No. 16-499

In The
Supreme Court of the United States

Joseph Jesner Et Al.,
Petitioners,
v.

Arab Bank, PLC,
Respondent.

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

BRIEF FOR THE CENTRAL BANK OF JORDAN AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND CONSTITUTIONS

TABLE OF AUTHORITIES (continued)

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES (continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

BRIEF OF THE CENTRAL BANK OF JORDAN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

The Central Bank of Jordan respectfully submits this brief as *amicus curiae* in support of respondent.[1]

INTEREST OF AMICUS CURIAE

The Central Bank of Jordan (the "CBJ" or the "Central Bank") is the central bank and primary banking regulator of the Hashemite Kingdom of Jordan (the "Kingdom" or "Jordan"). Under the Central Bank Law, the CBJ acts as both a central monetary authority and as an independent prudential regulator. *See* Central Bank of Jordan Law No. 23 of 1971 ("CBJ Law"). In the former capacity, the CBJ is responsible for safeguarding monetary stability, maintaining the health of the Kingdom's banking and financial sectors, and preserving the safety and soundness of the Jordanian banking system. In the latter capacity, the CBJ supervises the operations of Arab Bank and other Jordanian banks, as well as foreign banks with operations in Jordan. As the chief financial regulatory body, the CBJ's mandate also includes significant responsibilities related to the Kingdom's anti-money laundering ("AML") and combating the financing of terrorism ("CFT") programs. Given these responsibilities, the CBJ takes seriously the

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[1] Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part. No person or entity, other than *amicus*, its members, or counsel made a monetary contribution to the preparation and submission of this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

need to prevent terrorist actors from making use of the Kingdom's financial system, and appreciates the role of the United States and the Kingdom's other international partners in supporting Jordan's AML/CFT programs.

The CBJ is concerned that the extraterritorial application of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, in this case would impair the Central Bank's ability to achieve both of these mandates. The prospect of substantial civil liability imposed by U.S. courts through the ATS would disrupt Jordan's carefully-constructed banking regulatory and AML/CFT regimes. These regimes are based on a complex system of multilateral agreements and global best practices, developed through a process of international collaboration over a period of decades. They involve a careful balancing of competing economic, geopolitical, and legal priorities, and include mechanisms for the CBJ to cooperate with other countries' financial sector regulators and competent authorities to combat money laundering and terrorist financing. The assessment of substantial civil liability under the ATS would subject a key part of the Jordanian banking system to such risk, would have a significant impact on the CBJ's administration of its comprehensive regulatory regime, and could potentially undermine the Kingdom's AML/CFT efforts. The Arab Bank, which maintains the largest global Arab banking network, is a systemically important bank in Jordan and plays a key role in the Jordanian economy. Accordingly, exposing Arab Bank to significant legal risk could also interfere with the CBJ's efforts to

ensure the safety and soundness of the Kingdom's banking sector.

We note the position of the United States in this case that "petitioners' claims raise serious extraterritoriality questions" and that "prompt appellate resolution of those questions would further foreign-policy and judicial efficiency interests." U.S.Br.25. We agree. The potential for continued litigation in this matter—which has already been pending for over 13 years—risks amplifying the harm created by interposing significant U.S. civil liability into the Kingdom's well-considered banking and AML/CFT regimes. Accordingly, the CBJ submits this brief to provide this Court with information about the Kingdom's banking regulatory and AML/CFT regimes, and to underscore the risk of disruption to those regimes posed by the broad extraterritorial application of the ATS proposed by the Petitioners.

INTRODUCTION AND SUMMARY OF ARGUMENT

The past two decades have been marked by an emerging international consensus on best practices and standards for both banking regulation and AML/CFT regimes. In the context of banking regulation, this consensus emphasizes the role of an empowered and independent central bank that is charged with supervising the banking sector, overseeing monetary policy, and safeguarding the

overall soundness of the financial system.[2] In the context of AML/CFT regimes, the global consensus involves a risk-based approach to preventing money laundering and terrorist financing, in which well-established regulatory tools (e.g., customer due diligence, the reporting of suspicious activities) are tailored to address the specific risk profile of a particular country, sector, or activity.[3] The international consensus around AML/CFT also

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[2] *See, e.g.*, Basel Comm. on Banking Supervision ("BCBS"), Core Principles for Effective Banking Supervision, Principle 2 (providing that the banking regulator should possess "operational independence, transparent processes, sound governance, budgetary processes that do not undermine autonomy and adequate resources").

[3] The focus on risk-based supervision is a core principle of banking regulation generally. *See* BCBS Core Principles for Effective Banking Supervision, at 4 ("Supervisors should assess the risk profile of banks, in terms of the risks they run, the efficacy of their risk management and the risks they pose to the banking and financial systems."). In the specific context of AML/CFT regimes, the best practice is to employ a risk-based approach to regulation, so as to ensure the effective use of limited supervisory and enforcement resources. *See* FATF, International Standards on Combating Money Laundering and The Financing Of Terrorism & Proliferation, at Recommendation 7 (2016), http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf ("FATF Recommendations") ("Countries should first identify, assess and understand the risks of money laundering and terrorist financing they face, and then adopt appropriate measures to mitigate the risk. The risk-based approach allows countries, within the framework of the FATF requirements, to adopt a more flexible set of measures, in order to target their resources more effectively and apply preventive measures that are commensurate to the nature of risks, in order to focus their efforts in the most effective way.") (other citations in text).

prioritizes international cooperation—both in the form of multilateral organizations such as the Financial Action Task Force ("FATF"), and in the form of country-to-country sharing of information and other resources.[4]

The systems of Jordanian bank regulation and AML/CFT administered by the CBJ reflect these common principles. The Kingdom has a modern, well-functioning banking regulatory regime, which draws upon best practices advocated by the BCBS[5] and the Financial Stability Board ("FSB"),[6] among others. The CBJ plays a central role in this regime, in which it acts as both chief monetary authority and principal financial services regulator. Following global best practices, the CBJ has been granted substantial authority over the Jordanian banking sector, as well as the autonomy to perform its role without undue interference.

The Kingdom also has a comprehensive approach to preventing money laundering and terrorist financing, which is consistent with international

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[4] *See, e.g.,* FATF Recommendations 35-40.

[5] The BCBS, a committee of banking supervisory authorities, is the primary global standard setter for the prudential regulation of banks and provides a forum for cooperation on banking supervisory matters. *See* BCBS Charter, arts. 1-2.

[6] The FSB is an international body that monitors and makes recommendations about the global financial system—it does so, in part, by coordinating the work of national financial authorities (such as the CBJ) and international standard-setting bodies on the development of strong regulatory, supervisory, and other financial sector policies. *See* FSB Charter, arts. 1-2.

standards. Jordan's AML/CFT regime was developed with reference to the FATF Recommendations, a set of globally-agreed principles for combating money laundering and terrorist financing, and the Kingdom has worked closely with FATF and other international and regional bodies to ensure that the Jordanian AML/CFT law meets global best standards. Reflecting this work, Jordan is considered to be a FATF-compliant jurisdiction, and was deemed to have an "effective" system of AML/CFT regulation by the FATF regional body for the Middle East. Middle East and North Afr. Fin. Action Task Force ("MENAFATF") Mut. Evaluation Rep., Third Follow-Up Rep. for Jordan 4 (Apr. 30, 2013) ("MENAFATF Evaluation Report"). Indeed, according to the 2017 Basel AML Index, which measures and assesses countries' risk regarding AML/CFT, the Kingdom was ranked third in the Middle East North Africa region and first among Arab countries. Basel Inst. on Governance, 2017 Basel AML Index (Aug. 16, 2017), https://index.baselgovernance.org/sites/index/documents/Basel_AML_Index_Report_2017.pdf.

The Jordanian AML/CFT law is tailored to Jordan's specific risk profile. Among other things, Jordan's AML/CFT regime is one way in which the Kingdom supports the global community's fight against terrorist groups. Jordan and the United States regularly exchange information and work together on AML/CFT issues, including through the Counter ISIL Finance Group.

The CBJ devotes substantial resources to supervising Arab Bank, which is the largest bank in Jordan and an important source of capital and

financial stability for the broader region. The CBJ considers Arab Bank to have a strong compliance record overall and in the specific area of AML/CFT, reflecting the substantial resources that Arab Bank has dedicated to these issues, as well as Arab Bank's well-developed compliance culture. As such, the CBJ echoes the conclusion of the United States that Arab Bank is a "constructive partner" in the prevention of terrorist financing, as well as a "leading participant" in international forums related to AML/CFT issues. Br. of United States as *Amicus Curiae* 20, *Arab Bank, PLC v. Linde*, No. 12-1485 (U.S.) ("U.S. *Linde* Br.").

As is the case in many countries, the U.S. dollar plays an important role in the Jordanian economy. A rule that grounds ATS jurisdiction principally on allegations that the underlying conduct involves dollar transactions could open broad swaths of otherwise purely non-U.S. activity to civil litigation in U.S. courts. In the Jordanian context, the CBJ believes this would upset the careful balance of the Kingdom's regulatory regimes, frustrating the CBJ's efforts to carry out its mission. More broadly, given the preeminent role of the dollar in overseas transactions, a broad application of the ATS would invite similar lawsuits in a range of other countries, which could also disturb other countries' application of their sovereign legal systems.

The broad application of the ATS in the AML/CFT context could also prompt financial institutions to engage in excessive de-risking (a phenomenon in which financial institutions seek to exit certain geographic areas and economic sectors that are perceived to expose them to a high level of

AML/CFT risks), complicating global efforts to fight money laundering and terrorist financing. *See* Christine Lagarde, Int'l Monetary Fund Managing Dir., Relations in Banking – Making it Work for Everyone, Remarks at the New York Federal Reserve (July 18, 2016) (expressing concern that pressure on global banks to "re-evaluate their risk exposures" has led to "the decline of correspondent banking relationships—a serious concern for those countries that have few avenues for participating in the global payment and settlement systems"); *see also*, Lanier Saperstein, Geoffrey Sant & Nichelle Ng, *The Failure of Anti-Money Laundering Regulation: Where is the Cost-Benefit Analysis?*, 91 Notre Dame L. Rev. Online 1, 5 (2015) ("This 'de-risking' has made financial activity less transparent and more susceptible to misuse by criminals."). More specifically, the "termination of account relationships may also encourage entities to move into less regulated channels," which present "a key source of systematic risk due to their limited or lack of regulatory oversight." Tracey Durner & Liat Shetret, Global Center on Cooperative Security/Oxfam, *Understanding Bank De-Risking and its Effects on Financial Inclusion* 19 (2015) ("Durner & Shetret").

This Court has previously recognized the potential harms associated with the broad extraterritorial application of the ATS, particularly when doing so risks upsetting other sovereigns' considered legal frameworks. We ask the Court to follow its decision in *Kiobel*, and to construe the ATS in a way that avoids significant disruption to Jordan's banking and AML/CFT regimes, and that

prevents similar harm to other countries' legal regimes as a result of future cases. *See Kiobel v. Royal Dutch Petroleum Co.,* 133 S. Ct. 1659, 1664 (2013) (noting that "the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do"). Such an approach would be consistent with this Court's recent ATS jurisprudence, as well as with customary tools of statutory interpretation, such as the principle of prescriptive comity. *See F. Hoffmann–LaRoche Ltd. v. Empagran S. A.*, 542 U.S. 155, 164 (2004) (applying prescriptive comity in construing the Foreign Trade Antitrust Improvements Act because of, *inter alia*, concerns over the disruption of foreign antitrust regimes) ("*Empagran*").

As the Solicitor General explained, "[d]elaying consideration of potentially dispositive threshold issues and allowing suit to proceed against a key Jordanian financial institution would harm the United States' relationships with Jordan and other important allies in the fight against terrorism." U.S.Br.7; *see also Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 733 fn.21 (2004) (where the Department of State and foreign sovereigns both express concern about the foreign policy implications of applying the ATS, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy"). To avoid these outcomes, we urge the Court to resolve petitioners' claims in its decision of the present appeal, rather than leaving their resolution to further litigation in the lower courts. Accordingly,

we urge this Court to affirm the judgment below.

I. THE CENTRAL BANK OF JORDAN OVERSEES A COMPREHENSIVE SYSTEM OF BANKING REGULATION BASED ON GLOBAL STANDARDS AND BEST PRACTICES THAT INCLUDES A ROBUST AML/CFT REGIME.

A. Jordan has a comprehensive and modern banking regulatory system, which is overseen by the Central Bank of Jordan and modeled on international standards and best practices.

The Kingdom's banking regulatory regime incorporates international best practices as set out by, among others, the BCBS, the FSB, and the Organization for Economic Co-operation and Development ("OECD"). *See* Eur. Inv. Bank, Jordan Rep. on Neighborhood SME Financing (Feb. 2016) ("Banking supervision and regulation in Jordan is provided by the central bank, which has adopted supervision and regulatory frameworks that are in broad compliance with international standards.").[7] The core of this system is the establishment of the CBJ as an independent monetary authority and banking regulator. Thus, the CBJ was formed under the CBJ Law as "an autonomous corporate body" with a broad mandate, similar to those of other central banks such as the U.S. Federal Reserve System, which encompasses both monetary policy and comprehensive regulation and oversight of the

[7] http://www.eib.org/attachments/efs/economic_report_neighbourhood_sme_financing_jordan_en.pdf.

banking sector. CBJ Law, arts. (3)(A), (4)(A); *see also* 12 U.S.C. § 248 (enumerating the powers of the Board of Governors of the Federal Reserve System).[8]

While the Central Bank has a range of responsibilities, two aspects of the Bank's mandate are of particular relevance here. The first of these concerns the CBJ's role as monetary authority and steward of the Jordanian economy. Accordingly, the CBJ Law provides that the Central Bank shall "maintain monetary stability in the Kingdom . . . contribute to achieving the banking and financial stability in the Kingdom, and promote the sustained economic growth in accordance with the general economic policies in the Kingdom." CBJ Law, art. (4)(A).[9]

The second key aspect of the Central Bank's mandate relates to the regulation and supervision of

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[8] The CBJ's independence is further reflected in recent amendments to the CBJ Law, which prompted the Board of Directors to establish an Audit Committee and Risk Management Committee charged with independent oversight of the CBJ's functions. CBJ Law, arts. (3)(A), (4)(A). The two committees' members are non-executive board members and the charter of both is in line with best international practices as set out in the BCBS, Core Principles for Effective Banking Supervision (2012).

[9] The CBJ has a number of powers at its disposal to achieve these goals. Among other things, the Central Bank is authorized to "[d]evelop and implement the monetary policies in the Kingdom," "[r]egulate credit to achieve monetary and financial stability," take such measures as may be necessary to "address the economic and financial problems," act as a banker of last resort, and "[a]dvise the Government on the formulation and the manner of implementation of its financial and economic policy." CBJ Law, art. (4)(B).

the banking sector. Under the CBJ Law, the Central Bank has a number of powers related to the supervision of banks and other financial institutions. These include a wide grant of authority to "[m]onitor and [s]upervise Banks to ensure the soundness of their financial positions and the protection of the rights of depositors and shareholders," as well as the power to "[s]upervise any financial institution subject to its supervision to ensure the safety of its financial position." The CBJ is also responsible for setting "the rules and controls necessary for the dealings between Banks and Financial Institutions with their customers in a fair and transparent manner." *Id.* In addition, the CBJ works closely with the international community to ensure global banking safety and soundness. To that end, the CBJ has entered into a number of Memorandums of Understanding ("MOUs") with peer supervisory bodies in other countries[10] to enhance supervision and allow the sharing of information across borders.

The CBJ's efforts with respect to banking regulation and supervision have been recognized by international bodies such as the International Monetary Fund ("IMF"). Following a recently-concluded consultation with the Kingdom, the IMF "commended" the CBJ "for preserving macroeconomic stability and external viability . . . and ensuring a sound financial system." IMF, IMF Exec. Bd. Concludes 2017 Art. IV Consultation with Jordan, Press Release No. 17/291 (July 21, 2017).

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[10] A full list of the CBJ's MOUs with other countries and international organizations can be found at http://www.cbj.gov.jo/Pages/viewpage.aspx?pageID=244.

The IMF also praised the CBJ's "ongoing reforms to preserve the financial sector's resilience, notably the gradual adoption of Basel III." *Id.*

Following global principles of banking regulation, the CBJ has adopted a risk-based approach to banking supervision that is intended to ensure the overall safety and soundness of the Jordanian and regional banking sectors. *See*, *e.g.*, Jordanian Banking Law No. 28 of 2000 arts. 36-49 ("Jordanian Banking Law"). In this context, the Central Bank performs intensive oversight on banking entities, with a view to ensuring the adequacy of capital ratios and solvency, asset quality, profitability, liquidity, management, corporate governance, and AML/CFT controls. This approach is effectuated primarily in three ways: supervision, examination, and enforcement. *See* CBJ Law art. (4)(3), Jordanian Banking Law, arts. 70-71.[11]

As the largest bank in the Kingdom of Jordan and one of the most important financial institutions in the broader Middle East region, Arab Bank is a

[11] In keeping with sound banking practices, the Central Bank employs a range of remedies to ensure that banks subject to its supervision take appropriate corrective action, including penalties to promote compliance with its edicts and deter bad conduct. The Central Bank is empowered to impose several forms of corrective action on banks licensed in Jordan that violate Jordanian banking laws or regulations including: reducing or suspending credit facilities extended to banks; preventing banks from carrying out certain transactions, and imposing such limitations on its credit transactions as the Central Bank may deem fit; appointing a temporary controller to supervise the bank's activities; and/or revoking its license. CBJ Law, art. 46 and the Jordanian Banking Law, art. 88.

major focus of the CBJ's oversight and supervision activities. Overall, roughly a quarter CBJ's supervisory resources are allocated to Arab Bank, including 10 dedicated examiners. Supervision of Arab Bank takes the form of both off-site and on-site supervision. The off-site portion consists of the review of regular periodic reports, as well as annual and semiannual financial statements, and covers several aspects of Arab Bank's operations in addition to AML/CFT, including credit facilities, investments, liquidity, profitability, and capital adequacy. The on-site supervision consists of both local and cross-border on-location supervisory visits, which are conducted on a risk-based basis. Pursuant to such on-going supervision, the CBJ holds regular meetings at different managerial levels, including with senior management and the board of directors. In addition, the CBJ regularly collaborates and exchanges information with host regulators in all jurisdictions in which Arab Bank operates, and regularly works with Arab Bank's foreign regulators to coordinate supervisory activity.

Based on the CBJ's assessment and exchange of regulatory information with peer supervisory authorities, Arab Bank has a very strong overall compliance record. This record reflects the substantial resources that Arab Bank has dedicated to compliance with applicable laws, as well as Arab Bank's well-developed compliance culture. In the CBJ's experience, Arab Bank takes seriously its obligation to comply with applicable Jordanian laws and regulations, as well as those imposed by the CBJ's peer regulatory bodies in the other jurisdictions in which Arab Bank operates.

B. This system includes a modern AML and CFT component that reflects global best practices and principles of international cooperation.

As a key element of the banking regulatory system described above, over the last 15 years the Kingdom and the CBJ have instituted a comprehensive system of AML/CFT regulation that draws upon broadly-accepted global standards and regulatory mechanisms.[12] This system includes a central role for the administratively-independent Anti-Money Laundering and Terrorist Financing Unit ("AMLU"), which reviews suspicious activity reports and exercises investigative powers over financial entities. *See* Anti-Money Laundering Law No. 46 of 2007 (Jordan) art. 7 ("Jordanian AML/CFT Law"). The Kingdom's AML/CFT regime is expressly modeled on the FATF Recommendations, which provide the international standard for combating money laundering and the financing of terrorism.

The FATF Recommendations "are recognised as the international standard for combating of money laundering and the financing of terrorism."[13] The Recommendations were developed—and are regularly updated—by the FATF, a global "policy-

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[12] The Kingdom's system of AML/CFT regulation is overseen by the National Anti-Money Laundering and Counter Terrorist Financing Committee, which is composed of senior government officials such as the Secretary General of the Ministry of Justice and the Secretary General of the Ministry of Finance and chaired by the Governor of the Central Bank of Jordan. *See* Jordanian AML/CFT Law, art. 5.

[13] FATF ABOUT PAGE http://www.fatf-gafi.org/about/.

making body" founded in 1989 by the G-7 member states, whose mission is to "set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system." FATF Recommendations at 7.

FATF member states are required to take steps to implement the FATF Recommendations, and FATF issues periodic notices regarding those jurisdictions which do not adhere to the Recommendations, or which otherwise pose a high-risk of money laundering. The result is a system of continual benchmarking that has proven to be a major success in prompting countries to address AML/CFT deficiencies. As the Former Assistant Treasury Secretary for Terrorist Financing has noted, the "FATF and FATF regional style bodies are essential to global implementation of the AML/CFT."[14]

Of all the FATF standards, three core principles of AML/CFT regulation are particularly relevant here. First, FATF Recommendation 1 provides that a risk-based approach is "an *essential foundation to efficient allocation of resources* across the anti-money laundering and countering the financing of terrorism (AML/CFT) regime." *Id.* (emphasis added). Second,

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[14] Daniel Glaser, Assistant Sec'y, U.S. Dep't of the Treasury, Power of Transparency, Remarks at the Atlantic Council and Thomson Reuters (Apr. 21, 2016), https://www.treasury.gov/press-center/press-releases/Pages/jl0437.aspx ("Glaser Remarks") (discussing the role of transparency in fighting corruption in financial systems).

FATF Recommendation 7 underscores the need to tailor global principles to local circumstances—because "[c]ountries have diverse legal, administrative, and operational frameworks and different financial systems," the FATF Recommendations "set an international standard, which countries should implement through *measures adapted to their particular circumstances*." *Id.* (emphasis added). Third, FATF Recommendation 37 highlights the importance of international cooperation, and requires FATF members (including members of FATF regional bodies) to "rapidly, constructively and effectively provide the widest possible range of mutual legal assistance in relation to money laundering, associated predicate offenses and terrorist financing investigations, prosecutions, and related proceedings." FATF Recommendations at 27.

MENAFATF's most recent evaluation of Jordan's AML/CFT controls, which concluded in 2013, found that Jordan had "*an effective AML/CFT regime in force*," and that Jordan's regime was either compliant or largely compliant with each of the FATF Recommendations. MENAFATF Evaluation Report, at 4-5 (emphasis added).[15] The Central Bank continues to work with MENAFATF and FATF to ensure that Jordan meets the highest global standards of AML/CFT compliance.

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[15] Because it is based on the global FATF principles, the Jordanian AML/CFT Law closely resembles the U.S. programmatic AML/CFT requirements that apply to covered U.S. financial institutions. *See* FATF, Mutual Evaluation Rep. of the United States (Dec. 2016) (assessing the U.S. AML/CFT regime against the FATF Recommendations).

In keeping with FATF principles, the Jordanian AML/CFT Law employs risk-based principles, and has been tailored to address the specific AML/CFT risk profile of the Kingdom and the Levantine region. Such tailoring requires striking a balance among competing economic, regulatory, and geopolitical concerns. Among other considerations, AML/CFT regimes should avoid over-deterrence, which could result in the phenomenon of de-risking, and the resulting withdrawal of high-risk markets and sectors from the highly-regulated formal financial system. *See* Michaela Erbenová et al., The Withdrawal of Correspondent Banking Relationships: A Case for Policy Action (IMF Staff Discussion Note 2016) ("IMF Staff Note"). From the perspective of AML/CFT regulation, de-risking is often counterproductive, as the withdrawal of highly regulated financial service providers from a particular market or sector can cause affected customers to turn to informal (and generally unregulated or even criminal) market alternatives. Durner & Shetret at 19. As FATF has explained, "de-risking may drive financial transactions underground which creates financial exclusion and reduces transparency, thereby increasing money laundering and terrorist financing risks."[16] In the U.S. context, the Treasury Department has also expressed concern about the potential for de-risking, warning about "the possibility that financial institutions are terminating or restricting an entire

[16] Press Release, FATF, FATF Takes Action to Tackle De-Risking (Oct. 23, 2015), http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-action-to-tackle-de-risking.html.

class of business relationships simply to avoid perceived regulatory risk."[17]

In keeping with FATF principles related to international coordination and cooperation, the CBJ and the AMLU work closely with their counterparts in other countries in which Arab Bank operates and with international bodies—including U.S. regulators and criminal authorities—to share information, identify potential money laundering and terrorist financing schemes, and bring violators to justice. Among other things, the AMLU has entered into a number of MOUs on the subject of AML/CFT cooperation.[18] The CBJ agrees with the Former Assistant Treasury Secretary for Terrorist Financing that the "international financial system is integrated," and as a result international AML/CFT standards are "only as strong as our weakest link." Glaser Remarks at 2. The Kingdom is a signatory to the International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 197. The Kingdom has also joined and ratified the Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the Palermo Convention Against Transnational

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[17] David S. Cohen, Under Sec'y for Terrorism and Fin. Intelligence, U.S. Dep't of the Treasury, Opening Remarks at the Treasury Roundtable on Financial Access for Money Services Businesses (Jan. 13, 2015), https://www.treasury.gov/press-center/press-releases/Pages/jl9736.aspx.

[18] A list of the AMLU's MOUs with other countries and international organizations can be found at http://www.amlu.gov.jo/ar-jo/memorandaofunderstanding/bilateralmous.aspx.

Organized Crime. [19] In addition, Jordan has established a national committee to ensure compliance with the obligations set out in United Nations Security Council Resolutions 1267, S.C. Res. 1267 (Oct. 15, 1999), and 1373, S.C. Res. 1373 (Sept. 28, 2001), both of which relate to the suppression of terrorism and terrorist financing.

Jordan's AML/CFT risk profile includes the struggle against regional terrorist groups. The Kingdom of Jordan participates in the Egmont Working Group Project on Foreign Terrorist Fighters, and works closely with key anti-terrorist partners on a bilateral and multilateral basis.[20] In addition, the Kingdom is an active participant in the Counter ISIL Finance Group, which was established to develop and coordinate efforts to combat ISIL's financial activities, and which is co-chaired by the United States, Italy, and Saudi Arabia.

Indeed, Jordan is considered to have one of the most effective systems of AML/CFT in the region, and to be a key U.S. partner for the prevention of terrorist financing. As the United States noted in its

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[19] The United Nations Treaty Collection compiles a list of countries that have ratified each treaty submitted to the UN. *See*, *e.g.*, UNITED NATIONS TREATY COLLECTION, STATUS OF TREATIES, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&clang=_en (indicating that Jordan has ratified the Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances).

[20] The Egmont Group is a body of 156 financial intelligence units that provides a platform for the secure exchange of expertise and financial intelligence to combat money laundering and terrorist financing. *See* https://www.egmontgroup.org/en/content/about.

amicus curiae brief, Jordan is a key U.S. ally in the fight against terrorism, and "has cooperated with the United States to help prevent terrorist financing." U.S.Br.7. In a brief filed in the related matter of *Arab Bank v. Linde* the United States went even further, praising Jordan as "a constructive partner with the United States in working to prevent terrorist financing, including by reporting suspicious financial activities to the government of Jordan, which in turn exchanges information with the United States." U.S. *Linde* Br.20. Similarly, Egmont Group Chair Sergio Espinosa recently praised Jordan's "wide expertise in the field of combating financial crimes, as well as its advanced financial investigative and information units supported by developed legislation and laws to combat money laundering and terrorism financing."[21]

The CBJ considers Arab Bank to have a very strong AML/CFT compliance program, and to play a key role in the Kingdom's efforts to combat money laundering and the financing of terrorism. Based on the CBJ's supervisory and oversight experience, Arab Bank takes issues related to the prevention of terrorism very seriously, and has devoted substantial compliance resources to its AML/CFT functions, both in Jordan and in the other markets in which it operates. Arab Bank works closely with the CBJ and other competent authorities to identify and report suspicious activity. As such, Arab Bank is

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[21] *Jordan's Anti-Money Laundering Efforts Appreciated by International Community*, Ammon News, (Feb. 4, 2017), http://en.ammonnews.net/article.aspx?articleno=34048#.WYLxs2CGPX4.

one of the most important sources of information related to potential money laundering and terrorist financing, which the CBJ and the AMLU share with key international partners such as the United States pursuant to the systems for information exchange described above. The CBJ thus agrees with the United States' conclusion that Arab Bank is a "constructive partner with the United States in working to prevent terrorist financing." U.S. *Linde* Br.20.

II. CONSTRUING THE ATS TO REACH PETITIONERS' CLAIMS AGAINST ARAB BANK RISKS DISRUPTION OF JORDANIAN BANKING AND AML/CFT REGULATION.

As a central bank and prudential regulator, the CBJ utilizes a range of tools to ensure both the soundness of individual Jordanian financial institutions subject to the CBJ's supervision and the stability of the Kingdom's financial system as a whole. As described above, these tools include a complex system of domestic regulation, as well as collaboration and information sharing with the CBJ's peer regulators in other countries.

The system of banking and AML/CFT regulation administered by the CBJ thus represents a refined and interconnected system of prudential regulation. *See* Stephen B. Burbank et al., *Private Enforcement*, 17 Lewis & Clark L. Rev. 637, 667-71 (2013) (discussing the advantages of public enforcement regimes over private rights of action, including regulatory coherence, fidelity to legislative intent, and cooperation with regulated entities to enhance

compliance with the relevant regulatory framework); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. Rev. 93, 114-20 (2005) (hereinafter "Stephenson") (reviewing the disadvantages of private enforcement, and concluding that "the case for authorizing private enforcement depends critically on context-specific judgments about the likely effect of private lawsuits on the enforcement of particular statutory schemes").[22] Given the many factors at play, the administration of such a system requires a high degree of technical knowledge and substantive expertise. *See generally* Charles Goodhart, Dirk Schoenmaker & Paolo Dasgupta, *The Skill Profile of Central Bankers and Supervisors*, 6 European Rev. of Fin. 397 (2002) (surveying the academic qualifications, commercial experience, and professional expertise of central bank staff and banking supervisors). In charting a regulatory course, the CBJ draws upon a wealth of industry and

[22] Professor Stephenson identifies three reasons that "the authorization of private enforcement suits" may "create serious problems" and ultimately prove counterproductive. Stephenson at 114. First, enforcement through a private right of action "can lead to inefficiently high levels of enforcement, causing waste of judicial resources and leading to excessive deterrence of socially beneficial activity." *Id.* Second, such suits "can directly interfere with public enforcement efforts, distorting government enforcement priorities and disrupting the cooperative relationship between regulators and regulated entities that is often necessary to achieve compliance with statutory objectives." *Id.* Third, private enforcement suits present issues related to the "accountability of law enforcers," since private plaintiffs are not subject to the same political checks that apply to government officials. *Id.*

macroeconomic experience, while also taking into account a rich set of data relating to individual firms and broader economic trends.

In view of the complexity of the underlying economic relationships and the interconnected nature of financial flows, moreover, financial sector regulatory regimes generally place an especially high value on regulatory certainty and predictability. *See Pinter v. Dahl*, 486 U.S. 622, 652 (1988) (noting that the regulation of financial markets is "an area that demands certainty and predictability"); FSB, Rep. to G20 Fin. Ministers and Cent. Bank Governors, *Update on Financial Regulatory Factors Affecting the Supply of Long-Term Investment Finance* 12 (Aug. 29, 2013) ("The importance of regulatory predictability and certainty was highlighted as a key factor to support healthy financial innovation and the supply of long-term finance."); Garry J. Schinasi, *Safeguarding Financial Stability: Theory and Practice* 8 (2005) ("[T]he financial system has become more complex in terms of the intricacy of financial instruments, the diversity of activities, and the concomitant mobility of risks."). As such, banking regulators such as the CBJ work closely with regulated entities to explain regulatory and enforcement priorities, and to signal potential shifts in course and recalibrations of regulatory requirements. This allows banks to prepare accordingly, and reduces the potential for financial disruption. The regular guidance provided by the CBJ to the banking community in Jordan includes, *inter alia*, direction as to the administration and design of effective AML/CFT programs.

By contrast, the type of civil litigation at issue in this case inherently involves unpredictability and uncertainty, both in terms of how such litigation unfolds and in terms of the potential exposure it creates for affected financial institutions such as Arab Bank. *See* Burbank et al., *Private Enforcement of Statutory and Administrative Law in the United States (and Other Countries)* 44 (2011) ("As compared to a more centralized, unified, and integrated administrative scheme . . . when a large role is given to private litigation in implementation, resulting policy will tend to be confused, inconsistent, and even straightforwardly contradictory."). Such civil litigation would be brought and conducted far from Jordan, without regard for broader systemic or geopolitical considerations. Even without a finding of ultimate liability, permitting such lawsuits (with their associated expenses and uncertainty) may interfere with foreign nations' domestic regulatory schemes. *See Empagran*, 542 U.S. at 168-69 (finding that "procedural costs and delays could themselves threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust enforcement system").

Simply put, the Jordanian system of banking and AML/CFT was not designed with the premise that non-U.S. plaintiffs would have the ability to bring civil suits in U.S. courts whenever the underlying conduct involves dollar denominated transactions, which given the role of the dollar in the Jordanian economy (over 75 percent of cross-border transactions conducted by Jordanian banks are dollar denominated) would include a remarkably

broad segment of the Jordanian economy. Such an exogenous source of potential civil liability—particularly when coupled with the availability of punitive damages under U.S. law—will complicate the Central Bank's oversight and regulatory tasks, as the CBJ's decision making will need to account for significant civil litigation adjudicated by foreign courts and untethered from the CBJ or any other global banking regulator. *See* Stephenson at 117 (noting that "allowing private suits forces the [regulator] either to tolerate excessive enforcement of an overbroad rule or to narrow the rule in a way that allows many socially undesirable activities to escape regulation").

The potential for the disruption of carefully calibrated regulatory regimes is even more acute in the context of AML/CFT regulation. The FATF Recommendations are based on the twin pillars of risk-based tailoring and international cooperation. *See* FATF Recommendations 1, 7 and 27. In other words, FATF-compliant regimes such as Jordan's must be simultaneously tailored to local circumstances and responsive to international developments.

The introduction of tort-based ATS liability in circumstances without a significant connection to the U.S. would disrupt this careful balance. Such private suits weaken "the administrative state's capacity to send its own clear and audible signals about what the law requires." *See* Stephen B. Burbank et al., *Private Enforcement of Statutory and Administrative Law in the United States (and Other Countries)* 43 (2011). While Jordan can account for actions taken by other financial sector regulators in calibrating the

Kingdom's AML/CFT regime (and indeed, regularly does so, as it often cooperates with foreign regulators, including the United States, on AML-related matters), the unpredictable nature of ATS civil litigation, and the fact that such litigation is wholly removed from the global FATF framework, makes incorporating such litigation into the Jordanian AML/CFT regulatory system extremely challenging. *See Empagran*, 542 U.S. at 167 (finding that application of prescriptive comity was warranted where, *inter alia*, "several foreign nations have filed briefs. . . arguing that to apply our remedies would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody").

The concerns expressed above apply equally to other countries that implement similar AML/CFT programs. AML/CFT issues are inherently cross-border in nature, and the FATF framework evolved with the objective of creating a comprehensive, cooperative approach global approach to combating money laundering and terrorist financing. *See* Stephen B. Burbank et al., *Private Enforcement of Statutory and Administrative Law in the United States (and Other Countries)* 43 (2011) ("Given how adversarial the litigation process is, wide scope for private enforcement litigation will erode and disrupt efforts at cooperation, coordination, and negotiation between regulators and those they regulate."). Other countries that implement a FATF-compliant AML/CFT regime must, as Jordan has, consider how to design a system for the prevention of money

laundering that does not inadvertently encourage the use of less-regulated channels that lack, or are subject only to limited, regulatory oversight. *See* Stephenson at 116-17 (observing that "citizen suits may disrupt the cooperative relationship between regulators and regulated entities that many argue is essential for long-term compliance with statutory mandates"). In administering the Jordanian AML/CFT regime, the CBJ is mindful of IMF Managing Director Christine Lagarde's recent warning that the "possibility of large penalties and reputational risks" may result in "considerable uncertainty among banks concerning their regulatory obligations," which may ultimately cause banks to "pull-out from correspondent banking" and engage in similar de-risking. Lagarde at 4.

III. INTERPRETING THE ATS TO EXCLUDE PETITIONERS' CLAIMS WOULD BE CONSISTENT WITH THE COURT'S PRIOR DECISIONS REGARDING THE SCOPE OF THE ATS AND PRESCRIPTIVE COMITY.

The Court has regularly interpreted ambiguous statutory language, including the ATS, to minimize the possible disruption of other countries' legal and regulatory regimes. *Kiobel,* 133 S. Ct. at 1669 (2013) (finding that the presumption against extraterritoriality applies to claims under the ATS, and that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace" the presumption); *Empagran*, 542 U.S. at 164 (indicating that courts should "construe[] ambiguous statutes to avoid unreasonable interference with the sovereign

authority of other nations"); *Sosa*, 542 U.S. at 761 (Breyer, J., concurring) (observing that the ATS should be construed "consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement"); *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) ("We assume that Congress legislates against the backdrop of the presumption against extraterritoriality."). The Court has repeatedly recognized that the potential for such disruption is particularly great where U.S. statutes are used to regulate activities and individuals in other jurisdictions, and that both respect for other sovereigns' regulatory authority within their own territory and the goal of restricting judicial entanglement in foreign affairs counsel in favor of construing statutes to limit their extraterritorial impact. *Empagran*, 542 U.S. at 164 (finding that "application of [such] laws creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs"); *RJR Nabisco v. European Community*, 136 S. Ct. 2090, 2100 (2016) ("Most notably, [the presumption against extraterritoriality] serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries."); *Arabian American Oil Co.*, 499 U.S. at 255 (declining to "ascribe to [Congress] a policy which would raise difficult international law issues by imposing this country's employment discrimination regime upon foreign corporations operating in foreign commerce"); *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 813 (1993) (Scalia J., dissenting) (noting that Congress

acts with a view toward the inherent limits on "the authority of a state to make its law applicable to persons or activities" in other jurisdictions) (*quoting* Restatement (Third) of Foreign Relations Law of the United States 231 (1987)). And the Court has noted that the foregoing concerns are particularly prominent in the context of ATS litigation, observing that "the danger of unwarranted judicial interference in the conduct of foreign policy is magnified" in the ATS context "because the question is not what Congress has done but instead" whether Courts will recognize a cause of action based on the alleged violation of international law. *Kiobel*, 133 S. Ct. at 1664 (2013); *see also Sosa*, 542 U.S. at 727-28 ("Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution."). As discussed above, interpreting the ATS to encompass Petitioners' claims has the potential to interfere with the CBJ's efforts to ensure the safety and soundness of the Jordanian banking sector and to undermine Jordan's AML/CFT regime as well as other countries' AML/CFT regimes that are similarly based on FATF standards. Accordingly, this Court's precedent indicates that the ATS should be construed to exclude Petitioners' claims.

A. Interpreting the ATS to exclude Petitioners' claims would be a logical extension of this Court's reasoning in *Kiobel*.

In *Kiobel*, the Court noted that while the interpretive presumption against extraterritorial

application did not directly apply to the ATS—since the ATS is a jurisdictional statute rather than a statute that directly regulates conduct or affords relief—the "principles underlying the presumption against extraterritoriality" nonetheless "constrain courts exercising their power under the ATS." 133 S. Ct. at 1665. The Court further explained that the concerns animating the presumption against extraterritoriality—that is, the potential that a court decision having extraterritorial effect would lead to "unintended clashes between our laws and those of other nations which could result in international discord"—were generally present in all ATS cases and were "all the more pressing" in those ATS cases where, as is the case here, the putative ATS claim "reaches conduct within the territory of another sovereign." 133 S. Ct. at 1665; *see also Sosa*, 542 U.S. at 727, (concluding that "the potential [foreign policy] implications . . . of recognizing . . . causes [under the ATS] should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs").

In other words, the *Kiobel* Court indicated that, when determining whether the ATS should apply to potential claims with significant extraterritorial effect, the statute should be construed to promote the principles on which the presumption against extraterritoriality is based: to minimize judicial interference in foreign affairs and to reduce the risk that ATS lawsuits will lead to international discord. 133 S. Ct. at 1664 ("The presumption against extraterritorial application helps ensure that the Judiciary does not erroneously adopt an

interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.") *see also RJR Nabisco*, 136 S. Ct. at 2106 (noting that the presumption against extraterritoriality applies with particular force in the context of private civil claims, because "providing a private civil remedy for foreign conduct creates a potential for international friction beyond that presented by merely applying U.S. substantive law to that civil conduct").

In this case, Petitioners' putative ATS claims plainly contravene those principles. As discussed previously, *see supra* Part II, such claims would insert U.S. courts in the center of a number of global regulatory frameworks, with potentially serious effects not only for Jordan's AML/CFT regulation, but also for efforts to prevent money laundering and combat the financing of terrorism around the world. The logical extension of *Kiobel*, therefore, is that exercising jurisdiction over Petitioners' claims would be inappropriate.[23]

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[23] Construing the ATS to exclude Petitioners' claims also would be consistent with the original intent of the U.S. Congress in enacting the ATS. As set forth in *Sosa*, the record suggests that Congress's enactment was focused on a "narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs" if not redressed. 572 U.S. at 715. By empowering the federal judiciary to supply these remedies, Congress intended to avoid international incidents, not to cause them. *See Kiobel*, 133 S. Ct. at 1669 (finding that the first Congress could not have intended the ATS to cover extraterritorial conduct given that, "far from avoiding diplomatic strife, providing such a cause of action could have generated it").

B. Interpreting the ATS to exclude Petitioners' claims would be consistent with the Court's prior decisions regarding the application of prescriptive comity.

Declining to exercise jurisdiction over the Petitioners' putative ATS claims would also be consistent with prescriptive comity, the interpretive principle that Courts should "construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *Empagran*, 542 U.S. at 164.

The canon of prescriptive comity reflects longstanding principles of customary international law embedded in U.S. jurisprudence, including the federal courts' recognition that "United States law governs domestically but does not rule the world," *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007), the corresponding presumption that Congress does not intend to interfere with "the legitimate sovereign interests of other nations when [it] write[s] American laws," *Empagran*, 542 U.S. at 164, and "the maxim that [U.S. courts] construe statutes so as to 'hel[p] the potentially conflicting laws of different nations work together in harmony.'" *Id.* at 164-65 (2004) (*quoting Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 271-72 (2004)). This Court has previously noted the relevance of comity considerations in the application of the ATS. *See Kiobel*, 133 S. Ct. 1659 (Breyer, J., concurring) (highlighting that the extraterritorial scope of the ATS should "also be consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations").

The prospect that U.S. private remedies may undermine other nations' conscious regulatory choices, as is the case here, creates a "potential for international controversy that militates against recognizing foreign-injury claims without clear direction from Congress." *RJR Nabisco*, 136 S. Ct. at 2107; *see also Empagran*, 542 U.S. 155 (dealing with private antitrust claims under the Sherman Act, as amended by the Foreign Trade Antitrust Improvements Act); *Sosa*, 542 U.S. at 761, (Breyer, J., concurring) (noting that comity is appropriate even where different nations maintain "similar substantive laws," in view of the potential for different nations to apply similar laws in different ways). In *Empagran*, the Court highlighted the view of foreign sovereign amici that providing non-U.S. parties access to U.S. remedies "would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody," and expressly rejected the view that U.S. law need not be limited so long as the foreign regulatory structure and objectives were broadly consistent. 542 U.S. at 167 (citing the treble damages provision and that "even where nations agree about primary conduct, say price fixing, they disagree dramatically about appropriate remedies"). The *Empagran* Court continued by noting that, beyond the ultimate question of liability, the "procedural costs and delays" associated with determining whether the application of U.S. law was proper "could themselves threaten interference with a foreign nation's ability to maintain the integrity of its own" regulatory

enforcement systems. 542 U.S. at 168-69; *see also* Stephenson at 116 (contrasting "regulatory agencies" ability to "screen[] out enforcement actions that are either nonmeritorious or not with the costs of prosecution" with "private plaintiffs'" tendency to "engage in 'strike suits,' seeking to extort from defendants a settlement offer that will enable the defendants to avoid the litigation costs and potential bad publicity associated with defending even nonmeritorious claims").

Here, the CBJ is similarly situated to many of the sovereign entities that submitted briefs in *Empagran*—the CBJ is coming before this Court to explain both the nature and scope of its regulatory regime and regulatory interests and the extent to which the putative ATS claims asserted by Petitioners potentially interfere with the CBJ's efforts to exercise its regulatory authority and fulfill its mandate. *See Empagran*, 542 U.S. at 167-69 (concluding that principles of prescriptive comity counseled against interpreting U.S. antitrust law to apply extraterritorially as urged by several amicus briefs submitted by foreign nations). Following the principle of prescriptive comity in *Empagran* led the Court to adopt a construction of the Foreign Trade Antitrust Improvements Act that minimized interference with foreign antitrust regimes; in this case, adherence to the principle similarly favors a construction of the ATS that minimizes disruption and interference with foreign banking and AML/CFT regimes. Indeed, the concerns that animated the Court's decision in *Empagran* are potentially even more pressing in the context of global AML/CFT regulation, as such regulation depends heavily on

the voluntary adoption of best practices, mutual assistance, and cooperation among sovereigns to identify and remediate vulnerabilities in the international financial system. *See Empagran*, 542 U.S. at 164-65.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Second Circuit.

Respectfully submitted,

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