) claim that Arab Bank violated the ATA and ATS by processing automated funds transfers from the government-created "Saudi Committee in Support of the Intifada Al Quds" to tens of thousands of Palestinians, including a few relatives of persons killed or imprisoned during the Intifada, and by maintaining accounts for and transferring funds to individuals and charitable organizations allegedly affiliated with Hamas or other terrorist organizations. App., *infra*, 6a-7a.

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[1] http://tinyurl.com/ArabBank1.

[2] http://tinyurl.com/ArabBank2.

B. Applicable Privacy Laws And The Bank's Efforts To Produce Requested Information.

Plaintiffs sought the wholesale disclosure of account records in Jordan, Lebanon, and the Palestinian Territories for tens of thousands of Arab Bank customers. These countries, like many others, make it a criminal offense to disclose private bank account records. As the Magistrate Judge who supervised discovery for four years found, disclosure "would violate the laws of foreign jurisdictions and expose not only the Bank, but its employees, to criminal sanctions." App., *infra*, 112a.[3]

The Bank made every reasonable effort to disclose the records. It obtained permission from the Lebanese government to produce documents relating to a specific account (App., *infra*, 8a, 14a); produced all documents previously provided to the Department of Justice for its prosecution of the Holy Land Foundation, including account records of entities alleged to be terrorist "fronts" (*id.* at 12a); produced documents regarding fund transfers through its New York branch, previously disclosed to the Comptroller of Currency (*id.* at 12a); obtained the Saudi Committee's consent to disclose every transfer it made, including the name of every beneficiary and amount of every payment (*id.* at 13a, 15a); and produced redacted customer records for certain Saudi Committee

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[3] Applicable laws include Jordanian Banking Law No. 28, Articles 72-75; Palestinian Banking Law No. 2 of 2002, Article 26 (now Banking Law of 2010, Article 32.2); and Lebanese Banking Secrecy Law, Articles 2-8. See http://tinyurl.com/ArabBank3; http://tinyurl.com/ArabBank4; http://tinyurl.com/ArabBank5.

beneficiaries. See A1043-1045.[4] Overall, these efforts "resulted in the disclosure of over 200,000 documents that are subject to bank secrecy laws." App., *infra*, 115a.

But Jordan, Lebanon, and the Palestinian Authority rejected the Bank's efforts to disclose other customer records, warning that disclosure would expose the Bank and its employees to prosecution for violating financial privacy laws. The Bank successfully petitioned Jordan's courts to allow it to disclose records, but that ruling was overturned on appeal. Requests to Lebanese and Palestinian authorities were denied. A1056-1067, A1075-1079; App., *infra*, 243a-252a. The only records not produced were those for which the Bank would face criminal liability for unauthorized disclosure.

C. The District Court's Sanctions Order.

The Magistrate Judge, who held 15 hearings concerning foreign account discovery, concluded that the sole supportable inference from the Bank's non-production of account records was that some customers who turned out to be terrorists, or relatives of terrorists, received financial services from the Bank. He rejected state-of-mind sanctions, explaining that "[t]here has been no showing that the withheld evidence would be likely to provide direct evidence of the knowledge and intent of the Bank in providing the financial services at the heart of this case." App., *infra*, 123a. He refused to order blanket preclusion of Bank evidence that might be subject to cross-examination using non-disclosed documents, because

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[4] "A" refers to Arab Bank's Appendix filed in the court of appeals.

that would unfairly "prevent the defendant from offering a broad range of evidence, including testimony concerning their knowledge about various matters." *Id.* at 129a-130a.

The district judge overrode these rulings without holding a single hearing. Judge Gershon has authorized the jury to make an adverse inference that the withheld materials "would have demonstrated that defendant acted with a culpable state of mind." App., *infra*, 84a. The court precluded the Bank from introducing at trial any state-of-mind evidence "that would find proof or refutation in the withheld documents." *Id.* at 88a. And it held that the Bank cannot introduce evidence that it "had no knowledge a certain Bank customer was a terrorist if it did not produce that person's complete account records" (*ibid.*) or submit any evidence that "the withheld documents *could* disprove." *Id.* at 95a (emphasis added). Relying on the Second Circuit's denial of mandamus, the court subsequently barred the Bank from explaining to the jury that its failure to produce was required by foreign criminal law. *Id.* at 106a ("Nowhere did the Second Circuit suggest" that Arab Bank could "introduce evidence of foreign financial privacy laws to the jury").

Judge Gershon denied the Bank's motion for reconsideration. The court dismissed international comity and due process concerns and disregarded letters from Jordan, Lebanon, and the Palestinian Authority supporting reconsideration in light of the affront to their national interests. App., *infra*, 91a-99a.

D. The Second Circuit's Denial Of Review.

Arab Bank filed a mandamus petition, contending that the sanctions were impermissible in light of

its obedience to the criminal non-disclosure laws of the countries where the documents are located, its production of 200,000 documents, and its efforts to obtain permission to disclose remaining documents. The Bank invoked principles of international comity and due process and showed that the harms flowing from an adverse jury verdict could not be remedied by post-judgment appeal.

Jordan's amicus brief explained that violators of its financial privacy laws would be criminally prosecuted; the district court's sanctions infringe Jordan's sovereignty; and branding the Kingdom's leading bank as a supporter of terrorism would have a disastrous impact on the Bank, the region's economy, and the fight against terrorism. App., *infra*, 225a-242a.

The Second Circuit acknowledged that the issues raised by the Bank are "wide-ranging and weighty," but held that "the difficulties presented by the Bank's conflicting legal obligations" and "the interests of foreign governments in enforcing their bank secrecy laws" do not support mandamus or collateral order review. App., *infra*, 2a, 31a. The court rested its decision on the discretionary nature of mandamus and the sufficiency of a final appeal. *Id.* at 49a.

E. The District Court's Foreclosure Of The Bank's Remaining Defenses.

Lacking appellate supervision, the district court has continued to abridge the Bank's due process rights. The court has excluded as irrelevant all the Bank's evidence that its provision of financial services in foreign jurisdictions complied with foreign law (App., *infra*, at 103a)—the same evidence that Judge Weinstein found "relevant to key issues" and "probative of the Bank's state of mind in handling

the [foreign] account[s]." *Gill* v. *Arab Bank*, 893 F. Supp. 2d 523, 537-539 (E.D.N.Y. 2012). Judge Gershon also has barred the Bank from introducing evidence of the foreign financial privacy laws that prevent it from producing account records—evidence critical to a juror's ability to assess the Bank's conduct. App., *infra*, 104a-106a. And the district court has excluded the Bank's expert testimony concerning its comprehensive safeguards against dealing with terrorists, the charitable nature of entities the Bank dealt with, the Israeli government's approval of these charities, and the legitimacy of the Saudi Committee. Order of Feb. 6, 2013, at 11-17; Order of May 28, 2013. Adding to the coerciveness of these proceedings, the court has ordered a mass trial before a single jury of claims of 300 plaintiffs arising out of 24 disparate terrorist incidents spanning more than three years. Orders of July 22, 2010 & May 24, 2013.

The district court's substantive rulings likewise deprive Arab Bank of a fair trial. In flat contradiction of this Court's causation precedents, Judge Gershon ruled that "foreseeability" is the touchstone of the statutory requirement that plaintiffs prove injury "by reason of" the Bank's conduct (Apr. 24, 2013 Tr. 17, 72-74), eliminating the need for plaintiffs to show that "the alleged violation led directly to the plaintiff's injuries" and making the Bank an insurer against harm directly caused by criminal misconduct of third parties. *Anza* v. *Ideal Steel Supply Co.*, 547 U.S. 451, 461 (2006); see *Hemi Grp.* v. *City of N.Y.*, 130 S. Ct. 983, 991 (2010). Plaintiffs concede that they are unable to connect the Bank's performance of routine financial services to their injuries because "we'll never be able to prove—not just because of bank secrecy, but in general—that [a terrorist] used this money to [commit a terrorist attack]." Apr. 24,

2013 Tr. 54. This legal error on proximate causation vitiates the Bank's remaining defenses.

For nearly a decade, the Bank has argued to Judge Gershon that plaintiffs' ATS claims must be dismissed. Yet those claims remain pending, despite rulings from the Second Circuit in *Kiobel* that ATS claims may not be brought against corporate defendants like the Bank, and despite this Court's ruling in *Kiobel* that the ATS does not apply extraterritorially to suits like these. See Apr. 24, 2013 Tr. 87-89.

REASONS FOR GRANTING THE PETITION

This case involves discovery sanctions—protested by three foreign governments—that strip a "uniquely significant" bank headquartered in Jordan, one of this country's strongest allies, of the right to a fair trial on the critical *mens rea* element in lawsuits that seek to hold it responsible for virtually all terrorist attacks carried out by Palestinian terrorists in Israel and Palestine between 1995 and 2004. App., *infra*, 229a. "Mandamus has shone prominently in the constellation of appellate devices to review discovery orders" when "particularly important interests are at stake," and is properly "used to correct an erroneous discovery sanction." 16 Charles Wright, Arthur Miller, & Edward Cooper, FEDERAL PRACTICE & PROCEDURE § 3935.3, at 708-709, 721 (3d ed. 2012). Yet here, where the stakes for U.S. foreign policy could hardly be greater, or the sanctions more destructive to a foreign defendant caught between U.S. discovery orders and threats of prosecution at home, the Second Circuit denied mandamus, dismissing international comity and due process concerns in ways squarely at odds with decisions of this Court and other circuits.

If "the writ" is to "serve[its] vital corrective and didactic function," *Will* v. *United States*, 389 U.S. 90, 107 (1967), it should have been granted here—and would have been granted by other courts of appeals. Because recurring issues of immense national and practical importance are at stake, this Court should grant certiorari to ensure that lower courts give the weight to international comity required by this Court's decisions, protect due process rights of foreign defendants haled before U.S. juries for alleged actions abroad, and exercise the "supervisory control of the District Courts by the Courts of Appeals" for which mandamus is intended. *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 259 (1957).

I. THE SANCTIONS ORDER VIOLATES INTERNATIONAL COMITY IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

The sanctions order clashes with settled principles of international comity, which require a court to minimize conflict with foreign laws. Since *Société Internationale* v. *Rogers*, 357 U.S. 197 (1958), this Court has afforded even more weight to international comity in the discovery context. And other courts of appeals have set aside sanctions orders with far less egregious effects than those at issue here. The Court should grant certiorari to settle these conflicts on an issue of immense importance to U.S. foreign relations and to consider the application of *Rogers* in light of more recent international comity precedents.

A. It Would Violate The Criminal Laws Of Jordan, Lebanon, And The Palestinian Territories To Disclose Personal Financial Information.

The financial privacy laws of Jordan, Lebanon, and the Palestinian Territories make it a criminal offense for Arab Bank to disclose the tens of thousands of account records demanded by plaintiffs. App., *infra*, 244a (Lebanon's government informed Judge Gershon that its law "imposes criminal penalties" for "violat[ing] an account holder's right to confidentiality," and "that Lebanon will seek to enforce its laws by instituting legal action against Arab Bank and its employees if it attempts to comply with the discovery orders of this Court"); *id.* at 252a (Jordan), 247a (Palestine Monetary Authority).

These laws are not "blocking statutes" enacted to impede discovery in U.S. courts. Rather, they protect personal privacy as a matter of domestic policy. See *Reinsurance Co.* v. *Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1280 (7th Cir. 1990) ("Unlike a blocking statute, Romania's law appears to be directed at domestic affairs rather than merely protecting Romanian corporations from foreign discovery requests"). As Jordan's Prime Minister explained, they "are laws of general application and implicate principles of law and policy that are of fundamental importance to the sovereign and national security interests of Jordan." App., *infra*, 252a; see *id.* at 244a ("It is the judgment of our [Lebanese] Republic that our Banking Secrecy Law serves our national interests and must be protected").

The Palestine Monetary Authority (PMA) carefully explained how breach of its privacy laws would "disincentiviz[e]" bank customers from "utilizing the

banking system within the Palestinian Territories," which would undermine the PMA's "critical role in enforcing anti-money laundering law and anti-terrorism banking regulation in the West Bank and Gaza." *Id.* at 247a. The resulting "flight of individual customers from the Palestinian banking system" would have a "dramatic" impact "on the banking system and the economy in the Palestinian Territories," the "means of eliminating illegal banking activity will be thwarted, and the potential risk of [terrorist] activity will be elevated." *Ibid.* Jordan agreed, explaining how the sanctions order will "seriously undermine the international community's anti-money laundering and anti-terrorism efforts in the region" by causing customers to "withdraw from formal banking services in favor of unregulated, informal and opaque funds-transfer systems." *Id.* at 241a.

Nevertheless, the Second Circuit deemed harm to foreign governmental interests too "speculative" and "indirect" to support mandamus and guessed that the sanctions order might actually serve their interests in opposing terrorism. *Id.* at 49a. It has long been clear, however, that a foreign government's statements on the requirements of its own laws are "conclusive." *United States* v. *Pink*, 315 U.S. 203, 220 (1942). And it is hard to imagine a greater affront to sovereignty than a U.S. court picking and choosing which of a foreign nation's laws of general application to credit.

B. The Sanctions Violate Well Established Principles Of International Comity.

Requiring foreign parties sued in U.S. courts to disclose their customers' personal financial information in discovery, when doing so would violate the criminal laws and domestic policy of their home

countries, offends the most basic principles of international comity.

This Court recognizes that "[w]e cannot have trade and commerce in world markets" exclusively "on our terms, governed by our laws, and resolved in our courts." *The Bremen M/S* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972). And "international comity questions" are implicated by "attempts to overcome protections afforded by the laws of another nation." *Doe* v. *United States*, 487 U.S. 201, 218 n.16 (1988). This Court has laid particular emphasis on avoiding conflicts with foreign regulatory schemes like banking privacy laws—even when applying laws with clear extraterritorial effect. See *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 165, 169 (2004) (any application of U.S. law that creates "a serious risk of interference" with a foreign nation's regulation of its own affairs would amount to "an act of legal imperialism"); *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 818, 820 (1993) (Scalia, J., concurring and dissenting in part) (urging courts to "tak[e] account of foreign regulatory interests" to avoid "sharp and unnecessary conflict with the legitimate interests of other countries").

These comity principles are so important that this Court has construed U.S. securities laws to have no extraterritorial application to prevent even *potential* conflict with foreign law. *Morrison* v. *Nat'l Austl. Bank*, 130 S. Ct. 2869 (2010). In *Morrison*, the Court found no justification for applying U.S. law "incompati[bly] with the applicable laws of other countries." *Id.* at 2885. Stressing that foreign law often "differs from ours" on a range of issues, including "what discovery is available in litigation," *Morrison* heeded the warnings of foreign governments against

"interference with foreign securities regulation." *Id.* at 2885-2886.

Likewise, in *Kiobel*, in limiting ATS jurisdiction, the Court sought to avoid "clashes between our laws and those of other nations which could result in international discord," describing "the danger of unwarranted judicial interference" in the "delicate field of international relations." 133 S. Ct. at 1664; see *id.* at 1671 (judicial orders must be "consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations") (Breyer, J., concurring in judgment).

The "potential implications for the foreign relations of the United States," this Court has warned, should "make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727 (2004). *Sosa* mandates "great caution" because "many attempts by federal courts to craft remedies" in the international arena "raise risks of adverse foreign policy consequences." *Id.* at 727-728. Courts lack institutional capacity to avoid trampling on delicate matters of foreign relations. See *Itel Containers* v. *Huddleston*, 507 U.S. 60, 76 (1993).

In a case like this where the district court imposed sanctions at the behest of private plaintiffs and the United States was not heard from (despite the Bank's repeated requests that the court invite the views of the United States), the potential for international antagonism is acute. "[P]rivate plaintiffs" often "are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government." *Empagran*, 542 U.S. at 171. Here, plaintiffs

seek personal account information from tens of thousands of people not involved in this litigation—illustrating why discovery requests by private plaintiffs, who have less "concern for the national interest," "should be scrutinized more carefully than requests initiated by the United States government." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442, Reporters' Note No. 9 (1987).

"[I]nternational terrorism" raises "politically sensitive issues that are especially prominent in the foreign relations problems of the Middle East." *Estate of Amergi* v. *Palestinian Auth.*, 611 F.3d 1350, 1364 (11th Cir. 2010) (quoting *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 806 (D.C. Cir. 1984) (Bork, J., concurring)). It goes without saying that "[a] federal court weighing in on" whether "claimed Palestinian war crimes" can be attributed to an important Middle Eastern bank "add[s] to the complexity" of achieving "American objectives in the region." *Ibid.* But here that attribution is to be made by a jury based not upon relevant evidence, but upon sanctions imposed solely because Arab Bank obeyed foreign privacy laws. Labeling Jordan's "leading financial institution," which "plays an enormous and uniquely significant role" in the "regional economies," as a terrorist accomplice based on sanctions rather than a full examination of the facts can only ignite international tensions and distort U.S. foreign policy. App., *infra* 229a.[5]

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[5] In a case challenging United States aid to the same charities that Arab Bank is alleged to have dealt with, the government urged dismissal and stated that U.S. "assistance programs in the West Bank and Gaza are essential to advance progress toward the achievement of a negotiated, two-state solution to the Israeli-Palestinian conflict." U.S. Br. at 2, *Bernstein* v. *Kerry*,

Given the volatile situation in the Middle East, the courts below should not have treated the views of three foreign governments dismissively. See *Ex Parte Peru*, 318 U.S. 578, 586-587 (1943) (mandamus appropriate where necessary to protect "the dignity and rights of a friendly sovereign state" and the Executive Branch's "conduct of foreign affairs"). Jordan is not an American province but an important U.S. ally. The two Nations are party to "numerous bilateral and multilateral accords" and Jordan is "a steadfast ally of the United States in combating terrorism and terrorism financing." App., *infra*, 230a. Both countries have signed the U.N. Convention for the Suppression of the Financing of Terrorism, which requires signatories to assist each other with *criminal* investigations and proceedings, and Jordan has cooperated in such requests by U.S. authorities. But as Jordan explained, the Convention establishes no "exception to otherwise applicable domestic bank confidentiality laws for requests by ordinary, private third parties in foreign litigation." App., *infra*, 239a. For the courts below to have swept aside Jordan's views—as well as the equally trenchant protests of Lebanon and the PMA—impinges "sharply on national nerves." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 428 (1964).

Just as "American antitrust laws do not regulate the competitive conditions of other nations' economies" (*Matsushita Elec. Indus.* v. *Zenith Radio*, 475 U.S. 574, 582 (1986)), comity requires that U.S. dis-

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1:12-cv-01906 (D.D.C., filed Apr. 1, 2013). In the Middle East, the Executive acts "not merely to make a political statement but to achieve a political result," which the sanctions here frustrate. *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 376 (2000).

covery rules not be stretched to regulate other jurisdictions' financial privacy policies. As the Solicitor General and State Department put it, "sovereign compulsion" should be "available as a defense" when conduct was "compelled by a foreign government, for it is in such cases that the imposition of liability by American courts is likely to touch most sharply on foreign concerns." Br. for the United States as *Amicus Curiae* at 8, *Matsushita*, No. 83-2004, 1985 WL 669667.

Underscoring the exceptional importance of the comity issue, the ABA's House of Delegates recently resolved that U.S. courts should "consider and respect" the "privacy laws of any applicable foreign sovereign, and the interests of any person who is subject to" those laws, "with regard to data sought in discovery in civil litigation." Resolution & Report 103 (Feb. 6, 2012). It explained that there has been an "exponential increase" in disputes involving data protected by foreign laws, as a result of which "[l]itigants often face a Hobson's choice: violate foreign law and expose themselves to enforcement proceedings that have included criminal prosecution, or choose noncompliance with a U.S. discovery order and risk U.S. sanctions." *Ibid.* The ABA concluded that "international comity" requires U.S. courts "to accommodate foreign interests even where the foreign system strikes a different balance," and that permitting discovery "in disregard or even defiance of foreign protective legislation" would "impede global commerce" and "harm the interests of U.S. parties in foreign courts." *Ibid.*

Against this backdrop, it is no answer to say, as the Second Circuit did, that the "wide-ranging and weighty" issues presented in this petition are "effec-

tively reviewable after final judgment." App., *infra*, 2a, 23a. That is especially true because the district court has coupled its sanctions with evidentiary exclusions that will deny the Bank a fair hearing. See *Sell* v. *United States*, 539 U.S. 166, 177 (2003) (upholding collateral order review of an order that "may make a trial unfair" because post-trial appeal would come "too late"). Courts lack the "aptitude, facilities, [and] responsibility" to conduct "foreign policy." *Chicago & S. AirLines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). The mere pendency of this litigation risks "embarrass[ing] the executive arm of the Government in conducting foreign relations," and mandamus is "the only means of forestalling" irreversible damage to the United States' foreign alliances. *Will*, 389 U.S. at 95.

C. The Sanctions Cannot Be Reconciled With Decisions Of This Court And Other Courts Of Appeals.

The sanctions order is inconsistent with this Court's ruling in *Rogers*, which overturned a sanction for refusing disclosure of bank records that "would violate Swiss penal laws and consequently might lead to imposition of criminal sanctions." 357 U.S. at 200. In *Rogers*, as here, the sanction was excessive because the party's "inability [was] fostered neither by its own conduct nor by circumstances within its control." *Id*. at 211.

Rogers makes clear that a party's "inability to comply because of foreign law" is a "weighty" reason for non-compliance—one to be carefully considered in fashioning any remedy. 357 U.S. at 211-213. This Court subsequently reiterated that courts must "take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of

its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state." *Société Nationale Industrielle Aérospatiale* v. *U.S. Dist. Ct.*, 482 U.S. 522, 546 (1987). As the Fifth Circuit put it, applying *Aérospatiale*, where "sensitive interests of sovereign powers are involved," courts must "respect properly such interests" in fashioning discovery orders and remedies. *In re Anschuetz*, 838 F.2d 1362, 1364 (5th Cir. 1988).

There is no question that under *Rogers* and this Court's more recent international comity decisions the sanctions here are improper. The sanctions are even less warranted than those set aside in *Rogers*, where the non-producing foreign plaintiff voluntarily filed suit in the U.S. By contrast, Arab Bank was forced into a U.S. court by private plaintiffs—more than 92% of whom are foreign—based on allegations of conduct and injury abroad. And since *Rogers* was decided the weight this Court attaches to comity concerns has increased greatly. Part I.B, *supra*.

Unlike the district court and Second Circuit here, other courts of appeals give effect to international comity where a party declines to produce documents because doing so would violate foreign law. In *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 994 (10th Cir. 1977), for example, producing requested discovery would have put the party "in violation of Canadian law and subject[ed it] to criminal sanctions." The Tenth Circuit recognized that "foreign illegality may prevent the imposition of sanctions for subsequent disobedience to the discovery order" and set aside sanctions because of Canada's "legitimate interest" in barring disclosure. *Id.* at 997, 999. See also, *e.g.*, *United States* v. *First Nat'l Bank*, 699 F.2d 341, 345-346 (7th Cir. 1983) (quash-

ing summons where disclosure risked criminal penalties under Greek bank privacy law); *Cochran Consulting* v. *Uwatec USA, Inc.*, 102 F.3d 1224, 1232 (Fed. Cir. 1996) (vacating sanctions where foreign party's disclosure would risk criminal penalties). Severe discovery sanctions have *never* been sustained where generally applicable foreign law barred disclosure, foreign governments represented that they would prosecute violations of their privacy laws, and the litigant made substantial efforts to obtain permission to disclose.

The draconian sanctions here violate international comity and endanger U.S. interests in a highly volatile region. The Second Circuit should have exercised its mandamus authority to enforce international comity principles before it is too late. Its failure to do so warrants this Court's review.

II. THE SANCTIONS ORDER VIOLATES DUE PROCESS.

The adverse inference and preclusion sanctions deprive Arab Bank of a fair trial simply because it could not produce documents without facing criminal penalties. While acknowledging that these sanctions are "substantial" and mean "Arab Bank might have difficulty avoiding liability," the Second Circuit downplayed them because "they are not equivalent to a default judgment." App., *infra*, 30a, 48a. But the sanctions deprive the Bank of any fair opportunity to respond to these serious accusations.

Rule 37(b)(2)(A) requires that sanctions be "just." And it has long been clear that "there are constitutional limits, stemming from the Due Process Clause" on "the imposition of sanctions." 8B Charles Wright, Arthur Miller, & Richard Marcus, FEDERAL

PRACTICE AND PROCEDURE § 2283, at 427 (3d ed. 2010). A century ago, this Court explained that harsh sanctions are proper only where a refusal to produce evidence is "an admission of the want of merit in the asserted defense." *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, 351 (1909). The Court later explained that due process is violated "if the behavior of the defendant will not support the *Hammond Packing* presumption." *Insurance Corp.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982). In *Insurance Corp.* the Court elaborated that "two standards" constrain "a district court's discretion": "any sanction must be 'just;'" and "the sanction must be specifically related to the particular 'claim' which was at issue in the order to provide discovery." *Id.* at 707. Both requirements are violated by the sanctions here.

A. The Sanctions Unconstitutionally Deprive Arab Bank Of A Fair Trial.

In *Rogers*, this Court disapproved a sanction exceeding "constitutional limitations" where failure to comply was "due to inability, and not to willfulness, bad faith, or any fault of petitioner." 357 U.S. at 209, 212. That decision reflected the rule that a party may not be penalized "for a failure to do that which it may not have been in its power to do" and that "any reasonable showing of an inability to comply" would have been sufficient. *Hammond Packing*, 212 U.S. at 347.

Although the Court in *Rogers* addressed a dismissal sanction, the same principles apply to sanctions that effectively eliminate a plaintiff's burden of proof on state of mind and preclude the defendant from introducing exculpatory evidence. These too deny the litigant its day in court. "[D]ue process pre-

cludes the severest sanctions," where "the party to be sanctioned was unable to comply with the court's discovery order." 8B FEDERAL PRACTICE AND PROCEDURE, *supra*, § 2283, at 433-434. As the Ninth Circuit has explained, "*preclusion of evidence* that is tantamount to dismissal" may not be "imposed when the failure to comply with discovery orders is due to circumstances beyond the disobedient party's control." *United States* v. *Sumitomo Marine & Fire Ins.*, 617 F.2d 1365, 1369 (9th Cir. 1980) (emphasis added).

Here, the Bank pursued every reasonable avenue to obtain governmental, judicial, and private consent to produce requested account records, resulting in it disclosing more than 200,000 documents, including all Saudi Committee records. It also provided plaintiffs with access to Bank officials from Jordan, Lebanon, and the Palestinian Territories through dozens of days of depositions. Although the court of appeals recognized that "plaintiffs acquired numerous documents related to their discovery requests," it questioned the Bank's "utmost good faith" because "the discovery dispute had resulted in 'years of delay.'" App., *infra*, 11a, 40a. But there is no evidence that the Bank was responsible for that delay, which resulted from plaintiffs' demands for documents subject to bank privacy laws and the years of effort required for the Bank to seek disclosure waivers. In fact, the Magistrate Judge found that the Bank had been "fairly quick" to act and acknowledged that he had "sat on" Bank requests. A981.

It is precisely in a case like this that an adverse inference or preclusion order violates due process. Failure to produce resulted from legal compulsion, not the Bank's "own conduct," and involved no "bad faith." *Rogers*, 357 U.S. at 211-212. Nevertheless, the

sanctions invite the jury to infer that Arab Bank had culpable knowledge and intent and preclude arguments and evidence that "could disprove" plaintiffs' state-of-mind allegations. The jury also will **never know** that the Bank was complying with legal obligations backed by criminal penalties.

Gagging the Bank on the state-of-mind issue denies the Bank a fair trial. Still worse, in combination with the district court's other rulings excluding witnesses and proof of foreign law, it leaves the Bank with no fair opportunity to defend itself. The district court deleted any meaningful causation requirement from the ATA by holding that plaintiffs need not prove that "the alleged violation led directly to the plaintiff's injuries" (*Anza*, 547 U.S. at 461)—a standard plaintiffs concede they cannot satisfy. It excluded expert testimony explaining the Bank's safeguards against dealing with terrorists, the widespread perception that the entities the Bank dealt with are charities, not terrorist affiliates, the nature of the Saudi Committee, and Israel's view of these charities. It barred all evidence of foreign law. And it ordered consolidated trial of 300 disparate claims, ensuring that the Bank will lack adequate opportunity to defend any one of them and that evidence inadmissible as to many incidents will be admitted as to all. See *supra*, pp. 11-13.

Having expended every reasonable effort and large amounts of money to comply with discovery orders without subjecting itself to criminal penalties, the Bank cannot fairly or justly be deprived in this manner of "an opportunity to present every available defense." *Philip Morris* v. *Williams*, 549 U.S. 346, 353 (2007).

B. The Adverse State-Of-Mind Inference Is Unwarranted And Unjust.

The sanctions also violate due process because the inference that the Bank knowingly and purposefully supported terror attacks is unwarranted. In accord with *Hammond Packing*, Section 442 comment f of the *Restatement* allows sanctions if "there is reason to believe that the information, if disclosed, would support a finding adverse to the noncomplying party." Here the materials produced by the Bank and other evidence offer no indication that it knowingly or intentionally facilitated terrorism and no reason to think that producing the records subject to financial privacy laws would turn up anything inculpatory. As the Magistrate Judge concluded, "[t]here has been no showing that the withheld evidence would be likely to provide direct evidence of the knowledge and intent of the Bank in providing the financial services at the heart of this case." App., *infra*, 123a.[6]

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[6] The Second Circuit thought the adverse inference was justified by the district court's observation (without any hearing) that disclosed documents showed transfers "to Hamas or individuals associated with Hamas" and processing of Saudi Committee payments "made to family members of individuals linked to terrorism." App., *infra*, 46a. But Arab Bank turned over all Saudi Committee records, every beneficiary is known to plaintiffs, and none appears on any blacklist (except one, where the Bank blocked the transfer). The few payments to persons allegedly linked to Hamas, including Osama Hamdan, were made before they were blacklisted or, on two occasions, were a result of screening software or human error. Arab Bank's careful screening of transactions and customers—it was the first bank in the region to adopt computerized screening utilizing U.S. terrorist blacklists—and prompt closing of every account upon learning that the holder was designated, make an adverse in-

In another case raising identical issues based on the same discovery record, Judge Weinstein rejected Judge Gershon's approach to sanctions for this very reason. Denying plaintiffs' motion for sanctions in *Gill* v. *Arab Bank* after hearings and a careful review of the record, Judge Weinstein found that "the evidence does not prove that the Bank acted with an improper state of mind." 893 F. Supp. 2d at 547. Judge Weinstein found "no proof" that the Bank provided "anything but routine financial services" to entities not then designated as terrorist front groups. *Id*. at 561. He explained that "punishing the withholder through adverse inferences may not take into adequate account the need to assess the probative force of missing documents" or the "litigant's reasons for withholding documents." *Id*. at 551. Hence, "[a]ny sanction which might adversely affect the ability of the trier to reach a decision on the merits should be avoided." *Ibid*. Furthermore, Judge Weinstein recognized that "[e]vidence of the foreign banking laws and practices, and attitudes towards those laws and practices"—excluded from evidence here—is "probative" of "the Bank's state of mind." *Id.* at 539.

Here, to the contrary, the sanctions mean that the jury will never be able fairly to consider the merits of Arab Bank's defenses. Because "constitutional limitations safeguarding essential liberties" must "remain vibrant even in times of security concerns" (*Hamdi* v. *Rumsfeld*, 542 U.S. 507, 539 (2004)), the petition should be granted to protect the Bank's due process right.

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ference patently inappropriate. See C.A. Reply Br. 15-20; App., *infra*, 255a-271a.

III. THE SECOND CIRCUIT'S DENIAL OF MANDAMUS UNDERMINES THE FUNCTIONS OF THE WRIT.

Mandamus is a "useful safety valve" for "promptly correcting serious errors" in cases involving "particularly injurious" and "consequential" rulings that work "a manifest injustice." *Mohawk Indus.*, 558 U.S. at 110-111. Mandamus is also properly used "to formulate the necessary guidelines" and "settle new and important problems" arising in the discovery context. *Schlagenhauf* v. *Holder*, 379 U.S. 104, 111-112 (1964); see *Will*, 389 U.S. at 107 ("the writ serves a vital corrective and didactic function"); *LaBuy*, 352 U.S. at 259 (mandamus is a tool for "supervisory control of the District Courts by the Courts of Appeals").

Schlagenhauf "affords strong support for the use of supervisory or advisory mandamus to review a discovery question that raises a novel and important question of power to compel discovery, or that reflects substantial uncertainty and confusion in the district courts." 16 FEDERAL PRACTICE AND PROCEDURE, *supra*, § 3935.3, at 717. See *id.* at 708-709 ("[m]andamus has shone prominently in the constellation of appellate devices to review discovery orders"); Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595, 618 n.96 (1973) ("In precisely such areas as discovery, advisory mandamus would be expected to have its greatest value").

The sanctions order here raises important issues that warrant review by mandamus. The problems caused by awaiting final judgment to correct the district court's error extend "well beyond the mere expense and inconvenience of litigation." *In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1295 (3d Cir. 1994) (Alito,

J.). The harm to foreign relations from the failure to afford comity to foreign financial privacy laws cannot be undone after trial, but is immediate and continuing. This clash between U.S. sanctions orders and foreign law is precisely the sort of "momentous" issue for which mandamus is warranted. *Mohawk*, 558 U.S. at 112; see *Ex parte Peru*, 318 U.S. at 586-587, *supra* p. 20. The ABA's recent call for greater accommodation by U.S. courts of "privacy laws" of a "foreign sovereign" in the face of an "exponential increase" in such international conflicts confirms that this is a "momentous" and timely issue. *Supra*, p. 21.

The district court's discovery orders confronted the Bank with a Hobson's choice: either violate foreign laws and face criminal prosecution or accept sanctions that threaten its existence. Either option produces irreparable harm that cannot be rectified post-judgment not only to the Bank but also to the governments whose laws are nullified and U.S. interests in Middle Eastern peace and stability.

Had the Bank produced the protected personal financial information it not only would have faced criminal prosecution but, as Jordan and the PMA explained, also would have forfeited customer trust throughout the Middle East. That in turn would have driven banking transactions into informal channels that are much less easily monitored for terrorist connections. *Supra*, pp. 15-16.

The district court now plans a series of mass liability trials before announcing final judgment. A liability verdict tarring the Bank as an accomplice of terrorists—produced by the adverse inference, the gag order, and the wholesale exclusion of exculpatory evidence—would "cause great reputational harm" and "stigmatize the Bank in the international bank-

ing community and the global capital markets," cause depositors to flee, and cause "correspondent banks and other critical counter-party financial institutions" to "cease doing business with it," with "calamitous consequences." App., *infra*, 240a-241a. As Jordan explained, the Bank's "role as a premier wholesale bank" and "important depositary institution" for the region would be threatened, "destabiliz[ing] the economies of the Kingdom, the Palestinian Authority, and the surrounding region," "precipitat[ing] political instability," "disrupt[ing]" the Palestinian-Israeli peace process, and "undermining the international community's anti-money laundering and anti-terrorism efforts." *Ibid.* The PMA said that the result would be "dramatic" damage to the regional banking system and its ability to interdict illegal monetary transactions. *Id.* at 247a-248a. Successful appeal after an adverse judgment could not remediate these harms.

The court of appeals thought these harms "overly speculative" and only "indirectly related to the sanctions at issue." App., *infra*, 49a. But three governments made these evaluations, not just Arab Bank. Appeal after verdict would do nothing to remedy the affront to sovereignty that occurs when a U.S. court issues sanctions that foreign governments say would have such destructive effects.

The question here—whether severe sanctions are warranted for inability to produce documents due to the mandates of foreign penal law—is a straightforward one of general applicability for which mandamus and collateral order review are well suited. Other courts of appeals have granted review in similar circumstances. The Ninth Circuit, for example, granted mandamus because "[r]equiring the Banks

to choose between being in contempt of court and violating Swiss law clearly constitutes severe prejudice that could not be remedied on direct appeal." *Credit Suisse* v. *U.S. Dist. Ct.*, 130 F.3d 1342, 1346 (9th Cir. 1997). Decisions exercising mandamus jurisdiction over onerous discovery sanctions abound. *E.g.*, *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998) (granting mandamus and overturning discovery orders based on "international comity"); *In re Bieter Co.*, 16 F.3d 929, 933 (8th Cir. 1994) (granting mandamus where district court applied erroneous legal standard in compelling discovery of privileged material); *EEOC* v. *Carter Carburetor*, 577 F.2d 43, 48 (8th Cir. 1978) (mandamus proper where court "exceeded its judicial power in limiting the evidence" as a discovery sanction); *Ohio* v. *Arthur Andersen*, 570 F.2d 1370, 1372 (10th Cir. 1978) (collateral order review of same issue).

This case presents an ideal opportunity to guide the federal courts on the recurring clash between discovery rules and foreign privacy law and on the appropriate use of mandamus or collateral order review (App., *infra*, 19a-27a) to correct errors in that field. This Court has often granted certiorari and reversed where the court of appeals improperly denied mandamus, and it should do so again here. See *supra*, p. 2 (citing cases).

IV. THE COURTS BELOW SHOULD HAVE DISMISSED PLAINTIFFS' ATS CLAIMS AS REQUIRED BY *KIOBEL*.

There is no question that plaintiffs' ATS claims seek to "impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign." *Kiobel*, 133 S. Ct. at 1667. This Court held in *Kiobel* that federal courts

lack jurisdiction to hear ATS claims "seeking relief for violations of the law of nations occurring outside the United States." *Id.* at 1669. And the Second Circuit had reached that same conclusion in the same case on the ground that the ATS does not allow suits against corporate defendants—reasoning that equally requires dismissal here. 621 F.3d 111, 145 (2d Cir. 2010). Thus it has been clear for several years that the district court lacks power to entertain the foreign plaintiffs' ATS claims.

As in *Kiobel*, Arab Bank's "only presence in the United States consists of [a single branch] in New York City." 133 S. Ct. at 1677 (Breyer, J., concurring). Such "corporate presence" does not "suffic[e]" for ATS jurisdiction. *Id.* at 1669. The only other alleged U.S. connection—that Arab Bank automatically and electronically processed wire transfer instructions coming from foreign countries and destined for foreign countries—is far more attenuated than in *Kiobel*, where defendant raised funds on the New York Stock Exchange that inevitably would have subsidized alleged genocide abroad. "[I]t would be farfetched to believe," based solely upon this sort of "minimal" U.S. connection, that U.S. courts have the power to adjudicate foreign disputes, concerning foreign conduct, committed by foreign defendants, causing injury to foreign plaintiffs. *Id.* at 1678 (Breyer, J., concurring). Even a fraudulent scheme devised by a U.S. subsidiary is not sufficient for jurisdiction over claims of foreign investors. *Morrison*, 130 S. Ct. at 2875-2876.

Though petitioner since 2005 has repeatedly urged dismissal of the ATS claims on jurisdictional grounds (*e.g.*, C.A. Br. 16, 45, 63), the district court and court of appeals failed to dismiss. A clearer cir-

cumstance warranting mandamus is difficult to conceive. "The traditional use of the writ" has been to confine the court against which mandamus is sought "'to a lawful exercise of its prescribed jurisdiction.'" *Cheney* v. *U.S. Dist. Court*, 542 U.S. 367, 380 (2004). Mandamus is also appropriate when "unwarranted judicial action threaten[s] 'to embarrass the executive arm of the Government in conducting foreign relations.'" *Will*, 389 U.S. at 95. Respondents evidently believe that "'United States law governs'" the "'world'" (*Kiobel*, 133 S. Ct. at 1664)—but that is not so, and for good reason. The pendency of the ATS claims brings about "'unintended clashes between our laws and those of other nations which could result in international discord.'" *Ibid.*

Immediate plenary review is therefore imperative. At minimum, the Court should vacate the decision below and remand for reconsideration in light of *Kiobel*. The Second Circuit panel did not have an opportunity to consider this Court's decision in *Kiobel*, which dictates dismissal of the overwhelming majority of claims pending in this suit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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