No. 12-1485

In the Supreme Court of the United States

ARAB BANK, PLC, PETITIONER

v.

COURTNEY LINDE, ET AL.,

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

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR AMICUS CURIAE THE UNION OF ARAB BANKS IN SUPPORT OF PETITIONER

DOUGLAS HALLWARD-DRIEMEIER
Counsel of Record
ROPES & GRAY LLP
One Metro Center
700 12th Street, NW, Suite 900
Washington, DC 20005
(202) 508-4600
Douglas.Hallward-Driemeier@ropesgray.com

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Rule 37.2 of the Rules of this Court, the Union of Arab Banks (UAB) moves for leave to file the accompanying brief as amicus curiae in support of petitioners. Counsel for petitioner has consented to the filing of this brief; counsel for respondents have not.

Amicus curiae is the largest banking and financial consortium in the Middle East, representing over 340 members collectively engaged in all aspects of the Islamic banking industry.

UAB has a particular interest in this litigation because of the potential adverse effects of the decision below on comity towards foreign banking secrecy laws. As institutions subject to bank secrecy laws, UAB's members have a strong interest in ensuring the predictability and fairness of the United States' treatment of these laws. The arbitrary and excessive sanctions affirmed by the United States Court of Appeals for the

Second Circuit are directly contrary to principles of international comity. The threat that banks operating in the Middle East will be subject to the Hobson's choice of either violating domestic criminal laws or being branded a supporter of terrorism (with potentially disastrous consequences) is particularly troublesome to UAB's members.

Amicus curiae's considerable interest in ensuring the fair treatment of bank secrecy laws gives it a strong interest in the resolution of the questions raised by the petitioners in this case. Amicus curiae filed an amicus brief in the court of appeals. Accordingly, amicus curiae respectfully requests leave to file the attached brief.

Respectfully submitted,
DOUGLAS HALLWARD-DRIEMEIER
ROPES & GRAY LLP
Counsel for Amicus Curiae the Union of Arab Banks

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BRIEF FOR AMICUS CURIAE THE UNION OF ARAB BANKS IN SUPPORT OF PETITIONER

Amicus curiae the Union of Arab Banks (UAB) respectfully submits this brief in support of petitioners.[1]

INTEREST OF AMICUS

The UAB was founded in 1973 to foster cooperation among Arab banking institutions, develop the Arab financial sector, and promote the role of Arab banks in

[1] Counsel for each party was informed at least 10 days prior to this brief's due date of amicus curiae's intention to file this brief. Counsel for petitioner consented to the filing of this brief; counsel for respondents did not. Accordingly, amicus is filing herewith a motion for leave to file this brief pursuant to Rule 37.2 of this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae or its counsel made a monetary contribution to the brief's preparation or submission.

the region. Today, the UAB consists of over 340 members, which include the largest and most prestigious Arab banking, financial, and investment institutions, including petitioner Arab Bank.

The UAB is a resource for the Arab banking community, publishing leading books and periodicals on Islamic banking. The UAB establishes policies, rules, and regulations that promote cohesion in the banking sector and economic development in the region, and has introduced new financial instruments to the marketplace. The UAB works to promote best practices and international dialogue on the prevention of money laundering and terrorist financing, partnering with the U.S. Department of the Treasury and Association of Certified Anti-Money Laundering Specialists, and conducting conferences on the topic in 2006, 2008, and 2011.

The UAB is uniquely qualified to comment on the issues raised in the Petition. As the largest banking and financial consortium in the region, the UAB is a true representative of the Arab banking community. Its expertise is not limited to the financial, strategic, and technical aspects of banking, but also extends to the myriad legal and ethical obligations that impact its member banks. These obligations are at the center of this litigation.

SUMMARY OF THE ARGUMENT

In a series of cases culminating in *Mohawk Industries, Inc.* v. *Carpenter*, 558 U.S. 100 (2009), and *Will* v. *Hallock*, 546 U.S. 345 (2006), this Court has restricted the scope of the collateral order doctrine to ensure that, in the ordinary course, district court litigation is reviewed in a single appeal upon entry of final judgment. But the Court has stressed the availability of manda-

mus as a critical "safety valve" to ensure that interlocutory orders necessitating immediate review receive it. *Mohawk*, 558 U.S. at 111. The courts of appeals, however, have shirked their duty to review interlocutory orders in even the most justified circumstances, including those, like the present case, that threaten serious disruption to the United States' foreign relations. This unwarranted reticence leaves litigants and our diplomatic interests at the mercy of capricious and abusive district court orders.

This case presents a compelling opportunity to clarify the scope of mandamus and the collateral order doctrine as it relates to extraterritorial orders that conflict with the domestic laws of foreign states. The district court has sanctioned petitioner for its failure to produce bank records that petitioner cannot produce "on the ground that disclosure of the required bank records" would violate the criminal laws of Jordan, Lebanon, and the Palestinian Territories, "and consequently might lead to imposition of criminal sanctions, including fine and imprisonment, on those responsible for disclosure." *Societe Internationale Pour Participations Industrielles et Commerciales, S. A.* v. *Rodgers*, 357 U.S. 197, 200 (1958); Pet. App. 8a–9a.

Despite the fact that "petitioner's failure to satisfy fully the requirements of this production order was due to inability fostered neither by its own conduct nor by circumstances within its control," the district court nevertheless imposed severe sanctions on petitioner. *Rodgers*, 357 U.S. at 211; Pet. App. 15a–19a; see also *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, 347 (1909) (courts should not penalize a party "for a failure to do that which it may not have been in its power to do"). By instructing the jury that it can infer liability

based solely on petitioner's failure to produce the documents in question, and precluding petitioner from introducing critical evidence, the district court, in effect, has labeled petitioner a supporter of terrorism, dispensed with any requirement that the plaintiffs prove a culpable state of mind or proximate causation, gagged the bank from articulating anything resembling a meaningful defense, and invited a jury to assign damages.

The repercussions of such rulings cannot be redressed adequately on direct appeal. Emboldened by the district court's jury instructions effectively directing a finding of liability, a jury will simply proceed to assign damages against a presumed supporter of terrorism. In similar litigation under the Alien Tort Statute, the Anti-Terrorism Act, and the Foreign Sovereign Immunities Act, judgments of hundreds of millions of dollars are common. See, *e.g.*, *Hilao* v. *Estate of Marcos*, 103 F.3d 767 (9th Cir. 1993) (ATS; ~$1.9 billion); *Acree* v. *Republic of Iraq*, 271 F. Supp. 2d 179 (D.D.C. 2003) (FSIA; ~$959 million), rev'd, 370 F.3d 41 (D.C. Cir.), cert. denied 544 U.S. 1010 (2004); *Estate of Brown* v. *Islamic Republic of Iran*, 872 F. Supp. 2d 37, 45 & n.1 (D.D.C. 2012) (FSIA; collectively $8.8 billion in judgments against Iran as a result of the 1983 Beirut bombing). The threat posed by damage awards of such magnitude (and the prospect of more awards) would itself undermine the trust of investors and counterparties and potentially threaten the viability of any bank, given that the industry is so heavily based on trust. Even worse, once a bank has been adjudicated a supporter of terrorism, legal prohibitions on doing business with sponsors of terrorism would cause many, if not all, of the bank's counterparties to cease all interactions.

The prospect of such a judgment is far more than an annoyance that can be addressed and remedied on appeal.

The court's rulings also threaten to propel the United States into a serious diplomatic entanglement. Foreign policy is—for good reason—not the province of the courts. See *Container Corp. of Am.* v. *Franchise Tax Bd.*, 463 U.S. 159, 195 (1983). The rulings, if not set aside, would be an affront to the sovereignty of foreign states, including one of the United States' closest allies, and could cause irreparable damage to ongoing international negotiations over data privacy. This harm cannot be unwound on appeal of final judgment years from now.

The district court's devastating rulings are precisely the type that mandamus and the collateral order doctrine exist to remedy. The Court should grant certiorari to clarify the scope of the collateral order doctrine and mandamus review and ensure that these essential mechanisms are not extinguished from the "constellation of appellate devices." 16 Charles Wright, Arthur Miller, & Edward Cooper, *Federal Practice and Procedure* § 3935.3, at 708–709, 721 (3d ed. 2012).

ARGUMENT

I. THE DISTRICT COURT'S ORDER COMPELLING DISCLOSURE OF EXTRATERRITORIAL DOCUMENTS SUBJECT TO FOREIGN PRIVACY LAWS IMPOSES CONTRADICTORY AND IRRECONCILABLE LEGAL OBLIGATIONS ON MEMBER BANKS

Plaintiffs are 6,596 individuals alleging to be the victims or family members of victims of terrorist attacks occurring in Israel and the Palestinian Territories

between 1995 and 2004. Of these, 6,053 are foreign citizens asserting claims under the Alien Tort Statute, 28 U.S.C. 1350 (2006). The remainder allege violations of the Anti-Terrorism Act as, or on behalf of, American citizens, 18 U.S.C. 2333 (2006). Plaintiffs allege that petitioner provided financial services to entities and individuals acting on behalf of terrorist groups, and processed payments to terrorists and their families on behalf of a Saudi Arabian government-created charity, the Saudi Committee for the Support of the Intifada Al Quds.

In discovery, Plaintiffs sought to gain access to bank records of tens of thousands of petitioner's customers in Jordan, Lebanon, and the Palestinian Territories. Pet. App. 14a–15a. Such vast disclosure of depositors' financial records would violate those countries' bank secrecy laws and subject petitioner to criminal penalties such as imprisonment and serious fines. Petitioner actively sought permission from these foreign states for release of the records, and ultimately produced over 200,000 documents that were subject to bank secrecy laws. *Id.* at 11a–14a, 115a, 312a–313a.

Petitioner could not obtain authorization, however, to disclose all the requested customer records. Pet. App. 11a, 14a–15a, 63a, 313a. As a result, the court has imposed drastic and heavy-handed sanctions. Under the district court's rulings, the jury may infer that petitioner actually provided financial services to terrorists and distributed payments to terrorists on behalf of the Saudi Committee, and did so "knowingly and purposefully." *Id.* at 90a–91a. In addition, the court's rulings preclude petitioner from making any argument or offering any evidence regarding its state of mind or "any other issue that would find proof or refutation in with-

held documents." *Ibid.* As a result, petitioner may not attempt to demonstrate that it did not have knowledge that a person was a terrorist "if it did not produce that person's complete account records." *Id.* at 88a.

Subsequent decisions by the district court have eliminated any remaining defenses. Petitioner is gagged from explaining to the jury that it could not produce the requested documents due to foreign secrecy laws. Pet. App. 104a–106a. Nor may petitioner present evidence showing that it complied with foreign law in implementing policies and procedures designed to detect suspicious transactions. *Id.* at 103a. Petitioner cannot present expert testimony concerning its cutting-edge techniques to screen for terrorists, the nature of the entities that petitioner was dealing with, the Israeli government's approval of these charities, or the nature of the Saudi Committee. Order (E.D.N.Y. May 28, 2013); Order at 11–17 (E.D.N.Y. Feb. 6, 2013).

These rulings show naked contempt for the bank secrecy laws that constrain petitioner in this litigation. But bank secrecy laws—like data privacy laws more generally—are common across the globe and were enacted not to block U.S. discovery requests, but instead to protect the privacy of banking customers against unwarranted intrusion. By virtue of the sweeping impact of the district court's orders on all banks and companies subject to foreign data privacy laws, immediate mandamus or collateral order review is essential.

A. Bank Secrecy Laws And Data Privacy Laws Have Been Enacted Across The Globe In Order To Protect Depositors And Consumers

Data privacy laws trace their origin to 1890, when future Supreme Court Justice Louis Brandeis co-authored an article for the Harvard Law Review arguing for recognition of a common law right of privacy, which he termed the "right 'to be let alone.' " Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 195 (1890). Bank secrecy laws—which emerged in a time when totalitarian regimes controlled the flow of their citizens' capital—recognize the societal interest in protecting personal privacy. Indeed, the first bank secrecy law, the Swiss Banking Law of 1934, thwarted attempts of Nazi authorities to investigate the assets of Jews and other "enemies of the state." Kurt Mueller, *The Swiss Banking Secret: From a Legal View*, 18 Int'l & Comp. L.Q. 360, 361–362 (1969). Today, numerous countries have strong bank secrecy laws, including Switzerland, Austria, Denmark, and Hong Kong.

These laws regulate the bank for the benefit of the depositor. Bank records brim with inherently personal information; one's finances, social affiliations, political sympathies, and personal affinities can all be discovered from bank records. Banks that violate secrecy laws are subject to criminal and civil remedies that may result in jail terms, fines, and civil damages. See *Rodgers*, 357 U.S. at 200. In this respect, the laws are analogous to the attorney's duty of confidentiality, which imposes an obligation to maintain client secrets, except under certain narrow circumstances, even when they do not qualify for evidentiary protection under the at-

torney-client privilege. See Model Rules of Prof'l Conduct R. 1.6 (2002); *Banner* v. *City of Flint*, 99 Fed. App'x 29, 36 (6th Cir. 2004).

As technology has grown, the need for data privacy legislation has become more acute. The 1960s and 1970s saw a proliferation of data privacy laws, resulting from the "surveillance potential of powerful computer systems," which "prompted demands for specific rules governing the collection and handling of personal information." Privacy Int'l, Privacy & Human Rights: Overview (2003), http://gilc.org/privacy/survey/intro.html. The first data privacy legislation was enacted in 1970 in the state of Hesse, Germany, and was "followed by national laws in Sweden (1973), the United States (1974), Germany (1977), and France (1978)." *Ibid.*

Although the United States still has relatively weak protection for privacy, it is regarded as a fundamental right internationally. From Belgium to Brazil, the right to privacy in many countries is expressly guaranteed in the national constitution. The United Nations Universal Declaration of Human Rights provides the right of the individual to be free from "interference with his privacy, family, home or correspondence." G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (Dec. 10, 1948). Similarly, the Charter of Fundamental Rights of the European Union provides a right of privacy in Article 8.1 that expressly applies to personal data.

Member states of the European Union must enact data privacy legislation complying with Directive 95/46/EC of the European Parliament and of the Council. The Directive requires Member States to enact laws that "protect the fundamental rights and freedoms

of natural persons, and in particular their right to privacy with respect to the processing of personal data." European Union Directive 95/46/EC, 1995 O.J. L281 (1995). The Directive sets a floor for privacy, but countries are free to enact more restrictive privacy standards. Following the EU Directive, a number of states have initiated legislation on data privacy including Belgium, the Czech Republic, Denmark, Germany, Spain, France, Italy, Hungary, the Netherlands, Poland, Portugal, Romania, Finland, Sweden, and the United Kingdom. See European Commission, *Status of Implementation of Directive 95/46 on the Protection of Individuals with regard to the Processing of Personal Data* (2012), http://ec.europa.eu/justice/data-protection/law/status-implementation/index_en.htm.

Like many foreign countries, U.S. law also imposes on financial institutions "an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information." 15 U.S.C. 6801 (2006). But courts routinely allow sharing of this information in civil discovery pursuant to a protective order or agreement designed to minimize the invasion of privacy. Although protective orders and confidentiality stipulations are common in the United States, countries with civil law systems are unfamiliar and suspicious of these measures. See American Bar Association, *Proposed Resolution and Report No. 103*, 7 (Feb. 6. 2012).

B. The Union Of Arab Banks' Members, Like Petitioner, Are Prohibited By Criminal Law From Disclosing Private Bank Records, But Must Comply With Money-Laundering And Anti-Terrorist Funding Laws And Government Investigations

Countries throughout the Arab world impose secrecy requirements on banks, either as a matter of statutory law, contract, or administrative practice. In recent years, however, bank secrecy laws have been tempered by new legal requirements to screen bank customers and transactions to prevent money laundering and terrorist financing. Petitioner has met and exceeded these legal obligations.

Lebanon, a hub of regional banking and finance, has the region's most stringent bank secrecy laws, which have been in place for over 50 years. Under Lebanese law, bank managers and employees are "absolutely bound" to maintain the confidentiality of bank clients' information. See Lebanese Law of September 3, 1956 on Banking Secrecy, Art. 2. Intentional violations are punishable by three months to a year of imprisonment. See *id.* at Art. 8. The law prohibits disclosure to "any party," even government officials, "whether administrative, military or judicial," with one exception: banks are required to report suspicious transactions or accounts to the Special Investigative Commission (SIC), a body responsible for administering and enforcing the country's anti-money laundering and terrorist financing law enacted in 2001. *Ibid.*; Pet. App. 276a. The SIC alone has authority to waive bank secrecy obligations, and even then may do so only in "very limited exceptional circumstances." Pet. App. at 244a.

Similarly, Jordan and the Palestinian Territories require that banks maintain the confidentiality of their account-holders. Jordanian Banking Law No. 28 of 2000, Arts. 72–75; Palestinian Territories Banking Law No. 2 of 2002, Art. 26. Violations of the duty of confidentiality are punishable in Jordan by six months of imprisonment and fines of up to 50,000 Jordanian Dinars (~$70,000) and in the Palestinian Territories by a year of imprisonment and fines of up to 100,000 Jordanian Dinars (~$140,000). Jordanian Banking Law No. 28 of 2000, Art. 75; Palestinian Territories Banking Law No. 2 of 2002, Art. 52. Failure to maintain the confidences of clients may result in revocation of the bank's license—a veritable death sentence for the bank. See Jordanian Banking Law No. 28 of 2000, Art. 88; Palestinian Territories Banking Law No. 2 of 2002, Art. 56. Banking secrecy may be overcome by consent of the client or by court order, which petitioner sought but could not secure. Pet. App. 114a, 234a–235a.[2]

Banks in these countries must also conform to legislation designed to prevent money laundering and financing of terrorism. In 2001, Lebanon enacted Law 318 in order to detect and punish money laundering. Under Law 318, banks must exercise "necessary diligence to detect warning signs of money laundering or corruption offenses related to accounts held with it and/or transactions carried [out] by its clients." Pet. App. 276a. Banks are required to disclose suspicious transactions to the SIC, which is responsible for investigating violations of the law, and which may lift the

[2] Banks operating in Saudi Arabia, Egypt, Bahrain, Qatar, Yemen, Oman, Kuwait, and the United Arab Emirates are also subject to bank secrecy requirements in one form or another.

confidentiality of an account in rare instances. Pet. App. at 244a; see also *id.* at 295a.

Like Lebanon, Jordan and Palestine are engaged in anti-money laundering and anti-terrorist financing efforts through legislation and international treaties. Under Jordanian law, financing terrorism is a criminal offense. See Jordanian Revised Penal Law of 2001. In 2006, the Central Bank of Jordan issued anti-money laundering regulations that spell out the steps banks must take to prevent money laundering and report suspicious activity. See Central Bank of Jordan, Regulation of Anti-Money Laundering and Terrorism Financing Circular No. 29/2006 (2006). In 2007, Jordan established an Anti Money Laundering Unit (AMLU) within the central bank, which issues regulations and guidance related to anti-terrorist financing. See Jordanian Anti Money Laundering Law No. 46 of 2007. As with Lebanon's SIC, Jordanian banks must submit notification of suspicious transactions to the AMLU, which is responsible for investigating suspected money laundering and terrorist financing violations. Likewise, the Palestinian Territories play a "critical role in enforcing anti-money laundering law and anti-terrorism banking regulation in the West Bank." Pet. App. 248a; see also Palestinian Presidential Anti-Money Laundering Decree Law (2007).

Every indication suggests that petitioner not just met but exceeded the anti-money-laundering and anti-terrorist-financing requirements of these countries, as well as those of Israel. See Pet. App. at 254a. Petitioner has had a policy dating to the mid-1990s of screening account applicants and financial transactions against local blacklists as well as internal bank blacklists. *Id.* at 295a. Petitioner was an industry leader in screening

clients and transactions against the U.S. government's OFAC[3] list of designated individuals and entities, and Israeli banks followed petitioner's lead in this regard. *Id.* at 296a–297a. Petitioner took these steps well before there was any legal obligation to perform screening of this magnitude, even under Israeli law. *Ibid.* Yet the district court's order precludes petitioner from explaining any of these measures to the jury.

The scope of data privacy rights and bank secrecy laws is a matter appropriately addressed through domestic legislation. While reasonable minds may differ about the proper scope of bank secrecy and data privacy laws, it is the Executive Branch and Congress who have the institutional competence to weigh the competing interests at stake and push for a mutually acceptable resolution with foreign nations. See *Am. Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 415 (2003).

The Executive Branch's negotiations with Switzerland over bank privacy laws in connection with tax evasion investigations demonstrate the proper way to handle diplomatically sensitive conflicts that arise between one country's need for information and another's privacy laws. In 2009, the government reached a deferred-prosecution agreement with UBS AG for release of customer data needed for ongoing tax-evasion investigations. See Deferred Prosecution Agreement, *United States* v. *UBS AG*, No. 09-60033, at 9 (S.D. Fla. Feb. 18, 2009). Since then, the government has investigated other Swiss banks and is working out the details of a broader agreement with the Swiss government to allow

[3] The Office of Foreign Assets Control is a subdivision of the Department of the Treasury responsible for economic and trade sanctions.

collection of data to identify violations of the U.S. tax code. See John Letzing, *Swiss Banks Near Tax Deal on U.S. Tax Cheats*, Wall St. J., July 11, 2013, at C1.

The district court's order rushes headlong into international conflict, without the guidance of those charged with conducting our foreign affairs. In the Middle East, there is significant international coordination to combat the financing of terror. Jordan, Lebanon, and Palestine are all members of the Middle East & North Africa Financial Action Task Force (MENAFATF), an international body dedicated to combating money laundering and terrorist financing. MENAFATF monitors members and offers advice on how member countries can meet the Recommendations on Anti-Money Laundering and Counter-Terrorist Financing issued by the Financial Action Task Force, an intergovernmental body of which the United States is a member.

Jordan also is a signatory to the 1999 United Nations International Convention for the Suppression of the Financing of Terrorism, and has executed bilateral agreements with the United States providing mutual assistance between their customs administrations. See Agreement on Customs, U.S.-Jordan, Dec. 8, 2004, T.I.A.S. No. 04-1208.2. The foreign policy issues in the Middle East are complicated by the fact that Jordan, Lebanon, and Palestine are at the center of a highly sensitive debate about Israel, the war on terror, and the role of the United States in the region, making it particularly important that the Executive Branch be involved in negotiations over those countries' data privacy laws.

C. The Extraterritorial Application Of The District Court's Authority Violates Principles Of Comity

The severe sanctions imposed on petitioner in the district court's Rule 37 rulings violate two bedrock legal principles. The first is the presumption against extraterritoriality, "a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Morrison* v. *Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (quotation marks and citation omitted). The second is that of comity, which requires that courts "exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position." *Societe Nationale Industrielle Aerospatiale* v. *United States Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 546 (1987). The district court's decision lies at the intersection of these two principles: the terrorist attacks at issue occurred in foreign countries, and the bank records requested lie abroad in jurisdictions that prohibit their disclosure. The district court thus has pressed its jurisdictional authority into the affairs of foreign countries with their own legal regimes, statutes, and court systems.

Principles of comity and the presumption against extraterritoriality exist to protect against just such "unintended clashes between our laws and those of other nations which could result in international discord." *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (internal quotation marks and citation omitted). Courts in particular can be the source of considerable diplomatic problems. Just this term, the Court,

in limiting the extraterritorial application of the ATS, warned of the "danger of unwarranted judicial interference in the conduct of foreign policy," a concern that is "magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do." *Ibid.*

Likewise, during the cold war, the Court struck down state laws prohibiting probate inheritance by nonresident aliens who live in countries that do not recognize a reciprocal right for U.S. citizens to inherit because these laws invited courts to engage in foreign policy. *Zschernig* v. *Miller*, 389 U.S. 429, 441 (1968). Of primary concern was the fact that as "one reads the Oregon [probate court] decisions, it seems that foreign policy attitudes, the freezing or thawing of the 'cold war,' and the like are the real desiderata," matters properly addressed by the Federal Government, not local probate courts. *Id.* at 437. The concern over extraterritoriality extends to situations where the regulation deals with the production of documents that would otherwise not be disclosed. *Garamendi*, 539 U.S. at 401 (striking down on grounds of preemption a California law requiring insurers doing business in the state "to disclose information about all policies sold in Europe between 1920 and 1945").

Principles of comity are also designed to prevent courts from inappropriately interfering with matters of foreign policy. Comity demands that courts 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." *Societe Nationale*, 482 U.S. at 546. A bank secrecy law which may result in criminal prosecution "constitutes a

weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign." *Rodgers*, 357 U.S. at 211. Despite the clear instructions from this Court, "U.S. courts have often misapplied the standard and ruled that the needs of the proceeding before them inevitably must take precedence over the privacy and data protection concerns of other nations." American Bar Association, *Proposed Resolution & Report No. 103* 3 (Feb. 6, 2012). This approach "often places parties in the perilous situation of having to choose between inconsistent legal requirements and perhaps to incur sanctions under one legal system or the other." *Id.* at 14. Thus, the ABA has urged courts to "consider and respect, as appropriate, the data protection and privacy laws of any applicable foreign sovereign, and the interests of any person who is subject to or benefits from such laws." American Bar Association, *Resolution No. 103* (adopted as revised).

II. It Is Essential That Immediate Appellate Review Be Available To Remedy District Court Rulings That Threaten To Push The United States Into Conflict With Foreign States

The Second Circuit had at its disposal several means to remedy the district court's errant rulings, but wrongly believed that it was powerless to act. This Court should intervene to clarify that interlocutory appellate review, by either collateral order review or mandamus, is available to correct significant and irreparable harm to litigants and our foreign policy from rulings with significant international repercussions like those of the district court.

A. The District Court's Rulings Will Inflict Irreparable Harm On Petitioner And The Diplomatic Interests Of The United States

The district court's ruling is a windfall virtually ensuring entry of a highly injurious judgment against petitioner. This judgment could easily reach hundreds of millions of dollars. See, *e.g.*, *Hilao* v. *Estate of Marcos*, 103 F.3d 767 (9th Cir. 1993) (ATS; ~$1.9 billion); *Doe* v. *Karadzic*, No. 93-cv-878, slip op. (S.D.N.Y. Oct. 5, 2000) (ATS; $4.5 billion); *Mehinovic* v. *Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (ATS; $140 million); *Morris* v. *Khadr*, 415 F. Supp. 2d 1323 (D. Utah 2006) (ATA; $102.6 million); *Rubin* v. *Hamas Islamic Resistance Movement*, No. 02-cv-0975, slip op. (D.D.C. Sept. 27, 2004) (ATA; $214.5 million); *Acree* v. *Republic of Iraq*, 271 F. Supp. 2d 179 (D.D.C. 2003) (FSIA, ~$959 million), rev'd, 370 F.3d 41 (D.C. Cir.), cert. denied 544 U.S. 1010 (2004). Once liability is established in the test case, collateral estoppel may preclude the bank from defending itself in subsequent litigation.

Although money damages in isolation might not be enough to establish the propriety of interlocutory review, the dizzying magnitude of potential collateral consequences from the anticipated judgment sets this case apart. By mislabeling petitioner a supporter of terrorism, the order and inevitable jury verdict inflicts devastating reputational harm on a bank with an otherwise sterling record. Such an attack on "intangible assets such as reputation and goodwill can constitute irreparable injury." *United Healthcare Ins. Co.* v. *AdvancePCS*, 316 F.3d 737, 741 (8th Cir. 2002). Here, the reputational harm is particularly acute because the bank is being labeled as an abettor of terrorism, a powerful stigma magnified by court imprimatur. Cf. *Wat-*

kins v. *United States*, 354 U.S. 178, 197 (1957) (noting that being called as a witness before the House Committee on Un-American Activities subjects the witness to "public stigma, scorn and obloquy.").

Once labeled a terrorist organization, a bank becomes toxic. After a federal court has issued a judgment declaring a bank to be a sponsor of terrorism, the Treasury Department's Office of Foreign Assets Control could impose sanctions on the bank prohibiting all interactions with U.S. citizens, persons located in the United States, or entities organized under U.S. law, including financial institutions. 31 C.F.R. 594.201(a), 597.201(a). Other countries may take similar actions to blacklist the bank under local counter-terrorist-financing laws. Placement on the OFAC list would be financially ruinous for many banks in the Middle East, which heavily depend on transacting business with U.S. entities. Even before any official ban, other participants in the financial sector would eschew dealings with an adjudicated sponsor of terrorism out of concern that such interactions would expose those banks themselves to liability or sanction.

These events, or even the threat of them, could also lead to a precipitous collapse of trust by depositors. Such was the case with auditor Arthur Andersen, which fell apart shortly after it was indicted on charges relating to the firm's auditing of Enron, causing most of its clients to "defect[] before the auditor was found guilty." See Jan Barton, *Who Cares About Auditor Reputation?*, 22 Contemp. Acct. Res. 549, 559 (2005). Although this Court ultimately reversed the company's conviction in a unanimous decision, the victory was little more than a posthumous exoneration.

These dire potential consequences would not await appellate review of the final judgment. The threat posed by the district court's ruling to Jordan's premier financial institution propels the U.S. into the middle of a diplomatic imbroglio, threatening an institution that Jordan views as "a pivotal force of economic stability and security" with an order that "raise[s] serious national security concerns for the kingdom." Pet. App. 250a. Jordan is one of the United States' closest allies in the Middle East, a moderate government neighboring war-torn Syria. The country is a key broker of peace between Israel and the Palestinians, and is vital to counter-terrorism efforts in the region. Without intervention by this Court, this imminent harm to Jordan's sovereignty and U.S. foreign interests will occur *without the courts even hearing the U.S. executive branch's views on the matter*, despite the petitioner's pleas to solicit the State Department's views. If the Court is not inclined to grant the petition outright, it should, at the very least, invite the views of the Solicitor General.

B. The Court Should Grant Certiorari To Ensure That Either Mandamus Or Collateral Order Review Is Available As An Essential Safety Valve For Abusive District Court Decisions

This Court has long recognized the power of appellate courts to review non-final decisions when delaying review "would imperil a substantial public interest" or a "particular value of a high order." *Will* v. *Hallock*, 546 U.S. 345, 352–353 (2006). Under the collateral order doctrine, the courts of appeals have jurisdiction to review conclusive collateral rulings that "resolve important questions separate from the merits" and which

are "effectively unreviewable on appeal from the final judgment in the underlying action." *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 106 (2009).

In this case, values of the highest order are threatened by the district court's rulings. The very existence of a prominent and reputable Jordanian bank is in jeopardy. Although this Court has favored an approach focusing on "the entire category to which a claim belongs," rather than the specifics of an individual case, *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 868 (1992), the Court may recognize a new category of collateral orders that impose unreviewable harm to foreign sovereign interests and domestic foreign policy. Indeed, the right of collateral review in other areas touching upon foreign sovereign interests is well established. See *Johnson* v. *Jones*, 515 U.S. 304, 310–312 (1995); see also *D&H Marketers, Inc.* v. *Freedom Oil & Gas, Inc.*, 744 F.2d 1443, 1446 (10th Cir. 1984) (collateral order review is appropriate for decisions implicating principles of comity that cannot be "ameliorate[d] . . . on the delayed appeal."). Furthermore, the catastrophic magnitude of the damages at stake and irreparable branding of petitioner as an abettor of terrorism distinguish this case from other decisions discussing collateral order review of Rule 37 sanctions orders. See, *e.g.*, *Cunningham* v. *Hamilton Cnty.*, 527 U.S. 198 (1999).

Even if the Court decides against collateral order review, it is unquestionably appropriate to issue mandamus "to correct an erroneous discovery sanction." Charles Wright, Arthur Miller, & Edward Cooper, *Federal Practice and Procedure* § 3935.3, at 708–709, 721 (3d ed. 2012). Indeed, to the extent the Court has cut back on collateral order review, it is precisely be-

cause the remedy of mandamus remains available. See *Mohawk*, 558 U.S. at 111.

In overruling the denial of mandamus in prior cases, this Court has instructed the inferior courts "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." *Societe Nationale Industrielle Aerospatiale* v. *United States Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 546 (1987). Indeed, this Court has long endorsed the use of mandamus to review court orders that would result in serious repercussions to foreign relations. See *In re Transportes Maritimos do Estado*, 264 U.S. 105, 107 (1924) (granting mandamus in recognition of "the high consideration always due diplomatic representatives of friendly nations"); see also *Cheney* v. *United States Dist. Court*, 542 U.S. 367, 369 (2004) (mandamus appropriate for orders that "threaten the separation of powers by embarrass[ing] the executive arm of the Government"). The Court should grant the petition to make clear the standards for relief when foreign policy interests are at stake.

Other circuits have issued mandamus to review orders that have "appreciable foreign policy consequences," and "financial stakes [that] are astronomical." *Abelesz* v. *OTP Bank*, 692 F.3d 638, 651 (7th Cir. 2012); see also *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998) (granting mandamus out of respect for "the demands of international comity"); *In re Philippine Nat'l Bank*, 397 F.3d 768 (9th Cir. 2005) (granting mandamus of district court ruling requiring violations of Philippine bank secrecy laws); *Credit Suisse* v. *United States Dist. Court*, 130 F.3d 1342, 1346 (9th Cir. 1997) ("[T]o choose

between being in contempt of court and violating Swiss law clearly constitutes severe prejudice that could not be remedied on direct appeal.").

District courts have considerable power to influence the direction and outcome of a case—for better or worse—before entry of final judgment. Though the district courts' power to regulate trial proceedings is fundamental to this judicial system, it is imperative that the Court ensure that either collateral order review or mandamus is available as an essential "safety valve" in cases like this, where the district court so clearly misapplied the law, ignored the facts, and abused its discretion with wildly inordinate sanctions that prohibit the bank from mounting a coherent defense. *Mohawk*, 558 U.S. at 111.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DOUGLAS HALLWARD-DRIEMEIER
Counsel of Record
ROPES & GRAY LLP

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