NO. 12-1485

In the
Supreme Court of the United States

ARAB BANK, PLC,

Petitioner,

v.

COURTNEY LINDE, ET AL.,

Respondents.

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

SECOND SUPPLEMENTAL BRIEF FOR PETITIONER

KEVIN WALSH
DOUGLAS W. MATEYASCHUK
DLA PIPER LLP (US)
1251 Ave. of the Americas
New York, NY 10020

PAUL D. CLEMENT
Counsel of Record
D. ZACHARY HUDSON
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Petitioner

June 10, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

SUPPLEMENTAL BRIEF

The United States correctly concludes that the lower courts' approval of draconian sanctions against Arab Bank for doing no more than complying with the laws of the foreign nations in which it operates is riddled with "significant" errors. U.S. Br. 8. Indeed, the United States identifies no fewer than three fatal errors with the sanctions order. The sanctions punish Arab Bank and foreign sovereigns for cooperating with U.S. government investigations, disregard the interests of foreign sovereigns in enforcing their laws in their own territories against their own subjects, and ignore the enormous foreign policy consequences of an order that threatens the existence of one of the most important financial institutions in the Middle East. All of these errors share a common thread: they place the District Court's own interests in facilitating the litigation before it above the interests of foreign sovereigns, the United States, and the broader foreign relations concerns implicated by these draconian orders. The tendency of trial courts to elevate the importance of discovery is perhaps natural, but it underscores the dire need for clear direction from this Court.

Despite dedicating the vast majority of its submission to detailing these fatal problems and their potentially disastrous implications, the United States nonetheless urges this Court to deny the Bank's petition based on its mandamus posture. But mandamus exists for cases like this, as the United States has recognized when its own interests are directly on the line. The United States has now confirmed that the orders below are not just wrong,

but threaten important sovereign interests of the United States and multiple foreign sovereigns. What is more, the orders threaten the ruin of the single most important financial institution in the Palestinian territories and Jordan if not the entire Middle East. The United States suggests that this Court should defer to the Court of Appeals' characterization of such concerns as speculative. But federal courts of appeals are not well-positioned to speculate about the foreign policy consequences of orders that could debilitate a critical financial institution in a sensitive region for doing nothing more than obeying the laws that govern where it operates. The Kingdom of Jordan is far better positioned to evaluate whether concerns about Arab Bank's survival are speculative, and it has made clear in no uncertain terms that review at this juncture is imperative. *See* Diplomatic Note from Kingdom of Jordan of June 9, 2014 (reproduced in Supplemental Appendix; hereinafter "Diplomatic Note").

I. The United States Correctly Acknowledges That The Severe Sanctions Imposed On Arab Bank Are Deeply Flawed In Multiple Respects.

The United States (at 8-21) correctly identifies the multiple fatal problems with the District Court's sanctions. First, the court effectively penalized both Arab Bank and the foreign nations in which it operates for cooperating with multi-national efforts to stop terrorist financing. Rather than view such efforts as evidence of good faith, the District Court treated them as selective enforcement that indicated

both bad faith and that the foreign laws were not a serious obstacle to the Bank's compliance. But as the United States explains, that view mistakenly equates private litigation with coordinated multi-governmental investigations, U.S. Br. 14-16, and more importantly threatens the continued efficacy of the latter as foreign banks and foreign sovereigns conclude that no good deed goes unpunished. *Id.*

Second, as the United States explains, the courts below "gave insufficient weight to the interests of foreign governments in enforcing their own laws within their own territories." *Id.* at 16. This approach stands in stark contrast to this Court's own precedents which have emphasized the importance of comity and been chary about projecting U.S. law abroad. *See, e.g., Daimler v. Bauman*, 134 S. Ct. 746, 762-63 (2014); *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 256 (2010). Arab Bank has already produced all relevant documents located in its U.S. offices. Arab Bank is thus being sanctioned for obeying the criminal laws of the foreign nations in which it operates and where the remaining documents are located. The only nation seeking to project its laws extraterritorially here is the United States. Nonetheless, the lower courts dismissed those foreign criminal laws by pointing to the willingness of the foreign sovereigns to make documents available in state-to-state cooperation and the importance of the information to the litigation here. U.S. Br. 17-18. And the lower courts completely "disregarded" the views of the Palestinian government and the interests of Britain and France. *Id.* at 18 nn.5-6.

Third, the lower courts also failed to take into account the potentially far-reaching foreign policy implications of the draconian sanctions order. As the United States underscores, "[t]he sanctions order could undermine the United States' vital interest in maintaining close cooperative relationships with Jordan and other key regional partners in the fight against terrorism." *Id.* at 19. "Jordan in particular is an invaluable partner in the region," and the "United States relies on Jordan in accomplishing a host of critical security and foreign-policy interests, including combatting terrorism." *Id.* "The sanctions order may have an impact on these important counterterrorism relationships." *Id.* The District Court gave short shrift to these extraordinarily weighty concerns.

All of these errors have a common theme: "the court failed to give adequate weight to United States and foreign interests that weighed in favor of a lesser sanction than the one the court imposed in this private litigation." U.S. Br. 9. Instead, the District Court elevated concerns about facilitating the litigation pending before it. That is perhaps understandable: District Courts are well-situated to oversee litigation and poorly-situated to weigh the foreign policy implications of disregarding foreign laws and endangering vital international financial institutions. But that only underscores the importance of this Court providing clear guidance now that the United States has confirmed that the analysis undertaken here was deeply flawed. The volume of transnational litigation and the need for guidance from this Court are only growing.

II. Review Of The District Court's Sanctions Order Cannot Be Put Off To A Future Merits Appeal.

The United States' conclusion that the sanctions order is irretrievably flawed makes the need for this Court's immediate review crystal clear. Mandamus review is purpose-built for cases such as this one where the underlying order is indisputably wrong and will inflict irreparable damage. This Court has granted certiorari to reverse denials of mandamus on numerous occasions, *see, e.g.*, *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2320 (2011); *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367 (2004), and the need for such review and reversal has never been more critical than here.

Allowing the trial against the Bank to proceed in the shadow of the District Court's sanctions order will result in multiple outcomes that are both disastrous and irreversible after a verdict against the Bank is returned. First, the adverse verdict that the District Court's sanctions all but guarantee will jeopardize the continuing operation of the Bank, and a reversal of that verdict years later on appeal will be an academic exercise. A financial institution is much more vulnerable to the immediate effects of being labeled a terrorist financier than other entities. Foreign banks critically depend on correspondent and clearing relationships, and no other bank wants to deal with an institution that is an adjudicated terrorist financier. Thus, the primary threat is not the size of the judgment—though that could be enormous—but the likelihood that an adverse judgment would deter other banks and

counterparties from doing business with Arab Bank, which would threaten the Bank's very existence. The verdict will also likely trigger withdrawals by depositors fearing that the Bank will be unable to serve their needs. *See* U.S. Br. 21. Such a run on the Bank's reserves could easily result in the Bank's demise, and the Bank could not be resuscitated by an appellate judgment after the fact.

These fears are far from mere "speculation." U.S. Br. 23. Some major financial institutions have already refused to do business with the Bank as a result of the sanctions order and several of the Bank's clients have already expressed significant concern about the upcoming trial.

Second, and relatedly, a verdict crippling Arab Bank will have immediate and far-reaching implications for Jordan and the Middle East that cannot be rectified by a later reversal. As the United States acknowledges, Arab Bank is the "'leading financial institution'" in Jordan and plays a unique and "'significant role in the Jordanian and surrounding regional economies.'" U.S. Br. 1. The Bank has accounted for as much as 30% of the value of the leading Jordanian exchange in recent years. And the pension fund for Jordan's public employees has a substantial stake in Arab Bank's stock. Likewise, the Bank is a critical purchaser of the Kingdom's public debt. Arab Bank is also a conduit for financial assistance to Jordan through many aid programs, including USAID's loan guarantee and microfinance programs. As a result—because of the Bank's central role in the Jordanian economy—the sanctions order, which "could devastate the Bank,"

could ultimately have the effect of "destabiliz[ing] Jordan and the surrounding region." Jordan Am. Br. 18. As Jordan has emphasized, "[e]conomic instability could in turn lead to political instability, which would," among other things, "disrupt the mutual efforts of Jordan and the United States to broker peace in the Middle East." *Id.* at 19.

Jordan is not alone in this view—the Palestinian Authority and Lebanon have confirmed that enforcing sanctions against Arab Bank would pose a serious risk to regional stability. *See, e.g.*, Pet. App. 247a-248a (forced abrogation of banking privacy laws will "negatively impact" "the economy in the Palestinian Territories"). The Kingdom of Saudi Arabia has expressed similar concerns. *See* U.S. Br. 19. These potentially cataclysmic consequences for the economy and political stability of Jordan and the surrounding region cannot be remedied by a future appeal on the merits, no matter how favorable the outcome to Arab Bank. The full measure of damage will already have been inflicted.

Third, refusing to review the sanctions imposed on Arab Bank will complete the affront to Jordanian sovereignty. As explained, Jordan "is an invaluable partner" in the Middle East and the "United States relies on Jordan in accomplishing a host of critical" tasks. U.S. Br. 19. For more than 60 years, Jordan has been the United States' closest ally in a region where many governments are reluctant to publicly support the United States. *See, e.g.*, Remarks by President Obama and His Majesty King Abdullah II, WhiteHouse.gov (Feb. 14, 2014), http://1.usa.gov/1nnUeUk ("[W]e have very few friends, partners and

allies around the world that have been as steadfast and reliable as" the Jordanian government.). Jordan rightly views the sanctions order against the Bank as a contemptuous and "direct affront" to its sovereignty, and has unequivocally stated that the order "threatens the close U.S.-Jordan partnership." Jordan Am. Br. 9, 14.

Because of the critical sovereignty interests at stake, Jordan took the "unprecedented step" of filing an *amicus* brief in this Court supporting review. *Id.* at 14. And the Kingdom has reiterated that the need for this Court's review at this juncture is critical. *See* Diplomatic Note. In the view of the Kingdom, the United States' "suggestion that review of the sanctions against Arab Bank can be conducted at some later point in time … unrealistically downplays the impact the sanctions will have at trial and fails to account for the way banking works." *Id.* at 2a. "The verdict against the Bank … will jeopardize the continuing operation of the Bank as soon as it issues," and it "will be devastating to the Bank, to Jordan, and to the entire region." *Id.* Moreover, denial of certiorari "will complete the affront to Jordanian sovereignty that began with the issuance of the sanctions." *Id.* "Jordan, like the United States, has the right to prescribe and enforce laws within its territory." *Id.* at 3a. "Punishing the Arab Bank for following Jordanian law directly undermines that right." *Id.*

The United States suggests that this Court should defer to the Second Circuit's view that all these concerns are too "speculative." *See* U.S. Br. 23. But the Second Circuit is poorly positioned to assess

whether the loss of the most significant financial institution in the Palestinian Territories and Jordan will have a destabilizing effect on the Middle East, or how the draconian sanctions order will affect the willingness of foreign banks and foreign sovereigns to cooperate with multi-national investigations in the future. The very fact that the sanctions order implicated such sensitive foreign policy concerns should have been a signal to the Second Circuit that its intervention was badly needed. But having ignored that signal, there is no cause to defer to that court's assessment of whether these concerns are real or speculative. The Kingdom of Jordan is in a far better position both institutionally and geographically to assess these risks, and it is emphatic that the threats to both Arab Bank and foreign policy imperatives are real, and the need for this Court's immediate intervention is dire. *See* Jordan Am. Br. 18-19; Diplomatic Note.

The United States also asserts that it is "difficult to assess" the effects of the sanctions order "[w]ithout knowing what evidence petitioner will present and the precise content of the jury instructions." U.S. Br. 23-24. But the District Court has already made clear that the sanctions are extraordinarily harsh and will largely obviate the need for plaintiffs to put on evidence of the Bank's culpability. And the draconian nature of those sanctions in no way turns on the precise wording of the jury instructions. At a bare minimum, the adverse inference sanction invites the jury to infer a culpable state of mind on the part of the Bank, and the preclusion sanction bars the Bank from offering the very evidence that would refute that inference. The precise details of

how the jury will be told to infer liability is entirely beside the point. Moreover, the District Court has ruled that the jury must never know that these sanctions resulted from the Bank's *compliance* with foreign privacy laws. *See* Pet. 3-4. The fact that this latter clarification post-dated the Second Circuit's denial of mandamus, *see* U.S. Br. 6, in no way detracts from the urgent need for this Court's review. Rather, it further clarifies that the sanctions here will operate in practice as the functional equivalent of a directed verdict.

Along the same lines, the United States suggests wishfully (at 23-24) that the District Court may come to its senses and amend the sanctions order before trial. But nothing that has transpired in the District Court thus far supports that hope. The District Court is already well aware that the sanctions order creates "'*very severe consequences*'" that make it "'*very difficult*'" for the Bank to defend itself, yet has fully embraced those sanctions. *See* First Supp. Br. 1-4.

Given the calamitous consequences of foregoing review, there is simply no justification for kicking the can down the road. Mandamus is designed to "promptly correc[t] serious errors" in cases involving "particularly injurious" and "consequential" pretrial rulings that work "a manifest injustice." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 110-12 (2009). It enables reviewing courts to redress "a clear abuse of discretion," "formulate the necessary guidelines," and "settle new and important problems" arising in the discovery context. *Schlagenhauf v. Holder*, 379 U.S. 104, 110-12 (1964). Thus, just last Term this Court granted certiorari and unanimously reversed

the Fifth Circuit's denial of mandamus over pretrial enforcement of a forum selection clause because the lower courts had "misunderstood the standards to be applied." *Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W.D. Tex.*, 134 S. Ct. 568, 575-77 (2013). With all due respect to the importance of forum selection clauses, the diplomatic and foreign policy implications here dwarf the concerns in *Atlantic Marine*. And with the United States' express recognition that the lower courts erred in several important respects, the case for review is abundantly clear.

In short, mandamus exists precisely to correct such manifest and consequential errors. Thus, the mandamus posture hardly poses an obstacle to this Court's review. Indeed, the United States has recognized as much when its own interests were directly implicated. In *Cheney*, for example, the Solicitor General sought review of the D.C. Circuit's refusal to grant mandamus to halt discovery into the operations of the Vice President's energy task force. In its Petition, the government told this Court that the discovery orders at issue were "far from ordinary," and that immediate review was necessary to prevent harm that could not be undone at some later date. Pet. for Writ of Cert., *Cheney* (No. 03-475), 2003 WL 22669130, at * 7. According to the government, "the procedural posture of th[e] case in no way render[ed]" the concerns raised regarding the discovery "premature" as the harm done could not "be adequately addressed by" "appeal after final judgment." *Id.* at *21-*22.

What the Solicitor General said in *Cheney* applies fully to this case. The sanctions order here is no ordinary discovery sanction. Draconian sanctions have been imposed on Arab Bank for refusing to break the criminal laws of the foreign nations in which it operates. The United States has now confirmed that those orders were erroneous precisely because they failed to afford sufficient respect to United States interests, foreign sovereigns, and the diplomatic repercussions of their extreme nature. There is nothing ordinary about those errors or consequences. And, as in *Cheney*, these orders cannot be adequately redressed on final review. By that point, the most important financial institution in the region may no longer exist as a functioning entity, and in all events the affront to the Kingdom of Jordan and its sovereignty will not be redressable. With the United States government now on record as finding the District Court's analysis not just erroneous, but erroneous because of its failure to account for critical diplomatic and sovereign concerns, the time for this Court's review is now.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
D. ZACHARY HUDSON
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

KEVIN WALSH
DOUGLAS W. MATEYASCHUK
DLA PIPER LLP (US)
1251 Ave. of the Americas
New York, NY 10020

Counsel for Petitioner

June 10, 2014

SUPPLEMENTAL APPENDIX

TABLE OF CONTENTS

Diplomatic Note D05-561 from the Embassy of the Hashemite Kingdom of Jordan (June 9, 2014)

EMBASSY OF THE HASHEMITE KINGDOM OF JORDAN
WASHINGTON, D.C.

No. _____
Ref. D05-561
Date 06/09/2014

The Embassy of the Hashemite Kingdom of Jordan in Washington DC presents its compliments to the U.S. Department of the State. And with reference to Amicus Curiae in *Arab Bank, PLC,* v. *Courtney Linde,* et al., Supreme Court Case No. 12-1485, the Embassy has the honor to bring to the kind attention of the esteemed Department that the Hashemite Kingdom of Jordan is grateful that the Honorable Solicitor General has filed a brief that unequivocally points out the several major legal errors made by the lower courts in New York. Jordan also greatly appreciates that the brief recognizes the close relationship between our countries and acknowledges our distinguished cooperation in advancing security and foreign-policy interests, including combating terrorism.

The Embassy, on the other hand, would like to inform the esteemed Department that Jordan has

great concern over what the Honorable Solicitor General believes that review of this case by the Supreme Court can be reserved until after a trial has occurred. The Arab Bank is the single largest financial entity in Jordan and plays a uniquely important role in the Jordanian economy as well as throughout the entire region. Indeed, it provides some of the only safe, sophisticated, and transparent financial infrastructure available in otherwise turbulent regions. The Honorable Solicitor General's suggestion that review of the sanctions against Arab Bank can be conducted at some later point in time, after Arab Bank has been branded a knowing financier of terrorism, unrealistically downplays the impact the sanctions will have at trial and fails to account for the way banking works. Banking is characterized by caution in the formation of relationships. The verdict against the Bank that the district court's sanctions all but guarantee will jeopardize the continuing operation of the Bank as soon as it issues. That verdict will be devastating to the Bank, to Jordan, and to the entire region. Other banks will not continue to do business with Arab Bank during the months, and years, it takes to appeal the judgment.

The Embassy believes that if the Supreme Court this month declines to review the sanctions imposed on Arab Bank, that denial will complete the affront to Jordanian sovereignty that began with the issuance of the sanctions. Such an affront to Jordan's sovereignty cannot be taken lightly. The United States has now formally acknowledged that the sanctions were wrongly issued based on an incorrect legal analysis that failed to account for the full range

of international comity concerns. Jordan will face a very real and grave threat to its economic stability and prosperity if certiorari is denied—all because its largest financial institution adhered to Jordanian law and did not tum over confidential customer information to private plaintiffs in the United States. Jordan, like the United States, has the right to prescribe and enforce laws within its territory. Punishing the Arab Bank for following Jordanian law directly undermines that right.

Taking into consideration that the Honorable Solicitor General has confirmed that the sanctions order was erroneous and failed to account for Jordan's sovereign interests, the Embassy remains hopeful that the Supreme Court will grant the Petition and avert this affront to Jordan's sovereignty and preserve the longstanding relationship that our nations have worked together to achieve.

The Embassy of the Hashemite Kingdom of Jordanian in Washington D.C. avails itself this opportunity to renew to the esteemed Department the assurances of its highest consideration.

The U.S. Department of State
Washington D.C.